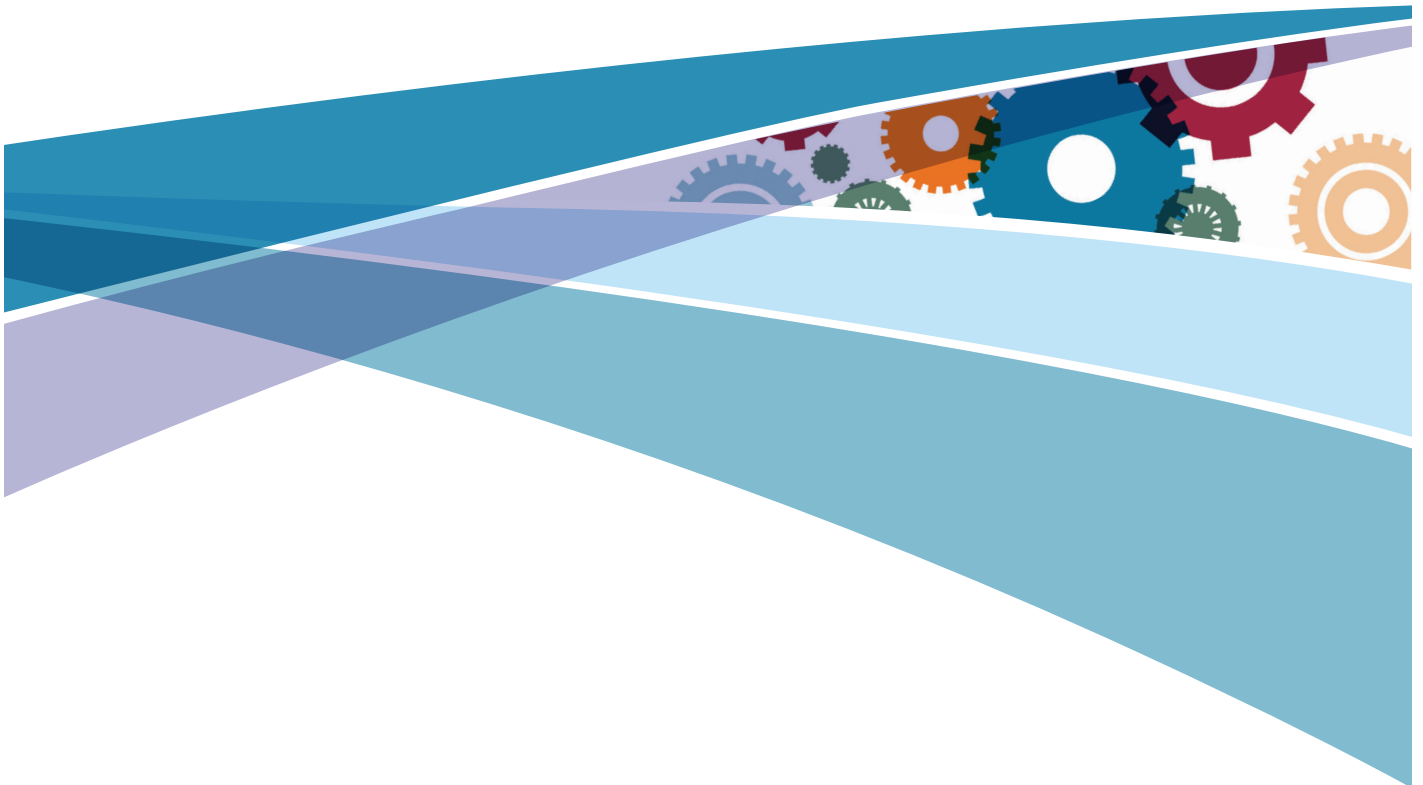




Intellectual
Property
Office

The Impact of Lookalikes

Similar packaging and fast-moving consumer goods



Research commissioned by the Intellectual Property Office, and carried out by:

Phillip Johnson, Johanna Gibson and Jonathan Freeman

This is an independent report commissioned by the Intellectual Property Office (IPO). Findings and opinions are those of the researchers, not necessarily the views of the IPO or the Government

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The Impact of Lookalikes: Similar Packaging and fast-moving consumer goods

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Executive Summary

Introduction

1. The issue of lookalikes is one that has been on the policy and business agenda for at least two decades. Well-known brands, and brand-owners' groups, have long advocated specific and adequate protection against lookalikes under United Kingdom (UK) law, particularly in the context of possible business-to-business harm. More recently, the issue has also become more prominent on the agenda of the European Union (EU) both in the context of so-called "free-riding" in relation to trade mark law, and with respect to possible unfair commercial practices.
2. This report uses a working definition of a lookalike in the following terms: a lookalike product is a product sold by a third party which looks similar to a manufacturer brand owner's product and, by reason of that similarity, consumers perceive the lookalike to share a greater number of features with the manufacturer brand owner than would be expected simply because the products are in the same product category. This report further defines own brand in this report as a product sold under a retailer's brand name (whether or not is it also a lookalike), and a manufacturer brand as a brand controlled by an entity that manufactures the products itself, rather than applying its own branding to something manufactured by a third party.

The literature review

3. The literature suggests that innovation leads to growth in consumer markets. Further, brands provide consumer security as brands need to retain consistent quality to survive. The literature also indicates that large brand owners, who manufacture and design their products, innovate more than non-manufacture brands rivals.
 4. The existing literature suggests that own brand products have an evolutionary life cycle with lookalikes existing in the later stages of that cycle. It also indicates that own brands are more successful in low innovation product categories. Accordingly, incremental innovation by manufacturer brand owners makes it more difficult for own brand to penetrate the market. This in turn might be a driver for manufacturers to innovate.
 5. There is little empirical evidence on whether own brand affects innovation. Further, in the food sector it has been found that the existence of own brand has had no effect in Europe (except in Spain). Nevertheless, it has been suggested that lost sales caused by own brand would lead to less money being spent by manufacturers on research and development
 6. The literature postulates certain types of business harm which might be caused by lookalikes. This includes lowering the level of innovation, wasted rents on packaging changes, brand followers being pushed out of the market place and an adverse effect on advertising. In addition, it suggests that there is a need to protect the investment in market research to obtain new consumer insights.
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7. The existing consumer evidence suggests that in the absence of the brand leader, products that look similar to that leader are better received by consumers than those that look distinct. In addition, when a lookalike is on the shelf at the same time as the brand leader the lookalike might be used for comparison purposes. Further, the presence of lookalikes will reduce a consumer's reaction time in selecting a product and may (under time pressure and outside the normal shop environment) increase the chance of mistaken selection.
8. There have been numerous consumer surveys on the issue of similar packaging for fast-moving consumer goods. These studies demonstrate a high level of consumers making mistaken purchases. The reasons for these mistakes include similar packaging such as cues of colour, shape and size. Additionally shelf position is reported as a factor.
9. Previous consumer surveys show that consumers have a perception that own brand goods have a common origin with manufacturer brand owner products (irrespective of packaging) and when packaging is similar there is an increased perception of common origin. Additionally, those surveys suggest that consumer perceptions of own brand are generally good with at least a quarter (and possibly three-quarters) of consumers perceiving own brand to be as good as the manufacturer brand owner's products.

Research findings

10. The present research was divided into three parts. The first part comprises interviews with stakeholders in the fast-moving consumer goods market. The second part of the research comprises two consumer surveys: one considering whether there is a lookalike effect; and the second addressing the advantages and disadvantages perceived by consumers across three jurisdictions. The final part of the research involved the analysis of sales figures for certain brand leading products to see the impact, if any, of a lookalike entering the market.
 11. The study found a small, but statistically significant, lookalike effect leading consumers to believe that similar-looking products have similar product characteristics and similar origin. The effect is greater, however, in those consumers who do not use products within a particular product category (and so the effect is lower in relation to the persons most likely to buy the product). This is consistent with the existing literature which suggests consumers are confused when packaging is similar.
 12. It was found that that a high number of UK households reported that the accidental purchase of lookalikes disadvantages them very much (1.68 million) or somewhat (9.92million). Conversely, a substantial number of households reported such a purchase to advantage them very much (0.99 million) or somewhat (8.99 million). This suggests that some consumers suffer detriment from the mistaken purchase whilst others find it to be a positive experience. However, the research did not investigate why some consumers perceived the purchase to be a good or bad experience.
-

13. The study revealed that a substantial majority of consumers had deliberately purchased a lookalike and, of those consumers, most of them found the experience to be advantageous. The research did not analyse why some consumers perceived the purchase to be advantageous.
 14. The research found that there is a fine line between confusing packaging and using generic cues to provide useful signals to consumers.
 15. The study found limited evidence to support the suggestion that lookalikes spur manufacturer brand owners to innovate as it is the best way to maintain the price differential. Such an effect, however, might disappear in markets where market share (more precisely, sales) has declined so much that the cost of research cannot be recovered.
 16. It was not found that lookalike products directly cause brand manufacturers to make additional (and wasteful) changes to their packaging.
 17. The literature suggested that lookalike packaging causes a greater loss of sales (or market share) than distinctive competitors. However, in interviews with the research team only one of the manufacturer brand owners reported this finding; the others gave a mixed picture.
 18. The statistical analysis of the sales figures showed that in a very limited number of product categories, an association was found between a reduction in the sales of the brand leader and an increase in the sales of the lookalike. This could have been caused by numerous factors, one of which is the similarity of the packaging (the lookalike effect at work). Such associations did not appear to relate to consumers' relative perception of packaging similarity or common production origin and also did not generally appear to exist within the particular supermarket selling the own brand. The evidence is therefore inadequate to determine whether lookalike packaging generally diverts sales or if the effect of that packaging is negligible.
 19. In relation to advertising spend, there were differing responses by manufacturer brand owners when a lookalike enters the market. Accordingly, no meaningful conclusions can be drawn as to the effect on advertising spend when a lookalike enters the market.
 20. The discussions with manufacturer brand owners, reviews of the literature and the surveys suggest that if there were to be a statutory definition of a lookalike it could be: "goods which by virtue of their name, shape, colour, packaging or labelling or any combination thereof, are similar in overall appearance to the goods; but excluding any of those things where they are descriptive, functional or commonplace."
 21. Manufacturer brand owners reported that lookalikes enabled competitors and retailers to take unfair advantage of the manufacturer brand owner's research into consumer insights and packaging design.
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Legal analysis

22. In none of the three jurisdictions examined - the UK, Germany and the United States – was the legal position of lookalikes particularly clear. Nevertheless, at the interim stage, there is a perception that a claimant is more likely to be successful in the favourable German forum than in either of the other two countries.
 23. It is probable that the prevention of certain lookalikes is within the scope of the Unfair Commercial Practices Directive (2005/29/EC). Under this assumption, the United Kingdom may not be free to legislate to further prevent lookalikes save in business-to-business transactions. However, it would also mean that certain lookalikes are already unlawful under the Consumer Protection from Unfair Trading Regulations 2008.
 24. Accordingly, if there is a restriction on legislation in relation to lookalikes, a private right of action under the Consumer Protection from Trading Regulations 2008 would be permitted under the Unfair Commercial Practices Directive.
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Chapter 1: The Question of Lookalikes

1.1 Introduction

The issue of lookalikes is one that has been on the policy and business agenda for at least two decades.¹ Well-known brands, and brand-owners' groups, have long advocated specific and adequate protection against lookalikes under United Kingdom (UK) law, particularly in the context of possible business-to-business harm. More recently, the issue has also become more prominent on the agenda of the European Union (EU),² both in the context of so-called "free-riding" in relation to trade mark law, and with respect to possible unfair commercial practices. It is therefore timely and important to undertake a study into the possible effects of lookalikes on consumers and business.

The Intellectual Property Institute (IPI) was commissioned by the Intellectual Property Office (IPO) to obtain empirical evidence on the effect of lookalikes on consumers and on the market place. The purpose of the research was to attempt to find the **balance of costs and benefits between manufacturer brand owners and retailers** and what, if any, **lookalike effect** might exist.

1.1.1 The Scope of the Research

What is the possible effect of lookalike packaging/products on the market?

The research has both a legal element and an evidence-based element. The legal element examines how three jurisdictions deal with the issue of lookalikes – the UK, Germany and the United States – and considers whether there are any constraints on the UK legislating on lookalikes if it so chooses. The second element is to collect and evaluate evidence so as to try and answer four questions:

- a. what is believed by interested parties to be a "lookalike";
- b. whether there is a lookalike effect;
- c. whether consumers suffer detriment by reasons of lookalikes; and
- d. whether there is any business harm suffered. The consumer research was undertaken by i2 Media Research and the data analysed for the purposes of assessing business harm was provided by Kantar Worldpanel.

1 See Annex I.2.1 which discusses the issues during the passage of the Trade Marks Act 1994.

2 See in particular, paragraph [4.2].

1.1.2: Lookalikes and the Value of Brands

The benefit individual firms and individual consumers achieve from trade mark, trade dress and branding has been widely studied.³ There have been fewer attempts to identify the macro-economic effect of brands, but those that have attempted such work have found evidence supporting the fact that the large brand owners who manufacture and design their own products more actively innovate than their rivals⁴ and that such innovation leads to growth in consumer markets.⁵ A brand, and its guarantee, also provides security to consumers as it means that a brand owner wishing to move to a new market must ensure there is high or consistent quality in the new product so as not to risk the existing value in the brand (so called brand equity).⁶ One report suggests that in 2006 the investment made in developing brands in the United Kingdom was £15.85 billion, which is made up largely of brand development, advertising and market research.⁷ It will therefore be accepted for the purposes of this report that brands as such are valuable to brand owners, consumers and to the wider economy.⁸

1.1.3 The complex relationships in the supermarket

The issue of lookalikes is part of a very complex relationship between retailers and those who make branded products. The traditional view of retail is that the retailer decides which products to stock in its shop and at what price. The retailer would then display the products on the shelves in such a way as to maximise sales based on its own experience. The role of the supplier and manufacturer of the product would be to fulfil orders from retailers and to promote their product in the wider marketplace. This simple view has not been the case for decades.

The modern retail relationship is far more complicated. Most retailers now appoint one of the brand leaders (often on competitive tender) as a so-called “category captain” and different retailers may have (or demand) a different category captain. The category captain may advise on any one or more of the following: shelf arrangement (the planograms); shelf-space management; and which products to stock (including competitors and own brand) to maximise

3 In terms of trade mark law, one of the most famous example being William Landes and Richard Posner “Trademark Law: An Economic Perspective” (1987) 30 *Journal of Law and Economics* 265 and a shorter version (without the equations) at (1988) 78 *Trademark Reporter* 267.

4 See Kamran Kashani, Joyce Miller and Tony Clayton, *A Virtuous Cycle: Innovation, Consumer Value and Communication* (AIM 1998).

5 Tony Clayton and Graham Turner “Brands, Innovation and Growth: The Role of Brands in Innovation and Growth for Consumer Business” in Joe Tidd (ed) *From Knowledge Management To Strategic Competence Assessing Technological, Market and Organisational Innovation* (3rd Ed, Imperial College 2012).

6 Ibid, 5

7 Peter Urwin et al “Valuing Brands in the UK Economy” (British Brands Group, 2008), 22-23.

8 However, some commentators argue that the development and protection of brands (rather than just protecting against consumer confusion) is wasteful potentially encouraging “irrational” brand loyalty as well as creating barriers to entry: see Ralph Brown “Advertising and the Public Interest: Legal Protection of Trade Symbols” (1948) 57 *Yale Law Journal* 1165, 1181-3; Glynn Lunney “Trademark Monopolies” (1999) 48 *Emory Law Journal* 367; Mark A. Lemley and Mark P. McKenna “Owning Markets” (2010) 109 *Michigan Law Review* 137, 176 and Barton Beebe “Search and Persuasion in Trademark Law” (2005) 103 *Michigan Law Review* 2020.

overall sales for the retailer.⁹ This means one brand leader, as category captain, can have an impact on the sales and product placement of another brand (including own brand), but they must remain “honest” to retain the coveted position. Nevertheless, the retailer, either locally or nationally, can decide to depart from the category captain’s advice if it chooses. In addition to this role, brand owners may pay retailers for better shelf placement (such as end of aisle) to try and increase exposure of the brand. They will also be required by the retailer to run a certain number of promotions each year to increase volume sales for both retailer and brand owner. The cost of these discounts is usually, but not always, absorbed by the supplier and not the retailer. This is but the tip of a large iceberg, which is substantially outside the scope of this report. However, throughout this report these complex interdependent relationships must be borne in mind.

1.1.4 Lookalikes in other contexts

The present research is concerned only with lookalikes within fast-moving consumer goods by reason of the research brief. Nevertheless, it is apparent that the relevant “practices” and marketing “norms” can be recognised in a wide range of other industries.

Private Eye ran a feature of “bookalikes”¹⁰ where the front covers of a series of books were printed to point out the apparent similarity between them as they all included half-a-face, as can be seen from the images on the right.¹¹ Although there are clear distinctions there is a common theme in the cover design. As the name given makes clear these are books that “lookalike.”



9 A explanation of the role and a discussion of the competitiveness can be found in Sanjay Dhar, Jagmohan Raju, Upender Subramanian and Yusong Wang “The Competitive Consequences of Using a Category Captain” (2010) 56 *Management Science* 1739.

10 Those from 2011 are: Private Eye, Issue Number 1279, 7th – 20th January 2011, 29; Private Eye, Issue Number 1280, 21st January – 3rd February 2011, 28; Private Eye, Issue Number 1281, 4th – 17th February 2011, 27; Private Eye, Issue Number 1283, 4th -17th March 2011, 27; Private Eye, Issue Number 1283, 4th -17th March 2011, 27; Private Eye, Issue Number 1286, 15th – 28th April 2011, 26; Private Eye, Issue Number 1289, 27th May to 7th June 2011, 28; Private Eye, Issue Number 1291, 24th June - 7th July 2011, 26; Private Eye, Issue Number 1296, 2nd – 15th September 2011, 24; Private Eye, Issue Number 1298, 30th September – 13th October 2011, 27; Private Eye, Issue Number 1301, 11th – 24th November 2011, 27; Private Eye, Issue Number 1308, 28th January to 24th February 2012, 28.

11 Private Eye, Issue Number 1297, 16th - 29th September 2011, 27. The book covers are taken from Amazon.co.uk.

The research team also saw common themes and cues being used in other cultural industries. The DVD covers for Iron Lord and Ironclad share many common features. Iron Lord was released 1 August 2011, three weeks after Ironclad, released 11 July 2011. It is clear that these share many elements and could well be seen as a lookalike.¹²

The general prevalence of common themes or ideas in packaging design and marketing is outside the scope of this research. However, at the outset it is important to demonstrate how packaging and design are commonly influenced by other similar products and practices already in the market place, thus building an agreed “language” to signify a particular product. This becomes more controversial where that “language” is used to signify particular qualities that may be attached to a leading product (a possible “lookalike” effect).



Therefore, if there is a “lookalike” effect it is not necessarily limited to fast-moving consumer goods. However it is this to which the present research is confined. Nevertheless, while only fast-moving consumer goods and their packaging are being considered, it may be that the conclusions reached in relation to these goods will have much wider application, both socially and commercially. It is also clear that packaging alone may not be the only factor making something more or less a lookalike.

1.2: Terminology: “lookalike”

1.2.1 Inconsistent Terminology

The issue of lookalikes is caught up in a torrent of conflicting terminology, which also potentially compromises the clarity of the debate and the existing information and literature. This is a problem which has long been acknowledged in marketing discussions.¹³ In each case the central issue is largely the same, but the words used to describe it may vary greatly, posing significant problems for achieving consensus in definition and approach.

Therefore, in order to achieve some consistency with respect to the subject matter and definition, the term **lookalike** will be used throughout this report. Nevertheless, it should be noted that alternative terms of **copycat** or **parasitic product** are also used in much of the literature.¹⁴ These terms will be used only in direct quotes or where it would not accurately reflect the context to use lookalike.

12 Subsequently similar pieces were run in Private Eye. The images are taken from Amazon.co.uk.

13 Michael Halbert, *The Meaning and Sources of Marketing Theory* (2nd Ed McGraw-Hill Book Company, 1965), 53; also see Thomas Schutte “The Semantics of Branding” (1969) 32 *Journal of Marketing* 5, 6.

14 There are some countries which have parasitic copying as an act of unfair competition.

1.2.2. Working Definition

It is therefore necessary to introduce and agree at this stage the working definition of lookalike that is the basis of this study before dealing with the surrounding context of terminology that informs that definition.

A lookalike product is a product sold by a third party which looks similar to a manufacturer brand owner's product and by reason of that similarity consumers perceive the lookalike to share a greater number of features with the manufacturer brand owner than would be expected by reason of the products being in the same product category alone.

There have been other attempts to define what amounts to a lookalike and these have contributed to this working definition.¹⁵ A discussion of this context is therefore important in understanding this definition.

1.3. Other terminology issues

1.3.1 Own Brand

The term own brand¹⁶ will be used to refer to products sold under a retailer's brand name (whether it is also a lookalike). There are other terms in common use, such as private label or own label, but these do not reflect the fact that retailers invest heavily in their brand.¹⁷ This is because retailers' brands, in the same way as manufacturers' brands, require significant development.

1.3.2 Manufacturers and Brand Owners

A further difficulty is with the terminology often used in relation to lookalikes for manufacturers' brands. They are often simply called brand owners. The view of this report is that brand owner does not take proper account of the fact that retailers are also (albeit different) brand owners. Accordingly, any reference to a manufacturer brand owner should be taken to mean a brand controlled by someone who primarily manufactures the products itself or under its direct control,¹⁸ rather than applies their own branding to something manufactured by a third party.

15 For a further discussion of the etymology of the term "lookalike", including attempts at a legal definition, please refer to the more detailed discussion in Annex I.

16 For a list of all the terms that have been used to describe such products see Thomas F Schutte "The Semantics of Branding" (1969) 32 *Journal of Marketing* 5, 6.

17 Leslie de Chernatony and Gil McWilliam "Clarifying the Difference between Manufacturers' Brands and Distributors' Brands" (Summer 1988) *Quarterly Review of Marketing* 1, 3.

18 This is meant to cover outsourcing of manufacturer. However, in practice the making of own brand could be seen as outsourcing. The purpose of the definition is to try and exclude own brand.

Summary Points Chapter 1

SP 1.1: Lookalikes and the Value of Brands

- Large brand owners who manufacture and design their products innovate more than non-manufacturer brands rivals;
- Innovation leads to growth in consumer markets;
- Brands provide security to consumers;
- Brand value demands maintenance of quality (high or consistent).

SP 1.2 “Lookalike” – Working Definition

- A lookalike product is a product sold by a third party which looks similar to a manufacturer brand owner’s product and by reason of that similarity consumers perceive the lookalike to share a greater number of features with the manufacturer brand owner than would be expected by reason of the products being in the same product category alone.

SP 1.3: Other Definitions

Own Brand

- Product sold under a retailer’s brand name (whether or not is it also a lookalike).

Manufacturer Brand

- A brand controlled by an entity that manufactures the products itself, rather than applying its own branding to something manufactured by a third party.
-

Chapter 2: Summary of Current Landscape

2.1 Introduction

Keeping in mind the significant limitations with respect to terminology and definitions outlined in Chapter 1 and Annex I, this Chapter outlines the current legal landscape.

To understand the context of the current research, and the mechanisms for responding to that research, it is necessary to consider the laws that might currently apply to lookalikes.

There is a multitude of laws which might be relevant in this regard including: copyright; design law; trade mark law; passing off; and various consumer laws. This discussion surveys the approach the law takes in three target jurisdictions: the UK; Germany; and the United States. In relation to these jurisdictions, only the primary mechanism used to prevent lookalikes will be considered. These are: passing off (UK)¹; unfair competition law (Germany); and trade dress protection (United States). This is not to suggest that other laws, in particular other intellectual property laws, are not equally important in preventing lookalike packaging. However, it is necessary to restrict the scope as described.

Annex II provides a more detailed examination of the legal frameworks in each of the selected jurisdictions, however a working outline is provided here. Annex IV provides further information with respect to cases involving lookalikes in the courts of each jurisdiction.

2.2 United Kingdom

There is no general law of unfair competition in the UK, although on occasion it has been suggested otherwise.² The law of passing off is traditionally what has been used to deter traders from using similar trade dress to their rivals.

There are three basic elements that must be established for a claim of passing off to be made out: goodwill in the get-up of goods; a misrepresentation leading the public to believe the goods supplied by one trader are those of another; and damage caused by reason of the erroneous belief.³ If these elements are shown then the second trader's state of mind is irrelevant.⁴ A major limitation for the application of passing off in preventing lookalikes is the

1 In the discussion of UK law, English modern terminology will be used even if it was not so used in the original literature. Therefore, reference will be made to claimants, applications, and interim injunctions, rather than plaintiffs, motions and interlocutory injunctions. The Scots have always used different terminology: e.g. pursuer for claimant; defender for defendant; interdict for injunction and so forth. Northern Ireland has retained the traditional terminology.

2 See Annex II.2.

3 *Reckitt & Colman Products Ltd v Borden Inc* (No 3) [1990] RPC 341, 499; also see the five elements identified by Lord Diplock in *Erven Warnink BV vJ Townend & Sons (Hull) Ltd* (No 1) [1979] AC 731, 742.

4 *Gillette (UK) Ltd v Edenwest* [1994] RPC 279, 289–94.

fact that the requirement for a misrepresentation (customer confusion) is central to the action.⁵ This is often found to be too difficult to establish as courts perceive that consumers can tell the difference between a lookalike and the manufacturer brand.

In Annex II an argument is explored which suggests that because so called extended passing off protects against misrepresentations which erode goodwill, the acid test being the need for some damage to goodwill. If this premise is right then there is an avenue for passing off to cover lookalike claims based on the loss of exclusivity of distinctive get-up. To date this view has not been tested before the courts.

2.3 Germany

In Germany, lookalikes are usually dealt with under conventional intellectual property laws, but there is specific provision in unfair competition law to prevent parasitic copies (Gesetz gegen den unlauteren Wettbewerb⁶ (UWG) §4 no 9). Nevertheless, where cases have been reported, there has been mixed success and there appear to be particular problems proving competitive individuality in relation to own brand (i.e., distinctiveness of get-up which informs the public of its origin or characteristics).

There is a perception that the German courts are more willing to provide a remedy against parasitic packaging than other countries including, in particular, England. At the behest of the British Brands Group, (BBG) Hogan Lovells made enquiries with the German courts regarding the number of cases relating to lookalikes.⁷ These enquiries were made of the IP Chambers in Hamburg and Cologne. They reported that there were about 350 cases in Cologne involving packaging, 188 cases in Hamburg, and estimated that for all courts there would be 800 cases. These cases did not divide out claims based on copyright infringement and design infringement from those under the UWG.

After reviewing this memorandum, the research team conducted its own research and contacted the judges of the IP chambers at Braunschweig, Munich, Dusseldorf, Mannheim, Frankfurt and Cologne. It was indicated by one of the judges that interim relief is actually quite difficult to obtain in relation to lookalikes under the UWG⁸ (the difficulty of proving the competitive individuality). Most of the judges were not able to provide specific numbers, but it appears that in Frankfurt about 30 cases were based in some part on UWG §4 no 9. It was widely reported amongst the judges that Cologne was perceived as claimant-friendly (and this was accepted by the Cologne judge). In general, the judges were not able to give very precise details as to the number of cases which were successful under UWG §4 no 9 alone (rather than successful in a claim based on trade mark, design or copyright infringement and

5 The misrepresentation must be made either to customers or end consumers (i.e., on the packaging) of the other's goods (*Erven Warnink* [1979] AC 731) and it should be judged against how the relevant goodwill was acquired in trade. But confusion per se is not sufficient to found such an action: see *My Kinda Town Ltd (t/a Chicago Pizza Pie Factory) v Soll and Grunts Investments* [1983] RPC 407, 418.

6 The German Unfair Competition Law.

7 Memorandum by Hogan Lovells, *Parasitic copying – No. of injunctions in Germany* (request from John Noble, British Brands Group of 24 May 2012) (1st June 2012) (copy with researchers and Intellectual Property Office).

8 Particularly following the following the decision of the BGH in *TUV* (2011) GRUR-Prax 228 (this requires the claims to be better particularised and remedies to be linked to the relevant claim).

UWG §4 no 9).

As the substantive law of trade mark and design law is entirely harmonised across the EU, in theory (although for various reasons connected to procedure and evidence, not always in practice) a trade mark or design infringement case should reach the same conclusion in both Germany and the UK. Furthermore, the law of copyright is substantially harmonised across the EU and so many, although not all, infringement cases should reach the same result.⁹ Thus, a claim being successful under UWG §4 no 9 and one or more of trade mark, design or copyright infringement (without specifying which) is not a particularly useful comparison for other member states.

Nevertheless, the judges mentioned that attorneys had problems proving elements required under UWG §4 no 9, although it was suggested that experienced German Attorneys using Cologne, who knew what the court was expecting, would have some success obtaining relief. Furthermore, there appear to be many more lookalike cases started in Germany than in the UK and brand owners have more success in Germany than in the UK at the interim stage (although it may be there are actually fewer successes than perceived to be the case). Neither Hogan Lovells nor the research team found results sufficient to determine whether this greater (perceived) success in Germany is because of a different judicial attitude, procedural or evidential differences, or different substantive law (i.e. the existence of UWG §4 no 9).

2.4 United States

In the United States, lookalikes are dealt with as part of trade dress law, which is essentially part of trade mark law.¹⁰ Trade dress must be distinctive to be considered a trade mark (registered or unregistered). This distinctiveness can be either inherent or acquired.¹¹ Functionality (aesthetic or utilitarian) cannot be protected under trade dress. Therefore, packaging dictated by function or custom (with respect to colour, for example) may not necessarily be protected. Trade dress is protected both against other traders adopting confusingly similar dress and against being diluted under the Federal dilution statute.

There is a divergence between the circuits as to the effect of a retailer's name appearing on the packaging. In any event, most cases still tend to fail due to the absence of confusion.

9 The scope of this harmonisation has only really become apparent to many practitioners and courts in the last year or two.

10 There are difficulties in relation to aesthetic and utilitarian functionality.

11 Restatement (Third) of Unfair Competition, §, 13 (1995); also see *Wal-Mart Stores v Samara Brothers*, 529 US 205, 210-211 (2000).

2.5 European Union (EU)

It has been perceived by some commentators that the concept of “unfair advantage” as set out in relation to trade mark infringement (dilution) may be of particular relevance to lookalikes. However, many forms of trade dress are difficult to register as they are not inherently distinctive and so require time in the market place to acquire distinctiveness. Furthermore, the continually evolving nature of Court of Justice jurisprudence means that it is unclear whether dilution would apply to lookalikes as such things may or may not fall within the meaning of “mere imitation”. It must be remembered that where the EU leads, either through legislation or decisions of the Court of Justice, Member States (including the UK) must follow.

It appears possible that lookalikes fall within the scope of the Unfair Commercial Practices Directive (UCPD) although this is subject to the view of the Court of Justice. A full discussion of this matter is in Annex III. If lookalikes do fall within the scope of that Directive then:

- the law of passing off (and UWG §4 no 9), as it applies to lookalikes, may be affected and may have been narrowed in scope;
- Member States may be restricted in enacting sui generis laws to prevent lookalikes;
- Some instances of lookalikes may already be unlawful in the United Kingdom under the Consumer Protection from Unfair Trading Regulations 2008 (which implement the Directive);

Notwithstanding the above, creating a private right of action under the 2008 Regulations would be compatible with the UCPD and would not make anything further unlawful, rather it would make it easier for manufacturer brand owners to bring an action in relation to (any) presently unlawful conduct.

Summary Points Chapter 2

SP 2.1: “Lookalikes” in the UK

- **Passing Off:** requirement of customer confusion limits application of passing off in prevention of lookalikes;
- **Unfair Competition:** no straightforward misappropriation, or general unfair competition law;
- **Extended Tort of Passing Off:** where a misrepresentation erodes distinctiveness of mark, this potentially bringing lookalikes within passing off.

SP 2.2: “Lookalikes” in Germany

- **Unfair competition laws:** specific provision under UWG §4 no 9;
- **Competitive individuality:** difficult evidentiary burden;
- **Interim stage:** greater success in Germany than before the English courts (but often not as much success as commonly believed and the results vary greatly between IP Chambers).

SP 2.3: “Lookalikes” in the United States

- **Trade dress:** essentially the same protection as for trade marks;
- **Functionality will not be protected:** therefore, protection may not include packaging determined by product, or features (such as colour) determined by custom;
- **Confusion** (or absence of) usually a deciding factor.

SP 2.4: “Lookalikes” in the European Union

- **Unfair advantage** it is not clear whether lookalikes would fall within the scope of dilution protection;
 - **Unfair Commercial Practices Directive (UCPD)** may also make lookalikes unlawful in some instances;
 - **A private right of action** under the Consumer Protection from Unfair Trading Regulations 2008 would be compatible with the UCPD.
-



Part I: Literature Review

Chapter 3: The Lookalike Effect

3.1 Introduction

There is extensive literature on the issue of lookalikes. The momentum behind lookalikes began in the 1990s and by the end of the decade the International Trademark Association (INTA) complained that English law still failed to protect against “unfair competition violations such as free-riding of misappropriation...inherent in the creation of so-called “look-alike” product packaging”.¹ More recently, the European Parliament Committee on the Internal Market and Consumer Protection described “copycats” as an unacceptable practice which should be addressed without delay.² Yet this is not the only side of the story as others have suggested that prohibiting lookalike packaging would unduly restrict competition.³

3.2 Background

The history of lookalikes is just one of the areas of potential conflict between the manufacturers and own brands which continues to take place on the supermarket shelf.⁴ This conflict is not new⁵ and over time the relative strength and positions of the parties have radically changed:⁶

“Power has ebbed and flowed in the grocery trade over the past century. Before the First World War it was the food wholesalers that called the shots, using sheer size to screw down small suppliers on the one hand and get top prices from small retailers on the other.

1 See Lucy Harrold “Beyond the well-trodden paths of passing off” [2006] *European Intellectual Property Review* 304, 307.

2 Report (2010/2109 (INI)), A7-0217/2011, [31].

3 See Mark A. Lemley and Mark P. McKenna “Owning Markets” (2010) 109 *Michigan Law Review* 137 and Ansgar Ohly “The Freedom of Imitation and Its Limits” (2010) *International Review of Intellectual Property and Competition Law* 506.

4 An excellent summary from a lawyer’s perspective is found in Belinda Mills (Issacs) “Own label products and the ‘lookalike’ phenomenon: a lack of trade dress and unfair competition protection?” [1995] *European Intellectual Property Review* 116.

5 The first own brand was probably Cremos launched by J. Sainsbury in the 1890s (it had to be renamed soon thereafter due to regulatory changes).

6 Patrick Husking “Inside Story: Superstores Stalk the Superbrands” *Independent on Sunday*, 20th February 1994; also see Leslie de Chernatony and Gil McWilliam “Clarifying the Difference between Manufacturers’ Brands and Distributors’ Brands” (Summer 1988) *Quarterly Review of Marketing* 1.

Between the wars, the manufacturers were on top. By developing strong, desirable brands, they persuaded customers to demand their products in what academics now term a 'pull through' strategy. The retailers were squeezed.

In post war years, wholesalers withered away and retailers came to the fore, developing their own names as brands themselves -- sufficiently convincing to make own label acceptable. Their sheer size gave them colossal negotiating clout."

In 1970, own brand accounted for about 20% of the overall retail market, but in the decade that followed - with its sustained recession,⁷ the ending of price controls and market restraints - own brand came into its own.⁸ Technology also made a difference, as *The Economist*⁹ explained nearly twenty years ago:

"Armed with bar-code scanners and 'smart' shopping trolleys and a host of other high-tech gadgets, supermarkets have been studying who is buying what, when and for how much. This information provides them with a competitive edge over manufacturers in deciding which new products to launch and then testing them on consumers. It also allows them to identify poorly performing brands easily."

Over recent decades the power has shifted from the big manufacturers to the retailers¹⁰ and the success of own brands is particularly pronounced in Europe.¹¹ Indeed, retailers have been described as 'double agents' in that they act both to sell branded goods to consumers and also to develop their own brand for consumers as a substitutable alternative for branded goods.¹² This strong market power is something which repeatedly arises in the discussion of lookalikes. Furthermore, it now appears that the market has evolved in such a way that the brand loyalty the manufacturers fought to obtain is no longer as significant in the marketplace. A little over ten years ago it was suggested that only 30% of consumers are committed to particular manufacturer brands,¹³ leaving the remaining 70% for the taking. Nevertheless, brand loyalty still exists - it applies to the loyalty customers have to manufacturer's products as well as to their retailer. Indeed, the loyalty to the latter may now have precedence over other brand loyalties.¹⁴ It is these conflicting loyalties which are at the heart of lookalikes.

7 There is literature on the effects of the present economic downturn.

8 Belinda Mills (Issacs) n. 4,117.

9 "Cut-price retailers are causing havoc on the High Street" *The Economist*, 4 December 1993, 5.

10 Jan Benedict Steenkamp et al, *A Global Study into Drivers of Private Label Success* (AIM 2004), 23-4.

11 Steenkamp n. 10, 25-28; DG Enterprise and Industry, *The Impact of Private Labels on the Competitiveness of the European Food Supply Chain* (January 2011), 17.

12 DG Enterprise and Industry n. 11, 39.

13 Carlson Marketing Group, *Marketing* (June 2001).

14 London Economics, *Competition in Retailing* (Research Paper 13, OFT).

3.3 Own Brand

In the context of lookalikes, it is important to provide some background on own brand and how these products function in the marketplace. At the moment, across the EU as a whole own brand now has about 23% share of the groceries market.¹⁵

Own brand products are normally cheaper than the manufacturer's brand, by about 31%;¹⁶ however, this pricing differential varies between product goods and, in some categories, the own brand is actually more expensive. Price is but one of the reasons for own brand success. According to a report to the European Commission there are three different reasons for own brand products to exist:

- a. to fill gaps in product categories that are not served by branded products (e.g. generic or low cost brands not presently served);
- b. to provide direct alternatives to brands (same quality but lower price); or
- c. to pioneer new products and categories.

Similar reasons for own brand have been presented by retailers in that own brand can be seen to be "broadening the product ranges", "enhancing product markets" and providing "unique products".¹⁷ Retailers, as an umbrella brand,¹⁸ have an advantage as the use of their mark can signal over a number of brands.¹⁹ This has resulted in specialist ranges being established by most major retailers. By way of example Tesco's ranges including the following: "Tesco Organics", "Tesco Free From", "Tesco Health Living", "Tesco Carb Control", "Tesco Fair Trade" and "Tesco Kids".²⁰

The present discussion of own brand will consider: (i) the lifecycle of a product; (ii) innovation in the own brand/manufacturer brand owner competitive space; (iii) the timing of market entry for own brand; (iv) the issues of market power intrinsically linked with own brand products; (v) the perception of quality (or otherwise) in relation to own brand; and (vi) the business strategies that can be (and are) used by manufacturers to address own brand competitors. These each have implications for the special case of lookalike own brand products and are relevant to the discussion in Part 3.

15 See DG Enterprise and Industry n. 11, 11.

16 AC Nielson, *The Power of Private Labels 2005: A Review of Growth Trends Around the World* (Nielson 2005), 5; DG Enterprise n.11, [3.4.1].

17 Steve Burt and Shiona Davis "Follow My Leader? Lookalike Retailer Brands in Non-Manufacturer-Dominated Product Markets in the UK" (1999) *International Review of Retail, Distribution and Consumer Research* 163.

18 Manufacturers can also develop umbrella brands and are increasingly doing so: see Unilever Press Release 2nd March 2009: "Signature corporate branding on product": available at: www.unilever.co.uk/media-centre/pressreleases/2009/ubrand.aspx.

19 DG Enterprise and Industry n. 11, 35-36.

20 AC Nielson n. 16, 7 and 20.

3.3.1 Lifecycle

The modern retailer²¹ now sells its own brand products, which they claim are often of equal and sometimes even better quality than manufacturers' products.²² An own brand or lookalike will usually start life as a cheaper version of the brand leader with emphasis on price, rather than quality.²³ Subsequently more money is spent on quality until the own brand or lookalike becomes a brand in its own right.²⁴ This was explained by McKinsey in its study in 1993²⁵ in terms of four generations of own brand²⁶ evolution:

First Generation (Generic) – low volume, functional product, technology lagging behind market leader, perceived lower quality/inferior image, price necessary to attract customers;

Second Generation (Quasi-brands) – large volume one-off product, technology lagging behind market leader, average quality (but perceived as lower), price is a major criterion for purchase, national manufacturers, partly specializing in private label;

Third Generation (“Umbrella brand of trade”) - Big category products, expand the number of SKUs,²⁷ technology closer to market leader, quality/image in line with leading brands, quality and price as criteria for purchase and national manufacturers, mostly specialising in own brand;

Fourth Generation (Segmented private labels: shaped brand) – image-forming groups, many SKUs, but with small volume, innovation technology, quality/image equal or superior to leading brands, better products as criterion for purchase, international manufacturers, mostly specialising in private label.

The particular generation of own brand will depend on the country and the product category. Lookalikes are most likely to be adopted in the Third and Fourth Generation of products.

21 Some retailers, like Marks & Spencer, have always adopted this approach.

22 See Nirmalya Kumar and Jan-Benedict Steenkamp “Brand versus Brand” (2007) 7 *International Commerce Review* 47, 48.

23 See Kumar and Steenkamp n. 22, 48.

24 Shantanu Sahay “Piracy of Trade Dress and the Law of Passing Off: National and International Perspectives” (2006) *Journal of Intellectual Property Rights* 201, 203.

25 Francois Glémet and Fafael Mira “The brand leader’s dilemma” (May 1993) *McKinsey Quarterly*.

26 They called it private label.

27 Stock-keeping units.

3.3.2 Innovation

Relative Innovation in the Market: The general evidence shows that own brand is more successful in product categories where there is low innovation.²⁸ This is why own brand is less successful (although still growing) in personal and health care, but much more so in food and beverages and home care.²⁹ It further appears that where there are incremental improvements by manufacturers it is more difficult for own brand to enter the category (whether a lookalike or not) as the manufacturer's product is essentially a moving target.³⁰

Pressure to Innovate: This drive to stay ahead means that own brand might actually lead to more product innovations by manufacturer brand owners³¹ through the increased pressure they face, something which at least one manufacturer in a previous study accepted.³² However, some manufacturer brand owners reported that the loss of sales to own brand meant that they felt obliged to cut their spending on advertising of, and research into, new products. This could lead to a vicious circle with lower innovation and advertising leading to a drop in sales and these drops leading to less spending on those things.³³ It has been hypothesised that competition with own brand might lead to "over-investment" which is where products are adapted for the sake of adaptation and change alone.³⁴ This might be given some support by some older empirical evidence which suggests that brand managers are preoccupied by incremental innovation, rather than radical innovation, despite the benefits that come from the latter.³⁵

Relative innovation: The existing evidence seems to suggest that manufacturer brand owners invest more in innovation than so called "non-branded" producers (this is assumed to include own brand), rather than "non-branded" producers are not investing in innovation at all.³⁶ This is partially contradicted by the interviews conducted with manufacturer brand owners during the research conducted by the European Commission, where manufacturers were strongly of the opinion that most retailers make no direct contribution to innovation (with the exception of multinationals).³⁷ A similar view was reflected in a twenty-year old study by

28 See Kumar and Steenkamp n. 22, 51 (the figure of 56% more successful is used although it is unclear what the basis of this figure is); Steenkamp n.10, 51-52; Glémet and Mira n. 25.

29 Steenkamp et al n. 28, 36-37.

30 Kumar and Steenkamp n. 22, 51.

31 DG Enterprise and Industry n. 11, 92 (this does not mean that any of those innovations is a quality innovation as such).

32 Ibid, 114.

33 Ibid, 114.

34 Paul Dobson and Arvind Yadav *Packaging in a Market Economy: The Economic and Commercial Role of Packaging Communication* (UEA for British Brands Group, 2012), 60.

35 See Kamran Kashani, Joyce Miller and Tony Clayton, *A Virtuous Cycle: Innovation, Consumer Value and Communication* (AIM 1998).

36 Tony Clayton and Graham Turner "Brands, Innovation and Growth: The Role of Brands in Innovation and Growth for Consumer Business" in Joe Tidd (ed) *From Knowledge Management To Strategic Competence Assessing Technological, Market and Organisational Innovation* (3rd Ed, Imperial College 2012), 76.

37 DG Enterprise and Industry n. 11, 112.

McKinsey which proposed a certain number of experience based beliefs,³⁸ including one that own brand retailers do not innovate.³⁹

Number of innovators and innovations: The biggest problem identified in the interviews conducted for the European Commission was not for brand leaders, but brand followers, in that own brand pushes them off the shelf and so prevents investment. In terms of the actual effect on innovation caused by own brand (and so by implication lookalikes) the recent evidence is sparse. The best recent example being the finding that in the food sector the existence of own brands has not reduced innovation in the food supply chain within Europe (other than in Spain) as the number of new products still increases both for manufacturers' brand and own brand.⁴⁰

3.3.3 Timing of entry

The timing of the entry of the own brand (or a lookalike) onto the market can be very important. Early market entry with an own brand tends to give it a larger market share,⁴¹ but such entry is clearly taking more risk. It also appears that own brand is more likely than a rival manufacturer brand to launch a competing product to a brand leader; and to do so more quickly.⁴²

3.3.4 Perception of Quality

It is apparent that own brand goods are more successful where consumers perceive the quality gap between the manufacturer's and own brands to be small. This had led to the suggestion that where a small quality difference is perceived between the manufacturer's brand product and own brand, the own brand will be as much as 54% more successful.⁴³ Similarly, where there is perceived to be a low performance risk with a product, own brands have a higher than average share of the market.⁴⁴ Therefore, own brand will be more successful where the consumer trust in the manufacturers' brands is quite low, but own brand will suffer where there is high consumer trust in the manufacturers' brands.⁴⁵

38 The evidence put forward by McKinsey supports lack of penetration of private label in innovative markets, rather than direct empirical evidence as to lack of innovation by private label.

39 Glémet and Mira n. 25.

40 DG Enterprise and Industry n. 11.

41 Christina Brown and James M Lattin "Investigating the Relationship Between Time in Market and Pioneering Advantages" (1994) 40 *Management Science* 1361; Lenard Huff and William T Robinson "The Impact of Leadtime and Years of Competitive Rivalry on Market Share Advantages" (1994) 40 *Management Science* 1370.

42 Ian Clark Sinapuelas and William T Robinson "Entry for Supermarket Feature Me-too Brands: An Empirical Explanation of Incidence and Timing" (2009) 20 *Marketing Letters* 183, 194.

43 Jan Benedict Steenkamp et al n. 10, 47-48.

44 Ibid, 49 (+44% share).

45 Ibid, 49-50.

3.3.5 Business strategies

Manufacturers' brands can still attract high price premiums over own brand goods;⁴⁶ accordingly own brand market share is much lower in heavily-advertised product categories⁴⁷ and where there is a well-managed promotion strategy.⁴⁸ Hoch identified six strategic options open to a manufacturer brand to respond to an own brand: (1) increase the distance from the own brand by offering new and improved products; (2) increase distance from own brand through offering "more for the money"; (3) reduce the price gap; (4) formulate a "me too" strategy by introducing a value-flanker (meaning a value range); (5) wait and doing nothing; or (6) make premium or regular own brand.⁴⁹ Dutch research suggests that brand leaders do not normally use price reductions or value-flankers to address own brand, but rather focus on trying to distance their brand from the own brand by way of advertising and product innovations.⁵⁰ This was also found to be the best strategy.⁵¹ Additionally (or alternatively) a strategy has been suggested that brand owners need to "develop a reputation for aggressively pursuing retail copycat violators".⁵²

3.4 Potential business harm

There is a range of potential business harm caused by lookalikes proposed in the literature. This includes (i) lowering innovation; (ii) wasted rents on packaging changes; (iii) lost sales; (iv) loss of brand followers; and (v) an adverse effect on advertising.

3.4.1 Lower innovation

If manufacturer brands attract lower revenues because of lookalikes this might affect the investment that can be made into product development; because such investment might not be recoverable through sales.⁵³ Therefore, although in the short term consumers may gain from lower prices, they lose out in the long term because of lower product investment.

46 Ibid, Ch 8.

47 Ibid, 51-52.

48 Cf Kumar and Steenkamp n. 22, 52.

49 Stephen J Hoch "How should National Brands think about Private Labels?" (1996) 37 *Sloan Management Review* 89.

50 Peter Verhoef, Edwin Nijssen and Laurens Sloot "Strategic Reactions of National Brand Manufacturers towards Private Label" (2002) 36 *European Journal of Marketing* 1309, 1323.

51 Ibid, 1323.

52 Kumar and Steenkamp n. 22, 52.

53 Paul Dobson "The Competition Effects of Look-alike Products" *School of Management and Finance Papers* 1998 VIII, 4.

3.4.2 Packaging wasting costs

There could also be wasted costs caused by the manufacturer brand owners constantly changing their packaging to avoid lookalikes.⁵⁴ The argument is that such changes are socially wasteful and manufacturers' brands are forced into rent-seeking behaviour to stay ahead of lookalikes⁵⁵ what could be terms "over-innovation".⁵⁶ There is some evidence in the market place of manufacturer brand owners (rent seeking behaviour) changing their packaging only for those changes to be followed by competitors. Paul Dobson, in his report, notes how Proctor & Gamble's product *Flash* was rebranded in 1986, 1992 and 1994 and each time the new packaging was followed by competitors soon thereafter.⁵⁷ Similarly, if one examines another Proctor and Gamble product, Head and Shoulders, it appears that similar tracking existed. The photographs below show the product in the 1990s (far left), the 2000s (middle) and it most recent (right).⁵⁸ In each case, a change in packaging by the brand leader was followed by others in the market place.



Figure 3.1

3.4.3 Loss of sales

The literature implicitly recognises that the arrival of a lookalike might adversely affect the volume sales of the manufacturer brand owner. The data so far has not looked at sales as such, but rather things like the prevalence of lookalikes in stores. For example, it has been stated that in the United States half of store brands were similar to the brand leader's packaging at least in colour, size and shape,⁵⁹ and that clear package imitation has occurred in one third of seventy-five product categories.⁶⁰ In relation to the United Kingdom, it was estimated by Interbrand in 1998 that lookalikes accounted for 2% of the UK grocery market or £1.5billion per year.⁶¹ That said, and as outlined in the Introduction and Annex 1, much of the research has suffered from imprecise terminology and methodology and, for those reasons, presents some limitations and must be viewed with caution.

54 An additional problem is that retailers need six months' notice of any change of packaging: Tony Durham, *Shopper Behaviour: How Choices are Made* (Presentation by Proctor & Gamble, Oxford 25th May 2012).

55 Dobson n. 53, 4.

56 Dobson and Yadav, n. 34, 60.

57 Ibid, 4, fn 3.

58 This is based on Durham n. 54 and the images are taken from the PowerPoint presentation.

59 Fiona Scott-Morton and Florian Zettelmeyer "The Strategic Positioning of Store Brands in Retailer-manufacturer Negotiations" (2004) 24 *Review of Industrial Organization* 161, 173-4.

60 Serdar Sayman, Stephen J Hoch and Jagmohan S Raju "Positioning of Store Brands" (2002) 21 *Marketing Science* 378.

61 Referred to in Paul Dobson n.53; no further source given in the paper to support this figure.

Implicit in much of the literature is the suggestion that the introduction of lookalikes will lead to loss of volume in sales (although it is often expressed in terms of market share).

3.4.4 Loss of brand followers

It has been suggested that lookalikes particularly adversely affect brand followers as the lookalike enjoys a particular market advantage. Other brand followers are unable to compete fairly and so ultimately are put out of business.⁶² This could either be due to the inability to make the necessary innovations to packaging or product to compete with the own brand or alternatively as a result of de-listing (being replaced by the own brand). In due course, the failure of brand followers leads to less consumer choice and reduced diversity in the market place.

3.4.5 Effects on advertising

Brands invest in their own trade dress to establish and retain strong, favourable and unique brand associations to make recognition and recall easier.⁶³ Traditionally, retailers have tended to advertise the shop as a whole, concentrating on highlighting particular special offers for individual products; it being unusual for retailer to run an advertising campaign for a normally priced product category.⁶⁴ Furthermore, actions addressing the perceived value of a brand through advertising and promotions tend to draw customers from rival brands rather than own brand.⁶⁵ However, the retailers advertising could benefit from lookalikes as the retailer can free-ride on the brand leader's advertising.

3.4.6 Protection of "Investment"

It is arguable that manufacturer brands should be protected so as to protect the investment in the brand. It costs a lot of money creating and maintaining brands in terms of market research into consumer desires, advertising and promotion of the product, as well as the internal development costs of the brand itself. It was estimated that between £1.9 and £3.7 billion⁶⁶ was spent in 2006 on this sort of research for the purpose of developing brands.⁶⁷ Indeed, the wider values of brands are now well-recognised in European trade mark law with the acknowledgement of the non-origin functions of a trade mark being protected, in particular, as the advertising function and the investment function.⁶⁸ It appears therefore that there has been some recognition and acceptance of the role of investment in branding and this might support its wider application elsewhere, including as part of the policy rationale for introducing mechanisms for protecting that investment.

62 Ibid, 5.

63 Kevin L Keller "Conceptualizing, Measuring and Managing Customer-based Brand Equity" (1993) 57 *Journal of Marketing* 1, 9.

64 However, recently Aldi has changed its tactics and has been running a series of comparative advertisements based with the price of the brand leader and then the price of the Aldi product emphasising they are comparable but Aldi is cheaper. These adverts are available on <http://www.aldi.co.uk/en/entertainment/as-seen-on-tv/>.

65 George Baltas, Peter Doyle and Paul Dyson "A Model of Consumer Choice for National v Private Label Brands" (1997) *Journal of Operational Research Society* 988, 993-4.

66 This does of course show a large scope for the margin of error of the calculations.

67 Peter Urwin et al, *Valuing Brands in the UK Economy* (British Brands Group 2008), 23.

68 C-487/07 *L'Oreal v Bellure* [2009] ECR I-5185, [2009] ETMR 55.

3.5 Consumers and Product Interaction

An important question is why consumers might purchase a lookalike over a branded product (or over a distinctive own brand product). There has been a significant amount of research into consumer perceptions of packaging in general, some of which can be highlighted. A basic view is that by using lookalikes the retailer benefits without incurring the innovation and marketing costs.⁶⁹ According to the British Brands Group, a lookalike can distort consumer behaviour in three different ways:⁷⁰

- a. the consumer can tell the copy from the brand but believes, due to the similar packaging, that both are made by the same manufacturer and come from the same factory;
- b. the consumer can distinguish the copy from the brand but believes that the quality is the same or closer to the brand than they would assume were the packaging more different;
- c. shoppers not paying full attention may buy the copy in error, mistaking it for the brand (the product in such packaging are normally low value, low engagement purchases).

3.5.1 Familiarity and Contrast

The first principle is that lookalikes reduce consumer doubt or uncertainty about unfamiliar or new products as similar packaging will communicate similar features.⁷¹ This uncertainty clearly plays a central role in consumer choice.⁷² Feelings of familiarity in consumers arrive after their repeated exposure to a product,⁷³ which can in turn lead to a consumer preference for that product.⁷⁴ This would suggest that the familiarity of packaging, even on a different (lookalike) product, will lead to more positive feelings towards it and so an increased likelihood of purchasing.

Familiarity: Where consumers are uncertain about a product they look for familiar cues. Because lookalikes imitate the look and feel of a leading brand some of those familiar cues are recognised. These cues can be transmitted in many different ways, including through brand names, price, packaging and advertising.⁷⁵

69 Dobson n.53, 3.

70 British Brands Group, *Priority Regulatory Outcomes* response to LBRO Consultation: Briefing.

71 Dobson n.53, 5.

72 Amna Kirmani and Akshay R Rao "No Pain, No Gain: A Critical Review of the Literature on Signalling Unobservable Product Quality" (2000) 64 *Journal of Marketing* 66, 66; Raanan Lipshitz, and Oma Strauss "Copying with Uncertainty: A Naturalistic Decision-making Analysis" (1997) 69 *Organizational Behaviour and Human Decision Process* 149.

73 Robert B Zajonc "Attitudinal Effects of Mere Exposure" (1968) 9 *Journal of Personality and Social Psychology* 1, 23-24.

74 Chris Janiszewski "Preattentive Mere Exposure Effects" (1993) 20 *Journal of Consumer Research* 376, 390.

75 E.g. Niraj Dawar and Philip Parker "Marketing Universals: Consumers' Use of Brand Name, Price, Physical Appearance, and Retailer Reputation as Signals of Product Quality" (1994) 58 *Journal of Marketing* 81.

Contrast: Similar packaging can also evoke contrast feelings, leading consumers to compare the characteristics of the brand leader and the lookalike.⁷⁶

3.5.2 Interaction with Lookalikes

It was found by van Horen, after conducting a number of experiments, that high similarity lookalikes were received less favourably than moderate similarity lookalikes when the brand leader was present.⁷⁷ But where the brand leader was absent, high similarity lookalikes were rated higher than less similar products⁷⁸ as they reduced consumer uncertainty.⁷⁹

Themes: Van Horen concluded that imitating abstract themes was far more effective than imitating distinctive perceptual features. Accordingly, theme-based lookalikes are better received than feature-based ones.⁸⁰ The research went further and found that it extended to evaluation of choice. In other words, consumers were more likely to buy lookalikes which copied themes than those which copied features.

Therefore, the effect of lookalikes is context-dependent. In other words, when consumers are fully aware of the differences between the products, familiar packaging in unfamiliar surroundings might be desirable for consumers as they can seek out these cues.

Colour and other factors: A number of factors attract consumers to products. One of the most important is colour and this example will be used to illustrate the broader issues. Colour can attract consumers' attention and have an impact on the evaluation of products. However, some colours are not believed to be acceptable in certain cultures⁸¹ and it is possible that certain colours can distract from the writing on labels enabling incorrect conclusions to be drawn⁸² and therefore raising the likelihood of mistaken purchases. Nevertheless, it must be borne in mind that consumers will only accept a certain range of colours within a particular product category, resulting product-specific restrictions on the scope to distinguish.⁸³ There are certain colours which have particular common perceptions such as quality or freshness.⁸⁴

76 Femke van Horen *Breaking the Mould on Copycats: What Makes Product Imitation Strategies Successful* (Ph. D Thesis, Tilburg University 2010), 22.

77 Femke van Horen and Rik Pieters "When High Similarity Copycats Lose and Moderate Copycats Gain: The Impact of Comparative Evaluation" (2011) *Journal of Marketing Research* 83.

78 Ibid.

79 van Horen n. 76, 116.

80 Ibid, 88.

81 Anthony Grimes and Isobel Doole "Exploring the Relationship Between Colour and International Branding: A Cross-Cultural Comparison of the UK and Taiwan" (1998) 14(7) *Journal of Marketing Management* 799; Thomas. J Madden, Kelly Hewett and Martin Roth "Managing Images in Different Cultures: A Cross-National Study of Color Meaning and Preferences" (2000) 8(4) *Journal of International Marketing* 90, 91; Randi P. Gossman and Joseph Wisenbilt "What we know about consumer's colour choices" (1999) 5(3) *Journal of Marketing Practice* 78.

82 Paula Fitzgerald Bone and Karen Russo France "Packaging graphics and Consumer Product Beliefs" (2001) 15(3) *Journal of Business and Psychology* 467, 485-6.

83 Randi P. Gossman and Joseph Wisenbilt "What we know about consumer's colour choices" (1999) 5(3) *Journal of Marketing Practice* 78.

84 Olga Ampuero and Natalia Vila "Consumer Perceptions of Product Packaging" (2006) 23(2) *Journal of Consumer Marketing* 100.

Similar issues arise in relation to aspects of packaging other than colour, such as shape and size, the graphics and so forth.⁸⁵

3.5.3 Identification of “Lookalikes”

Blurring experiments: The factors of packaging identification have been used in studies to try and determine similarity of products. For example, Kapferer⁸⁶ conducted an experiment with 45 consumers as subjects, each of whom was shown a sequence of pictures of brand leader products and lookalike products. The sequence began with a very blurred photograph and as the sequence of 15 photographs continued the photograph became more in focus.⁸⁷ He found that consumers tend to identify products first by reference to colour, then by shape, then by dominant images and finally by name. Similar sorts of experiment have found similar results.

Heuristic research: In recent years, there has been some research into the heuristics of the purchasing decision. It was found by Clement⁸⁸ that there a number of phases underlie the purchasing decision. First, the pre-attention phase where visual impact of the packaging on the shelf catches consumers attention. Secondly, the succeeded attention phase where the packaging design builds up in the consumers mind – it is the critical phase. Thirdly, the tipping point where consumers actually reach out to pick up the product, which is followed by the fourth phase the physical action phase which results in the purchase. There then follows a post-purchase phase where interactions with the product will assist with the future development of each of these phases. This breaking down of the shopping experience into phases is a useful way of thinking about lookalikes. For example, it might be suggested that lookalikes have a much greater impact in phase one of the process than subsequent phases. Others have reported how consumers usually only remember no more than five things about a particular product.⁸⁹

Mountainview: The importance of phase one was demonstrated by recent research conducted by Mountainview⁹⁰ in which they presented a sample of people with six images of similar consumer products. They did this under three conditions. The first condition had a brand leader and no own brand brands. The second condition had a brand leader, a lookalike and other non-own brands. The third and final condition is where there is a brand leader, a lookalike and a distinctive own brand. In each of the three conditions, the participants were asked to identify a particular branded product from a group. The reaction times for the first and third condition were similar (224 ms and 220 ms), but there was a statistically significant difference when the lookalike was also present (233ms). Further, they found that there were the most mistakes were made in selection when the lookalike was present (3.8% mistakes) compared to where no lookalike was present (1.4 and 1.7%).

85 See generally, Dobson and Yadav n. 34, [2.2].

86 Jean-Noël Kapferer “The Brand and its Double” (1997) 1 *Internationales Markentechnikum* 18.

87 This sort of study was thought not to be particularly helpful in *United Biscuits v Burton Biscuits* [1992] FSR 14, 22-23 and *Laura Ashley Ltd. v. Coloroll Limited* [1987] RPC 1, 11.

88 Jesper Clement “Visual Influence on In-Store Buying Decisions: An Eye-tracking experiment on the Visual Influence of Packaging Design” (2007) 23(9) *Journal of Marketing Management* 925-6.

89 Durham n. 54.

90 Jane Leighton and Geoff Bird, *The Effect of Branding of Consumer Choice* (Mountainview, 2012).

This is evidence of lookalikes affecting the processing fluency of consumers – the ease with which consumers can find and select the product they want to buy.

However, at this early stage, an inhibition in a consumer's processing fluency is unlikely to be considered evidence relevant to passing off or trade mark infringement claims. A court is likely to be sceptical about this effect as a single purchasing decision taking 10 milliseconds longer is not sufficient damage, unfair advantage or detriment (as the case may be) to warrant a remedy.⁹¹ As the research in this field develops this might change. The other finding by Moutainview, namely that a higher number of mistakes were made when a lookalike (in contrast to a distinctive own brand) was presented at the same time as a brand leader, is useful evidence. The next stage is for this to be tested in a real world environment with the products on a real supermarket shelf and consumers making their decisions without extreme time pressure. Further research in this field is awaited with interest.

91 Also see Rebecca Tushnet "Gone in Sixty Milliseconds: Trademark Law and Cognitive Science" (2007) 86 Texas Law Review 507.

Summary Points Chapter 3

SP 3.1: Own brand (and lookalikes)

Own brands have lifecycles and lookalikes are most common as these own brands develop and enter their later life cycles.

The literature on innovation suggests:

- Own brand is more successful in low innovation product categories;
- Incremental innovation by manufacturer brand owners makes it more difficult for own brand to penetrate the market and this fact might be a driver for manufacturers to innovation;
- Lost sales due to own brand leads to less money being spent by manufacturers on research and development;
- There is little empirical evidence on whether own brand affects innovation; but in the food sector it has been found that own brand has had no effect in Europe (except in Spain).

Perceived quality - own brand which is perceived to be of a similar quality to manufacturer brands will be more successful.

Business strategies – price premiums can still be maintained by manufacturers where there is a well-managed promotional strategy and product innovation.

SP 3.2: Business harm

The following represents potential business harm which, theoretically, might be caused by lookalikes:

- Lowering innovation;
- Wasted rents on packaging changes;
- **Brand followers** might be pushed out of the market place;
- Adverse effect on **advertising**.

Other justifications to prevent lookalikes

- To protect the **investment** in market research to obtain new consumer insights;
-

Literature reviews identifies the following in relation to lookalikes:

Consumer perceptions

- **Reception** – in the absence of the brand leader, products that look similar to that leader are better received by consumers than those that look distinct;
- **Comparison** – when a lookalike on the shelf at the same time as the brand leader the lookalike might be used for comparison purposes;
- **Mistake** – the presence of lookalikes will reduce a consumer's reaction time in selecting a product and will (under time pressure and outside the normal shop environment) increase the chance of mistaken selection.

Product identification

- **Themes** being copied is more effective than copying features;
 - **Cues** in relation to colours (and other cues) there is a limited range of things which consumers will accept and understand;
 - **Consumers identify products** by reference to cues in descending order: colour; shape; dominant images; name.
-



Chapter 4: Existing lookalike studies

4.1 Introduction

The subject of lookalikes has been reported or considered as part of various reviews. The most recent was that undertaken by Hogan Lovell for the European Commission, but recent studies have also been conducted by the European Brands Association (AIM) and MARQUES as well as by the International League for Competition Law. At the national level, the issue of lookalikes was considered by the Trade and Industry Parliamentary Committee in 1998 and as part of the Gowers Review of Intellectual Property in 2006.

4.2 Hogan Lovells Report

The European Commission commissioned Hogan Lovells to produce a report on the issue of lookalikes, which was published 13 January 2012.¹ It was intended to provide an in-depth comparative legal assessment of the legal protection against “parasitic copying” under the laws of the various Member States of the European Union.² The report contained two elements: first, direct enquiries of lawyers in each of the Member States; and secondly, a literature review.³ The enquiries involved two questionnaire-based surveys and a second survey on the implementation of the Unfair Commercial Practices Directive (2005/29) (UCPD).⁴ The study also included a more in-depth case study of six Member States (Bulgaria, Germany, Italy, Spain, Sweden and the UK).⁵

The study concluded that “All Member States offer some form of protection [against lookalikes], even though the scope of the rights granted...differ”.⁶ Indeed, it concluded that the present legal frameworks appear to lead to different results in different countries⁷ and so the general effectiveness of the laws was questioned.⁸ The report noted that trade mark law and design law have been harmonised across the EU and concluded that the continuing different approaches to lookalikes in Member States might relate to how the issue was best dealt with historically.⁹ It also found that in some Member States’ consumer protection laws could be used to prevent lookalikes¹⁰ and that the UCPD appears to have improved the situation in some Member States in relation to lookalikes.¹¹

1 MARKT/2010/20/D.

2 Final Report (MARKT/2010/20/D), [2 and 3].

3 This was merely a list of relevant literature.

4 Ibid, [20 and 21].

5 The reasons for selection of these countries are explained in Ibid, [31 to 32].

6 Ibid, [11] and [42].

7 Ibid, [106].

8 Ibid, [11].

9 Ibid, [16].

10 Ibid, [15].

11 Ibid, [19].

The study found that in most Member States the primary means of preventing lookalikes is unfair competition law¹² (the exception being the UK¹³), but there was a divergence between Member States as to what “contrary to honest practices” means in terms of their unfair competition law.¹⁴ Some Member States distinguish between classic and parasitic unfair competition and it appears that the majority have taken lookalikes to be covered by the UCPD.¹⁵ Nevertheless, other Member States took the view that the UCPD was intended to benefit consumers and so Member States were free to enact laws to prevent lookalikes, but most Member States have not done so.¹⁶

The questionnaire to the lawyers included: “Does the law of your Member State provide specific legislative provisions to protect against parasitic copying.” However, problematically there was no definition agreed of what amounts to “parasitic copying” when the questions were asked and so respondents were essentially answering the question based on their own understanding of this term leading to potential variations (e.g., some might think origin confusion important, others might not).

The problems identified with establishing a claim based on lookalikes (parasitic copying) were examined in more detail in relation to certain countries.¹⁷ The report concluded there can be problems with proving that products or packaging are distinctive, proving confusion as to commercial origin, and establishing that there has been an imitation of the original product.¹⁸ The respondents were asked to apply their law to certain examples (case studies as it were). Each country came to a different conclusion as to whether a particular example was a lookalike or not.¹⁹ Thus the different requirements in each country necessarily produce different results. This case study is probably the best indication to participants of what was within the scope of the term “parasitic copy” (lookalike).

4.3 The European Brands Association (AIM)

The European Brands Association (AIM) conducted its own review of the laws relating to lookalikes across its member countries.²⁰ The report includes a table setting out whether there is a law against “parasitic copying”, whether it is useful or effective for brand owners, and how participants rate the country for an appreciation of the problem. There is no synthesis of the results. The responses vary in quality with some countries saying little or nothing (Estonia and Luxembourg) and others providing extensive information (the UK and Italy).

12 Ibid, [46 et seq].

13 Ibid, [44].

14 Ibid, [49] and necessarily Article 10*bis* of the Paris Convention.

15 Ibid, [57].

16 Ibid, [109].

17 Ibid, Bulgaria, [88 to 88.6], Germany [89 to 89.9], Italy [90 to 90.4], Spain [91 to 91.8], Sweden [92 to 92.5] and the United Kingdom [93 to 93.4].

18 Ibid, [87].

19 Ibid, [95].

20 September 2010.

4.4 MARQUES

The MARQUES Unfair Competition team conducted their own survey on lookalikes.²¹ This involved questionnaires being sent to representatives from each of the countries represented in MARQUES. Those questionnaires asked things such as whether trade dress can be proprietary and, if so, the scope and how such rights can be obtained. It also asked some interesting questions such as whether “quality difference” is an issue, whether the presence of a different trade mark on the packaging affects the result, the admissible evidence, and cost of pursuing the claim. There was also a question on the size of the problem of “lookalikes” in the country. The answers to this last question varied in quality and clarity, but it is apparent that the problem is perceived to be a bigger issue in some countries than others. There was no synthesis of the results however.

4.5 International League for Competition Law (LIDC)

In 2009, LIDC and its national reporters²² answered a series of questions: “What are the criteria that determining the unfairness of so-called ‘look-alikes?’”; “What are the prohibitions and appropriate sanctions?”. The report began by acknowledging the difficulties with defining a lookalike²³ and then continued with a report on the various countries. The report identified the distinction between confusion and parasitism which exists in some jurisdictions.²⁴ The reporters confirmed that a basic freedom to trade is provided in France, Luxembourg, Sweden, Lithuania, Czech Republic, Spain, China, Austria, Germany, Belgium, the UK, Japan, Italy and Switzerland (Lithuania and Latvia did not).²⁵

The reports all said the chances of success will depend on the facts of the case. Many mentioned an established law of unfair competition, but only in Germany was it reported that there was a long history of cases relating to lookalikes.²⁶ However, Sweden, Lithuania, the UK, Japan and Estonia all reported that usually lookalikes cannot be prevented by reliance on unfair competition laws (passing off) alone.²⁷

There are three aspects which recur in the reports on preventing lookalikes: (i) the requirement to establish reputation, (ii) the requirement of distinctiveness; and (iii) the defendant’s activities enabling “cost saving”.²⁸ For parasitism, where such an action is available, the important factors are the economic value in being able to copy, the distinctiveness of the

21 MARQUES, *Protection and Infringement of Look-alikes* (Compiled by Paul Steinhauser and Till E Lampel) (August 2011).

22 The report was prepared by Hon Prof Dr Guido Kucsko: *International Report for Question B: What are the criteria that determine the unfairness of so-called lookalikes; what are the prohibitions and appropriate sanctions* (LIDC 2009).

23 *Ibid*, p.[Section II]

24 *Ibid*, [1.1.2].

25 *Ibid*, [1.3.1].

26 *Ibid*, [2.2.2].

27 *Ibid*, [2.2.3].

28 *Ibid*, [4.1.4].

trade dress, and the degree of familiarity.²⁹

4.6 Trade and Industry Select Committee, House of Commons

In 1998 the Trade and Industry Select Committee of the House of Commons reported on the issue of lookalikes (as well as some other branding issues).³⁰ The Committee considered a lookalike to be a product that was so close to a [manufacturer] branded product that it calls the [manufacturer] branded product to mind.³¹ The committee took evidence from both manufacturer brand owners (in particular the British Brands Group), from retailers (such as Tesco and ASDA), and from third party manufacturers (such as McBride). The committee heard the conflicting views, with the British Brands Group stating lookalikes “ride off the innovation, investment, effort, risk and reputation of the brand,”³² and Tesco saying they “indicate to consumers that there is a competing (and cheaper) product of the same quality as the manufacturer’s brand”.³³ The Committee noted that the alleged problem lay in the test for confusion, with lookalikes calling to mind the brand product and riding on its marketing achievement without falling foul of the law.³⁴

The Government submission took the view that further legislation is not appropriate.³⁵ The Chartered Institute of Patent Agents (CIPA)³⁶ believed the terms “get up” and “brands” were too imprecise³⁷ and the Institute of Trade Mark Attorneys (ITMA) took a very strong line against giving protection against lookalikes.³⁸ The Committee concluded:

“we are not convinced that the law is deficient in this area; the simple fact is that, whatever the law, brand owners would be understandably reluctant to start legal proceedings against the supermarkets who are their largest customers.”³⁹

29 Ibid, [4.4].

30 Trade and Industry Committee (Eighth Report), *Trade Marks, Fakes and Consumers* (1998-9 Session), HC Paper 380.

31 Ibid, [30].

32 Ibid, Ev, 3.

33 Ibid, Ev, 24.

34 Ibid, [32].

35 Ibid, Ev, 146.

36 Now the Chartered Institute of Patent Attorneys (CIPA).

37 Ibid, Ev, 85.

38 Ibid, Ex 179 to 181.

39 Ibid, [36].

4.7 HM Treasury: Gowers Review of Intellectual Property

In 2006, the Gowers Review of Intellectual Property⁴⁰ received submissions on the issue of lookalikes (it called them “copycats”). The Review cited figures from some available research⁴¹ and took the view on the evidence submitted that passing off was insufficient, stating the following:⁴²

“...the Review believes that passing off does not go far enough to protect many brands and designs from misappropriation for the following reasons:

- if copycats appear on the market before the [claimant]⁴³ has built up goodwill in a certain appearance, the brand owner cannot rely on the law of passing off. This may prevent new entrants from adequately protecting the appearance of their products; and
- it is difficult to demonstrate consumer confusion in court and substantial evidence may be required to bring a successful passing off action.

This is often especially relevant to small designers who are at risk of their designs being copied before they are able to establish a reputation in the marketplace.”

At the time Gowers reported, the UCPD⁴⁴ had not been implemented⁴⁵ and so the Review recommended that the government should monitor the effect of the current law and the Directive and take further action if the situation is found still to be ineffective.⁴⁶ This response was criticised by some commentators for largely reflecting the same “wait-and-see” approach that had been taken when the Trade Marks Act 1994 had been adopted.⁴⁷ Such criticism argued that wait-and-see had been used as a strategy for “too long”.

40 (HM Treasury 2006).

41 *Fighting Private Label* (Business Insights, 2005); Jean Noël Kapferer “Stealing Brand Equity: Measuring Perceptual Confusion Between National Brands and ‘Copycat’ Own-Label Products” (1995) *Marketing and Research Today* 96 and the Consumer Associations 1998 study (this study is described below at paragraph [5.3.5]). These were all provided by the British Brands Group.

42 HM Treasury n. 40, [5.84 and 5.85].

43 The Review says “Defendant” but this is clearly an error and should read Claimant.

44 Directive 2005/29/EC.

45 Now implemented by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

46 Recommendation 37.

47 Christopher Morcom QC “Gowers: A Glimmer of Hope for UK Compliance with Article 10bis of the Paris Convention” [2007] *European Intellectual Property Review* 125, 126.

Chapter 5: Previous Surveys

5.1 Introduction

There have been a large number of reports published outlining different consumer perceptions related to lookalikes. Some of these surveys have been reported without any details of methodology¹ or questions, but in respect of others the methodology and questions have been made available. Where a survey does not include its methodology then the assessment of its value is more difficult than when full methodology is provided. This is why the two types of survey have been separated. This section will consider the findings of those surveys to date.

5.2 Surveys with no published methodology

5.2.1 Europanel – Reported in The Independent on Sunday 20 February 1994

Europanel interviewed 2,000 “housewives” asking about their perceptions of own brand. A snapshot of the results was published in the *Independent on Sunday*.² It reported that of the shoppers at ASDA, 4% thought its own brand was better, 75% of shoppers thought its own brand was as good and 21% thought it was worse. At Gateway,³ 2% thought own brand was better, 67% thought it was as good and 31% thought it was worse. In relation to Sainsbury, 7% thought own brand was better, 78% thought it was the same and 15% thought it was worse. This study was not considering packaging at all, but rather own brand generally (and so the report relates to both own brand and lookalike). However, it does appear to suggest that as far back as 1994 upwards of two-thirds of shoppers thought that own brand goods are at least as good as those of manufacturers.

5.2.2 Consumer Association 1994

In December 1993, the Consumer Association conducted a survey of 681 shoppers at the checkouts of Safeway,⁴ Sainsbury and Tesco. A summary of the results was published in their magazine *Which?*⁵ The survey found that of the shoppers interviewed 3% had a lookalike (or the branded product it represented) in their shopping baskets, rather than the product they intended. In total, 12.5% of those interviewed had bought a product they had not intended to purchase in the last six months because they thought it was something else.

1 These tend to those carried out early on and it is assumed result from the debates occurring in relation to lookalikes during the passage of the Trade Marks Act 1994.

2 Patrick Husking “Inside Story: Superstores Stalk the Superbrands” *Independent on Sunday*, 20th February 1994.

3 Gateway became Somerfield, which was eventually taken over by The Co-operative in 2009.

4 Now Morrisons.

5 “Public Interest Own Brands: Lookalikes” *Which? Magazine* March 1995, 30-31.

Furthermore, only 13% of those people interviewed found the packaging of the lookalike and the manufacturer's branded product confusing and only 11% would not have been "particularly bothered" by the fact they mistakenly bought a lookalike.

In relation to consumer attitudes, it appeared that 20% disapproved of supermarkets producing products which look like well-known brands. As to quality, 37% thought the manufacturers' brands were of a better quality than lookalikes, while only 7% thought the lookalike was better. As to price, 59% thought most brands were more expensive than lookalikes and 2% thought it was the reverse. As to value for money, 33% thought that lookalike products were better value for money whereas 20% thought that manufacturer branded products were better value.

5.2.3 British Retail Consortium 1994⁶

On April 13 1994, a poll was conducted by MORI⁷ for the British Retail Consortium with 514 shoppers polled over 21 locations. Of those surveyed 69% regularly purchased own brand goods and 2% purchased only own brand. The reasons given by consumers for purchasing own brand were that they were cheaper (42% strongly agree), they were better value for money (33% agree) or they were equivalent to the manufacturer's brand (26% agree).

The survey found that 79% of shoppers denied ever being confused by retailers' own brands as being equivalent to a manufacturer's brand (and 21% have been confused). Further, 51% of consumers reported that they found it helpful to have similar packaging to identify own brand alternatives; and 59% said such packaging helped for price comparisons between own label and branded products.

Less than 20%⁸ of consumers strongly agreed that they bought own brand because of the similarity of packaging, whereas 21% strongly agreed that they bought own brand because they believed it is mostly made by well-known manufacturers. The methodology is not clear, but it is presumed that the questions were asked with options of "Agree" and "Strongly Agree". The figures presently only set out those who "Strongly Agree" and so it is possible that others (or even many others) said that they "Agree" with some of these conclusions.

5.2.4 Which? 2013

In February 2013, Which? conducted a survey of 2,244 of its Members.⁹ They found that 20% of participants had purchased a lookalike believing it to be a manufacturer brand owner's product at least once. Of those who had mistakenly purchased the lookalike product, 38% were annoyed by the fact and 30% felt misled. The survey further found that 18% of participants had deliberately purchased an own brand product because it resembled a branded product. The report found that of those 18%, 60% had made the purchase because

6 Supermarketing "Quarrel over Brands vs Own-label Hots Up" (22nd April 1994), 5.

7 The only document available is British Retail Consortium "Summary of Result of the MORI Research Commissioned by the British Retail Consortium."

8 There is no indication of anything more precise, but it is likely the figure was close to 20%.

9 "Spot the Difference: Big Brand or Supermarket Equivalent?" (2013) *Which Magazine* May 2013, 22.

it was cheaper while 59% wanted to test to see whether it was as good as the branded product.

The report then asked selected participants to source four manufacturer brand owner’s products alongside the lookalikes. The name of the products was removed and the participants were asked to identify which was the manufacturer brand. The results were as follows:

Products Compared	Identified manufacturer branded product	Identified lookalike
Jacob’s Cream Crackers / Aldi’s Savour Bake Creams	50%	43%
Head and Shoulders / Boots Anti-Dandruff	84%	7%
Sarson’s Malt Vinegar / Lidl’s Samson Malt Vinegar	50%	40%
Herbal Essence / Boots Fruit Essence	64%	13%

Those who did not know the answer were excluded.

These results demonstrate that in at least two of products the packaging, without the products name, were similar enough to mean that approximately half of consumers would not know the difference. In respect of the other two products the results were less conclusive. This demonstrates, at least, that packaging is similar between certain own brand products and manufacturer own brand products. It also might indicate how important product names (trade marks) are to purchasing decisions.

This part of the survey involved participants who were self-selecting and so, it might be said, they do not necessarily represent a cross-section of society. This might suggest the results found were higher than in the population as a whole. Conversely, it might be said that, as readers of Which?, the participants are the more aware of consumer issues and so are less likely to be confused. Accordingly, the result may be lower than the population as a whole. In the absence of information regarding the tested population it is not possible to determine which of these outcomes is the most likely.

A second part of the survey asked 20 participants (no details are provided as to their selection) to take a blind taste test of three pairs of products. This found that in relation to Oat Biscuits 70% preferred the taste of McVitie’s Hobnobs over 30% preferring Alidi’s Oaties. And 85% preferred the taste of Monster Munch (Pickled Onion flavour) to Asda’s Beastie Bites at 15%. However, in relation to Pringles Original 45% preferred the original to 55% preferring Tesco’s Chipz Original. Thus, in some cases, a consumer mistakenly buying the wrong product might get what they view as inferior and in others it might be the converse. “

5.3 Surveys with published methodology

5.3.1 Methodology testing

Where the methodology used to conduct a survey is apparent from the literature, it is appropriate to assess the quality of the survey. The pitfalls that can occur from poorly conducted surveys have been explained numerous times by the courts and, by way of guidance to best practice, the rules adopted by the English courts¹⁰ for admissibility and weight of surveys¹¹ are set out below:

1. The number of surveys carried out (if there was more than one) must be recorded and disclosed;
2. The number of people questioned must be recorded and disclosed;
3. The totality of all answers must be disclosed;
4. The questions should not be leading;
5. The questions should not lead the person questioned into a field of speculation upon which they would not have embarked had the question not been put;
6. The exact answers must be recorded and disclosed (and not abbreviations);
7. Any coding must be accurately carried out and the methods disclosed, but this coding should not take place on the spot; and
8. The instructions given and the way the interviews were carried out must be disclosed.

The surveys considered below cannot be expected to meet these high standards. Indeed, in many respects, it would be unnecessary for them to do so considering the different purposes they serve and the fact there is no subsequent cross-examination. However, some of these factors will be applied to demonstrate where a survey has a particular strength or weakness.

10 This practice is now confirmed as applicable during proceedings at the Intellectual Property Office as well: see *Tribunal Practice Notice* (2/2012).

11 See *Imperial Group plc v Philip Morris Ltd* [1984] RPC 293, 302–3; also see *Scott Ltd v Nice-Pak Products Ltd* [1988] FSR 125, 133. The Court of Appeal recently endorsed this standard in *Marks and Spencer v Interflora* [2012] EWCA Civ 1501.

5.3.2 NOP Consumer Market Research – For Reed Business Publishing – February 1994

Between 25 and 27 February 1994, on behalf of Reed Business Publishing, NOP Consumer Research interviewed 1004 people who were 15 years and older. The survey asked two questions.

The first question asked how often the person buys “supermarkets’ own brand grocery products.” Of those who responded: 44% always or often bought own brand products; 41% occasionally bought own brand products; and 14% never bought such products.

The second question was: “in your opinion is the packaging of the supermarkets’ own brands so similar to the branded alternatives that you find you confuse the two or not?” In the results, 19% of the interviews answered yes. It is important to note that the question is clearly leading and did not present a range of options (only yes and no). The value of the survey is therefore greatly diminished; notwithstanding most respondents went against the lead of the question.

5.3.3 NOP Consumer Market Research – For Mars - April 1994

Between 15-17 April 1995, NOP Consumer Market Research interviewed 1008 people who were 15 years and over¹² on behalf of Mars. Of those interviewed 92% had bought own brand products regularly or sometimes.¹³ The survey went on to ask whether the participant had ever picked up a product in the shop they did not intend to buy. The results were 42% of participants said that they had done so and 21% had actually purchased the wrong product. The reasons given for picking up the wrong product include, in relation to the products: were the same colour (28%); were the same or similar shaper (13%); looked the same or similar (30%); had a similar product design (22%); were on the same/similar shelf in the store (7%); or unintended product was a supermarket own brand version (4%). The methodology for eliciting this reply was an open question: “What was it about the brand that caused this?” The opening question on this issue did not put a time frame for when the mistaken purchase was made (e.g. was it in the last six weeks, six months, six years or ever?) and so it could be that the issue is now purely historic. In contrast, the free response questions regarding the reasons for this confusion are particularly useful.

The survey went on to ask how important the participants thought it was for products from various manufacturers to look distinct. In relation to the interview population as a whole, 67% thought it was important that the packaging should be distinct; however, amongst those who had picked up the wrong product this figure went up¹⁴ to 86%.¹⁵

An open question was also asked: “Who do you think makes own brand products for the

12 NOP/42729.

13 The options were “Regularly”, “Sometimes”, “Never” and “Don’t Know”.

14 Strangely, of those who bought the product, the figure goes down to 85%.

15 The options were “Very important”, “Fairly important”, “Fairly unimportant”, “Very unimportant” and “Don’t Know”.

supermarket?" No options were presented, but interviewees' responses were coded. The responses suggest that 41% of interviewees thought that own brands were made by manufacturer brand owners; 14% thought they were made by other manufacturers; 18% thought they were made by retailers themselves; and 31% did not know. Where a participant indicated that they believed that the manufacturer brand owner made the own brand goods,¹⁶ a follow-up question was asked enquiring why they had this belief. This was reported with 17% indicating it was because they believed it had a similar taste or performed similarly and 11% said it was because of the same or similar packaging with a further 8% saying simply that it looked the same.

5.3.4 NOP Solutions 1997

NOP Solutions conducted a survey of 996 people between 28 February and 2 March 1997 and asked two questions relating to lookalikes. The first question asked "...if you see an own-label product in a supermarket with a design very similar to the product you normally buy, would you assume that the branded company had made it for the supermarket, or not?". This is clearly a leading question nevertheless the result was the same as in the previous survey¹⁷ in that 41% of interviewees thought that own brand was made by the manufacturer of the similar looking brand. The second question was "have you, personally, ever been in a supermarket and bought a product believing it to be a branded product, only to discover later that it is the supermarket's own-label brand?" Results were 17% of interviewees said that they had mistakenly bought a product. In addition to being a leading question, the survey did not determine when the similar product had been purchased (the last week, the last six months or ever) or why they believed they made the mistake (e.g., was it similar packaging? shelf-placing? similar taste? etc). In comparison to the earlier survey conducted for Mars, the methodology of this later NOP survey is less robust.

5.3.5 Consumer Association 1998

In 1998 the Consumer Association commissioned RSL to survey consumers during February and March 1998.¹⁸ The survey looked for consumer mistakes relating to lookalikes and, in particular, four types of mistake: first, where the supermarket's own brand was mistaken for the manufacturers' brand; secondly, where the manufacturer's brand was mistaken for the supermarket own label products; thirdly, where the wrong variant of a product is selected (e.g., the low-fat version of a product instead of the regular variety); and fourthly where completely the wrong product is selected.¹⁹

Mistaken purchases: Of those interviewed, 27% had selected the wrong item off the shelf once in the last six months. Of that sample, 35% had taken the own brand instead of the manufacturer's brand (representing 9% of shoppers overall); 29% had taken the wrong variant of a product (representing just under 8% of shoppers overall); and 13% had taken

16 A (weighted) 412 interviewees.

17 NOP Consumer Market Research – For Mars - April 1994, see paragraph [5.3.3].

18 Consumer Association *Confusion in the Supermarket?* (1998); presented at *Consumer Reactions and Attitudes*, 24th April 1998.

19 *Ibid*, 7.

completely the wrong product (representing 3% of shoppers overall).²⁰ The survey found variations with certain classes of shopper reporting a greater number of mistakes in relation to certain products.

In relation to the consumers who mistakenly picked up the wrong product, 63% said the mistake was related to the packaging in some way. Of all consumers who mistakenly picked up the wrong products, the reasons given for the mistake (and more than one could be given) were 59% colour, 27% shape, 23% size, 11% name and 37% shelf location.²¹

Reactions to mistake: Where consumers noticed the mistake between taking the product from the shelf and arriving at the checkout, 96% returned the product and 88% replaced it with what they had intended to buy. Further, where the mistake was noticed at the checkout 47% did not buy the product. The survey went on to try and identify what was perceived to be consumer detriment. It did this by looking at those who picked up or bought the wrong product. Of those people, 30% were bothered a little by picking up that product and 19% were bothered a lot. The reasons for this included: preferring the usual brand (17%); feeling irritated, cross or annoyed (17%); felt tricked or conned (13%); did not want it (12%); own fault (7%); and price difference (7%).²² Conversely 29% were not bothered very much about their mistake and 21% were not bothered at all. The reasons for this included: it not being important (33%); the buyer's own fault (13%); used product anyway (13%); the product is the same or just as good (12%); and managed to correct the problem before purchase (5%).²³

Attitudes to packaging: The survey also investigated certain consumer attitudes to packaging. Results were 71% of participants thought that packaging should look different between products and 75% said that similar packaging might be confusing. Conversely, 58% expected packaging to be similar with 29% suggesting it is useful as it indicates that it is the well-known brand with 39% thinking it helps because the supermarket brand is just as good as the well-known brand.²⁴ As the Consumer Association made clear,²⁵ this might suggest that there is a fine line between the useful "signals" from an own brand and being too close so as to be confusing.

Quality: The survey then looked at the similarity of packaging and the perceived quality. Five products were used for the comparison and consumers were asked to state whether the products were similar and then to assess whether the perceived quality of the manufacturer's brand was better, the own brand was the better quality or they were of the same quality.²⁶

20 Ibid, 8-9.

21 Ibid, 9.

22 Ibid, 11-13.

23 Ibid, 11-13.

24 Ibid, 15.

25 Ibid, 15.

26 Ibid, 17-18.

Branded Product	Own brand	Perceived Similarity (Similar/Not similar) ²⁷	Quality (Manufacturer brand better / same / own brand better) ²⁸	Value for money (Manufacturer brand better / same / own brand better) ²⁹	Origin (Same company / Different company) ³⁰
Kellogg's Crunchy Nut Cornflakes	Tesco Honey Nut Cornflakes	82 / 18	51 / 31 / 10	32 / 20 / 37	42 / 49
Nescafé Fine Blend Coffee	Sainsbury Full Roast Coffee	82 / 17	53 / 29 / 10	33 / 20 / 36	44 / 46
Jif Cream Cleaner Lemon	ASDA Farm Store Cream Cleaner	38 / 62	64 / 9 / 21	45 / 15 / 31	30 / 59
Sensodyne Mint Toothpaste	Tesco Toothpaste for Sensitive Teeth	71 / 29	39 / 37 / 12	25 / 22 / 38	50 / 38
Comfort Vitality Fabric Conditioner Lemon	ASDA Silk Fabric Conditioner	84 / 16	46 / 36 / 9	31 / 19 / 38	52 / 38

All the products, except the Jif Cream/ASDA Farm store, were selected because they were believed to have similar packaging. Jif Cream/ASDA Farm Cream were selected as a "control". This led the Consumer Association to reach certain conclusions. First, in relation to the cleaner and fabric conditioner there was a relationship between perceptions of similarity and quality; and consumers who thought the packaging similar were more likely to rate the two brands as the same quality.³¹ In relation to cereals and coffee there was no significant relationship between the similarity of packaging and perceived value for money; whereas for the other products where the packaging was similar, consumers were more likely to think the own brand was better value for money. For all the brands, where people thought the packaging of the products was similar they were more likely to think they had the same manufacturer.

Review of this survey: The survey and its methodology were reviewed by Alan Wicken on behalf of the British Brands Group.³² The review was largely positive, highlighting the fact that it was a nationally representative study and that it used a control product (the Jif Lemon). Nevertheless, Wicken made two significant criticisms. First, the survey did not look at brand-to-brand lookalikes (brand leader to brand follower), rather it considered only brand-to-own-brand lookalikes. This might lead to an underestimate of the number of mistaken consumer purchases. Secondly, a question could have been asked, but was not, about how respondents

27 The scale used was "Very Similar, Similar, Not very similar, not at all similar".

28 The scale used was "Supermarket much better", "Supermarket a little better", "Same", "Brand a little better" and "brand much better".

29 The scale used was "Supermarket much better", "Supermarket a little better", "Same", "Brand a little better" and "brand much better".

30 The scale used was "Definitely made by same company", "Probably made by same company", "Probably not by same company", "definitely not made by same company".

31 Consumer Association n. 18,14.

32 Alan Wicken *Review of Research into Lookalikes (commissioned by the Consumers' Association)* (May 1998).

would feel about packaging which incorrectly suggest a connection between the brand leader and the own brand.³³ These criticisms are certainly valid although it is clear the review was extracting findings from the Consumer Association’s survey to support the British Brands Group’s position.

5.3.6 RSGB Survey for the BBG 1998

The RSGB Study³⁴ consisted of three separate surveys covering approximately 1,300 participants (total sample size 3,994 individuals). Each survey was conducted on different occasions during January and February 1998, as part of RSGB’s General Omnibus Survey. Each survey was divided into two groups: the first group was shown pictures of three pairs of products; and the second group had those products described to them. They were then asked a series of questions.

First, participants were asked about the perceived similarity between the paired products: one product being chosen as being very similar; one as being quite similar; and one as being quite different. The participants were then asked whether they would mistakenly buy the lookalike rather than the branded product; whether they thought the lookalike was made by the same manufacturer as the branded product; and whether they believed the owner of the lookalike brand had a commercial agreement with the branded product. The results were as follows:

Branded product	Lookalike	Perceived Similarity (Average aspects of similarity mentioned)	Oral Confusion (“Mistake” / “Made By” and “Agreement”)	Visual Confusion (“Mistake” / “Made By” and “Agreement”)
Gillette Deodorant “Pacific Light”	Blueprint Deodorant “Tradewind”	90% (2.27)	10% / 13% / 21%	42% / 32% / 34%
Bailey’s Irish Whiskey Liquor	ASDA’s Irish Whiskey Liqueur County Cream	71% (1.87) ⁵	-	-
Pantene Pro-V	Superdrug’s “Vitamin Active”	6% (0.42)	11% / 21% / 30%	5% / 17% / 23%

The survey concluded that a person was eight times more likely to purchase a lookalike product where it had similar packaging to the branded product. Furthermore, consumers thought it twice as likely that the most similar pair came from the same manufacturer as the distinctively packaged pair. Similarly, consumers were more likely to think a commercial agreement exists where the packaging is similar, rather than distinct. It was also said that confusion was lower where photographs of distinctive products were shown to them.

33 Ibid, 4.

34 RSGB, *Study of Lookalikes: Summary Report* (Prepared for British Brands Group) March 1998 (JN 0904/0808/0809).

Review of this part of the survey: The survey had some shortcomings. First, it could have dealt with not just similarity as an abstract, but going further to investigate and clarify whether it was the colour, the packaging shape, the imagery, the name or some other factor which made it similar. The second part of the survey is more problematic. The first question asked was leading. It went no further than determining whether the two packages are confusing (“mistakenly purchased”) and it clearly led interviewees into fields of speculation they might not otherwise enter. Similarly, the second question leads by asking: “Would you say [Vitamin Active] is made by the people who make [Pantene]?” Again this could have been asked in a non-leading way. Similar objections could be made against the third question as well.

Other results: There were two other results set out in the survey, but no methodology was included. The first result was 59% consumers said they would prefer distinctive packaging as opposed to similar packaging; and 67% said they would be annoyed if a product’s packaging suggested that a product was connected with a long-established brand when this is not the case.

5.3.7 Don Edwards & Associates for BBG 2009

The survey conducted by Don Edwards & Associates on behalf of the British Brands Group had two parts. Between 8 and 14 January 2009 a series of face-to-face interviews were conducted with 1,199 grocery shoppers over the age of 16. Additionally, between 8 January to 1 February 2009 an online survey was conducted with between 920 and 946 grocery shoppers aged between 16 and 64.

Face-to-face: statements: The face-to-face survey asked respondents to express their attitude³⁵ to the following statements: (i) it can be confusing or misleading when the packaging of two grocery shopping items look similar (64% strongly agreed or agreed); (ii) I have been confused or misled by the packaging of two grocery shopping items which look similar (38% strongly agreed or agreed); (iii) I have accidentally bought the wrong grocery shopping item because the packaging design was similar to the item I wanted (32% strongly agreed or agreed); and (iv) it would concern me if the packaging of a grocery item suggested that the item is connected to a long established make or brand when it is not (66% strongly agreed or agreed).

The questions present some interesting results although the statements themselves do beg additional questions. At the outset it is clear the results are unnecessarily leading. That aside, where the packaging is “confusing or misleading” or the consumer has been “confused or misled” nothing goes further to determine what *caused* the confusion or related to the consumer being misled (i.e., there is no information as to whether it was origin, consistency, price, quality, value for money or something else). The third statement asks about a specific problem without investigating the general problem first, in that it is important to know how many mistaken purchases were made overall (and not just those where the purchase relates to the similarity of the packaging). The fourth statement does not distinguish adequately the

35 Each question had the following four options “Strongly agree”, “agree”, “neither agree nor disagree”, “disagree” and “strongly agree”.

level of similarity about which consumers are being asked (between counterfeits, confusing similar packaging and lookalikes).

Face to face: Product questions: The second part of the face-to-face interview involved the participants being shown four products: two butter substitutes, Buttery Gold and You'd Butter Believe It (the latter perceived as a lookalike of "I Can't Believe it's not Butter"); and two washing powders, Ultima and Sherry's (the latter perceived as a lookalike of Bold). The participants were then asked when looking at the picture of the product whether another grocery product was brought to mind. The approach is certainly sound.

Butter: in relation to Buttery Gold (the control), 47% said it did not remind them of any other products; 26% of respondents mentioned Utterly Butterly; 5% mentioned I Can't Believe It's Not Butter; and 7% mentioned assorted other brands. For You'd Butter Believe It (the lookalike): 37% said it did not remind them of any other product; 33% said it reminded them of I Can't Believe It's Not Butter; 16% said it reminded them of Utterly Butterly; other brands were mentioned but none were significant. The alternative answers are interesting in that Buttery Gold (the control) still reminded 26% of another brand (Utterly Butterly).

Washing Powder: in relation to Ultima (the control): 91% said it did not remind them of any other product; 3% said it reminded them of Aerial; and other brands were mentioned but none significant. For Sherry's (the lookalike): 41% said it did not remind them of any other product; 33% said it reminded them of Bold; 10% said it reminded them of Aerial; 4% said Persil; and finally two other brands were mentioned.

Perceptions about the product: The second half of the survey used ten products with a lookalikes and "control" and a series of questions were asked. The first question asked whether the branded product/lookalike/control were made by the same manufacturer. Across all products, lookalikes and controls, a little under 39% of interviewees thought that the manufacturer of the branded product was the same (a little under 31% for the control; 46.5% for the lookalike). The second question asked about the similarity between the branded product and the lookalike/control. When participants said that a product was similar a fourth question was asked as to what evoked the similarity (and they could select more than one option). The following reasons were cited: brand name (17.3%); shape (52%); size (45%); colour (70%); text font (24.4%); imagery (24.6%); logo (20.4%); and the overall design (54%).³⁶ It was not explored in the report, but there appeared to be no meaningful correlation between products which were considered to be very similar and those which had the same manufacturer.

The fourth question was: "how likely do you think one of these products could be bought by mistake believing it to be the other one?" The question is clearly leading. With that in mind, in relation to all the lookalike save one, more participants said they might be mistaken than participants who said they would not have been mistaken. In contrast, in relation to all the controls but one, significantly more participants said they would not be mistaken than those participants stating they would be mistaken.

36 These results are averaged across all the ten products.

The fifth and sixth question looked at whether the interviewee would buy the branded product rather than lookalike or control; and conversely, whether they would buy the lookalike or control over the branded product. To negate price differentials between the lookalike and the control, the price of the control was stated to be the same as the price of the lookalike. The branded product was stated to have its real price.

To try and assess the “lookalike” effect the results obtained from the survey have been converted (for the purposes of this discussion) into “swing”. This represents the difference (in percentage) between those who would buy the lookalike product (over the manufacturer brand) and those who would not, *minus* the difference (in percentage) between those who would buy the control product (over the manufactured brand) and those who would not.³⁷

In relation to vinegar, there was a 22% swing towards the control and in relation to Jam Sandwich biscuits a 9% swing to the control. In relation to all other products there was a swing towards the lookalike. There was a 27% swing to both the lookalike washing powder and butter substitute. Across all ten products, the overall swing across was 10.5% towards lookalikes.

5.3.8 Don Edwards & Associates for European Brands Group (AIM) 2011

A survey with similar methodology was carried out by Don Edwards & Associates for AIM. The first stage of the survey took place between 20 and 31 October 2011 and involved 997 German grocery shoppers over the age of 16. The second part was an online survey conducted between 27 and 31 October 2011 with a sample of 504-505 German grocery shoppers aged between 16 and 64.

Face-to-face: Statements: The face-to-face survey asked participants to express their attitude³⁸ to the following statements: (i) it can be confusing or misleading when the packaging of two grocery shopping items look similar (70% strongly agreed or agreed); (ii) I have been confused or misled by the packaging of two grocery shopping items which look similar (28% strongly agreed or agreed); (iii) I have accidentally bought the wrong grocery shopping item because the packaging design similar to the item I wanted (23% strongly agreed or agreed); and (iv) it would concern me if the packaging of a grocery item suggested that the item is connected to a long-established make or brand when it is not (56% strongly agreed or agreed).

Face-to-face: Product questions: The second half of the survey used seven products each with a lookalike and control. The first question asked whether the branded product/lookalike/control were made by the same manufacturer. A little over 39.5% of participants thought the lookalike/control were made by the same manufacturer (29% for the control and 50% for the lookalike). The second question asked about the similarity between the branded product and the lookalike/control. These questions will not be explored here.

37 So in relation to vinegar (53% would buy the lookalike vinegar – 19% would not = 34%) – (68% would buy the control vinegar – 13% would not buy the control = 56% (rounded)). Thus the swing in this case would be 22% to the control.

38 Each question had the following four options “Strongly agree”, “agree”, “neither agree nor disagree”, “disagree” and “strongly agree”.

The fourth question was the same as for the British survey: “how likely do you think one of these products could be bought by mistake believing it to be the other one?” The same criticisms as in relation to the British survey can also be made here. Nonetheless, in relation to all the lookalikes there were more participants saying they might be mistaken than participants who said they would not have been mistaken. In contrast, in relation to all the controls there were significantly more participants who said they would not be mistaken than those who were mistaken.

The fifth and sixth question looked at whether the participant would buy the branded product over the lookalike or the control; and conversely whether they would buy the lookalike or control over the branded product. The prices of the control were set to the price of the lookalike and the branded product had its actual price. In relation to chocolate drink there was a 3% swing towards the control. In relation to all other products there was a swing towards the lookalike, the biggest swing being 33% swing towards the lookalike for the dried potato product. There was an overall swing of 17.57% towards lookalikes.

5.3.9 AIM Parasitic copies in Europe

In November 2011, AIM surveyed its members as to their perceptions of lookalikes,³⁹ thus providing information on manufacturer brand owners’ own perceptions of lookalikes. The survey indicated that 71.4% of brand-owners⁴⁰ reported that their products had attracted a lookalike during 2009-10.⁴¹ That perceived copying was mainly of an existing range (68%) or of both an existing and new range (28%) with very little copying only of a new range.⁴² It was reported that about 19% of the lookalikes were produced by manufacturer brand competitors; 28% by retailers (own brand); and 51% by both. It was also found that the incident of there being a lookalike did not represent the first time it had happened (56%⁴³).⁴⁴

Notwithstanding the high reported incidents of lookalikes, only 37% tracked the effect of the lookalike on their own product;⁴⁵ and of those 76% tracked it through sales and 23% tracked it through customer surveys.⁴⁶ Based on these tracked sales it was asked what percentage of sales the lookalike attracted from the manufacturer’s brand in the store where it was sold:⁴⁷

39 AIM Survey, *Parasitic copies in Europe* (Dedicated Research) (November 2011).

40 Ibid, [1].

41 Of those that had not, 12% said their products were no susceptible to lookalikes.

42 Ibid, [1.1].

43 An addition 31% reported that it in some cases it was the first time in others not.

44 Ibid, [1.1.4].

45 Ibid, [1.2].

46 Ibid, [1.2.1].

47 Ibid, [1.2.2].

Percentage of sales acquired by lookalike (Options)	Number answering to the option
Less than 2%	13%
More than 2% up to 5%	13%
More than 5% up to 10%	32%
More than 10% up to 20%	17%
More than 20% up to 40%	10%
More than 40%	1%
Did not answer	14%

Median: 5-10%

This question was followed by a question asking participants what effect the entry onto market of a retailer's lookalike⁴⁸ had compared to the entry of a distinctive manufacturer brand competitor in terms of lost sales:

Percentage of sales lost due to lookalike compared to a distinctive branded competitor (Options)	Number answering to the option
No effect	1%
Less than 2%	8%
More than 2% up to 5%	18%
More than 5% up to 10%	20%
More than 10% up to 20%	23%
More than 20% up to 40%	8%
More than 40%	8%
Did not answer	13%

Median: 10 to 20%

There was no survey on the effect of an own brand (non-lookalike) on sales, but it is apparent that members report that greater loss of market share is caused by a lookalike than a new distinctive competitor (median 10-20% loss of share); although in total the overall lost sales for a new lookalike are in the range of 5-10% (median) loss of market share.

Action taken: The survey went on to ask whether action had been taken against the lookalike (62% had taken some action)⁴⁹ and to comment on why they failed to take action. Results showed 49% believed there were insufficient legal remedies; and 45% believed that there was a lack of judicial appreciation of the problem.⁵⁰

Analysis: The AIM survey presents an interesting view of the perception of brand owners.

48 It was also reported that there was an effect on a participants product when a competitor manufacturer had a lookalike introduced into the market (51% reported an effect).

49 Ibid, [2].

50 Ibid, [2.8].

However, as evidence of lost sales/market share changes it has a number of flaws. First and foremost, it is not clear what was being referred to when it came to what amounts to a lookalike (or parasitic copy as the survey called it), relying instead on self-reporting. A brand owner (whether manufacturer or own brand) is more likely to have a perception that their own product is being copied by a “lookalike” than an impartial bystander. A further problem is that it was not clear whether the concept of lookalike covered activities which amounted to trade mark infringement, passing off (unfair competition), copyright or design right infringement or elsewhere where there are already acknowledged to be effective legal remedies, or whether it was restricted to “lookalikes” in the sense of something that the participant thought should be protected, but was not. There was also no effective “control” used as there is no indication relating to the effect on sales where a distinctive own brand was put on the market (as it is not apparent that the “distinctive competitor” question extended to “distinctive own-brand” or not).

5.4 Summary of survey findings

The surveys discussed above are of varying quality. Nevertheless, with their flaws in mind, the following presents a summary of the findings across the surveys in relation to four key areas: mistaken purchases of products (and the reasons); perceived common origin; perceived quality of own brand goods; and general perceptions about packaging.

5.4.1 Mistakes

It is clear that many consumers report that they have been confused by packaging at some point in the past. During the 1990s, studies range from 21% in NOP for Mars to 6% in the second of the Consumer Association Survey (with a range of 19% in the NOP for Reed Survey; 17% NOP Solutions 1997; 13% Consumers Association 1995). Indeed, more recent research appears to suggest a much higher result as Don Edwards found in their UK survey that 32% of respondents agreed or strongly agreed that they had bought the wrong product by mistake in the past a lower result was found in their German study with 23% reporting the same. The most recent survey, by Which?, suggests a slightly lower figure of 20% of consumers making a mistaken purchase of a lookalike. It is clear across all these studies that consumers report making mistakes in what they have bought and in high numbers. There was much less reporting of whether these mistakes actually bothered consumers with only the Consumer Association in 1994, 1998 and 2013 (as Which?) reporting on the matter (1994, 11% particularly bothered; 1998, 30% bothered a little and 19% bothered a lot; 2013 38% annoyed and 30% misled). The reasons for the mistake were also not as thoroughly investigated, but some common results do emerge.

Factors for mistake: The reasons giving for the mistake include the colour of the mistakenly purchased product (NOP Mars 1994, 28%; Consumer Association 1998, 59%; Don Edwards UK, 70%) or its shape (Consumer Association 1998, 23%; NOP Mars 1994, 13%; Don Edwards UK, 52%) or its size (Consumer Association 1998, 23%; Don Edwards UK, 45%). A highly reported factor unrelated to the product get up is the product’s shelf location (NOP Mars 1994, 7%; Consumer Association 1998, 37%)

5.4.2 Consumer perception of common origin

The surveys also show a consistent finding in relation to common origin for own brand (although not all investigated the reasons for it). The NOP survey for Mars found 41% of respondents thought that own brands were manufactured by well-known manufacturer brands; similarly, NOP Solutions study in 1997 found it to be 41%; the British Retail Consortium 1994 study found it to be 21%. More recent research shows that these figures have not changed with the Don Edwards & Associates reporting in 2009 that 39% of respondents think that own brand share a common origin (31% for the control and 46.5% for the lookalike) with very similar results for their survey of German consumers in 2011 where there was 39.5% of respondents believing in common origin (29% for the control and 50% for the lookalike). Similar results were also found in the earlier RSGB Survey for the BBG in 1998. Accordingly, it is clear that a large number of consumers believe that own brand have the same origin as the manufacturer brand products. In many cases this is not because of the packaging (as the controls for the recent Don Edwards survey shows), but where the packaging is similar then it appears that more people think the own brand has a common origin with the manufacturer.

5.4.3 Consumer perceptions of quality

In a now very dated study by Europanel in 1994, it was found that 78% of consumers of three major supermarkets thought that the own brand was the same or better quality than the manufacturer brand owner. A much lower percentage was found in the same year in research conducted by the British Retail Consortium where 26% of respondents perceived own brand to be of the same quality.

In relation to a similar question, the NOP Study for Mars found that 17% of respondents said they thought they had similar origin because they had similar taste or performance. The Consumer Association who used five products in 1998 and found that as the similarity of packaging increases it becomes more likely that consumers will perceive the quality of products to be the same. The effect did not exist across all product categories however. The 2013 blind taste tests carried out by Which? demonstrated that consumer perceptions of the manufacturer brand owner's product tasting better was found in two out of three products.

5.4.4 Consumer views on packaging

Some of the surveys asked respondents about their perceptions of packaging. This section will summarise those views although it will not refer to results which related link to the confusion or mistake and packaging (as these are referred to under mistake above). The British Retail Consortium (BRC) 1994 survey found that 20% of consumers strongly agreed they bought products because of the packaging. The Consumer Association in 1998 found that 71% of participants thought that products should be in distinct packaging with 29% thinking it was useful to have similar packaging. A brand loyalty type question was asked by the RSGB Survey in 1998 and the two Don Edwards surveys which found that between 56% and 67% of respondents would not like the packaging of a grocery item wrongly suggested a connection to a well-known brand (67% RSGB; 66% Don Edwards UK; and 56% Don

Edwards Germany). This shows that consumers want to have distinct packaging and believe brands should be protected although as the Consumer Association 1998 survey shows a large number also want cues from the packaging showing its intended purpose.

Summary Points Chapter 5

SP. 5.1 – Surveys

The surveys are of mixed quality, but disregarding these differences, the literature review of survey research shows:

Mistakes

- High levels of consumers making mistaken purchases;
- Reasons for these mistake include packaging such as cues of colour, shape, size;
- **Shelf position** is also reported as a factor.

Consumer perception

- general perception of own brand goods as having a common origin with manufacturer brand owner products (irrespective of packaging);
- when packaging is similar there is an increased perception of common origin;
- consumer perceptions of own brand are generally good with at least a quarter (and possibly three-quarters) of consumers perceiving own brand to be as good as the manufacturer brand owner's products;
- in some product categories (but not all) it appears that similarly perceived quality increases when the packaging becomes similar.

Consumer beliefs respecting packaging

- consumers desire distinctive packaging and believe that brands should be protected;
 - consumers also want cues from packaging to indicate intended purpose (generic cues).
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Part 2: Research

Chapter 6: Interviews

6.1 Introduction

The research team approached manufacturer brand owners and retailers so as to discuss the issue of lookalike products. The interviews with brand owners took place in February 2012 with a follow-up during March and April 2012. The interviews with retailers took place in March and April 2012. The purpose of the interviews was to try and understand the issues from a commercial perspective, both that of manufacturer brands and retailers.

6.2 Methodology and Reporting

The British Brands Group (BBG) was approached for suggestions of brand owners who would be willing to participate in the research. A list of contacts was provided by the BBG in January 2012¹ and these contacts were approached by the research team. In addition to members of the British Brands Group, the research team approached other brand owners who might be willing to participate. In each case, the individual approached was sent a list of questions as discussion points; these are included in Appendix A.

Any person who agreed to participate was given the option of speaking on the record (with comments being attributed to a particular company) or speaking off the record (so that the comments are attributed to a type brand owner without identifying the particular company) or a mixture of the two. To protect the anonymity of those brand owners who did not wish to be identified no further details about who was approached by the research team will be included in this report.

Once a company had agreed to participate in an interview it was offered the chance of making written comments on the questions included in Appendix A before the interview. Thereafter, an interview (or phone conference interview) was undertaken where an open-ended discussion took place regarding the issues of lookalikes. These interviews were recorded. After the interview, the research team produced a note of the interviews and this was then sent to the people interviewed for further comments and approval.² Müller (which also agreed to be identified), in contrast to other interviewees, asked to produce the first draft of the note and this was edited by the research team and then agreed by Müller. If no note was approved then nothing is included from the interview. The approved notes are included in Appendix B.

1 An earlier list was provided, but this was the list which was used.

2 Some headings have been changed or added since the notes' approval, but the text itself has not changed save to correct typographical, grammatical and syntax errors which remained after approval.

In February 2012, the research team met with members of the BRC and explained the purpose of the interviews. At that meeting members were presented with a list of discussion points; these are also included in Appendix A. Retailers were given the same opportunity as manufacturer brands to speak to us on or off the record and the same procedures were undertaken with the approval of the note. One retailer, which was willing to participate on an anonymous basis, thought an interview was not required due to the fact that lookalikes were not particularly relevant to its industry. Instead, the retailer sent a short statement by email, which it agreed could be printed. Eventually, only one retailer – The Cooperative – was willing to be interviewed (and also identified). The approved note of that interview is also in Appendix B.

Accordingly, although retailers were given an opportunity to be involved in the research they expressed little interest in doing so. As a result we only managed to obtain a very narrow spectrum of their views.

The analysis set out in this chapter is based solely on the notes included in Appendix B and on no other aspects of the interviews with either manufacturer brand owners or retailers.

Different interviewees emphasised different things and some did not comment on certain questions. Accordingly, there are no common answers upon which to construct this section; rather, general themes have been brought together.

6.3 Results

Theme 1: Concept of lookalike

There was a general sense amongst all interviewees as to what makes packaging similar and so what makes a lookalike.

The interviewees came up with some or all of the following indicia for lookalikes. The lookalikes should be in the same product category³ and share similar colour,⁴ wording or other logo,⁵ iconography,⁶ and layout,⁷ the shape of packaging⁸ and the materials used to make it.⁹ The overall look and feel of the product was thought to make it a lookalike according to some interviewees.¹⁰ Additionally, some interviewees indicated that the colour of the product itself (when externally visible) could be indicative of a lookalike¹¹ as could the

3 This was only expressly mentioned by the *Beverage*, [1] but the context suggests that this was a general requirement.

4 *GSK*, [1]; *Diageo* [2]; *PZ Cussons* [1]; *Müller* [1]; *LFMCGM* [1 and 2] (where copying the exact Pantone® colour was thought to be a particular problem); *Beverage*, [1]; *Beauty* [2]; *Co-op* [5].

5 *GSK*, [1]; *Diageo* [2]; *PZ Cussons* [1]; *Müller*, [1]; *LFMCGM*, [1]; *Co-op* [5].

6 *GSK*, [1]; *Diageo* [2]; *Müller* [1]; *LFMCG* [1]; *beauty* [2]; *Co-op* [5].

7 *GSK*, [1]; *Beauty*, [3].

8 *GSK*, [1]; *Diageo*, [2]; *PZ Cussons*, [1]; *Müller* [1] (they also thought the pack weight significant); *LFMCGM*, [1]; *Co-op*, [5].

9 *Müller*, [1].

10 *GSK*, [1]; *PZ Cussons*, [1]; also see *Diageo*, [1].

11 *Diageo*, [2]; *PZ Cussons*, [1].

composition or nutritional information¹² or other “claims”¹³ made about the product. This was despite the fact that it was accepted by some that the colour of the product itself can represent a generic signal¹⁴ and that the claims made or composition of the product cannot be restricted.¹⁵

Characterising a lookalike: It was generally felt that one shared feature was not usually enough to make something a lookalike,¹⁶ rather, it required a combination of elements.¹⁷ Some interviewees also suggested their research had indicated that there was an order of importance which consumers attach to the various elements, starting with colour,¹⁸ then shape,¹⁹ then wording or other logo,²⁰ and then iconography.²¹ Further, the research suggested that consumers look at packaging for only 2-3 seconds before making their purchasing decision.²²

Many manufacturer brand owners accepted that many lookalikes did not create consumer confusion²³ and so passing off would not be made out. Instead of confusion they felt that there might be a likelihood of association between the products,²⁴ or that consumers might believe the products shared the same elements,²⁵ or there was some form of “family” relationship,²⁶ or simply that a lookalike appropriates the “positive image” associated with the well-known packaging.²⁷ Some were quite frank, such that the assessment of whether something was a lookalike was described as subjective,²⁸ and “you know it when you see it.”²⁹

Signalling: It was accepted by most manufacturer brand owners that certain marketing cues were acceptable on own brand as signals to consumers about the nature of the goods.³⁰ A particular reference was made to category colours³¹ and the need to use such colours was something emphasised by the retailer as well.³² However, it was suggested that the number

12 Müller, [1]; in contrast LFMCGM suggested that the formulations of lookalikes were often distinctly different (at [4]) and consumers did not often compare them (at [4]).

13 Müller, [1]; Beauty, [2 and 3].

14 PZ Cussons, [2].

15 Beauty, [3].

16 GSK, [14]; PZ Cussons, [2].

17 GSK, [14].

18 LFMCGM, [1]; Beverage, [1].

19 LFMCGM, [1].

20 LFMCGM, [1].

21 LFMCGM, [1].

22 Diageo, [2].

23 GSK, [1] (although they suggested that a product might share the same manufacturer and still be no confusion as to origin); Diageo, [4]; Beverage, [1 and 2].

24 Beverage, [1].

25 GSK, [1]; LFMCGM, [3].

26 PZ Cussons, [3]; Beverage, [1 and 3].

27 Beverage [3].

28 Beauty, [3]

29 PZ Cussons, [6].

30 Diageo, [19]; LFMCGM, [27]; Beauty, [8]; but see GSK, [14].

31 LFMCGM, [28].

32 Co-op, [16].

of signals or common cues would vary across the categories.³³ One interviewee perceived the difficulty to be where these signals were taken from a manufacturer brand owner who had developed the consumer perception as a signal.³⁴ It appears that some manufacturer brands developed packaging so as to distance themselves from the usual marketing cues.³⁵

Ranges: A concern raised by one interviewee was that of lookalikes mirroring an entire range.³⁶ This is where each product in the lookalike range copies the packaging of the substitutable product in the manufacturer brand owner's range.

Timing of arrival: There were differing views as to when lookalikes generally arrived on the market. One interviewee suggested that there was no particular pattern.³⁷ Others suggested that lookalikes would usually only arrive once the manufacturer brand had created sufficient market share.³⁸ Accordingly, a lookalike generally did not arrive on the market at the same time or soon after the manufacturer brand.³⁹ It might be that even if the retailer wanted to enter the market quickly this would not be possible by reason of formulation development⁴⁰ or for other unspecified reasons.

Rationale for prevention: The justification for restricting lookalikes was usually suggested to be where the seller of the lookalike was perceived to be appropriating the investment in research and development undertaken by manufacturer brand owner⁴¹ or, put another way, appropriating the goodwill (or brand equity).⁴² Such investment is made in the form of undertaking marketing surveys and advertising.⁴³ It was suggested that it takes 2-3 years⁴⁴ to recover this investment.

Another sort of harm suggested was where the packaging inaccurately suggested to consumers that the lookalike was equivalent in quality to the manufacturer brand product⁴⁵ (the products are comparable⁴⁶). As it was put by one interviewee very succinctly:

"... our competitor is clearly convinced that there is some advantage. Whether this is through confusion or some of the magic of our product rubs off on them. But it is clear that they think there is some advantage in looking like a brand."⁴⁷

33 Co-op, [7].

34 LFMCGM, [27].

35 LFMCGM, [27].

36 GSK, [17].

37 GSK, [11].

38 GSK, [11]; LFMCGM, [26]; a related comment was made by Diageo, [18].

39 GSK, [11].

40 LFMCGM, [25].

41 GSK, [2 and 5].

42 GSK, [5]; PZ Cussons, [3].

43 GSK [5].

44 LFMCGM, [29].

45 Diageo [5]; LFMCGM, [7] said they had conduct research supporting this finding.

46 GSK [5];

47 PZ Cussons, [5]; also see Diageo, [3].

Theme 2: Incidents of lookalikes

The incidents of lookalike seemed to vary: some suggested they faced an incident once every couple of months;⁴⁸ another stated they had an issue with three of the four big retailers over the previous two years;⁴⁹ a third indicated they had ten cases over the last ten years;⁵⁰ and a fourth said potential lookalikes arrived about once a week.⁵¹ There was one report that incidents were cyclical⁵² and another suggesting the problem is getting worse.⁵³ The incidents and the parties producing and selling lookalikes appears to vary between product categories.⁵⁴ There were some examples of actual lookalike cases which were presented by interviewees and some specifically described why a particular product was, in their view, a lookalike.⁵⁵

Differing perceptions: A particular issue was that different interviewees had differing views of what amounts to a lookalike.⁵⁶ This meant some would report something as a lookalike where it was essentially related to the protection of registered designs⁵⁷ or trade mark infringement,⁵⁸ whereas others thought of lookalikes only in terms of passing off or to be outside existing rights.

Theme 3: Innovation

One manufacturer brand owner interviewee explained how the decline in business in particular product categories has led to a reduction in research and development (although they “had not joined the dots” to see if this reduction related to lookalikes.)⁵⁹ Another manufacturer brand owner described the need to stay ahead of lookalikes, and how this might actually spur the development of new product features⁶⁰ through costly research.⁶¹ They also pointed out that when new manufacturer brands come to the market they need innovations or they would not get listed.⁶² There was a feeling amongst some manufacturer brand owners that own brand (and lookalikes) did not innovate.⁶³ Nevertheless, the retailer interviewee described how they innovated in relation to some of their own brand products and gave a recent example of an original product.⁶⁴ Nobody reported actually leaving a product category or not entering it because of lookalikes as such.⁶⁵

48 *Diageo*, [7]; *LFMCGM*, [17]; GSK said there were not many example at [6].

49 *PZ Cussons*, [9].

50 *Müller*, [2].

51 *Beverage*, [4].

52 *Beverage*, [4].

53 *PZ Cussons*, [7]; *Beverage*, [15].

54 *LFMCGM*, [14].

55 *GSK*, [7, 15 and 16]; *Diageo*, [10]; *Müller*, [2 and 11].

56 *Beverage*, [4] also spoke of large single batches with the issue disappearing after that batch was sold.

57 *Müller*, [2].

58 *Müller*, [3]; *Beverage*, [9].

59 *GSK*, [22].

60 *LFMCGM*, [15].

61 *LFMCGM*, [16].

62 *LFMCGM*, [32]. Listing in this context essentially means that it is the list of retailers stocked products.

63 *LFMCGM*, [35].

64 *Co-op*, [17].

65 See, for example, *GSK*, [22].

Theme 4: Packaging and investment

It depended on the industry as to whether manufacturer brand owners change their packaging or not.⁶⁶ None had changed their packaging specifically because of the arrival of a new lookalike,⁶⁷ although some had considered, but rejected, doing so.⁶⁸ However, one did say they had changed packaging to distinguish themselves from competitors generally.⁶⁹

It was explained that the existence of lookalikes would simply become part of the marketing mix and so it might be a contributing factor in making a change to packaging, but never a decisive one.⁷⁰ Indeed, the desire to be distinctive might lead to introducing packaging with unusual colours⁷¹ or to take other steps to distance the product from lookalikes.⁷² The other side of the coin is demonstrated by the retailer who indicated that it too changed its packaging every two years or so to avoid its packaging looking too dated,⁷³ such changes being related only to the retailer's own product cycle.⁷⁴

Copying of products: Only one interviewee mentioned packaging development and said they would not copy the existing packaging of a product on the market, although one accepted that they had done so a long time ago.⁷⁵ Both the retailer and manufacturer brand owners believed that having distinctive packaging was important.⁷⁶ One interviewee reported how competitors adopted packaging similar to its old packaging following a change.⁷⁷ The fact that there is not copying does not mean that the packaging of rivals is not considered during a redesign however.⁷⁸

Retailer perspective: It was reported by one retailer that many aspects of packaging design and shape are constrained by what the manufacturer can source or what they are already using.⁷⁹ It is too expensive for a retailer to get a factory retooled to change packaging design or colour. An example was given where the retailer tried to have the packaging colour changed to match the rest of its range, but the increased manufacturing costs made it prohibitive.⁸⁰ It is also quite common for a manufacturer to make own brand for more than one retailer and this means common packaging design.⁸¹

66 *Beauty*, [12] (changes, but none which would be noticed by consumers); *Beverage*, [12] (never changed); *Müller*, [7] (change every 2-3 years); *GSK*, [21] (every 2-5 years depending on the product).

67 See *GSK*, [21]; *Diageo*, [17].

68 *GSK*, [21]; *LFMCGM*, [39].

69 *Müller*, [7].

70 *Diageo*, [17].

71 *PZ Cussons*, [22]; also see *LFMCGM*, [27].

72 *PZ Cussons*, [22].

73 *Co-op*, [15].

74 *Co-op*, [15].

75 *PZ Cussons*, [23].

76 *LFMCGM*, [29 and 40]; *Co-op*, [11].

77 *Müller*, [7].

78 *LFMCGM*, [40]; *Co-op*, [15].

79 *Co-op*, [8].

80 *Co-op*, [9].

81 *Co-op*, [10].

Theme 5: Sales

There were mixed responses as to how lookalikes affected the sale of manufacturer branded products. One interviewee said the launch of own brands affects sales, but it was not possible to determine whether this was greater when the own brand was a lookalike.⁸² Another said that there was no evidence that sales were significantly affected by the launch of lookalikes.⁸³ Two others said that lookalikes had affected sales but without being specific.⁸⁴

One interviewee described how the launch of a lookalike product led to a 15% drop in sales across the whole market (and greater drop within the particular retailer).⁸⁵ They generally expected a 10% long-term drop in market share,⁸⁶ whereas a long-term 5% drop was usual when a distinctive competitor enters the market.⁸⁷ Another interviewee reported a 20% drop in sales when a lookalike product was launched by one retailer, but a 40% drop when another retailer launched a dissimilar own brand.⁸⁸ This was attributed to the own brand being pushed strongly by the latter retailer, but not by the former.⁸⁹ It was suggested that only 15% of customers buying own brand were new to the product category, the remainder having previously purchased manufacturer brands.⁹⁰ Therefore, usually there is no increase in volume sales.⁹¹

It was explained that sales can be affected in two ways: first, by loss of volume; and secondly by reason of brand followers being de-listed to make way for the own brand.⁹² It was suggested that lookalikes tended to lead to volume growth, rather than market growth (number of units sold goes up, but the turnover generated does not).⁹³

82 GSK, [19]; also see *PZ Cussons*, [15] where a similar more oblique point was made.

83 *Diageo*, [14].

84 *Müller*, [5]; *PZ Cussons*, [21].

85 *LFMCGM*, [30].

86 *LFMCGM*, [33].

87 *LFMCGM*, [32].

88 *Beauty*, [6].

89 *Beauty*, [6]; see *Diageo*, [14].

90 *LFMCGM*, [35].

91 *LFMCGM*, [37].

92 *LFMCGM*, [35].

93 *LFMCGM*, [37]; also see *Beauty*, [7].

Theme 6: Advertising spend and promotions

It was reported that lookalikes benefit from advertising by manufacturer brand owners. In other words, lookalikes aim to enter the market at the right time after the bulk of advertising spend has occurred.⁹⁴ Therefore, sellers of lookalikes do not want advertising spend cut as they want as much benefit as possible.⁹⁵

New entry and advertising spend: Where a distinctive competitor enters the market, advertising spend generally increases to avoid the loss of market share,⁹⁶ whereas in relation to lookalikes the responses vary. One interviewee described how advertising spend would be reduced in order to avoid promoting the lookalike, unless the market was growing in another retailer.⁹⁷ Another, however, said a new lookalike would lead to an increase in general marketing spend,⁹⁸ possibly even an additional 10% spend.⁹⁹ Another response to the lookalike was to invest in training in the shop (i.e., advertising to the shop staff) in which a lookalike was launched.¹⁰⁰ Others said lookalikes would have no effect on advertising spend either way.¹⁰¹ Even where spending is not affected by lookalikes, their entry might affect the nature of the advertising campaign.¹⁰²

The retailer explained that it did not generally pay for advertising for a particular own brand product, but rather for its entire own brand range.¹⁰³

Promotions: There was a view that promotions, and price cuts, are generally not a good response to the arrival of lookalikes,¹⁰⁴ particularly where such activity undermines the premium nature of the product.¹⁰⁵ However, one interviewee said that promotions by manufacturer brands are often met by promotions from own brand,¹⁰⁶ and so it is not worth running them. Others simply said they would not run promotions in response to lookalikes.¹⁰⁷ However, one interviewee indicated that they had been compelled to use promotions due to a lookalike, despite knowing that it might not work in the long term.¹⁰⁸ The retailer acknowledged that when it launched an own brand product it might adopt promotional strategies such as three for the price of two.¹⁰⁹

94 *LFMCGM*, [31].

95 *LFMCGM*, [31].

96 *LFMCGM*, [32].

97 *LFMCGM*, [33] (described as a significant effect).

98 *Müller*, [5].

99 *Müller*, [6].

100 *Beauty*, [11] with £90,000 being spent in total.

101 *Diageo*, [16].

102 *Diageo*, [15 and 16].

103 *Co-op*, [13].

104 *Beverage*, [12]; *Diageo*, [20].

105 *Diageo*, [20]; *Beverage*, [12].

106 *Beauty*, [10].

107 *GSK*, [24].

108 *LFMCGM*, [41 and 42].

109 *Co-op*, [13].

Theme 7: Making own brand

There was a mixed response as to whether the manufacturer brand owners made own brand products: some did¹¹⁰ and others did not.¹¹¹ The retailer described how own brand manufacturers regularly change and so who is involved changes over time.¹¹² One interviewee described how the squeezing of its manufacturer branded product's market share was so bad that it was pushed towards making own brand to defend its profits.¹¹³

Theme 8: Consumer complaints

Most of the manufacturer brand owners had no record of consumers making complaints about lookalike products,¹¹⁴ but they tended to think that consumers would complain to retailers and not to the manufacturer.¹¹⁵ The only retailer interviewed said they had never had a complaint from a consumer about a lookalike product.¹¹⁶ However, one interviewee described how they had an email address on their website to send complaints regarding lookalikes, which they reported was used and resulted in meaningful reports from consumers.¹¹⁷ Another described some instances of reports from consumers who were confused in the form of emails,¹¹⁸ and a third reported general evidence of consumers contacting them about confusion.¹¹⁹

Theme 9: Legal disputes

A common concern amongst manufacturer brand owners was that passing off was not made out by lookalikes as there was not confusion.¹²⁰ Accordingly, other causes of action are relied upon where they are available, in particular, trade mark infringement.¹²¹

Competitors: The approach to incidents of lookalikes varies depending on the putative defendant. Where the lookalike is produced by a third party manufacturer then they will be pursued very robustly,¹²² although it is still usually resolved without recourse to legal proceedings being issued.¹²³ One manufacturer brand owner reported that it is usual that other competitor issues get into the mix and so it rarely remains a simple lookalike issue.¹²⁴

110 *Müller*, [9] (in Germany, but not the UK); *LFMCGM*, [12].

111 *GSK*, [23]; *Diageo*, [6].

112 *Co-op*, [17].

113 *LFMCGM*, [12].

114 *GSK*, [25]; *LFMCGM*, [44]; but its value was acknowledged, *PZ Cussons*, [5].

115 *GSK*, [25].

116 *Co-op*, [19].

117 *Beverage*, [14].

118 *Beauty*, [13].

119 *Diageo*, [23].

120 *GSK*, [7]; *PZ Cussons*, [18]; *LFMCGM*, [20]; *Beverage*, [10].

121 *Beverage*, [10].

122 *GSK*, [8]; *LFMCGM*, [17].

123 *GSK*, [8]; *LFMCGM*, [18].

124 *LFMCGM*, [17].

Retailers: Where the lookalike is sold by a retailer then manufacturer brand owners are more reluctant to take action.¹²⁵ Nevertheless, any action would begin with business to business conversation,¹²⁶ although this would be based on legal advice.¹²⁷ Manufacturer brand owners had differing views of whether they would actually bring proceedings against a retailer where they are major customers.¹²⁸ Some were clear that it would be a difficult decision, but they would nevertheless bring such proceedings¹²⁹ and some had even done so.¹³⁰ Others said they would not bring a case against a retailer/customer under any circumstances.¹³¹ The balance to be struck was described as being between the overall value of the brand and the loss of a potential customer.¹³² It was generally the view, however, that disputes with retailers were ordinarily resolved without resort to legal proceedings.¹³³

Retaliation: One interviewee reported that they would not bring proceedings because they feared retailers would “punish”¹³⁴ them with price inflation or de-listing. Both of these actions would lead to a dip in volume sales.¹³⁵ However, no threat of such punishment had yet been made in relation to lookalikes.¹³⁶ Other interviewees, although concerned about problems with commercial relationships, would take steps to minimise the risk to the relationship, such as any business to business conversation excluding the usual relationship manager.¹³⁷ Indeed, it was suggested by one manufacturer brand owner that the dispute could be compartmentalised¹³⁸ and that “retailers would expect you to protect your brands, they would want you to protect your brand.”¹³⁹

The retailer interviewed said that they had not had any complaints from manufacturers regarding lookalikes¹⁴⁰ and the other retailer said they did not sell the right sort of products to attract such complaints.¹⁴¹

125 See, for example, GSK, [9].

126 *Diageo*, [9] and [11]; *Beverage*, [6].

127 *Beverage*, [5].

128 GSK, [9]; *Beverage*, [4].

129 GSK, [10]; *PZ Cussons*, [9] (including against the its biggest global customer).

130 *Diageo*, [10]; *Beverage*, [7].

131 *LFMCGM*, [22].

132 *Beverage*, [5].

133 *Diageo*, [8]; *PZ Cussons*, [7]; *Beverage*, [5]; GSK, [9] where more circumspect.

134 Another referred to “strong arm” tactics: *Beauty*, [4].

135 *LFMCGM*, [22 and 23].

136 *LFMCGM*, [23] (the example of punishment was relating to price rises not lookalikes); a similar incidence relating to price rises was referred to by *PZ Cussons*, [12].

137 *Diageo*, [11].

138 *PZ Cussons*, [11].

139 *PZ Cussons*, [12].

140 *Co-op*, [12].

141 *Consumer Goods Retailer*, [1].

Theme 10: Litigating and forum selection

The regular concern of the cost of bringing proceedings was mentioned, particularly with the attendant risk of passing off actions.¹⁴² As one interviewee suggested, it is easy to spend £10,000-£20,000 before realising one does not have a very good case.¹⁴³ An interviewee expressly stated that they avoid the UK because of the cost of litigation¹⁴⁴ and another indicated they had a lookalike case in the UK where they specifically had not taken action because of the cost.¹⁴⁵ Others had started proceedings or at least threatened to do so.¹⁴⁶ One interviewee stated:

“... there may be instances we think it is important to stand our ground and to make an investment in the third party’s legal costs. Even if our lawyers say the case is not that strong. You do however want to establish credibility. It is more of a commercial rather than a legal decision.”¹⁴⁷

Surveys: Some brand manufacturers had conducted surveys in contemplation of litigation in relation to perceived lookalikes to see whether consumers were confused. They received mixed results. Some surveys found that even with a prominent rival brand name there was still some confusion as to origin,¹⁴⁸ others suggesting that their surveys gave no indication of confusion.¹⁴⁹ Obviously without precise comparisons of the products or details of the survey this matter could not be explored in much depth.

EU regional variations: The problems caused by lookalikes varied between jurisdictions in terms of the incidents of lookalikes, the availability of remedies, and the business response.¹⁵⁰ The sorts of products which attract lookalikes seem to vary between countries and the dominance of particular brands.¹⁵¹ Some interviewees described the German unfair competition law as particularly useful at preventing lookalikes¹⁵² as well as giving favourable reports of the German court system.¹⁵³ There was particular concern regarding obtaining relief in Eastern Europe.¹⁵⁴ Another interviewee reports greater success against lookalikes in Australia than they had in the UK.¹⁵⁵ It was explained by another that when there was an incidence of a lookalike in the UK, they would undertake investigations to see if it was also being sold in another European country to avoid litigating domestically.¹⁵⁶

142 GSK, [7]; PZ Cussons, [18]; Beverage, [9 and 10]; also see LFMCGM, [1].

143 PZ Cussons, [19].

144 Beverage, [9].

145 Beauty, [5].

146 GSK, [7].

147 PZ Cussons, [18]. The third party in this context being the putative defendant in a lookalikes claim before the courts.

148 PZ Cussons, [20].

149 LFMCGM, [19].

150 Diageo, [13] (no pre-existing relationships in Eastern Europe more likely to issue proceedings).

151 Diageo, [12].

152 GSK, [13]; LFMCGM, [10].

153 GSK, [13]; LFMCGM, [10]; Beverage, [7].

154 Beverage, [7].

155 PZ Cussons, [8].

156 LFMCGM, [11].

Theme 11: Commercial strategies

The usual commercial strategies are used to try and address lookalikes,¹⁵⁷ with no interviewees reporting the adoption of particular commercial strategies being used. Unsurprisingly, none mentioned entering agreements with retailers to restrict the stocking of lookalikes as it would present competition law issues.¹⁵⁸ It was suggested by one manufacturer brand owner that retailers would not agree to shelving arrangements where the lookalike was kept away from the brand leader.¹⁵⁹

Theme 12: Current legal framework and proposals for law reform

There was a general concern that passing off was not sufficient to prevent improper lookalikes as there was usually no confusion as to origin:¹⁶⁰ “consumers almost never buy an own brand thinking it is the branded product”.¹⁶¹ It was also pointed out by one interviewee that despite packaging being protected by a variety of intellectual property rights (such as copyright, designs and trade marks), the rights a manufacturer brand owner had were only as strong as the best individual right.¹⁶² Therefore, despite the product having very similar packaging there was rarely a “knock-out” punch.¹⁶³

The proposals of how to legislate to prevent lookalikes led many manufacturer brand owners to make several suggestions, including: enactment of a general unfair competition law;¹⁶⁴ and creation of a right based on the “overall impression of the product.”¹⁶⁵ Other suggestions included a right of action under the UCPD¹⁶⁶ or something based on the approach of the Court of Justice in *L’Oreal v Bellure*¹⁶⁷ being extended to packaging.¹⁶⁸

Most interviewees, however, could not identify a point where a product went from permissibly sharing marketing cues to becoming a lookalike.¹⁶⁹ Nevertheless, one interviewee, a brand director, thought that a product was a lookalike where at least three key elements of the following were apparent: colour, shape, branding iconography or structuring of artwork were adopted (a view not shared by the legal director of the same company).¹⁷⁰ Another suggested that it would just require the colour and the layout being copied.¹⁷¹ A less ambitious suggestion

157 *PZ Cussons*, [24]; *Müller*, [8].

158 See *Beverage*, [13].

159 *LFMCGM*, [43].

160 *Diageo* [5].

161 *LFMCGM*, [7].

162 *PZ Cussons*, [6]; also see *Müller*, [4].

163 *PZ Cussons*, [4].

164 *GSK*, [4]; *LFMCGM*, [5].

165 *Diageo*, [4].

166 *GSK*, [4].

167 C-487/07 *L’Oreal v Bellure* [2009] ECR I-5185, [2009] ETMR 55; none of the interviewees mentioned the subsequent refinements by the Court of Justice and others: see Annex II, [II.4.1].

168 *Diageo*, [4]; *LFMCGM*, [5].

169 *GSK*, [4]; *PZ Cussons*, [6]; *Beauty*, [3] described the assessment as difficult and subjective.

170 *LFMCGM*, [5].

171 *Beauty*, [3].

was to provide an inclusive list of get-up which makes something a lookalike.¹⁷² One of the retailers thought it was unnecessary for there to be further legislation¹⁷³ and the other did not comment.

Theme 13: Unfair Commercial Practices Directive

Most of the interviewees had not considered relying on the Consumer Protection from Unfair Trading Regulations 2008 to prevent lookalikes.¹⁷⁴ A reason given was that trading standards would not have the resources to pursue lookalikes.¹⁷⁵ However, one interviewee saw the 2008 Regulations as a significant tool which could be used to prevent lookalikes. They described how, after failing to reach a commercial settlement,¹⁷⁶ they approached trading standards which in turn spoke to the other party, ultimately leading to an agreement to change the packaging.¹⁷⁷ Nevertheless, they believed that a private right of action under the 2008 Regulations would greatly assist in the prevention of lookalikes,¹⁷⁸ although a disclosure requirement as to how packaging was generated would probably be needed as well.¹⁷⁹

172 *Diageo*, [4].

173 *Consumer Goods Retailer*, [3].

174 *Diageo*, [24]; *LFMCGM*, [45].

175 *GSK*, [4]; *LFMCGM*, [45].

176 *Müller*, [12].

177 *Müller*, [14].

178 *Müller*, [15]; also see *GSK*, [4].

179 *Müller*, [15].

Summary Points Chapter 6

SP 6.1: Features of a lookalike and signalling

Features

- Product category; colour; wording and logo; Iconography; layout; packaging (shape and materials); overall look and feel and the product (colour, composition, nutritional information, other “claims”);

Order of Importance (descending): Colour; Shape; Wording and logo and Iconography;

Lookalikes are **associated**, rather than **confused**, with brand leaders (a “family” relationship).

Signalling – certain common cues, and in particular colour, were accepted by retailers and manufacturers to be generic to a particular product or category.

SP 6.2: Incidents of lookalikes

- The incidents of lookalikes varied over time and between product categories;
- Reporting on the number of incidents was hampered by differing view on what is meant be a “lookalikes” incident.

SP 6.3: Innovation

Negative - Decline in business by reason of lookalikes would led to a decline in research and development;

Positive - Competition from own brand (including lookalikes) might increase in packaging and product innovation (but costly);

Own Brand Innovation - Retail reporting but disputed significant by manufacturers.

SP 6.4: Packaging and investment

- Packaging – general distinctiveness from competitors (not specific);
 - No specific changes made as a response to lookalikes reported;
 - Lookalikes taken into account as part of general “marketing mix” (contributing factor to change);
 - No explicit (current) practice of copying admitted by retailers or manufacturers.
-

Industry limitations on packaging variation:

- Available materials and product composition;
- Manufacturing costs;
- Generic features;

SP 6.5: Sales

- Some reports of **loss of volume**, but some reported no evidence of such loss and a **mixed picture** regarding whether a **greater loss associated with a lookalike compared to a distinctive own brand** (factors other than packaging often at play);
- The entry of an own brand might lead to **de-listing**;
- Suggested a **redistribution of existing customers** to product category when lookalike or own brand enters the market (no increase in volume sales).

SP 6.6: Advertising and promotion

- **New competitor** on market leads to an increase in advertising spend (defensive);
- **Different response** when **own brand or lookalike** enters market varies widely between interviewees;
- **Promotions and price cuts not** usual response (undermine premium nature of brand leader and so ineffective against lookalike).

SP 6.7: Legal Disputes

Passing off not usually made out in relation to real instances of lookalikes (no confusion);

Commercial considerations very important in how dispute pursued:

- Difference between competitors versus customers (retailers);
- Retaliation concerns by retailers (price inflation; de-listing);
- Negotiation and mediation (importance of protecting brand);

Balance: overall value of brand versus loss of potential customer.

SP 6.8: Litigation and forum-shopping

- Considerations for which jurisdiction to litigation include cost, forensic considerations (surveys; customer confusion), availability of remedies and business response;
- **Favourable jurisdictions:** Germany (Unfair Competition Law); Australia;
- **Problem jurisdictions:** Eastern Europe; UK.

SP 6.9: Unfair Commercial Practices Directive (UCPD) and Law Reform

Trading Standards

- Lack of resources to pursue lookalikes;
- Consumer Protection from Unfair Trading Regulations 2008 nevertheless could be significant tool;
- “Brokerage”/Mediation role;

Private right of action under the 2008 Regulations

- Important in prevention of lookalikes;
- Disclosure requirement (packaging development) also desirable;

Other proposals for reforms

- Enactment of a general unfair competition law;
- Creation of a right based on overall impression of the product;
- Right for trade dress (L’Oreal v Bellure);

Consensus on “lookalike” (or test) important.

Chapter 7: Consumer Surveys

7.1 Introduction

This chapter reports on the two stages of consumer research conducted by i2 media research limited. The research was conducted during the period October 2011 to March 2012. The research is concerned only with the consumer's interaction with the product's packaging. It does not cover any other aspect of the consumer's shopping experience, such as shelf-placement, customer support from staff, or other forms of promotional activity.

7.2 Questions the consumer research addressed and research methodology

The consumer research in the project was designed to address two distinct questions. Each question was addressed by its own dedicated survey.

Question 1: Consumer perceptions of similarity

First, if two substitutable products have similar packaging to what extent (and in what way) do consumers believe that those products have the same characteristics? And does the belief in shared characteristics vary as the packaging is perceived to get more (or less similar)?

The first question is qualified further by clarifying what is considered relevant. For example, at one end of the scale the packaging is so similar (or the same) that consumers may believe the products are the same – i.e., confusion as to origin (e.g., consumers believe that Sainsbury's beans are actually Heinz beans). At the other end of the scale there is no packaging similarity at all (e.g., at the extreme end a white tin of baked beans with simply the name Sainsbury's and the words baked beans on the side). References to characteristics means, for example, that consumers think Sainsbury's baked beans are the same as Heinz because they have the same taste, quality of ingredients, same manufacturer, and they are canned by the same person or they have the same nutritional profile.

A survey was developed which asked respondents to rate product trios (two own brands relative to each other and to a manufacturer brand) in twelve different categories. Multiple versions of the survey were developed which varied the position of the manufacturer brand relative to own brands in the trios. The survey was constructed so as to include all twelve product trios, together with a series of mini-surveys, each of which comprised three trios. The surveys were made available online via surveymonkey.com for the period 2 January to 8 March 2012. In this time period data was obtained 330 UK participants. Participants were

recruited through invitations to participate presented on publicly accessible forums and websites, and through email invitations. Respondents were self-selecting and participation was voluntary. Each respondent completed the survey question set in relation to an average of 3.5 product trios. In total, the phase 1 survey obtained 1160 product trio question set responses from 330 UK participants. A copy of the full survey questions is included in Appendix C. Results from the first survey are presented in this chapter, with a detailed breakdown of results per product and per product split between users and non-users of each category in Appendix D.

Question 2: Consumer perceptions of advantage and disadvantage

The second consumer research question addressed consumer perceptions of advantage and disadvantage from any accidental and or deliberate purchase of lookalikes, to inform the project's view on the extent to which lookalikes can be shown to cause consumer detriment. If the first survey reveals that closeness of packaging makes a difference to consumer perceptions of product features, then do consumers perceive themselves to be disadvantaged by purchase of a product with similar packaging? What are the participants' actual experiences with lookalike type products? Do they report accidentally purchasing lookalike type products? How much advantage and disadvantage do they report from doing so? And do they report deliberately purchasing lookalike type products? And how much advantage and disadvantage do they report from doing so?

Contextual consumer research questions in second survey

Each of the consumer research questions was addressed using its own specific research exercise, that is, a dedicated survey.

In addition to addressing the core consumer research questions outlined above, the second survey also sought to contextualise responses. To do so, it required respondents to provide a series of self-reports about their behaviours in relation to purchasing fast moving consumer goods (FMCG) products and their perceptions of retailers and brand owners. These data, though not directly relevant to the core consumer research questions this chapter addresses, are reported here for completeness.

7.3 Methodology of identifying products

Product indication: The British Brands Group proved very helpful by providing examples of products it believed to be lookalikes, in particular about 20 examples of products which were on the market in 2010. In addition to approaching the manufacturer brand owners, the research team also contacted the British Retail Consortium and presented on the project at a meeting of BRC members in June 2011. We asked for members of that group to give feedback on the study at the early stage and to provide potential examples of lookalikes.

Despite indicating they would respond by the end of July 2011 (and numerous attempts by the research team to follow up on this interest) nothing was ever received in relation to this aspect of the report.

Field Work: The research team also undertook field work in the main supermarkets (Tesco, ASDA, Sainsbury, Morrison, Aldi, Wilko and Lidl) and pharmacies (Boots and Superdrug) looking for potential lookalikes. In addition, those lookalikes which had been identified by the BBG were acquired. It became apparent that some of the examples presented by the BBG had changed their packaging since 2010. A particular example of this was the withdrawal of the packaging by Wilko of its “lookalike” for “Charlie” bodyspray.



The lack of a control: A further objective of the research methodology was to find an equivalent product for each lookalike to include as a “control”. This was to facilitate a comparison between a manufacturer branded product, a lookalike and a control. Ideally, this would be where the supermarket had both a lookalike and non-lookalike own brand product. One of the few examples where this was possible was in relation to “Charlie” bodyspray at Tesco.

It was more common to find that the lookalike product was the own brand equivalent to the manufacturer branded product, as demonstrated by Clearasil.

There were also particular problems identifying control products even from other retailers. This is because in relation to certain products, all brands (manufacturer, lookalike, and control) had similar packaging, as can be demonstrated by the Lurpak example:



Nevertheless, eventually the products selected for the consumer study were:

Category	Brand Leader	“Lookalike”	“Control”
Bodyspray*	Charlie Pink	Tesco Sweet	Tesco Pink Body Spray
Bodywash*	Original Source Lime	Tesco’s Wake Up	Sainsbury’s Lime Bodywash
Cheese*	The Laughing Cow Cheese	Tenery Cheese	Tesco’s Cheese Triangles
Razor*	Gillette Mach 3	Boots Blade 3	Morrison’s Triple Blade
Washing Up Liquid*	Fairy Lemon Washing Up Liquid	Magnum Lemon Washing Up Liquid	Tesco Lemon washing up liquid
Shampoo*	Head and Shoulders	Boots anti-dandruff	Sainsbury’s Anti-dandruff
Drinks#	Red Bull	ASDA Blue Charge	Mixed Up
Vinegar*	Sarson’s Malt Vinegar	Samson’s Malt Vinegar	Asda Malt Vinegar
Butter	Lurpack	Norpak	Tesco Butterpak
Ibuprofen	Nurofen Ibuprofen capsules	Boots Ibuprofen caplets	Sainsbury’s Ibuprofen capsules
Skin care	Clearasil Ultra	Boots Skin Clear	Tesco Clear Skin
Shaving gel*	Gillette Fusion Shaving Gel	Boots Blade 3 Shaving Gel	Morrison’s Shaving Gel

* The lookalike/brand leader were indicated as lookalikes in the British Brand Groups Sample Packaging Survey 2010 (the control was selected by the research team)¹

The lookalike is an updated version of packaging indicated in that 2010 Sample (control selected by the research team)

7.4 Consumer research results: Study 1

The first survey addressed the project’s first key research question, namely whether the perceived relative similarity in packaging of two different own brand products to a manufacturer brand product is related to respondents’ perceptions of various quality characteristics of the two own brands, including their perceived origin.

It was notable that results varied across the different product categories, suggesting that a range of factors aside from product appearance may be relevant.

A series of figures in Appendix D show, per product, survey respondents’ ratings of (i) perceived similarity in look of packaging and the (ii) perceived likelihood of common origin. These charts show respondents’ ratings of perceived similarity in appearance of packaging of two own brands to the brand per category (on the left), and perceived likelihood of each of the two own brands being manufactured by the same manufacturer/entity as the brand per category (on the right).

¹ See <http://www.britishbrandsgroup.org.uk/upload/File/Similar%20pkg%20examples%202010.pdf>; a similar survey was conducted at the end of 2011 and early 2012 (after the consumer research was started).

These figures relate to each of two own brands to manufacturer brand for all twelve of the product trios, across all respondents (n=330, providing 1160 product trio ratings).² As indicated in these figures, there is a statistically significant lookalike effect for some, but not all, product categories included in the survey. For some of the product types included in the survey, differences between two own brands and a manufacturer brand product in ratings of perceived similarity of packaging appearance and/or similarity in perceived common origin were significantly positively correlated with differences in the perceived quality of the own brand products.

In section 7.4.3 below, a scatter plot illustrates the relationship between difference in perceived similarity of packaging of two own brands to manufacturer brand, and differences between the two own brands on ratings of four dimensions of perceived quality (quality, suitability for intended use, expensiveness, value for money). This illustrates a statistically significant lookalike effect across the 12 product trios. Increased perceived similarity of packaging to manufacturer brand product packaging of one own brand product relative to another is significantly correlated with higher perceptions (ratings/expectations) of price, quality, suitability for intended use and (marginally) value for money. Further analyses show that when the groups are considered separately, the lookalike effect is significant both for users and non-users when analysed across all product categories (grouping all product categories together).

The charts in Appendix D which also show the results on (i) perceived similarity in look of packaging, and (ii) the perceived likelihood of common origin of each of two own brands to manufacturer brand for all twelve of the product trios, with respondents split into users and non-users of the product category, for each product. These figures illustrate that where there were differences between the pattern of ratings provided by users and non-users of the various product groups, the lookalike effects were more likely to be measured in relation to non-users. That is, being a consumer of the product category (e.g., shaving gel) tends to weaken the beneficial effect on an own brand of looking more like the manufacturer brand than does another own brand.

The scatter chart shown in Figure 7.4.4 illustrates the relationship between difference in perceived similarity of packaging of two own brands and manufacturer brand, and difference in perceived likelihood of common origin between each of the two own brands and manufacturer brand. This illustrates a statistically significant lookalike effect on perceived common origin across the 12 product trios. Increased perceived similarity of packaging to manufacturer brand product packaging of one own brand product relative to another is significantly correlated with higher ratings of likelihood of common origin to the manufacturer brand product. Further analyses show that when the groups are considered separately the lookalike effect is significant both for users and non-users when analysed across all product categories (grouping all product categories together).

2 The data behind the figures for Survey 1 can be found in Appendix E.

7.4.1: Relationship between differences in perceived similarity in look of packaging to perceived common origin

A significant relationship in differences between two own brands' perceived similarity in look of packaging to a manufacturer brand and perceived likelihood of having a common origin to that brand was found in nine of the 12 product categories tested (boxed in green below, the upper box) and not in the other three (boxed in red below, the lower box):



7.4.2 Relationship between differences in perceived similarity in look of packaging and perceived quality

A significant relationship in differences between two own brands' perceived similarity in look of packaging and a manufacturer brand and perceptions of quality was found in four of the 12 product categories tested (boxed in green below, the upper box) and not in the other 8 (boxed in red below, the lower box).



7.4.3 Relationship between differences in perceived common origin and perceived quality

A significant relationship in differences between two own brands' perceived likelihood of common origin to manufacturer brand and perceptions of quality (quality, suitability for intended use, expensiveness, value for money) was found in five of the 12 product categories tested (boxed in green below, the upper box) and not in the other seven (boxed in red below, the lower box).



As described above, through interaction with representatives of manufacturer brand owners and retailers the research team identified a range of 12 FMCG manufacturer brand products each with two potential substitutes, one or both of which might be considered by consumers to be lookalikes of the manufacturer brand products. Each of the 12 product categories of three products (the manufacturer brand product and two own brand equivalents) was presented to survey respondents. For each trio, participants were required to rate their perception of the similarity or dissimilarity in look of each non-target product's packaging to that of the manufacturer branded product equivalent.

It is important to note that for the 12 product categories, ratings of similarity of the look of the packaging of the own brands to look of the packaging of the manufacturer brand were relatively low responses were looked at as a whole, or when users and non-users of each product category were considered separately. This is illustrated by the charts for perceptions of each product, and by the user/non-user charts in Appendix D.

There is a statistically significant lookalike effect: With the method deployed in the survey, it has been possible to evaluate the relationship between the difference in perceived similarity to target (manufacturer brand) of two non-targets (own brands) and differences in perceived qualities of the two non-targets. As show in the figure overleaf, the Phase 1 survey identified a statistically significant lookalike effect across the 12 product trios. Increased perceived similarity of packaging to manufacturer brand product packaging of one own brand product relative to another is significantly correlated with higher perceived (ratings/expectations of) price, quality, suitability for intended use and (marginally) value for money.

The correlations shown in the figure overleaf are pooled across users and non-users of the products. Further analyses demonstrated that when the groups are considered separately the lookalike effect is significant both for users and non-users.

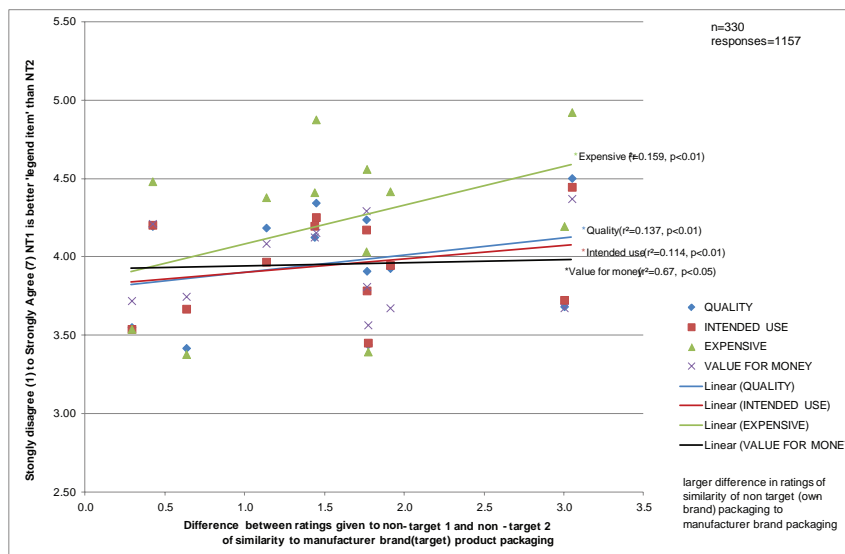


Figure 7.1 - Scatter chart illustrating the relationship between difference in similarity of packaging of two own brand to manufacturer brand, and differences between the two own brands on ratings of four dimensions of perceived quality (quality, suitability for intended use, expensiveness, value for money)

7.4.4 Comparing responses of users and non-users of products

An interesting point to note from the comparisons between users and non-users of the 12 product categories shown in Appendix D, is that where lookalike effects were found either directly on quality or perceived common origin to brand, or indirectly on perceived quality as a result of perceived common origin to brand, these tended to be observed more frequently in relation to non-users of a product category than in relation to users of a product category.

There is a statistically significant lookalike effect on perceived origin: It has also been possible to evaluate the relationship between the difference in perceived similarity to target (manufacturer brand) of two non-targets (own brands) and differences in perceived likelihood of common origin to the manufacturer brand of the two non-targets.

As shown in the figure overleaf, the first survey identified a statistically significant lookalike effect on perceived origin. Increased perceived similarity of packaging to manufacturer brand product packaging of one own brand product relative to another is significantly correlated with higher ratings of perceived likelihood of common origin of one own brand with the manufacturer brand to another own brand with the manufacturer brand.

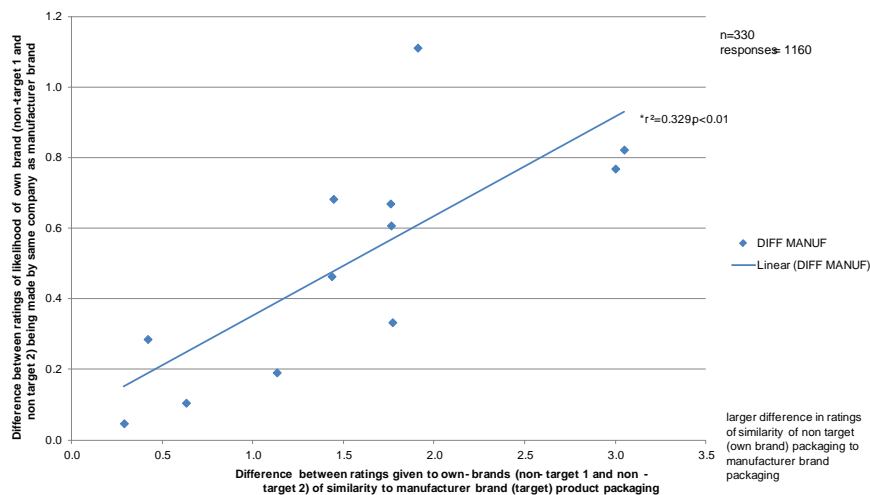


Figure 7.2 - Differences in similarity of own - brands to brands are related to differences in perceived likelihood of own - brands being made by same companies as manufacturer brands

7.4.5 Discussion

Accordingly, the first stage survey showed a relatively weak, but significant, lookalike effect, in relation to some categories of product. Effectively, an own brand product, whose packaging is perceived by respondents to look more like that of a manufacturer brand for which it could be a substitute, appears to gain some advantage in being of higher perceived quality (quality, suitability for intended use, expensiveness, value for money) over another own brand product whose packaging looks less like that of a manufacturer brand.

As noted above, whilst a lookalike effect is observable in relation to some categories of product, there is substantial variability across product categories. This suggests potentially important roles of a range of other considerations.

Some may focus around product characteristics. For example, any lookalike effect may be lower in relation to a fairly generic product (such as vinegar) relative to a category in which manufacturer brands have innovated (such as razors or shaving foam). Equally, lookalike effects may be moderated by consumer perceptions of own brand products, for example, because of consumer associations of reliability and quality with well-known high street retailers, such as Boots, Sainsbury and Tesco.

And as shown in above, whilst the lookalike effects we found were evident in responses of users and non-users of the relevant product categories, the effect seems to be slightly more evident for non-users of a product category.

7.4.6 Increased lookalike effect?

Although the methodology used in the first survey was not designed to explore the matter, it is worth noting that in a retail environment shelf positioning might increase any lookalike effect. There is evidence that consumers concentrate on certain parts of the shelf and so prime positioning can affect the likelihood a consumer looks at a product and the attention it is given.³ It may be that certain shelf placements would increase a lookalike effect if the products closely mirror the range, or alternatively where they are positioned in such a way as to enable the comparison of equivalents.



The Superdrug “lookalike” and Head and Shoulders as presented in the shop (above left); and the Boots lookalike and Clearasil as presented in the shop (above right). Original Source and the Tesco lookalike (below left) and Gillette Shaving Gel and the Boots lookalike (below right)



3 Xavier Dreze, Stephen Hoch and Mary Puck “Shelf Management and Space Elasticity” (1994) 70(4) *Journal of Retailing* 301.

7.5 Consumer research results: Study 2

The project's second consumer research activity was a large-scale, nationally representative survey in three countries (UK, the United States and Germany) designed to understand the extent to which consumers report purchasing lookalikes (accidentally or deliberately) and the extent to which, if at all, they consider having done so, or doing so, to advantage or disadvantage them.

To address this question, i2 media research developed with the Project Steering Board a short survey targeting the research questions directly.

The survey was conducted on a large scale internationally (UK, Germany and the United States), with each national sub-sample being nationally representative. This enabled us to compare results obtained in each of the three countries sampled. The survey sampled 1,000 consumers in the UK, 500 in Germany and the United States, and was conducted for i2 media research by GfK NOP Media Ltd⁴ using their nationally representative online panels in the UK, Germany and USA. The number of responses targeted per territory was selected such that sufficiently robust and reliable results would be generated.

The survey was specifically designed to understand the extent to which consumers report purchasing lookalikes (accidentally or deliberately) and the extent to which whether they consider having done so, or doing so, to advantage or disadvantage them.

7.5.1 Accidental or mistaken lookalike purchase is reported

Substantial proportions (50-60%) of the UK, German and US populations report having purchased a lookalike accidentally or mistakenly at least once or twice. The results showed 20-25% of all three national samples reported having done so a few times, or even frequently, and a further 28-37% ever having done so.

⁴ The data behind the figures for Survey 2 can be found in Appendix F.

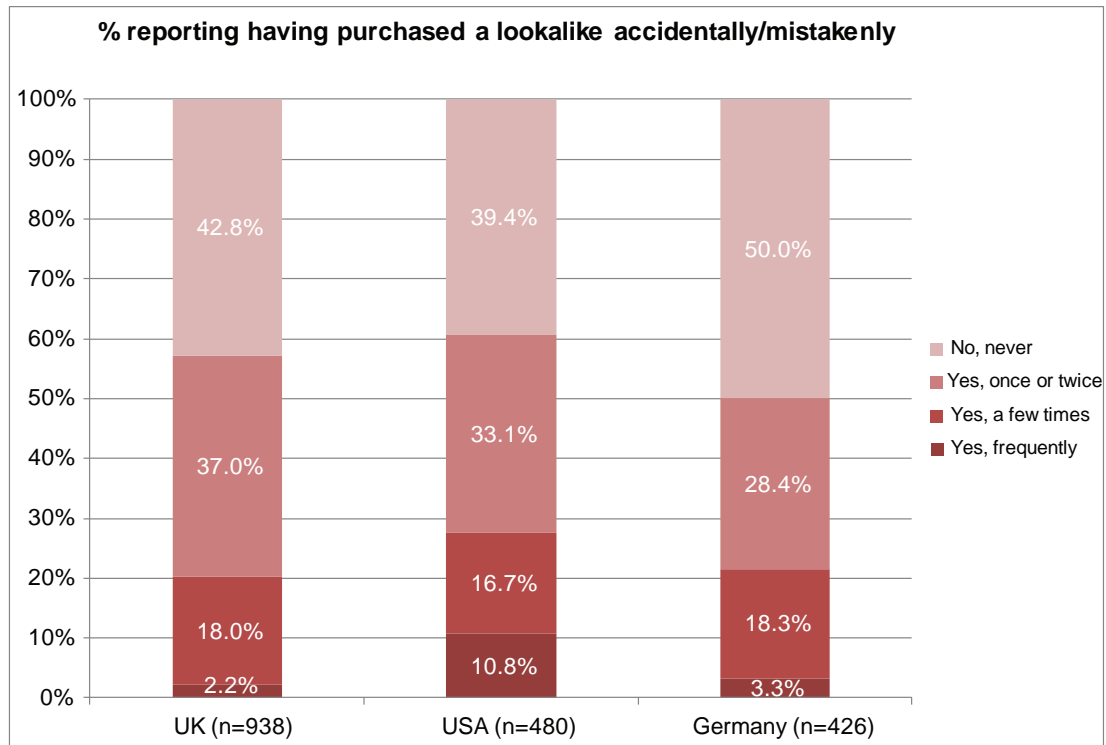


Figure 7.3 - Proportion of respondents reporting different frequencies of having purchased a lookalike product accidentally/mistakenly

This is an important finding to report as it shows that, regardless of the reasons why consumers may do so, many report having purchased lookalikes accidentally or mistakenly at some point. If these proportions are thought of in terms of numbers of households it generates substantial numbers. For example, 20% of UK households⁵ purchasing a lookalike frequently or even a few times would equate to over 5 million accidental product purchases having been made. And 60% of UK households every having done so would equate to over 15 million accidental product purchases have been made in total.

7.5.2 Advantage and disadvantage associated with accidental lookalike purchase

To quantify the extent to which respondents who reported having purchased a lookalike product accidentally or mistakenly perceived themselves to have been disadvantaged or advantaged by having done so, these questions were asked directly to the relevant respondents. The results are illustrated overleaf.

In summary, across the three national samples 5-15% of accidental purchasers of lookalikes rated the purchases as having been of the highest level of disadvantage (“very much”) to them, and 30-40% rated the purchases as having been of the next highest level of

⁵ In 2011 there were 26.3million households in the United Kingdom according to the Office of the National Statistics: All household reporting is based on the United Kingdom statistics only.

disadvantage (“somewhat”). Across the three national samples a majority (50-60%) considered themselves to have been disadvantaged “very little” or “not at all”.

This result is balanced by broadly similar proportions of respondents rating the episodes to have advantaged them, to a broadly similar degree as they rated the episodes to have disadvantaged them. Across the three national samples relatively low proportions (5-15%) of accidental purchasers of lookalikes rated the purchases as having been of the highest level of advantage (“very much”) to them. The survey did not address the question of why respondents perceived advantage or disadvantage as a result of having made a mistaken purchase. We speculate that any perceived advantage could be based on a perception of cost saving. Across the three national samples a majority (50-60%) considered themselves to have been advantaged “very little” or “not at all”.

As shown in the chart overleaf, the perceived advantage and disadvantage ratings in relation to accidental purchase of lookalikes are fairly balanced.

It is though worth noting that scaled to national populations the reports captured by this survey equate to high numbers of households reporting accidental purchase of lookalikes to disadvantage them very much (in the UK for example, 1.68 million households) or somewhat (in the UK for example, around 9.92 million households). And substantial, although fewer, numbers report that it advantages them very much (in the UK for 0.99 million households), or somewhat (in the UK for example, 8.99 million households.)

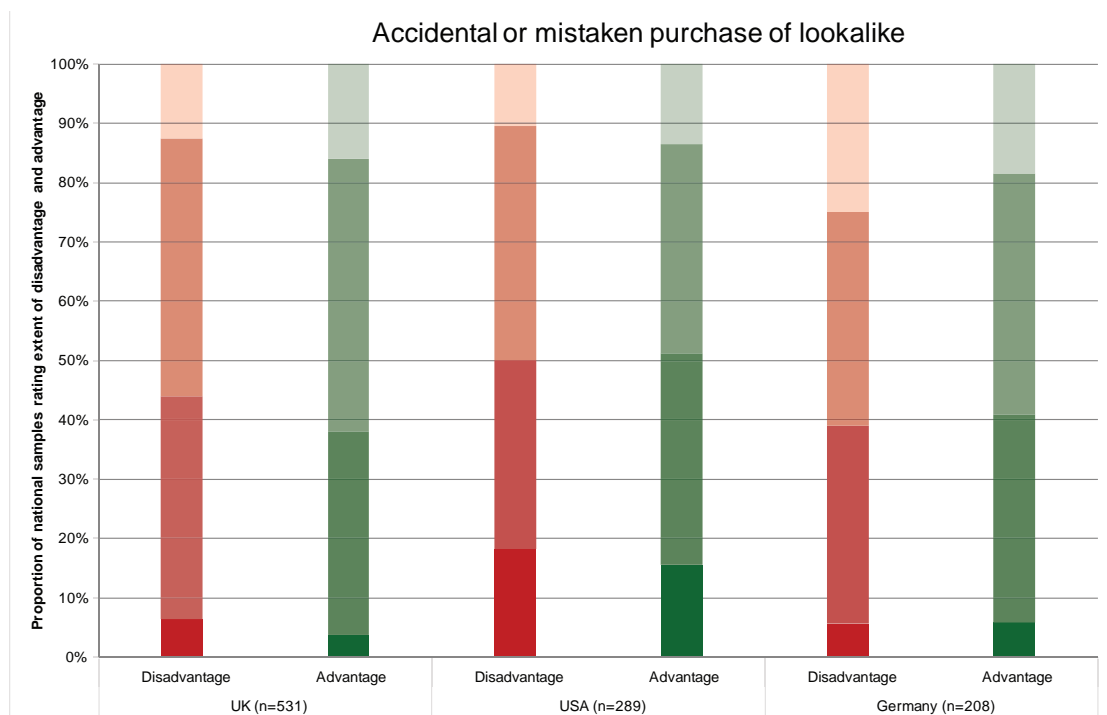


Figure 7.4 - Proportion of respondents reporting extent of advantage and of disadvantage from having purchased a lookalike product accidentally/mistakenly

7.5.3 Lookalike purchase reported deliberately

Across all three national samples a relatively high proportion of respondents reported having purchased a lookalike deliberately. Deliberate purchase of a lookalike could encompass two scenarios: (a) where a respondent sets out from home with the specific intention of buying a lookalike; and (b) where in the shop a respondent deliberately decides to purchase an own-brand product that happened to look like a manufacturer branded product. The defining feature of the report is that the purchase of a lookalike was not accidental or by mistake. As demonstrated in the chart below, German consumers were much more likely to report having purchased a lookalike product deliberately than were US consumers, followed by UK consumers.

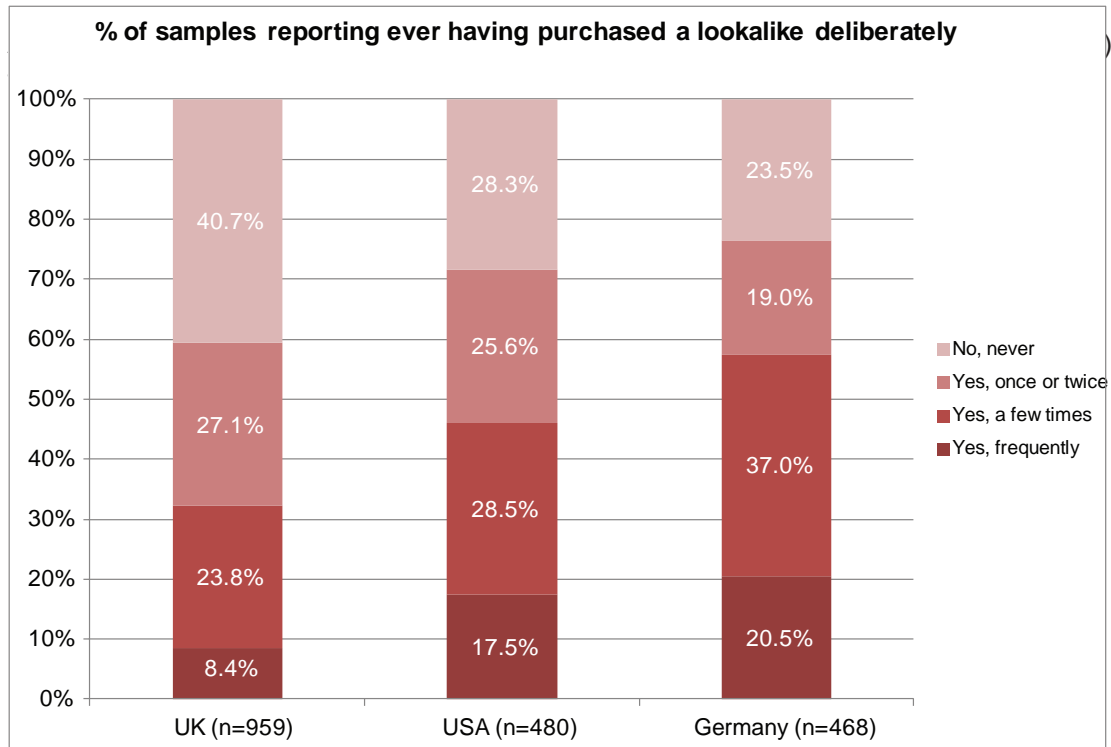


Figure 7.5 - Proportion of respondents reporting different frequencies of having purchased a lookalike product deliberately

7.5.4 Advantage and disadvantage associated with deliberate lookalike purchase

Respondents who reported ever making a deliberate lookalike purchase were asked to rate the extent, if any, to which they considered the purchase to have advantaged and to have disadvantaged them. The consumers were answering this question based on their own perceptions about the nature of the product and not based on full information about its actual qualities.

Across the three national samples between 10-25% of deliberate purchasers of lookalikes rated the purchases as having been of the highest level of advantage (“very much”) to them whilst between 2-10% rated the purchases as having been of the highest level of disadvantage to them.

Across the three national samples a majority (60-75%) considered themselves to have been advantaged “very much” or “somewhat” by their deliberate lookalike purchases, compared to a minority (15-25%) who reported considering themselves to have been disadvantaged “very much” or “somewhat”.

These data are illustrated in the graph below.

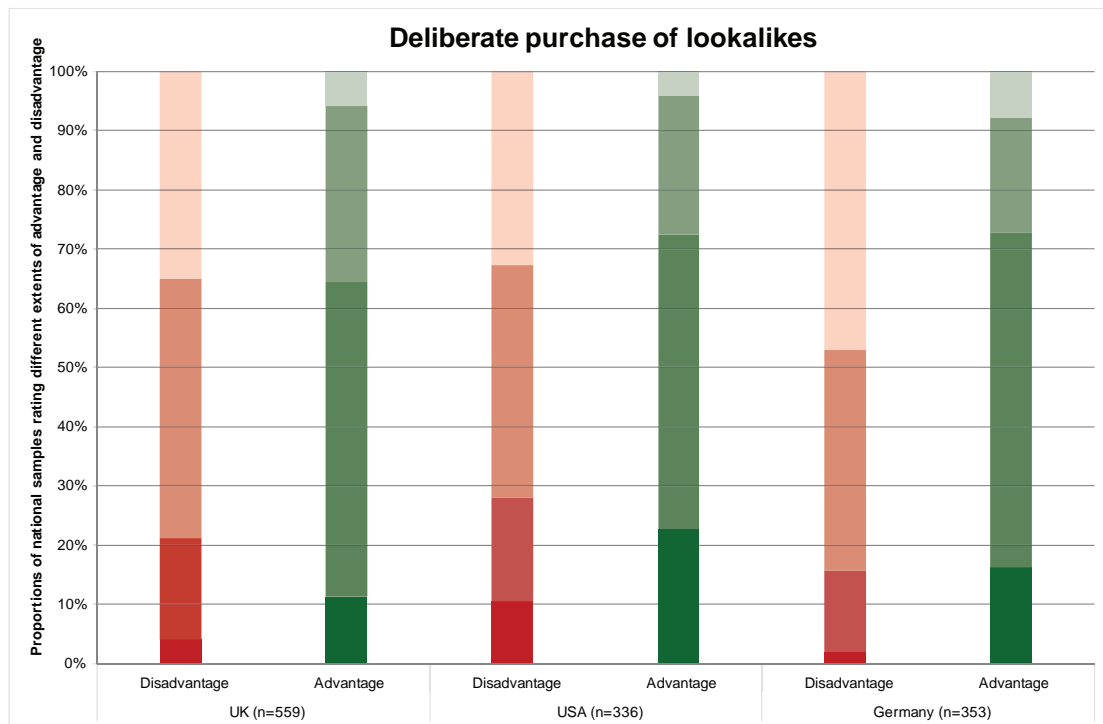


Figure 7.6 - Proportion of respondents reporting extent of advantage and of disadvantage from having purchased a lookalike product deliberately

7.5.5 Additional data from survey 2

In addition to the core research questions our second survey addressed, several additional questions were posed to respondents to provide additional context in which to enable interpretation of the results from the core research questions.

Purchasing tendencies: Respondents were asked which if a series of statements best describes their typical behaviour when shopping for groceries and household items. The chart shows the proportion of each of the British, American and German samples selecting each option. The pattern of results is broadly similar across the three national samples. The least likely response was “I tend not to buy brand/own-brands” (meaning respondents did not characterise their purchase behaviours in terms of brand/own-brand). Frequency of response was highest for “I tend to buy a specific brand/own-brand, but sometimes experiment with a different one”, followed by “often switching”, then “never changing”.

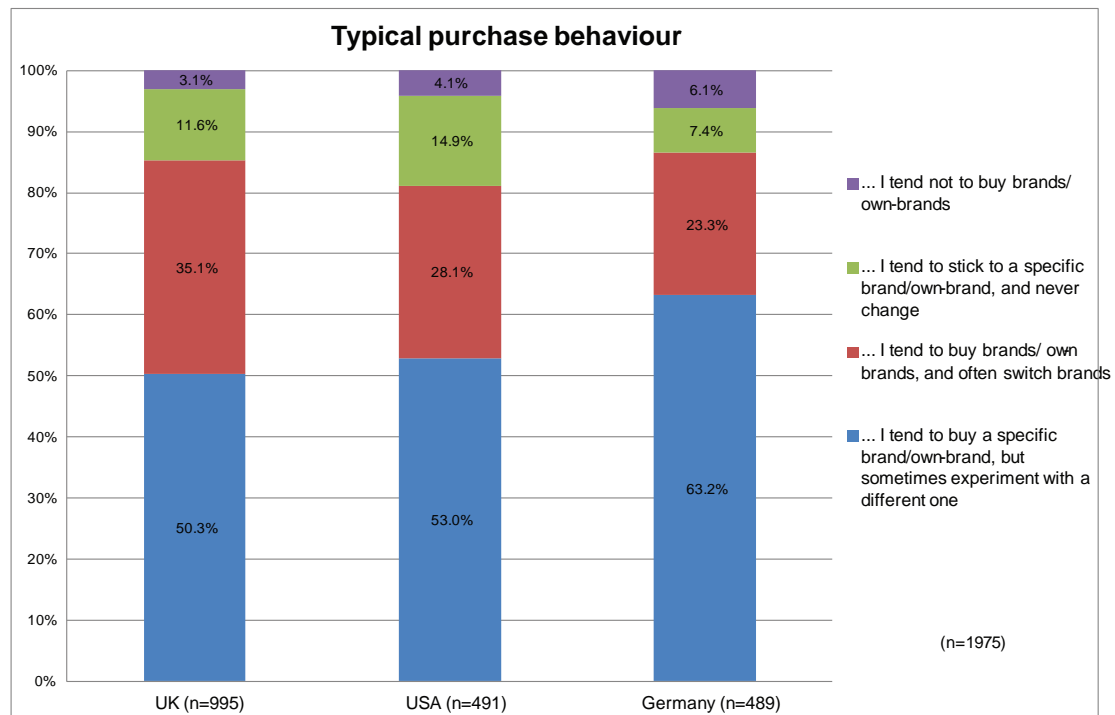


Figure 7.7 - Proportion of respondents selecting each of 4 possible typical purchase behaviours

Those reporting that they buy brands or own-brands were then asked whether they tended to buy brands or own-brands. Their responses are shown in the table and chart below. The main result to note is that German respondents were least likely to report buying brands only – with a much higher proportion of German than UK or USA respondents reporting buying own-brands only.

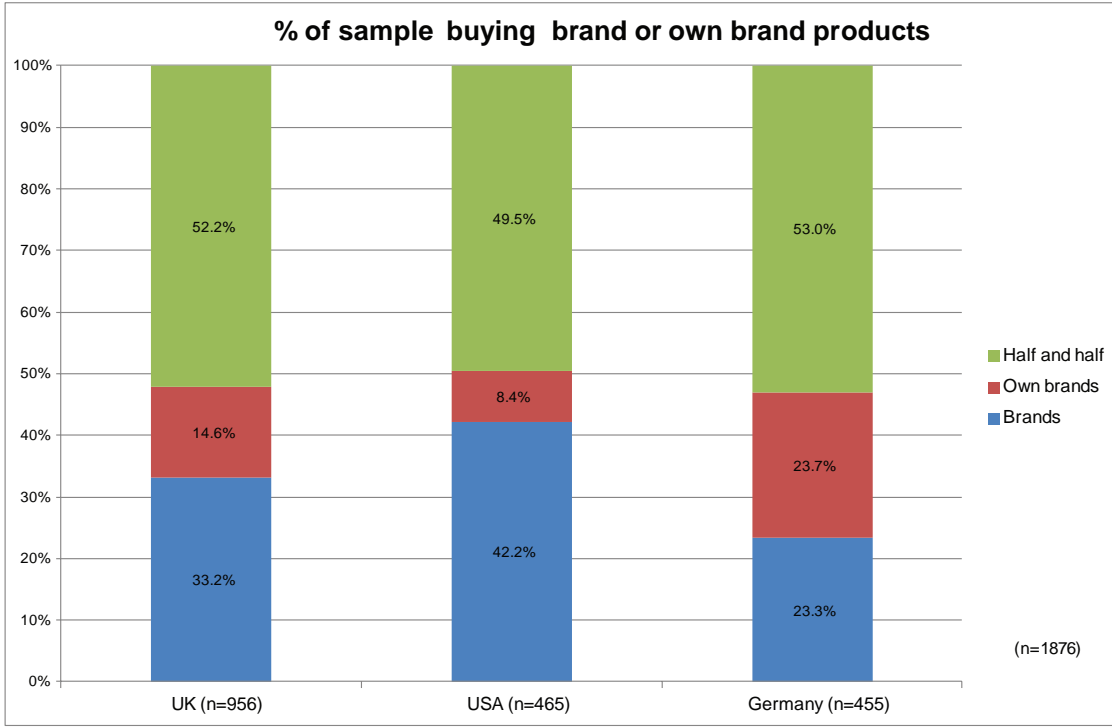


Figure 7.8 - Proportion of respondents reporting tendency to buy manufacturer brands, own-brands or a mixture

Importance attributed to considerations for day to day purchases: Respondents were next asked to rank in order of importance a series of five considerations for day-to-day purchasing decisions. The chart below shows the proportion of each of the British, American and German samples ranking each option as first, second, third, fourth and fifth in relative importance. The pattern of results is broadly similar across the three national samples, with best value for money being ranked above highest quality for UK and US respondents. The notable exception is that German respondent reported “Highest quality” to be a more important consideration than “Best value for money” in contrast to UK and US respondents who thought that was the second most important feature.

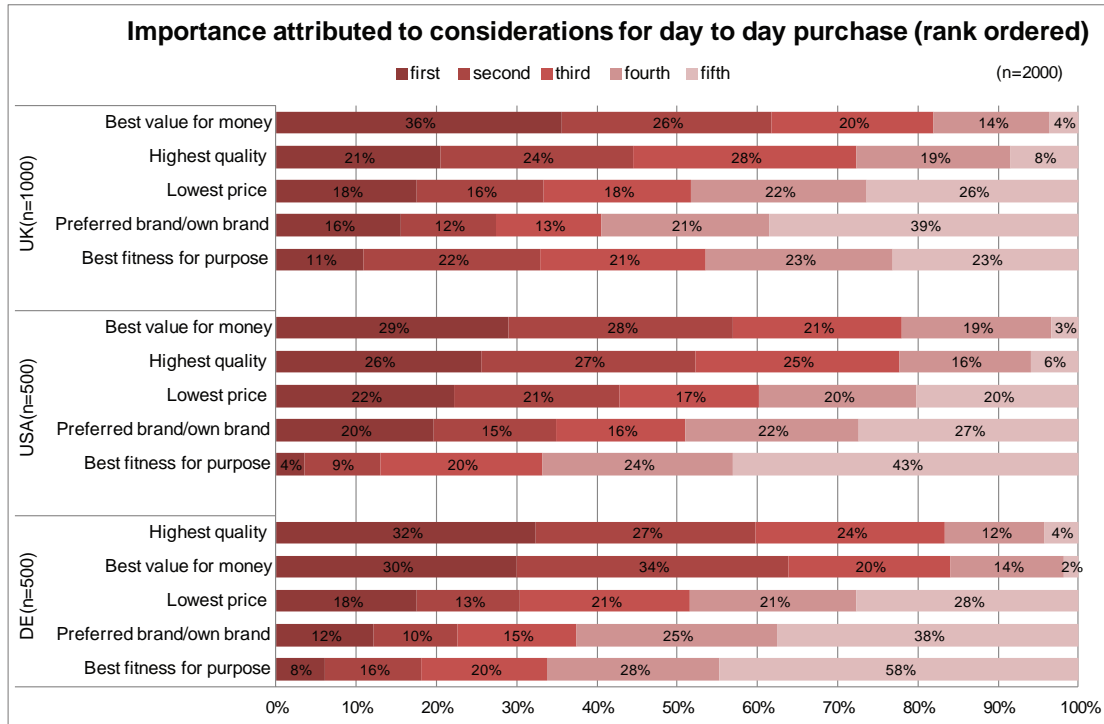


Figure 7.9 - Proportion of respondents ranking (from 1 to 5) considerations in order of importance for day to day purchase in UK, USA and Germany

Importance of various characteristics in purchasing decisions: Respondents were next asked to rank order a series of six characteristics of products in terms of their perception of how much each influences their likelihood of purchasing a day to day product.

The table below and chart overleaf show the proportion of each of the British, American and German samples ranking each option as first, second, third, fourth, fifth and sixth in relative importance. The pattern of results is broadly similar across the three national samples, with previous positive experience with the product itself consistently rated as most important and product packaging shape and colour as less so.

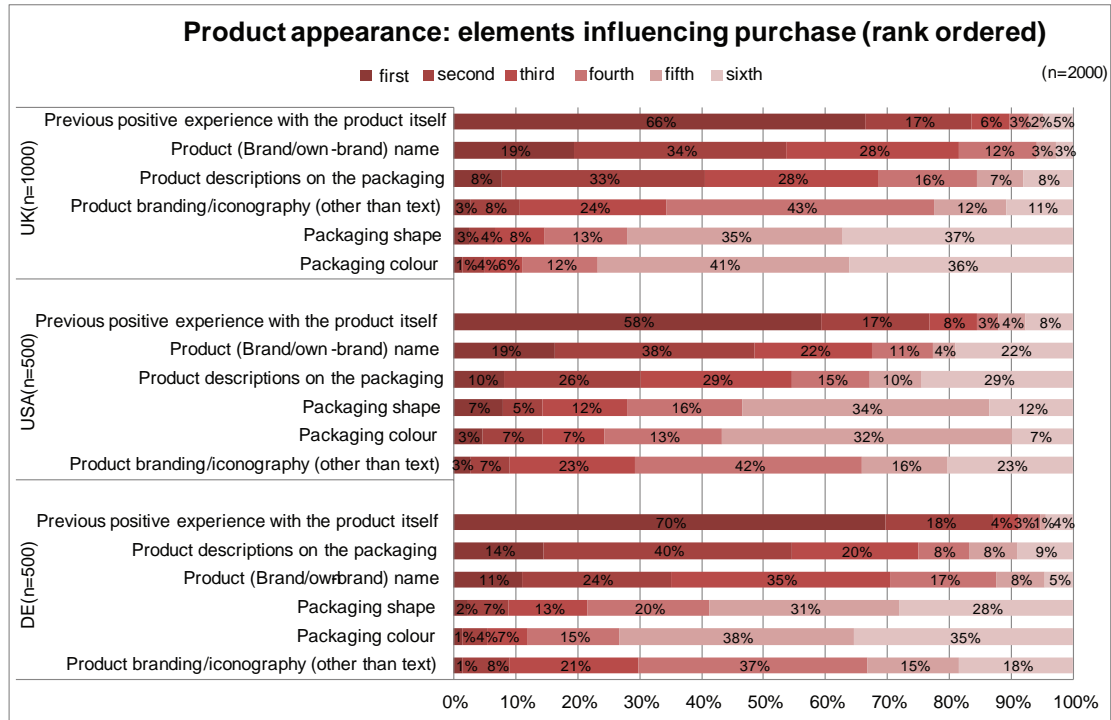


Figure 7.10 - Proportion of respondents ranking (from 1 to 6) different elements influencing their purchasing decisions (UK, USA, DE samples)

Relative strengths of own-brand and manufacturer brands: Respondents were finally asked to indicate whether they thought own-brand products or manufacturer brand products delivered:

- Lower prices;
- Higher quality;
- Better value for money;
- Best fit for purposes.

As the charts below show, when asked to associate various strengths of products with own-brand products, manufacturer brand products or both, respondents from all three national samples tended towards rating own-brand products as being associated with “lower prices” and “better value for money”, and manufacturer brands as being associated with being of “best fit for purpose” and “higher quality”.

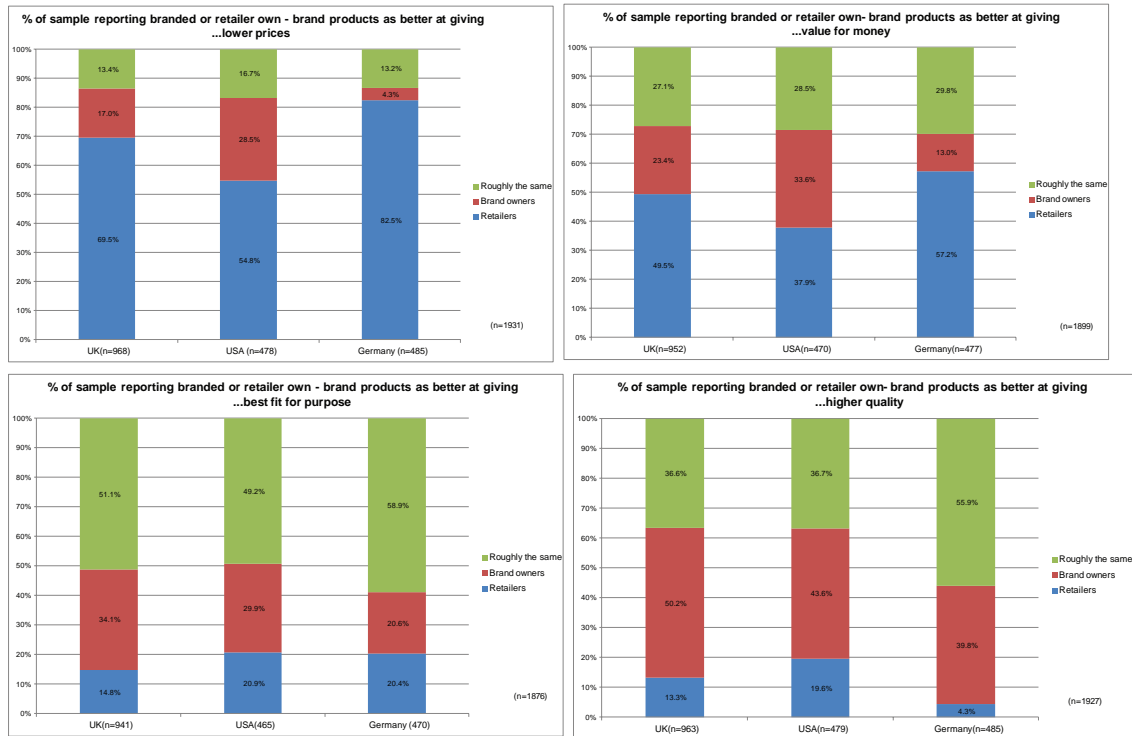


Figure 7.11 - Charts showing proportion of respondents rating own-brand (blue) or manufacturer brand (red) products to be better at providing lower prices, value for money, best fit for purpose and higher quality. Green bars represent proportion of sample indicating that both retailers and brand owners are equally good at delivering the features.

An interesting result shown in the fourth chart above ('higher quality') is that German respondents were more likely than were UK or US respondents to report that branded and retailer own-brand products are roughly the same at delivering 'higher quality'. This result provides a coherent rationale for the two findings reported above – that German respondents reported 'Highest quality' to be a more important purchase consideration than 'Best value for money', in contrast to US and UK respondents, and that German respondents were much more likely to report deliberately purchasing lookalike products. The rationale would then be that deliberate purchase of lookalike products would be based on a consumer perception that lookalike and manufacturer brand products are of similar high quality.

Summary Points Chapter 7

SP 7.1: Consumer survey Lookalike effect

Based on the sample of products the following results were obtained:

- **One own-brand product** can benefit over **another own brand product** in consumer perceptions of **its features** (quality, suitability for intended use, expensiveness, value for money) **by its packaging** looking more like that of a manufacturer brand product in its category;
- **One own-brand product** can benefit over **another own brand product** in consumer perceptions of **common origin** with the manufacturer brand (quality, suitability for intended use, expensiveness, value for money) **by its packaging** looking more like that of a manufacturer brand product in its category. Such shared origin also increase perception of **shared features**.

This suggests a lookalike effect subject to the following:

- Any lookalike effect varies across different types of product category. Lookalike effects were observed in relation to some products, and not in relation to others;
- Any lookalike effects are more likely to be observed in relation to **non-users** of a product category.

SP 7.2: Survey 2 – Mistake and Advantage/Disadvantage

Mistake

A substantial proportion of consumers report having purchased a lookalike product mistakenly (by accident):

- 20-25% reported do so at least a few times;
- around 60% reported doing so at least one (across the three national samples).

Disadvantage

Across the three national samples:

- 5-15% of all respondents who reported making an accidental purchase of a lookalike product rated the purchase as having the highest level of disadvantage (“very much”);
 - 30-40% rated the purchases as having been of the next highest level of disadvantage (“somewhat”);
 - across the three national samples a majority (50-60%) considered themselves to have been disadvantaged “very little” or “not at all”;
-

High numbers of households reporting accidental purchase of lookalikes to disadvantage them “very much” (in the UK for example, 1.68 million households) or “somewhat” (in the UK for example, 9.92 million households).

Advantage

Balancing this, across the three national samples:

- 4-15% of accidental purchasers of lookalikes rated the purchases as having been of the highest level of advantage (“very much”) to them;
- 30-40% rated the purchase as having the next level of advantage (“somewhat”);
- the remainder considered themselves to have been advantaged “very little” or “not at all”.

Scaling these proportions to numbers of households generates an estimate of substantial numbers being advantaged “very much” by accidental purchase of lookalikes (in the UK for example 0.99 million households), or “somewhat” (in the UK for example, a little under 8.99 million households).

Deliberate Purchase

- A higher proportion (60-75%) of consumers reported having purchased a lookalike product deliberately;
- Of these, much higher proportions report associating the purchase with advantage (10-20% “very much” and around 50% “somewhat”) than disadvantage (2-10% “very much” and around 10-15% “somewhat”).

As context to the above, the second survey found that respondents across the three national samples:

- ranked **previous positive experience** with a product as more important than aspects of its appearance (such as packaging shape and colour) as considerations in purchasing decisions;
 - ranked **“value for money”** as a more important consideration in their purchase decisions than “highest quality” (except for German respondents, who rated them as equally important);
 - tended towards rating **own-brand products** as being more associated with **“lower prices” and “better value for money”**, and manufacturer brands as being associated with being of “best fit for purpose” and “higher quality”;
 - reported buying manufacturer brands and own-brands, but with more of a tendency to buy manufacturer brands.
-

Chapter 8: Sales Data

8.1 Introduction

There were reports, both in the literature and from brand owners during interviews,¹ that the sales of manufacturer branded products were affected by lookalikes. The purpose of the analysis in this chapter is to investigate in available sales data what, if any, effect there is on those sales and to see if the effect is different when a distinctive own brand is launched. The raw sales data in this chapter were provided by Kantar Worldpanel² but the analysis of that data was conducted by the research team.

8.2 Methodology

8.2.2 Collection of data

In summary, the data sought from Kantar was the sales volume and sales value relating to three products in twelve different product categories. These three products represent the brand leader (a manufacturer branded product), the lookalike and the control. The analysis attempts to measure the effect of the “launch event” of a lookalike and so the data sought was intended to represent the sales of the brand leader for 12 months before the launch of the lookalike and the sales of both the lookalike (or control) and the brand leader for the next 24 months. These figures were sought in relation to the overall market and the particular supermarket where the lookalike (or control) was sold. This represented the ideal, but as will be explained below this was not always available. First, the products studied will be identified once more.

8.2.3 Products

The sales data were sought for the same products as those selected for the purposes of the consumer research discussed in Chapter 7. The reason these were chosen was so that the consumer research data could be used in conjunction with the sales data. The sales data was sought and obtained after the products were tested in the consumer research. Accordingly, the products selected were as follows:

1 See Chapter 6, Theme 5: Sales.

2 www.kantarworldpanel.com.

Category	Brand Leader ⁶	"Lookalike"	"Control"
Bodyspray	Charlie Pink	Tesco Sweet	Tesco Pink Body Spray
Bodywash	Original Source Lime	Tesco's Wake Up	Sainsbury's Lime Bodywash
Cheese	The Laughing Cow Cheese	Tenery Cheese	Tesco's Cheese Triangles
Razor	Gillette Mach 3	Boots Blade 3	Morrison's Triple Blade
Washing Up Liquid	Fairy Lemon Washing Up Liquid	Magnum Lemon Washing Up Liquid	Tesco Lemon washing up liquid
Shampoo	Head and Shoulders	Boots anti-dandruff	Sainsbury's Anti-dandruff
Drinks	Red Bull	ASDA Blue Charge	Mixed Up
Vinegar	Sarson's Malt Vinegar	Samson's Malt Vinegar	Asda Malt Vinegar
Butter	Lurpack	Norpak	Tesco Butterpak
Ibuprofen	Nurofen Ibuprofen capsules	Boots Ibuprofen caplets	Sainsbury's Ibuprofen capsules
Skin care	Clearasil Ultra	Boots Skin Clear	Tesco Clear Skin
Shaving gel	Gillette Fusion Shaving Gel	Boots Blade 3 Shaving Gel	Morrison's Shaving Gel

8.2.4 Volume / Value vs Market Share

The data used for this analysis were absolute volume (and value) sales of particular products. There is no consideration of the effect of lookalikes on market share. The interviews with brand owners³ considered lost sales in relation to market share rather than volume. However, the research team considered that there would be problems with using market share for the following significant reasons. First, the market definition would be very difficult, if not contrived, and any definition of the market chosen for this study would be perhaps justifiably open to criticism. Secondly, some of the products studied created the market or were very dominant⁴ within the market for the product in question. Accordingly, any entry of a new product onto that market might have a significant effect on market share even if the volume sold did not change.⁵ Thirdly, some of the own brand products (control / lookalike) have very low volumes and so measuring their market share would be measuring very small changes.

³ See Chapter 6, Theme 5: Sales.

⁴ This does not mean in the competition law sense.

⁵ Imagine Red Bull was selling 90 units in a retailer and so had a 100% market share within that retailer. The retailer launched an own brand (lookalike) and managed to sell 10 units of its own brand and Red Bull continued to sell 90 units. Now 100 units are sold in that retailer, but without any change in volume, Red Bull has lost 10% market share.

The use of volume data provides a loose indication of whether the own brand is expanding the market or “taking” sales from others. However, to assess this accurately would require data on the total number of units sold within the market (which once more requires market definition). Conversely, there are problems with using volume as the measure. Volume data do not take account of other players in the market (i.e., other competitors – the manufacturer brands and retailers) and it does not indicate how particular products are doing compared to the market as a whole (e.g., whether the market is growing or shrinking). However, it is reasonable to assume that the movement of a product, which is the brand leader, will generally follow the movement of the market overall.

8.2.5 Launch event

The data provided by Kantar do not include the date of a product’s “launch event” as such. However, it is assumed that the first time sales of the product reported in their data represent a good proxy for the actual launch event (although, in fact, it can take some weeks or even months for data to feed through to the Panels and so be recorded by Kantar).⁶ Where there was no “launch event” for a lookalike, because it was launched before the branded product, the data provided constituted an indicative 36-month period. A lookalike which was launched before a branded product would of course have to change its packaging to become a lookalike.

8.2.6 Weaknesses in data sets and noise

Although data were sought for the period of 12 months before launch for each of the products, this was not possible for a number of reasons. A brief summary of issues connected to each data set appears in Appendix J. The nature of sales data makes the data very noisy (as the sales figures for each four week period regularly change radically) and this may mask otherwise statistically significant results.

8.2.7 Barcodes/product codes

The data collected by Kantar is based on bar codes and Kantar’s own internal “Product codes”. Kantar (obviously) does not record the look of packaging in which each product was sold. Kantar’s product codes for a product do not (usually) change when the packaging changes. Similarly, it is not always the case that the product code will change where an own brand product is rebranded. This means that it is not possible to measure directly the sales effect of the particular packaging used for the consumer surveys in Chapter 7. However, it is reasonable to assume that the packaging of the lookalike will be closest to the brand leader at the time of the lookalike’s launch event⁷ and become more distinct as time goes on. This is because the perceived lookalike advantage is strongest when a new product enters the market. However, this assumption also means that the control’s packaging may have been closer to the brand leader at the launch event, but subsequently distanced itself before the consumer survey. There are no data on this and so it must be assumed that the control never resembled the brand leader.

6 Interestingly the research group purchased the Boots Blade 5 Shaving Gel for the purposes of the consumer research on 7th September 2011. The product does not appear on Kantar data until the 4 week period ending 27th November 2011. It was also included in the British Brands Group in their 2010 Study.

7 See paragraph [8.2.5].

8.2.8 Brands

In determining the sales of a particular product it was necessary to identify what constitutes that product. For this reason, the idea of “brands” was adopted. This was determining what, in the research team’s view, would be substitutable.⁸ This means products of different sizes and volumes and prices were combined into a brand. It was therefore a subjective assessment of what a consumer would consider substitutable, without any consumer research to support these decisions. There is therefore scope for error. In any event, the selections made for each particular brand (with their barcodes and product codes) are set out in Appendix G. It should be noted that the combination of products into brands means that it is not possible to divide the value by volume statistics to obtain a unit price.

8.2.9 Substitution data

Kantar Worldpanel is able to provide data as to substitution. This indicates whether one panellist changes his or her habits and extrapolates this to an entire market. For example, where a panellist bought one bottle of Original Source Lime Bodywash each week for six months and then stopped buying that and instead started buying an own brand lime bodywash, this would be considered a substitution. It may be that further research could use this sort of data in assessing the lookalike effect. However, for the purposes of this research, it was considered that to understand the various factors that might underlie substitution would require interviews with consumers (and the relevant panellists) before understanding whether the packaging made the difference. As the purpose of the data analysis here is not to measure substitution as such but lost sales, these problems are not as significant.

8.2.10 Assumptions

For the reasons outlined in the previous paragraph the following assumptions are made:

1. **A lookalike is likely to have the most similar packaging to the branded product when it is launched; and**
2. **The packaging of the control has not changed significantly during any study period.**

8 For example, it was decided that a single can ASDA Blue Charge was not substitutable for a 12 can multipack of Red Bull.

8.3 Hypotheses

The purpose of the research was to see whether the number of sales a brand leader decreases as the packaging of an own brand gets closer to that of the brand leader. Line graphs setting out the sales data are available at Appendix H. These line graphs provide a good indication of the rapid and drastic changes in sales patterns over the year but they do not provide any great insight into lookalikes. The basic research question can be expressed in three hypotheses:

- H₁ A brand leader's volume (value) sales will decline when any own brand enters the market;**
- H₂ The decline will be greater in the supermarket selling the own brand than across the whole market; and**
- H₃ This decline will be greater when the product is a lookalike than when it is a dissimilar own brand.**

Summary of theory behind hypothesis: It is axiomatic that in a competitive market the entry of a new competitor will affect negatively the sales of existing players on that market; unless the sales of the new product is absorbed entirely by market growth.⁹ Accordingly, it would be expected that an own brand entering the market, as a new competitor, would divert sales from existing players including the brand leader. This is the basis of **H₁**. Own brand products are on sale only in particular supermarkets, and so any negative effect they have on sales is likely to be greatest in that supermarket. Accordingly, where the "launch event" of own brand is a significant factor in a drop in sales, it would be expected that the decline would be greater in the particular supermarket (where customers can choose between the two products) than it would be on the overall market (as only a proportion of the customers on that market are likely to visit a particular supermarket¹⁰). This is the basis of **H₂**. Finally, if there is an advantage in selling a lookalike over a distinctive own brand it would be expected that the decline in volume will be greater in relation to the lookalike than against the control. This is the basis of **H₃**.

9 Except where the product fails.

10 The nature of these goods is such it will be assumed that few, if any, customers are likely to change supermarkets because of the arrival of a particular own brand product.

8.4 Mean sales

8.4.1 Year by year comparison of mean sales

The following table sets out the mean sales of the manufacturer brands across the three periods. The first period is a period before the launch of the lookalike (usually one year, but this is not always the case).¹¹ The second period is the 12 months after the launch of the lookalike and the third period is the next 12 months (where data permits). Accordingly, the following charts show the decline in sales of the brand leader which may relate to the launch of the lookalike. Where there are no “launch” data (i.e., data for the last 3 years is all that is provided or the lookalike or control came first), no figures are provided below. Where the sales of the lookalike have grown following launch the increase is marked in red.

Manufacturer Vs Lookalike	Period 1		Period 2		Period 3	
	Whole	S/M	Whole	S/M	Whole	S/M
Bodyspray	105.9	25.27	112.5 (+6.2%)	25.9 (+2.5%)	129.7 (+15.3%)	17.0 (-34.4%)
Bodywash	177.3	84	128.3 (-27.6%)	38.6 (-54.4%)	214 (+66.8%)	59.15 (+153%)
Cheese	104.9	-	106.3 (-1.3%)	-	87.1 (-18.1%)	-
Razor	30.5	8.1	28.2 (-9.2%)	3.8 (-53.1%)	21 (-25.5%)	2.3 (-39.0%)
Washing up lqd	218.1	-	166 (-23.9%)	-	144.5 (-13.0%)	-
Shampoo	-	-	-	-	-	-
Drinks	684	109.4	908.38 (+132.8%)	102.4 (-6.4%)	629.31 (-30.7%)	56.23 (-45.1%)
Vinegar	622.0	-	568.0 (-8.9%)	-	568.0 (=)	-
Butter	1386.0	3	1259.0 (-9.2%)	0.4 (-86.7%)	1106.7 (-12.0%)	0.5 (+25%)
Ibuprofen	206.0	11.8	199 (-3.4%)	12.6 (+6.8%)	-	-
Skin care	-	-	-	-	-	-
Shaving gel	194.7	29.4	152.2 (-21.8%)	13.5 (-54.1%)	-	-

Manufacturer brand vs lookalike: Mean sales of Brand Leader ('000)

¹¹ The time periods are set out in Appendix J.

Manufacturer Vs Control	Period 1		Period 2		Period 3	
	Whole	S/M	Whole	S/M	Whole	S/M
Bodyspray	57.6	15.9	138.8 (+141%)	39.8 (+150%)	109.3 (-21.3%)	30.5 (-23.4%)
Bodywash	166.2	36.8	195.3 (+17.5%)	39.07 (+6.1%)	-	-
Cheese	-	-	-	-	-	-
Razor	16	1	10.8 (-32.5%)	2.8 (+180%)	-	-
Washing up lqd	163.5	40.5	292.2 (+78.7%)	129.8 (+320.5%)	152.3 (-47.9%)	68.3 (-47.4%)
Shampoo	884.9	191.7	564.3 (-36.2%)	109.8 (-42.7%)	584.6 (+3.6%)	126.0 (+14.8%)
Drinks	353.6	21	355.9 (+0.7%)	25.1 (+19.5%)	358.9 (+0.8%)	35.8 (+42.6%)
Vinegar	-	-	-	-	-	-
Butter	1396.2	276.9	1656.7 (+18.7%)	307.5 (+11.1%)	1366.7 (-17.5%)	357.5 (+16.2%)
Ibuprofen	226.1	35.3	192.8 (-14.7%)	27.9 (-21.0%)	204.9 (+6.3%)	26.3 (+5.7%)
Skin care	-	-	-	-	-	-
Shaving gel	-	-	-	-	-	-

Manufacturer brand vs control: Mean sales of Brand Leader ('000)

8.4.2 Analysis of findings

As these charts show, there were some very significant movements in the sales of the brand leader products (both across the whole market and within the supermarket) following the lookalike/control product being launched. The comparison of mean sales shows that the mean sales of the brand leader across the whole market went down, sometimes dramatically, in 8 out of 10 of the product categories during the first period following the launch of the lookalike. In relation to the drop in sales with the particular supermarket the sales went down in 5 out of 7 categories.

In relation to the launch of the control product the mean sales of the brand leader went up, sometimes substantially, across the whole market in relation to 5 out of the 8 product categories. In relation to the sales within a particular supermarket, the sales of the brand leader went up following the launch of a control in relation to 6 of the 8 product categories.

The data in relation to the lookalike products initially suggests a very dramatic and negative effect on sales following the launch of a lookalike, but a very positive effect following the launch of a non-similar packaged product. This does not fit H_1 . The sales of the brand leader whether going up or going down can be related to a number of factors, including possibly the packaging. The following section looks to see whether there is a closer correlation between the sales of the brand leader and the own brand (whether lookalike or control).

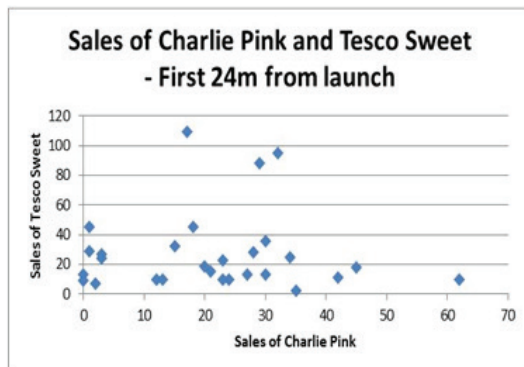
8.5 Correlations

8.5.1 Methodology

If H_1 , H_2 and H_3 are correct it would be expected that there would be a correlation between the volume sales of the brand leader and the volume sales of the own brand (both control and lookalike). This will be tested using the following null hypothesis:

H_0 There is an inverse correlation between the number of sales of the brand leader and those of the own brand

The correlations are based on scatter charts with the sale of lookalikes on the Y axis and the sale of branded products on the X axis. The chart to the right demonstrates an ideal cluster which would prove the null hypothesis. When the sales of the lookalike are zero the sales of the branded product are at their highest and as the sales of the lookalike increase those of the branded product decrease.



The time does not need to be considered because the comparison between sales figures is taking place at the same time. The further away the cluster is from following the pattern in the “Ideal” cluster the less correlated the results will be and so the less likely that there is a relationship between the sales of the two products. The scatter chart on the left, based on some of the data analysed, shows a very low correlation.

The correlation between the two sales figures is demonstrated by the Pearson product coefficient (r). The closer the coefficient is to -1 the closer the correlation is to that which would be expected under the null hypothesis. If the coefficient is close to 0 then there is no correlation at all. Finally, the closer the coefficient is to 1 the correlation represents the opposite of what is expected under the null hypothesis. The nature of results and the noise in the data has meant that statistical significance is measured at four different levels rather than at a single level: 10%, 5%, 2% and 1%.

Definition of “negative association” and “positive association”

“**negative association**” means, unless the context otherwise suggests, that there is significant negative correlation which suggests an association between an increase in sales of the own brand (lookalike or control as the case may be) and a decrease in the sales of the brand leader.

“**positive association**” means, unless context otherwise suggests, that there is a significant positive correlation which suggests an association between an increase in sales of the own brand (lookalike or control) and an increase in the sales of the brand leader.

The data correlated: The basic approach adopted was to measure the correlation of the sales over three periods. The first period was 24 weeks after launch of the lookalike/control. As the sales data represent four-weekly cycles, 24 weeks was used as an approximation to the first six months of sales (26 weeks). A second correlation was obtained for the sales during the first 12 months after launch. A third was obtained for all sales data from launch. In certain instances some of these correlations were not possible. For example, where the own brand product was launched before the brand leader the correlations over a 36-month period were assessed. In addition to the volume of sales, the value of those sales and the correlation between that of the brand leader and the lookalike/control are included in Appendix J. Those value correlations will not be discussed here.

The coefficients for volume sales are displayed in the charts below to three decimal places; in Appendix J they are displayed to five decimal places. The scatter charts behind the coefficients are in Appendix I. The trend lines for those charts demonstrate increases both gentle and drastic as well as decreases both gentle and drastic. The charts themselves are not enough to interpret adequately the data across product categories.

Importance of associations: A negative association in relation to a particular product category indicates that there might be substitution between the brand leader and the lookalike or control. Such substitution could be caused by the similarity of the packaging, but it might also be caused by numerous other factors such as price, advertising, promotions, shortages in supply, previously poor/good experience and so forth. The lack of a negative association (or even a positive association) might also be the result of different interplays of these and other factors, in particular an increase in the size of the market.

8.5.2 Correlations - 24 weeks

Product Category	Brand leader/Lookalike		Brand leader/control	
	Whole Market	Supermarket	Whole Market	Supermarket
Bodyspray	0.503	-0.212	0.707	0.658
Bodywash	-0.813#	-0.119	-0.121	-0.621
Cheese	-0.884*	-	-	-
Razor	0.118	0.913*	-0.863*	-0.263
Washing up lqd	-0.203	-	-0.367	-0.001
Shampoo	-	-	-0.894*	-0.642
Drinks	-0.434	-0.416	0.640	0.511
Vinegar	-0.070	-	-	-
Butter	-0.278	-0.300	0.254	-0.434
Ibuprofen*	0.697	0.519	-0.490	0.578
Skin care	-	-	-	-
Shaving gel	-0.703	-0.910*	-0.233	-0.587

* The Ibuprofen sales represent only 16 weeks of sales and not 24 in relation to the lookalike (but the control is 24 weeks)

‡ → p < 0.1 ; # → p < 0.05 ; * → p < 0.02 ; \$ → p < 0.01

Summary of data - 24 weeks: These figures represent the correlation between only 6 pairs of data and so are likely to give very limited insight. Nevertheless, of 35 measured correlations 6 show a statistically significant correlation (17.1% of comparisons show a significant correlation). Looking at these correlations more closely it is apparent that there are 3 negative associations out of seventeen measured correlations for lookalikes (17.6%) and 1 positive association (5.9%). Two of those 3 negative associations relate to the whole market and only 1 relates to the supermarket (the positive association is also related to the supermarket). In contrast, there are 2 negative associations out of 18 measured correlations for control products (11.1%) and no positive associations. These 2 negative associations are both related to sales across the whole market.

8.5.3 Correlations – 12 months

Product Category	Brand leader/Lookalike		Brand leader/control	
	Whole Market	Supermarket	Whole Market	Supermarket
Bodyspray	0.399	-0.125	-0.186	0.053
Bodywash	-0.421	-0.278	-0.331	-0.268
Cheese	-0.546 [‡]	-0.161	-	-
Razor*	-0.069	0.203	-0.311	-0.018
Washing up lqd	-0.201	-	-0.130	0.084
Shampoo	-	-	-0.675	-0.542 [‡]
Drinks	0.323	0.316	-0.014	0.032
Vinegar	-0.125	-	-	-
Butter	-0.164	-0.244	-0.083	-0.363
Ibuprofen*	-	-	-0.067	0.058
Skin care	-	-	-	-
Shaving gel	-	-	-0.284	-0.174

* The data on the sales of the Morrison's Control Razor are only available for 11 months from launch (df=9, rather than df=11)

[‡] → p < 0.1 ; # → p < 0.05 ; * → p < 0.02 ; \$ → p < 0.01

Summary of data – 12 months: This represents the correlations of the first 12 months of sale, and of 32 measured correlations only 3 show a statistically significant correlation (9.3% of comparisons show a significant correlation). Looking at these correlations more closely it is apparent that there are 1 negative association out of 14 measured correlations for lookalikes (7.1%) and no positive associations. The negative association related to sales across the whole market. In contrast, there are 2 negative associations out of 18 measured correlations for control products (11.1%) and no positive associations.

8.5.4 Correlations – All data

The final correlation considered is the change in sales volume from (a) the first 4 week period when the lookalike or control entered the market to (b) the last period for which data have been received. This means some of the results reported here may already have been reported in one of the earlier tables. Where there was no launch event, it includes the correlation of all the data received.

Product Category (df)	Brand leader/Lookalike		Brand leader/control	
	Whole Market	Supermarket	Whole Market	Supermarket
Bodyspray (26)	0.308	-0.001	-0.0386	0.049
Bodywash (25)	-0.092	-0.012	-0.331	-0.268
Cheese (21/37)	-0.444#	-0.208	0.270	0.450\$
Razor (24)	0.124	0.225	-0.311	-0.018
Washing up lqd (27/18)	-0.104	-	-0.077	0.078
Shampoo (37/18)	-0.172	-0.241	-0.333	-0.296
Drinks (24)	0.455*	0.394#	-0.212	-0.270
Vinegar (24/37)	0.199	-	0.297#	-0.349#
Butter (24)	-0.393#	0.023	-0.144	-0.017
Ibuprofen* (2/25)	0.697	0.518	0.187	0.305
Skin care (37)	-0.188	-0.028	-0.255	-0.151
Shaving gel (4/14)	-0.703	-0.910*	-0.179	-0.190

‡ → p < 0.1 ; # → p < 0.05 ; * → p < 0.02 ; \$ → p < 0.01

Summary of results – All data: This represents the correlations of all the data from launch (or over the 36-month period) of sale, and of 46 measured correlations only 8 show a statistical significance. This represents 17.4% of comparisons showing a significant correlation. However, of those 8 correlations, 4 are actually positive. Looking at these correlations more closely it is apparent that there are 3 negative associations out of 22 measured correlations for lookalikes (13.6%) and 2 positive associations (9%).¹² Two of those 3 negative correlations relates to the whole market and only 1 the supermarket (the positive correlation relates to the same product in both the supermarket and whole market). In contrast, there is 1 negative association out of 24 measured correlations for control products (4.2%) and 2 positive correlations (8.3%). One negative correlation is related to sales across the whole market and 1 of the positive associations is across the whole market and one for the supermarket.

12 Three of these correlations – that for Shaving Gel (lookalikes); Bodywash (control); and Razor (control) are all the second reporting of the same data. The former was reported at 24 weeks the other two at 12 months.

8.5.5 Ranked correlations

As was explained above, the data is very noisy and includes numerous outliers and this may affect the number of negative and positive associations identified. Accordingly, to reduce the effect of the noise in the data and remove the effect of outliers the sales figures were ranked. The ranking begins at the launch of the product (or the beginning of the 36 month period where relevant). The 4 week period with the highest sales is ranked 1 and that with the second highest 2 and so forth (and when the sales in two weeks were the same they were given the same ranking). This enables the data to be assessed to see whether the ranking of the sales of the brand leader decrease is associated with the ranking of the sales of the own brand increasing.

The table below sets out the correlations using both Kendall's tau b and Spearman's rank correlation (Rho).

Product Category (sample size)	Brand leader/Lookalike				Brand leader/control			
	Whole Market		Supermarket		Whole Market		Supermarket	
	Kendall	Spear	Kendall	Spear	Kendall	Spear	Kendall	Spear
Bodyspray (28/27)	0.445 [§]	0.634 [§]	-0.014	-0.017	0.189	0.215	0.135	0.154
Bodywash (26/13)	-0.124	-0.153	0.068	0.105	-0.116	-0.190	-0.271	-0.363
Cheese (23/39)	-0.367 [*]	-0.505 [*]	-	-	0.150 [#]	0.274 [#]	0.231	0.337 [‡]
Razor (26/11)	0.007	0.027	0.209	0.266	-0.357	-0.399	-0.189	-0.264
Washing up lqd (29/20)	-0.057	-0.132	-	-	-0.011	-0.060	0.058	0.063
Shampoo (39/20)	-0.039	-0.081	-0.166	-0.209	-0.260	-0.364	-0.112	-0.147
Drinks (26)	0.217	0.390 [#]	0.245 [‡]	0.370 [‡]	-0.201	-0.272	-0.190	-0.266
Vinegar (26/39)	0.072	0.092	-	-	0.237	0.322	-0.234 [#]	-0.343 [#]
Butter (26)	-0.424 [§]	-0.581 [§]	0.155	0.188 [#]	-0.162	-0.210	-0.012	-0.017
Ibuprofen [†] (4/27)	0.333	0.400	0.333	0.600	0.216	0.297	0.219	0.329 [‡]
Skin care (39)	-0.158	-0.230	-0.035	-0.036	-0.154	-0.233	-0.041	-0.072
Shaving gel (6/16)	-0.548	-0.621	-0.730	-0.830	0.017	0.066	-0.043	-0.069

‡ → p < 0.1 ; # → p < 0.05 ; * → p < 0.02 ; § → p < 0.01

Summary of results: This represents the correlations of all the data from launch (or over the 36-month period) of sale, and of 46 measured correlations only 3 demonstrate a negative association using both Kendall's tau b and Spearman's (Rho) (6.5%) and 3 demonstrate a positive association (6.5%). Looking at these more closely it is 2 negative associations and 2 positive associations of 21 measured correlations for lookalikes. Those negative associations relate only to the whole market and not the supermarket and one positive association one is in the supermarket and one the whole market. For controls, there is 1 positive and 1 negative association out of 24 measured correlations.

A further, three correlations demonstrate a positive association using Spearman's (Rho) but not Kendall's tau b and one a negative association using only that test. Two of the positive associations related to controls and the negative association and 1 positive association related to lookalikes.

8.5.6 Analysis of both sets of correlations

There were 105¹³ measured correlations for Pearson's. Of these measurements, 49 related to lookalike products and 56 related to control products. These will be looked like individually then in combination.

Lookalikes: Of the 49 measured correlations relating to lookalikes there were 6 negative associations (12.2%) and 3 positive associations (6.1%) and the remaining 40 correlations were not significant either way (81.6%). Of the 6 negative associations 5 related to sales across the whole market and only 1 related to sales within a supermarket. None showed a negative association both across the whole market and in the relevant supermarket. The position for ranked correlations showed 2 negative associations and 2 positive associations of 21 measured correlations. Those negative associations relate only to the whole market and not the supermarket and of the positive correlations one is in the supermarket and one the whole market.

Control: Of the 56 measured correlations relating to lookalikes there were 5 negative associations (8.9%) and 2 positive associations (3.6%) and the remaining 49 correlations were not significant either way (87.5%). Of the 5 negative associations 3 related to sales across the whole market and 2 related to sales within a supermarket. In only one product category, Shampoo at 12 months, was there a negative association both across the whole market and in the relevant supermarket. For ranked correlations there is 1 positive and 1 negative association out of 24 measured correlations.

13 This section does not double count (see footnote 12 above).

Hypothesis testing: In this section it has been shown that there is no consistent pattern demonstrating H_0 . In relation to lookalikes, the results of 87.7% were inconsistent with that hypothesis (including both no association and positive associations). Further, in relation to controls, 91.1% of results were inconsistent with that hypothesis. Accordingly, although it is apparent means the entry onto the market of a lookalike has a negative association in a few product categories (Bodywash, Cheese, Shaving Gel and Butter) it is not consistent enough across all product categories to support H_0 . Further, although this will be explored later, only in one instance (Shampoo, a control product) was a negative association found in relation to the whole market and the supermarket. Accordingly, only this product category supports H_2 .

8.6 The relative effect of packaging

8.6.1 Relative similarity of packaging and significant correlations

The analysis of the data so far has drawn a distinction between the “lookalike” and the “control”. However, some of the lookalikes are closer in appearance to the brand leader than others and, similarly, some controls are more dissimilar from the brand leader than others.

The first consumer survey, reported in chapter 7, asked respondents to rate the similarity of the packaging of a lookalike (and control) to the brand leader on a scale from 1 (they don't look at all like each other) to 7 (they look exactly the same).¹⁴ Accordingly, a score of 4 represents the mid-point and a score of over 4 represents the consumer rating the packaging of product as more alike than different. Whereas a score of less than 4 means the packaging looks more different than alike. However, a rating below 4 does not, automatically, mean that the packaging is distinctive.

In the table below the Pearson correlations calculated above are set out, where a correlation was found to be statistically significant it is coloured red for positive and black for negative. To make the ranges of similarity easier to distinguish the upper range is marked orange (a rating of 5 or over), the upper-mid range (a rating between 4 and 5) is marked yellow; the lower-mid range is marked lime green (a rating between 3 and 4); and the lower range is marked dark green (a rating of below 3).

In contrast to the earlier statistical analysis the controls and lookalikes can be considered at the same time as the similarity is between the own brand (lookalike and control) and the brand leader. It can be seen that all the products in the upper-mid and upper range are lookalikes; whereas all the products in the lower range were controls. However, products in the lower-mid range fall into both categories.

14 The raw results for column one are reported in Appendix E.

Product (LL) Lookalike (CT) Control	Similarity of packaging	24wks		12m		All	
		W/M	S/M	W/M	S/M	W/M	S/M
Body spray (LL)	5.3252	0.503	-0.212	0.399	-0.125	0.308	0.001
Skin care (LL)	5.0381	-	-	-	-	-0.188	-0.028
Butter (LL)	4.7475	-0.278	-0.3	-0.164	-0.244	-0.393 [#]	0.023
Cheese (LL)	4.5747	-0.884 [*]	-	-0.546 [‡]	-0.161	-0.444 [#]	0.208
Shampoo (LL)	4.4456	-	-	-	-	-0.172	0.241
Vinegar (LL)	4.058	-0.070	-	-0.125	-	0.199	-
Wash Up liqd (LL)	3.7831	-0.203	-	-0.201	-	-0.104	-
Drink (LL)	3.7706	-0.434	-0.416	0.323	0.316	0.455 [*]	0.394 [#]
Ibuprofen (LL)	3.75	0.697	0.519	-	-	0.697	0.518
Razor (LL)	3.5882	0.118	0.913 [*]	-0.069	0.203	0.124	0.225
Body wash (LL)	3.5395	-0.813 [#]	-0.119	-0.421	-0.278	-0.092	-0.012
Wash Up liqd (CT)	3.4824	-0.367	-0.001	-0.13	0.084	-0.077	0.078
Shave gel (LL)	3.4783	-0.703	-0.91 [*]	-	-	-0.703	-0.91 [*]
Razor (CT)	3.1527	-0.863 [#]	-0.263	-0.311	0.018	-0.311	-0.018
Vinegar (CT)	2.9706	-	-	-	-	0.297 [‡]	0.349 [#]
Body wash (CT)	2.9079	-0.121	-0.621	0.331	0.268	-0.331	-0.268
Shampoo (CT)	2.8819	-0.894 [*]	-0.642	-0.675 [*]	-0.542 [‡]	-0.333	-0.296
Butter (CT)	2.83	0.254	-0.434	-0.083	-0.363	-0.144	-0.017
Cheese (CT)	2.7841	-	-	-	-	0.27	0.45 ^{\$}
Body spray (CT)	2.3445	0.707	0.658	-0.186	0.053	-0.039	0.049
Shave gel (CT)	2.0429	-0.233	-0.587	-0.284	-0.174	-0.179	-0.190
Drink (CT)	2	0.640	0.511	-0.014	0.032	-0.212	-0.270
Skin care (CT)	2	-	-	-	-	-0.255	-0.151
Ibuprofen (CT)	1.9875	-0.49	0.578	-0.067	0.058	0.187	0.305

‡ → p < 0.1 ; # → p < 0.05 ; * → p < 0.02 ; \$ → p < 0.01

Summary of results: If H_3 were correct there would be the most negative associations in the orange (upper) region (in fact there are none), followed by the yellow (where there are 3), followed by the light green (where there are 5) and finally the dark-green (where there are 5). There is no clear pattern demonstrating this result however. The total number of negative correlations is greater in the lower-mid and lower than in the upper-mid and upper. The number of negative associations “above” the bar (a mark of 4) is less half of those below the bar.

This does not reflect the number of products in each of the categories (as there are more products in the green regions). In the upper region, 0% of correlations represented a negative association; in the upper-mid region, 17.6% of correlations represent a negative association; the figure is 12.2% in the lower-mid; and 10.4% in the lower region. Conversely, in the upper-mid region, 5.88% of correlations represent a positive association; the figure is 7.3% in the lower-mid; and 14.5% in the lower region. This does show a slightly greater proportion of negative associations in the upper-mid region than in the lower regions and similar there is slightly smaller proportion of positive associations in that region than below.

8.6.2 Perceived common origin and significant correlations

If H_3 is correct it would also be expected that as the perceived common origin of the own brand with the brand leader increased there would more statistically significant correlations (as calculated above).

The respondents to the consumer survey were also asked to rate the likelihood of the product as having a common origin on a scale of 1 to 7 (once more 1 extremely unlikely to be made by the same company and 7 extremely likely to be made by the same company). As before this is set out on the table below. As there were no products which the aggregate score suggests that consumers considered the product to have a common origin all products were marked with a score of below 4. Similarly, no products achieved a rating of under 2.5. The range of aggregate scores is therefore very narrow. Nevertheless, the same colour scheme is used as above (save there are no orange or yellow sections).

Product (LL) Lookalike (CT) Control	Similarity of packaging	24wks		12m		All	
		W/M	S/M	W/M	S/M	W/M	S/M
Butter (LL)	3.9600	-0.278	-0.3	-0.164	-0.244	-0.393 [#]	0.023
Body spray (LL)	3.8468	0.503	-0.212	0.399	-0.125	0.308	0.001
Shampoo (LL)	3.8378	-	-	-	-	-0.172	0.241
Skin care (LL)	3.7778	-	-	-	-	-0.188	-0.028
Razor (LL)	3.7029	0.118	0.913 [*]	-0.069	0.203	0.124	0.225
Vinegar (LL)	3.6765	-0.070	-	-0.125	-	0.199	-
Ibuprofen (LL)	3.6707	0.697	0.519	-	-	0.697	0.518
Cheese (LL)	3.5632	-0.884 [*]	-	-0.546 [‡]	-0.161	-0.444 [#]	0.208
Drink (LL)	3.4727	-0.434	-0.416	0.323	0.316	0.455 [*]	0.394 [#]
Vinegar (CT)	3.4493	-	-	-	-	0.297 [‡]	0.349 [#]
Razor (CT)	3.4104	-0.863 [#]	-0.263	-0.311	0.018	-0.311	-0.018
Cheese (CT)	3.2273	-	-	-	-	0.27	0.45 ^{\$}
Wash Up liqd (LL)	3.2235	-0.203	-	-0.201	-	-0.104	-
Shampoo (CT)	3.1862	-0.894 [*]	-0.642	-0.675 [*]	-0.542 [‡]	-0.333	-0.296
Wash Up liqd (CT)	3.1765	-0.367	-0.001	-0.13	0.084	-0.077	0.078
Ibuprofen (CT)	3.0886	-0.49	0.578	-0.067	0.058	0.187	0.305
Shave gel (LL)	3.0857	-0.703	-0.91 [*]	-	-	-0.703	-0.91 [*]
Body wash (CT)	3.0789	-0.121	-0.621	0.331	0.268	-0.331	-0.268
Body spray (CT)	3.0331	0.707	0.658	-0.186	0.053	-0.039	0.049
Body wash (LL)	2.9737	-0.813 [#]	-0.119	-0.421	-0.278	-0.092	-0.012
Skin care (CT)	2.9720	-	-	-	-	-0.255	-0.151
Butter (CT)	2.8788	0.254	-0.434	-0.083	-0.363	-0.144	-0.017
Drink (CT)	2.8570	0.640	0.511	-0.014	0.032	-0.212	-0.270
Shave gel (CT)	2.6377	-0.233	-0.587	-0.284	-0.174	-0.179	-0.190

‡ → p < 0.1 ; # → p < 0.05 ; * → p < 0.02 ; \$ → p < 0.01

Summary of results: If H_5 is proven it would be expected that there would be the most negative associations towards the top of the table. Considering the eight products with the highest perceived origin (those with a score of 3.5 or over) then of 32 measured Pearson correlations there were 3 negative associations (9.3%) and 2 positive associations (6.25%). If this is contrasted with the five product with the lowest perceived origin (those with a score of under 3) then of 26 measured correlations there were 3 negative associations (11.5%) and 1 positive association (3.8%). For completeness, in the middle region (a score greater than 3.0 but less than 3.5) there were eleven products. In relation to those products there were 53 measured correlations of which 7 were negative associations (13.2%) and 7 were positive associations (13.2%). These figures show that there were proportionally more negative

associations amongst the five products with the least perceived common origin (<3.0) than there were in the eight products with the highest perceived common origin (>3.5). However, proportionally there were more still in the middle region between the two.

8.6.3 Analysis of the similarity of packaging and common origin

When the correlations are re-arranged so as to represent consumer's perception of package similarity and common origin the data suggests away from packaging similarity being associated with negative correlations. Where the packaging was most similar there were no negative associations and although there were proportionally more negative associations in the "upper-mid" region than the "lower-mid" or "lower region" this appears to be masking how the data is actually spread. In the lower-mid region there are no further negative associations in the four most similar packaged products (those four products immediately below the upper-mid region), but there are three positive associations. The negative associations found in the lower-mid region are actually all in the four products closest to the lower region. Further, there were proportionally more negative associations in the lower region than the lower-mid region. The results in relation to the perceived common origin similarly demonstrate an unclear picture. This means that no clear pattern emerges whereby as packaging (or perceived origin) becomes closer to the brand leader the number of negative associations increases. The lack of such a relationship may be the result of numerous other factors masking the association caused by packaging or it may be that no such relationship exists.

8.7 Conclusions on Hypotheses H₁ to H₃

If a lookalike effect was to be evidenced from the sales data then H1, H2 and H3 would have been demonstrated by the data. When the comparisons were made between the lookalikes and controls there were more negative associations for lookalikes than controls. There was however less than a 5% difference across all data and so it might be reasonable to put this distinction down to chance rather than the slightly more similar packaging. Further, when the relative similarity of the packaging was considered, the pattern of negative associations did not tend to be at the highest level of similarity (and this was more pronounced with perceived origin).

If the launch of an own brand, whether lookalike or control, was causing substitution of sales it would be expected that there would be more negative associations within supermarkets than across the whole market (as the sales of the new own brand would take place in that supermarket). However, this pattern was not demonstrated as most negative associations were across the whole market. Further, there were positive associations in some product categories and this is contrary to all the hypotheses and so makes the picture more unclear.

Nevertheless, in some product categories there is an association between an increase in sales of an own brand (both control and lookalike) and a decrease in sales of a brand leader. It is possible that association is caused by a number of factors, one of which is the similarity of packaging. Conversely, the wide number of factors affecting sales means that an association between the similarity of packaging and the sales might be masked by these other factors.

Summary Points Chapter 8

SP 8.1: Are sales affected by launch of own brand / lookalike.

- Following the launch of lookalike there was generally a drop in annual sales of brand leader;
- Following the launch of control there was generally an increase in annual sales of brand leader.

SP 8.2: Correlations – Lookalikes and Control.

- In some product categories there is negative association between the sales of the control and lookalike and the brand leader;
- However, in other product categories there is positive association between the sales of the control and lookalike and the brand leader;
- In a substantial majority of product categories there are no significant correlations found at all;

However, masking of data limits conclusions which be drawn on associations. A number of factors may underlie this, one of which is the packaging.

SP 8.3: Correlation – Relative similarity in packaging.

Similarity in packaging – conclusions unclear:

- There are more negative associations where own brand is slightly similar to brand leader than where most similar, slightly dissimilar, or very dissimilar;
- More negative associations where own brand is very dissimilar than where it is slightly dissimilar;

Accordingly, no clear pattern emerges demonstrating that negative associations increase as the packaging becomes more similar.

SP 8.4: Packaging and Common Origin.

- There are fewer negative associations where the perceived origin of the own brand is closer to the brand leader than when the perceived origin is further away;
 - No clear pattern emerges demonstrating that negative associations increase as consumers increasing perceive an own brand shares a common origin with the brand leader.
-

SP 8.5 Conclusions on H1 to H3.

On the current data the following can be stated:

- H_1 A brand leader's volume (value) sales will decline when any own brand enters the market (**NOT PROVEN**);
- H_2 The decline will be greater in the supermarket selling the own brand than across the whole market (**NOT PROVEN**); and
- H_3 This decline will be greater when the product is a lookalike than when it is a dissimilar own brand (**NOT PROVEN**).

The quality of the data is such that it is not possible to say that H_1 to H_3 are not true, merely that the current data does not prove them.

“**negative association**” means, unless the context otherwise suggests, that there is significant negative correlation which suggests an association between an increase in sales of the own brand (lookalike or control as the case may be) and a decrease in the sales of the brand leader.

“**positive association**” means, unless context otherwise suggests, that there is a significant positive correlation which suggests an association between an increase in sales of the own brand (lookalike or control) and an *increase* in the sales of the brand leader.

Part 3: Going Forward – Legal and Business Landscape

Chapter 9: The Impact of Lookalikes

9.1 Introduction

This chapter brings together the literature from Part 1 and the research described in Part 2 and addresses the central questions of the research.

9.2 Is there a lookalike effect?

There have been a number of published surveys, and a vast number of unpublished ones, which make it clear that consumers make mistaken purchases. The literature also indicates that the cause of these mistakes is often packaging, but other factors, such as shelf position, are also reported. The literature generally does not examine or clarify whether the common perceived origin relates to the packaging itself or relates to beliefs about the origin of own brand products more generally.¹

Some of the recent studies have indicated that consumers are more likely to buy own brand products where they look more like the branded product.² The existing literature also reports that consumers generally believe manufacturer brands to be “better” than own brand.³ Accordingly, this might suggest that lookalikes are also perceived to be “better” the more closely they resemble the brand. To date, of the surveys considered in the present research only, the Consumer Association has tried to equate similarity with quality.⁴ That said, even that study does not examine what the term “quality” meant to the consumers.

1 This might be called the Marmite problem – where consumers believed all yeast extracts were made by the same company and the packaging makes no difference: see *Beecham Group v J Sainsbury plc* (unreported) 6th April 1987, Whitford J (also see discussion in Annex IV).

2 Paragraphs [5.3.7] and [5.3.8].

3 Paragraph [5.2.1].

4 Paragraph [5.3.5]; using behavioural experiment Jean-Noel Kapfere, in “Stealing Brand Equity: Measuring Perceptual Confusion between National Brands and ‘Copycat’ Own-label Products” (May 1995) *Marketing and Research Today* 96, was able to conclude that “when the copy and the original are presented side by side...the consumers judge the copy similar or equivalent to the original...The exterior resemblance of the products side by side is a source of inferences on the internal equivalence of the products and their performance” (at 102). As he acknowledged this experiment was on a side by side comparison basis which is not usually how consumers make the comparison.

The present research addressed a subtle question, namely, whether the relative similarity in packaging of one own brand to a manufacturer brand to another own brand was related to respondents' perceptions of various quality characteristics, including perceived origin.

At the outset, it should be made clear that the consumers did not view any of the twelve manufacturer branded products selected for the study as having a particularly strong own brand lookalike.⁵ This might suggest the research team made a poor choice of samples; however most, although not all, of the samples were products which were put forward as good examples of "lookalike" by the manufacturers themselves (through the British Brands Group (BBG) in its 2010 Study). It is therefore fair to assume that the results are representative of consumer perceptions of the product packaging perceived by manufacturers as problematic.

Despite the absence of any samples being standout lookalikes, the research found from the individual comparison graphs that there was a statistically significant lookalike effect for some, but not all, product categories.⁶ When this was plotted on a scatter chart it appears across all product categories that there is a small but statistically significant lookalike effect.

This means that, as product packaging becomes closer to the manufacturer branded product, there are higher consumer expectations of product features, namely, price, quality, fitness for intended purpose, and (marginally) value for money.

It was also found that there is a statistically significant lookalike effect on common origin. Consequently, the closer the two sets of packaging are to each other, the more likely it is that consumers believe the products have the same origin.⁷

It was also found that the lookalike effects were more likely to be measured in relation to non-users. This is consistent with the research team's finding that previous experience is most important factor in making purchasing decisions.⁸ This could mean that the lookalike effect is most significant when a lookalike enters a mark. Further, that being a consumer of the product category (e.g., shaving gel) tends to weaken the beneficial effect on an own brand of looking more like the manufacturer brand than does another own brand and so the lookalike effect is lower in relation to the person most likely to buy the product.

Finding 1: Is there a lookalike effect?

There is a small, but statistically significant, lookalike effect leading consumers to believe that similar-looking products have similar product characteristics, and similar origin. The effect is greater, however, in those consumers who do not use products within a particular product category (and so the effect is lower in relation to the persons most likely to buy the product). This is consistent with the existing literature which suggests consumers are confused when packaging is similar.

5 Paragraph [7.4.3].

6 See paragraph [7.4].

7 It appears that some, but not many, manufacturer brand owners do make own brand: see Chapter 6, Theme 7: Making own brand.

8 See paragraph [7.5.5].

9.3 Consumer detriment

The next issue that needs to be considered is whether consumers suffer detriment as a result of this lookalike effect. The measure of any such detriment is difficult, primarily as there are arguments over how that detriment should be gauged. Does it relate only to an individual purchase? Or can it also be extended to the loss of product choice or lack of product innovation?

The literature, and the research undertaken here, has generally considered the responses of individual consumers making purchasing decisions, rather than the broader questions as to product availability. Those broader questions will be considered, to the extent possible, within the confines of business harm.

There were some reports from manufacturer brand owners of consumer complaints they had received directly regarding lookalikes.⁹ A difficult question is whether a mistaken purchase of a product automatically creates consumer detriment. The Consumer Association¹⁰ took the view that a mistaken purchase causes detriment only if consumers were “bothered” about it. This seems to be a sensible benchmark to adopt; however, it does require the assumption that consumers have full information about the differences between the desired product and the one mistakenly purchased, which is not always the case.

9.3.1 Mistaken purchase

Much of the literature does not investigate the question of whether consumers were concerned about their mistaken purchase or not.¹¹

In the Consumer Association survey mentioned above, it appears that one in five consumers were bothered a lot by their mistake and three in ten were bothered a little.¹² The research conducted as part of this study found that across the UK, German and the US, 5-15% of accidental purchasers rated their level of disadvantage as being “very much” and 30-50% reported the next highest level of disadvantage. This presents broadly similar results to those obtained by the Consumer Association. In terms of UK consumer reports, this represents a high number of households reporting that the accidental purchase of lookalikes disadvantages them very much (1.68 million households) or somewhat (9.92 million households).¹³

Conversely, a substantial number of consumers across the three jurisdictions reported an advantage resulting from an accidental purchase. In that group, 11-22% of accidental purchasers of lookalikes considered themselves to have had the highest level of advantage from their mistake and a further 49-56% reported having the next level of advantage. In terms of the UK data, this represents a substantial number of households reporting that the accidental purchase of lookalikes advantages them very much (0.99million households) or somewhat (8.99million households).¹⁴

9 See paragraph Chapter 6, Theme 8: Consumer complaints.

10 See paragraph [5.3.5].

11 See the discussion in Chapter 5; as from a business perspective, and a legal perspective, this is not relevant.

12 See paragraph [5.3.5]; also see the earlier survey at paragraph [5.2.2].

13 See paragraph [7.5.2].

14 See paragraph [7.5.2].

This suggests that some consumers suffer detriment from the mistaken purchase whilst others find it to be a positive experience.

Finding 2: What is the consumer advantage / disadvantage from mistaken purchases?

A high number of households report that the accidental purchase of lookalikes disadvantages them very much (1.68 million) or somewhat (9.92million). Conversely, a substantial number of households reported such a purchase to advantage them very much (0.99 million) or somewhat (8.99 million). This suggests that some consumers suffer detriment from the mistaken purchase whilst others find it to be a positive experience. The research did not find out why some consumers perceived the purchase to be a good or bad experience.

9.3.2 Intentional purchases

There was nothing found in the literature reporting whether consumers who intentionally purchase a lookalike perceive themselves as suffering a detriment (e.g., a person knowingly buys an own brand product on the basis that it looks like a well-known manufacturer brand product). Again, a consumer's (possibly mistaken) beliefs about a product may have a significant influence on whether they perceive the intentional purchase as advantageous. If a consumer perceives the lookalike to be of equal (or better) quality than the manufacturer brand owner's product then they are likely to report an advantage – even if the products are not actually equivalent. Nevertheless, as with mistaken purchasers it will be assumed that the consumers have full information. Further, the research found that consumers tended to rank value for money as more important than quality¹⁵ and if a lookalike is perceived a small drop in quality for a bigger drop in price this might lead them to assume it to be advantageous.

The research found a very high number of consumers had purchased a lookalike deliberately (60-70% across the three jurisdictions) and unsurprisingly a much higher proportion of those consumers reported the experience to be advantageous (10-20% at the highest level of advantage and approximately 50% at the second highest level) than disadvantageous (2-10% at the highest level of disadvantage and 10-15% at the second highest level).¹⁶

Finding 3: Do consumers deliberately purchase lookalikes and do they gain advantage from it?

A substantial majority of consumers had deliberately purchased a lookalike and of those consumers most of them found the experience to be advantageous. The research did not find out why some consumers perceived the purchase to be advantageous.

The literature includes a number of other matters which have been investigated relating to consumer's attitudes to packaging. They generally report that packaging should look

15 See paragraph [7.5.5].

16 See paragraph [7.5.4].

different,¹⁷ although some similarity is found to be useful for signalling purposes.¹⁸ Both manufacturer brand owners and retailers accepted that some customer cues are necessary signals.¹⁹ This is because if there is a lookalike effect then it is likely to lead to some mistaken purchases and so to some detriment, but it also signals to consumers and so leads them to buy lookalikes and receive the reported advantage. The conclusion reached by the Consumer Association that there might be a fine line between useful signals and confusing packaging therefore appears apt.²⁰

Finding 4: What role does packaging play in signalling in relation to lookalike packaging?

There is a fine line between confusing packaging and using generic cues to provide useful signals to consumers.

9.4 Business harm

The potential types of business harm associated with lookalikes and discussed in the literature²¹ include: lowering innovation; wasted costs on changing packaging; sales diversion, and an adverse effect on advertising.²²

9.4.1 Innovation

The research team had no empirical evidence regarding the relationship between innovation and lookalikes. However, the literature discusses it in the wider context of own brand goods and it is reasonable to assume that similar issues are at play with lookalikes. Of course, lookalikes are not confined to own brand and they may be produced by a third party manufacturer and sold in a variety of retailers.

In the literature it is clear that manufacturer brand owners believe that own brands (rather than just lookalikes) do not undertake product innovation.²³ Similar views were expressed in the interviews undertaken by the research team.²⁴ However, this is clearly not the view of the own brand retailers themselves. The only retailer who discussed the issue with the research team supported their innovation assertion by describing a recent product where there had been own brand innovation.²⁵ It is outside the scope of this study to assess whether retailer own brands lead to innovation or not.

17 See paragraph [5.3.3], [5.3.5], [5.3.7] and [5.3.8].

18 See paragraph [5.2.3] and [5.3.5].

19 See Chapter 6, Theme 1: Concept of lookalike.

20 See paragraph [5.3.5].

21 See paragraph [3.3.2].

22 An additional issue was whether lookalikes have a greater impact on brand followers (see paragraph [3.4.4]), this was not something that could be investigated by the research team as no relevant data or literature was available.

23 See paragraph [3.3.2].

24 See Chapter 6, Theme 3: Innovation.

25 See Chapter 6, Theme 3: Innovation.

The literature includes some very limited empirical evidence suggesting that, in the food sector in Europe at least, the presence of own brand on the market does not inhibit innovation.²⁶ The evidence was too general to divide the data between distinctive own brand and lookalikes and the relative effect of each. The literature goes further, however, to suggest that own brand actually spurs innovation within the manufacturer brand owners.²⁷ There was some support from the present research that own brands, and lookalikes, necessitate innovation²⁸ as it was the only way for a manufacturer brand owner to maintain an edge. Furthermore, it is through innovation that the manufacturer brand owners can stay ahead and maintain the price differential with lookalikes. However, there may be a tipping point where the lost sale caused by lookalikes (or other competitors) is such that research can no longer be funded or commensurate.²⁹

Accordingly, the literature and the interviews provide some limited evidence to support the suggestion that lookalikes spur manufacturer brand owners to innovate (usually incremental)³⁰ as it is the best way to maintain the price differential. Such an effect, however, might disappear in markets where market share (more precisely, sales) have declined so much that the costs of research cannot be recovered. Thus, there is circumstantial evidence that if, and when, a lookalike causes a drastic fall in sales this might in turn reduce the expenditure on innovation.

Finding 5: What effect do lookalikes have on innovation?

There is some limited evidence to support the suggestion that lookalikes spur manufacturer brand owners to innovate as it is the best way to maintain the price differential. Such an effect, however, might disappear in markets where market share (more precisely, sales) have declined so much that the cost of research cannot be recovered.

9.4.2 Wasted packaging costs

The literature postulates that the existence of lookalikes might cause manufacturer brand owners to change their packaging regularly in order to distance themselves from the lookalike.³¹ This otherwise unnecessary redesign would amount to wasted costs. The literature includes two instances (Flash and Head and Shoulders) where a change in style or look of packaging of a brand leader has been followed by competitors so that the packaging in the product category remains very similar even though the brand leader has made radical changes. These changes might be indicative of two things. The first would be that lookalikes have actually caused additional redesigns to be undertaken (wasted costs). The second is that the brand leader was refreshing the design in any event and this refreshed design was then followed / copied by competitors (no wasted costs).

26 See paragraph [3.3.2].

27 See paragraph [3.3.2].

28 See Chapter 6, Theme 3: Innovation.

29 See Chapter 6, Theme 3: Innovation.

30 See paragraph [3.3.2].

31 See paragraph [3.4.2].

This issue was explored during the interviews with the brand owners. It is clear that some brands never change their packaging at all whilst others change it at regular and sometimes quite frequent intervals.³² Indeed, the packaging of more than one of the products used for the consumer survey changed between the time of its purchase for the survey and the drafting of this report.³³

However, even in those industries where there is a regular change of packaging, nobody reported that a change of packaging was caused (or brought forward) by the arrival or existence of a lookalike.³⁴ In fact, some had considered making such a change but decided against doing so.³⁵ This may be because consumers prefer packaging not to undergo regular radical changes. Nevertheless, it is clear that when a regular packaging renewal is being undertaken then the packaging of rivals, including lookalikes, would be considered.

Accordingly, it does not appear that costs were wasted³⁶ by repeated packaging redesigns caused by lookalikes; rather, any redesigns undertaken would happen in any event as part of the normal lifecycle of the product.

Finding 6: Do lookalikes lead the brand manufacturer to change its own packaging?

It does not appear that lookalike products directly cause brand manufacturers to make additional (and wasteful) changes to their packaging.

9.4.3 Sales diversion

The entry onto the market of a new lower-priced competitor of similar quality would generally be thought to divert sales away from the existing products. However, the literature on lookalikes causing lost sales is very limited indeed. This might be explained by the fact that even within the relevant industries, and where a lookalike is perceived by a manufacturer brand owner, only about a third track it at all, and of those only three-quarters track it through sales.³⁷ Nonetheless, a survey by the manufacturer brand owners' group AIM reported that a lookalike attracts an average (median) of 5-10% of market share from the manufacturer brand.³⁸ Further, on average (median) there is a 10-20% greater decline caused by the launch of a lookalike than that expected when a competitor in distinctive branding is launched (this appears to refer to both distinctive own brand and non-own brand competitors).

32 See Chapter 6, Theme 4: Packaging and investment.

33 The research team did not set out to investigate this, but coincidentally noticed that Boots Ibuprofen changed as did Clearasil Ultra.

34 See Chapter 6, Theme 4: Packaging and investment.

35 See Chapter 6, Theme 4: Packaging and investment.

36 It might be that there would be slightly more costs associated in distinguishing a product from a lookalike when a redesign occurred, but this would be too difficult to measure.

37 See paragraph [5.3.9].

38 See paragraph [5.3.9].

A further problem is that a product's sales may be affected by a wide range of factors. These include most obviously a change in the size of the market and the product's price, but similarly the running of promotions, the extent of advertising campaigns, shortages in supply reducing sales, shelf-positioning, previously good or bad experiences with a particular product and so forth, are all relevant factors. Thus, any effect on sales on a brand leader caused by the entry on the market of a lookalike might not be immediately apparent as changes in sales figures might be caused by so many different factors.

The research team addressed the issue of sales diversion in two ways. First, the team discussed the issue during the interviews and, secondly, examined certain sales figures for product trios over twelve product categories. During the interviews, there were very different responses regarding the effect lookalikes had on sales. Only one interviewee specifically reported sales being affected by the launch of a lookalike and this being worse than the launch of a distinctive own brand.³⁹ Another reported the converse, namely that sales had fallen more when a distinctive own brand had been launched than following the launch of a lookalike.⁴⁰ Others said there had been some effect on sales and one even said that there was no discernible effect on sales.⁴¹ This result is not surprising given the numerous factors at play and, at best, it provides somewhat inconclusive evidence as to sales diversion.

Finding 7: Do manufacturer brand owners report that lookalikes cause additional loss of sales over distinctive competitors?

The literature suggests that lookalike packaging causes a greater loss of sales (or market share) than distinctive competitors. However, the qualitative data from the interviews produced inconclusive results.

The second aspect of this research examined the volume sales data of trios of products (brand leader, lookalike and control) over twelve product categories. The mean sales of the brand leader did appear to take a dip, and sometimes a drastic dive, following the launch of a lookalike product in most (although not all) product categories.⁴² However, in relation to the control it appears that following the launch of the product the brand leader gained sales, sometimes substantially. This pattern suggests strongly that other factors, other than packaging, may well have been at work. This becomes more evident when a more precise measure of the association between the own brand (control and lookalike) was correlated with the brand leader.

It was expected that there would be a correlation between the own brand / lookalike volume sales going up and the brand leader's going down. In some product categories, such a correlation was found and it is possible that this is caused by the similarity of the packaging (the lookalike effect at work).⁴³ However, in over 80% of cases there was no correlation between the sales of the brand leader and the lookalike. Further, in a little over 6% of cases the pattern was the converse and the sales of the lookalike and brand leader both went up.⁴⁴

39 See Chapter 6, Theme 5: Sales.

40 See Chapter 6, Theme 5: Sales.

41 See Chapter 6, Theme 5: Sales.

42 See paragraph [8.4]

43 See paragraph [8.3].

44 See paragraph [8.5.6].

When the relative similarity of the packaging (based on the consumer survey) was taken into account it was expected that there would be substantially more significant correlations where the packaging was considered similar by consumers. But this result was not found. Indeed, there were actually fewer significant correlations where consumers perceived the own brand and brand leading product to have a common origin than when they did not.⁴⁵

The variety of factors mentioned above could well be masking the effect of the lookalike packaging on brand leader sales or it may be that its effect is negligible.

Finding 8: Do sales figures show that lookalikes causes additional loss of sales over distinctive competitors?

In a very limited number of product categories, an association was found between a reduction in the sales of the brand leader and an increase in the sales of the lookalike. This could have been caused by numerous different factors, one of which is the similarity of the packaging (the lookalike effect at work). Such associations did not appear to relate to consumers' relative perception of packaging similarity or common production origin and also did not generally appear to exist within the particular supermarket selling the own brand. The evidence is inadequate to determine whether lookalike packaging generally diverts sales or if the effect of that packaging is negligible.

9.4.4 Advertising

The literature on advertising and lookalikes is limited, but it does tend to suggest that advertising is effective at drawing away trade from non-retailer rivals, but is less effective against own brand.⁴⁶ Nevertheless, it was postulated by the research team that, in order to retain market share against lookalikes, manufacturer brand owners would have to spend more money on advertising than would be the case from own brand alone. If this was proved it would represent a cost on, and so harm to, manufacturer brand owners.

It was only possible to examine this issue within the scope of the interviews conducted with manufacturer brand owners. In those discussions, it was explained that generally it was advantageous for retailers to delay the launch of own brands until the bulk of the advertising spend had been completed, as manufacturer brand owners' advertising caused growth in the own brand market as well.⁴⁷ The responses of manufacturer brand owners to own brands once launched seem to vary between spending more, making no change in spending at all, and cutting all spending.⁴⁸ Future research could be undertaken to measure advertising spend using media monitoring services to see whether advertising by manufacturer brand owners increases or decreases following the launch of a lookalike. However, based on the interviews no meaningful conclusions can be drawn as to the effect on advertising spend when a lookalike enters the market.

45 See paragraph [8.6.3].

46 See paragraph [3.4.5].

47 See Chapter 6, Theme 6: Advertising spend and promotions.

48 See Chapter 6, Theme 6: Advertising spend and promotions.

Findings 9: Do lookalikes affect advertising spend?

There are differing responses by manufacturer brand owners when a lookalike enters the market. Accordingly, no meaningful conclusions can be drawn as to the effect on advertising spend when a lookalike enters the market.

Chapter 9 Findings

Finding 1 – Is there a lookalike effect?

There is a small, but statistically significant, lookalike effect leading consumers to believe that similar-looking products have similar product characteristics, and similar origin. The effect is greater, however, in those consumers who do not use products within a particular product category (and so the effect is lower in relation to the persons most likely to buy the product). This is consistent with the existing literature which suggests consumers are confused when packaging is similar.

Finding 2 - What is the consumer advantage / disadvantage from mistaken purchases?

A high number of households report that the accidental purchase of lookalikes disadvantages them very much (1.68 million) or somewhat (9.92million). Conversely, a substantial number of households reported such a purchase to advantage them very much (0.99 million) or somewhat (8.99 million). This suggests that some consumers suffer detriment from the mistaken purchase whilst others find it to be a positive experience. The research did not find out why some consumers perceived the purchase to be a good or bad experience.

Finding 3 - Do consumers deliberately purchase lookalikes and do they gain advantage from it?

A substantial majority of consumers had deliberately purchased a lookalike and of those consumers most of them found the experience to advantageous. The research did not find out why some consumers perceived the purchase to be advantageous.

Finding 4 - What role does packaging play in signalling in relation to lookalike packaging?

There is a fine line between confusing packaging and using generic cues to provide useful signals to consumers.

Finding 5 - What effect do lookalikes have on innovation?

There is some limited evidence to support the suggestion that lookalikes spur manufacturer brand owners to innovate as it is the best way to maintain the price differential. Such an effect, however, might disappear in markets where market share (more precisely, sales) have declined so much that the cost of research cannot be recovered.

Finding 6 - Do lookalikes lead the brand manufacturer to change its own packaging?

It does not appear that lookalike products directly cause brand manufacturers to make additional (and wasteful) changes to their packaging.

Finding 7 - Do manufacturer brand owners report that lookalikes causes additional loss of sales over distinctive competitors?

The literature suggests that lookalike packaging causes a greater loss of sales (or market share) than distinctive competitors. However, in interviews with the research team only one of the manufacturer brand owners reported this finding; the others gave a mixed picture.

Finding 8 - Do lookalikes causes additional loss of sales over distinctive competitors?

In a very limited number of product categories, an association was found between a reduction in the sales of the brand leader and an increase in the sales of the lookalike. This could have been caused by numerous different factors, one of which is the similarity of the packaging (the lookalike effect at work). Such associations did not appear to relate to consumers' relative perception of packaging similarity or common production origin and also did not generally appear to exist within the particular supermarket selling the own brand. The evidence is inadequate to determine whether lookalike packaging generally diverts sales or if the effect of that packaging is negligible.

Finding 9 - Do lookalikes affect advertising spend?

There are differing responses by manufacturer brand owners when a lookalike enters the market. Accordingly, no meaningful conclusions can be drawn as to the effect on advertising spend when a lookalike enters the market.

Chapter 10: Legislative Policy

10.1 Introduction

The purpose of this chapter is to draw conclusions as to the legal aspects of the research which was set out in Part 1 and the Annexes. It addresses the following whether any of the three target jurisdictions provide a satisfactory lookalike law, provides a possible statutory description of a lookalike and analyses the UK's freedom to legislate in the realm and the potential for other possible solutions.

10.2 Lookalikes under the law as it stands in UK, Germany and the United States

It appears that under the law of passing off in the UK, most claimants in “lookalike” cases do not fare very well. Of the ten lookalike cases considered,¹ the claimant was successful in only three instances and partially successful in one.² That said, the lack of success in itself does not prove anything, as the claimant might simply have brought a weak case. Further, it is apparent that the cases failed for a number of different reasons but the pivotal reason was usually because confusion could not be proved.³

The situation in Germany is commonly reported to be much more favourable than that in the UK.⁴ In particular, there appears to be greater success at obtaining interim injunctions in Germany, notwithstanding this depended on the particular judicial chamber where the case was brought.⁵ When it comes to the substantive cases between retailers and lookalikes, despite the long history of German cases based on parasitic copying, the cases do not appear to be consistent. The two decisions of the German Supreme Court (BGH) considered come to opposite conclusions – one finding the “lookalike” to be a parasitic copy and the other not.⁶ Furthermore, a procedural change made in 2011⁷ means that unfair competition cases have become more difficult to bring successfully.

1 See Annex IV.

2 *F Hoffmann-La Roche v DDSA Pharma* [1972] RPC 1; *Reckitt & Colman Products v Borden Inc* [1990] RPC 341; *United Biscuits v Burtons Biscuits* [1992] FSR 14 (partial success) and *United Biscuits v ASDA* [1997] RPC 513.

3 Cf. See Chapter 6, Theme 10: Litigating and forum selection.

4 See Chapter 6, Theme 10: Litigating and forum selection.

5 See paragraph [2.3].

6 See Annex IV.

7 See the BGH decision of *TUV* (2011) GRUR-Prax 228; also see paragraph [2.3] and Annex II.

Similarly, in the United States there is not a consistent approach to trade dress infringement where the infringing product is a lookalike being sold by a retailer.⁸ The issue usually remains whether or not the trade dress is such that consumers are confused.

In each of these three jurisdictions it is clear that a retailer (or another) selling a lookalike might be prevented from doing so (whether as passing off, unfair competition or trade dress infringement) but in each jurisdiction successfully bringing an action is challenging.

Point 1: Does the law of any of the three target jurisdictions clearly prevent lookalikes?

In none of the three jurisdictions examined - the UK, Germany and the United States – is the legal position of lookalikes sufficiently clear. Nevertheless, at the interim stage, there is a perception that a claimant is more likely to be successful in the favourable German forum than in either of the other two countries.

10.3 Legal definition

The sorts of packaging features which make a product a lookalike were generally agreed and supported by the research – colour, wording, logos, iconography, layout, shape and composition of packaging.⁹ This largely fits with the previous attempts to legislate in this field.¹⁰ In the interviews it was emphasised that certain cues are generic. Such cues would be things which are “descriptive”, “functional,” or “commonplace”.¹¹ In trade mark law, where something has become generic it is for the person asserting that fact to prove the matter in a revocation action.¹² Accordingly, whether the definition of a lookalike excludes the generic elements (leaving it to the claimant to prove that it is not generic) or it forms a defence to a claim (leaving it to the defendant to prove it has become generic) is a matter of policy.

Furthermore, a strong view came across in the interviews that a lookalike is something that you will know when you see it,¹³ sometimes called an “elephant test.” However, such tests are generally not appropriate in assessing intellectual property infringement.¹⁴ Nevertheless, if a statutory definition were required the following definition reflects the evidence collected (adopting the approach of requiring the claimant to prove the packaging has not become generic).

8 See Annex II, paragraph [II.5.3].

9 See Chapter 6, Theme 1: Concept of lookalike.

10 See Annex I, paragraph [I.2.1].

11 See Chapter 6, Theme 1: Concept of lookalike and generally Annex I.

12 Trade Marks Act 1994, s. 46.

13 See Chapter 6, Theme 1: Concept of lookalike.

14 See *Lucasfilm v Ainsworthy* [2009] EWCA Civ 1328, [77] and the criticisms of such an approach by the Supreme Court, *Lucasfilm v Ainsworthy* [2011] UKSC 39, [47] (assessing copyright infringement by knowing it when you see it).

Point 2: If a statutory definition of a lookalike were required what might it be?

Lookalikes can be appropriately described as “goods which by virtue of their name, shape, colour, packaging or labelling or any combination thereof, are similar in overall appearance to the goods; but excluding any of those things where they are descriptive, functional or commonplace.”

10.4 Unfair advantage

Irrespective of business harm, it might be the case that lookalikes give own brand an “unfair advantage”; something which should be prevented on policy, rather than economic, grounds (i.e. it cannot be prove by empirical evidence as such). This terminology largely comes from trade mark law.

It was this advantage, or alternatively the “appropriation” of consumer insights (research), which some of the manufacturer brand owners thought justified the creation of a right to prevent lookalikes.¹⁵ It was emphasised that the investment in research could take as long as two to three years to recover. Intellectual property rights, in particular patents, are based on the premise that it takes time to recover research and development costs.¹⁶

If there is value in packaging and it is worth encouraging packaging innovation then a law preventing lookalikes would fit within the intellectual property paradigm. The assessment of whether the advantage of being a lookalike is “unfair” is a policy decision.

Point 3: Other than specific business harm, what other reasons do manufacturer brand owners put forward for lookalikes to be prevented?

Manufacturer brand owners reported that lookalikes enabled competitors and retailers to take unfair advantage of the manufacturer brand owner’s research into consumer insights and packaging design.

10.5 Freedom to legislate

It is probable that the prevention of lookalike is within the scope of the Unfair Commercial Practices Directive (2005/29) (UCPD) as discussed in Annex III.¹⁷ As the Directive is a maximal measure it sets the maximum and minimum level of protection which Member States can provide. This means that Member States would be precluded¹⁸ from enacting any measure to prevent lookalikes where it went further than the UCPD (i.e. prevented the sale of a lookalike which is not contrary to the UCPD).

15 See Chapter 6, Theme 1: Concept of lookalike.

16 See Ashley Roughton, Phillip Johnson and Trevor Cook, *The Modern Law of Patents* (2nd Ed, Lexisnexis 2010), Appendix B for a summary of these theories.

17 Save business-to-business selling of lookalike products such as between (non-brand) manufacturers and whole-sellers.

18 The European Union would of course be free to enact legislation which goes beyond the UCPD.

Furthermore and significantly, it would mean that some lookalikes are already unlawful in the United Kingdom as they are contrary to the Consumer Protection from Unfair Trading Regulations 2008. Therefore, under European Union law, the only lookalikes which can be prohibited are already prohibited in the UK. However, certain lookalikes already being unlawful under the 2008 Regulations is of little significance if trading standards (or others) do not have the resources to take action against those breaching the Regulations.

Point 4: What freedom does the United Kingdom have to legislate in this field?

It is probable that the prevention of certain lookalike is within the scope of the Unfair Commercial Practices Directive (2005/29/EC). If this is the case then the United Kingdom may not be free to legislate to further prevent lookalikes save in business-to-business transactions. However, it would mean that certain lookalikes are unlawful under the Consumer Protection from Unfair Trading Regulations 2008.

10.6 Private enforcement

The UCPD leaves it up to Member States to determine how they would like to enforce the Directive. It merely suggests the certain sorts of organisations which might have the right to bring an action, and this includes consumer groups and competitors.¹⁹ In relation to lookalikes, the British Brands Group, amongst others, has advocated very strongly for there to be private enforcement of the Consumer Protection from Trading Regulations 2008.²⁰ However, the UK did not include a private right of action when the UCPD was originally implemented, as it might have “unintended and adverse consequences, by potentially providing consumers with undesirable latitude to sue traders and by impacting on the law of misrepresentations.”²¹

The Law Commission gave preliminary advice in 2008 agreeing that private redress would present great uncertainty²² and it followed this with a consultation in 2011.²³ In its report, published in 2012, it concluded that there should be a limited private right of action for consumers for some, but not all breaches of the UCPD (importantly it used “bait and switch” - an extreme form of lookalikes – as a example of a problem area).²⁴

In total 22 Member States have provided for some form of private right of action, they are: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden.²⁵ The implementation in Ireland, with its very similar legal system, is particular relevant to the UK. In Ireland, the Directive was implemented

19 Directive 2005/29/EC, article 11.

20 See for example, John Noble “Time to Stop the Copycats” (2007) *Managing Intellectual Property* 31, 33.

21 Response to the Consultation Paper on implementing the Unfair Commercial Practices Directive (December 2006).

22 Law Commission, *A Private Right of Redress for Unfair Commercial Practices?* (London 2008).

23 Law Commission, *Consumer Redress For Misleading And Aggressive Practices* (Consultation Paper No 199 (Scots No. 149)).

24 Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (2012) (Cmd 8323), [4.40 to 4.61], Recommendation 4.

25 This list is based on the results reported in Appendix 5 of the Hogan Lovell Report.

by the Consumer Protection Act 2007²⁶ which provides that any person may apply to the court to have an order to prohibit another person from continuing or engaging in acts which would be contrary to the Act (the Directive).²⁷ Put simply, there is no right of damages, but there is a right to an injunction. This greatly limits the number of private actions which are likely to be brought, but is likely to meet the concerns of manufacturer brand owners.

The concerns expressed during the implementation in the UK and recently by the Law Commission do not appear to have occurred in Ireland where there have only been two reported cases relying on the Consumer Protection Act 2007 and only one of those relating to lookalikes²⁸ albeit the injunction was granted only on the grounds of passing off.²⁹ Further, following enquires with the Irish National Consumer Agency³⁰ it appears that only one further case³¹ (still pending and not related to lookalikes) has been started using this private right of action.³² Therefore, a total of three cases have been started before the courts since 1st May 2007.³³ This does not mean, however, that the private right of action is not a useful tool that has been used during the commercial resolution disputes without the need to start legal proceedings; further research into this issue would be useful.

Point 5: What legislative proposals might the United Kingdom consider?

A properly constituted private right of action under the 2008 Regulations would neither make conduct unlawful which was not already so nor, based on the Irish example, would it open the floodgates.

26 No 19 of 2007.

27 Section 71; there are certain notice requirements on the Agency so that they must have an opportunity of being involved in the proceedings.

28 *McCambridge Limited v. Joseph Brennan Bakeries* [2011] IEHC 433; the other case is *Tesco Ireland Ltd -v- Dunnes Stores* [2009] IEHC 569 (a misleading advertising case).

29 *McCambridge Limited v. Joseph Brennan Bakeries* [2011] IEHC 433 upheld on appeal (in relation to passing off) [2012] IESC 46.

30 There is a statutory obligation to give notice to the National Consumer Agency when any application is made: Consumer Protection Act 2007, s. 71(3). Accordingly, unless that obligation has not being met by parties, the Agency will have knowledge of all such cases commenced (whether or not they subsequently settle or are otherwise resolved).

31 *Flogas v Morgan Fuels Ltd* (still pending).

32 Research Team's Correspondence with Freedom of Information Officer at National Consumer Agency (12th December 2012).

33 When the 2007 Act came into force: Consumer Protection Act 2007 (Commencement) Order 2007 (S.I. No. 178/2007).



Postscript

P.1 Introduction

The nature of research is that it usually raises more questions than it answers. It was therefore considered useful to set out some ideas for future research if, and when, the relevant resources become available.

P.2 Interviews

P.2.1 Retailer and third party manufacturer engagement

The interviews reported in Chapter 6 enabled a number of themes to be explored. These largely reflected the view of the major manufacturer brand owners. The retailers, with some limited exceptions, did not take advantage of the opportunity to explain the other side of the relationship. Some manufacturer brand owners presented what they perceived to be the retailers' views, but this is obviously not as valuable as the real thing. Further, as was made clear by the retailer who was interviewed, many of the packaging decisions are effectively made by third-party manufacturers.¹ A discussion with some of these third-party manufacturers would enable the circle to be completed.

P.2.2 Interviews in Ireland

A number of the manufacturer brand owners reported that a private right of action under the Unfair Commercial Practises Directive (2005/29) (UCPD) might make a significant difference in addressing their concerns with lookalikes.² By way of comparison, in Ireland there is a private right of action under the Consumer Protection Act 2007, the Irish implementation of the UCPD, but over five years since commencement there have been only three cases issued (and two judgments given).³ The manufacturer brands in the Irish market are largely the same as the United Kingdom. Furthermore, many, but not all, of the United Kingdom retailers operate in the Irish market (in particular, Tesco, Aldi, Lidl and Iceland). Therefore, it would be useful to interview Irish manufacturer brand owners, retailers and others to see what effect the 2007 Act, and the private right of action, has had in the lookalikes field.

1 See Theme 4: Packaging and investment.

2 See Theme 12: Current legal framework and proposals for law reform.

3 See paragraph [10.6].

P.3 Consumer research

The consumer research reported in Chapter 7 presented some findings as to consumer advantage and disadvantage from the mistaken and deliberate purchase of lookalikes. Further consumer research could explore why consumers perceive themselves to be disadvantaged or advantaged (as the case may be) by the lookalike purchases they made and whether these perceptions affect subsequent purchasing behaviour.

P.4 Business harm

The sales data examined in Chapter 8 did not present a clear picture. It is plausible that this was because volume sales are affected by too many variables and so it was not possible to isolate the effect, if any, of similar packaging. It may be that addressing this aspect on a micro rather than macro level would resolve some of the issues presented. An ideal experiment might involve examining the sales of a brand leader in a small number of individual branches of retailers (in different socio-economic and regional areas) before the launch of the lookalike packaging (and a control distinctive own brand product) and then examining the sales of the brand leader and the lookalike after launch.

Simple visits to different branches of the major retailers demonstrate the different stock held: sometimes only a brand leader is held; sometimes brand leader and own brand; and sometimes a range of brands, including own brand. This variation is most evident between the superstores and the local convenience store branches. It would be important to ensure that the stores selected were comparable in terms of the type of consumer they attract (single basket versus trolley for instance) and that they hold the same sort of stock.

Such a study would be difficult with Kantar style data, which presents a good picture of the overall marketplace, but for such a study would have too small a sample size. Therefore, it would require EPOS scanner data from a series of individual retailers so as to examine the movement in sales. It was not possible, despite requests from the IPO and the research team, to obtain global scanner data from the retailers or the manufacturer brand owners for the present research. This was largely related to the commercially-sensitive nature of the scanner information. Accordingly, it should be anticipated that it may be equally difficult (if not more so) for this data to be provided in relation to an individual store.

In addition to this scanner data, it would also be necessary to know exactly when the packaging changed in a particular store. As discussed in Chapter 8,⁴ barcodes do not usually change with a change in packaging. This means that information about the change of packaging would need to be sought from the brand leader and the retailer respectively (as it cannot be obtained from the raw sales figures themselves). Further, the packaging is sometimes trialled or rolled out nationwide over a period of weeks. Therefore, it would be necessary to know when the packaging changed for the sample stores. This is information that is probably available to the brand owners or retailers, but might not be information which is routinely monitored.

4 See paragraph [8.2.7].

The narrow scope of the research means that price fluctuations and planograms could be considered to minimise the number of variations other than packaging.

P.5 Conclusion

The research has addressed the question of lookalikes and in so doing presented new findings. The future research proposed in this Postscript would further enhance our understanding of the issues. Yet, as before, the insights from such research may present further and more interesting questions. This is because as the consumer market evolves so does the consumer. Therefore, the issues raised by lookalikes are likely to be as dynamic as the market itself.



Annex I: “Lookalike” – An Etymology

I.1 Ambiguity and Accepted Terminology

This report has devised its own working definition of a lookalike. However, one of the most pronounced problems in the lookalike debate is the determination of when a product is a lookalike and when it is acceptably similar. Many of the studies into lookalikes as well as discussions of the topic are problematic in that there is no agreed definition of when a product is a lookalike and when it is not.

Lookalikes and Intellectual Property Rights: In relation to intellectual property rights, the term lookalike is sometimes used to cover things which are trade mark, design or copyright infringements. Therefore, in this context, the issue of lookalikes is substantially one of enforcement of intellectual property rights (whether this is a problem with evidence, cost or commercial difficulty).

Lookalikes and Perceived Business Harm: Distinct from intellectual property rights, the term lookalike could also be used to cover activities which do not amount to infringement of intellectual property rights or come within the scope of unfair competition laws. Nevertheless, such practices may be perceived as problematic by brand owners.¹ In the latter instance the issue is one of substantive law that can be remedied only by creating a new legal right.

Lookalikes – A Narrow Perspective: This ambiguity in the meaning of lookalike is aptly demonstrated by a description in *The Times*:²

“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.”

If something is virtually identical (at least in legal terms) then it represents something which is likely to be a counterfeit product (or some other form of intellectual property infringement) and so represents a very narrow view of lookalikes.

Lookalikes – A Broader Approach: At the other extreme is the definition of a lookalike (or parasitic copying) used by AIM:

“Parasitic copying 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 itself are closely imitated.”³

1 Including both manufacturing brands and own brand.

2 ‘Brand of Logic’, *The Times*, 20 April 1994.

3 AIM Position Paper: (AIM Trade Mark Committee, January 2010), 3.

This definition is very wide indeed, and presents as many questions as it answers. How many marketing properties need to be copied? What is meant by concept and style? And how close does something need to be to be an imitation? Despite the problematic nature of this definition, the mischief is clear in that it suggests that a lookalike is something which is misleading the consumer into believing that the product has the same quality, source of innovation and the same set of values as the brand.⁴

1.2 Lookalikes – Approaches to a Legal Definition

In the context of the present report, it is useful to consider some of the attempts to create a legal definition for lookalikes.

1.2.1 Trade Marks Bill (1994)

The first attempt at a statutory definition was during the passage of Bill that was to become the Trade Marks Act 1994. Whilst the Bill was being considered by the Public Bills Committee of the House of Lords, an amendment was tabled to what became section 10 of the Trade Marks Act 1994 so as to include the following additional act of infringement:⁵

() A person infringes a registered trade mark if in the course of trade he sells or offers for sale goods which by virtue of their name, shape, colour, packaging or labelling or any combination thereof, are similar in overall appearance to the goods covered by the trade mark and in respect of which the trade mark is used by or with the permission of the trade mark proprietor thereof and such sale or offer for sale without due cause takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the trade mark.

This amendment was rejected by the Government on two grounds. The first was that it went beyond the scope of what was permitted by the Directive⁶ (as the acts of infringement are set out in Article 5) and, secondly, the Government found it hard to accept that a person could be sued for trade mark infringement without actually using the registered mark at all.⁷ Accordingly, the amendment was withdrawn.⁸ When the Bill returned from the Committee for Report a new clause was proposed to address lookalikes in a different way:⁹

Unfair competition: Article 10 bis.

—(1) Where any goods of the proprietor of a trade mark bearing the trade mark are associated in the course of trade with any label, packaging or container having an overall appearance of a distinctive character it shall be an act of unfair competition actionable as

4 Ibid.

5 See Public Bill Committee, *Trade Marks Bill*, Second Sitting, 18th January 1994, col 26 (Amendment 25 moved by Lord Reay).

6 Directive 89/104/EEC now Directive 2008/95/EC.

7 Lord Strathclyde, Public Bill Committee, *Trade Marks Bill*, Second Sitting, 18th January 1994, col 31-33.

8 Ibid, col 33.

9 HL Deb, 24th February 1994, Vol 552, col 749 (Amendment 34 moved by Lord Reay).

such for any person in the course of trade to supply or offer to supply any such goods with or in any label packaging or container which is similar in overall appearance, whether by reason of name, shape, colour, design or any combination thereof or otherwise, to the overall appearance of that of the proprietor's goods if the use of the label, packaging or container either:

(a) is likely to cause confusion, which includes a likelihood of association with the proprietor or the proprietor's goods; or

(b) without due cause takes unfair advantage of, or detrimental to, the distinctive character or repute of the appearance of the proprietor's goods or trade mark.

(2) In an action for unfair competition under this section all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff (in Scotland, pursuer) as is available in respect of infringement of a registered trade mark or other property right.

This amendment was also rejected on the basis that the government did not think it fell within the scope¹⁰ of the Trade Marks Bill. Concerns were raised regarding the quality of the drafting of the proposed clause. However, the biggest issue appears to have been over the desirability or otherwise of having a general unfair competition law, something the government would not introduce without discussing it first with industry generally.¹¹ Again, the amendment was withdrawn.¹² The issue of lookalikes was raised once more in the House of Commons during the passing of that Bill, but no further drafting was proposed.¹³

1.2.2 Copyright and Trade Marks Bill (2000)

In 2000, the Copyright and Trade Marks Bill (a Private Members Bill) was proposed which would, amongst other things, have prevented lookalikes. Clause 3 read:

Duty not to imitate features of goods or services

3. (1) A person ("A") shall not, in relation to any goods or services, use any features of packaging, marking, labelling or decoration in such a way that the public is likely to attribute to A's goods or services the reputation of another person ("B") or the qualities or reputation of B's goods or services.

(2) For the purposes of subsection (1) it is immaterial whether there is any similarity between the goods or services of A and those of B.

(3) Subsection (1) shall not apply to features of packaging, marking, labelling or decoration that are commonplace.

10 As to scope see, Erskine May, *Parliamentary Practice* (28th Ed, 2011) (Ed Malcolm Tuck), 564-5.

11 Lord Strathclyde, HL Deb, 24th February 1994, Vol 552, cols 757-759.

12 HL Deb, 24th February 1994, Vol 552, col 759.

13 It was discussed at second reading: HC Deb, 18th April 1994, vol 241, col 676-688 (an interesting debate reiterating the issue was also heard on HC Deb 24 July 2000 vol 354 cc873-80).

The Bill did not get past the second reading debate.¹⁴ Once more there were issues about the drafting. It was difficult to ascertain what would amount to a “lookalike” service and how a service could be packaged, marked, labelled or decorated. Usually references to services in this context would refer to the advertising of the services or paperwork connected to providing them.¹⁵ This draft, however, continues to be the closest representation of what manufacturer brand owners believe they would need to prevent lookalike products.

1.2.3 Institute of Grocery Distribution (1995)

The Institute of Grocery Distribution instituted a Dispute Resolution Procedure in relation to Packaging and Trade Dress. As part of the procedure it included the following:¹⁶

“For the purpose of avoiding or resolving disputes, it is accepted that a product sold in the United Kingdom should avoid using any combination of the same or similar name, colour scheme, shape, typeface, design layout or portrayed images so as to convey significant visual features which are essentially similar to those of another producer. Exceptionally, a single feature may be sufficiently significant.

However, it is recognised that similarities may justifiably occur where special features are:

1. *descriptive;*
2. *necessarily dictated by functional considerations;*
3. *already in common use in the UK amongst similar products at the time the matter is being considered; or*
4. *required to indicate the proper or safe usage/application of the products.”*

This Procedure was signed by the major retailers (except ASDA¹⁷) and has been used at least by Tesco.¹⁸ There are of course definitional issues about this phrasing including the meaning of “significant visual feature” and what amounts to “essentially similar”; however, this definition once more highlights the sort of thing that is understood by the concept of a lookalike. The Trade and Industry Committee of the House of Commons was told variously that this dispute resolution procedure was “inadequate”¹⁹ (as reported by the British Brands Group) and that it worked (as suggested by Tesco).²⁰ It is clear now however that it has not dealt with the concerns raised by manufacturer brand owners.

14 HL Deb, 17th March 2000, Vol 610, col 1885-1906.

15 See Trade Marks Act 1994, s. 10(5).

16 *Dispute Resolution Procedure in relation to Packaging and Trade Dress* (IGD 1995).

17 See Trade and Industry Committee (Eighth Report), Trade Marks, Fakes and Consumers (1998-9 Session), HC Paper 380, Ev 4 (British Brands Group).

18 Trade and Industry Committee (Eighth Report), Trade Marks, Fakes and Consumers (1998-9 Session), HC Paper 380, Ev 24 (Tesco).

19 *Ibid.*

20 *Ibid.*, Ev, 24; Tesco also suggested it had ceased to sell lookalikes.

I.2.4 DG Internal Policy

As part of a wider study on misleading packaging, the European Commission (DG Internal Policy) considered the issue of lookalikes (it called them “copycats”). The report stated that lookalike packaging “may mislead consumers into thinking that they are buying a premium brand. The design and colour of the package and images on the package are confusing. Thereby avoids investing in brand development and rides free at its rival’s expense”.²¹ The report also acknowledged that lookalike packaging might fall foul of the Unfair Commercial Practices Directive.²² Ultimately, the following definition of misleading packaging (which would include lookalikes) was presented by DG Internal Policy:²³

“A packaging practice shall be regarded as misleading if it deceives or is likely to deceive the average consumer as a result of the size of the packaging, its form or design or other important elements directly related to the packaging, including a comparison of differences between the current packaging and

(i) previous packaging, or

(ii) the packaging of competitor’s products,

and causes, or is likely to cause him to make a transactional decision which he would not otherwise have taken.”

I.3 Conclusions on definitions

This panoply of definitions makes it clear that there is no generally agreed definition, but rather an assortment of related concepts. Additionally, it is often not clear which definition is being used at a particular time. Nevertheless, it is apparent that the working definition proposed in Chapter 1 is *not* in common accord with the attempts to define lookalikes in statutes and other regulatory instruments in the past.

21 DG Internal Policy (Margaretha Lawrynowicz), *Misleading packaging practices* (Briefing Paper) IP/A/IMCO/NT/2011-19.

22 *Ibid*, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques* (Oxford 2007), 191-4.

23 *Ibid*, 59.



Annex II - Current Legal Landscape

United Kingdom

II.1 Passing off

In the United Kingdom, lookalikes are most likely to be prevented under the law of passing off. The three basic elements to be established in order to make out a claim of passing off are (i) goodwill in the get-up of goods; (ii) a misrepresentation leading the public to believe the goods supplied by one trader are those of another; and (iii) damage caused by reason of the erroneous belief.¹ State of mind is irrelevant if these elements are established² although the courts are rarely impressed with defendants who ‘sail close to the wind’.

II.1.1 Goodwill

Traders have to show³ that they have sufficient goodwill⁴ (reputation, in the strict sense, is not enough⁵) in a mark or get-up for the public to believe that they are buying a particular trader’s goods, rather than those of the person allegedly passing off. This requires there to be business conducted in the United Kingdom, that is, the sale of a significant number of goods.⁶ In short, it is necessary to show that the second trader has taken the first trader’s goodwill.

This goodwill can be reflected in the get-up of the packaging of the goods in the same way that it can exist in a word or figurative mark. The leading case on get-up remains *Reckitt & Colman v Borden*,⁷ where the House of Lords accepted that a plastic lemon, as used by Jif, could attract goodwill and so be protected under the law of passing off:

1 *Reckitt & Colman Products Ltd v Borden Inc* (No 3) [1990] RPC 341, 499; also see the five elements identified by Lord Diplock in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* (No 1) [1979] AC 731, 742.

2 *Gillette (UK) Ltd v Edenwest* [1994] RPC 279, 289–94.

3 The point at which the goodwill must be established is when the second trader commences the conduct complained of: *Cadbury Schweppes v Pub Squash* [1981] RPC 429.

4 The traditional definition of goodwill is found in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217, 223.

5 *Athletes’ Foot Marketing Associates Inc v Cobra Sports Ltd* [1980] RPC 343.

6 *Anheuser-Busch Inc v Budějovický Budvar NP (t/a Budweiser Budvar Brewery)* [1984] FSR 413, 462 *et seq*; there are slightly different rules for services: *Hotel Cipriani v Cipriani* [2010] EWCA 110 [2010] RPC 16, [118] adopting *Pete Waterman Ltd v CBS UK Ltd* [1993] EMLR 27.

7 [1990] 1 WLR 491, (HL).

“The deception alleged lies not in the sale of the plastic lemons or the dimpled bottles, but in the sale of lemon juice or whisky, as the case may be, in the containers so fashioned as to suggest that the juice or whisky emanates from the source with which the container of the particular configuration have become associated in the public mind.”⁸

Accordingly, where the packaging distinguishes the goods of one trader from another passing off is not precluded simply because the packaging itself is the indication of origin. But, where that packaging is no longer a source identifier, for example where it is common to the trade, it cannot be distinctive of any trader,⁹ and so no action for passing off can lie. Furthermore, where a consumer wants goods with a particular construction or feature on the grounds the goods are practical, functional or aesthetically pleasing then these features may not usually be relied upon as a source identifier.¹⁰ Thus, the test is not whether something is original or eye-catching,¹¹ but whether it is distinctive.¹² Of course, where packaging is very new or novel then it is possible that it will become distinctive more quickly, but that is the only relevant aspect.¹³

II.1.2 Defendant’s misrepresentation

It is actionable to misrepresent that one’s business or trade is that of another person or is connected with that person in any way likely to cause damage.¹⁴ This same test applies to get-up as it does in relation to other marks or signs. The activity of one trader misrepresenting a connection to another person is not actionable *unless* it also appears to consumers that the other person is actually responsible for that trader’s goods or services. The basic test applied to get-up passing off cases was stated in *Payton & Co*¹⁵ by the Master of the Rolls:

“What is it that the [claimants] must make out in order to entitle them to succeed in the action? They must make out that the defendant’s goods are calculated to be mistaken for the [claimant’s] and the goods of the defendants unquestionably resemble each other, but where the feature in which they resemble each other are common to the trade, what has the [claimant] to make out? He must make out not that the defendant’s are like his by reason of those features which are common to them and other people, but he must make out that the defendant’s are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark, or device or label, or something of that kind, which distinguishes the [claimant’s] from other goods which have, like his, the features common to the trade”

8 [1990] 1 WLR 491, 504 (Lord Oliver).

9 [1990] 1 WLR 491, 505.

10 Christopher Wadlow, *The Law of Passing-Off* (4th Ed, Sweet and Maxwell 2011), [8-142]; also see *Crescent Tool v Kilborn & Bishop* (1917) 247 F. 299 cited with approval in *Hodgkinson & Corby v Wards Mobility Services* [1994] 1 WLR 1564.

11 *Payton & Co* (1899) 17 RPC 48 (per Romer LJ) affirmed [1901] AC 308.

12 See *New Way Packaged Products v Lucking* [1960] RPC 147.

13 *White Hudson & Co v Asian Organisation* [1964] 1 WLR 1466.

14 *Ewing v Buttercup Margarine Co Ltd* [1917] 2 Ch 1, 11–13; *Clock Ltd v Clock House Hotel Ltd* (1936) 53 RPC 269, 275; *British Telecommunications plc v Nextcall Telecom plc (Trade Marks)* [2000] FSR 679.

15 (1899) 17 RPC 48 affirmed [1901] AC 308.

The misrepresentation must be made either to customers or end consumers (i.e., the packaging) of the other's goods¹⁶ and it should be judged against how the relevant goodwill was acquired in trade. This means that customer confusion is central to the action for passing off.¹⁷ In assessing whether a customer would be confused it is necessary to consider the attention they would pay to the purchase,¹⁸ what the goods are,¹⁹ and how they are sold or provided.²⁰ The characteristics of the customers of those goods or services are also relevant, but such customers will have an imperfect recollection.²¹ In making the actual assessment, the entirety of the get-up of both the claimant's and the defendant's product must be considered and not simply the aspects that are in common.²² An association becomes unacceptable where it crosses the line between 'I wonder if there is a connection' (permissible) to 'I assume there is a connection' (unacceptable).²³

There is no need to show that anyone was actually deceived by the get-up, but proving such deception will greatly assist the claim.²⁴ Similarly, if it can be shown that a trader was actually acting fraudulently this will be very good (but not conclusive) proof that customers were confused.²⁵ In any event, there must be a substantial number of customers confused (or more than trivial or a *de minimis* number).²⁶

II.1.3 Likelihood of damage

The final element of passing off is that damage is caused or, at least, there is some likelihood of injury to the trader's goodwill. In straightforward passing off, where the goods are competing on the same or similar markets, the likelihood of damage comes from the customer confusion itself, in particular, by reason of trade being diverted. Other sorts of damage can result in particular in the form of blurring or loss of distinctiveness.²⁷ It may be, accordingly to academic argument, that brand owners get-up being "debased" by others using the same get-up, which could be actionable without there being any actual confusion as to origin.²⁸

16 *Erven Warnink* [1979] AC 731.

17 But confusion per se is not sufficient to found such an action: see *My Kinda Town Ltd (t/a Chicago Pizza Pie Factory) v Soll and Grunts Investments* [1983] RPC 407, 418.

18 eg *Morning Star Cooperative Society Ltd v Express Newspapers Ltd* [1979] FSR 113, 117.

19 *Teleworks Ltd v Telework Group Plc* [2002] RPC 27, [12].

20 *William Edge & Sons Ltd* [1911] AC 693, 704; *HFC Bank plc v HSBC Bank plc (formerly Midland Bank plc)* [2000] FSR 176, 185.

21 *William Edge & Sons Ltd* [1911] AC 693, 704–5 (sale to washer women); *Johnstone v Orr-Ewing* (1882) 7 App Cas 219, 225 (for Indian natives who did not speak English).

22 *Aristoc Ltd v Rysta Ltd* [1945] AC 68, 86.

23 See for example, *Schweppes v Gibbens* (1905) 22 RPC 601.

24 *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159; [2004] ETMR 56, [111].

25 eg *Champagne Heidsieck et cie Monopole Société Anonyme v Buxton* [1930] 1 Ch 330.

26 *Neutrogena Corp v Golden Ltd (t/a Garnier)* [1996] RPC 473, 493–4 (but note concerns about using words trivial and *de minimis*).

27 *Bulmer v Bollinger* [1978] RPC 79 and *Tattinger v Allbev* [1993] FSR 641.

28 Jennifer Davis "Why the United Kingdom should have a Law against Misappropriation" (2010) 69 *Cambridge Law Journal* 561; also see Susie Middlemiss and Steven Warner "Is there Still a Hole in this Bucket? Confusion and Misrepresentation in Passing Off" (2006) 1 *Journal of Intellectual Property Law and Practice* 131.

II.2 Tort of unfair competition

II.2.1 Paris Convention Article 10bis

The Paris Convention includes a requirement, at Article 10bis, for contracting parties to prevent unfair competition.²⁹ It has been suggested that the United Kingdom is not compliant with this obligation as it lacks a general unfair competition law.³⁰ However, as the diplomatic negotiations leading up to the conference make clear this obligation can be implemented under the criminal law, administrative or the civil law.³¹ There is no requirement on a country to create a specific unfair competition law if the protection is provided by the general law.³² Thus, the protection required by Article 10bis was met by the Trade Descriptions Act 1968 (and its predecessors)³³ and, following its repeal in relevant respects, is now met by the UK implementing law for the Unfair Commercial Practices Directive 2005/29/EC.

Nevertheless, over the years, there has been a number of attempts to transform passing off into a more general unfair competition law or a tort of misappropriation. This has largely failed because of the view that the common law avoids monopolies³⁴ as was explained in *Cadbury-Schweppes v The Pub Squash Company*:³⁵

“...competition must remain free; and competition is safeguarded by the necessity for the [claimant] to prove that he has built up “an intangible property right” in the advertised descriptions of his product or, in other words, that he has succeed by such methods in giving his product a distinctive character accepted by the market. A defendant, however, does not wrong by entering a market created by another and there competing with its creator. The line may be difficult to draw; but, unless it is drawn, competition will be stifled.”

There is no doubt that much of the ground covered by unfair competition laws in other European countries is provided for by a range of causes of action such as breach of confidence,³⁶ malicious falsehood³⁷ and passing off. However, the English law does not appear to cover straightforward misappropriation – the wrong commonly associated with lookalike cases.

29 It is therefore also an obligation under the TRIPS Agreement, art 2(1) and an EU obligation, EEA Agreement, Protocol 28, art 5.

30 See for example, Christopher Morcom “Gowers: a glimmer of hope for UK compliance with Article 10 bis of the Paris Convention” [2007] *European Intellectual Property Review* 125.

31 Actes de la Haye (1926), 478-480; Acts de Londres (1934), 421-422; also see Christopher Wadlow, *The Law of Passing Off* (4th Ed, Sweet and Maxwell 2011), [2-022].

32 Actes de Washington (1911), 255, 305; Actes de la Haye (1926), 472, 578.

33 See Stephan Ladas, *Patents, Trademarks, and Related Rights: National and International Protection* (Harvard 1975), 1699. Ladas is widely accepted to be the leading English language commentator on the Paris Convention.

34 See *Hodgkinson v Ward Mobility* [1994] 1 WLR 1564, 1568, Jacob J.

35 [1981] RPC 429, 491.

36 See Tanya Aplin, Lionel Bently, Phillip Johnson and Simon Malynicz, *Gurry: On Breach of Confidence* (2nd Ed, OUP 2012).

37 See Christopher Wadlow, *The Law of Passing Off* (4th Ed, Sweet and Maxwell 2011), Ch 6.

II.2.2 Passing Off and Unfair Competition Law

The question as to whether passing off has evolved into an unfair competition law was raised by a Delphic statement of Aldous LJ in *Arsenal v Reed*.³⁸ This was followed by a number of commentators asking whether the time had come for an unfair competition law to be recognised in the common law. The views were mixed: some described a new wider tort as a “sledgehammer to crack a nut,”³⁹ while others proposed extending passing off to cover “pre-sale” misrepresentations.⁴⁰ These are misrepresentations as to origin which might attract a customer, but are corrected before the purchase takes place.⁴¹ If this was clearly introduced it might have some effect on passing off as many lookalikes are picked up off the shelf but the consumer realises the mistake before reaching the checkout.

Whether passing off has actually developed into unfair competition law was considered by the Court of Appeal in *L'Oréal v Bellure*.⁴² After considering the cases and the arguments of the parties, Jacob LJ reiterated that passing off always requires some form of misrepresentation⁴³ and he took the view that misappropriation was not a helpful term.⁴⁴ He made it clear that the misrepresentation does not need to be about the origin of the goods. Other deceptions, such as a misrepresentation of equivalent quality, would also be sufficient.⁴⁵

38 [2003] EWCA Civ 696, [2003] ETMR 73, [70].

39 Tom Alkin “Should there be a Tort of ‘Unfair Competition’ in English Law?” (2007) 3 *Journal of Intellectual Property Law and Practice* 48, 52.

40 Ben Allgrove and Peter O’Byrne “Pre-sale Misrepresentation in Passing Off: An idea whose Time has come or Unfair Competition by the Back Door?” (2006) 1 *Journal of Intellectual Property Law and Practice* 413.

41 They have recently be recognised in trade mark law: *Och-Ziff Management v Och Capital* [2010] EWHC 2599 (Ch), [2011] ETMR 1; but this does not necessarily extend to passing off as noted by Christopher Wadlow, *The Law of Passing Off* (4th Ed, Sweet and Maxwell 2011), [5-183-5-186].

42 [2007] EWCA Civ 968; [2008] ETMR 1.

43 He expressed a similar view in *Reed v Reed Employment* [2004] EWCA Civ 159, [2004] RPC 40, [149].

44 [2007] EWCA Civ 968; [2008] ETMR 1, [135 to 161].

45 Based on the approval of his decision at first instance in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1994] 1 WLR 1564 (see [137]).

Germany

II.3 UWG (Unfair Competition)

The German law⁴⁶ of unfair competition, *Gesetz gegen den unlauteren Wettbewerb* (UWG), has long been seen as an effective tool to prevent all sorts of unfair commercial practices. The law is structured so that there is a general prohibition⁴⁷ in relation to business-to-business practices⁴⁸ and in relation to business-to-consumer practices.⁴⁹ This is followed with a non-exhaustive⁵⁰ list of examples of things which fall under the prohibition, including one which is particularly relevant to lookalikes.⁵¹ The relevant provisions read as follows:⁵²

Section 9

Prohibition of unfair commercial practices

(1) Unfair commercial practices shall be illegal if they are suited to tangible impairment of the interests of competitors, consumers or other market participants.

(2) Commercial practices towards consumers shall be illegal in any case where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumers ability to make an information-based decision, thus inducing him to make a transactional decision which he would not otherwise have made. Here reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Reference shall be made to the perspective of the average member of a group of consumers who are particularly vulnerable and clearly identifiable because of their mental or physical infirmity, age or credulity, if it is foreseeable for the entrepreneur that his commercial practice will affect the latter group only.

(3) The commercial practices towards consumers, listed in the Annex to this Act, shall always be illegal.

46 In this section, cases will be cited in the English, rather than German style.

47 This is based on existing case law: Statement of Grounds of the Governmental Draft of the Unfair Competition Act 2004 (Bundestag, No 15/1487), 18.

48 §3 (I) UWG.

49 §3 (II) UWG.

50 Begr RegE UWG 2004, BT-Drucks 15/1487, p 13 and 18.

51 §4 No. 9 UWG before codification it was acknowledged as an act of unfair competition in *Puppenjunge* (1941) GRUR 116 (RG) and *Torpedofreilauf* (1940) GRUR 489 (RG).

52 Translation from www.gesetze-im-internet.de (by Brian Duffett).

(4) Unfairness shall have occurred in particular where a person 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

II.3.1 Principle of the freedom to copy

An overarching principle of German unfair competition law is that a person should be free to copy the get-up or design of a competitor product.⁵³ Accordingly, unfair competition rules cannot generally preclude copying as this would undermine the limited and restricted nature of intellectual property protection⁵⁴ and restrict the freedom to participate in the market.⁵⁵ However, there is protection against replica (or imitation) products being sold, but this is not about the copying of the product⁵⁶ as such, but rather about the circumstances regarding how the product is offered to the public. This rule also means that where a particular act or action would be an infringement of an intellectual property right (if registered) it cannot be prohibited under unfair competition law as well.⁵⁷

II.3.2 Interests protected

The prohibition on imitations and replicas is intended to protect the interests of the person whose product has been copied,⁵⁸ although it is likely to give consumer protection to the relevant public as well.⁵⁹ The law is there to serve a public interest by encouraging innovative and undistorted competition,⁶⁰ but ensuring that innovation is not hindered by reason of copying being too easy.⁶¹

53 *Handtaschen* (2007) GRUR 795, [51] (BGH).

54 *cf. Klemmbausteine III* (2005) GRUR 349, 352 (BGH).

55 Eike Ullmann, *juris PraxisKommentar UWG: Gesetz gegen den unlauteren Wettbewerb* (Juris GmbH 2009), § 4 Nr 9, [31]; Ansgar Ohly "Designschutz im Spannungsfeld von Geschmacksmuster-, Kennzeichen- und Lauterkeitsrecht" (2007) GRUR 731, 735.

56 No absolute rights are granted: Rudolf Nirk "Zur Rechtsfigur des wettbewerbsrechtlichen Leistungsschutzes" (1993) GRUR 247, 249; Hefermehl/Köhler/Bornkamm *UWG* § 4 Rdn 9.4.

57 *Elektronische Pressearchive* (1999) GRUR 325, 326 (BGH); *Paperboy* (2003) GRUR 958, 962 (BGH); *Handtuchklemmen* (2005) GRUR 600, 602 (BGH); *Baugruppe* (2008) GRUR 790, [35] (BGH); *Apfel-Madonna* (1966) GRUR 503, 506 (BGH).

58 *Vespa-Roller* (1988) GRUR 620, 621 (BGH); *Finnischer Schmuck* (1991) GRUR 223, 225 (BGH); *Cartier-Armreif* (1994) GRUR 630, 634 (BGH); *cf. Imitationswerbung* (2008) GRUR 628, [12] (BGH).

59 *Vitamin-Zell-Komplex* (2005) GRUR 519, 520 (BGH); as discussed below at Annex III, III.2), for the purposes of the UC DP it is immaterial what the intention of the legislation is where it is a commercial practice within the meaning of that Directive.

60 *Vitamin-Zell-Komplex* (2005) GRUR 519, 520 (BGH); *Gartenliege* (2007) GRUR 984, [23] (BGH).

61 *cf. Vakuumpumpen* (2000) GRUR 521, 526 (BGH); Axil Beater: "Unlauterer Wettbewerb" (2011 Mohr Siebeck), [1906 ff].

II.3.3 Elements of parasitic copying

To bring a claim it is necessary to establish the following:

- (1) the competitor has made and offered an imitation or replica product on the market;
- (2) the product has “competitive individuality” meaning that the get-up is such that it indicates to consumers its origin or characteristics; and
- (3) there are circumstances making the actions unfair, in particular one of those things set out in UWG §9(4).

Prerequisites: A prerequisite for any action to be brought under the UWG is that the defendant must be engaged in business activity (be a market participant); but it is immaterial whether or not the parties are at the same level of competition (so a manufacturer can bring a case against a retailer). As the law is there to prohibit the imitation of products, it does not matter if the particular product is still on the market.

Certain market awareness: The get-up of the product must be such that that its specific form or specific characteristics suggest to the public the product’s commercial origin.⁶² The law does not protect concepts or ideas, only the aspects of the product which represent the distinctive packaging.⁶³ Similarly, the law does not protect themes.⁶⁴ Nevertheless, there may be certain features of a product’s get-up which are presumed by consumers to be something which should be kept free for others to use (such as generic colours or symbols). In such cases, copying cannot be prevented.⁶⁵

The closer the copy is to the original the less that is required to establish the competitive nature of the product.⁶⁶ Thus, where it is a perfect copy or different only in minor details, very little evidence is needed to establish the competitive nature.⁶⁷

“Competitive individuality” (or “nature” or “purpose”) (wettbewerbliche Eigenart): The competitive individuality of the product is that distinctiveness of get-up which informs the public of its origin or characteristics.⁶⁸ Any feature or characteristic of the get-up,⁶⁹ including

62 *Les-Paul-Gitarren* (1998) GRUR 830 (BGH); *Modulgerüst* (2000), GRUR 521, 523 (BGH); *Laubhefter* (2002) GRUR 86 (BGH).

63 *cf. Rosaroter Elefant* (1995) GRUR 47, 48 (BGH).

64 *Knoblauchwürste* (2009) WRP 1374, [21] (BGH).

65 *cf. Pulverbehälter* (1968) GRUR 59 (BGH); *Rollhocker* (1981) GRUR 517, 519; *Vakuumpumpen* (2000) GRUR 210, 213; *Modulgerüst* (2000) GRUR 521, 523.

66 *Betonsteinelemente* (1992) GRUR 523, 524 (BGH); *Tele-Info-CD* (1999) GRUR 923, 927 (BGH).

67 *Beschlagprogramm* (1986) GRUR 673, 675 (BGH); *Vakuumpumpen* (1996) GRUR 210, 211 (BGH).

68 *Helmet Köhler and Joachim Bornkamm, UWG* (30th Ed. Beck 2012), [9.24]; *Henning Piper, Ansgar Ohly and Olaf Sosnitza, Gesetz gegen den unlauteren Wettbewerb*, (5th Ed. 2010), [9.32].

69 *Coffeinfrei* (1963) GRUR 423, 428 (BGH); *Gebäudefassade* (1977) GRUR 614, 615 (BGH); *Grau/Magenta* (1997) GRUR 754, 756; *Messerzeichnung* (2001) GRUR 251, 253.

its shape,⁷⁰ or labelling,⁷¹ or numbering systems,⁷² can be used to support a finding of its competitive individuality, provided the feature has not become generic.⁷³ There is also no requirement of any originality, novelty or individual character as protection relates to indication of origin or characteristics.⁷⁴ Further, the greater the product's reputation the more likely it is that consumers will make false assumptions as to origin.⁷⁵ This requirement can be met even where a consumer would determine that the two products are distinct if they undertake a closer inspection.⁷⁶ Finally, the competitive individuality may still remain even where the manufacturer has changed its own packaging and the competitor copies the old packaging.

Public renown of get-up: In *Noppenbahn (Dimpled Foil)*⁷⁷ the BGH (Supreme Court) held that the product's get-up needs to be sufficiently well-known amongst the relevant public before it can be parasitically copied.⁷⁸ Essentially, this requires the product⁷⁹ to be sufficiently familiar to the relevant public ("market awareness"⁸⁰) such that they might be deceived about its origin. Accordingly, this might suggest that the product and its get-up must have been on the market for some time before protection is available under UWG §9(4). However, there are some cases and commentators which suggest there is no requirement that the product has been on the market for any particular time.⁸¹

Assessment of competitive individuality: The determination of a product's competitive individuality can be made by the judge alone⁸² even where the judge is not the relevant consumer. The inclusion of the retailer's trade mark (or another trade mark) on the product does not in itself preclude a finding that there is a competitive individuality.⁸³ In making this assessment the judge will take into account all the circumstances of the case even where a particular factor, standing alone, would not affect the competitive individuality of the get-up.

Imitation: The next requirement is that the second comer is selling an imitation or replica of the original product. It does not need to be an imitation of the entire product, it is sufficient that the competitive individuality is established by those aspects which have been copied.⁸⁴

70 *Hemdblusenkleid* (1984) GRUR 453 (BGH); *Tchibo/Rolax I* (1985) GRUR 876, 877 (BGH).

71 cf *Coswig* (1956) GRUR 553, 557 (BGH); *Gebäudefassade* (1977) GRUR 614, 615 (BGH); *Messerkennzeichnung* (2001) GRUR 251, 253 (BGH); *Tupperwareparty* (2003) GRUR 973, 974 (BGH).

72 cf *Michel-Nummern* (2006) WRP 765, [28] (BGH).

73 *Gartenliege* (2007) GRUR 984, [24] (BGH).

74 *Ovalpuderdose* (1976) WRP 370, 372 (BGH); *Vitra programm* (1984) GRUR 597 (BGH).

75 *Viennetta* (2001) GRUR 443, 444 (BGH); *LIKEaBIKE* (2010) GRUR 80, [37] (BGH); *Femur-Teil* (2010) GRUR 1125, [24].

76 *Les-Paul-Gitarren* (1998) GRUR 830, 833 (BGH); *Handtaschen* (2007) GRUR 795, [28] (BGH).

77 (2002) GRUR 275 (BGH).

78 (2002) GRUR 275, 277 (BGH).

79 This has been described as a stumbling block for niche products, although it is not clear why this is the case as the relevant public for those products will be those aware of the niche (even if the public in general is not aware): *Hogan Lovell's Report* (MARKT/2010/20D), Appendix 8, pg 7.

80 *Handtuchklemmen* (2005) GRUR 600, 602 (BGH); *Stufenleitern* (2007) GRUR 339, [39] (BGH); *Gartenliege* (2007) GRUR 984, [34] (BGH); *Gebäckpresse* (2009) GRUR 79, [35] (BGH).

81 *Ovalpuderdose* (1976) WRP 370, 371 (BGH); *Betonsteinelement* (1992) GRUR 523, 524 (BGH); *Helmet Köhler and Joachim Bornkamm, UWG* (30th Ed. Beck 2012), [9.25].

82 *Hemdblusenkleid* (1984) GRUR 453, 454 (BGH).

83 *Modulgerüst* (2000) GRUR 521, 524 (BGH).

84 *Tele-Info-CD* (1999), GRUR 923, 926 (BGH); *Handtaschen* (2007) GRUR, 795, [32] (BGH).

Therefore where the second comer is an independently created “replica” it is not actionable,⁸⁵ but such a claim must be proved by the defendant.⁸⁶

There are three levels of imitation:⁸⁷ (a) a perfect copy of the original;⁸⁸ (b) a copy which is different only in minor or insignificant details; and (c) a copy which exploits elements of another’s work. The more closely the imitation resembles the original, the lesser the degree to which the remaining relevant factors will be necessary to find the defendant’s doing actionable.⁸⁹ The third level of imitation is the most relevant to lookalikes. It might occur where the original is not copied as such, but it is used as a model from which the new product or packaging is built,⁹⁰ and it would remain an imitation as long as recognisable elements of the original remain.⁹¹ It is not enough that the similarities are such that consumers will make an association between the lookalike and the manufacturer’s product.⁹² Further, confusion as to trade origin, brought on by similar packaging, can be dispelled by appropriate steps being taken, such as having clear and prominent labels attached to the product.⁹³ This is particularly relevant to lookalikes.

Ranges of products: The similarity of the products can be judged across the whole range,⁹⁴ and so products which are not otherwise sufficiently similar can become so.⁹⁵ Further, the longer the copying of a range has occurred and the more products copied, the more likely it is that it amounts to taking unfair advantage.

Unfairness: The mere fact that a product is a replica or lookalike is not enough on its own, there must also be an element of unfairness. In addition to avoidable deception regarding origin, two other forms of unfairness are described in § 4 Nr. 9 UWG: unreasonable exploitation of the product; or impairing the distinctiveness of the product. The copied product must be something which has a reputation (“appreciation”) in the public perception which relates to the quality,⁹⁶ exclusivity, and luxury or prestige⁹⁷ value of the product.⁹⁸ The rationale is that the higher the reputation of the copied product the more that can be transferred to the replica or lookalike⁹⁹ and, accordingly, it is necessary to show that there has been some transfer of

85 *Blendsegel* (2002) GRUR 629, 633; *ICON* (2008) GRUR 1115, [24] (BGH).

86 *Blendsegel* (2002) GRUR 629, 633 (BGH).

87 This is based on the case law: *Helmet Köhler and Joachim Bornkamm*, *UWG* (30th Ed, Beck 2012), [9.34].

88 Something like scanning or photograph: *Helmet Köhler and Joachim Bornkamm*, *UWG*, (30th Ed, Beck 2012), [9.35].

89 *Gartenliege* (2007) GRUR 984, [14] (BGH).

90 *Modulgerüst I* (2000) GRUR 521, 524 (BGH); *Femur-Teil* (2010) GRUR 112, [25] (BGH).

91 *Rotaprint* (1963) GRUR 152, 155 (BGH); *Hit Bilanzen* (2003) GRUR-RR 329, 330 (OLG München).

92 *Tupperwareparty* (2003) GRUR 973, 975 (BGH).

93 *Güllepippen* (1999) GRUR 751, 753 (BGH); *Viennetta* (2001) GRUR 443, 445; cf *Stufenleitern* (2007) GRUR 339, [26] (BGH); *Handtaschen* (2007) GRUR 795, [25] (BGH); *ICON* (2008) GRUR 1115, [20] (BGH); *Ausbeinmesser* (2009) GRUR 1073, [10] (BGH); *LIKEaBIKE* (2010) GRUR 80, [23] (BGH); *Femur-Teil* (2010) GRUR 1125, [21] (BGH).

94 *Ha-Ra/HARIVA* (1999) GRUR 183, 186 (BGH); *Rillenkoffer* (2008) GRUR 793, [29] (BGH).

95 *Büromöbelprogramm* (1982) GRUR 305, 307 (BGH); *Beschlagprogramm* (1986) GRUR 673, 675 (BGH); cf *Möbelprogramm zur Geschmacksmusterfähigkeit* (1975) GRUR 383, 385 (BGH).

96 *Les-Paul-Gitarren* (1998) GRUR, 830, 833 (BGH).

97 *Tchibo/Rolux I* (1985) GRUR 876, 878 (BGH).

98 *Similarily: Pen 68(2011)* GRUR-RR 182, 183 (OLG Frankfurt).

99 *Femur-Teil* (2010) GRUR 1125, [42] (BGH); *Hartplatzhelden.de* (2010) GRUR 436, [18] (BGH).

this reputation for the action to succeed.¹⁰⁰ This means the reputation is not exploited merely because things are brought to mind, rather there must be very specific reasons why the consumer buys the other product even though the consumer knows that it is not from the same source (such as perceptions of quality).

Factors for inappropriate use: The courts take into account a number of factors in deciding whether there has been inappropriate use. These include: (i) the extent of the competitive individuality of each of the products; (ii) the closeness of the imitation;¹⁰¹ (iii) the cost and return on the manufacturing cost of the original;¹⁰² (iv) the cost saving for the lookalike¹⁰³ (the greater the cost saving for the imitator the more likely it is that the copying is unfair¹⁰⁴) (v) the commercial success of the lookalike;¹⁰⁵ and (vi) any customary practice relating to licence fees.¹⁰⁶

Obstruction: Another form of unfair competition is obstruction, which arises where the replica product obstructs the market entry of the genuine product. Something will be an obstruction only where it not only disturbs the market, but also is actually directed at a particular competitor.¹⁰⁷ The *Ovalpuderdose*¹⁰⁸ case is a good example of this. The product was not sold in Germany, but was sold in other European countries. The BGH held that the lookalike being sold on the European market would obstruct the market entry of the genuine product and so the lookalike had to be removed from the market.

United States

II.4 Trade Dress

In the United States, trade marks are protected under the States' common law, but this protection can be shored up by registration under the federal Lanham Act or at the State level.¹⁰⁹ In each case, the basic requirement for a trade mark is that it must be used in commerce,¹¹⁰ meaning a bona fide use of a mark in the course of trade.¹¹¹

In the United States, trade dress is simply a type of "trade mark". The definition of a trade mark is a mark which "includes any word, name, symbol, or device, or any combination".¹¹² The word "includes" means that it is not restricted to those things listed. Nothing shall be

100 Also see *Bestellnummernübernahme* (2005) GRUR 348, 349 (BGH).

101 *Arbeitselement für Resektoskopie* (2006) GRUR-RR 278, 279 (OLG Köln).

102 *Tele-Info CD* (1999) GRUR 923, 927 (BGH).

103 *Tele-Info CD* (1999) GRUR 923, 927 (BGH).

104 Helmet Köhler and Joachim Bornkamm, *UWG*, (30th Ed. Beck 2012), [9.66, No. (3)].

105 See *McLaren* (1994) WRP 599, 601 (BGH).

106 see *Rolls-Royce* (1983) GRUR 247, [248] (BGH).

107 Sebastian Heim "Protection of Competitors, Consumers and the General Public – The New German Act against Unfair Competition" (2006) 1 *Journal of Intellectual Property Law and Practice* 524, 531.

108 *Ovalpuderdose* (1976) WRP 370, 372 (BGH).

109 State registration will not be considered here.

110 US Constitution, art I, s.8, cl. 3; see *Trade-Mark Cases*, 100 US 82 (1879); also see *Hanover Star Milling v Metcalf*, 240 US 403, 425 (1916).

111 Lanham Act §45 (15 USC §1127).

112 Lanham Act §45 (15 USC §1127).

refused registration on account of its nature¹¹³ alone and, more pertinently, the definition includes “product configuration,” or what might be more commonly called trade dress.¹¹⁴

II.4.1 Nature of protection

Protection for a trade mark (or trade dress) is the same whether it is registered or unregistered in terms of subject-matter and exclusive rights. The purpose of registration is to provide additional rights to a trade mark owner, such as constructive notice of the claim of ownership of the mark,¹¹⁵ nationwide constructive use of the mark as at the date of application,¹¹⁶ and *prima facie* evidence of registrability.¹¹⁷ After five years of continuous use, the trade mark becomes incontestable and can thereafter be challenged only on very limited grounds.¹¹⁸

II.4.2 Distinctiveness

Trade dress must be distinctive to be considered a trade mark (registered or unregistered). This distinctiveness can be either inherent or acquired.¹¹⁹ The relevant law is now set out in a trinity of Supreme Court cases: *Two Pesos v Taco Cabana*;¹²⁰ *Qualitex v Jacobson Products*;¹²¹ and *Wal-Mart Stores v Samara Brothers*.¹²² In summary, *Two Pesos* suggested that trade dress can, in some circumstances, be inherently distinctive. However, the lower courts had difficulty working out the appropriate test for assessing whether trade dress had become inherently distinctive.¹²³ In the subsequent *Wal-Mart* decision the Supreme Court appears to have modified its view and made it clear that product-packaging trade dress can be inherently distinctive, but product-design trade dress cannot.¹²⁴ Accordingly, in terms of lookalikes many, although not all,¹²⁵ aspects of the packaging would be considered to be product-packaging, rather than product-design.¹²⁶ It could in theory be inherently distinctive; however, in most cases it would be necessary for there to be evidence of secondary meaning.

113 Lanham Act §2 (15 USC §1052).

114 See *Kohler Co v Moss Inc*, 12 F 3d 632 (7th Cir 1993); see earlier decisions, *Application of Kotzin*, 276 F 2d 411, 414-5 (CCPA 1960); *Application of Honeywell*, 497 F.2d 1344 (CCPA), cert denied 419 US 1090 (1974). The court put emphasis on the word “includes” and so it was not restricted to things listed; also see S. Rep 100-515, 100th Cong 2d Session 44.

115 Lanham Act §21 (15 USC §1072).

116 Lanham Act §7 (15 USC §1057(c)).

117 Lanham Act §7 (15 USC §1057(b)).

118 Lanham Act §15 (15 USC §1065); those grounds set out Lanham Act §33 (15 USC §1115(b)).

119 Restatement (Third) of Unfair Competition, s. 13 (1995); also see *Wal-Mart Stores v Samara Brothers*, 529 US 205, 210-211(2000).

120 505 US 763 (1992), rehearing denied 505 US 1244 (1992).

121 514 US 159 (1995).

122 529 US 205 (2000).

123 See Graeme Dinwoodie and Mark Janis, *Trade Dress and Design Law* (Aspen 2010), 76-77; also see Graeme Dinwoodie “Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress” (1997) 75 *North Carolina Law Review* 471.

124 *Wal-Mart Stores v Samara Brothers*, 529 US 205, 212-213(2000).

125 An example given in *Wal-Mart* (at 215) is that of a Coca-Cola bottle. The bottle is product-packaging for the person who drinks the Coke, but product-design for the person who collects glass bottles.

126 An example of a case trying to distinguish between product-design and packaging is *In re Slokevage*, 441 F 3d 957 (Fed Cir 2006); also see *McKernan v Burek*, 118 F. Supp 2d 119 (D. Mass 2000).

This can be provided by evidence from consumers, surveys (if properly conducted) and long and continuous use of the market,¹²⁷ to name a few.

II.4.3 Functionality

Trade dress cannot be protected under the Lanham Act to the extent that it is functional. There are two forms of functionality – utilitarian and aesthetic. The Supreme Court has indicated that “in general terms, a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article”.¹²⁸ Thus, where the packaging has to be a particular shape for functional reasons, such as where the colour of the packaging is dictated by the colour of the contents, then this will not be protectable as part of the trade dress.

II.4.4 Confusion

The basic right of action for trade mark or trade dress infringement is set out in §43(a) of the Lanham Act:¹²⁹

§43 False designations of origin, false descriptions, and dilution forbidden

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

127 Restatement (Third) of Unfair Competition, §13, comment (e).

128 *Innwood v Ives Laboratory*, 456 US 844, 850, n 10 (1982); *Qualitex v Jacobson Prod*, 514 US 159 (1995); *TrafFix Devices v Marketing Displays*, 532 US 23 (2001).

129 15 USC §1125.

In the determination of whether a lookalike and a brand leader are confusing there is a number of factors which the courts use. These vary between the twelve circuits.¹³⁰ By way of example, the Federal Circuit has adopted the following factors:¹³¹

- (1) The similarity or dissimilarity of the trade dress as to appearance, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i. e. "impulse" vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar trade dress in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a trade dress is or is not used (house mark, "family" mark, product mark).
- (10) The market interface between the owner of the trade dress and the owner of a prior mark:
 - (a) a mere "consent" to register or use.
 - (b) agreement provisions designed to preclude confusion, i. e. limitations on continued use of the marks by each party.
 - (c) assignment of mark, application, registration and good will of the related business.
 - (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
- (11) The extent to which applicant has a right to exclude others from use of its trade dress on its goods.

130 See n. 163 for a description of the circuits and the issues that arise.

131 *In re E.I. Du Pont de Nemours & Co*, 476 F. 2d 1357, 1361 (CCPA 1973); followed and endorsed *Champagne Louis Roederer v Delicato Vineyards*, 148 F. 3d 1373 (Fed Cir 1998); the other famous set of factors comes from *Polaroid Corp v Polarad Eletronics Corp*, 287 F.2d 492, 495 (2d Cir 1961).

(12) The extent of potential confusion, i. e., whether de minimis or substantial.

(13) Any other established fact probative of the effect of use.

These factors are aids in determining the issue of the likelihood of confusion, but they are not determinative as the ultimate question remains as to whether the consumer is confused¹³² and not all factors are given equal weight.¹³³ A detailed discussion of these factors is outside the scope of this report, but certain factors have particular significance for lookalikes and these will now be addressed.

Appearance, sound and connotation of the trade dress: The first factor is the similarity in appearance of the two different sets of trade dress. In making this assessment the general recollection of the customer, rather than a side-by-side comparison, is undertaken.¹³⁴ Nevertheless, a side-by-side comparison is permitted in circumstances where this happens in real life,¹³⁵ and this is particularly likely in terms of own brand lookalikes where the goods are likely to share shelf space with the brand leader.

Similarity of the goods or services: The similarity of the goods and services is important in assessing confusion.¹³⁶ The courts have acknowledged that certain products are expected to expand into new related markets and that this might lead to potential confusion.¹³⁷ Again, this factor is relevant for own brand where retailers expand into a new market. Indeed, the incidents of lookalikes almost always arise where the goods are in the same product category. This does not mean the goods are always similar, but it is usually going to be more likely than not.

Strength and famous marks: Where the trade dress is particularly famous it will be given greater protection.¹³⁸ However, this may have a counter-effect in defeating lookalikes, where in some cases it has been suggested that the better known the trade dress, the more likely that any difference in the other trade dress will be noticed by customers.¹³⁹

Trade channels and marketing environment: The channel of trade or the marketing environment in which the goods are sold will be significant as to whether or not there will be confusion. This means, for example, that where the trade dress is used by one trader in relation to retail goods and by another in relation to wholesale goods confusion is unlikely.¹⁴⁰

132 *Playtex Prods v Georgia-Pacific*, 390 F.3d 158, 162 (2d Cir 2004).

133 See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

134 *Malletier v Burlington Coat Factory*, 426 F.3d 532, 538-9 (2d Cir 2005); *Louis Vuitton Malletier v Dooney & Bourke*, 454 F.3d 108, 117 (2d Cir 2006).

135 *Compare McNeil Nutritional v Hearlands Sweetners*, 511 F.3d 350, 359 (3d Cir 2007); *Top Tobacco v North Atl. Operating*, 509 F.3d 380, 381 (7th Cir 2007).

136 *Scarves by Vera v Todo Imports*, 544 F.2d 1167, 1173 (2d Cir 1976).

137 *Tiffany & Co v Parfums Lamborghini*, 214 USPQ 77, 78-9 (SDNY 1981).

138 *CPC International v Skippy*, 231 USPQ 811, 814 (ED Va 1986); *Virgin Enterprise v Nawab*, 335 F.3d 141, 147 (2d Cir 2003); *Kenner-Parker Toys v Rose Art Industries*, 963 F.2d 350, 352-3 (Fed Cir 1992); but see *Kellogg v Toucan Golf*, 337 F.3d 616, 626 (6th Cir 2003).

139 *BVD Licensing Corp v Body Action Design*, 846 F.2d 727, 728-9 (Fed Cir 1988); *Louis Vuitton Malletier v Haute Diggity Dog*, 507 F.3d 252, 262 (4th Cir 2007).

140 *Cadbury Beverages v Cott Corp*, 73 F.3d 474, 481 (2d Cir 1996).

Similarly, where one trader sells to the mass market and another sells to upmarket customers, confusion is less likely.¹⁴¹ Again, in general, lookalikes are sold in the same trade channels although they may be marketed differently.

Actual confusion: It is not necessary to prove actual confusion, but where it can be proved it will add great weight to the case for confusion.¹⁴² An individual instance of actual confusion can be so significant that it can be given weight by the court.¹⁴³ Conversely, where the trade dress has been used in the same geographical market for some time and there is no evidence of actual confusion, this is good evidence that there will be no customer confusion.¹⁴⁴ This sort of evidence can be supplemented by evidence from surveys and similar sources.¹⁴⁵

Initial interest confusion and post-sale confusion: The United States courts have recognised so-called “initial interest confusion”, that is, where initially a customer is confused and so becomes interested in a competitor’s product, but such confusion is dispelled before the purchase takes place.¹⁴⁶ The courts have also recognised that confusion otherwise than at the point of sale can be actionable.¹⁴⁷ This is often called secondary confusion¹⁴⁸ or post-sale confusion. This is to protect the owner of the rights in the trade dress from consumers who merely see the goods after they were sold without the identifying labels.¹⁴⁹ Both types of confusion might be relevant to lookalikes as many consumers may pick the wrong product off the shelves only to replace it before the counter (initial interest confusion), whereas others may buy a lookalike thinking it is the same only to find out later on use it is different (post-sale confusion).

II.4.5 Dilution

There is federal protection against dilution under the Lanham Act¹⁵⁰ as well as several State statutes¹⁵¹ which prevent trade mark dilution.¹⁵² There was originally some doubt about the application of the dilution provisions to trade dress, but an amendment made in 2006 makes it clear that Congress intended to include it.¹⁵³

141 *Duluth News-Tribune v Mesabi Publishing Co*, 84 F. 3d 1093, 1099 (8th Cir 1996).

142 *World Carpets v Dick Littrell's New World Carpets*, 438 F. 2d 482, 489 (5th Cir 1971); also see *Berkshire Fashions v Sara Lee Corp*, 725 F. Supp 790, 796-7 (SDNY 1989), *affr'd* 904 F.2d 33 (2d Cir 1990).

143 *Daddy's Junky Music Stores v Big Daddy's Family Music*, 109 F.3d 275, 284 (6th Cir 1997).

144 Restatement (Third) of Unfair Competition §23; also see *Pignons SA de Mecanique v Polaroid Corp*, 657 F. 2d 482, 490 (1st Cir 1981).

145 See Jerry B. Swann “Likelihood of Confusion Studies and Straitened Scope of Squirr” (2008) 98 *Trademark Reporter* 739.

146 See *Playboy Entertainments v Netscape Comm*, 354 F. 3d 1020, 1024-5 (9th Cir 2004); it has been suggested to be on a statutory basis: *Checkpoint Sys v Check Point Software*, 269 F. 3d 270, 295 (3d Cir 2001).

147 See *Ferrari SPA Esercizio v Roberts*, 944 F. 2d 1235, 1245 (6th Cir), *cert denied*, 505 US 1219 (1992).

148 It originated with *Mastercrafts Clock & Radio v Cacheron & Contantin-Le Colutre Watches*, 221 F. 2d 464, 466 (2nd Cir 1955), *cert denied* 350 US 832 (1955).

149 *Lois Sportswear USA v Levi Strauss & Co*, 799 F. 2d 867, 872-3 (2d Cir 1986); also see *Hermes Int v Lederer De Paris Fifth Ave*, 219 F. 3d 104, 107 (2d Cir 2000).

150 E.g. *Advantage Rent A Car v Enterprise Rent A Car*, 238 F. 3d 378, 381 (5th Cir 2001).

151 These are not considered here.

152 About half the states: see *Mosley v Secret*, 537 US 418, 430 (2003). However, before statutory intervention there was no protection under the common law: Restatement (Third) of Unfair Competition (1995), §25.

153 The inclusion of Lanham Act s. 43(c)(4).

Famous trade dress is protected from two sorts of dilution under the Lanham Act: dilution by blurring (the watering down of the potency of a mark and the whittling away of its selling power¹⁵⁴); and dilution by tarnishment (unwholesome associations being made with a trade mark¹⁵⁵). The latter is not relevant to lookalikes and so will not be considered and the former is probably only of marginal relevance and so warrants only a short introduction.

Famous marks: The federal law protects only famous trade dress from dilution.¹⁵⁶ This requires the trade dress to be widely recognised by the general public of the United States and, in making that determination, the court will consider the following factors: (i) the duration, extent and geographical reach of advertising and publicity of the trade dress, whether advertised or publicised by the owner or a third parties; (ii) the amount, volume and geographical extent of sales of goods offered under the trade dress; (iii) the extent of actual recognition of the trade dress; and (iv) whether it has been registered for many years.¹⁵⁷

Dilution by blurring: The protection against blurring is engaged where the famous mark is blurred by an association caused by reason of the similarity between the get-up of a product and the famous trade dress so that it impairs the distinctiveness of that famous trade dress. Put another way, blurring occurs when the trade dress no longer brings to mind only the famous trade dress, but both sets of trade dress.¹⁵⁸ The following factors, which are not exhaustive, will be taken into account in assessing whether the mark (for mark read trade dress in the following) has been blurred: (i) the degree of similarity between the mark or trade name and the famous mark; (ii) the degree of inherent or acquired distinctiveness of the famous mark (this might raise the question of whether a mark that is iconic, rather than just famous, will be more difficult to blur¹⁵⁹); (iii) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (iv) the degree of recognition of the famous mark; (v) whether the user of the mark or trade name intended to create an association with the famous mark; and (vi) any actual association between the mark or trade name and the famous mark.

This list is not exhaustive and so in addition to these statutory factors, the following additional factors (as examples) may assist in determining whether there has been blurring: first, the similarity of the marks and the products; secondly, the sophistication of the consumer; thirdly, the defendant's predatory intent; fourthly, the renown of the senior mark; and, fifthly and finally, the renown of the junior mark.¹⁶⁰ The factors which relate to the confusion analysis are not usually relevant.¹⁶¹ However, similarity of marks and goods can be relevant to whether an association may be made by the consumer and accordingly whether blurring occurs.

154 See *Toys R Us v Canarsie Kiddie Shop*, 559 F. Supp 1189, 1208 (EDNY 1983).

155 *New York Stock Exchange v New York, New York Hotel*, 293 F. 3d 550, 558 (2d Cir 2002); *Coca-Cola Co v Alma Leo USA*, 719 F, Supp 725, 728-9 (ND Ill 1989).

156 Lanham Act §43(c) (15 USC §1125(c)); this was amended in 2006 under the Trademark Dilution Revision Act following the *Mosley v Secret*, 537 US 418 (2003).

157 Lanham Act §43(2)(A) (15 USC §1125(2)(A)).

158 *Mattel Inc v MCA Records*, 296 F 3d 894, 904 (9th Cir 2002).

159 *Louis Vuitton v Haute Diggity Dog*, 507 F.3d 252 (4th Cir 2007).

160 *Mead Data Central v Toyota Motor Sales*, 875 F. 2d 1026, 1035 (2d Cir 1989).

161 See *Times Mirror Magazine v Las Vagas Sporting News*, 212 F.3d 157, 168-9 (3d Cir 2000) (criticism of *Mead Data* criteria as based on confusion).

The law of trade dress and blurring has not been well explored, but trade dress may become famous (for example the Coca Cola bottle) and that shape being used for other products, such as beer, could potentially amount to dilution.

Significance of own brand labelling: In the United States¹⁶² there is a divergence between the Circuits¹⁶³ as to an effect of having a retailer's label on products which have a trade dress similar to that of a manufacturer. Some courts have gone as far as to acknowledge that own brands "owe their existence to the advertising and promotion efforts" of manufacturer brands.¹⁶⁴ The majority view is that using a retailer's mark does turn what would otherwise be infringing trade dress into permitted trade dress.¹⁶⁵ Therefore, in general, the courts have found that a defendant which has placed a different label on confusing trade dress did not avoid liability as it had not done enough to dissipate confusion.¹⁶⁶

Nevertheless, where there is clear and prominent labelling some US courts have taken the opposite view and held that proper labelling can be sufficient to negate confusion. For example, the Court of Appeals for the Third Circuit stated in *Versa Prods. Co. v. Bifold Co.*¹⁶⁷

"[E]xcept where consumers ordinarily exercise virtually no care in selecting a particular type of product (as may be the case with inexpensive disposable or consumable items, [such as] cookies), clarity of labeling in packaging and advertising will suffice to preclude almost all possibility of consumer confusion as to source stemming from the product's configuration."

162 In general see Andrew Corydon Finch "When Imitation is the Sincerest Form of Flattery: Private Label Products and the Role of Intention in Determining Trade Dress Infringement" (1996) 63 *University of Chicago Law Review* 1243.

163 In the United States, there are twelve circuits and they can, and often do, have diverging rules on federal matters. Each circuit must follow the precedent of its Court of Appeals (so a District Judge in the Sixth Circuit is not strictly bound to follow the decision of the Eighth Circuit Court of Appeals), but all must follow decisions of the US Supreme Court.

164 *Smithkline Beckman Corp v Pennex Products*, 605 F Supp 746, 748 (ED Pa 1985).

165 McCarthy, *Trademarks and Unfair Competition* (4th Ed, 2012 Revision), § 23:53.

166 *Source Perrier, S.A. v. Waters of Saratoga Springs, Inc.*, 217 USPQ 617 (SDNY 1982); *Accord Aris-Isotoner Gloves, Inc. v. Fownes Bros. & Co.*, 594 F. Supp. 15 (SDNY 1983); *PAF S.r.l. v. Lisa Lighting Co.*, 712 F. Supp. 394 (SDNY 1989); *Life Indus. Corp. v. Star Brite Distrib., Inc.*, 803 F. Supp. 646 (EDNY 1992); *Nabisco Brands, Inc. v. Conusa Corp.*, 722 F. Supp. 1287 (MDNC 1989), *aff'd without op.*, 892 F.2d 74 (4th Cir. 1989)

167 50 F.3d 189 (3d Cir. 1995), *cert. denied*, 516 U.S. 808 (1995).

European Union

II.4 Trade mark registration

Under European Union trade mark law, and so UK law and German law, it is possible to register any sign¹⁶⁸ which can be graphically represented as a trade mark,¹⁶⁹ provided that the representation is clear, precise, self-contained, easily accessible, intelligible, durable, unequivocal, and objective.¹⁷⁰ Therefore where get-up functions as an indication of origin and is not functional it can be registered.

However, a trade mark cannot be registered if the relevant public¹⁷¹ would think that it is devoid of distinctive character.¹⁷² This exclusion is to prevent the registration of a mark which is incapable of fulfilling its essential function, namely distinguishing¹⁷³ the goods or services of one undertaking from others which have a different origin.¹⁷⁴ A trade mark, or get-up, can either be inherently distinctive or acquire that distinctiveness. The test for the distinctiveness of shape or get-up marks is the same as for any other mark. However, consumers are not in the habit of making assumptions about the origin of products based on the shape of their packaging alone in absence of any other element.¹⁷⁵ In short, it is difficult to establish that get-up is inherently distinctive. Thus, usually, the get-up will need to have been on the market for some time to acquire the necessary distinctiveness.¹⁷⁶ The problem is that in the time others might enter the market with a lookalike. Essentially, the difficulty in relation to packaging is trying to register the combination of elements necessary to provide robust protection against lookalikes. Another issue with get-up marks is the restrictions on marks where the shape of the mark results from the nature of the goods themselves, the shape is necessary to obtain a technical result or it gives substantial value to the goods.¹⁷⁷

168 But not everything is a sign: see C-321/03 *Dyson Ltd v Registrar of Trade Marks* [2007] ECR I-687; [2007] ETMR 34.

169 Directive 2008/95/EC, Art 2.

170 C-273/00 *Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737; [2003] ETMR 34.

171 C-136/02 *Mag Instrument Inc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2004] ECR I-9165; [2005] ETMR 46, [19] and [49]; C-218/01 *Henkel KGaA v Deutsches Patent- und Markenamt* [2004] ECR I-1725; [2005] ETMR 45, [50]. The relevant public is made up of those who might buy the goods or services.

172 Directive 2008/95/EC, Art 3(1)(b).

173 The distinctiveness bar may actually be very low: see C-64/02 *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Erpo Möbelwerk* [2004] ECR I-10031; [2005] ETMR 58.

174 C-329/02 *SAT.1 Satellitenfernsehen GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2004] ECR I-8317; [2005] ETMR 20, [23]; C-37/03 *BioID* [2005] ECR I-7975, [27].

175 C-136/02 *Mag Instrument Inc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2004] ECR I-9165; [2005] ETMR 46, [30].

176 The things which might be used to prove distinctiveness are explained in: C-108 and 109/97 *Windsurfing Chiemsee Produktions- und Vertriebs GmbH v Boots- und Segelzubehor Walter Huber* [1999] ECR I-2779; [1999] ETMR 585, [51]; also see C-25/05 *August Storck (Storck II)* [2006] ECR I-5719.

177 Directive 2008/95/EC, Art 3(1)(e); as to the test applied to shapes see C-299/99 *Philips v Remington* [2002] ECR I-5475, [2002] ETMR 81; and C-48/09 *Lego Juris v OHIM, Mega Brands* [2010] ETMR 63.

II.4.1 “Free riding”

The rights granted under a trade mark by Article 5(2) of the Trade Marks Directive (and Article 9(3) of the Community Trade Mark Regulation) means that where a third person uses a sign which is identical or similar to a registered trade mark which has a reputation¹⁷⁸ in the United Kingdom¹⁷⁹ (or in the case of a Community trade mark, the EU) and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark it can be prevented.¹⁸⁰

Essentially, there are three forms of dilution in the European Union. In *C-252/07 Intel*¹⁸¹ the Court of Justice identified these as follows: first, detriment to the distinctive character of the earlier mark; secondly, detriment to the repute of that mark and, thirdly, unfair advantage taken of the distinctive character or the repute of that mark. The Advocate-General in *C-323/09 Interflora v Marks and Spencer*¹⁸² went further and tried to place these three types into conventional categories in the context of trade mark law. The first he called *blurring* (or dilution in the strict sense) which is where the uses that entail a danger that the trade mark loses its distinctive character and thereby its value. The second he called *tarnishment* which protects against uses that endanger the reputation of the trade mark. The third he called protection against *free-riding* or the taking of unfair advantage of the reputation or distinctiveness of another’s trade mark.

It is plausible that all of these could apply to lookalikes, but it is the last (free-riding) which has been referred to most frequently in this context and so it will be given greater consideration. Indeed, so called free-riding is the most pervasive and in many respects appears to dwarf the importance of the other two because a finding of tarnishment or blurring (the other forms of dilution) can help support a finding of free-riding or unfair advantage.¹⁸³

The leading case on free-riding, and the one most regularly cited in relation to lookalikes, is the Court of Justice decision in *C-487/07 L’Oréal v Bellure*.¹⁸⁴ In that case, the term free-riding was described as to take unfair advantage is that a person, through the use of a sign similar to a mark with a reputation, rides on the coat-tails of that mark in order to benefit from its power of attraction, its reputation, and its prestige, and exploits, without paying any financial compensation and without being required to make efforts of her own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark. The advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or the repute of that mark.¹⁸⁵

178 As to reputation see: *C-301/07 Pago International v Tirolmilch* [2009] ECR I-9429; [2010] ETMR 5, [21].

179 In another member state.

180 Directive 2008/95/EC, Art 4(3) and 5(2) still suggest that it only applies to dissimilar goods or services. But the Court of Justice has indicated that it applies to both similar and dissimilar goods: *C-292/00 Davidoff & Cie SA v Gofkid Ltd* [2003] ECR I-389; [2003] ETMR 42; *C-408/01 Adidas-Salomon AG v Fitnessworld Trading Ltd* [2003] ECR I-12537; [2004] ETMR 10.

181 *C-252/07 Intel v CPM* [2008] ECR I-8823, [2009] ETMR 13, [27].

182 *C-323/09 Interflora v Marks and Spencer* [2012] ETMR 1, [AG52] and [AG53]

183 *C-487/07 L’Oréal v Bellure* [2009] ECR I-5185, [2009] ETMR 55, [45].

184 [2009] ECR I-5185, [2009] ETMR 55.

185 *C-487/07 L’Oréal v Bellure* [2009] ECR I-5185, [2009] ETMR 55, [49].

When making these assessments it is important to acknowledge that the relevant public is different from that for blurring (and probably tarnishment) – it is the consumers of the goods and services of the later user of the mark which must be considered (rather than the goods for which the mark is registered).¹⁸⁶ Whichever public is used as the barometer, this test is incredibly generous to trade mark proprietors and it has even been suggested by Jacob LJ that it effectively removes the word ‘unfair’ from unfair advantage.¹⁸⁷ He went on to say:

*“So far as I can see this is saying if there is ‘clear exploitation on the coat-tails’ that is ipso facto not only an advantage but an unfair one at that.”*¹⁸⁸

After these comments were made in the Court of Appeal, the concept was explored in more detail by the Court of Justice in C-323/09 *Interflora v Marks and Spencer*:¹⁸⁹

“the concept of ‘taking unfair advantage of the distinctive character or the repute of the trade mark’, also referred to as, inter alia, ‘free-riding’, relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.”

In the context of keywords referencing on the internet the court held that where someone goes to a website by reason of the use of a keyword and this causes them to make a purchase this can in principle amount to taking unfair advantage.¹⁹⁰ This might suggest that the use of get-up which has been registered as a trade mark on other products could be infringing where it is used by a retailer or another manufacturer. However, the *Interflora* court went on to say that where an alternative product is put forward, which is not a mere imitation of the goods, and which offers an alternative to the goods provided by the trade mark proprietor, then this falls within the ambit of fair competition.¹⁹¹ A similar view had already been reached by Daniel Alexander QC sitting as the Appointed Person in *Beko*¹⁹²

“...it is possible to envisage situations in which a user of a mark intentionally uses a sign and the use of it, objectively viewed, provides an advantage but the user does not intend to take advantage of a proprietor’s registered mark. He may intend other results (such as for example signalling that there goods or services are similar or have similar characteristics). In such a situation, a role may remain for the concept of unfairness in excluding from liability free riding which in fact takes place but which is an unintended consequence of some other purpose.”

186 C-252/07 *Intel v CPM* [2008] ECR I-8823, [2009] ETMR 13, [36]; *Antartica SRL v OHIM* [2009] ECR I-28; [2009] ETMR 47 [48].

187 This originates from Darren Meale and Joel Smith, ‘Enforcing a Trade Mark when Nobody’s Confused: Where the Law Stands after L’Oréal and Intel’ (2010) 5 *Journal of Intellectual Property Law and Practice* 96, 103; which with approval in *L’Oréal v Bellure* [2010] EWCA Civ 535; [2010] ETMR 47, [18]. It has been described by the Advocate-General as moving away from the welfare optimal position (as users are prejudiced without benefit to proprietor): see C-323/09 *Interflora v Marks & Spencer* [2012] ETMR 1, [AG 94].

188 *L’Oréal v Bellure* [2010] EWCA Civ 535; [2010] ETMR 47, [49].

189 C-323/09 *Interflora v Marks & Spencer* [2012] ETMR 1, [74].

190 C-323/09 *Interflora v Marks & Spencer* [2012] ETMR 1, [87 and 88].

191 C-323/09 *Interflora v Marks & Spencer* [2012] ETMR 1, [91].

192 O-307-10 (20th August 2010).

It is unclear precisely what the Court of Justice meant in *Interflora* by a “mere imitation”. Does it mean “slavish imitation” or replica as it was used in *L’Oréal* and the Comparative Advertising Directive¹⁹³? Or does it mean something less? Is there a requirement of intention?¹⁹⁴ Where it is not an imitation (whatever that means) and the similarity of packaging is merely signalling to the consumer that it is substitutable then this, according to the court, is a due cause for using the mark¹⁹⁵ and so it is not an infringement. It would amount to “fair competition”. Whether a particular lookalike falls on the side of fair or unfair competition is likely to depend on the circumstances of the case.

193 Directive 2006/114/EC, article 4(g).

194 This issue is discussed in *Whirlpool v Kenwood* [2009] EWCA Civ 753; [2010] ETMR 7.

195 The due cause element of the Court of Justice’s reasoning is explained in *Specsavers International v ASDA* [2012] EWCA Civ 24; [2012] ETMR 17, [141].

Annex III: Unfair Commercial Practices Directive

III.1 Introduction

The Unfair Commercial Practices Directive (2005/29), or UCPD, represented a fundamental shift in consumer protection law both at the European level and within the individual Member States.¹ In relation to the United Kingdom, it was described as the biggest shake-up in consumer law for over 40 years.² Most importantly of all, it has occupied the field in relation to unfair commercial practices between businesses and consumers and so its scope is of vital importance.

III.2 Scope

The scope of the UCPD is very important as it is a maximal Directive,³ which means that Member States cannot restrict free movement of goods or services for any reason falling within the field approximated by the Directive. In other words, they cannot adopt stricter (or, by implication, more lax) laws which fall within the scope of the UCPD even if it would provide greater consumer protection (or more lax, to provide a more competitive environment).⁴ The scope, therefore, is very important and it applies to:⁵

“...unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product...”

The definition of “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.⁶ Essentially this means the UCPD does not extend to unfair commercial practices which do not affect consumers or where the effect on consumers is minimal;⁷ although it might still affect such

1 As to previous attempts to harmonise unfair competition law across Europe see Christopher Wadlow “Unfair Competition in Community Law: Part 1: The Age of the “Classical Model” [2006] *European Intellectual Property Review* 433 and Christopher Wadlow “Unfair Competition in Community Law: Part 2: Harmonisation Becomes Gridlock” [2006] *European Intellectual Property Review* 469; also see Friedrich-Karl Beier “The Law of Unfair Competition in the European Community: Its Development and Present Status” [1985] *European Intellectual Property Review* 284 (also see an extended version at (1985) 16 *International Review of Intellectual Property Law* 139).

2 Joel Smith and Rachel Montagnon “The New Consumer and Business Protection Regulations: Another String to the Brand Owner’s Bow?” (2009) 4 *Journal of Intellectual Property Law and Practice* 33, 33.

3 Directive 2005/29/EC, article 4.

4 C 261/07 and C 299/07 *VTX* [2009] ECR I-2949; [2009] 3 CMLR 17, [52].

5 Directive 2005/29/EC, article 3. There are a number of paragraphs of Article 3 preserving other legal regimes, but none relates to lookalikes.

6 Directive 2005/29/EC, article 2(d).

7 Directive 2005/29/EC, recital (6).

laws where they are directly addressed to consumers.⁸ The UCPD does not therefore extend to national laws relating to unfair commercial practices which prevent harm only to competitors' economic interests or which relate to a transaction between traders.⁹ The touchstone is whether the practice is related to influencing consumers' transactional decisions in relation to products.¹⁰

The difficult question is what amounts to the situation where both consumer and competitor interests are engaged.¹¹ The Court of Justice has indicated that where a law falls within the definition of commercial practices it is within the scope of the UCPD, whether the law is aimed at protecting consumers or preventing competitors behaving in a certain fashion.¹² If something is connected to the promotion, sale or supply of products to consumers then it falls within the scope of the UCPD.¹³ Only where it is not connected to these things and relates only to competitor harm does it fall outside the Directive.¹⁴

III.2.1 Lookalikes

A product which looks similar to another product is, in the usual course of things, connected to the promotion, sale or supply of products to consumers. However, the Explanatory Memorandum to the Proposed Directive¹⁵ expressly mentions "slavish imitations" as something outside the scope of the UCPD:

"It also means that acts which constitute unfair competition in some Member States but which do not harm the economic interests of consumers, such as slavish imitation (ie copying independently of any likelihood of consumer confusion) and denigration of a competitor, are outside the scope of the Directive. Acts which are classed in some Member States as unfair competition which do harm consumers economic interests, such as confusion marketing (which generates a danger of confusion among consumers with the distinctive signs and/or products of a competitor) are within scope."

At first blush, this suggests two things: first, that lookalikes (absent confusion) fall outside the scope of the UCPD;¹⁶ and secondly, passing off may fall within its scope. Each of these issues will be examined in reverse order.

8 Jochen Glöcker "The Scope of Application of the UCP Directive – " I Know What You Did Last Summer"" (2010) *International Review of Intellectual Property and Competition Law* 570, 582.

9 Directive 2005/29/EC, recital (6).

10 Directive 2005/29/EC, recital (7).

11 See Christopher Wadlow "The Emergent European Law of Unfair Competition and its Consumer Law Origins" [2012] *Intellectual Property Quarterly* 1, 20; similar points are raised by Asterios Pliakos and Georgious Anagnostaras "Harmonising National Laws on Commercial Practices: Sales Promotions and the Impact on Business to Business Relations" (2010) *European Law Review* 425.

12 C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [2010] 2 CMLR 24, [38].

13 C-540/08 *Mediaprint Zeitungs* [2011] 1 CMLR 48, [19]; C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [2010] 2 CMLR 24, [38].

14 C-540/08 *Mediaprint Zeitungs* [2011] 1 CMLR 48, [21].

15 COM (2003) 356final.

16 There is some further support for this on the basis that the Enforcement Directive (2004/48/EC), recital (13) refers to "parasitic copies" in terms of unfair competition law for competitors.

III.2.2 Passing off

A leading commentator on passing off suggested that passing off is unaffected by the UCPD.¹⁷ This might be true, although it is important to consider the arguments that it does fall within scope. If passing off (or indeed, protection under the UWG in Germany) is affected by the UCPD then some of the discussion in Annex II and IV on the effectiveness of those laws might be superseded.

In looking at the effect of the UCPD, the first thing to note is that the intention or purpose of a particular law does not matter as to whether it falls within scope.¹⁸ What is important is whether the law is connected with the promotion, sale or supply of products to consumers. Once goodwill is established, the law of passing off exists to prevent a misrepresentation being made to the customer of the product or, importantly, a misrepresentation to the ultimate consumer of the product.¹⁹ As has been discussed, this misrepresentation might result from the get-up of the goods being confusingly similar. Such misrepresentation is likely to be connected to the promotion, sale or supply of the product and it is difficult to see how a court could conclude that the get-up or signs on a product were not related to those things. It is immaterial that passing off is intended to prevent business harm. Assuming this is correct, only where the misrepresentation is purely between the manufacturer and wholesaler would the action for passing off fall outside the scope of the UCPD.²⁰ If this were right passing off as a tort would still exist but its scope would have varied (narrowed) and additional things might be needed to be proved to make out the action. The potential changes to the law of passing off are outside the scope of this report save to the extent that the maximum scope of passing off is probably now limited by the UCPD.

III.3 The original view of the Commission

The extract of the Explanatory Memorandum as set out above²¹ appears to suggest that lookalikes, as they do not necessarily require confusion and do not cause harm to consumer interests, fall outside the scope of the UCPD. This view was reiterated by Giuseppe B. Abbamonte, the Head of the Health and Consumer Department of the European Commission responsible for the Directive:

“If a commercial practice harms only the competitor but does not hurt the consumer, it will fall outside the scope of application of the Directive. As a result, an act may violate the standard of unfair competition in certain Member States but still not be subject to the Directive. This is, for example, the case of denigration and slavish imitation (i.e., slavish copying independently of the risk of confusion for the consumer). The latter is forbidden in certain countries as an act of unfair competition because they consider that the company copying the product is taking undue advantage of the reputation or expenditure of a competitor...Consumers may derive an advantage from the placing on the market of such products, which may be substitutes having the same quality as the branded products but

17 Christopher Wadlow, *The Law of Passing Off* (4th Ed, Sweet and Maxwell 2011), [2-075 – 2-078].

18 See paragraph [III.2].

19 *Erven Warnick* [1979] AC 731, 742; see also *Hoffman-La-Roche v DDA* [1969] FSR 410.

20 As in *Scandecor Development v Scandecor Marketing* [1999] FSR 26.

21 See paragraph [III.2.1].

*are sold at lower prices. Therefore, such an action does not run afoul of the Directive.”*²²

This statement reflects a misconception about lookalikes (at least some lookalikes), namely that the product within the packaging is of the same quality.²³ The nature of lookalikes is that they are usually substitutable, but that does not mean they are the same quality, efficacy and fitness for purpose. Indeed, a lookalike may often try to do the same thing as a branded product, but in a different way or have different chemical or nutritional content. In any event, the Commission’s original view applies only to the extent that the contents of the similar looking packages are *actually* the same.

If the consumer believes them to be the same, but they are not, and a consumer would not buy them if they realised they were not in fact the same (or as good), then it is possible this indicates consumer harm and a lookalike would fall within the UCPD. Indeed, there is an extract of a recital which appears to support this view:²⁴

“It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading.”

However, it is not entirely clear how this recital will fit with the Article of the Directive itself. As has been mentioned above, something comes within the scope of the UCPD where it is a commercial practice. The packaging of a product, making it a lookalike or otherwise, must be concerned with promotion, sale or supply of products to consumers.²⁵ The reason the packaging looks like it does is to signal certain things to the consumer about its purpose, price and quality. Indeed, if packaging has no impact on consumers, then making a transactional decision regarding branding would be almost entirely unnecessary.

22 Giuseppe B. Abbamonte “The Unfair Commercial Practices Directive: An Example Of The New European Consumer Protection Approach” (2005) 12 *Columbia Journal of European Law* 695, 700-1.

23 Glöcker n 8, 583.

24 Directive 2005/29/EC, recital (13).

25 Glöcker n 8, 583.

III.4 Other member states

The Hogan Lovells report²⁶ states that the majority of Member States²⁷ have taken the view that “parasitic copies” are an example of an unfair commercial practice under the UCPD.²⁸ The view taken by the majority of member states that lookalikes are within scope is either incorrect or, alternatively, lookalikes can (in principle) be prevented under the UCPD.

III.5 Modified view of the Commission

In 2009 the Commission modified its view on lookalikes in its *Guidance on the Implementation of the Directive*.²⁹ The issue of lookalikes is mentioned in relation to Article 6 of the UCPD where the Guidance (using the term “copycat”) suggests that consumer deception takes three forms:

- *outright confusion – the consumer buys the copycat product mistaking it for the brand;*
- *deception over origin – the consumer recognises the copycat product is different, but believes, due to similar packaging, that it is made by the same manufacturer; and*
- *deception over equivalence or quality – again the consumer recognises the copycat is different but believes, due to the similar packaging, that the quality is the same or closer to what they would have assumed if the packaging were different.*

The third category 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). The Commission then presents an example: “a trader names or brands his new sunglasses so as to very closely resemble the name or brand of a competitor’s sunglasses. If the similarity is such as to confuse the average consumer making him or her more likely to opt for the new sunglasses when, without such confusion, he or she otherwise would not have done so, this practice would breach the directive.”³⁰

This suggests that where a consumer buys a lookalike believing that it is of the same quality as the branded product the lookalike might breach the UCPD. However, if it is the same quality (to the average consumer) then there could be no breach of the UCPD (as then competition is simply on price). Further, where the consumer would have bought the lookalike even if it had been packaged in distinctive packaging there is no breach of the Directive.

26 See Main Report, paragraph [4.2].

27 The High Court of Ireland came to the view that packaging was not related to “marketing and or advertising” and so lookalikes are outwith the scope of the Directive: *McCambridge v Brennan Bakeries* [2011] IEHC 433. This may be in part because only the Article 6 implementation was considered (Consumer Protection Act 2007, s. 43) and not the Directive as a whole (in particular, s. 41). The point was not taken on appeal - *McCambridge Ltd v Joseph Brennan Bakeries* [2012] IESC 46 – where the Supreme Court simply upheld the passing off claim.

28 Final Report (MARKT/2010/20/D), [57]; this does not mean it has had a practical difference (this was only found in 14 Member States, see [61]).

29 Commission Staff WP, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (3rd December 2009), SEC (2009) 1666, 36-37.

30 *Ibid*, 37.

Although, in a different context in *C-323/09 Interflora v Marks & Spencer*,³¹ the Court of Justice felt that in the interests of preserving fair competition right owners might, in some circumstances, be obliged to adapt its efforts to acquire or preserve its customer base.

III.6 UCPD and Intellectual Property

The UCPD does not affect the laws relating to intellectual property³² and so it has no effect on other laws of trade marks, copyright, design law and other remedies which might be used to prevent similar packaging. It is not entirely clear what the term “intellectual property” is meant to mean in this context and whether it might include passing off. The only guidance would be the list of things considered to be intellectual property by the Commission in relation to the Enforcement Directive³³ in its Statement it suggested that intellectual property extends to “trade names, in so far as these are protected as exclusive property rights in the national law concerned”.³⁴ Whilst goodwill is a property right, the marks representing that goodwill are not usually seen as property rights in gross (ie. separate from the goodwill) and this is why a mark cannot be assigned (or, possibly, licensed) separately from the goodwill.³⁵ It is more likely that passing off is characterised as unfair competition.³⁶ Accordingly, it is likely that passing off, and the protection it provides, is not excluded from the scope of the UCPD on the grounds it is an intellectual property right.

31 [2012] ETMR 1, [64].

32 Recital (9).

33 Directive 2004/48/EC.

34 Commission Statement on Directive 2004/48/EC [2005] OJ L 94/37.

35 *Warwick Tyre v New Motor and General Rubber* [1910] 1 Ch 248; *Tavener Rutledge v Trexal palm* [1975] FSR 479, 486; cf Shelly Lane, *The Status of Licensing of Common Law Marks* (Dareheath 1991).

36 See Directive 2004/48/EC, Recital (13) and, in another context, Christopher Wadlow has stated that passing off is part of unfair competition for the purposes of the Rome II Regulation on the applicable law to non-contractual obligations: see Christopher Wadlow “The New Private International Law of Unfair Competition and the ‘Rome II’ Regulation” (2009) 4 *Journal of Intellectual Property Law and Practice* 789.

Annex IV: Lookalikes in the courts

United Kingdom

There has been a small number of cases¹ before the English courts² where passing off has been alleged in relation to lookalikes.³ The following are representative of those cases.⁴

F Hoffman-La Roche v DDSA Pharmaceuticals

The case of *F Hoffmann-La Roche v DDSA Pharmaceuticals*⁵ related to the sale of a drug which was sold under the trade mark Librium in distinctive black and green capsules with the name Roche on each one. The defendant started marketing similar capsules in black and green with DDSA written upon them. They argued that the drug inside the capsules was the same and the colours were merely signalling this to consumers. However, the Court of Appeal took the view that the public associated the green and black capsules with Roche. Rather than, as the defendant suggested, being a signal to consumers. Therefore passing off was made out.

Lever Brothers v Robert McBride

In *Lever Brothers v Robert McBride*⁶ the claimant, the owner of the Domestos brand, tried to stop the defendant selling its thick bleach. The claimant argued that any blue coloured plastic bottle with a red cap, ribbing and waisting and a paper label had become distinctive of Domestos. The judge took the view that “anyone who actually reads or even looked at the label...with any attention at all could not possibly be confused into thinking [the Defendant’s product] was Domestos or was in any way connected with Domestos”. The judge accepted that in principle confusion was possible where the label was different, but concluded that this was not such a case. The bottles were a different size, the shape was only vaguely similar, the waisting and ribbing were different styles and the shades of blue were different.

1 There are some older cases such as *William Edge & Sons v William Niccolls & Sons* [1911] AC 693; *Lever v Goodwin* [1886-90] All ER Rep 427; *Payton & Co v Snelling, Lampard & Co* [1901] AC 308.

2 An example before the Scots courts is *Haig & Co v Forth Blending* 1954 SC 35 CS (OH). However, the facts were somewhat peculiar to the way Scotch Whisky was sold in pubs. For examples relating to Ireland, see Gerard Kelly “Protecting the Goods: Dealing with the Lookalike Phenomenon through the Enforcement of IP rights in the United Kingdom and Ireland” [2011] *European Intellectual Property Review* 425, 431-432.

3 There are other cases relating to trade dress of course, in particular where the trade dress claimed is for the product design.

4 Other cases involving lookalikes of some type include, for example, *Diageo North America Inc v Intercontinental Brands* [2010] EWCA Civ 920; [2010] ETMR 57.

5 [1972] RPC 1.

6 (unreported) 23rd May 1980, Slade J.

Imperial Group plc v Philip Morris Ltd

*Imperial Group plc v Philip Morris Ltd*⁷ related to the John Players Special (JPS) brand sold by Imperial Tobacco and the launch of the Raffles brand by Philip Morris. JPS had been on sale for a little over a decade with a black pack, gold writing and the JPS monogram. The Raffles pack was also black with gold writing and something which looked like a Royal Crest. The case turned on whether a black pack with gold writing was distinctive and so had sufficient goodwill and whether a similar pack would confuse the consumer. The judge held that there was no goodwill in the get-up as pleaded⁸ and that there was no misrepresentation as nobody would be confused between the two packets. Accordingly, the claim failed.⁹

Rizla v Bryant and May

In *Rizla v Bryant and May*¹⁰ it was argued that the colours red, green and blue, which had been used by Rizla for cigarette paper for many years, were protected as get-up. Bryant and May was about to introduce its own cigarette papers under the mark “Swan” and was intending to use the same colour range as Rizla. Nothing else was similar. Rizla’s case was that consumers would simply ask for “Reds”¹¹ – wanting Rizla Reds – but find they are getting the Swan product. The court accepted this might happen, but the judge viewed this as nothing to do with Bryant and May, rather, it was down to individual shopkeepers. At the interim stage the court concluded there was nothing suggesting that, when viewed side by side or based on based an imperfect recollection, the packaging would cause confusion.¹² Ultimately, the court took the view that passing off would only ever be committed by the shopkeepers and not by the manufacturers.¹³

Beecham Group v J Sainsbury

The case of *Beecham Group v J Sainsbury plc*¹⁴ involved an application for an interim injunction in relation to Marmite and Bovril. Sainsbury introduced a new own brand yeast and beef extracts in pots of a shape similar to those used by Beecham. The dispute related only to the shape of the pots and did not concern the colour of the lids or the labels. The court accepted, for the purpose of the application, that the shape and colour of the Marmite and Bovril pots had, after twenty years use, attracted sufficient goodwill. Sainsbury’s case was that a practice had generally developed in supermarkets that substitutable products were put in the same sized pots as the brand leader. Surveys were conducted by both parties. The claimant’s survey found that consumers assumed that the product in the Sainsbury’s pot was made by the same company which made Marmite. The defendant’s survey reached the same results, but it also discovered that the result would be the same whatever the size or look of the pot. The judge took the view that the public would assume any “almost solid, black sticky

7 [1984] RPC 293.

8 [1984] RPC 293, 298.

9 [1984] RPC 293.

10 [1986] RPC 389.

11 [1986] RPC 389, 391.

12 [1986] RPC 389, 391.

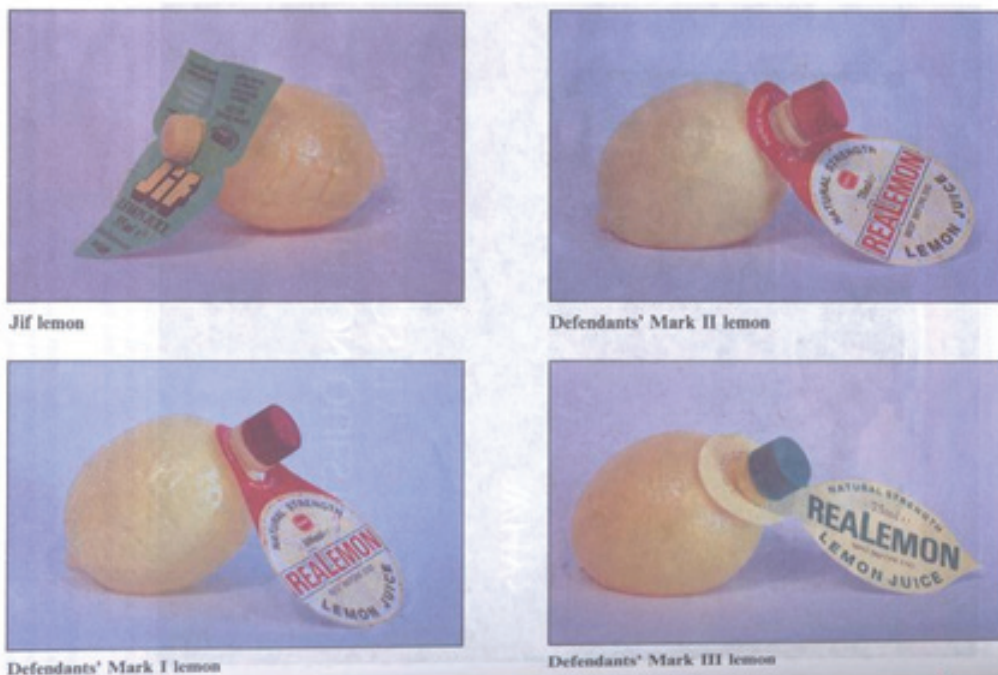
13 [1986] RPC 389, 392.

14 (unreported) 6th April 1987, Whitford J.

substance” was made by the people who make Marmite, whomever sold it. Therefore, the court declined to grant the injunction as it was unclear whether the case would be made out at trial and, further, whether damages would be an adequate remedy.

Reckitt & Colman v Borden

One of the leading cases on passing off, the so called “Jiff Lemon” case, *Reckitt & Colman v Borden*¹⁵ relates to a lookalike although it was not a lookalike sold by a retailer, but by a competitor. The case related to the sale of Jiff Lemon in a lemon shaped container and the launch by the defendant of a similar lemon shape:



The court was presented with impressive evidence. There was an independently produced brochure using Jiff Lemon as an example of a product which can be recognised from the packaging alone.¹⁶ In addition, there were a number of street surveys conducted as well as longer interviews away from the street. These again supported shoppers directly associating the lemon shape with Jiff. The defendant ran its own surveys, but got very similar results.¹⁷ The quality of the evidence in the case was very good and almost entirely supported the claimant. The judge at first instance was able to conclude that shoppers were aware of Jiff and identified the lemon shape with Jiff without reference to the label. Accordingly, passing off was established, and his decision was upheld by the Court of Appeal and then the House of Lords.

15 *Reckitt & Colman Products v Borden Inc* [1990] RPC 341.

16 [1990] RPC 341, 349.

17 [1990] RPC 341, 349.

United Biscuits v Burtons Biscuits

The first of the biscuit cases related to Jaffa cakes. In *United Biscuits v Burtons Biscuits Ltd*¹⁸ the claimant sold McVitie's Jaffa Cakes and the defendant sold Burtons Jaffa Cakes. The case was an application for an interim injunction following a change of packaging by the defendant. In 1989, McVitie's redesigned their packaging, which the judge described as follows:¹⁹

"The new pack is also blue but it is dark blue at the top and bottom and shades to a lighter blue in the centre. The words "Jaffa Cakes" are more prominent, running across two-thirds of the pack from left to right. They are printed in what has been described as "bouncy" Italic script. To the right is a single sectioned Jaffa Cake with above a whole orange with a single leaf attached. Immediately to the left of the orange, above the "es" of "Cakes," is a stylised insignia which looks at first sight like an official stamp and which reads: "Made with real orange juice." Then to the left, above the word "Jaffa," is the McVities logo, this time printed on a dark blue background with a gold surround and, to the left of the label, a stylised wheat ear. Under the words "Jaffa Cakes," in small orange lettering are the words "12 light sponge cakes, with plain chocolate and a smashing orangey bit."

"The words "Jaffa Cakes" and "McVities" are printed in white, but the words "Jaffa Cakes" are thrown into greater relief by the use of two-tone colour shadow, the inner dark blue and the outer dark orange or red."

Burtons packaging was also described by the judge:

"The new pack...is dark orange at the top shading to light orange or yellow at the bottom. The words "Jaffa Cakes" are written prominently across the pack in a similar but not identical "bouncy" Italic script. The words "Jaffa Cakes" are more centralised than on the McVities pack. The gap on each side between the beginning and end of the words and the ends of the pack is the same whereas on the McVities' pack the words "Jaffa Cakes" appear to the left, leaving the right-hand one-third of the pack for the illustration of a Jaffa Cake and an orange. On the Burtons' pack the words "Jaffa Cake" are embossed and thrown into greater relief by a green shadow. The Burton logo, this time written in green with a white background, appears in much the same position as before. The words "Made with real orange juice" run in smaller letters in yellow above the words "Jaffa Cakes." To the right, slightly overlapping the "es" of "Jaffa Cakes," is depicted a sectioned cake. The bottom one-third of the pack is taken up with a row of whole or cut oranges, six in all, with orange leaves sprinkled among them. Along the bottom, printed in black, are the words "12 cakes • delicious chocolate • tangy orange • soft sponge."

"...Burtons introduced a new flavour of Jaffa Cake, a lemon and lime. The pack is like the orange pack, except that it is coloured dark green at the top, shading to green-yellow at the bottom. The other differences are, first, that the words "Made with real orange juice" are, not surprisingly, replaced with "lemon and lime" and, secondly, along the bottom of one side of the pack are written in black the words "Zartes eigeback mit zitrone und

18 [1992] FSR 14.

19 [1992] FSR 14, 16-17.

limone fruchtfüllung und schokol” and underneath “*Genoises nappées de marmalade de citron—citron vert et de chocolat.*”

The court heard evidence of a straw poll survey, but it was thought not to be sufficiently well constructed to be of any value.²⁰ The court also heard of a tachistoscope test, but likewise the results were not found to be probative.²¹ A more substantial street survey was conducted and with this evidence and the judge’s own views it was found that there was potential for confusion in relation to the lemon and lime flavour Jaffa Cake, but not in relation to the orange flavour. An interim injunction was granted on this limited basis.

United Biscuits v ASDA

The most famous English case relating to lookalikes is *United Biscuits v Asda Stores*,²² the so called “Puffin/Penguin” case. United Biscuit’s Penguin had long been established as the market leader in the category and in 1996 ASDA launched Puffin biscuits. The packaging of the two products were as follows:²³



The judge considered the evidence and background to the development of ASDA’s Puffin and reached the following conclusions:²⁴

“I am of the clear view that with the very important exception of the name and the bird picture, there is nothing in the Puffin get-up that is deceptively similar to Penguin. With the name and the bird picture I have no such clear conviction. The cartoon puffin (whose multicoloured beak is reproduced, but not very clearly) could, I am inclined to think, be mistaken for a cartoon penguin. The word PUFFIN is not very different from PENGUIN. Forty per cent of Penguins are eaten by children, and children often help with the shopping even though they do not pay for it.

Had the Asda product been called for example BISON (to take another name from the original list of possibilities) with a cartoon picture of a brown woolly bison on the packaging, these proceedings could not possibly succeed. Almost certainly they would never have been brought. But the name PUFFIN and the prominent picture of an upright dark-coloured bird with a white front gives me the expectation, as a matter of first impression, that a substantial part of the public who shop in supermarkets would see an association between the Asda product and McVities Penguin.”

20 [1992] FSR 14, 19-21.

21 [1992] FSR 14, 22-23.

22 [1997] RPC 513.

23 Images from the INTA Trade Dress Library.

24 [1997] RPC 513, 526-7.

The judge heard an array of evidence, including some evidence of lost sales, which the claimant had attempted, unsuccessfully, to develop into an econometric model,²⁵ as well as evidence of a survey conducted, although it was not relied upon, which suggested 21% of consumers found some similarity between Puffin and Penguin.²⁶ Having heard all the evidence, the judge made three findings of fact:

“First, although occasional mistakes may be made for unaccountable reasons, it is unlikely that a significant proportion of supermarket shoppers would fail to distinguish between Puffins and Penguins if both are on sale next to each other, as they usually are... Secondly, that a substantial number of shoppers would suppose, or assume, or guess at an association (in the form of a common manufacturer) between the Puffin and the Penguin. Thirdly, that the great majority of shoppers would not know who manufactures Penguins (the McVities logo having appeared on them only quite recently) and that what they are concerned with is taste and quality (which depends primarily on the manufacturer) and cost (which depends on the supermarket retailer and on the supermarket’s influence or “clout” with even the largest manufacturers).”

Importantly, the judge also concluded that the design brief for Puffin had been to design packaging that was close, but not too close, to that of Penguin while ensuring it was a parody and a competitor to Penguin. They were not trying to deceive, but were consciously living dangerously.²⁷ The case also reiterated an important proposition of law: where consumers believe something was manufactured by the same person, even if they were aware the product in question was an own brand, this was sufficient to amount to passing off (as it is a “connection”).²⁸ Accordingly, the claim for passing off (although not trade mark infringement) was successful.

Red Bull v Mean Fiddler

There have been two subsequent reported decisions on lookalike type cases. The first is *Red Bull v Mean Fiddler*.²⁹ The claimant was selling the well known energy drink Red Bull. The defendant ran a number of entertainment venues and decided to introduce its own energy drink, Sinergy, to be sold in its venues (and nowhere else). It was accepted that from a distance the cans looked quite similar, although with a side-by-side comparison this was not the case.³⁰ By the time the application for an interim injunction was made, an undertaking had been given by the defendant so that any customer who asked for Red Bull is told Red Bull was not sold at the venue, but a different product Sinergy is sold.³¹ The court took the view that aside from a few purchasers who might point at the drink in a fridge or might say they will have the same to a friend, no customers would be confused as this would be avoided by the implementation of the undertaking. Accordingly, at the interim stage, the court felt that an injunction was inappropriate.

25 [1997] RPC 513, 527-8.

26 [1997] RPC 513, 529.

27 [1997] RPC 513, 531.

28 [1997] RPC 513, 531-2, 538; it is worth noting that United Biscuits does produce own brand products (see 536).

29 [2004] EWHC 991.

30 [2004] EWHC 991, [24].

31 When Sinergy was first introduced there were some instances where test purchasers had asked for Red Bull and received Sinergy without being told it was a different product. This was before the undertaking was given.

Mars v Burgess

The final case is *Mars v Burgess*,³² which related to an application for an interim injunction to prohibit the defendant from selling something believed by the claimant to be too close to Whiskas cat food. The case related mainly to the colour purple (approximately Pantone® No. 248), which the court accepted had long been associated with Whiskas.³³ The Burgess cat food was going to use a different hue of purple (Pantone® 235).³⁴ There was evidence that Burgess had looked at Whiskas packaging during the design process and that the hue of purple had changed from earlier Burgess designs. The court did not think looking at a rival's packs during the design process was in any way sinister.³⁵ No consumer evidence was led before the court and so the decision as to confusion was based on the judge's view alone:

"There are some superficial similarities between the packaging of [the Defendant's product] and that of Whiskas dry food, but, in my judgment, the differences, especially in the purple itself, and in the amount and layout of the purple, are more significant. Accordingly, I will not grant an interim injunction based on passing off."

It has been questioned why this case reached a different result from the *Puffin/Penguin* case, but suggestions have included the passage of time has increased consumer sensitivities to lookalikes.³⁶

32 [2004] EWHC 1912 (Ch). There was also a trade mark claim, but this will not be summarised.

33 [2004] EWHC 1912 (Ch), [26].

34 [2004] EWHC 1912 (Ch), [29].

35 [2004] EWHC 1912 (Ch), [30].

36 Gill Grassie "EU Directive on Unfair Commercial Practices – a UK Perspective" (2005) 1 *Journal of Intellectual Property Law and Practice* 107, 109.

Germany

Viennetta

The *Viennetta* case,³⁷ before the Supreme Court, involved a *Viennetta* Ice Cream Cake. *Viennetta*'s packaging included a picture of the product, the manufacturer's trade mark ("Langnese") and the word "Viennetta":³⁸



A competitor *Schöller* adopted a different product name and called it a *Café au Lait*. The Court concluded that consumers typically identify packaged supermarket products by their brand name and further, that packaging design which simply displays the product in a straightforward manner, absent direct copying, would not be used to distinguish the product by the consumer. It therefore did not offend UWG §9(4).

³⁷ (2001) GRUR 443 (BGH).

³⁸ The images are reproduced from the case report.

Garlic Sausage

In the *Garlic Sausage* (Knoblauch Würste)³⁹ case the court came to a slightly different conclusion. It reiterated the rule from *Viennetta* that brand names are very important for consumers. However, a distinction was drawn where the product bears a supermarket's brand name, rather than a competitor's,⁴⁰ as consumers have different perceptions of own brand products and may not necessarily consider the presence of such a mark conclusive. The packaging was as follows (the product on the right being the lookalike):⁴¹



39 (2009) GRUR 1069 (BGH).

40 (2009) GRUR 1069 [18] (BGH).

41 The images are reproduced from the case report.

Atemgold

In 2005, Storck launched the brand “Atemgold“ (Breath Gold) with blue and white packaging showing a polar Bear. Wick, the producer of “Wick Blau,” had been using a polar bear-based brand since 1984. Initially, Wick was successful before the Lower Court of Cologne.⁴² Wick successfully filed a case against this packaging before the Lower Regional Court of Cologne and the packaging was changed. Wick continued the case when it came to the view that the modified packaging still infringed their packaging:⁴³



The higher Regional Court of Cologne found in favour of Wick.⁴⁴ The court held that Wick’s product had competitive distinctiveness and that Atemgold unreasonably exploited the reputation of Wick’s product as the perceptions of quality would be transferred to Atemgold. The court relied strongly on a consumer survey that consumers perceived Wick’s Blau as “the mint in a blue bag with the polar bear”⁴⁵ and that there was no justifiable reason for the competitor to use a polar bear.

United States

Oral-B Laboratories v Mi-Lor Corp

In *Oral-B Laboratories v Mi-Lor Corp*,⁴⁶ where Mi-Lor adopted new packaging which had an overall appearance similar to Oral-B’s toothbrush box used consistently by Oral-B for ten years. Mi-Lor’s packaging, like Oral-B’s, included a prominent blue and white oval logo and displayed the statement “COMPARES WITH ORAL-B.”⁴⁷ Particularly problematic for the retailer was its president of the defendant company who, in his evidence, admitted that the packaging was designed specifically to “catch the eye of the potential Oral-B customer.”⁴⁸

42 31 O 401/07 (LG Köln).

43 Image taken from case database.

44 6 U 131/09 (OLG Köln).

45 6 U 131/09 (OLG Köln), [21].

46 810 F 2d 20 (2d Cir 1987).

47 810 F 2d 20, 22 (2d Cir 1987).

48 810 F 2d 20, 23 (2d Cir 1987).

After a preliminary injunction was granted the retailer submitted revised packaging to the court and this was still not accepted. Eventually, the defendant retailer went ahead and sold under further revised packaging and contempt proceedings were brought for breach of the preliminary injunction. On appeal the court took the view that the president's evidence of conscious imitation was relevant as the law presumed that intended similarity is likely to cause confusion.⁴⁹

Conopco v May Department Stores

The leading case on own brand and trade dress is *Conopco v May Department Stores*.⁵⁰ In summary, the plaintiff launched its product, Vaseline Intensive Care, in the autumn of 1989. In January 1989, prior to launch, the defendant started developing an own brand competitor and, during the design process, it changed its packaging. The packaging of the two products once they got to market looked as follows:⁵¹



On appeal, it was held there was not trade dress infringement, because of the placement of the retailer's mark.⁵²

“This is a case in which a retailer markets a national brand product and at the same time markets its own private label product in direct competition. The retailer packages its product in a manner to make it clear to the consumer that the product is similar to the national brand, and is intended for the same purposes. At the same time, the retailer clearly marks its product with its private logo, and expressly invites the consumer to compare its product with that of the national brand, by name.”

“With the rise of regional and national discount retailers with established names and logos, retailers who market both national brands and their own private label brands in direct competition, this form of competition has become commonplace and well-known in the marketplace. When such packaging is clearly labelled and differentiated—as was the case here, see the discussion in the next section—we are unwilling to attribute to the Eighth Circuit, absent clear precedent so requiring, a rule that would make such competition presumptively unlawful.”

49 810 F 2d 20, 23 (2d Cir 1987); relying on *Harlequin Enterprises v Gulf & Western*, 644 F2d 946, 949 (2d Cir 1981).

50 46 F3d 1556 (Fed Cir 1994).

51 Images taken from INTA Trade Dress Image Library.

52 46 F3d 1556, 1565 (Fed Cir 1994).

This means, as McCarthy puts it, the case can be read to permit the use of own brand lookalike containers so long as a recognized retailer's mark was attached.⁵³ However, there have been decisions going the other way.

McNeil Nutritionals v Heartland Sweeteners

In *McNeil Nutritionals v Heartland Sweeteners*,⁵⁴ the plaintiff began selling Splenda in 2000 and by 2006 a number of Supermarket own brands began to appear. These were being sold in Giant, Stop & Shop, Tops, Food Lion, Safeway, Albertson's, and Wal-Mart.⁵⁵ At the material time *Splenda* was being sold for \$5 for a 100-count box whereas the own brands were being sold for between \$4.00 and \$4.60. The relevant packages were as follows:⁵⁶



The Court of Appeals for the Third Circuit ultimately held that there was sufficient evidence on the facts for a preliminary injunction to be granted as there was a likelihood of confusion between some of the own brand products and Splenda, although there was not sufficient evidence in relation to the others.⁵⁷ In its judgment the court reiterated that the single most important factor in trade dress cases is similarity.⁵⁸ It also thought that a side-by-side comparison would be appropriate in the case of own brand goods as they would be sold on the same shelf at the same time. The court went on to address the vexed question of what difference the inclusion of a retailer's brand name makes to similar trade dress:

*"To be sure, we do not suggest that the prominent presence of another well-known mark is an affirmative defense to every trade dress infringement action. ... But this fact unquestionably plays a role in a district court's analysis of the first ...factor, such that it may cause the overall impressions created by two trade dresses to be different enough for the ...factor to be weighed in a defendant's favor. When it is relevant, district courts should consider this fact as part of its analysis of the degree of similarity ...as opposed to some sort of independent defense."*⁵⁹

53 Thomas McCarthy, *Trademarks and Unfair Competition* (4th Ed, 2012 Revision), § 23:53.

54 511 F. 3d 350, 358 (3d Cir 2007).

55 511 F. 3d 350, 355 (3d Cir 2007).

56 Image taken from the INTA Trade Dress Image Library.

57 511 F. 3d 350, 369 (3d Cir 2007).

58 511 F. 3d 350, 359 (3d Cir 2007).

59 *McNeil Nutritionals v Heartland*, 511 F.3d 350, 361 (3d Cir 2007).

It ultimately held that “the absence of the ‘Splenda’ label from the Food Lion and Safeway packages is not sufficient to cure an otherwise infringing trade dress, nor is the mere presence of another label.”⁶⁰

McNeil v Guardian Drug

In the case of *McNeil v Guardian Drug*,⁶¹ the manufacturer of LACTAID ULTRA (a lactose enzyme digestive aid) brought a claim against the manufacturer of a generic equivalent, which was sold as the own brand version in various supermarkets. The packaging was described by the court in the following fashion:⁶²

“A comparison of the packaging of Arbor’s and McNeil’s products shows that the packages are virtually identical in color, design and labeling. Both McNeil’s LACTAID ULTRA and Defendant’s ARBOR ULTRA LACTASE are packaged in boxes which have: a dark blue background with gradually lighter-blue horizontal pinstriping; the product brand identified in white block-print; the word “Ultra” in cursive script; a photo of dairy products in the center of the front panel; a yellow informational “banner” with red script to the left of the dairy product photo; a picture of a caplet in a “spotlight” cut-out in the lower right corner; and the number count of the package caplet contents in the lower left corner

The back panel of both Plaintiff’s and Defendant’s packages similarly are identical. The content of the text on the back of the packages is nearly verbatim the same and, on both packages, the text is presented in the same red and blue color combination.

Defendant does not dispute the above similarities in product packaging but does point out that, on its product, the name “ARBOR” appears prominently in white letters on the package above the product name “ULTRA LACTASE”, and in small print under the product name appears the invitation “Compare to the Active Ingredient in Lactaid® Ultra”, and in small print under the product name appears the invitation “Compare to the Active Ingredient in Lactaid® Ultra”. Defendant further notes that on the back of the package in small print appears a disclaimer that “This product is not manufactured by McNeil Consumer Products Company, distributor of Lactaid®) Ultra.”

The court eventually decided that the own brand products infringed the LACTAID trade dress, but in so doing it made some interesting observations on shelf placement:

“Because Defendant is mimicking Plaintiff’s packaging and placing the products side-by-side on the shelf, the price comparison signs and advertising do not dispel customer confusion as to the source or origin of the Arbor product. The signs and advertising can be read as actually telling customers “Our Arbor product is the same product as the national brand, only cheaper.” Furthermore, if Arbor’s goal were truly only to encourage customers to “compare” its product to the national brand, it would have made its package as distinct as possible from that of Plaintiff’s product.”⁶³

60 *McNeil Nutritionals v Heartland*, 511 F.3d 350, 360 (3d Cir 2007); cf *Bristol-Myers Squibb v McNeil PCC*, 973 F. 2d 1033 (2d Cir 1992).

61 984 F. Supp 1066 (E.D. Mich 1997).

62 984 F. Supp 1066, 1068 (E.D. Mich 1997).

63 984 F. Supp 1066 , 1073 (E.D. Mich 1997).

The court also confirmed that confusion does not have to occur at the point of sale, it is enough that the product is selected off the shelf erroneously (initial interest confusion).⁶⁴ The court viewed the “hook” of having similar trade dress to be enough to amount to infringement.

64 984 F. Supp 1066, 1073 (E.D. Mich 1997); also see *Esercizio v. Roberts*, 944 F.2d 1235, 1239 (6th Cir1991); and *Blockbuster Entertainment Group v. Laylco, Inc* 869 F.Supp. 505 (E.D.Mich1994).

Appendix A: Interviews – Discussion Points

[See Chapter 6]

Discussion points relating to lookalikes for brand owners

We hope to have a wide ranging discussion with brand owners about lookalikes and the issues that their products have faced in relation to lookalike packing. The following are indicative of the sorts of questions and topics we would like to cover.

1. What characteristics do you think make one product a “lookalike” of another?
 2. Are there any products of yours which you believe have attracted “lookalikes”? Who sold the lookalike (supermarket own brand/other own brand/competitor branded product)? If your product packaging has been copied, have these been established products of yours or new variants / brand extensions recently introduced to the market? In the case of a retailer copy of a new product’s packaging, do you believe the advance knowledge the retailer has of your plans had an impact?
 3. What complaints have you made to the owner of a “lookalike” product? And what was the outcome of your complaint (e.g. was the product packaging changed)? Did you involve lawyers (in-house or external) and/or send (i) a letter before claim; (ii) started proceedings? How much did you spend in trying to resolve the complaint and why did it come to an end?
 4. Has the arrival of a lookalike on the market ever affected your advertising spend (figures would be very useful to support this)? Has the arrival of a lookalike affected your sales (figures would be very useful)? What about where the “lookalike” is of a competitor within the same product category?
 5. Has the arrival of a new generic (non-lookalike) affected your advertising spend (figures would be very useful)? Has the arrival of a new generic (non-lookalike) affected your sales (figures would be very useful)?
 6. How often do you change the packaging of your products? Why is it changed? Do you change more often when there is a “lookalike” than otherwise? Have you ever changed your packaging specifically because of “lookalike” packaging?
 7. When you are launching a new product in what ways, if any, do you believe the packaging of existing products in the sector has on the packaging of your own product?
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8. Are there certain products in your category where you think colours are used by your customers to identify the type of products (e.g. yellow for butter/silver for unsalted butter)?
9. Have you ever adapted the packaging of one of your products to more (or less) resemble a competitor (in particular, a market leader)?
10. Have you ever used commercial strategies (e.g. price cuts/2-3 offers or launching cheaper ranges) to challenge a lookalike? Conversely, if a retailer has launched a lookalike product against one of your products, has it used other marketing tools to gain competitive advantage (eg. price, shelf position and facings, shelf / in-store display, promotions)?
11. Do you have any commercial agreements with major supermarkets to discourage / allow own brands? (e.g. exclusivity of a product in exchange for not challenging a lookalike)
12. Do you manufacture own brand products for supermarkets which compete with your own branded products? (examples would be useful) If yes, are the own brand products made to a different formula to the brand and are they packaged distinctively or to look like yours or others' brands?
13. If consumers wish to complain about products being packaged similarly to your brands, would you expect them to complain to you or to the retailer? Have you received any such complaints? If not, why do you think that is?

Discussion points relating to lookalikes for retailers

We hope to have a wide ranging discussion with the major retailers about lookalikes. The following are indicative of the sorts of questions and topics we would like to cover.

1. What characteristics do you think make one product a "lookalike" of another?
 2. What complaints have been made to you by brand-owners relating to "lookalike" products? (e.g. trade mark infringement/passing off allegations). How were these complaints put to you? (e.g. through commercial channels or legal channels). And what was the outcome of the complaint? (e.g. was your product packaging changed or other amicable solution reacted)? Did you involve lawyers (in-house or external)? How far did the matter get (were proceedings issued)? Would you ever delist a branded product (or your own brand) if there has been an allegation of intellectual property infringement? How much did you spend in trying to resolve the complaint and why did it come to an end?
 3. When you launch a new "own brand" do you ever directly spend money advertising that product in particular? If so, how much is spent (figures would be very useful to support this)?
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4. When you launch an own brand product how does this affect the sales of the brand leader (figures would be very useful)? Is the effect on sales different when the packaging used by your own brand uses the same colour, shape, themes or iconography as the brand leader?
 5. How often do you change the packaging of your products? Why is it changed? Do you change it when brand leaders adapt their packaging?
 6. When you are launching a new own brand product in what ways, if any, do you believe the packaging of existing products in the sector has on the packaging of your own product? Are there certain products in your category where you think colours are used by your customers to identify the type of products (e.g. yellow for butter/silver for unsalted butter)?
 7. In the last five pack changes (introductions) how many have resulted in shelf presentation which looked more like a branded product, how many which were more distinctive and how many which are no different?
 8. How often do you use commercial strategies (e.g. price cuts/2-3 offers or launching cheaper ranges) when launching an own brand? Are different strategies used when the packaging used by your own brand uses the same colour, shape, themes or iconography as the brand leader?
 9. Do you see leading brands as more important to create and establish new categories and store brands to expand them later on? Or the other way around? Or is it category specific?
 10. How many of your own brand products are manufactured by brand leaders? In those cases, how often is the product the same in your own brand as the brand leader?
 11. If consumers wish to complain about products being packaged similarly to your brands, would you expect them to complain to you or to the brand-owner? Have you received any such complaints?
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Appendix B: Interview - Notes of Interviews

[See Chapter 6]

GlaxoSmithKline (GSK)

Interview: 13th February 2012

Interviewees: Alicia Chantrey (Assistant General Counsel, IP) and Holly Turner (Group Brand Director)

Lookalike

1. We think that a product is a lookalike when it combines a number of the following features from the original pack: similar colour, language iconography, layout of graphics and copy and packaging shape. It is the overall look and feel of the product that makes it a lookalike. For us, the problem is usually not where the consumer thinks they are actually getting the same product, but rather they think “that looks to me like it has all the elements of Lucozade in it and I think it is made by the Lucozade people or it has something special in it like Lucozade”.
2. It is important that brand owners are able to protect their brand as this is the only way to protect the investment in research and development leading to many branding decisions. When the product is on the shelf it is intended to be a beacon for quality, safety and efficacy. These beacons, which we as brand owners have developed, should not be misappropriated by those who have not invested in their development.
3. In the healthcare sector it is often the actives that are the same rather than anything else, or the product claims, but increasingly this is changing. There are a lot of other manufacturers using the same ingredients (using the same active). They are entitled to take the active, once it is off patent, but it is not appropriate to use packaging cues from the market leading brand to suggest they possess the same quality, safety and efficacy.

Legislative provision

4. We think there should be a specific provision on lookalikes, rather than an entire unfair competition law. It is difficult to identify what sort of cases should be covered by such a law and what should not. It is hard to work out what the tipping point is between an acceptable rival and a lookalike. A good starting point would be to give brand owners the right to take direct action against parasitic copies under the Unfair Commercial Practices Directive rather than having to rely on the overstretched resources of Trading Standards to enforce this. Trading Standards are unlikely to be seen as a
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priority when they are tasked with handling so many other issues and consider this a business to business issue. We have not attempted to persuade Trading Standards to bring an action under the Directive to date but are not aware of any enforcement action by them on this issue.

Justification

- The reason the consumer is buying the lookalike is because they have learnt all the marketing cues which brand owners have invested in and created and believe that the product is comparable. Essentially, the lookalike is misappropriating the goodwill (it dilutes the equity in the brand). Therefore, the justification for the right is the investment in the brand made by the brand owner. This investment may come from conducting market surveys or advertising or promotion or other similar sorts of investment.

Complaints

- We don't have that many examples of lookalikes, but when we have had a close one where we have not been able to resolve it quickly through direct dialogue with the other party we will seek external advice from a QC. The advice is normally that because the third party has its brand name on the product (however small) it will be incredibly difficult (and expensive) to win in relation to a passing off claim.

- For instance, we were very unhappy about the product "Night Time" (right) which was brought out and which competed with Nytol. The product Night Time had been brought about by a former supplier of ours after the supply agreement was terminated. The product was identical and they were using up the excess product, which they were entitled to do as there was no patent and no confidential information involved. We were advised by an intellectual property QC that it was a weak case for passing off because "Potters" was on the packaging. We ended up settling and Potters changed the pack. It cost us a lot of money, but we did not get any damages or costs as we could not get the matter to court. The modified packaging of night-time (left) no longer remains a lookalike in our view. This is because the category is green for herbals and it is a sleeping product so stars are acceptable.



Competitors

- We would approach third parties (non-retailers) very aggressively although we have yet to take anything to courts against a third-party. This is because the cases have been resolved. Usually, where we have a reasonable case, the chances of the matter being resolved without recourse to the courts are "pretty good".

Retailers

9. The commercial pressure in relation to whether to bring an action against a retailer is such that we are much more reluctant to bring claims. Essentially, it is a claim against one of our main customers. In general, retailers are not willing to change their packaging when they are approached unless there is a cast iron case (70%+ of success). However, in relation to passing off we can never get to that level of certainty.
10. If it was necessary to bring a claim to protect a GSK brand then the Head of UK Business would support the decision. Nevertheless, it would be a difficult political decision as it could result in difficult conversations for our sales team with our retail partners. Our view is that it is unlikely we would be delisted if a claim was issued but it would depend on the nature of the relationship before the issue arose. In contrast, we have stopped supply because of a dispute with a major commercial retailer due to a (non-IP) dispute and so it is possible it could happen in an IP dispute.

Timing

11. The incidents of lookalike are not particularly cyclical; sometimes one or two arrive in quick succession, at other times none will arrive for a long time. There is no real timetable of when a lookalike arrives, although it will only arrive once market share has been created. You don't tend to see lookalikes arriving immediately after the brand (and its packaging) is launched. They tend to wait until the brand is established. There is not much point in a lookalike being launched before a market is created. However, once a lookalike arrives on the market it stays. This means it will still be on the shelves two or three years later if there is nothing we can do about it.
12. We have never had the situation where the lookalike arrives at more or less the same time as us, but it is our view that there is not much value in such behaviour from the point of view of retailers. I am not aware of them copying the pack when they have seen it in advance of launch.

Regional variations

13. In my experience, Germany is somewhere where we would be able to take action under unfair competition law. The law of passing off in comparison does not seem to give sufficient protection against this sort of activity at all. In Germany, we had a case involving one of our vitamin ranges and a retailer introduced a lookalike. The court system was such that German unfair competition law was sufficient to prevent too many features of our pack being copied. We have also been able to tackle cases where there has been systematic copying of a range. It was also a lot cheaper to litigate.

Signalling

14. Certain elements suggest speed, such as movement or lightning. We believe that the copying of these elements is a factor going towards a lookalike. However, it is the combination of the elements which make something a lookalike; one element taken is not something where we would be aggrieved.
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15. For example, we thought that this Tesco's juicy water was something which we were happy with, we were concerned with the colour being the same and that Tesco's had adopted the flying berries. This is an example of Tesco getting closer than necessary. We cannot say, however, whether light blue generally stands for "Really Light" in the marketplace. Nevertheless, we think that there are sufficient elements for this to be a lookalike. The composition of the pack is the same: the sky to the grass, the clouds and blackcurrants in the middle, and the playful font could be seen as similar; and the colour is almost identical. The Tesco product is no longer on the market in that packaging, but we did not take action, so it was not because of us.



16. The question is why Tesco took those cues unless it is to be the same as Ribena or very similar to it. It is not just the cues, but the way they appear.

Ranges

17. A particular problem is the copying of the look of an entire range might not be problematic, but in some instances it is clear that entire ranges are being mirrored. This suggests a pattern of behaviour of following our packaging. We did write a letter to Boots regarding the mirroring of Panadol, but the commercial decision was that we would not take further action as we did not want to jeopardise the overall relationship.



18. If they are coming to the category as an own brand then there is no need to use the same packaging cues. You could buy Paracetamol and Codeine in a White Box and so there is no need to copy packaging.



Sales

19. The launches of own brand products do affect our sales generally and we assume this is worse when it is closer to the brand lead. We assume so, but cannot prove it however. A branded competitor's launch would lead to a blip in sales. Consumers then usually revert to their brand choices (or not). Own brand however leads to an on-going erosion of the market share unless a new product is launched. This means we have to introduce new features and benefits for existing products to compete with lookalikes.
20. In general terms, in categories where own brands have been established for longer, for example pain relief, they have about a 60% market share. In relation to children's medicines they have only about 20% (although issues of trust are stronger in relation to children's medicines). Over time, the business modelling is that own brand could become about 60% of market share in this market as well.

Packaging

21. There is always a desire to have a new feature on the product and we do on occasion change packaging without changing a feature. In healthcare and oral care packaging changes every 3-5 years, but with drinks it is more like every 2-3 years. Within GSK we have never taken the decision to change packaging as a result of a lookalike although we have decided not to take action in relation to particular products because we were about to change our packaging and so it was not worth it.

Product innovation

22. We have never been excluded from a market, or not entered a market, because of lookalike packaging. Obviously, it might be the case that a competitor or own brand is so strong that it was not in our interests to enter the market for other commercial reasons. However in general we are making cuts in our investment because the business is declining rather than because of own brand/lookalikes. We have not joined the dots.

Making for other people

23. We do not make products for other people (at least not within living memory).

Promotions

24. We would not make decisions to start promotions based on a lookalike entering or being in the marketplace. Such decisions would be part of the general commercial category decisions.

Complaints

25. We have no record of any complaints from consumers about lookalikes. If it ever happened it is likely to have to come to the marketing team or legal department and that has not happened. We don't have a protocol to notify the legal department if such a complaint is made. We consider it is unlikely that a consumer will bother to make a complaint if they realise they have not bought what they were expecting as our products tend to be relatively low value or impulse purchases and it is therefore not worth the hassle or the consumer feels embarrassed to admit their error.

Images

Juicy water image: mysupermarket.co.uk

Ribena Extra light: mysupermarket.co.uk

Other images supplied by GSK.

Diageo

Interview: 15th February 2012

Interviewees: Chris Lock (Category marketing director); Romain Dourlen (IP Counsel, Western Europe); Katherine Tsang (Senior IP Counsel, Europe IP Team)

What is a lookalike?

1. A lookalike is a product whose overall get-up resembles, calls to mind or creates a link, with a brand owner's product. It may or may not be trade mark infringement or amount to passing off (although we don't think passing off goes far enough to prevent lookalikes).
2. Our research suggests that a consumer looks at packaging for 2-3 seconds before making the purchasing decision and so any product which is put into a bottle which has a similar shape or colour and has similar imagery or close brand name should be considered a lookalike. It might also be that the colour of the liquid is relevant to whether a product is a lookalike. This is because it could quite easily be mistaken for the product we have invested in to create our brand. Clearly, if there is a difference between iconography, bottle shape or colour it ceases to be a lookalike.
3. Some of our wholesaler producers are in a position to develop their own product and it will be a cheaper version of a market leader. Their primary motivation is to sell in the same product category and do it cheaper and so get a greater market share. We have no problem with own label products as such, but the problem is where retailers are trading on the consumer's awareness of the branded product.

Framing a law

4. We cannot provide a formula of when something becomes a lookalike, rather it would need to be something like the "overall impression of the product" brings to mind the brand leader. The best that could be done would be to have an inclusive list of things which determine the "overall impression of the product" such as the name of the product, the colour, packaging and extra features. It might be something like the Court of Justice's approach in *L'Oreal v Bellure*¹ as to "riding on the coat tails" would be appropriate², rather than the passing off which requires there to be a misrepresentation. This is because it is clear that something can be a lookalike without there being a likelihood of confusion.

1 C-487/07 *L'Oreal v Bellure*[2009] ECR I-5185.

2 Ibid, [49] – "In that regard, where a third party attempts, through the use of a sign similar to a mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark, the advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or the repute of that mark."

Harm – lack of equivalence

5. The lookalike is often cheaper as it goes through a cheaper manufacturing process and uses less expensive materials. Thus, the packaging suggests equivalence when this is not in fact the case.

Manufacturing

6. We do not make products for anyone else.

Complaints and examples

7. On average, in relation to the United Kingdom, we would estimate that a lookalike type incident arises about once every two months (about six times a year). About 30-50% of these cases come from retailers. In about 50% of cases overall we take the view that the lookalike might be actionable (so about three times a year). Once we had formed this view we would get an opinion from an external lawyer. At this stage, the majority of these opinions suggest that there is a good chance of success.
8. The way we approach a claim once we believe we have a good chance of success depends on the nature of the other party. Factors affecting the approach will include things such as: Is there an existing relationship (e.g. are they customers)? Do they have a history of this sort of behaviour? Are there others in the same category?
9. If the potential claim was against a customer, we may well start with a business-to-business conversation. Generally speaking they are resolved without issuing legal proceedings.
10. Smirnoff Vodka, Bailey's Irish Cream, Pimm's and Gordon's Gin have all attracted lookalikes. We have brought proceedings against some retailers and also against some manufacturers. It is our opinion that the Glenn's Vodka brand was based entirely on Smirnoff and we believe that its entire business strategy was to copy Smirnoff.
11. We may arrange it so that where there is a problem the person who has the business-to-business conversation is not the person at Diageo who has the existing relationship with the retailer. The discussion with a retailer is always going to begin with being commercial to commercial.

Regional variation

12. The incidents of lookalikes vary between markets. In the United Kingdom, Smirnoff is a premium Vodka at a mid-range price and therefore we are the one that lookalikes chase. In the United States, there are lookalikes that compete with Absolut, but that is not really the case here. We presume that this is because Absolut has a lot smaller market share in the United Kingdom.
 13. If there is no relationship, such as in Eastern Europe, you have less commercial leverage and so you are more likely to have to issue proceedings.
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Sales

14. We have no strong evidence to suggest that there has been a loss in sales when a lookalike enters the market. There are often other factors why a lookalike does well. In relation to Smirnoff for example, active steps were taken by the wholesaler to try to sell their lookalike. Accordingly, there are more factors at work than merely the similarity of the packaging.

Advertising

15. There have not been cases where the arrival of a lookalike on the market has changed (or been the tipping point) for changing advertising plans. However, the presence of Glen's Vodka on the market has led us to have several years of advertising extolling the virtues of our production process. The key issue for us was whether the consumer would pay more for what Smirnoff offered in terms of quality.
16. This means that lookalikes might change the themes of advertising adopted, but it would not change the "spend" on advertising. This is because the spending is more or less fixed internally. We get an advertising budget for a brand and we spend it in the best way to promote the product within the relevant market. We would not have extra money (or less money) because a lookalike came on the market.

Packaging

17. If a design is protectable then it might be a factor in designing the packaging, but such key spending is not affected by lookalikes as such. The existence of lookalikes goes into the marketing mix, as it were, but it would not be the primary factor of changing or accelerating the change in the packaging of our product.
18. Lookalikes tend to be attracted to more established products. It is not very useful to try to copy elements of a new brand as consumers are not familiar with that brand.

Signals

19. There is a risk over time that a colour adopted by a brand leader becomes an indication of the product. However, we would, for example, dispute that red is indicative of Vodka.

Promotions

20. We have used promotions, price cuts and so forth as part of the usual commercial deal. It would be counter-intuitive for us to drop our prices in order to combat a lookalike. We would want to make more of the premium nature of the brand and why we are worth the money.
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21. There is a lot of negotiation about range and layout; some of it is paid for and some is based on research. The category leader is normally put at eye level on the shelf. The competitor brands would either be above or below the brand leader. A product which is own label or lookalike where it is adding incremental sales will be included in the Category Captain's recommendation. Only if they are purely cannibalising sales (i.e. substituting sales) would they be recommended for it to be removed.

Consumer complaints

22. Consumers do complain to us about products when they are not getting the product they thought they were. We have strong consumer engagement. There is almost an attachment with some of our consumers. However, consumers complaining about confusing products is not something that happens frequently.

Consumer Protection from Unfair Trading Regulations 2008

23. We have not considered using the Consumer Protection from Unfair Trading Regulations 2008.
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PZ Cussons

Interview: 14th February 2012

Interviewee: Sam Plant (IP Lawyer)

Lookalikes

1. A lookalike product is shape of bottle (packaging), colour of packaging, similar signs (whether having trade mark function or not), the overall look and feel of the packaging. Finally, the colour of formulation is also important. Accordingly, we have a range of products where colour is particularly important. A product like Original Source (Washing Gel), the first thing is the palette of colours. The colour is a key element of the product.
2. If you do a lemon shower gel then you would have the colour of the lemon (unless you are going wacky with it). This is why one element on its own is rarely enough. But if you have a similar shaped bottle and a similar colour liquid in it then it is likely to suggest to consumers it might be the same product.
3. When we talk about lookalikes we are talking about a third party, with no relationship with us, seeking to trade on the reputation and goodwill we have generated in a particular product. I have no doubt that some manufacturers have tried to design a product specifically to look like ours. This is either because of genuine consumer confusion or, more commonly, where a consumer thinks that is very similar to what I am used to buying and there must be some "family" relationship with the product to buy.

Particular focus

4. We have tended to focus on similar packaging when we have real disputes. We have found the similar packaging, trade marks and so forth and say they're all individual rights. When I look at my Original Source bottle against someone else's I do not have a knock-out punch. But in a side-by-side comparison, it is clear that my competitor cannot accidentally look like mine.
 5. It cannot be a coincidence that the product has been produced. It is very difficult to prove confusion and the ideal is a consumer has called and complained about something they mistakenly believe to be our product. This sort of evidence is difficult to get: Our competitor is clearly convinced that there is some advantage. Whether this is through confusion or some of the magic of our product rubs off on them. But it is clear that they think there is some advantage in looking like a brand. We have done surveys in the marketplace.
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Legislation

6. We would struggle to articulate where the tipping point between a lookalike and not should be. It is an art and not a science. You know it when you see it as it were. When we have looked at this in the industry you would put together the person responsible for marketing, the legal adviser and so on and together they would decide what they think is acceptable and what is not. The tipping point is at different points along the line. The accumulation of the rights in packaging adds up to no more than the strongest individual right that you have.

Incidents of lookalikes

7. We have an increasing number of lookalike products, but I don't think we are any more prone to it than anybody else. The people putting together the products, they know how far they can go and where the line is drawn based on the current law. When we have had someone overstep that mark they are very quick to recognise they have gone too far.
8. Most of our principal products in the UK have attracted lookalikes: Certainly in the United Kingdom and Australia we have seen an increase in lookalike activity. We have fewer in the developing world. We don't have personal experience on the application of the Australian Consumer Law, although we have had more success in Australia than the United Kingdom. But there are no products which have appeared both in the United Kingdom or Australia where a real comparison of the regimes can be undertaken.
9. In the past two years, we have had lookalike products from three of the four big retailers. In this context, PZ Cussons have been obliged to take action against the supermarket concerned. The furthest we have got is issuing draft pleadings. We have not got as far as filing a claim (at least in the last three and half years).
10. We have been very selective in the terms of action we have taken. Whenever we have made a threat of legal action we have always been happy to follow it through. Our biggest single global customers, we shared draft proceedings and we would have issued those had we not reached a satisfactory conclusion.

Handling of complaints

11. We had a lot of dialogue between us and the retailers, both legal teams and relationship managers. It appeared to us, certainly the big four would expect brand owners would take action to protect their brands and they would compartmentalise the dispute. It would not significantly impact on the relationship.
 12. We will regularly be threatened with, and occasionally follow through, with delisting products. That is where there is a dispute usually over pricing (cost prices). Our view has always been that the retailer would be relatively unlikely to retaliate by delisting a product. Retailers would expect you to protect you brands. They would want you to protect your brand.
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13. We are extremely cautious. But we are a brands business and without those brands we are nothing. If we had not reached a sensible conclusion we would have issued proceedings.
14. Of the six complaints per year only one is possible to solve with the "right" letter being sent. Of those, three complaints are such that we would not start action unless we wanted to establish the principle or wanted to take action for another reason.

Sales and advertising

15. We had a series of lookalike products and also explosion around the time of swine flu (Carex market-share). It is the leading hand sanitizer; as those concerns increased a number of people entered the market either to legitimately or otherwise eat into that market share.
16. I am not sure that if we say a campaign on Original Source has not led to any particular behaviour in relation to lookalikes or otherwise.

Legal claims

17. In respect of a case regarding one of our hair care lines, the look and feel of the own brand was not particularly similar. In that instance we concluded we were not in a strong enough position to take legal action, but we could take commercial steps.
 18. The advice of external lawyers is one factor in the decision; it is not the only one. In my experience our external lawyers do not give us as robust advice in relation to passing off as other areas of law. We don't like fighting battles we might lose, but it is only one factor. However, there may be instances we think it is important to stand our ground and to make an investment in the third party's legal costs. Even if our lawyers say the case is not that strong. You do however want to establish credibility. It is more of a commercial rather than a legal decision.
 19. We have not had too many instances where we have spent significantly and then not proceeded with things too much. But you can spend £10,000 - £20,000 fairly easily before you realise you don't have a very good case.
 20. In the surveys we have conducted, there have been questions as to confusion. We have found some evidence of consumers being confused even where there the retailer's name was prominently displayed. For example, we had a dispute with a retailer over a soap bar product where the get-up of the product was extremely similar. However, the brand name itself was different and prominent. But the surveys we carried out show some confusion or some association with the particular product. Consumers thought it might have been something we had manufactured for them or it was a range we were doing for the retailer. Or we were somehow connected with the grocer. On that basis we did go forward. That was a reasonably significant sample size.
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Arrival of a lookalike

21. I do not have any indication of advertising being directly affected by lookalikes. We have some instances where we believe there has been a correlation between a drop-off in sales and the introduction of a lookalike product. This is a greater drop-off of sales than for non-lookalike own brand.
22. We have introduced packaging with particular colours or looks not because of existing lookalike products, but simply to make it more difficult for a lookalike. We certainly spend more money in packaging design than we did a few years ago.

Copying of the product

23. No I don't believe we have actually copied any existing packaging in the range as we seek to distinguish ourselves from our rivals. We try to go the other way to assert our identity. I have heard stories about in the past we have tried to steer close to the wind and piggy-back on brand leaders. But this is not something we have ever done in recent times.

Commercial strategies

24. We have not adopted commercial strategies to try and increase market share against a lookalike; not as a direct result of lookalikes only as part of a wider commercial strategy.

Manufacturing own brand

25. We do not manufacture products under the own brand label.

Consumer complaints

26. I would hope that the dream consumer would complain to us. Complaints do come to us although some may go to the retailers.
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Müller UK

Interview: 8th February 2012

Interviewee: Sukh Gill (Chief Regulatory Advisor) and Gemma Wisniewski (Legal Executive)


(subsequent note received 18th April 2012)


Meaning of “lookalike”

1. We think the assessment of whether a product is a “lookalike” should be based on several features including, but not limited to: the packaging design; the similarity of recipes and nutritional profiles; the packaging material and colour; the shape of packaging; the similarity of key ingredients; having the same standard pack weights; the copying of discrete elements of the design; and the use of other descriptors which have a long association with branded products. Similarly, the way a product is marketed (e.g. “100% natural ingredients” branding) is also relevant.

Incidents of lookalikes

2. Over the last five years, we have had at least ten cases where we have faced lookalikes for our distinctive yogurt. For commercial reasons, we are not content to discuss the details of many of these cases. For example, during that five year period, we have had a number of cases involving third parties adopting a similar pot design to ours. For example, the two pots to the left were the subject of a dispute where we instructed external lawyers and spent a significant amount of time internally resolving the matter. The dispute was essentially resolved on the basis of our registered design in the pot design. The competitor eventually agreed to change the pot design to pot on the right. This case is only one of a few similar cases (albeit with different resolutions) over the last few years.





3. In addition, we have had cases where third parties who have used our mark “CORNER” or the peel back design. In some instances we took no action for commercial reasons and in other cases we took no action because the product was already being delisted. In every case, even when no action was taken, internal resources and costs were incurred.
4. Our experience has led us to reach the following conclusions in relation to lookalikes. First, bringing intellectual property claims generally is easier in relation to registered intellectual property rights (where the case is often “black and white”). Secondly, most competitors will take some elements of a packaging design, but bringing legal

proceedings against them is protracted and, in our view, often provides ineffective remedies. Thirdly, there are many barriers to bringing such proceedings, in particular maintaining commercial relationships. Fourthly, in relation to registered trade marks the risks of making unjustified threats makes intellectual property rights more difficult to enforce. Finally, the threat of infringement cases can push brand owners to undertake very expensive redesigns.

Effect on sales

5. We have found that the launches of lookalike products have affected sales and we have some sales data to support the consumer switch from Müller to other products. When a lookalike product is launched, Müller may increase marketing spend on a particular sub-brand to react to the competition. We apply normal commercial practice when there is any new entrant to the marketplace (such as a distinctive own brand) and this will have some impact on market share and sales, but this is not specifically measured.

Advertising spend

6. Müller would not change its advertising strategies due to lookalikes, but it might 'beef-up' an existing campaign expenditure by up to 10%.

Changing packaging

7. We usually re-design our packaging every 2-3 years. Müller's product re-designs are usually a reaction to competitors using similar designs. Therefore, the 2011 re-launch was necessary to differentiate ourselves from others in the market place. Müller has noticed a common theme of competitors using Müller's old packaging designs once Müller has re-launched its products in a different design. Prior to any product re-launch, Müller always carries out the necessary due diligence checks to ensure that its designs are not similar to competitors. Müller always aims to be distinctive.

Commercial strategies

8. Müller does not undertake any commercial strategies in response to a lookalike, other than normal competitive practices aimed at all competitors.

Manufacturing own brand

9. We do not make own brand in the United Kingdom, but we do in Germany.

Consumer complaints

10. We would expect our consumers to approach the retailer and then perhaps Müller. However, we do not have any examples of any such complaints.
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Case study relying on the Consumer Protection from Unfair Trading Regulations 2008

11. In December 2009, Müller had an issue with a competitor's lookalike packaging (the two pots are on the right). It was our view that, in context, this competitor's activities caused or were likely to cause the average consumer to take transactional decisions he would not have taken otherwise. The following factual context was important in the case of our dispute. Müller marketed a significant part of their range, at that time, under the slogan "100% natural ingredients". Both enterprises that were in dispute were dairies in Shropshire. The following features of the products were similar (being our original and longstanding features): twin-pot; nutritional profiles of the foodstuffs; white plastic moulding; foil lidding; fruit content; full size products; positioning of characterising ingredients in the corner; depiction of a yogurt swirl; and the use of the words "thick and creamy" to describe the yogurt. We also could show that we had used the peel back design for a long period and had used the slogan "Our Shropshire Dairy to you" and "100% natural ingredients" for some time.
12. Our own attempts at reaching a commercial agreement with the competitor, relying on our registered trade mark, failed and so the matter would only be resolved by expensive and time-consuming litigation (in an area of the law that is developing). Our competitor did not respond to other suggestions that their conduct was not in accordance with the 2008 Regulations and in particular under regulation 3, Schedule 1, paragraph 13 of the "black-listed" activities.
13. We made a number of arguments under the Regulations; as with trade marks, similarity was important, but not simply the elements which were registered trade marks. We believed that it is not necessary to provide actual evidence of consumer confusion under the Regulations and further, any attempt to invalidate the registered trade mark is also irrelevant. The test, we argued, was whether the aggregate effect of all elements misled the consumer into believing that the product is made by Müller. It was argued, we believed, wrongly that other brands using the peel-back design on yogurts was relevant and that the use of the various elements represented "custom and practice" in the industry.
14. We reported the dispute to Shropshire Trading Standards and they spoke to the other party and, relying on the 2008 Regulations, our competitor agreed to change their packaging. It appears to us that the key fact is that the 2008 Regulations, over and above conventional IP protection, enable a holistic view to be taken of the cumulative effect of several practices that might be treated discretely, otherwise.

Enforcement

15. Whether lookalike practices are curtailed depends on the effectiveness of enforcement. We believe that under the 2008 Regulations such action is necessary to ensure "a fair, responsible and competitive trading environment" – a stated aim of Trading Standards enforcement. Such attention is badly needed and long overdue. A major problem for us is that there is no additional civil right of action for breaches of the 2008 Regulations, which even if available, would need to be accompanied with measures requiring the infringing party to disclose how packaging was generated.
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Large fast moving consumer goods manufacturer with extensive portfolio of brands (LFMCGM)

Interview: 8th February 2012

Interviewees: Legal Director, Brand Manager, Trade Marks Attorney

Lookalike

1. We find that consumers identify products firstly by colour, secondly, by shape or 3D packaging, thirdly by brand logo and finally by iconography. A lookalike is therefore taking the “distinctive elements” of products. The problem is that the requirement of misrepresentation in passing off just “kills” any potential claim against “lookalikes”.
2. In relation to colour it is not simply taking the colour, but the exact pantone number on occasion. One of our brands has a very clear shape and colour, and if there were a lookalike version of the product it would be in the same pantone colour and be the same shape. Furthermore, it is particularly difficult to register colours as trade marks as you need acquired distinctiveness and competitors usually come into the market before this can occur.
3. Our research suggests that where a product is in a similar shape package, brand consumers generally think that the product inside the container is the same. An own brand product having the same packaging characteristics as a branded product will lead consumers to recognise the product as the own brand version equivalent of the branded product.
4. In relation to health care products, consumers do not tend to go as far as comparing formulation. They will assume they are the same even when they are clearly not if they looked at the side of the packet.
5. The Brand manager thought that the law needed to have at least three key elements being identical: colour; three-dimensional shape; and branding iconography or structuring of the artwork (the more subtle aspects of branding). The Legal Director thought it would be wrong to define lookalikes as this would lead to retailers working around these rules. We would ideally like a law of unfair competition. We think that something along the lines of “taking unfair advantage” as set out in the TM Directive³ or CTM Regulation⁴ is about right.

3 Directive 2008/95/EC, art 5(2).

4 Regulation (EC) No. 207/2009, art 9(1)(c).

Lookalike behaviour

6. In terms of pricing, the lookalike tends to be closer to the leading brand pricing than their other own brand versions. There are some product categories where retailers do not follow anyone at all and the packaging is very different and, usually, the price is lower. In our view, There is not much point in a retailer having an own brand which is not a lookalike.

Consumer beliefs

7. Consumers know the own brand is from the retailer in question. They almost never buy an own brand product thinking it is the branded product. A study we conducted in relation to a potential passing off claim confirms this view. It was an online survey where we created a planogram of a retailer's shelf in store. A consumer was then given 93 seconds to select a product within the whole product category. After this selection they were asked some questions about their choice. We had hoped that the consumer would pick up the own brand thinking it was ours. That rarely or never actually happens. When they picked up the own label product they believed it to have the same attributes as our branded product.
8. It is our view that the closer the packaging between the own brand and the branded product the more the consumer thinks the product within that packaging is the same. This is supported by results we have had from focus groups.

Relationship with retailer

9. We are never going to litigate against a retailer however. Instead, there is usually a negotiation – a top-to-top conversation between our MD/CEO and the retailer at similar level. However, to start the negotiation we would need a firm legal position. This requires evidence of a really strong case otherwise we would not get to that conversation in the first place as in our experience the law is only route into such a conversation.

National variations in lookalikes

10. In Germany we tend to have good results. The threat of a preliminary injunction in Germany is useful, but I don't think we have ever done it in relation to a retailer's lookalike. There is simply a perception that such injunctions are granted more readily. In Spain, we have been successful at taking reports and surveys to retailers (suggesting that consumers think the retailer's product is of the same composition as ours) and this has led to an agreement to phase out the lookalike (or elements of it) within six months or so.
 11. As we think there is a gap in the UK system, we would forum shop to try and bring claims elsewhere. For example, recently a lookalike was introduced by a British retailer which we did not think we could prevent in the UK. So we went to all our other markets to see if that retailer had introduced the products to those markets and we managed to have a high level discussion based on activities in one of those other countries.
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Manufacturing own brand

12. There are some manufacturers who say “we don’t make own label products”. We do some own label products although it is less than 2% of our UK business. In some cases we have been compelled to make own brand products. In one particular case, Retailer A⁵ was one of our biggest retailers and from a relationship point of view we felt we had no choice but to make the product. In other areas, where own label is squeezing the market significantly (as it does in some categories), the only way to improve profitability is to make own label.
13. Further, in an inherited business we had a legacy where we have to make lookalikes of our own products for retailers.

Incidents of lookalikes

14. The incidents of lookalikes vary between the categories. In relation to health care, the biggest problem for us is retailers, whereas in relation to home care it is our competitors.

Innovation

15. The incidents of lookalikes increase your brand range. As we need to stay ahead of lookalikes we need to add features to our products. This means we will have put in the research into what the consumer desire is within the category. To prove that it is worth the listing we have to share the data with the retailer and this means six months later the own brand range expands (by reason of our investment in consumer behaviour, insight and knowledge). The retailers always follow, they “never branch out on their own *ever*”.
16. We would invest a great deal of time, money and so forth to conduct trials to add new claims for the product – for example, the speed the product becomes effective. This involves a new amount of money.

Complaints

Third party manufacturers and competitors

17. Where the lookalike is made by a smaller manufacturer selling into convenience shops or by a competitor we will tackle it very robustly. We send a letter before claim immediately in relation to competitors or rival manufacturers. These tend to have mixed success. It is usually that other competitor issues are brought in. There will be a lot of internal discussion about whether to send the letter. In number, globally there would be a little less than one a month. It is so infrequent that a competitor tries to introduce a lookalike. They are usually trying to have their own distinctive brand.

5 The retailer was named by the interviewees, but as the brand-owner did not want to be identified it is unfair to identify the retailer.

18. Smaller manufacturing, six to ten letters sent off a year. This is mainly in relation to the wholesaler own labels. We are usually pretty successful against these manufacturers. We would issue proceedings against them, and we have sent them draft pleadings, but we have not gone on and issued. I can't remember the last time we filed a complaint against a third party manufacturer. We have not gone for any interim injunctions either. This is usually because when we lean on them enough to get the result we want.
19. The problem is we can't prove misrepresentation based on our surveys. We usually don't bother with a survey with the third party manufacturers. We would be very aggressive about the matter and so they know we will fight it and so they decide, as we are a big company, we would spend the necessary money, and so they decide it is not worth the financial risk. We would accordingly allege passing off without the consumer survey.
20. Sometimes we will get external counsel's view to add credibility to "the discussion". In passing off, even with a very strong case the advice is generally not positive, which contrasts to trade mark infringement cases.

Retailers

21. Our problem is that our biggest customer is our biggest rival. This means that retailers who carry less of our stock have less bargaining power with us and we are more likely to be robust.
 22. We have been punished in the past where we have spoken out or done something the retailer didn't like. They have inflated the price of lines so volumes dip or they reject new listings or threaten to de-list brands. It is a very real threat. The threat would be product specific and they can find a way to damage us. This is why we would never bring an action against a retailer. Having a cause of action would give us more weight to the discussion between directors of these large companies. We need it more than we don't like it, we need this is what my lawyer's advise. We would not threaten to issue in those dialogues.
 23. We have suffered retribution for price increases for example. Either they de-list or they sold products vastly over recommended retail price (and so nobody buys the product) so our volume dips massively, but they make the same as they sell fewer products but for a much higher price. So we have to pay, but they don't. It is punishment. Products will be de-listed because of price rises.
 24. We have settled other types of dispute with retailers by giving them co-brand advertising (a normal advert then, "Product X can be found at retailer").
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Timing

25. A lookalike can never arrive on the shelf as quickly as we can mainly because, in most of our categories, the retailers still have to do some formulation development. Indeed, if an own brand appeared 2-3 months after our product it would be difficult to prove whether it was based on shared information or not as some manufacturers can get things to shelf that quickly. So it is a feeling that they have used our research rather than something we can prove as such.
26. In general, it is not advantageous to launch a lookalike before or at the same time as a branded product. Retailers will wait because they know brand owners will spend money on advertising. This advertising spend usually starts about 3 months after launch (after we reach peak distribution to market) and so this is the ideal time to introduce the own brand product.

Signals

27. There are certain things which are signals to consumers such as yellow for lemon, green for pine and so forth. However, flavour and colour cues are expected, we are not always led by colour cues and sometimes we try to distance us from them. In any event, there tends not to be copying between large competitors. The disputes are usually around advertising such as product efficacy. The question is not that they cannot have imagery suggesting speed, but the source of that imagery. We accept that some images are so well identified, for example, speed could be shown to be a target.
28. We are developing signals and we would expect own brands to copy signal category colours. It is where the other elements are copied.

Packaging innovation

29. If you launch a product you have 2-3 years in which to recover the research and development in consumer demand. When we launch a new product we would want it look very distinctive.

Sales

30. In relation to Product B,⁶ when a lookalike was launched in 2010 the sales went down about 15% overall (it had more of an impact in that shop). The data is often difficult to work out however as a lot of retailers mask the launch of their own label in shopping basket data.

6 The product was named by the interviewees, but as they did not want to be identified it has been called Product B.

Advertising spend

31. As the retailers benefit from our advertising, it is very advantageous for them to come at the right time. They don't want our advertising spend to be cut as it affects them as well as us. Lookalikes usually arrive after the bulk advertising spend has been used. There are examples where the arrival of a lookalike has affected the marketing budget significantly. If you say a product type is a good idea then you are advertising a need for a product that did not exist before. If you advertise the need for a product then it increases demand in the market for us, competitors and own brand. If you develop a faster product you have iconography to identify them with speed.

Competitors

32. New non-lookalike competitors will come to the market with advertising spend and new insights based on their own research. This will bring new customers into the category and so grow the market overall. If they can't do that then retailers might not even put them on the shelf as without offering anything else they are just taking existing market share. The competitor brand will normally make us lose 5% market share (maybe more) in the long term. To lose more than 5% market share to a competitor is disastrous for us. To avoid losing market share, we invest in promotional activity and advertising. This means that although we are set to lose market share, we are not set to lose as much.

Own label

33. With own label it is not uncommon to lose 10% market share over the whole market (and not just their own store). In contrast to competitors, we would spend less on advertising when an own brand comes on the market. We would reduce our advertising spend because we would not want to promote the own label. In relation to a non-lookalike own brand, we would not change our advertising spend. Also, if the loss from one retailer is being offset by gains in other retailers then we would continue to advertise to support those gains elsewhere (although it will promote the lookalike as well).
 34. We are very fast at addressing marketing issues and so with the launch of an own label we would be making decisions in days on how to respond. We would never give up advertising spend, but we have on occasion substituted advertising for one of our products for another to avoid advertising the lookalike category. However, the two month lead time for TV advertising is not very long to see how consumers are responding to an own label product.
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Sales

Price competition

35. Consumers tend not to reject an entire product category on price (although they might make a decision within that category on price). This means that a lookalike is unlikely to attract new customers to a category and so they are likely to only eat into market share. A low priced lookalike might introduce people to premium range products from basic ranges however. We undertook some consumer research into a lookalike in relation to one of our health care products. It appeared that of those buying lookalike products only 15% were new to the sub-category (premium) (and 85% were not). When we lose consumers to own brand they usually do not come back because they find that the own brand is worth the trade down in price.
36. A particular problem is that when they bring in own label products they often say we don't need the branded product any more so we will only stock it if there is a cost reduction. This gives us a double hit.

Volume growth

37. The data we have tends to show that own brand growth tends to be volume growth rather than value of the market growth (e.g. 10 units sold at £0.90, rather than 9 units sold at £1.00).

Masking of sales figures

38. There is a lot of masking in shopping basket data. It might be possible for a retailer to see how a rival's own brand is doing, but it much easier to follow how a branded product is doing in their own shops. They tend to look to us for category data on particular products as the cost of category data from Kantar/Neilson is too high for them.

Changing packaging

39. We will rarely change the packaging of the product as it represents the brand. When we have had a product which is in trouble with own label, we have researched changing that packaging and consumers have said you should not change it because to do so would no longer represent our brand. It is consumers who keep us from changing packaging to address lookalikes.
 40. When we launch a new product we look at other products in the category, we try and be distinct from them. We want to distinguish ourselves from those brands. We have considered to launch a sub-premium range, but decided against launching such a product as you need to advertise.
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Promotions

41. We have used promotions against a competitor coming to market. Recently, we have been compelled to use promotions against a lookalike own brand entering the market. This is because we had no other response. This strategy doesn't pay back. If you compete on price then you might gain customers, but they go again when we go back to full price.
42. We have invested in (paid for) off-shelf promotions. We cannot sustain off-shelf placing for very long and it means the retailers win both ways. They launch an own label and get some of the market share and then they have brand-owners paying for off-shelf placing. We have had instances of the own brand coming "off-shelf" immediately after our product. Or worse still, the lookalike comes off shelf at the same time as we do and so the lookalike is off shelf at the same time at the brand.

Tenders and exclusivity

43. It is our view that they would not accept an agreement where they could not have own brand near-by. A retailer will sometimes ask us to tender to be the only branded product on the shelf for a short time. This would mean that our product would be against the retailer's own brand but not also against a competitor.

Consumer complaints

44. Consumers do not complain to us directly about lookalikes and we have never had evidence of consumer complaints about lookalikes and, in particular, we almost never have consumers ringing up saying I thought I was buying the wrong things.

Consumer Protection from Unfair Trading Regulations 2008

45. The CPR 2008 has never been considered by us as a tactic. This is because in our experience Trading Standards will not take action as they do not have the resources to take proceedings on your behalf.
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A major beverage brands owner (Beverage)

Interview: 6th February 2012

Interviewee: Legal Director

What characteristics make a product a “lookalike”?

1. A lookalike product is one which is in the same or similar product category and shares at least one important element of the get-up or packaging of another (usually the brand leader). It is often the colour or colour combination (or arrangement) which is most significant as they play a vital role in consumers relating to a product: “it brings the original to the consumer’s mind”, “it is linked” and “it acts as one of the main identifiers”. A lookalike presents more a likelihood of association (in terms of indirect confusion like an extension of line or that the consumer thinks that the companies are economically linked), rather than a likelihood of direct confusion as it is normally the case that consumers are not confused as such with regard to the product itself.

Similar origin

2. We are not sure that consumers think so much as to consider whether lookalikes are the same product as the product they are imitating. Consumers might buy a product simply by reason of the brand (even if the product is the same – using cars as an example). In any event, we do not make products for anyone else (e.g. competitors).
3. We also think that where the competitor’s brand is placed on the packaging it is likely to make a significant difference to the consumer perception as to product. A competitor brand even on similar packaging is going to be noticeable to consumers. Even so we believe that a positive image of the well-known brand leads them to buy the lookalike or they think that it is a brand extension in collaboration with the competitor/the companies are economically linked.

How often are lookalikes raised as a problem with the company?

4. It varies, but within Europe almost every day a product comes in to the legal department and, about once a week, one of the products is problematic. The number of problematic products is cyclical as demand for the product changes over the year. A big problem is usually with a batch of infringing products which they try to sell rather than on-going products (i.e., 250,000 units made and sold and that’s it).

Complaints to competitors/customers

5. Where the person selling a lookalike is a customer (e.g., a supermarket) we have rarely started proceedings. Usually, our customer agrees to change the packaging once the matter has been raised (although this may take some time to feed through). How quickly and in which way a particular customer responds varies greatly however depending on the customer. The resolution is usually on a commercial level but based on a legal background (i.e. the customer signs an undertaking, settlement or
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something similar. We do get the feeling however that they will agree for only as little as possible of change and take steps to try to sell the lookalike product for as long as they can.

6. When there is a complaint against a customer's own brand lookalike, we would complain and discuss it with the customer. The question is really at the end what is more important to us: the good relationship with the customer now and on a short/middle term basis (e.g., over the next 1-3 years); or the long term value of the trade mark and brand of our products. The latter is of greater importance as if you allow one customer to sell a lookalike other customers will think they can sell such products as well and in the long run your brand will be diluted losing value and consequently your company will lose value too.
7. In relation to lookalikes other than those produced by customers, cease and desist letters are of mixed success. A lot work, but others do not, so legal proceedings are to be commenced. It really depends on the jurisdiction. In Germany, for example, we would get a preliminary injunction within a few days and then the other side is very willing to stop selling and we would reach an agreement in due course. In some countries of Eastern Europe, it is more difficult to tackle lookalike sellers as some of these jurisdictions are (still) often not as developed as other European jurisdictions.
8. We would normally consider allowing the lookalike seller a reasonable sell-off period for already produced units/items in stock, but this will always depend on the other party and its behaviour/cooperation. We would also always seek a contractual penalty for continuing to sell the lookalike goods (although we know this is not possible in the United Kingdom) in order to avoid the risk of repetition.

United Kingdom as forum

9. We try to avoid the UK, the UK is too expensive to litigate (although this might change by reason of the Patents County Court, we would avoid the High Court). In any event, it is often possible to take steps in other countries (such as seeking an injunction under CTM Regulation, including a Pan-European injunction) and so cut off the supply to and the sale in the UK. We also avoid the United Kingdom because the civil procedure requirements are too complicated and, in particular, the disclosure requirements and the unwillingness to accept survey evidence. It is also our view that the English judges are less willing to consider a mark to be well known within the meaning of 9(1)(c) of the Regulation.
 10. In relation to passing off we have considered bringing a claim in relation to lookalikes. We seek advice from English lawyers regularly, but in general the advice is such that we do not pursue the claim as they predict a low chance of success. The legal advice we receive is usually that it would be difficult to show damage to goodwill for the purposes of passing off. In general, there is a better, higher chance of winning in other countries, rather than the United Kingdom. In any event we generally try to bring claims based on trade mark law, rather than passing off. Such decisions are better for us as they can be used in other countries (especially when based on a CTM) and help to establish reputation and thus a broader scope of protection of our trademarks/brands.
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Sales and marketing data

11. *[The person interviewed was not able to comment regarding advertising spend or sales by reason of lookalikes coming on the market as the interviewee was from the legal department and had not been able to obtain any figures.]*

Adapting packaging

12. We have never changed the packaging of our products. We have never taken decisions to price cut as we are a premium product, we would not enter price battles. Our competitors do however enter price battles.

Agreements

13. An agreement with a supermarket about lookalikes would be on the one hand anti-competitive and on the other hand also detrimental for our brand at the end. Thus we would not do that.

Consumer complaints

14. Consumers can report lookalikes, and there is an email address on our website for this purpose. We get from time to time meaningful reports (although much more spam and groundless issues are raised). The complaints are usually something along the lines of "I bought a product in xy country, (often a foreign country), being similar to your product. I tried it and it tasted bad." The consumer going on to suggest to us that we do something to stop it. We are usually already aware of the issues raised by consumers in relation to the particular product in advance, however, and are normally already in process of tackling it.

Concluding thoughts

15. The problem of lookalikes is getting worse and it is systematic. It is the systematic copying of brands across all sectors. We are far away from a harmonised law of trade marks in practice there are really big differences between the countries in the EU.
-

Distributor of branded beauty/health care product (Beauty)

Interview: 16th February 2012

Interviewee: General Manager of the Brand

Background

1. We are the distributors of a branded beauty/health care product and in the UK we are responsible for its position in the UK market. Our product has about 70% market share in its specific product category. We have had two record years for selling Product B. Our product category is growing with on-line customers starting to trust the line of products.

Lookalike

2. A lookalike product is where it takes the main concepts of a brand's identity, the colours and the "claims" are the same (or more precisely the way those claims are laid out) being prime examples. The particular concern is the fact the claims are in the same order, not that the claims are made (as if a product does something then it does it). Other factors might be that the ingredients for the products are totally substitutable (although different) and the bottle shape is very similar. Finally, the delivery method being similar is important as well. Lookalikes is lazy marketing, a product gets to a certain level of sales and then an own brand is launched.
3. A list of claims on a product in our category cannot of course be restricted. Similarly, the colour of the packaging alone is not enough. The tipping point is usually the colours and the layout. You have the colour, graphic, claims and the shape of the box. Retailers would argue that the brand leader has a colour scheme and in terms of consumer behaviour we need to go to the colour to get consumers to know the function of the product. In one major retailer (Shop X) I think there is a lookalike of our product (Product X), and in another retailer (Shop Y) their equivalent product is not a lookalike (Product Y) Drawing the line between similar packaging and a lookalike is very difficult, and very subjective.

Retailers

4. Shops X and Y represent a substantial part of our business and so we need to protect our relationship with them. We have only recently (last 3 years) started to push hard with the grocery market. Our category is a growing category. There is so far only one grocer own label but it is likely to change in time as the category grows. Retailers want to provide own brands as an alternative. The grocery retailers use strong-arm negotiation tactics because they are aware of their significance in the market.
-

Competitor

5. When there was a lookalike (from another manufacturer), Brand B's management took the view that it was not worth bringing legal proceedings as the cost was too high and the brand was growing. It was felt we should harness that growth rather than waste money on legal fees. At the time, our product was some 50 times bigger than the lookalike and as the lookalike was only in one major retailer it was not worth taking action.

Sales

6. We lost 20% sales in Shop X when the lookalike was launched and 40% down in Shop Y when their own brand was launched. The hit we got from the non-lookalike was therefore worse than for the lookalike. The reasons for this were mainly the way the own brand was strongly promoted in Shop Y, whereas this is not the case in Shop X. In addition, we lost a lot of our shelf space in Shop Y and it trained its staff to push the own brand, rather than the branded product. Conversely, we have one or two shelves in Shop X and the own brand was launched with only one facing; also Shop X staff will usually recommend our product. It was clear when the own brand was launched, our customers switched to the own brand but that switching has declined. Indeed, on the whole customers come back to our product from the own brand. Further, when a competitor (a major manufacturer) launched a competitor product it led to what will be a 20-30% decline in sales; a competitor which is a major manufacturer is a much bigger threat to a business of our size than the retailers.
7. In general, the own brand does not expand the market very much, but competitor products generally do.

Signals

8. We accept that there would be category signals, although we more or less created the category.

Promotions

9. If we go on promotion then it is usual for the own brand to go on promotion as well (in Shop Y) and so we lose the advantage.
 10. We were spending more money within some customers on promotions when our sales went down and similarly we bought more shelf space to compete with the own brand.
-

Advertising

11. We invested in training in Shop X (i.e. we paid to train Shop X staff) as this helped us develop our product range. This was a direct response to their lookalike. This is effectively upping advertising as it is getting Shop X staff to promote our product to its customers. We have paid for this training three times, each time costing £30,000. Essentially, it involves a feature in their official training material (so it was about 1 of 6 pages in the monthly training manual).

Packaging

12. We have only made very minor changes to our product's packaging and I doubt it would be spotted by consumers.

Consumers

13. We have some instances of consumers being confused so that they believe a lookalike is our branded product. We have had a few emails saying they have been confused by the lookalike. It is not something that is happening in vast numbers, but it is still a problem. We have done no consumer research into the issue of lookalikes or focus groups however.
-

The Co-operative (Co-op)

Interview: 19th March 2012

Interviewees: Duncan Bowdler (Trade and Legislation Manager) and Marjorie Murphy (Senior Commercial Manager - Food Product Strategy)

About the Co-operative

1. The Co-operative has about 7-8% market share in the food retail market about a £7.5 billion turnover. It provides branded and own brand goods to its own shops and to regional Co-operatives through the buying group, the Co-operative Trading Group. Regional Co-operatives themselves have a turnover of about £2.5 billion.
2. It used to have own factories providing Co-operative brand products. This began in 1872 when it launched its first biscuit factory. The biscuits were branded with "Crumpsall Biscuits" and the "Co-operative Wholesale Society". This was the original Co-operative brand. There used to be hundreds of Co-operative factories over the country, which made all sorts of things, not just food. Eventually, because of the broad range of production it became apparent that in each product area the Co-operative was a very small player. The factories gradually closed with a range of food factories lasting until about 1992-3.

The Co-operative's own brand range

3. The Co-operative's own brand range has been around 140 years and it says something about us. One of the reasons we have an own brand range is that there was a desire for us to be in control of the ingredients and raw materials for our products. We wanted to use it to inform consumers that the product has been made in a way that they would approve of and which is in line with our vision.
4. The first time we used a consistent Co-operative logo was the 1960s (two manifestations since then and the most recent is "the Co-operative") and we have had an own brand image since that time. However, we do not usually lead the entry of new products in own brand (there are some isolated examples such as washing gels). An own brand would only be introduced if the margins were better for us and that is usually the case (although on occasion the own brand might cease to be so successful).

Lookalikes

5. It is our view that whether something is a lookalike depends on the how much of the design font, colour, imagery and pack shape has been replicated.
 6. The Co-operative has a clear brand template and we try to have a consistency across our brand which reinforces our brand value. The development of a new product would involve us looking across the product category, including the brand leader, to see if
-

there are any customer cues which are common across the category. These category specific cues are applied to our central brand template and not the other way around. We try to develop our brand to enable customers to shop easily and not to confuse them or mislead them in any way.

7. The number of product cues will depend on the category. For example, in relation to laundry products, there are lots of cues common across the category such as colours for biological, non-biological, colour products; signs for the number of washes and so forth. In another product categories there may be very few general cues.

Limits of manufacturers

8. When it comes to packaging (and even colour) we are often constrained by what the manufacturer has or can source (e.g., a product can only be made in a particular bottle size or range of sizes). Usually, if you are a late entry into the own brand market, it is likely that the manufacturer who will make the product is already making it for someone else as well. This means you are restricted to the sort of packaging the manufacturer is already using.
9. It is usually too expensive to arrange a factory to be retooled to change the packaging significantly from that which is offered, particularly if volumes are not sufficient. For example, in relation to a chocolate bar we suggested to a manufacturer that the colour of the foil should be changed to represent the rest of our fair trade range. This would have brought in a lot of extra cost to the manufacturing process as we did not need the volume needed to make the savings in relation to that foil.
10. We do not contractually try to prevent manufacturers making own brand for other retailers. Our procurement process involves a tender being put out to manufacturers to make a product to our particular specification. We then give the tender to the best manufacturer in terms of quality and price and according to our responsible retailing agenda. This last criterion means there are sometimes a very limited number of manufacturers with the capacity to make the products for us.
11. We would not want to copy other people's branding as we want our products to speak about our values - and principles.

Complaints from brand owners

12. We have undertaken detailed checks internally and we cannot find any example where we have had a manufacturer making a complaint about any of our packaging.

Advertising

13. We do not normally spend large sums of money promoting or advertising an individual own brand product, rather the spending is on the Co-operative brand generally. However, there may be promotions or other ways of pushing an own brand in an advertisement. When we launch a new product, whether own brand or not, we would usually launch it with a promotion (such as 3 for 2, or price reductions).
-

14. We tend to find that customers are more likely to shop around now than in the past, we tend to find less loyalty in customers. They are, due to the present climate, looking for value.

Change of packaging

15. We tend to change the packaging every two years or so. We think that period is sufficient to get the value out of the product redesign, but leaving it too much longer might make the product start to look dated. We do not change our packaging based on any changes in the market leader, our changes are based entirely on our own product life cycle. However, when a redesign is underway we will look at the sort of packaging of the product in the category to judge things like customer cues and other sorts of development.

Signalling / customer cues

16. There are clearly certain customer cues that are used in certain product categories. An interesting example we have noticed is that now retailers are using the colour black for the packaging of premium ranges. We are not sure where this started, but it has become a clear signal across most retailers. Similarly, in milk there are general cues which have been adopted such as red, green and blue to denote the fat content of milk.

Innovation

17. The level of innovation in an own brand product will depend on the category. In relation to plain flour it is difficult to imagine any innovation, but in other brands it is very common. For example, recently in relation to Easter Eggs we launched our own brand egg made of our fair trade chocolate and so it follows our own fair trade values. It is quite different from everything else on the market and is innovative.
-

Who makes the Co-operative own brand products

18. We are not sure how many of our own brand products are made by the brand leader. Further, this will change over time as we can switch supplier (or have multiple suppliers) so it might be that at one time a manufacturer made the own brand and at another time they did not.

Consumer focus groups

19. We have conducted focus groups and found that consumers' behaviour in relation to own brand will vary greatly between individuals and between categories. Some people will buy own brand in some categories and not others. Some will know the manufacturer is the same for an own brand product and yet still buy the branded product.

Complaints

20. We have never had a complaint to our customer retailer's department where someone has bought one of our own brand products believing it to be a manufacturer's brand.
-

Consumer Goods Retailer

Email 29th March 2012 from Legal Team

1. Having looked at the initial questions you posed, we feel that perhaps these are more applicable to the food and grocery market where customers may have expectations as to certain appearances denoting certain products (whether red ketchup bottles, silver butter packages or yellow mustard jars).
 2. For the majority of our business, we seek to make sales based on the appearance of a product itself (rather than its packaging) given that the vast majority of our stock is not placed on display and instead is featured in promotional materials or online.
 3. Our overall opinion on this issue is that we do not believe further legislation for rights holders is necessary, as we believe existing legal rights of Trade Mark and passing off law are sufficient and appropriate to protect against lookalike products.
-

Appendix C: Consumer Survey – Questions and Brief

[See Chapter 7]

Stage 1 survey

Notes: Branded and own brand products to be varied in position, though relative comparisons to remain constant

Photoshop to be used to enable presentation of any products for judgement in trios

Demographic data to be captured for each respondent (though Stage 1 survey is not designed to be nationally representative)

Please look at the packaging of the three products below



Please rank the three products in terms of your preference?

Product A []

Product B []

Product C []

Do you think the packaging of product B or product C looks most like that of product A?

Product B Product C Neither

How likely or unlikely do you think it is that product B is made by the same company as is product A?

1 (extremely unlikely) - 7 (extremely likely)

Thinking of product B, how similar or dissimilar would you say its packaging looks to that of product A?

1 (they don't look at all like each other) - 7 (they look exactly the same)

How likely or unlikely do you think it is that product C is made by the same company as is product A?

1 (extremely unlikely) - 7 (extremely likely)

Thinking of product C, how similar or dissimilar would you say its packaging looks to that of product A?

1 (they don't look at all like each other) - 7 (they look exactly the same)

How likely or unlikely do you think it is that product C is made by the same company as the product B?

1 (extremely unlikely) - 7 (extremely likely)

Thinking of product C, how similar or dissimilar would you say its packaging looks to that of product B?

1 (they don't look at all like each other) - 7 (they look exactly the same)

Comparing products B and C, to what extent do you agree or disagree that product B is likely to be...

1 (Strongly Disagree)-Disagree- Slightly Disagree - Neither-Slightly Agree - Agree- (Strongly Agree) 7

- a. ...of a better quality (e.g., more desirable,tastes better, safer)?
- b. ... better for its intended use (e.g., more effective, better at doing what it's supposed to)?
- c. ... more expensive (e.g., cost more money)?
- d. ... better value for money – in your opinion?

Thinking of <product type: razors>, which of the following statements best describes your behaviour:

I stick to one brand, and never change

I always buy a branded one, but sometimes/ often switch brands

I usually buy a branded one, but sometimes experiment with a different version

I always buy whatever is cheapest

I never buy them

We'd like to ask you one question we asked you earlier again. Now that you've thought more about the 3 products, please rank the three products again in terms of your preference?

Product A

Product B

Product C

Which, if any, of the following are relevant to your preferences?

I prefer a product from a company I know

I prefer brands

I like trying new products

Other: (please specify) _____

Which, if any, of the following products have you ever tried?

Product A

Product B

Product C

None of them

Of these, which if any would you say you enjoyed?

Product A

Product B

Product C

None of them

Appendix 2: Stage 2 survey

Key:

Black text: to be presented to respondents

Blue text: response options

Red text: explanatory comments for reviewers & scripter

READ OUT: Here, we are interested in your shopping habits, and specifically in your experiences of 'lookalike' products. By 'lookalikes', we mean products whose appearance may to some extent resemble the look of a well known brand in the same category. For example, some people may say the "Boots Blade 3" below is a 'lookalike' to the "Gillette Mach 3", or that "Boots Ibuprofen caplets" is a 'lookalike' to the "Nurofen caplets" – because aspects of their packaging are similar.



To make clear the terms we are using:

- By 'brand product' we mean a product with a particular name. Examples might include Kellogg's Corn Flakes, or Gillette Mach 3 razors.
- By 'own-brand product' we mean a product in the same category as a brand that is manufactured by a well known retailer. So for example, there is a Tesco (and Sainsbury) own-brand version of Corn Flakes.

To be clear, by lookalikes we **do not** mean products that are counterfeit copies of branded products.

Neither do we mean **any** own-brand product. A lookalike is where another product in the same category looks somewhat like a brand leader in the category. So, in some instances a lookalike may be of an own-brand product.

Thinking of when you go shopping for groceries and household items....

Question 1: to identify generic respondent purchasing tendencies

1. ... across all products you buy, which of the following statements best describes your typical behaviour? For any one product... [SINGLE CODE]
- ... I tend to stick to a specific brand/ own-brand, and never change [1]
 - ... I tend to buy a specific brand/ own-brand, but sometimes experiment with a different one [2]
 - ...I tend to buy brands/ own-brands, and often switch brands [3]
 - ... I tend not to buy brands/ own-brands [4]
 - ... I don't know [5]

If [1], [2], or [3] to Q1

- a. Do you mainly buy *brand products*, or *own-brand products*? [SINGLE CODE]
- Brands [1]
 - Own brands [2]
 - Around half and half [3]
 - I don't know [4]

Question 2: to identify priorities in considerations for day to day purchasing decisions

2. ... across all products you buy, please rank order the following **from 1-5** in terms of their importance to you?
- ... preferred brand/ own-brand [1]
 - ... lowest price [2]
 - ... highest quality [3]
 - ... best value for money [4]
 - ...best fitness for purpose [5]
-

Question 3: **to identify perceived influence of product presentation characteristics**

3. ... across all products you buy, thinking of the appearance of the products, please rank order the following **from 1-6** in terms of how much they influence the likelihood of your purchasing?

Packaging shape [1]

Packaging colour [2]

Product (Brand/own-brand) name [3]

Product branding/iconography (other than text) [4]

Product descriptions on the packaging (for example, "Extra Power" or "Fresh Ingredients") [5]

Previous positive experience with the product itself [6]

Question 4: **accidental purchase of lookalikes**

4. a.... across all products you buy, have you ever **mistakenly or accidentally** purchased a 'lookalike', thinking you were buying the branded/own-branded version of the product?

Yes, frequently [1]

Yes, a few times [2]

Yes, once or twice [3]

No, never [4]

Don't know [5]

If [1], [2], or [3] to Q4

b... and to what extent would you say the experience(s) **disadvantage**(d) you?

[SINGLE CODE]

- very much [1]
- somewhat [2]
- very little [3]
- not at all [4]
- don't know [5]

c... and to what extent would you say the experience(s) was (were) **advantageous** to you?

[SINGLE CODE]

- very much [1]
- somewhat [2]
- very little [3]
- not at all [4]
- don't know [5]

Question 5: **deliberate purchase of lookalikes**

5. a... across all products you buy, do/have you ever **deliberately** purchase/d a 'lookalike'?

- Yes, regularly [1]
- Yes, a few times [2]
- Yes, once or twice [3]
- No [4]
- Don't know [5]

If [1], [2], or [3] to Q5

b... and to what extent would you say that doing so **disadvantages** you?

[SINGLE CODE]

very much [1]

somewhat [2]

very little [3]

not at all [4]

don't know [5]

c... and to what extent would you say that doing so is **advantageous** to you?

[SINGLE CODE]

very much [1]

somewhat [2]

very little [3]

not at all [4]

don't know [5]

Question 6: **trust in retailers and brand owners**

6. From your experiences of purchasing both branded and retailer own-brand products, do you think the branded (such as Gillette, Kelloggs', Original Source) or the retailer own-branded (such as Tesco, Sainsburys', Boots) products are on average better at giving you the...

a... lower prices? [SINGLE CODE]

Retailers [1]

Brand owners [2]

Roughly the same [3]

Don't know [4]

b... higher quality? [SINGLE CODE]

Retailers	[1]
Brand owners	[2]
Roughly the same	[3]
Don't know	[4]

c... best value for money? [SINGLE CODE]

Retailers	[1]
Brand owners	[2]
Roughly the same	[3]
Don't know	[4]

d... best for their purpose? [SINGLE CODE]

Retailers	[1]
Brand owners	[2]
Roughly the same	[3]
Don't know	[4]

END

Appendix D: Consumer Survey - Graphs and Charts

[See Chapter 7]

Part 1: Similarity and Origin

Bodyspray & Bodywash

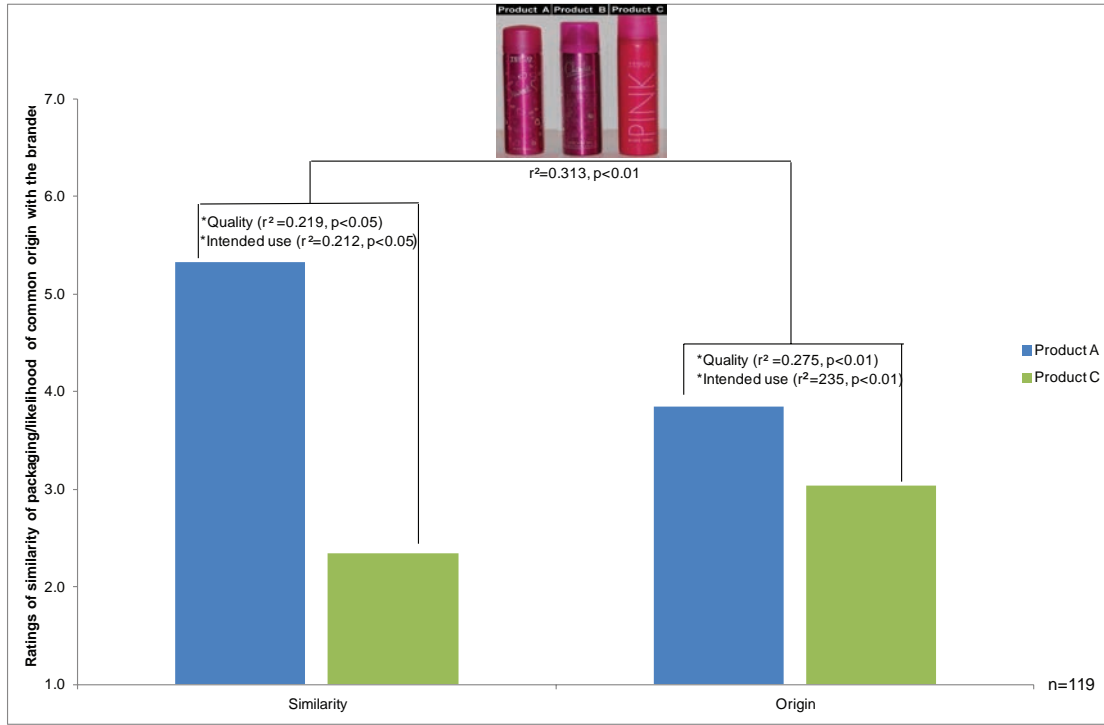


Figure D.1(i) – Similarity and origin –Tesco Sweet, Charlie Pink and Tesco Pink

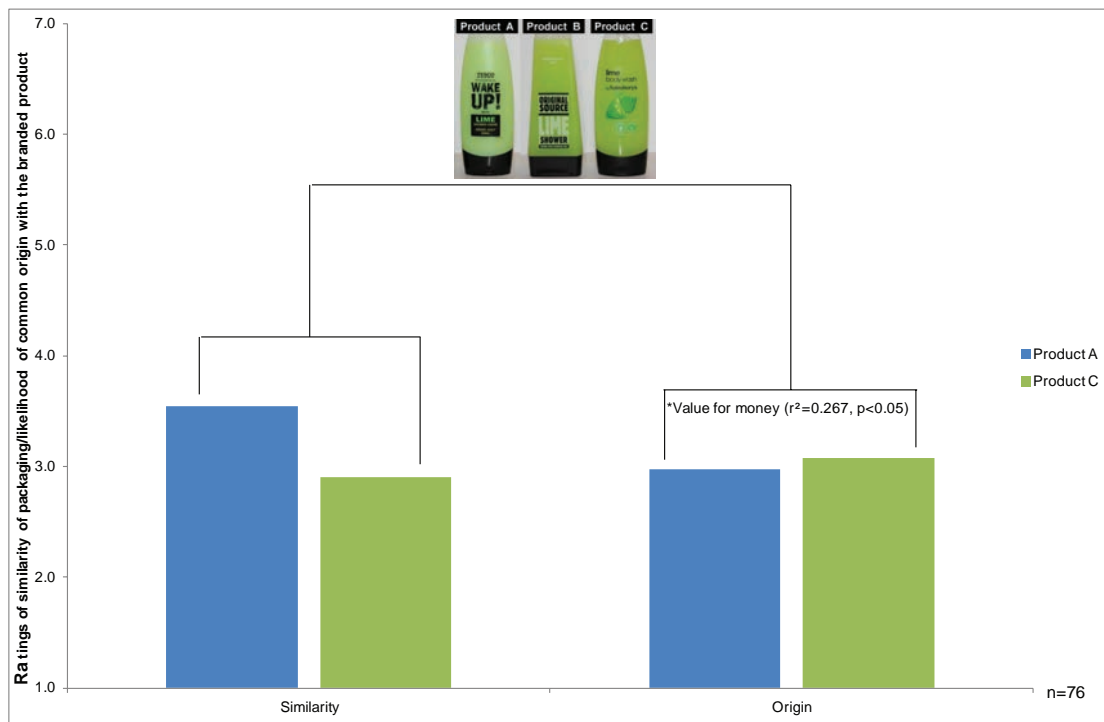


Figure D.1(ii) – Similarity and origin –Tesco Wake Up, Original Source and Sainsbury's Lime Bodywash

Cheese & Razor

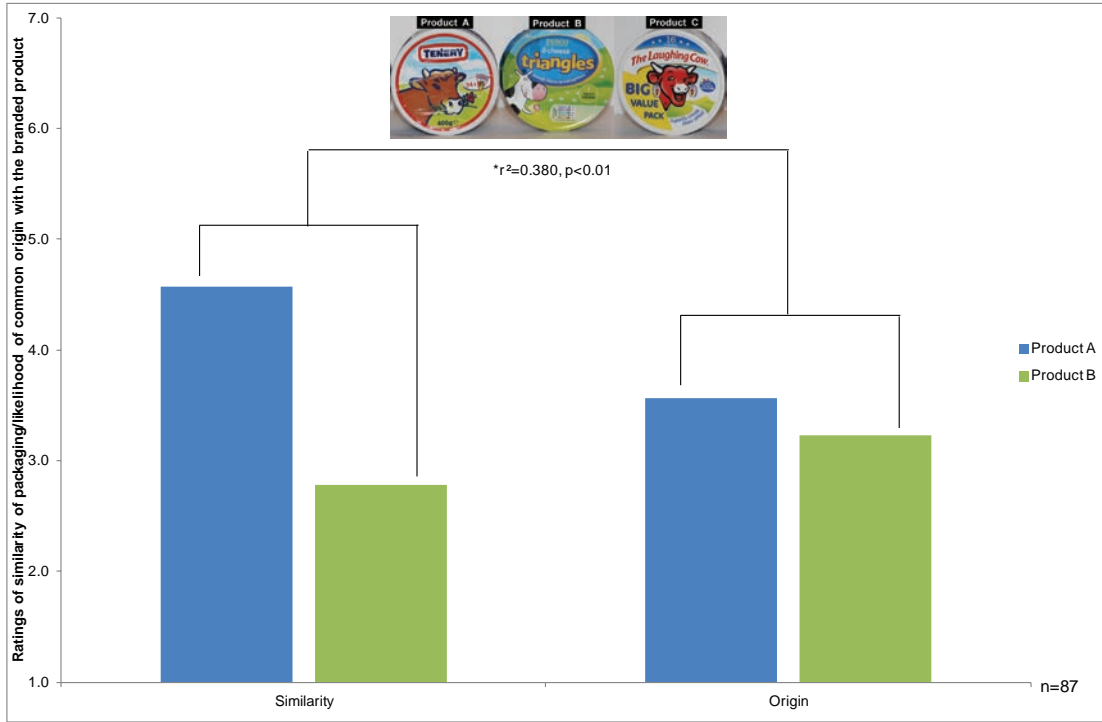


Figure D.1(iii)– Similarity and origin – (Lidl) Tenery, Tesco Triangles and The Laughing Cow,

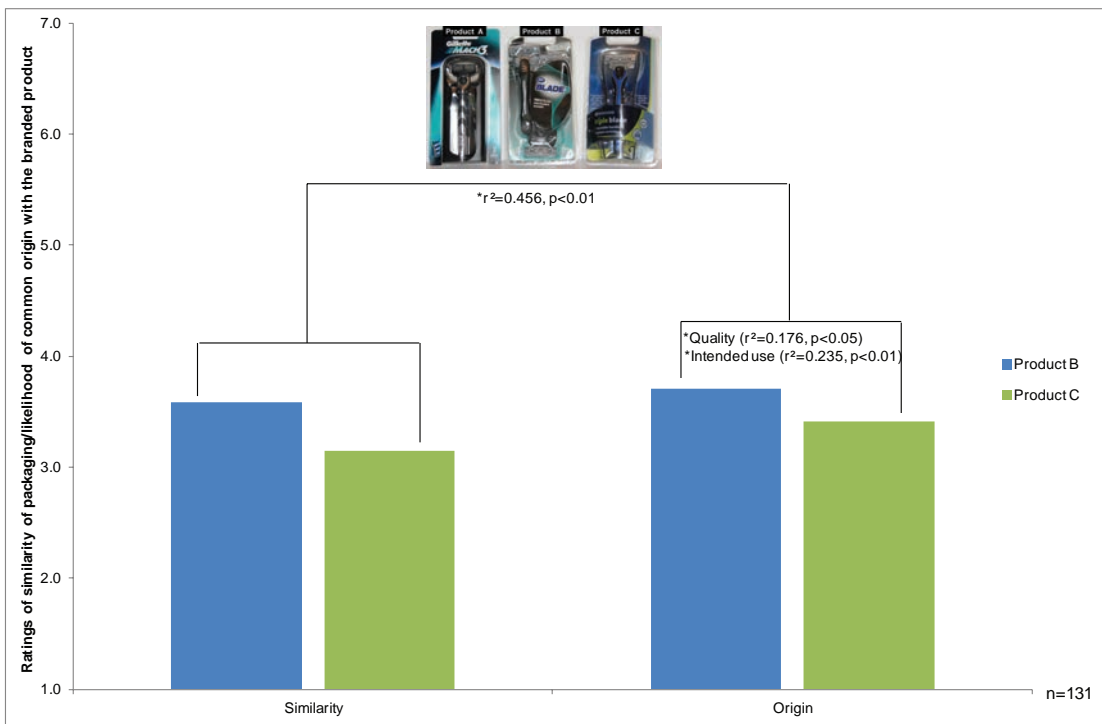


Figure D.1(iv) - - Similarity and origin – Gillette Mach3, Boots Blade 3 and Morrison's Triple Blade

Washing Up Liquid & Shampoo

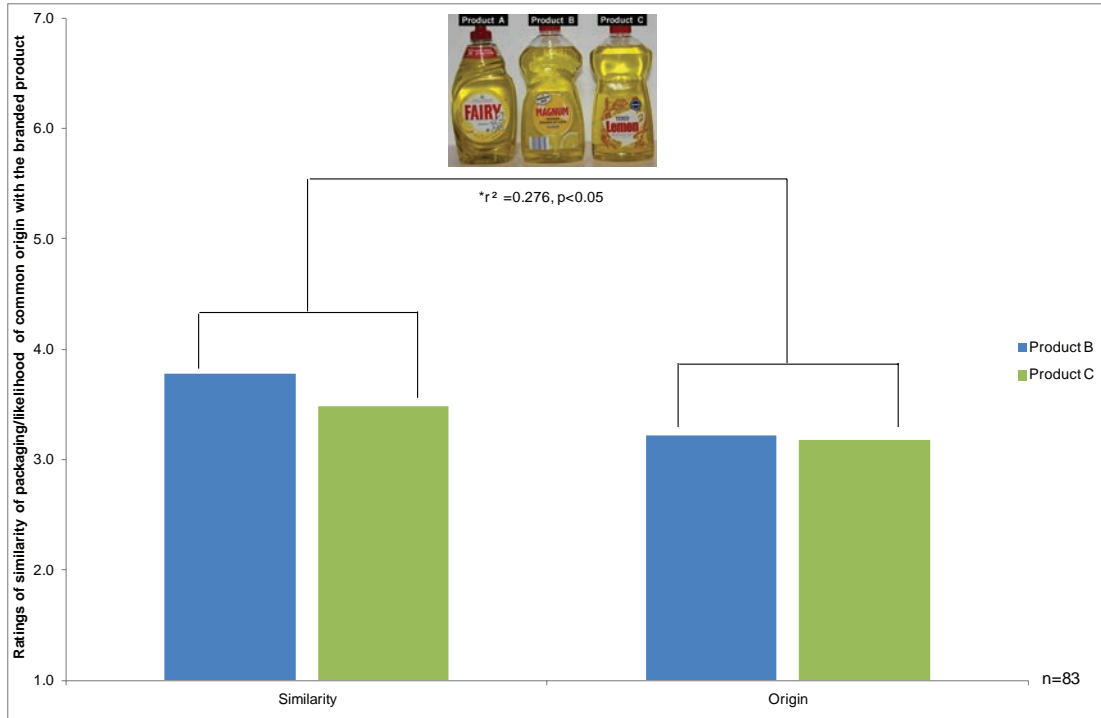


Figure D.1(v) - - Similarity and origin – Fairy Liquid, (Aldi) Magnum and Tesco’s washing up liquid

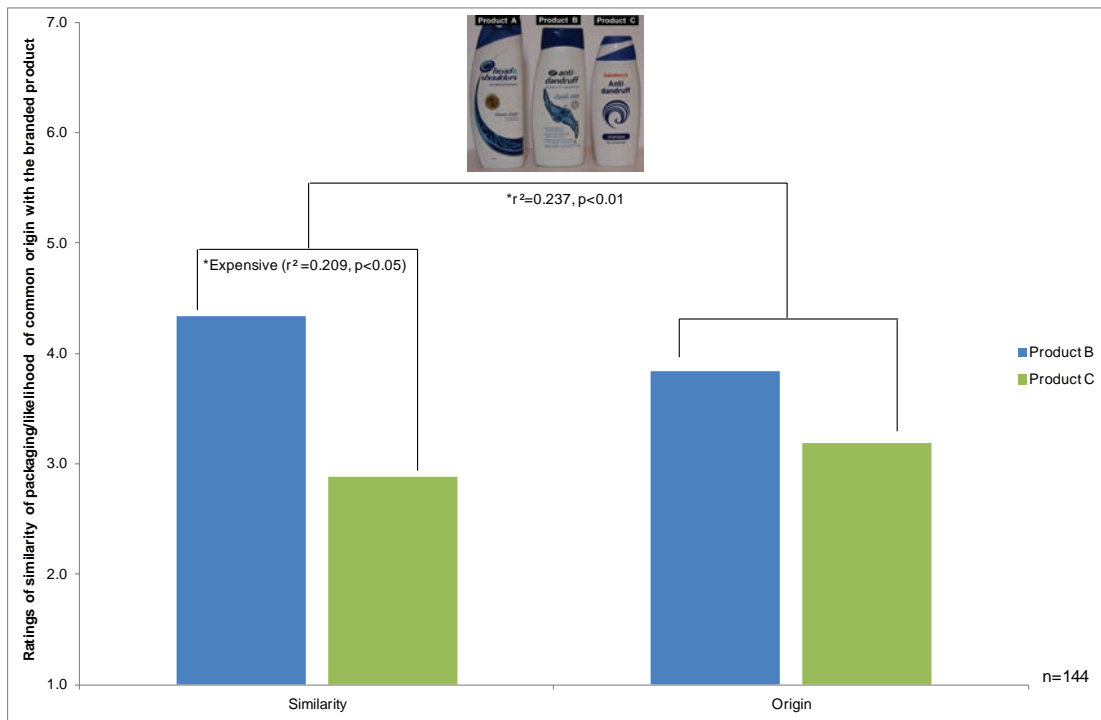


Figure D.1(vi)– Similarity and origin – Head & Shoulders, Boots Anti-dandruff and Sainbury’s anti-dandruff

Drinks & Vinegar

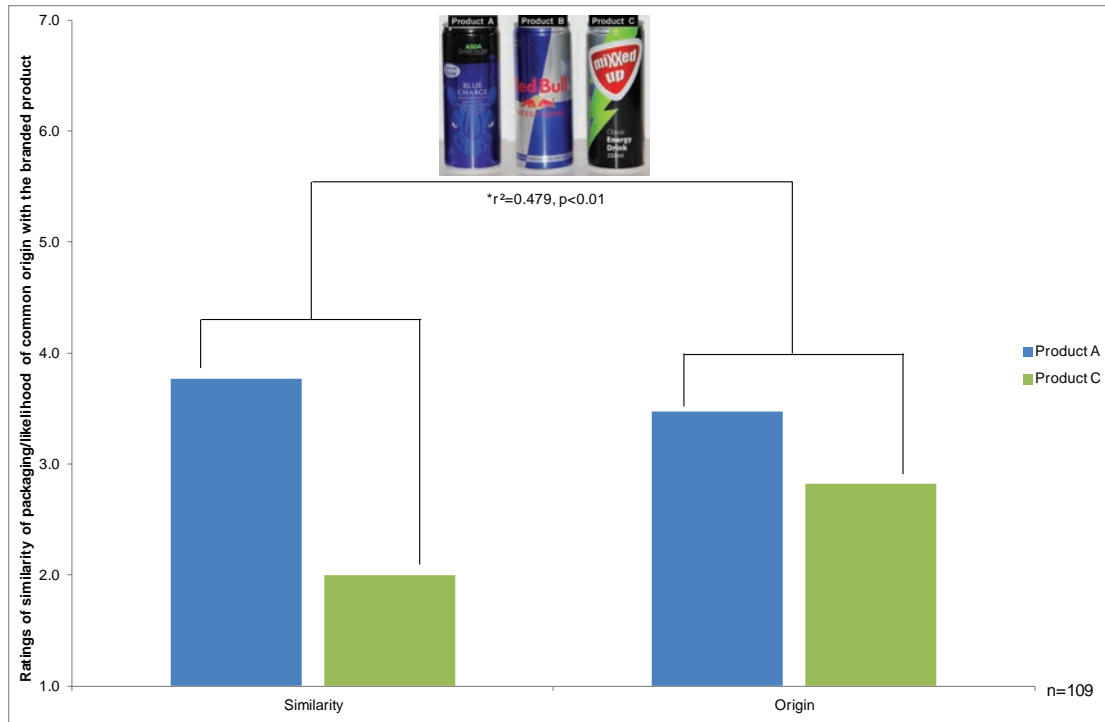


Figure D.1(vii)– Similarity and origin –ASDA Blue Charge, Red Bull and (Lidl) Mixed Up

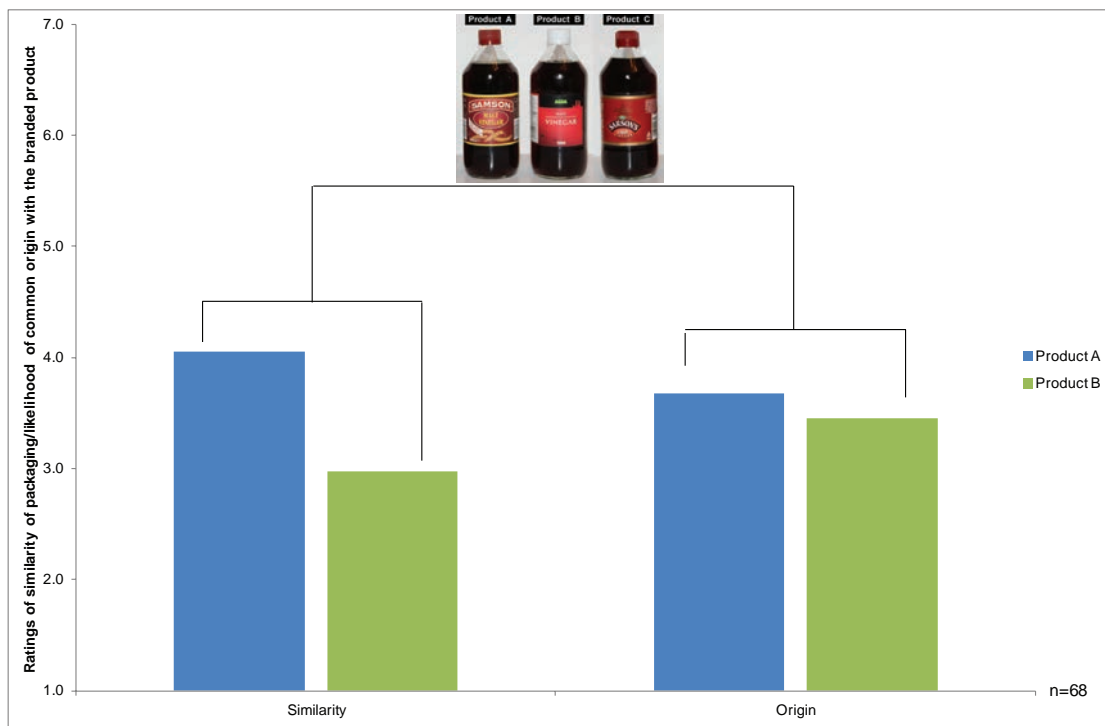


Figure D.1(viii)– Similarity and origin –(Lidl) Samson’s Malt Vinegar, ASDA Malt Vinegar and Sarson’s Malt Vinegar

Butter & Ibuprofen

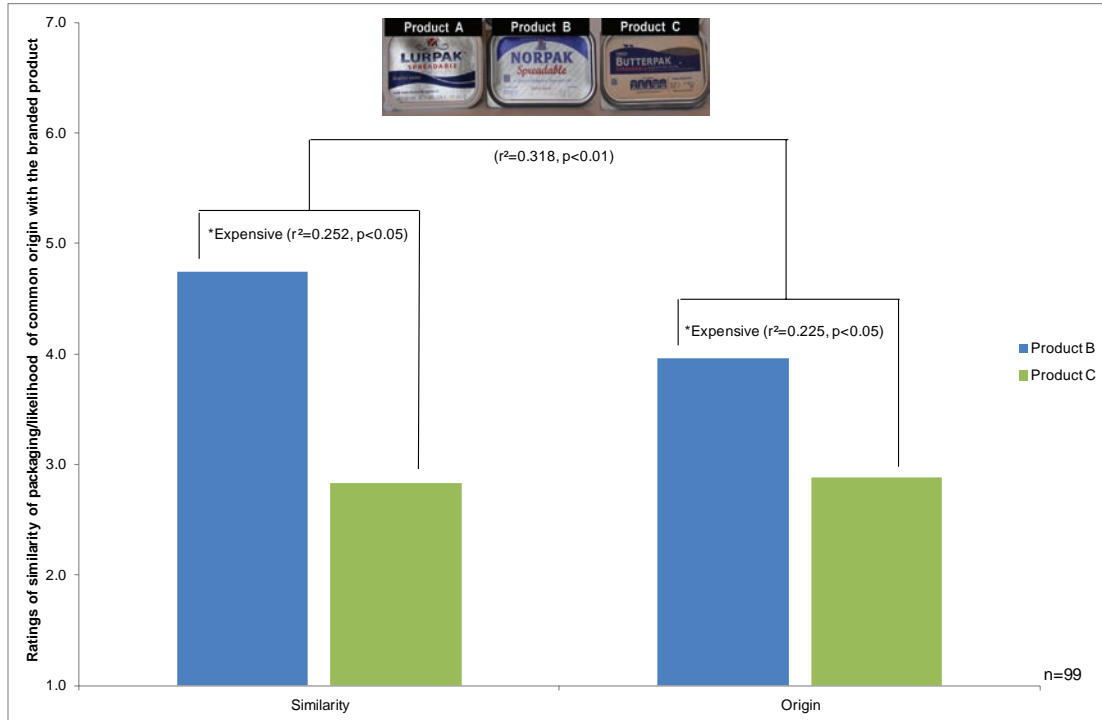


Figure D.1(x)– Similarity and origin – Lurpak, (Aldi) Norpak and Tesco Butterpak

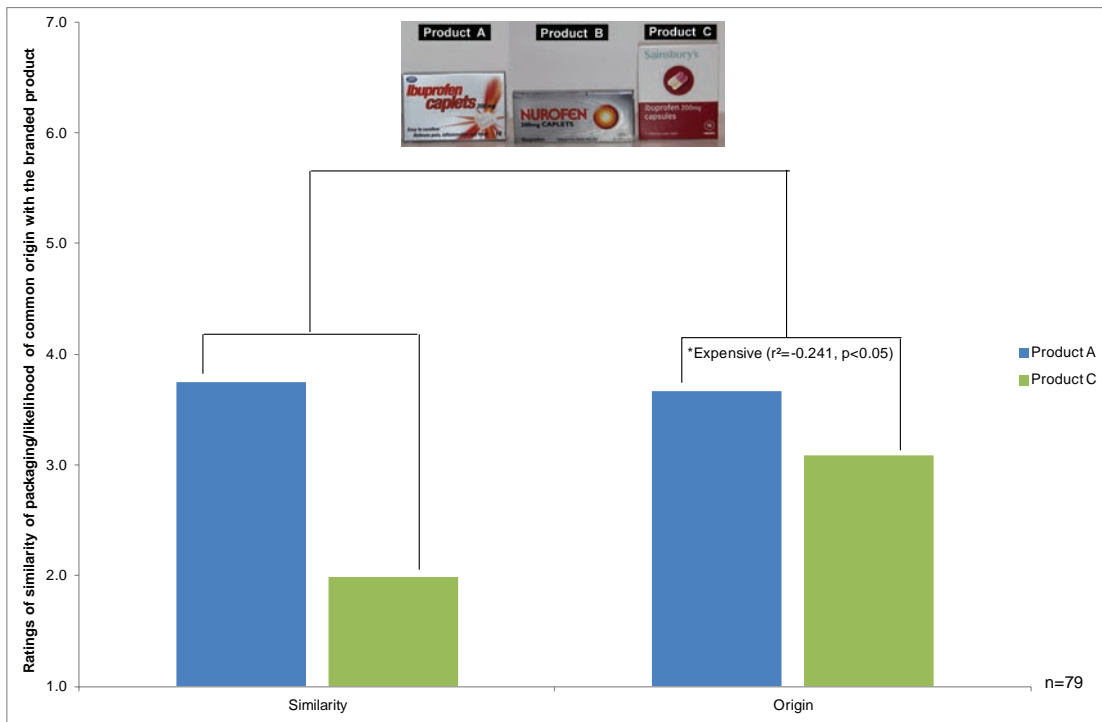


Figure D.1(xi) – Similarity and origin –Boots Ibuprofen Caplets, Nurofen Ibuprofen Caplets and Sainsbury's Ibuprofen Capsules

Skin Care & Shaving Gel

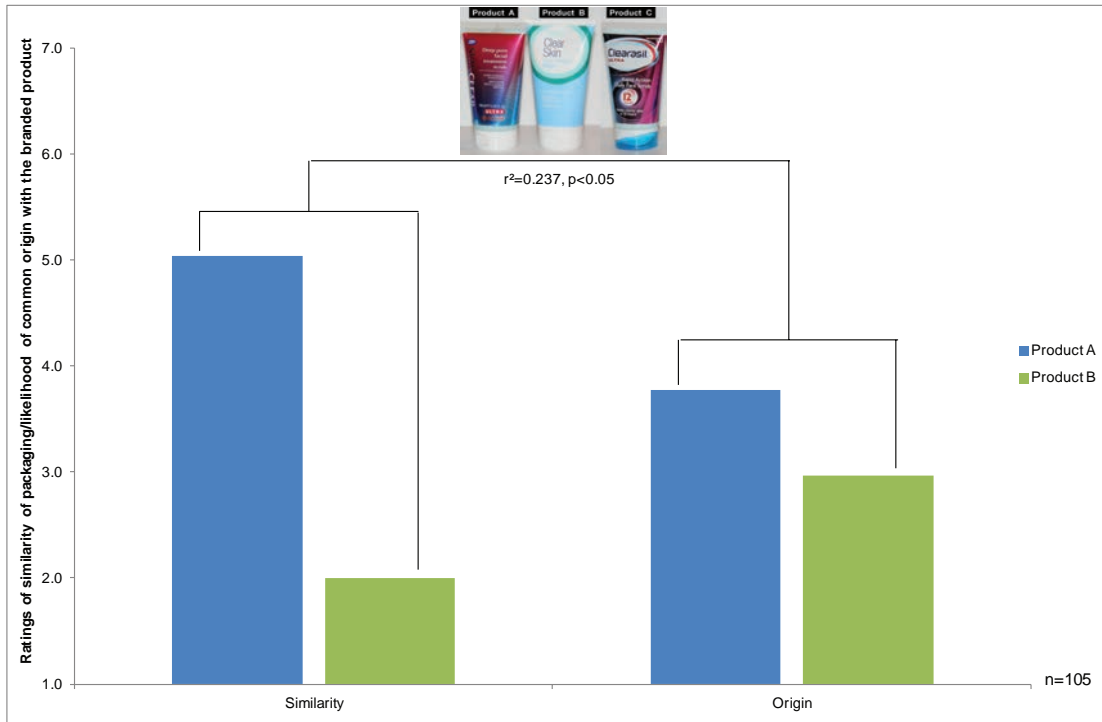


Figure D.1(xi) – Similarity and origin –Boots SkinClear, Tesco Skin Clear and Clearasil Ultra,

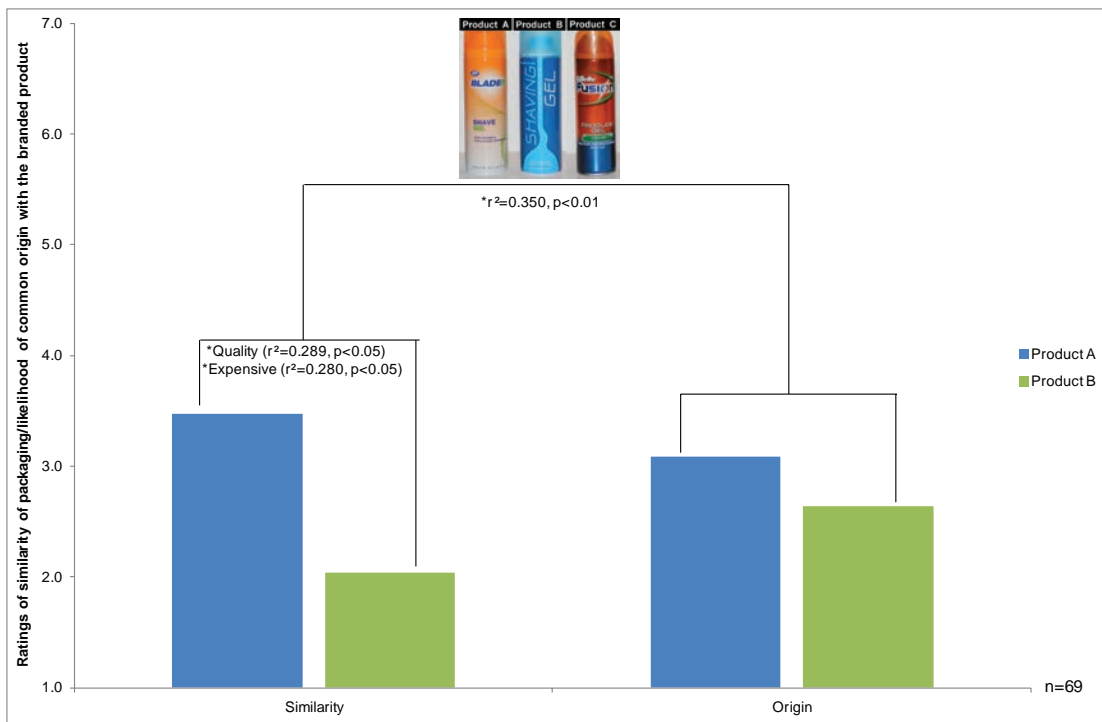


Figure D.1(xii) – Similarity and origin –Blades 3 Shaving Gel and Morrison's Shaving Gel, Gillette Fusion Shaving Gel,



Part 2: User vs Non-Use

Bodyspray

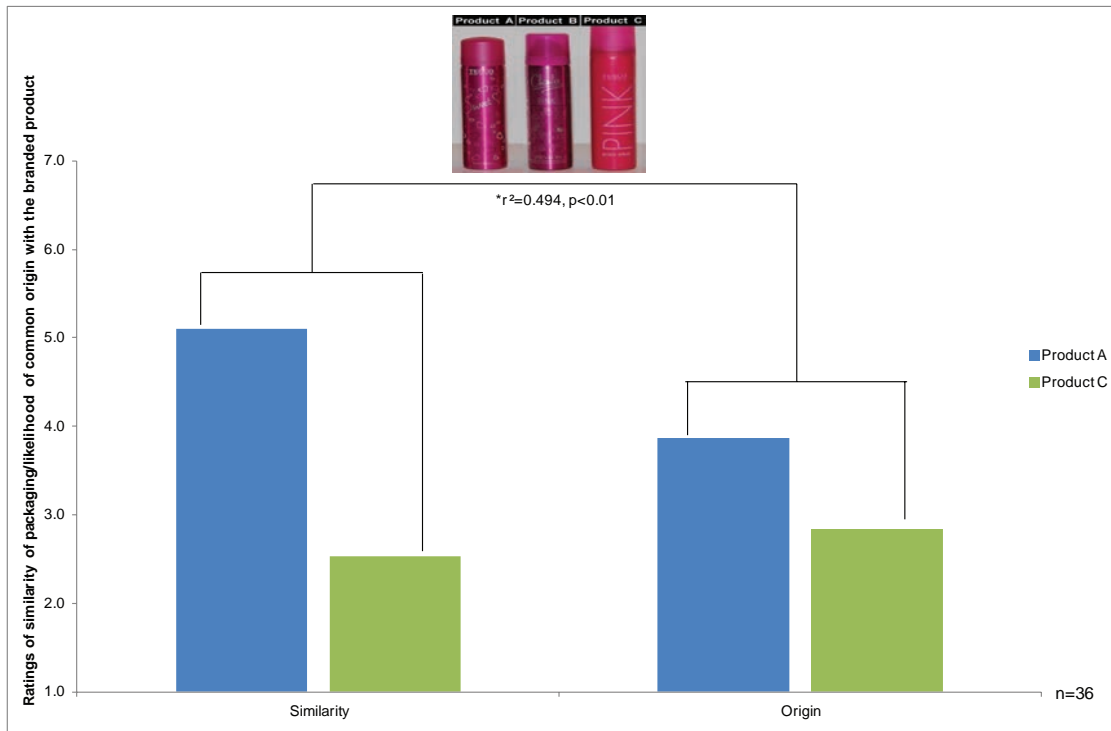


Figure D.2(i) – Similarity and Origin - Users

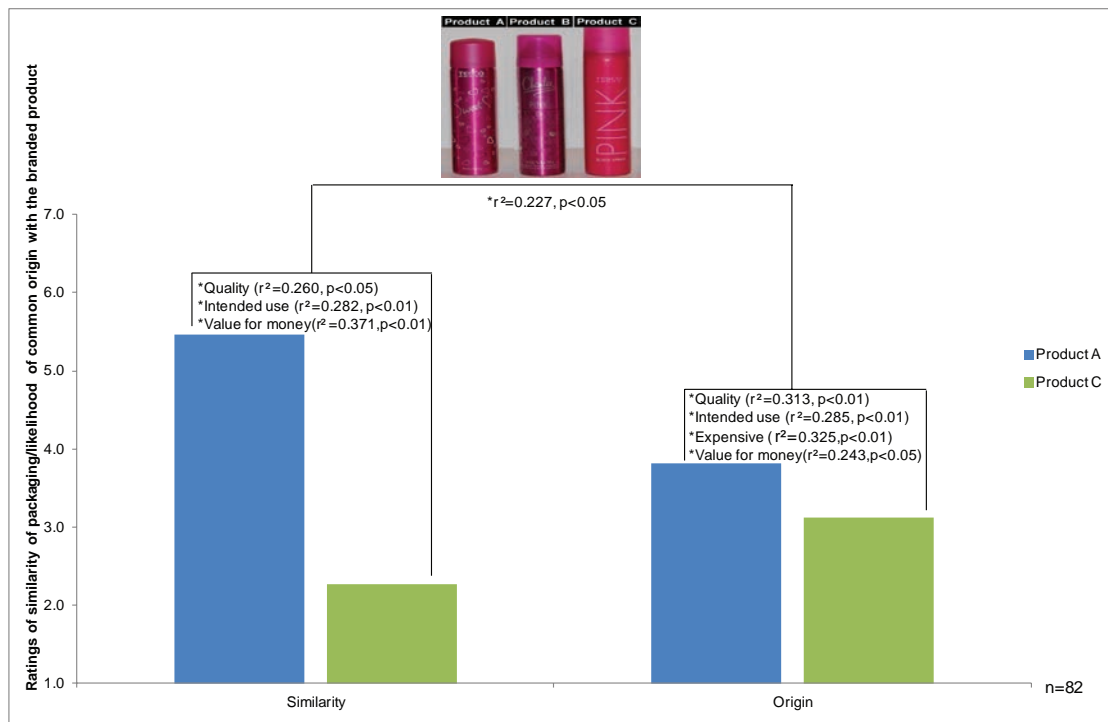


Figure D.2(ii) – Similarity and Origin – Non-Users

Bodywash

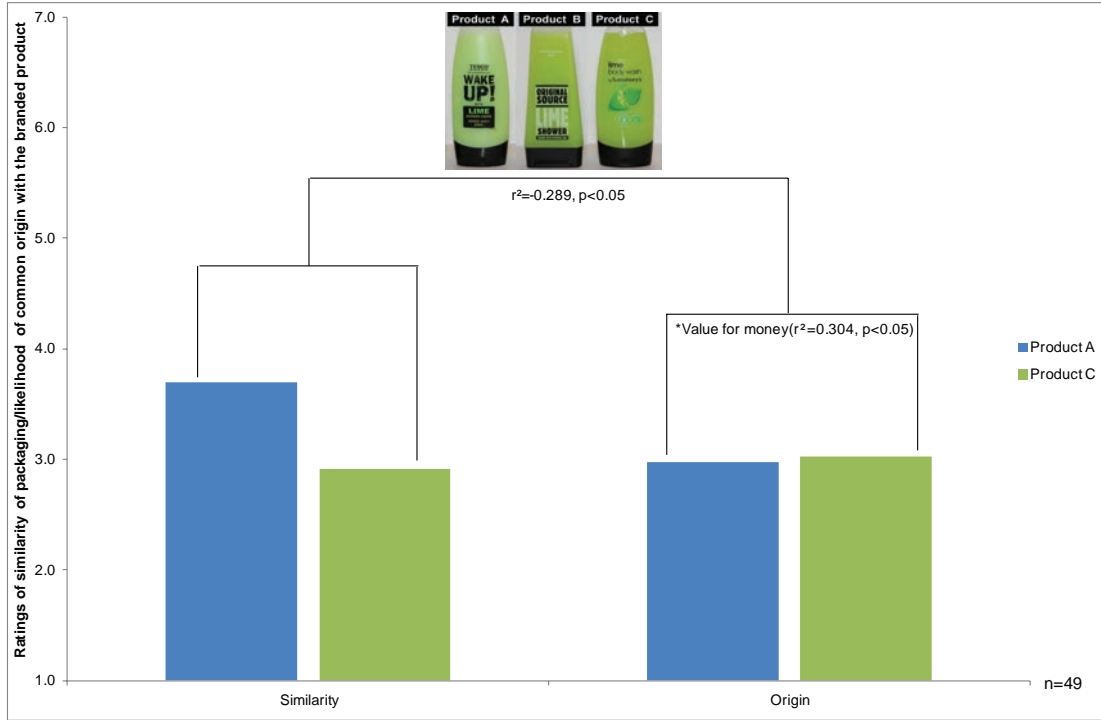


Figure D.2(iii) – Similarity and Origin - Users

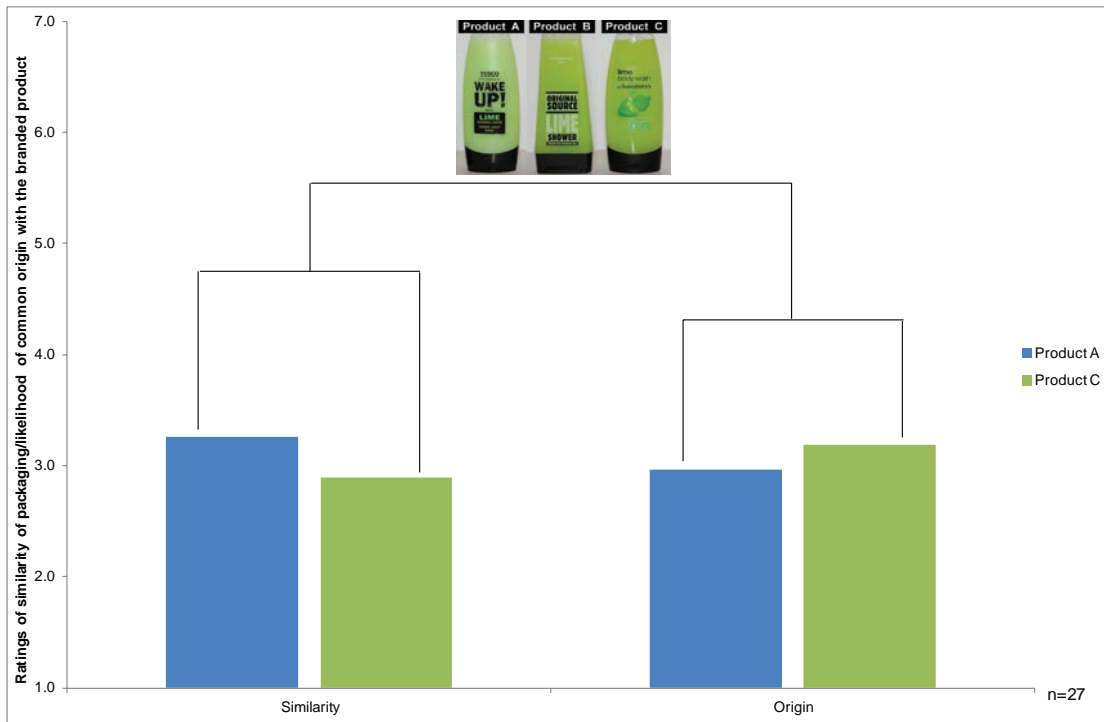


Figure D.2(iv) – Similarity and Origin – Non-Users

Cheese

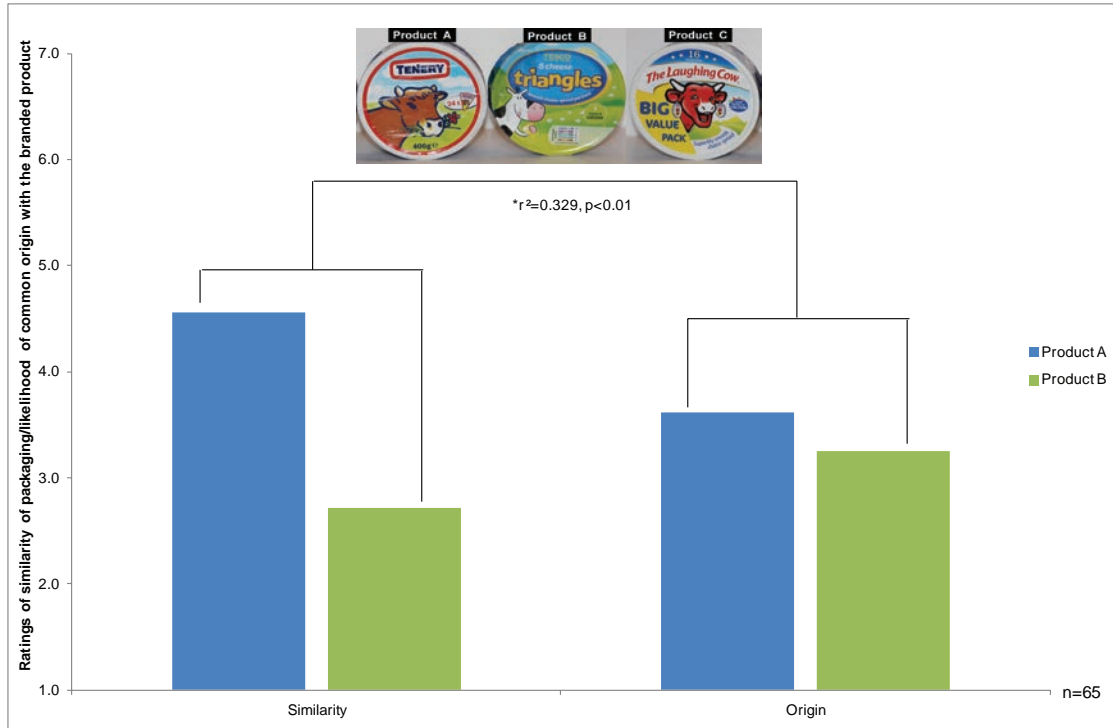


Figure D.2(v) – Similarity and Origin - Users

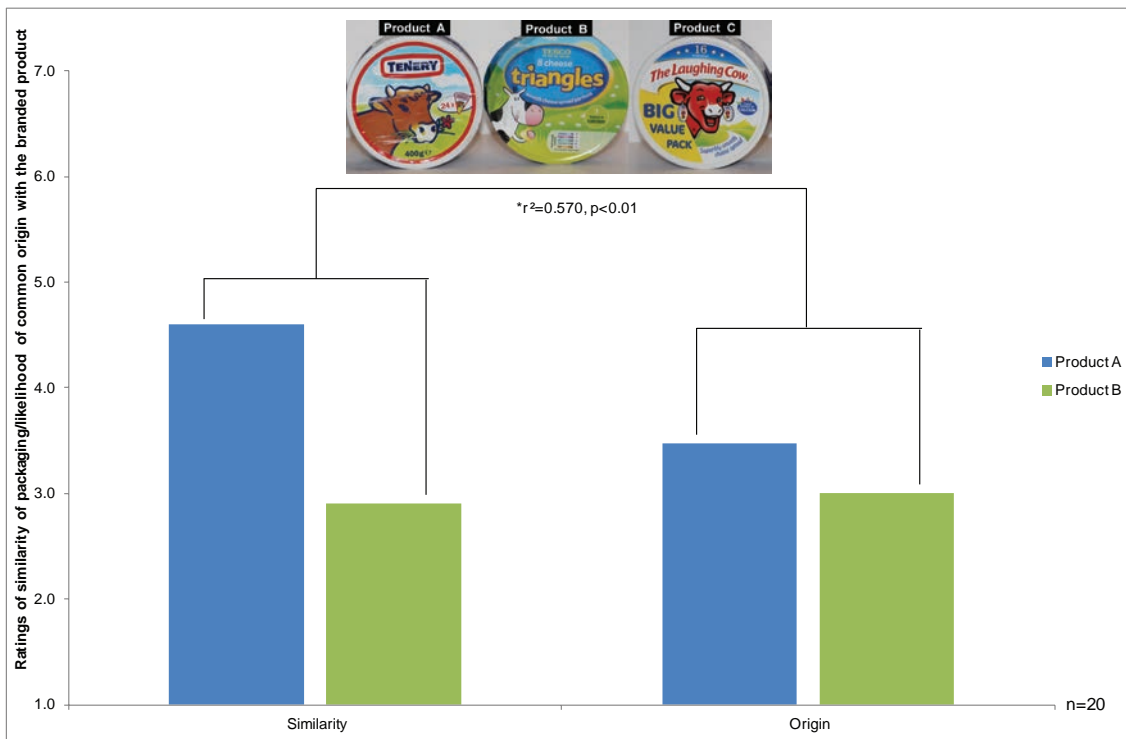


Figure D.2(vi) – Similarity and Origin – Non-Users

Razors

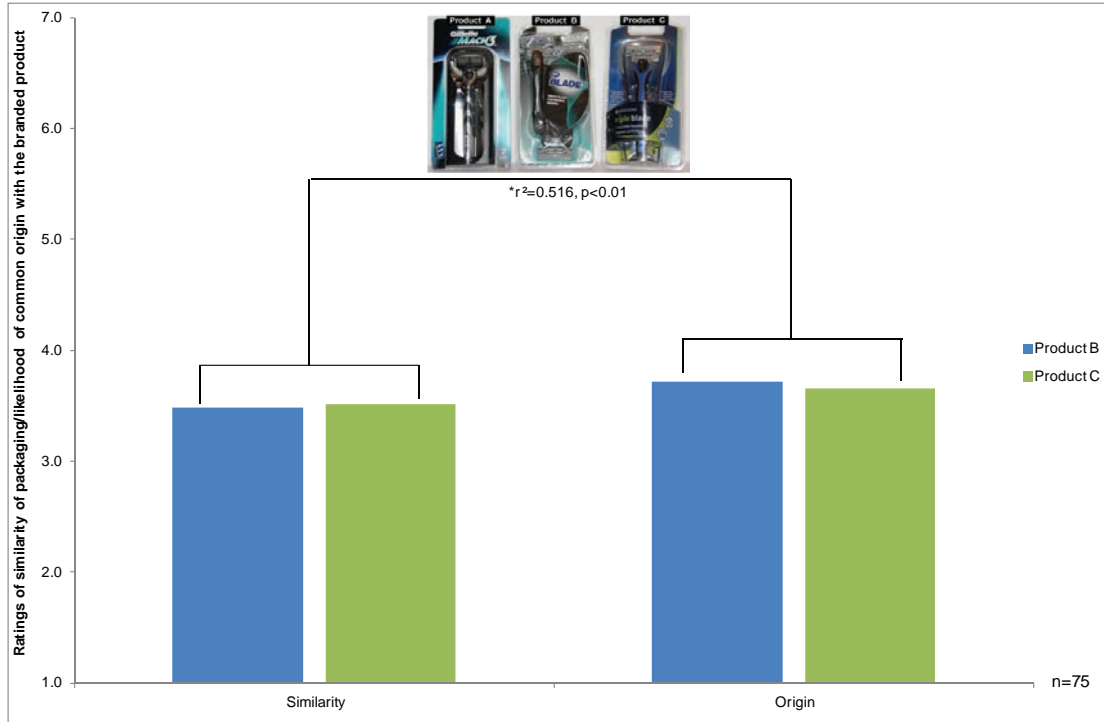


Figure D.2(vii) – Similarity and Origin – Users

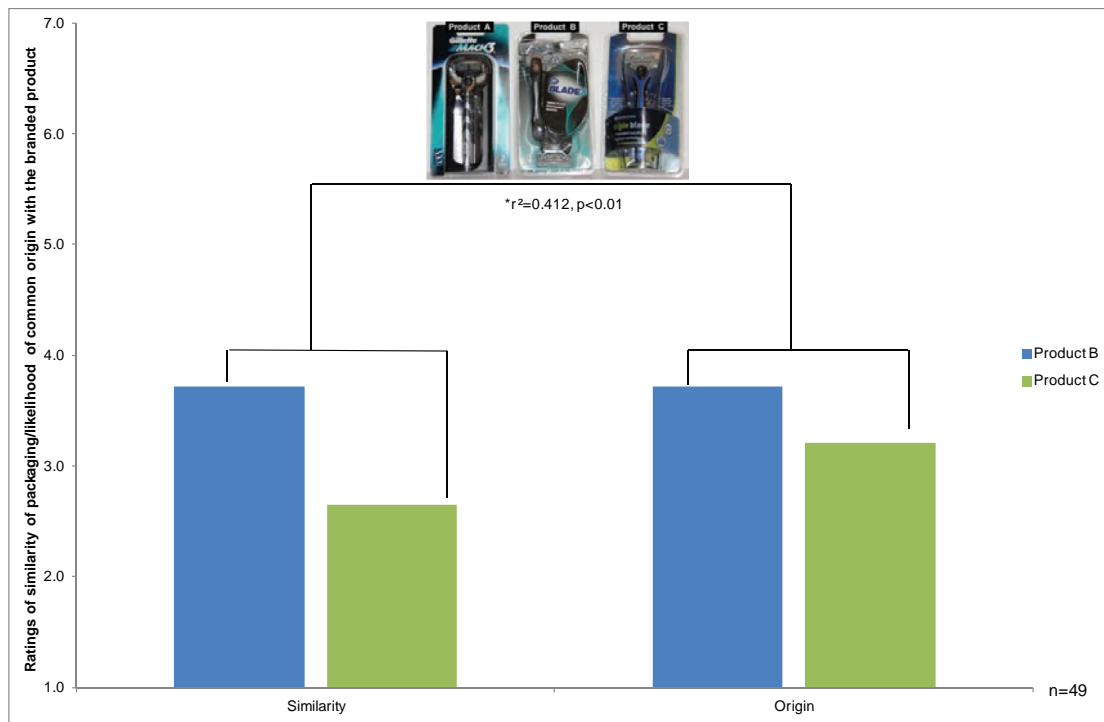


Figure D.2(viii) – Similarity and Origin – Non-Users

Washing Up Liquid

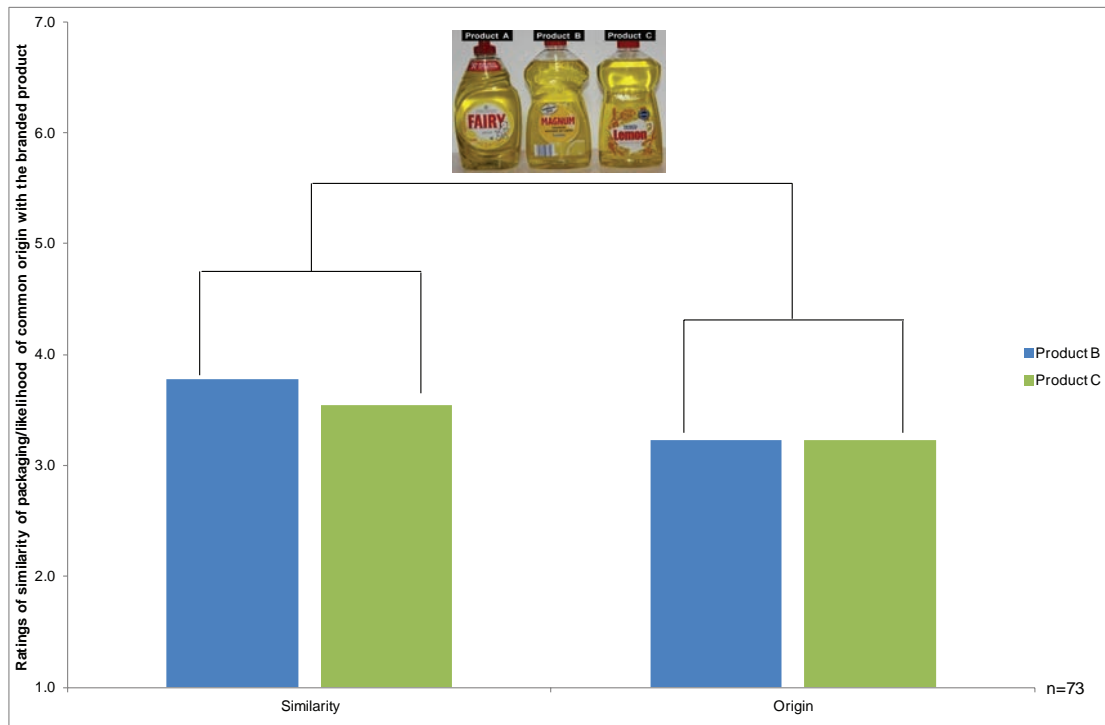


Figure D.2(ix) – Similarity and Origin –Users

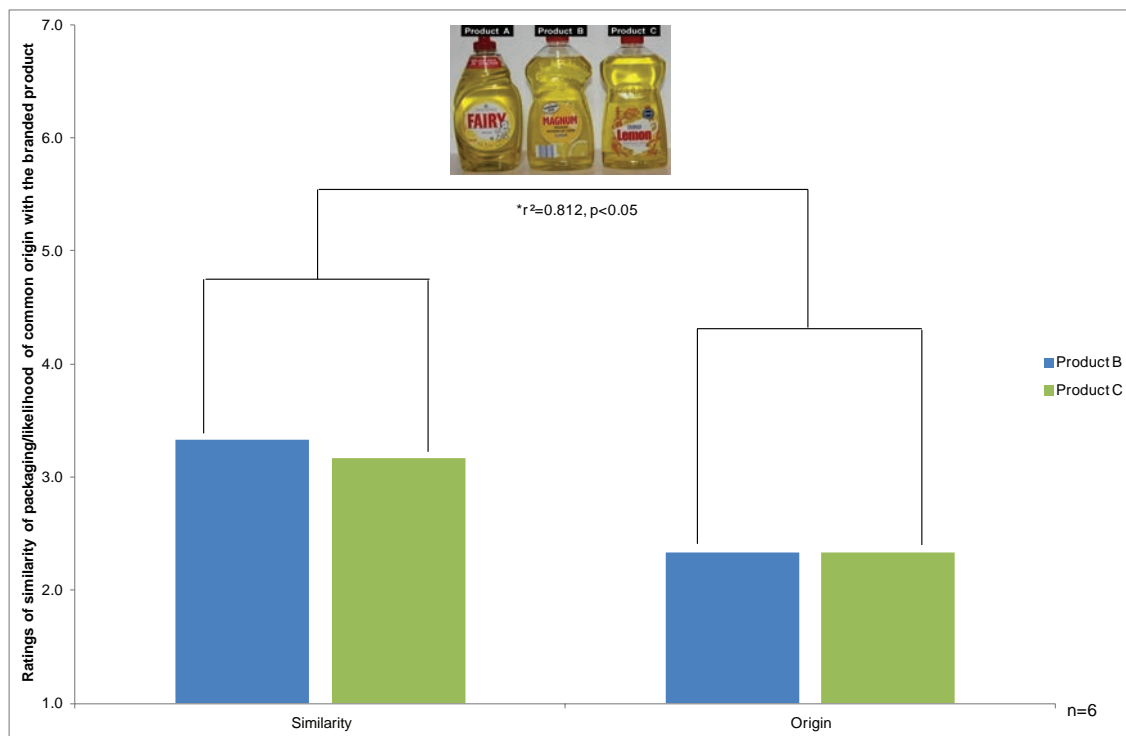


Figure D.2(x) – Similarity and Origin –Non-Users

Shampoo

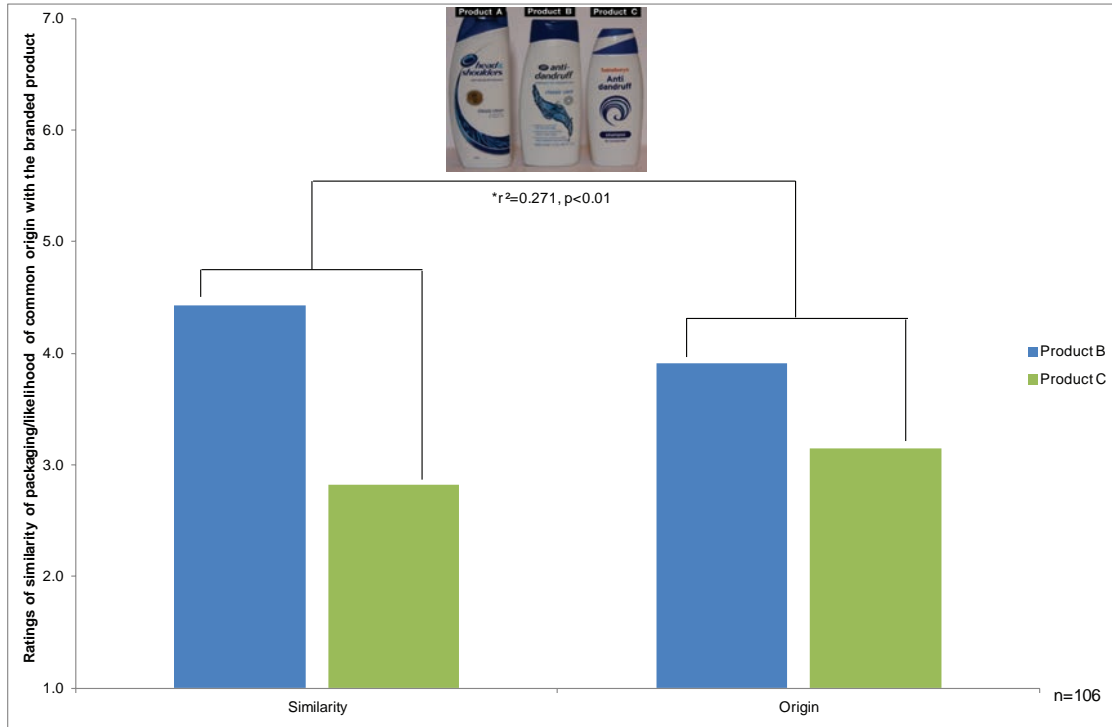


Figure D.2(xi) – Similarity and Origin – Users

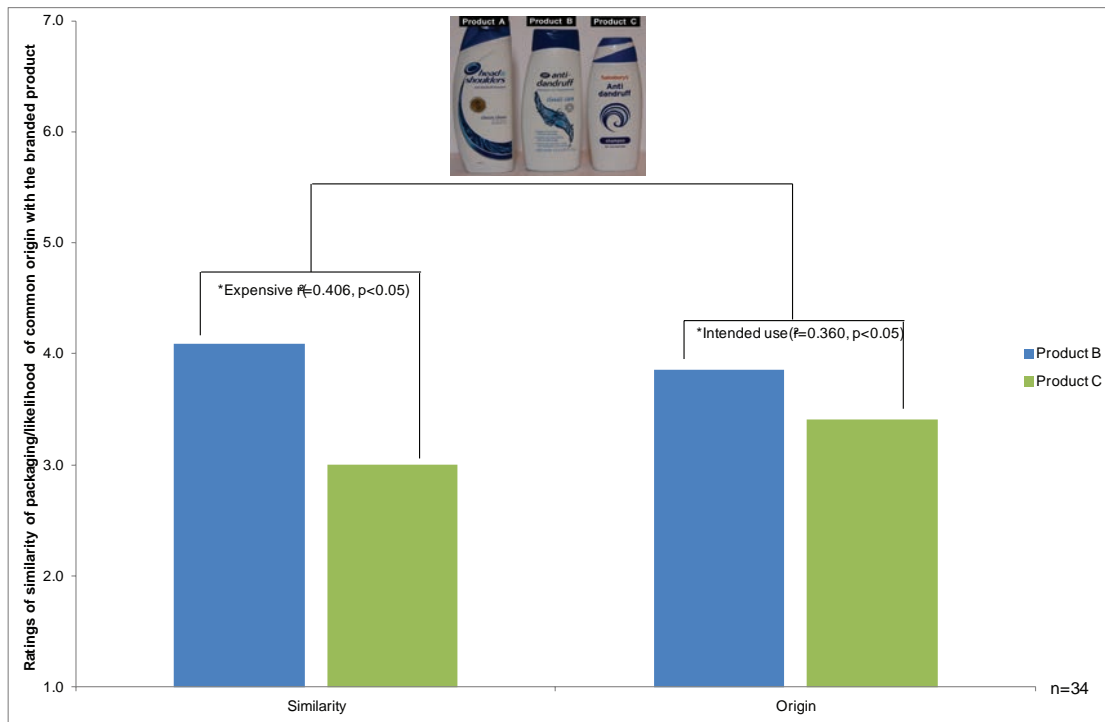


Figure D.2(xii) – Similarity and Origin – Non-Users

Drinks

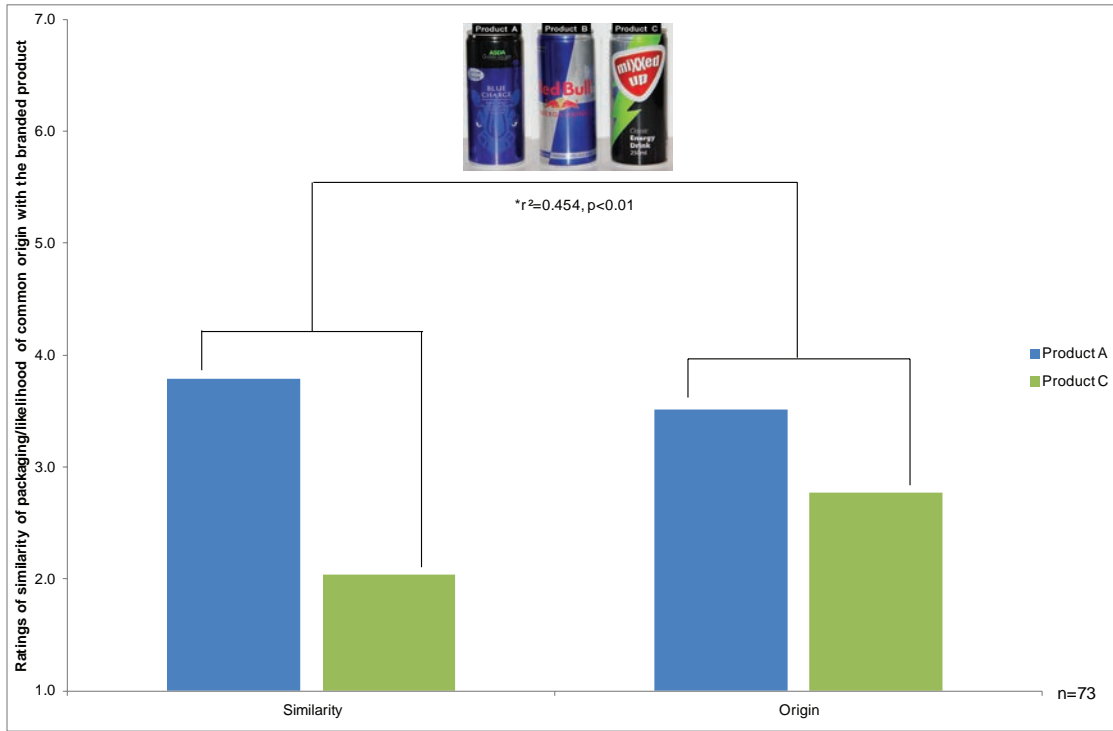


Figure D.2(xiii) – Similarity and Origin – Users

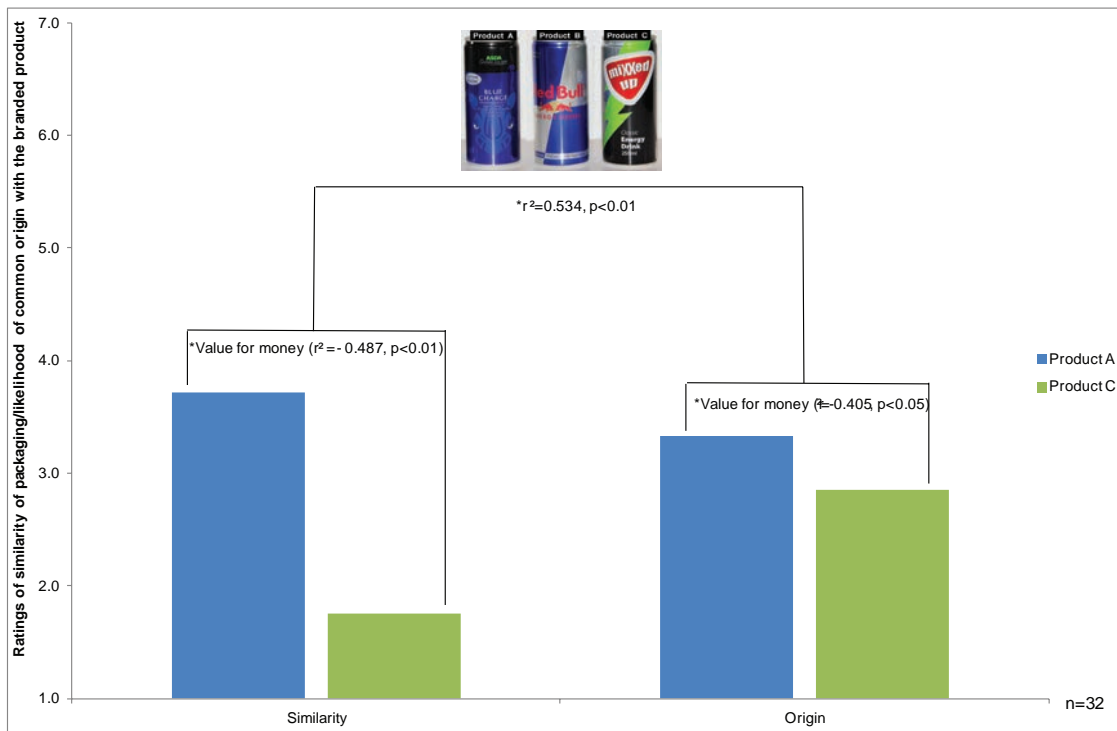


Figure D.2(xiv) – Similarity and Origin – Non-Users

Vinegar

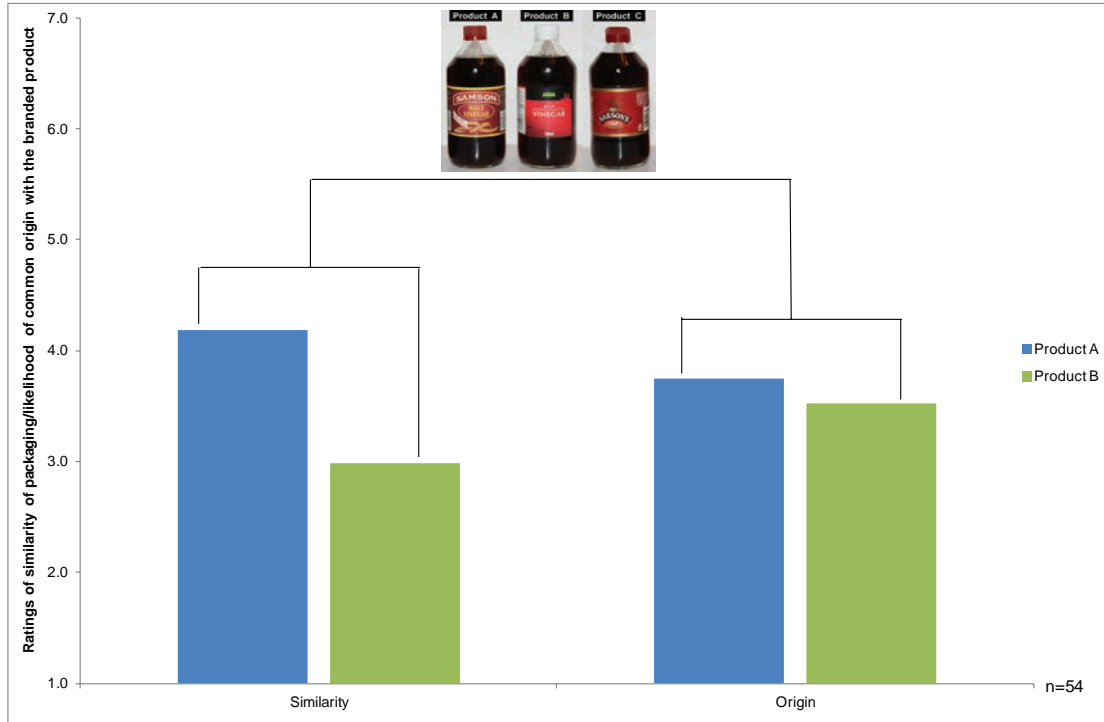


Figure D.2(xv) – Similarity and Origin – Users

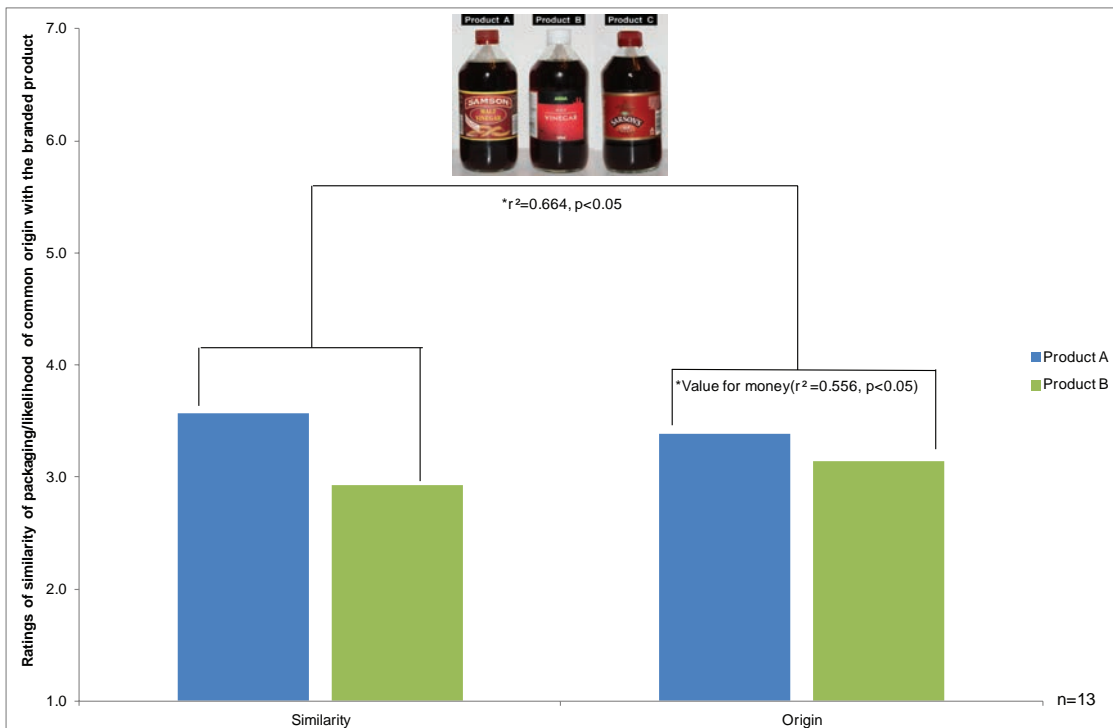


Figure D.2(xvi) – Similarity and Origin – Non-Users

Butter

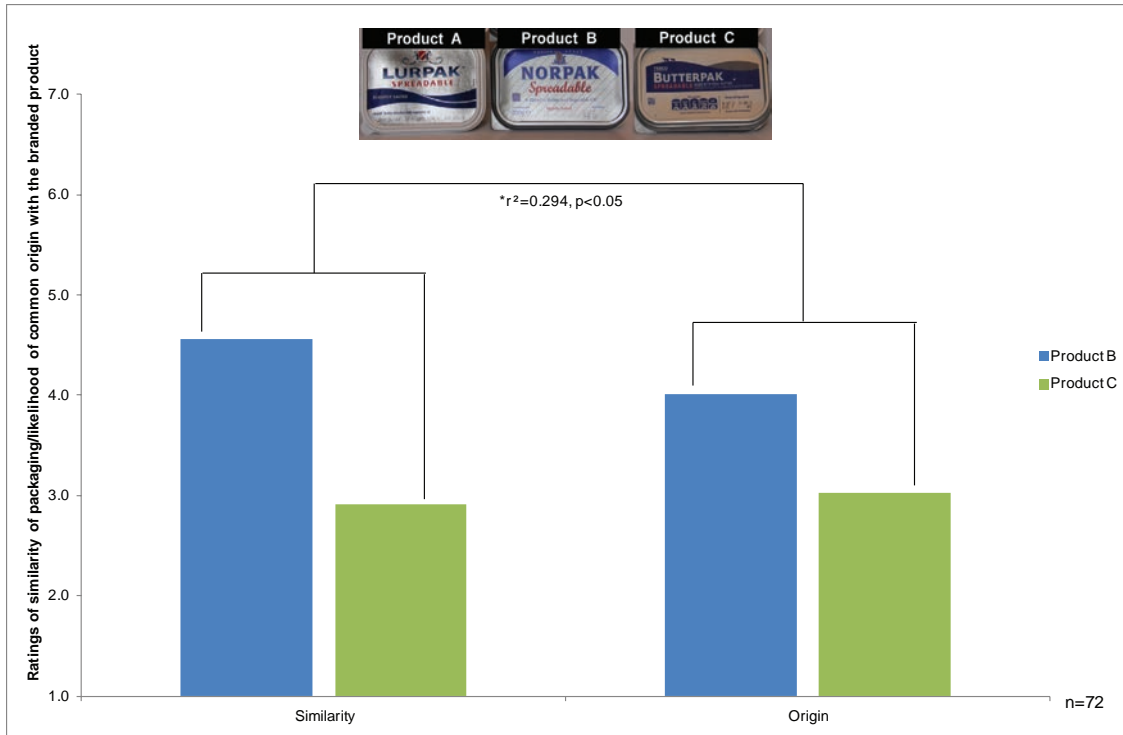


Figure D.2(xvii) – Similarity and Origin – Users

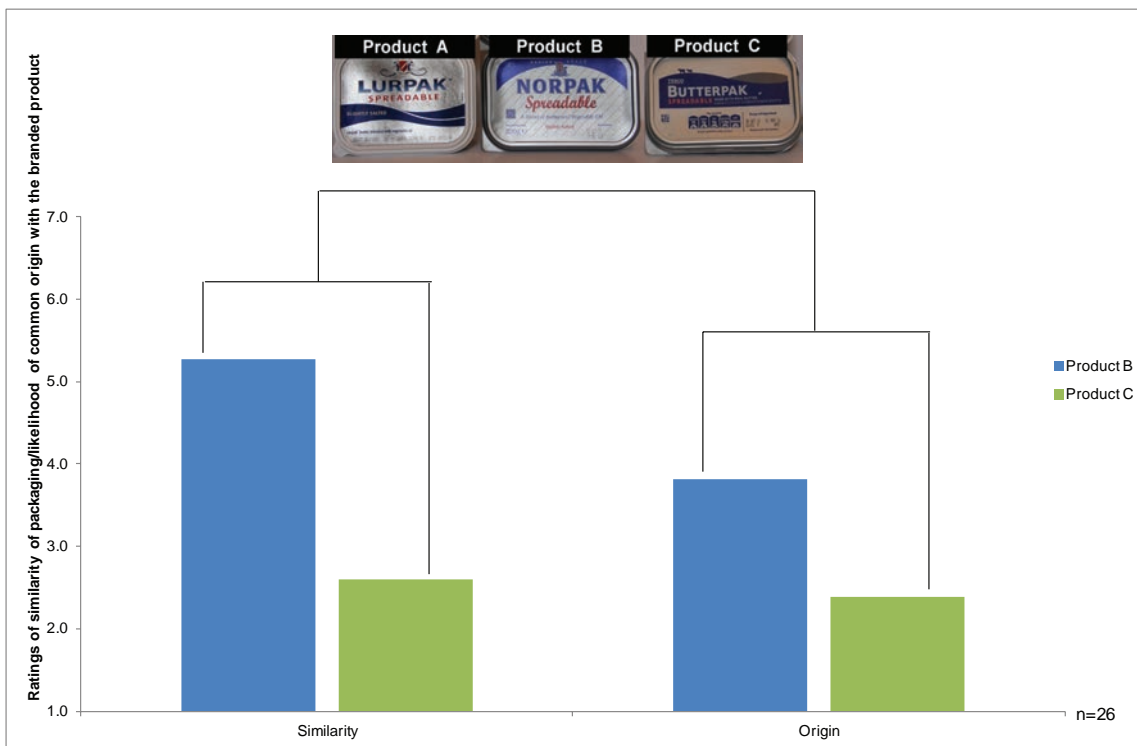


Figure D.2(xviii) – Similarity and Origin – Non-Users

Ibuprofen

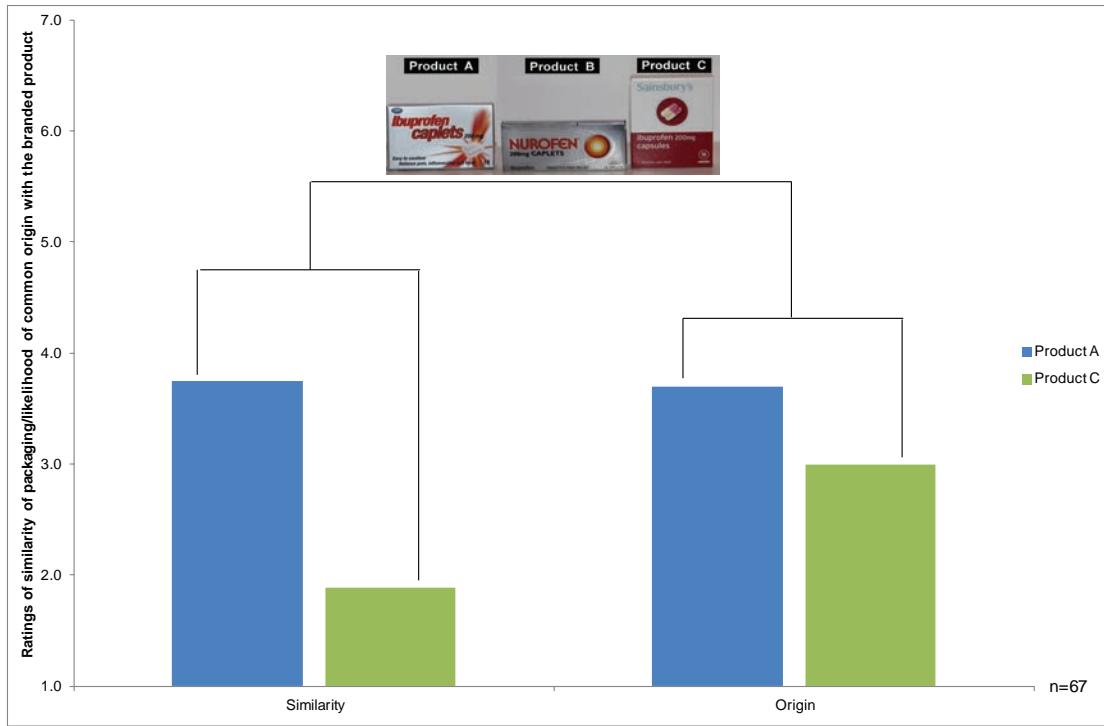


Figure D.2(xix) – Similarity and Origin – Users

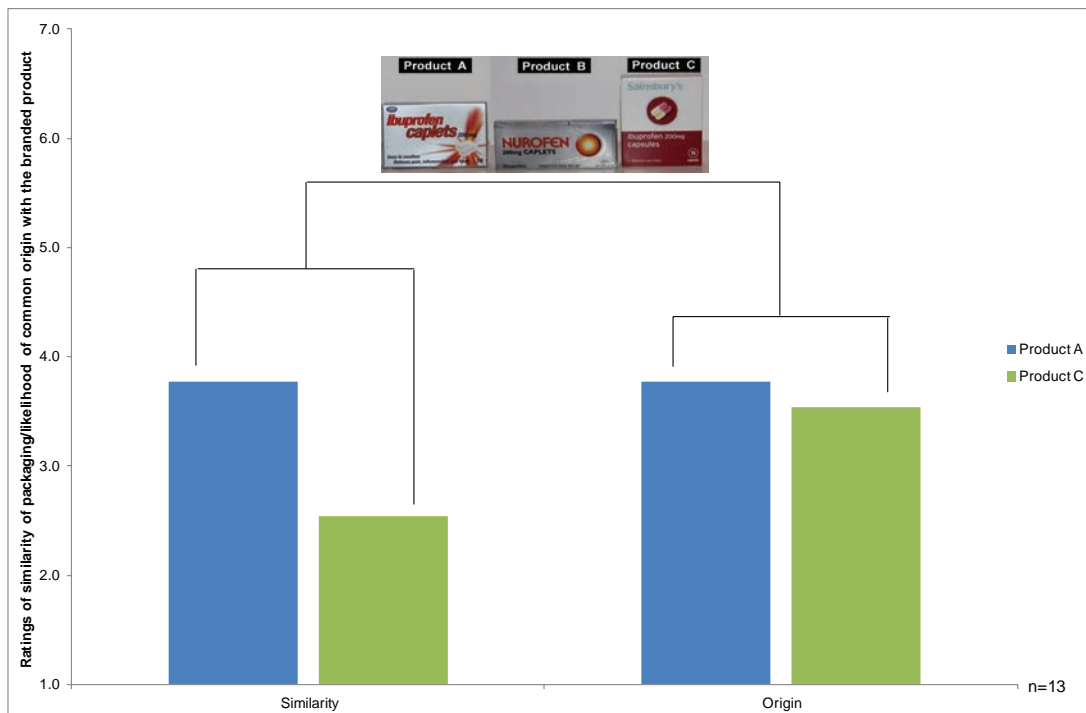


Figure D.2(xx) – Similarity and Origin – Non-Users

Skin Care

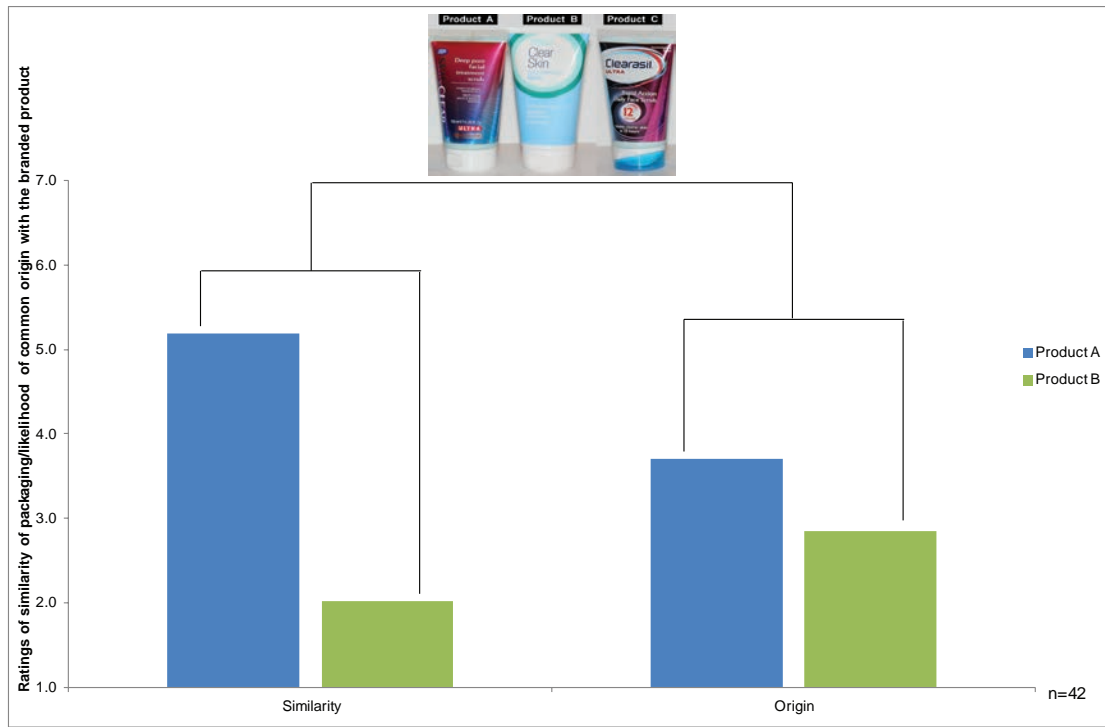


Figure D.2(xxi) – Similarity and Origin – Users

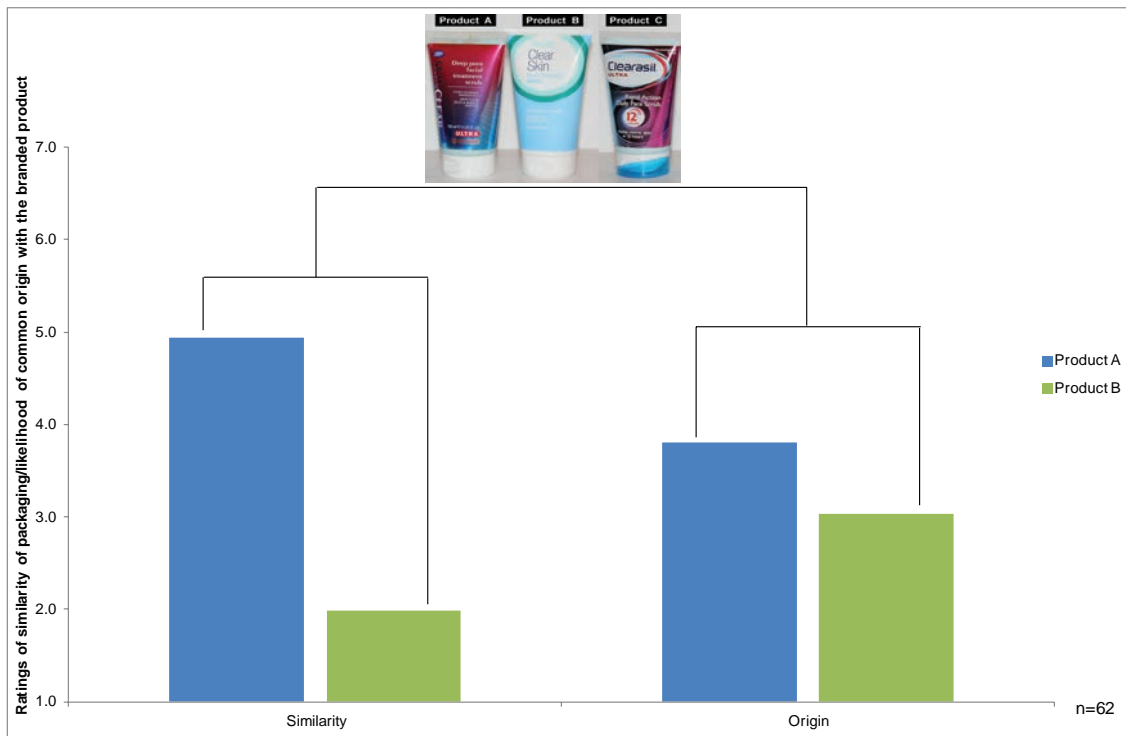


Figure D.2(xxii) – Similarity and Origin – Non-Users

Shaving Gel

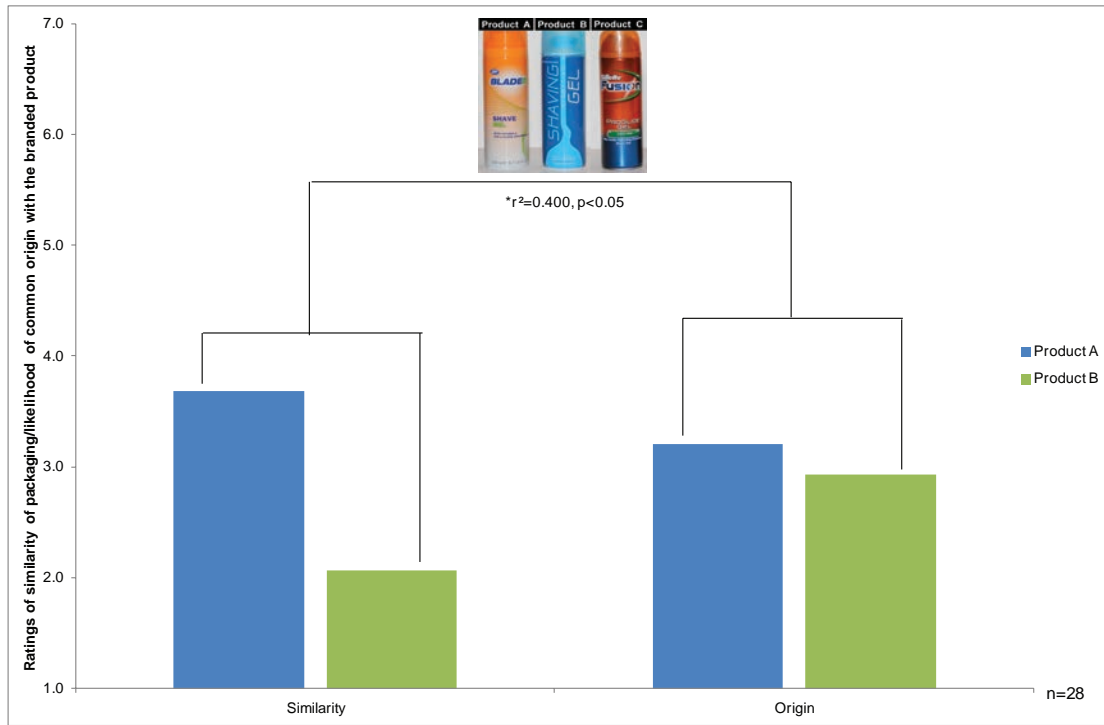


Figure D.2(xxiii) – Similarity and Origin – Users

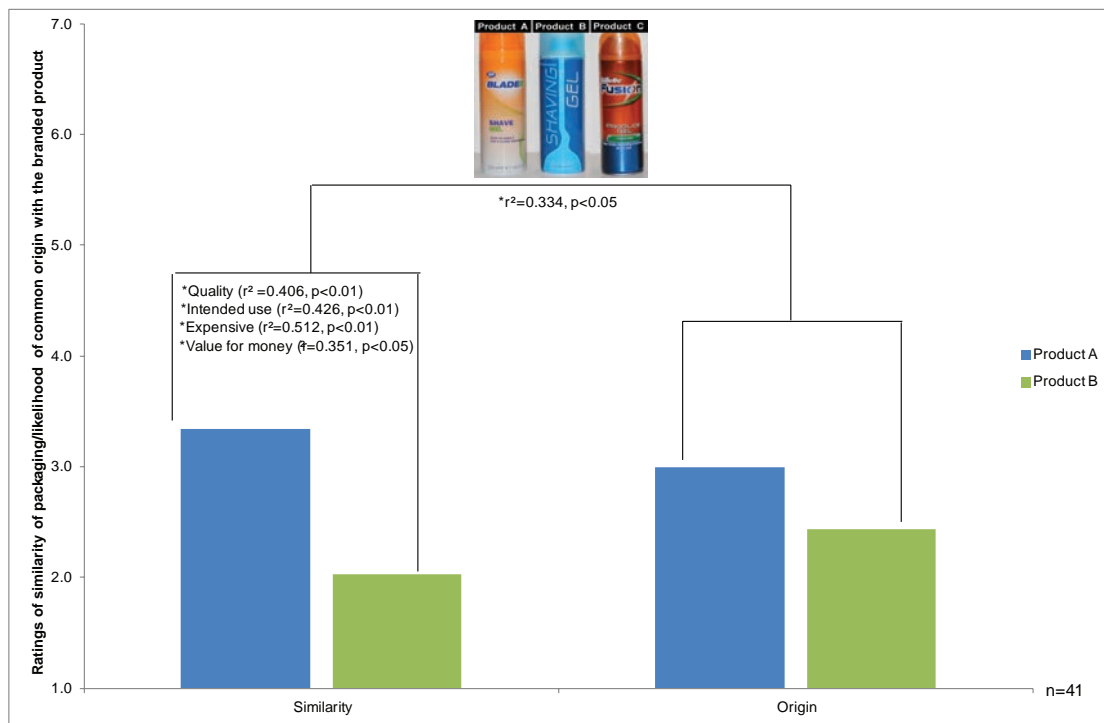


Figure D.2(xxiv) – Similarity and Origin – Users

Appendix E: Consumer Survey – Data for Charts on Similarity and Perceived Origin

[See Chapter 7]

Product	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Agreement that own brand 1 is better than own brand 2
1. Body spray Manufacturer brand: Revlon	Tesco	Tesco					
Similarity of own brand to manufacturer	5.3252	2.3445	3.00000				
Quality							3.6860
Suitability for intended use							3.7273
Expensive							4.1983
Value for money							3.6777
Likelihood of own brand having same origin as manufacturer brand				3.8468	3.0331	0.7686	
2. Body wash Manufacturer brand: Original source	Tesco	Sainsbury's					
Similarity of own brand to manufacturer	3.5395	2.9079	0.6316				
Quality							3.4211
Suitability for intended use							3.6711
Expensive							3.3816
Value for money							3.7500
Likelihood of own brand having same origin as manufacturer brand				2.9737	3.0789	0.1053	
3. Cheese Manufacturer brand: Laughing cow	Lidl	Tesco					
Similarity of own brand to manufacturer	4.5747	2.7841	1.7701				

Product	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Agreement that own brand 1 is better than own brand 2
Quality							3.4432
Suitability for intended use							3.4545
Expensive							3.3977
Value for money							3.5682
Likelihood of own brand having same origin as manufacturer brand				3.5632	3.2273	0.3333	
4. Razors Manufacturer brand: Gillette	Boots	Morrisons					
Similarity of own brand to manufacturer	3.5882	3.1527	0.4198				
Quality							4.1984
Suitability for intended use							4.2063
Expensive							4.4841
Value for money							4.2143
Likelihood of own brand having same origin as manufacturer brand				3.7029	3.4104	0.2857	
5. Washing up liquid Manufacturer brand: Fairy	Aldi	Tesco					
Similarity of own brand to manufacturer	3.7831	3.4824	0.2892				
Quality							3.5542
Suitability for intended use							3.5422
Expensive							3.5422
Value for money							3.7229
Likelihood of own brand having same origin as manufacturer brand				3.2235	3.1765	0.0471	
6. Shampoo Manufacturer brand: Head&Shoulders	Boots	Sainsbury's					
Similarity of own brand to manufacturer	4.3356	2.8819	1.4444				
Quality							4.3475
Suitability for intended use							4.2553
Expensive							4.8786
Value for money							4.1571
Likelihood of own brand having same origin as manufacturer brand				3.8378	3.1862	0.6828	

Product	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Agreement that own brand 1 is better than own brand 2
7. Drinks Manufacturer brand: Red Bull	Asda	Lidl					
Similarity of own brand to manufacturer	3.7706	2.0000	1.7593				
Quality							4.2407
Suitability for intended use							4.1759
Expensive							4.0370
Value for money							4.2963
Likelihood of own brand having same origin as manufacturer brand				3.4727	2.8257	0.6697	
8. Vinegar Manufacturer brand: Sarson's	Lidl	Asda					
Similarity of own brand to manufacturer	4.0580	2.9706	1.1324				
Quality							4.1884
Suitability for intended use							3.9710
Expensive							4.3824
Value for money							4.0882
Likelihood of own brand having same origin as manufacturer brand				3.6765	3.4493	0.1912	
9. Butter Manufacturer brand: Lurpak	Aldi	Tesco					
Similarity of own brand to manufacturer	4.7475	2.8300	1.9091				
Quality							3.9300
Suitability for intended use							3.9500
Expensive							4.4200
Value for money							3.6768
Likelihood of own brand having same origin as manufacturer brand				3.9600	2.8788	1.1111	

Product	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Own brand 1	Own brand 2	Diff in own brands' similarities to manufacturer	Agreement that own brand 1 is better than own brand 2
10. Ibuprofen Manufacturer brand: Nurofen	Boots	Sainsbury's					
Similarity of own brand to manufacturer	3.7500	1.9875	1.7625				
Quality							3.9125
Suitability for intended use							3.7875
Expensive							4.5625
Value for money							3.8125
Likelihood of own brand having same origin as manufacturer brand				3.6707	3.0886	.6076	
11. Skin care Manufacturer brand: Clerasil	Boots	Tesco					
Similarity of own brand to manufacturer	5.0381	2.0000	3.0481				
Quality							4.5047
Suitability for intended use							4.4486
Expensive							4.9252
Value for money							4.3738
Likelihood of own brand having same origin as manufacturer brand				3.7778	2.9720	0.8224	
12. Shaving gel Manufacturer brand: Gillette	Boots	Morrison					
Similarity of own brand to manufacturer	3.4783	2.0429	1.4348				
Quality							4.1286
Suitability for intended use							4.2000
Expensive							4.4143
Value for money							4.1286
Likelihood of own brand having same origin as manufacturer brand				3.0857	2.6377	0.4638	

Product	Perception that packaging of Own Brand 1 is similar-dissimilar to manufacturer brand	Perception that packaging of Own Brand 2 is similar-dissimilar to manufacturer brand	Perception that Own Brand 1 is made by same company as manufacturer brand	Perception that Own Brand 2 is made by same company as manufacturer brand
1. Body Spray				
Overall (n=119)	5.3252	2.3445	3.8468	3.0331
Users (n=36)	5.1053	2.5278	2.8421	4.9211
Non-users (n=82)	5.4578	2.2651	3.1220	5.2048
2. Body wash				
Overall (n=76)	3.5395	2.9079	3.2235	3.1765
Users (n=49)	3.6939	2.9184	2.9796	3.0204
Non-users (n=27)	3.2593	2.8889	2.9630	3.1852
3. Cheese				
Overall (n=87)	4.5747	2.7841	3.5632	3.2273
Users (n=65)	4.5606	2.7121	3.6154	3.2576
Non-users (n=20)	4.6000	2.9048	3.4762	3.0000
4. Razors				
Overall (n=131)	3.5882	3.1527	3.7029	3.4104
Users (n=75)	3.4868	3.5132	3.7200	3.6579
Non-users (n=49)	3.7143	2.6531	3.7143	3.2041
5. Washing up liquid				
Overall (n=83)	3.7831	3.4824	3.2235	3.1765
Users (n=73)	3.7808	3.5467	3.7808	3.5467
Non-users (n=6)	3.3333	3.1667	2.3333	2.3333
6. Shampoo				
Overall (n=144)	4.3356	2.8819	3.8378	3.1862
Users (n=106)	4.4340	2.8208	3.9151	3.1509
Non-users (n=34)	4.0882	3.0000	3.8529	3.4118
7. Drinks				
Overall (n=109)	3.7706	2.0000	3.4727	2.8257
Users (n=73)	3.7838	2.0405	3.5135	2.7671
Non-users (n=32)	3.7188	1.7576	3.3333	2.8485
8. Vinegar				
Overall (n=68)	4.0580	2.9706	3.6765	3.4493
Users (n=13)	3.7455	3.5273	4.1818	2.9815
Non-users (n=54)	4.1818	2.9815	3.7455	3.5273

Product	Perception that packaging of Own Brand 1 is similar-dissimilar to manufacturer brand	Perception that packaging of Own Brand 2 is similar-dissimilar to manufacturer brand	Perception that Own Brand 1 is made by same company as manufacturer brand	Perception that Own Brand 2 is made by same company as manufacturer brand
9. Butter				
Overall (n=99)	4.7475	2.8300	3.9600	2.8788
Users (n=72)	4.5556	2.9167	4.0139	3.0278
Non-users (n=26)	5.2692	2.5926	3.8148	2.3846
10. Ibuprofen				
Overall (n=79)	3.7500	1.9875	3.6707	3.0886
Users (n=66)	3.7463	1.8806	3.7015	3.0000
Non-users (n=13)	3.7692	2.5385	3.7692	3.5385
11. Skin care				
Overall (n=105)	5.0381	2.0000	3.7778	2.9720
Users (n=42)	5.1905	2.0227	2.8409	3.06818
Non-users (n=62)	4.9355	1.9841	3.0323	3.30159
12. Shaving gel				
Overall (n=69)	3.4783	2.0429	3.0857	2.6377
Users (n=28)	3.6786	2.0690	3.2069	2.9286
Non-users (n=41)	3.3415	2.0244	3.0000	2.4390

Note: the number of users and non users of each product are not always equivalent to the overall n due to missing data.

Appendix F: Consumer Survey – Data from nationally representative survey

[See Chapter 7]

Proportion of respondents reporting different frequencies of having purchased a lookalike product accidentally/mistakenly

Country	Frequency of accidental/mistaken purchase of a lookalike product			
	Yes, frequently	Yes, a few times	Yes, once or twice	No, never
UK (n=938)	2.2%	18.0%	37.0%	42.8%
USA (n=480)	10.8%	16.7%	33.1%	39.4%
Germany (n=426)	3.3%	18.3%	28.4%	50.0%

Proportion of respondents reporting extent of advantage and of disadvantage from having purchased a lookalike product accidentally/mistakenly

Country	Effect	Accidental/mistaken purchase: extent of perceived advantage/disadvantage			
		Very much	Somewhat	Very little	Not at all
UK (n=531)	Disadvantage	6.4%	37.7%	43.3%	12.6%
	Advantage	3.8%	34.2%	45.9%	16.1%
USA (n=289)	Disadvantage	18.3%	31.8%	39.4%	10.4%
	Advantage	15.5%	35.7%	35.3%	13.4%
Germany (n=208)	Disadvantage	5.8%	33.2%	36.1%	25.0%
	Advantage	5.9%	35.1%	40.5%	18.5%

Proportion of respondents reporting different frequencies of having purchased a lookalike product deliberately

Country	Frequency of deliberate purchase of a lookalike product			
	Yes, frequently	Yes, a few times	Yes, once or twice	No, never
UK (n=959)	8.4%	23.8%	27.1%	40.7%
USA (n=480)	17.5%	28.5%	25.6%	28.3%
Germany (n=468)	20.5%	37.0%	19.0%	23.5%

Proportion of respondents reporting extent of advantage and of disadvantage from having purchased a lookalike product deliberately

Country	Effect	Deliberate purchase: extent of perceived advantage/disadvantage			
		<i>Very much</i>	<i>Somewhat</i>	<i>Very little</i>	<i>Not at all</i>
UK (n=559)	Disadvantage	3.9%	17.2%	43.8%	35.1%
	Advantage	11.3%	53.1%	29.8%	5.7%
USA (n=336)	Disadvantage	10.4%	17.6%	39.3%	32.7%
	Advantage	22.8%	49.7%	23.4%	4.1%
Germany (n=353)	Disadvantage	2.0%	13.6%	37.4%	47.0%
	Advantage	16.3%	56.6%	19.4%	7.7%

Proportion of respondents reporting to the following statement “across all products you buy, which of the following statements best describes your typical behaviour”

	UK (n=995)	USA (n=491)	Germany (n=489)
... I tend to buy a specific brand/own-brand, but sometimes experiment with a different one	50.3%	53.0%	63.2%
... I tend to buy brands/ own-brands, and often switch brands	35.1%	28.1%	23.3%
... I tend to stick to a specific brand/own-brand, and never change	11.6%	14.9%	7.4%
... I tend not to buy brands/ own-brands	3.1%	4.1%	6.1%

Proportion of brands who mainly buy *brand* products or *own-brand* products

	Brands	Own brands	Half and half
UK (n=956)	33.2%	14.6%	52.2%
USA (465)	42.2%	8.4%	49.5%
Germany (455)	23.3%	23.7%	53.0%

The respondents responses to the ranking as to factors affecting the likelihood of your purchasing.

UK(n=1000)		first	second	third	fourth	fifth
	Best value for money	36%	26%	20%	14%	4%
	Highest quality	21%	24%	28%	19%	8%
	Lowest price	18%	16%	18%	22%	26%
	Preferred brand/own brand	16%	12%	13%	21%	39%
	Best fitness for purpose	11%	22%	21%	23%	23%
USA(n=500)		first	second	third	fourth	fifth
	Best value for money	29%	28%	21%	19%	3%
	Highest quality	26%	27%	25%	16%	6%
	Lowest price	22%	21%	17%	20%	20%
	Preferred brand/own brand	20%	15%	16%	22%	27%
	Best fitness for purpose	4%	9%	20%	24%	43%
DE(n=500)		first	second	third	fourth	fifth
	Highest quality	32%	27%	24%	12%	4%
	Best value for money	30%	34%	20%	14%	2%
	Lowest price	18%	13%	21%	21%	28%
	Preferred brand/own brand	12%	10%	15%	25%	38%
	Best fitness for purpose	8%	16%	20%	28%	58%

Proportion of respondents ranking (from 1 to 6) different elements influencing their purchasing decisions (UK, USA, DE samples)

UK(n=1000)		first	second	third	fourth	fifth	sixth
	Previous positive experience with the product itself	66%	17%	6%	3%	2%	5%
	Product (Brand/own-brand) name	19%	34%	28%	12%	3%	3%
	Product descriptions on the packaging	8%	33%	28%	16%	7%	8%
	Product branding/iconography (other than text)	3%	8%	24%	43%	12%	11%
	Packaging shape	3%	4%	8%	13%	35%	37%
	Packaging colour	1%	4%	6%	12%	41%	36%
USA(n=500)		first	second	third	fourth	fifth	sixth
	Previous positive experience with the product itself	58%	17%	8%	3%	4%	8%
	Product (Brand/own-brand) name	19%	38%	22%	11%	4%	22%
	Product descriptions on the packaging	10%	26%	29%	15%	10%	29%
	Packaging shape	7%	5%	12%	16%	34%	12%
	Packaging colour	3%	7%	7%	13%	32%	7%
	Product branding/iconography (other than text)	3%	7%	23%	42%	16%	23%
DE(n=500)		first	second	third	fourth	fifth	sixth
	Previous positive experience with the product itself	70%	18%	4%	3%	1%	4%
	Product descriptions on the packaging	14%	40%	20%	8%	8%	9%
	Product (Brand/own-brand) name	11%	24%	35%	17%	8%	5%
	Packaging shape	2%	7%	13%	20%	31%	28%
	Packaging colour	1%	4%	7%	15%	38%	35%
	Product branding/iconography (other than text)	1%	8%	21%	37%	15%	18%

Proportion of respondents rating own-brand or manufacturer brand products to be better at providing lower prices, value for money, best fit for purpose and higher quality.

	UK (n=968)	USA (n=478)	Germany (n=485)
...lower prices...			
Retailers	69.5%	54.8%	82.5%
Brand owners	17.0%	28.5%	4.3%
Roughly the same	13.4%	16.7%	13.2%

	UK (n=963)	USA (n=479)	Germany (n=485)
...value for money...			
Retailers	49.5%	37.9%	57.2%
Brand owners	23.4%	33.6%	13.0%
Roughly the same	27.1%	28.5%	29.8%

	UK (n=963)	USA (n=479)	Germany (n=485)
...best fit for purpose...			
Retailers	14.8%	20.9%	20.4%
Brand owners	34.1%	29.9%	20.6%
Roughly the same	51.1%	49.2%	58.9%

	UK (n=963)	USA (n=479)	Germany (n=485)
...higher quality...			
Retailers	13.3%	19.6%	4.3%
Brand owners	50.2%	43.6%	39.8%
Roughly the same	36.6%	36.7%	55.9%



Appendix G: Sales data – Brand definition

[See Chapter 8]

Product	Position	Kantar – Full Product Description	Kantar Code	Bar Code
Bodyspray	Brand Leader	Charlie Pink Body Spray, Aerosol Can , 50ml	774625	5051389019140
		Charlie Body Spray, For Women, Pink, Aero, 75ml	597482	5000386292872
		Charlie Female Body Spray Aerosol Can Pink 150ml	743204	5051389009394
	Lookalike	Tesco Bodyspray Sweet 75ml For Women Aero	732406	5051790585166
	Control	Tesco BodysprayFor Women Pink 75ml	628124	5051008720747
Bodywash	Brand Leader	Original Source Lime Shower Gel 250ml	284563	5000101844997
		Original Source Shower Gel Lime Pouch 500ml	343859	5000101028182
	Lookalike	Tesco Wake Up! Lime ShwrCreme 250ml	783588	5052003014558
	Control	Sainsburys Lime Body Wash Pl Btl 250ml	827465	01772449
Cheese	Brand Leader	Laughing Cow Cheese Spread 8 Triangle 140g	542502	3073780774130
		Laughing Cow Processed Cheese Spread,16 Portion, 280g,Chilled,France,Big Value Pack	346665	3073780574242
		The Laughing Cow 24 Portion Processed Cheese Spread. Chilled. C/Board Box. 400g. France. Pm 1.99.	346666	3073780574310
	Lookalike	Milbona.Cheese Spread Portions 24 Triangles,Chilled,- Box, 400g France	469760	20024949
	Control	Tesco 8 Cheese Triangles 140g	541437	5051140070304
Razors	Brand Leader	Gillette Mach3 Triple Blade Shaving System-1razor With Triple Action Blade.	293238	3014260251147
		Gillette Mach 3 W/Rzr , 2 Pk	269324	3014260239626
	Lookalike	Boots Swivel Triple Bladed Razor With 2 Cartridges For Men	565384	5045095902261
	Control	Mrsn Triple Blasde Razor 1 + 2 Cart Aloe Vera &Botanical Oils Pivot Head 3 Blade Suit Sens Skin Pl Pck Female	834216	5010251380795
Washing Up Liquid	Brand Leader	Fairy, Washing Up Liquid, "New", Lemon, 1lt	362176	5413149051027
		Fairy Washing Up Liquid Lemon 1 Ltr £1.56	362176	5413149008236
		Fairy, Washing Up Liquid, Lemon, 433ml, Concentrated	807800	5413149980594
		Fairy Liquid Cnc Lemon 500ml	362174	5413149836051
		Fairy Liquid, Concentrated, Lemon, 900ml	824160	5410076213917
	Lookalike	Magnum (Aldi) Active Concentrated Washing Up Liquid Lemon Scented 1ltr PlstcBtl	444205	
	Control	Tesco,Premium Washing Up Liquid, Citrus, PltBtl, 500ml.	382902	5000436371854

Product	Position	Kantar – Full Product Description	Kantar Code	Bar Code
Shampoos	Brand Leader	Head & Shoulders*New Look Bt-Classic Clean-For Normal Hair,For Frequent Use-Plastic Bt-200ml-Flip Top Lid	354704	5000174989694
		Head And Shoulders Classic Clean Normal Hair Twin Pack~Shampoo 200ml PlstcBttl~Conditioner 200ml PlstcBttl____(Confirmed)	354704	5011008071478
		Head & Shoulders Classic Clean Shampoo 250ml	573134	5000174989922
		Head & Shoulders Classic Clean Anti Dandruff Shampoo Normal Hair Frequent Use[Plbtl Flip Lid 250ml	573134	5410076229994
		Head & Shoulders Classic Clean Shampoo, 400ml	391211	5000174990164
		Head & Shoulder Classic Clean Conditioner 400ml	391211	5410076229406
		Head And Shoulders Classic Clean, Medicated - Normal/Greasy 500ml	420183	5000174206005
		Head & Shoulders, Classic Clean, Shampoo, Normal To Greasy Hair, PltBtl, 500ml	420183	5000174990393
		Head And Shoulder Classic Clean Shampoo Normal/Greasy 500ml ** See Notes**	420183	5013965601057
		Head And Shoulders Classic Clean Shampoo 500ml	420183	5410076230068
		Head& Shoulders Anti Dandruff Shamp Classic Clean Nor HrFrq Use Plbt 750ml	376085	5000174990621
	Lookalike	Boots Anti Dandruff Shampoo For Normal Hair, Plastic Bottle,400 MI	616444	5045093546047
		Boots Anti- Dandruff Shampoo For Frequent Use Classic Care 400ml PI Bttl	616444	5045095798949
	Control	Js Anti-Dandruff Shampoo For Normal Hair, 300ml	812355	01732528

Product	Position	Kantar – Full Product Description	Kantar Code	Bar Code
Drinks	Brand Leader	Red Bull Stimulation Drink Carb With Flavours Can Ring Pull 250mls Ambient	129865	90162602
		Red Bull, Original Flavour, Can, 250ml	129865	90162909
		Red Bull CrbndrnkFlvrscnt Can 250 ML	129865	9002490200077
		X Red Bull Energy Drink Carbonated Can 250ml	129865	4030915000075
		Red Bull Red Bull Can Value Not Available 00250 MI	129865	9016260200006
		Red Bull Fizzy Energy Drnk Can,250ml	129865	9002490100070
		Red Bull, Energy Drink, Taurine, Can, 250ml	129865	9002490100094
		Red Bull, Energy Drink, Can, 250ml	129865	90162541
		Red Bull 250ml Can	129865	00674300
		Red Bull Energy Drink W Caffeine & Taurine Carbonated Can 250ml Amb	129865	90376368
		Red Bull Energy Drnk With Taurine 250ml Can	129865	90376337
		Red Bull Eneyry Drink Carbonated Wth Taurine Can 250ml UkAmb Pm 109	129865	90162497
		Red Bull Energy Drink With Taurine Carbonated Can 355ml	674584	9002490206000
		Red Bull Energy Can 355ML	674584	9002490206741
		Red Bull, Can, 355ml	674584	9002490206239
		Red Bull Energy Drink Carbonated With Taurine Can 473ml	751797	9002490210991
	Lookalike	Asda Blue Charge, High Impact Energy Drink, Fruit Flavour, Can, 250ml, Carbonated, £0.67p	341668	21165689
		Asda Blue Charge High Impact Stimulation Drink Carbonated 440ml Can Amb Flashed 2 For £1__ [Fruit Flav Soft Drink]	743861	5051413404591
	Control	Mixed Up (Lidl) Stimulation Drink Carbonated Drink Wth Blackcurrant Flvr Can 250ml Amb Single	731489	
		Mixed Up Stimulation Drink Blackcurrant 250ml Carbonated Stimulation Drink Wth B/Currant FlvrWth Added Vitamins & Taurine Can Ambient	731489	20082819
Vinegar	Brand Leader	Sarsons Brown Malt Vinegar Glass Bottle 250ml UK	90594	50222155
		Sarsons Natural Spray Brown Malt Vinegar Spray 250ml Gls Btl Ambient Pump Dispenser	90594	5000354903045
		Sarsons Malt Vinegar Brown Gl Bt Amb 250ml	90594	5000354900716
		Sarsons Malt Vinegar 284ml	90595	5000354900617
		Sarsons Brown Malt Vinegar 300ml	90596	50354283
		Sarsons Brown Malt Vinegar, PI Bt 300 MI	90596	50222049
		Sarsons Brown Malt Glass Bottle 400ml	24228	5000354900723
		Sarsons Brown Malt Vinegar, Glass Bottle 568ml	90597	5000354900631
		Sarsons Malt Brown Vinegar Glass Bottle 1.14lt	90598	5000354900662
	Lookalike	Samson (Lidl) Malt Vinegar Gls Btl 568ml	129831	20018078
	Control	Asda Malt Vinegar 10 OZ	90654	21004261
		Asda Malt Vinegar, Glass Bottle, 568ml.	90655	21004278

Product	Position	Kantar – Full Product Description	Kantar Code	Bar Code
Butter	Brand Leader	Lurpak Danish Butter Slightly Salted Chilled Foil Wrap 250g Denmark	64828	5740900050303
		Lurpak Butter Slightly Salted Danish Wrppd 500g	64830	5740900050402
		Lurpak Danish Slightly Salted Butter,125gm,Pack	70313	5740900050204
	Lookalike	Norpek (Aldi) Spreadable Blend Butter And Veg Oil Slightly Salted Danish Style PI Tub Chilled 500g	592048	25189353
		Nrpak Spreadable(Aldi) (500g Tub Blend Of Butter & Vegetable Oil Slightly Salted Danish Style Spreadable Butter Frsh)	592048	25075465
	Control	Tesco Spreadable (Continental Style Butter Blended With Veg Oil)Salted Tub,500g,Chilled,	628778	5050179077025
Ibuprofen	Brand Leader	Nurofen Caplets, Easy To Swallow, 1/2 To Be Taken Every 4-6 Hours, 16s Box	311985	5000167056488
	Lookalike	Boots Ibuprofen Caplets, 16pk	313875	5045095384234
	Control	Sainsbury Ibuprofen 200mg Capsules Effective Pain Relieve 16 Capsules Bx Not Liquid Adults &Chuld Over 12 Yrs No Approval Rqd	724837	770-01542431
Skin Care	Brand Leader	Clearasil Ultra Medicated Facial Scrub 125ml	684153	5000158100640
	Lookalike	Boots Facial Cleanser Scrub Plastic Tube All Skin Types 150 MI	200550	5045095798628
	Control	Tesco Clear Skin Deep Cleansing Wash, 150ml	127232	5000358227444
Shaving Gel	Brand Leader	Gillette Fusion Proglide Cooling Shave Gel 200ml Aero	822013	7702018073245
		Gillette Fusion Proglide Hydrating Shave Gel 200ml Aero Can	821993	7702018073221
	Lookalike	Boots Blade 5 Sensitive Shave Foam Aerosol Can 250ml	852139	5045095793555
	Control	Morrisons Sensitive Shaving Gel 200ml Aerosol Can	326155	5010251251170

Appendix H: Sales Data - Line Graphs

[Chapter 8]

Bodyspray

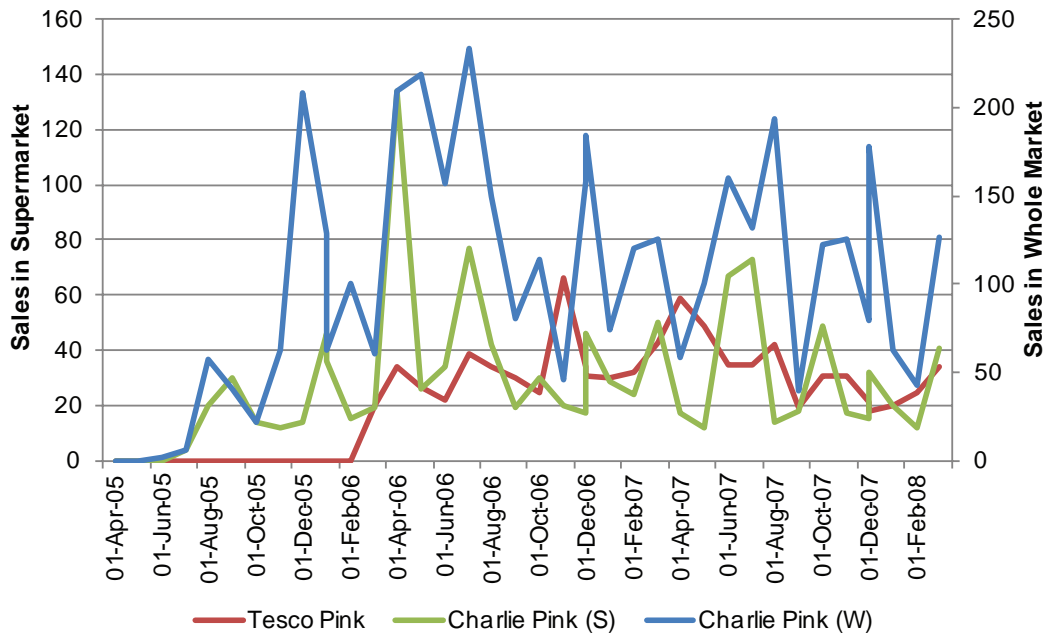


Figure H.1 Comparison of Sales Charlie Pink and Tesco Pink

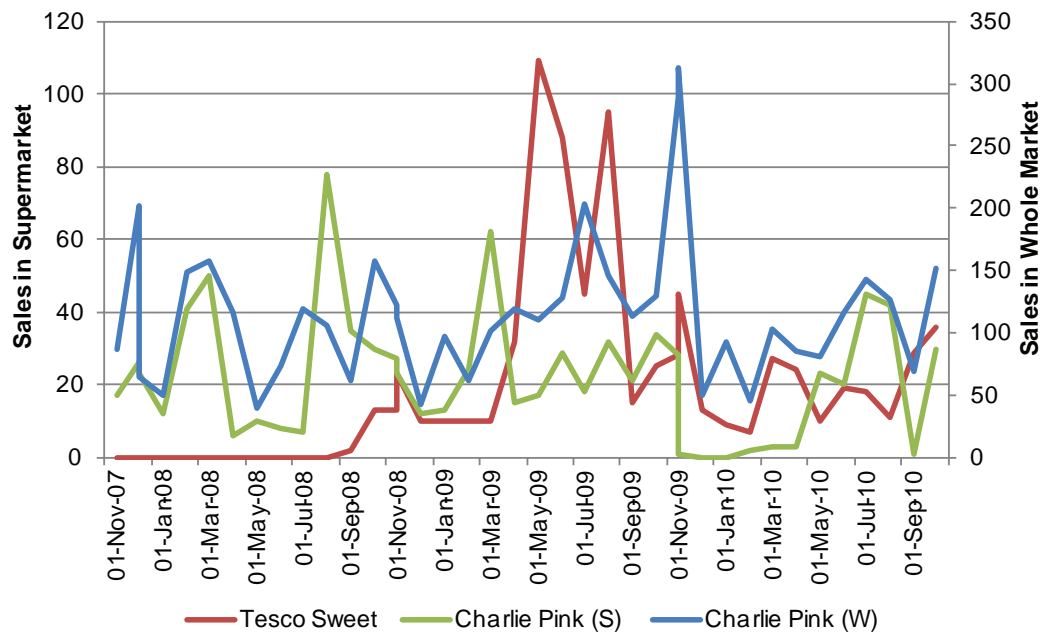


Figure H.2 Comparison of Sales Charlie Pink and Tesco Sweet

Bodywash

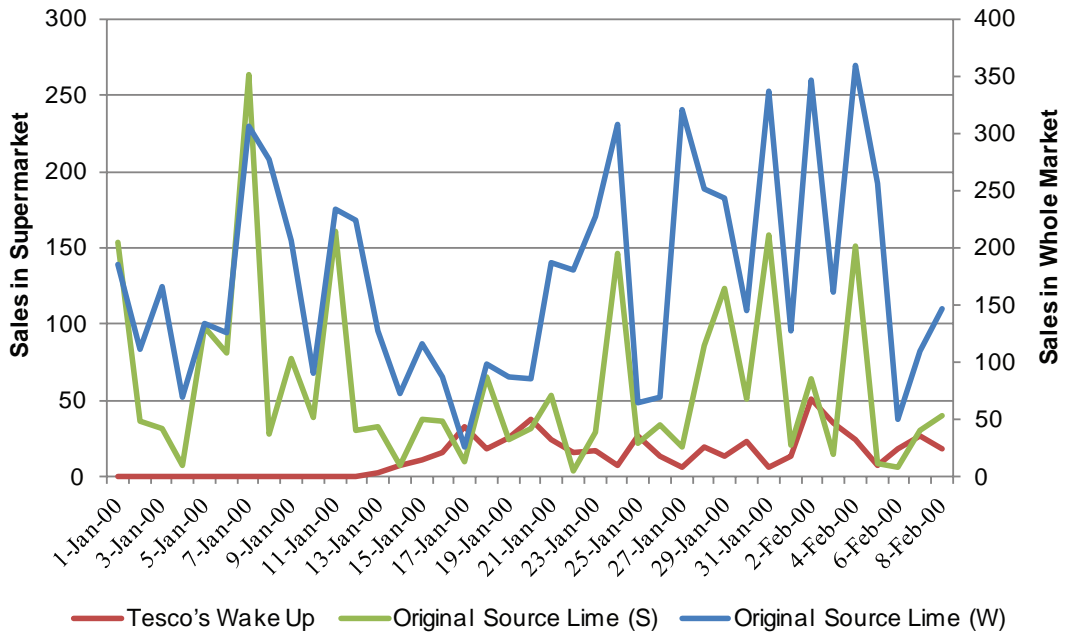


Figure H.3 Comparison of Sales Original Source and Tesco's Wake Up

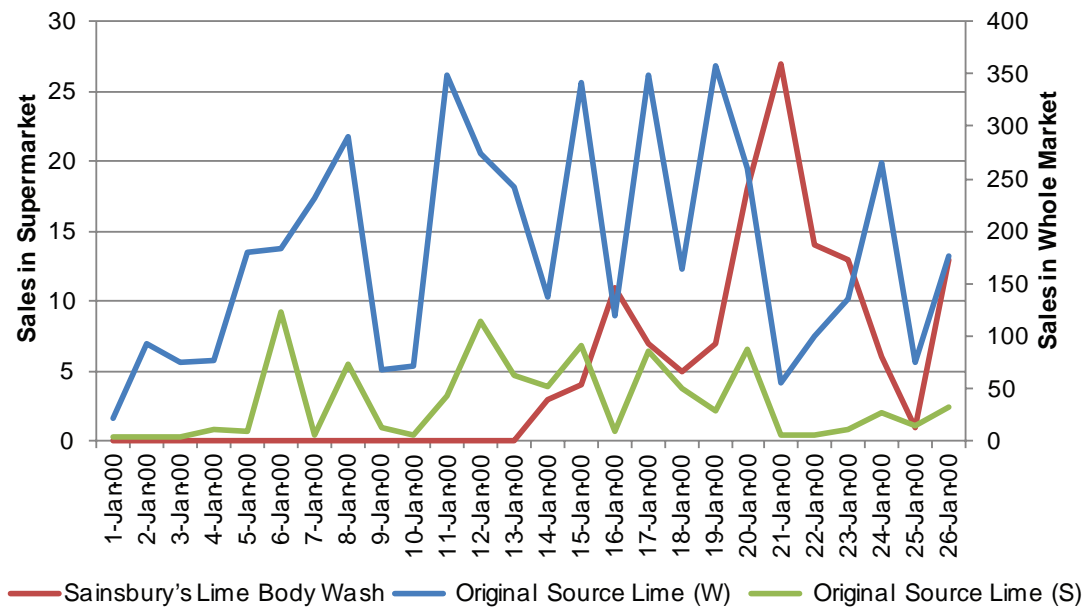


Figure H.4 Comparison of Sales Original Source and Sainsbury's Body Wash

Cheese



Figure H.5 Comparison of Sales Laughing Cow and Lidl's Tenery Cheese

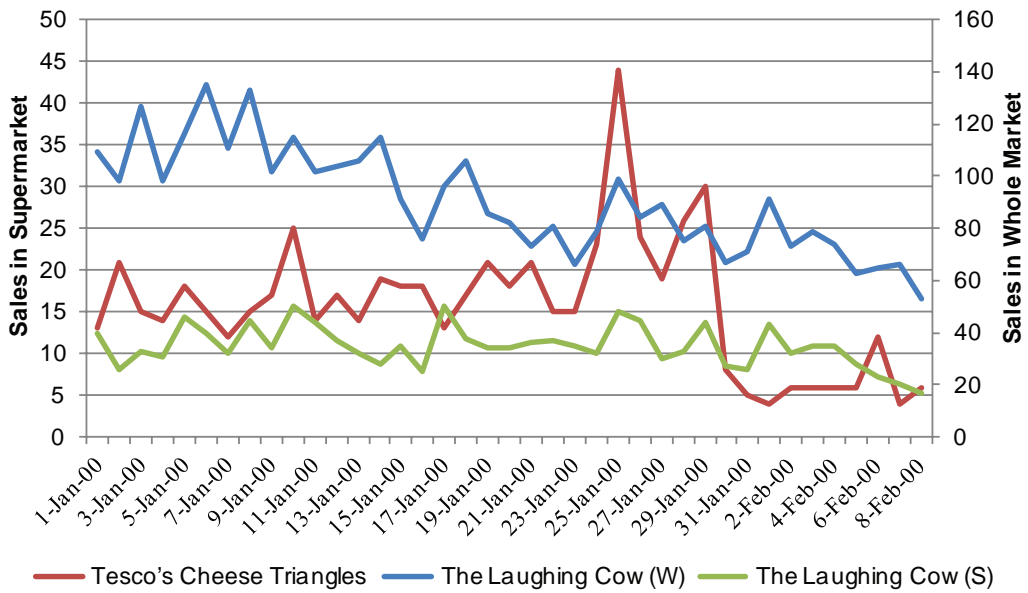


Figure H.6 Comparison of Sales Laughing Cow and Tesco's Cheese Triangles

Razors

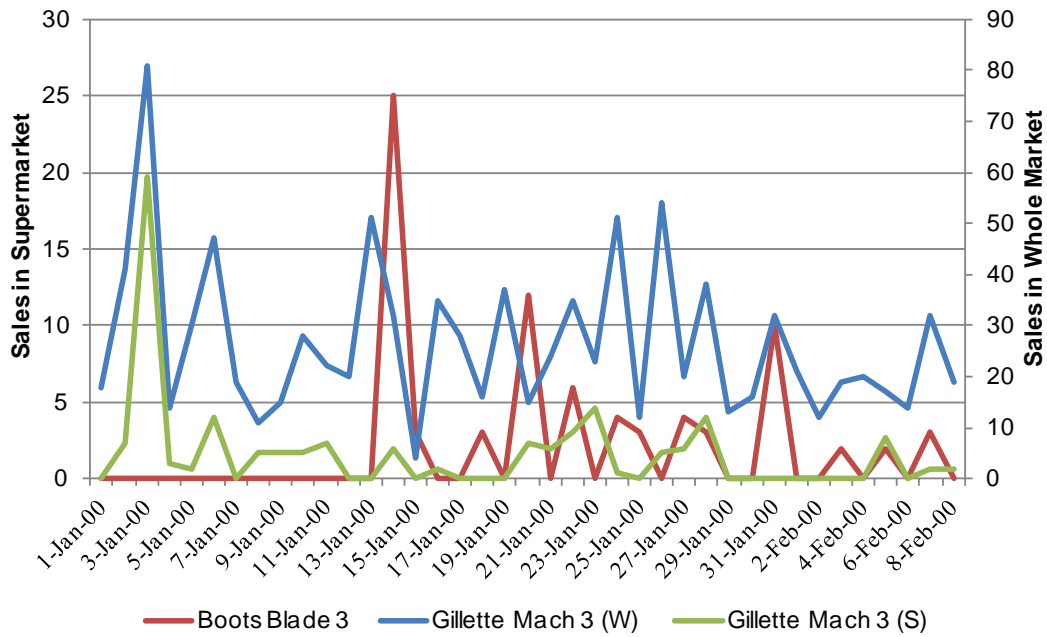


Figure H.7 Comparison of Sales Gillette Mach 3 and Boots Blade 3

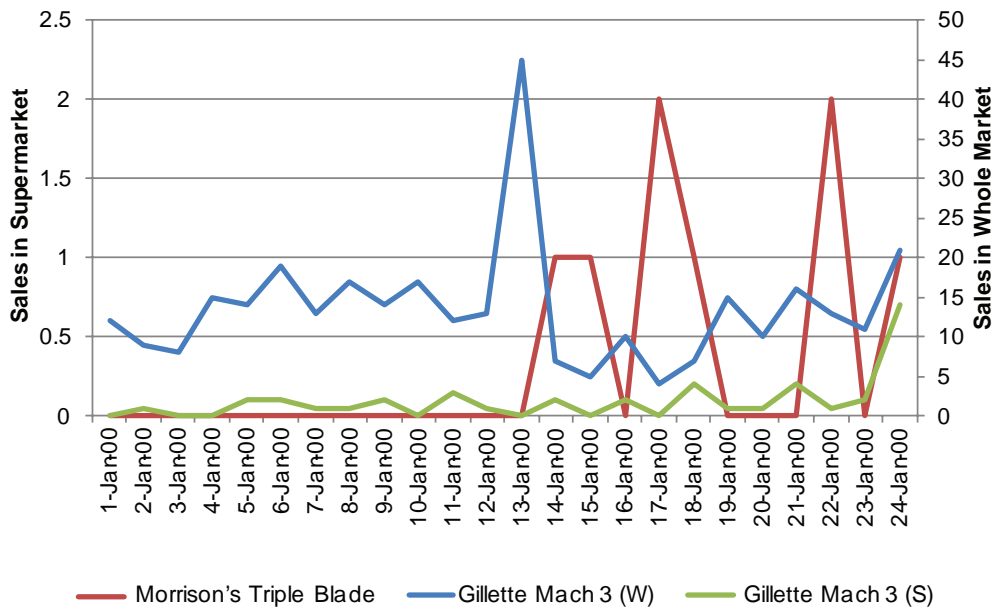


Figure H.8 Comparison of Sales Gillette Mach 3 and Morrison's Triple Blade

Washing Up Liquid

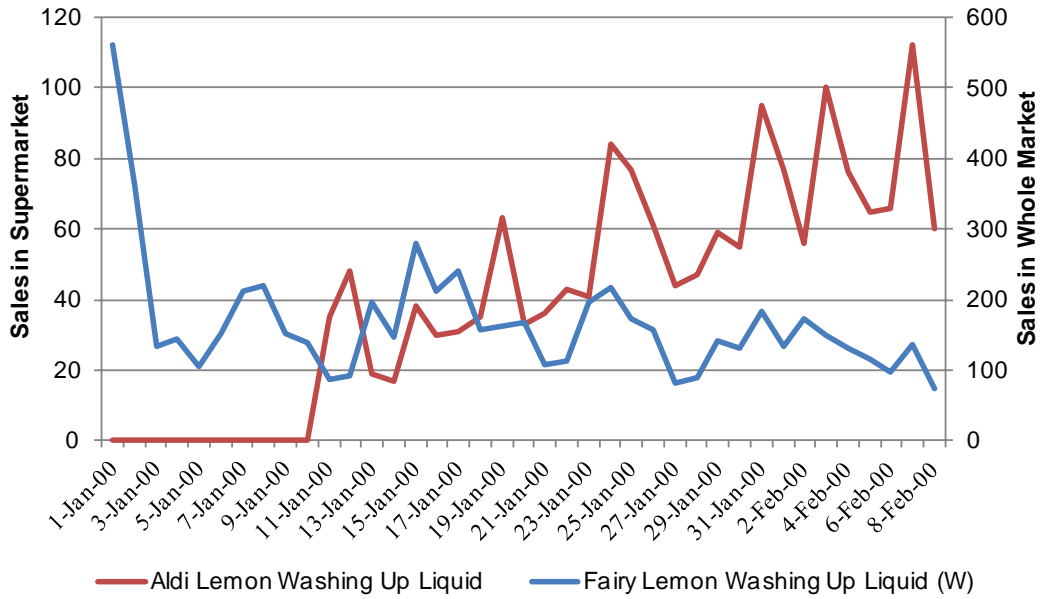


Figure H.9 Comparison of Sales Fairy Liquid and Aldi Washing Up Liquid

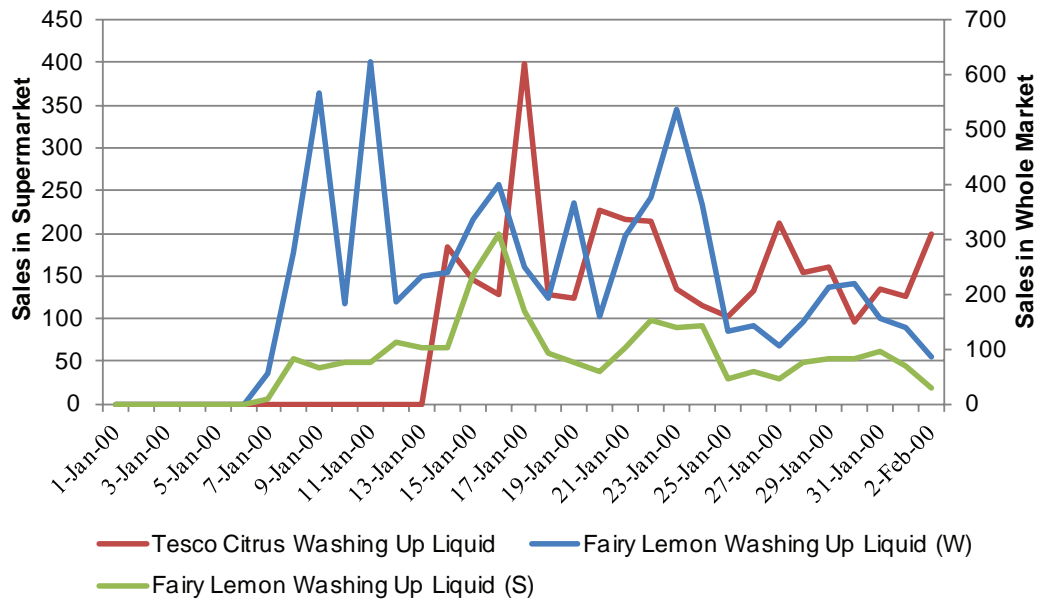


Figure H.10 Comparison of Sales Fairy Liquid and Tesco Citrus Washing Up Liquid

Shampoo

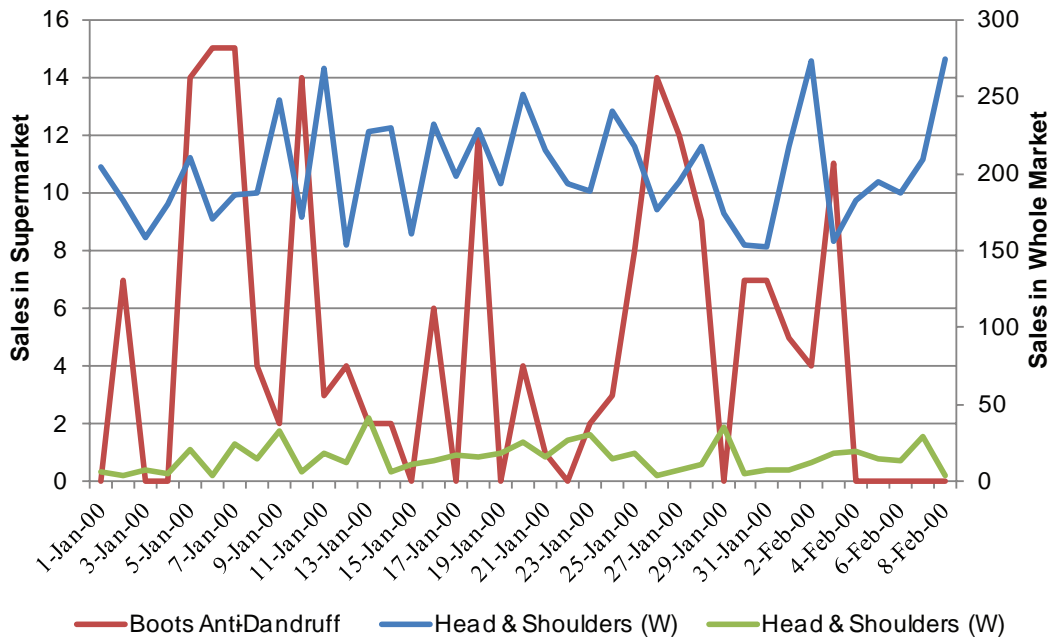


Figure H.11 Comparison of Head & Shoulders and Boots Anti-Dandruff

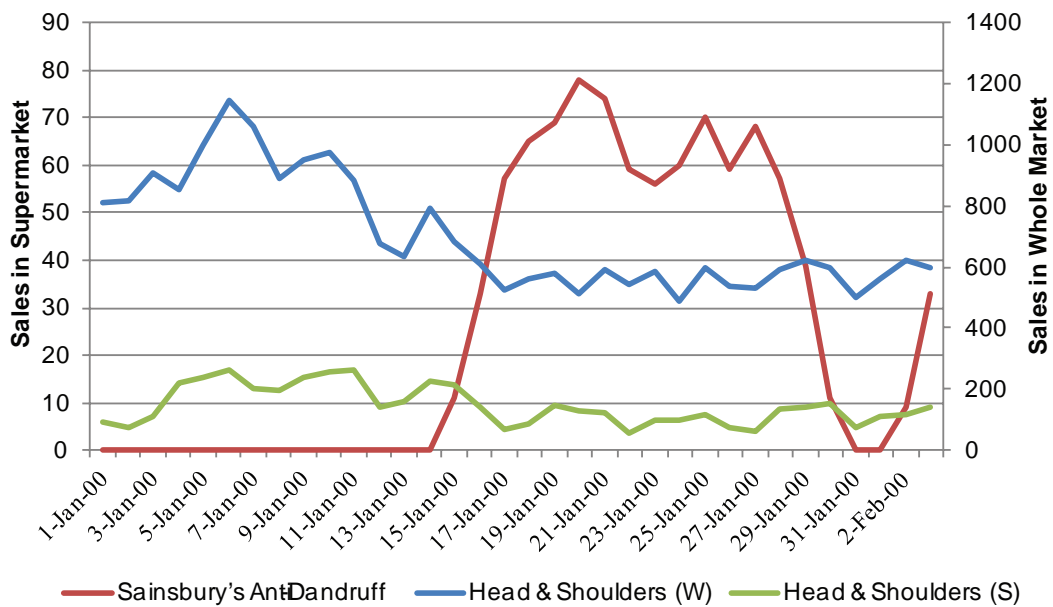


Figure H.12 Comparison of Head & Shoulders and Sainsbury's Anti-Dandruff

Drinks

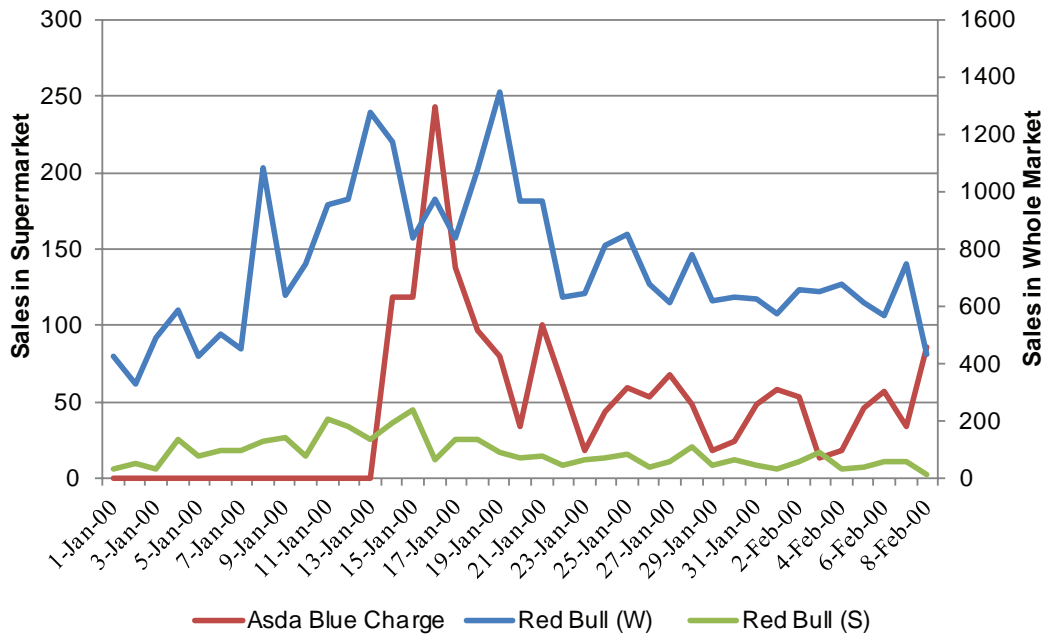


Figure H.13 Comparison of Red Bull and Asda Blue Charge

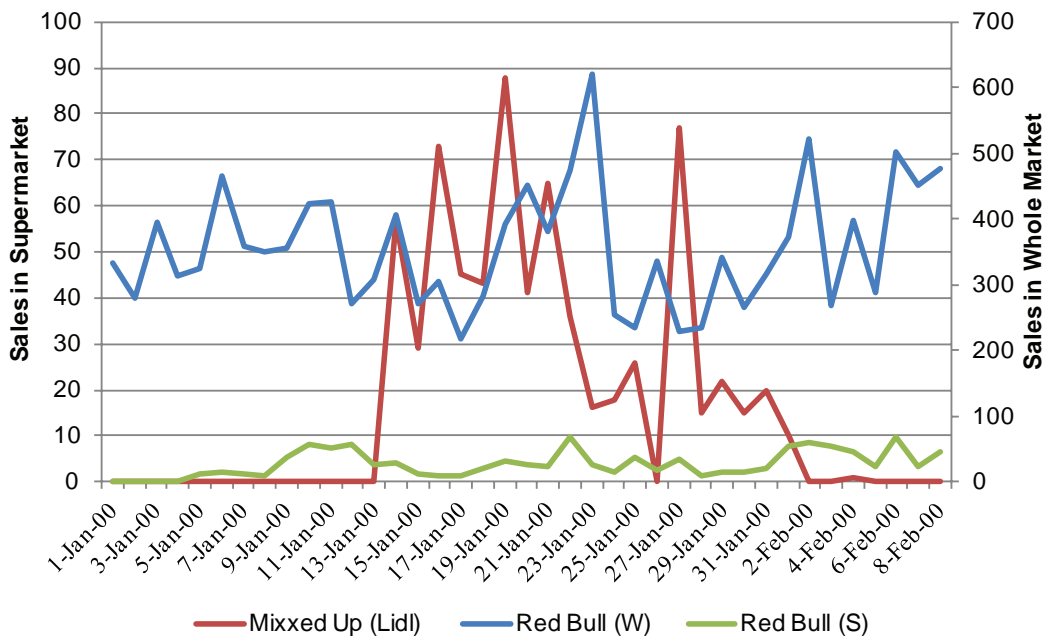


Figure H.14 Comparison of Red Bull and Mixed Up (Lidl)

Vinegar

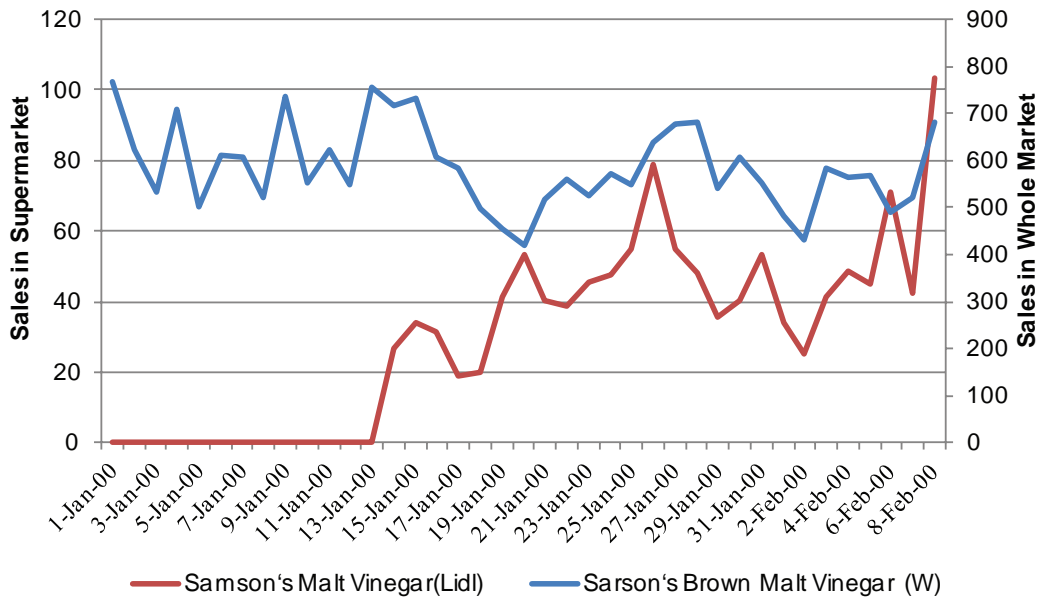


Figure H.15 Comparison of Sarson's Brown Malt Vinegar and Samson's Malt Vinegar (Lidl)

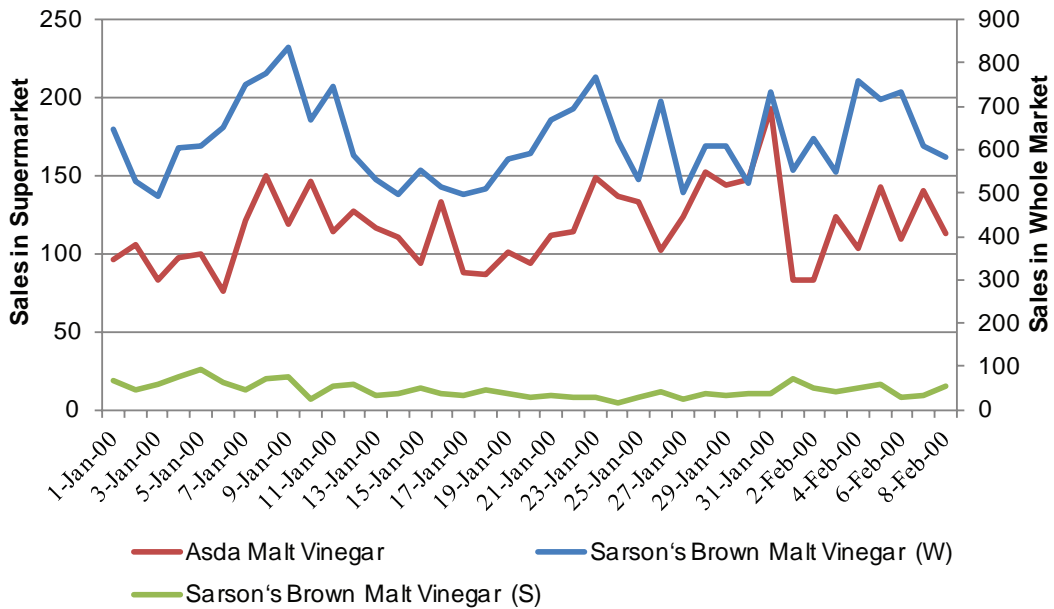


Figure H.16 Comparison of Sarson's Brown Malt Vinegar and Asda Malt Vinegar

Butter

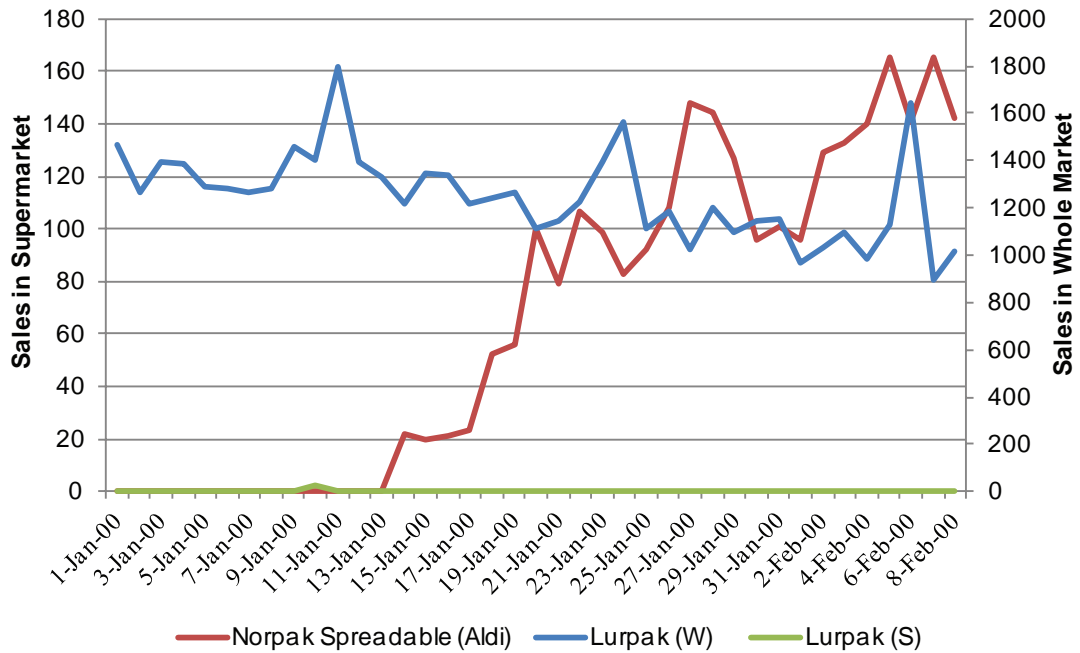


Figure H.17 Comparison of Lurpak and Norpak Spreadable

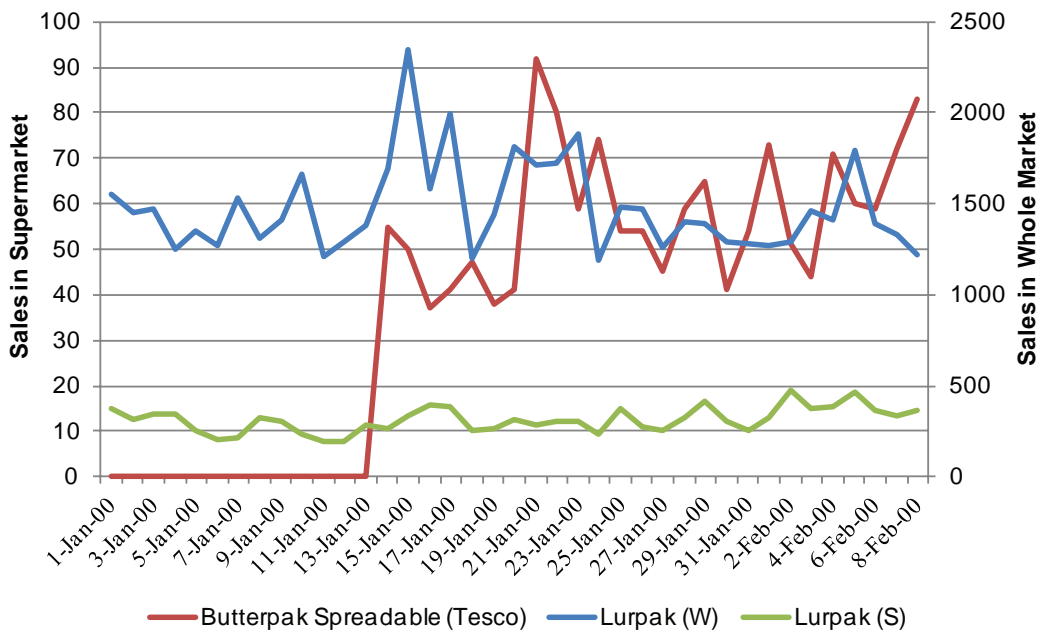


Figure H.18 Comparison of Lurpak and Butterpak Spreadable

Ibuprofen

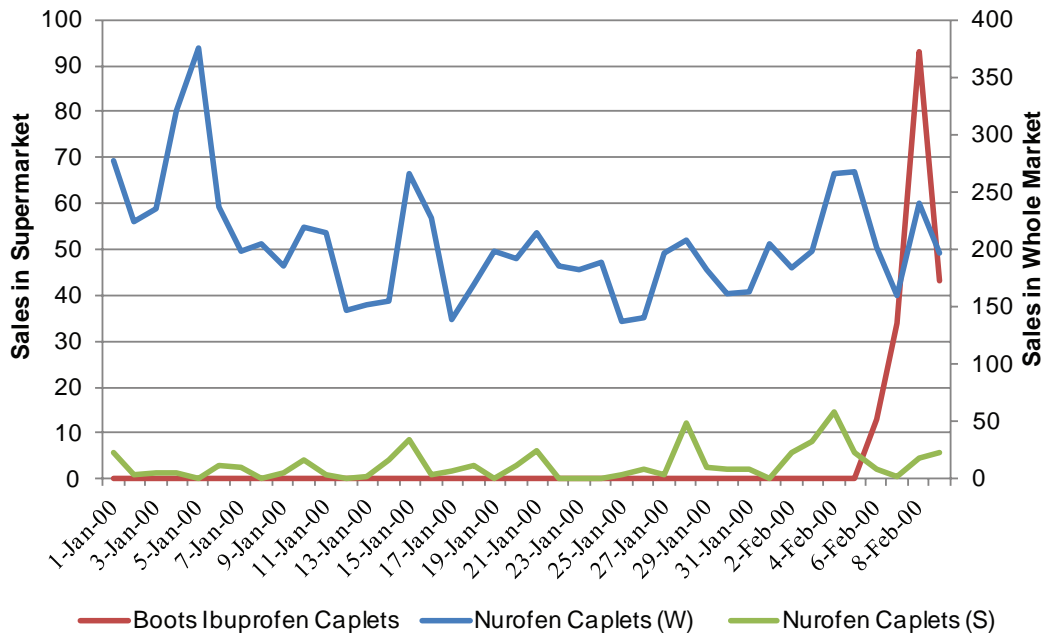


Figure H.19 Comparison of Nurofen and Boots Ibuprofen

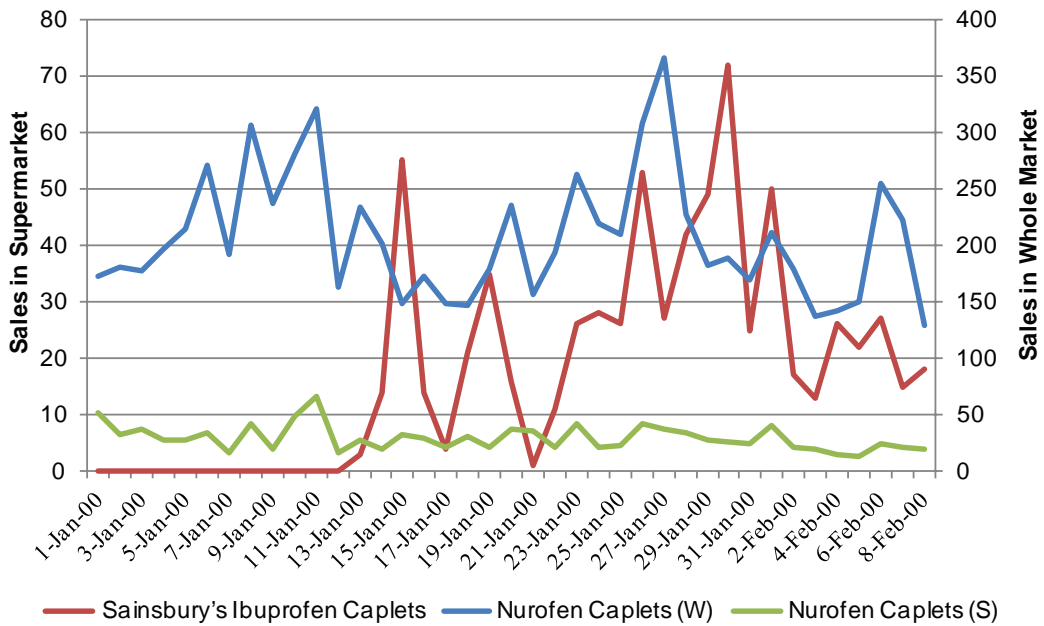


Figure H.20 Comparison of Nurofen and Sainsbury's Ibuprofen

Skin care

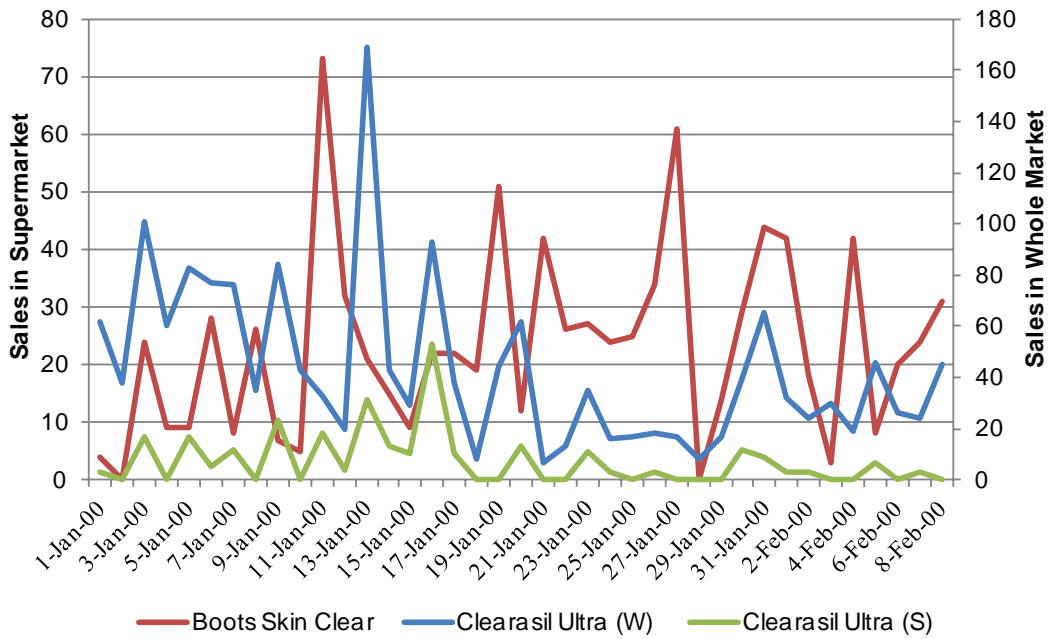


Figure H.21 Comparison Clearasil Ultra and Boots Skin Clear

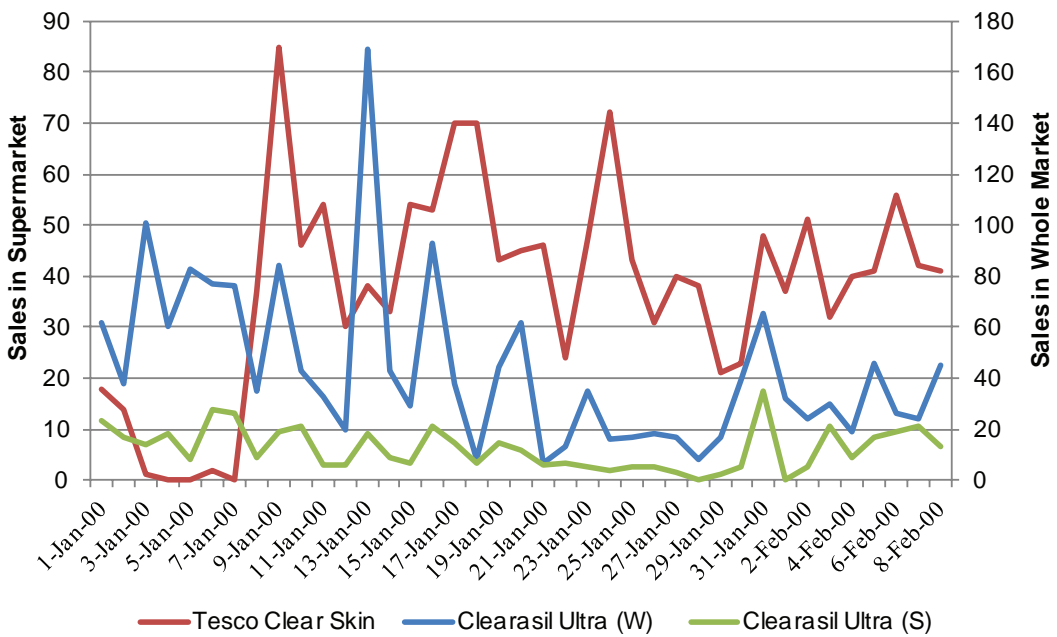


Figure H.22 Comparison Clearasil Ultra and Tesco Clear Skin

Shaving gel

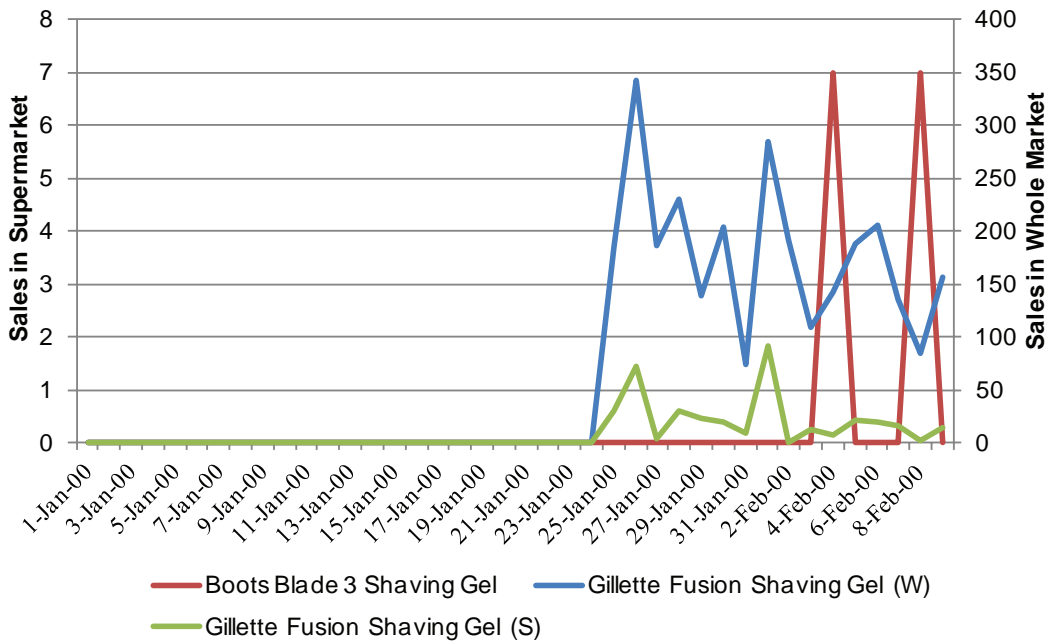


Figure H.23 Comparison Gillette Fusion Gel and Boots Blade 3

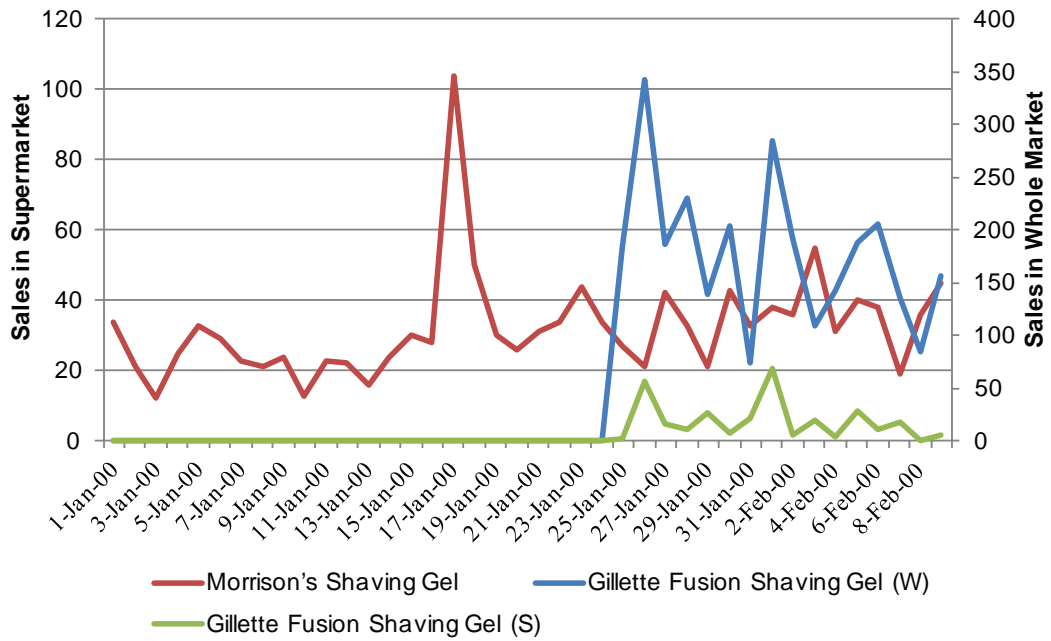


Figure H.24 Comparison Gillette Fusion Gel and Morrison's Shaving Gel



Appendix I: Sales Data - Scatter Charts

[Chapter 8]

Bodyspray

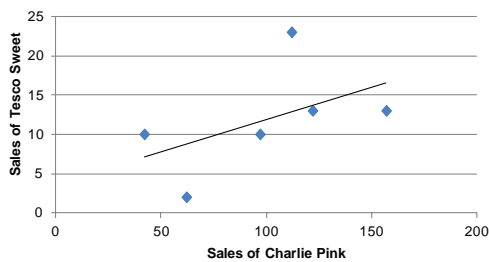


Chart I.1.1: Charlie Pink and Tesco Sweet 24wks - Whole Market

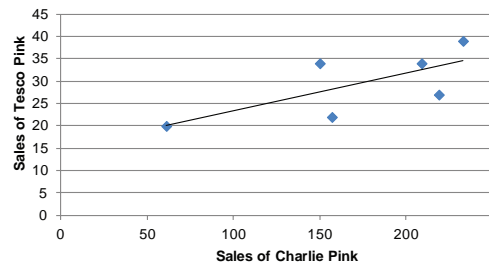


Chart I.1.2: Charlie Pink and Tesco Pink 24 wks - Whole Market

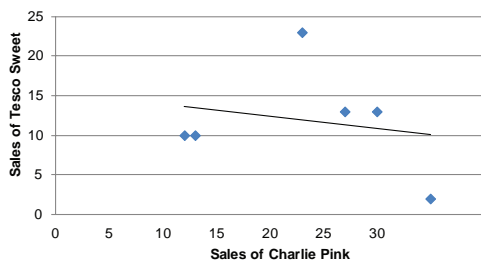


Chart I.1.3: Charlie Pink and Tesco Sweet 24wks - Supermarket

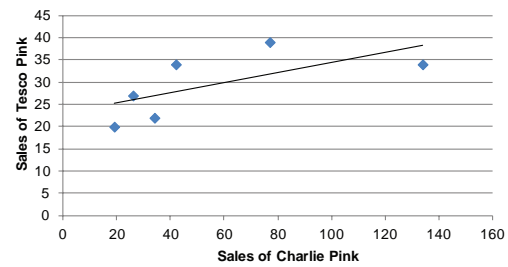


Chart I.1.4: Charlie Pink and Tesco Pink 24wks - Supermarket

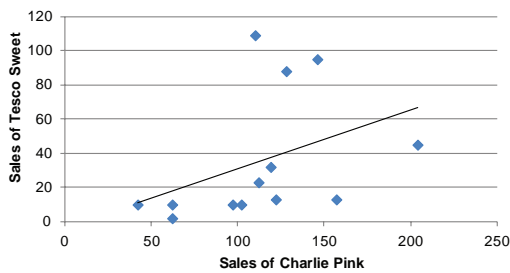


Chart I.1.5: Charlie Pink and Tesco Sweet 12m - Whole market

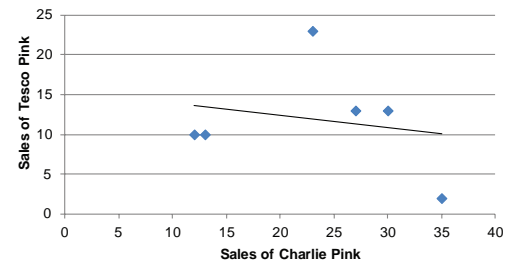


Chart I.1.6: Charlie Pink and Tesco Pink 12m - Whole Market

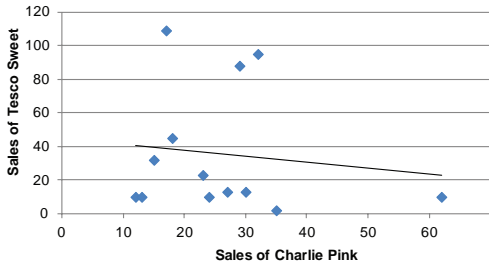


Chart I.1.7: Charlie Pink and Tesco Sweet 12m - Supermarket

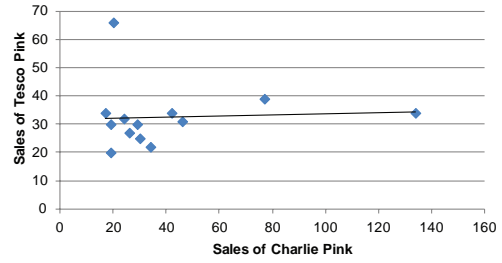


Chart I.1.8: Charlie Pink and Tesco Pink 12m - Supermarket

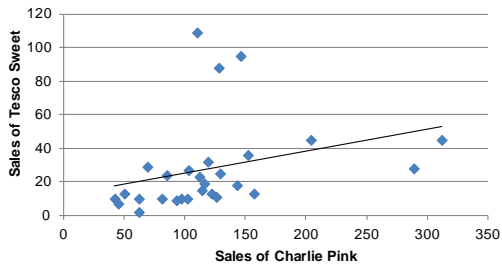


Chart I.1.9: Charlie Pink and Tesco Sweet All data - Whole Market

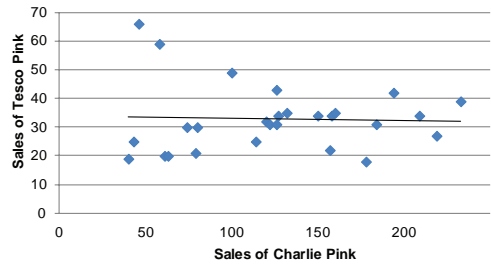


Chart I.1.10: Charlie Pink and Tesco Pink All data - Whole market

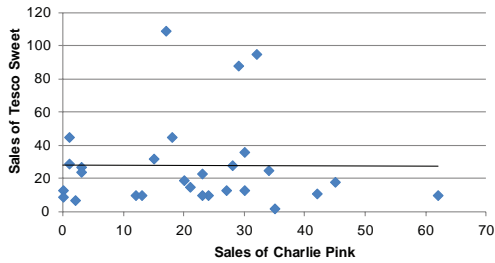


Chart I.1.11: Charlie Pink and Tesco Sweet All data - SuperMarket

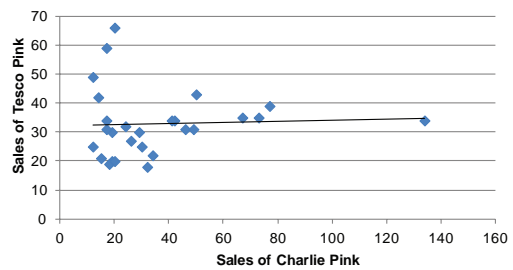


Chart I.1.12: Charlie Pink and Tesco Pink All data - Supermarket

Bodywash

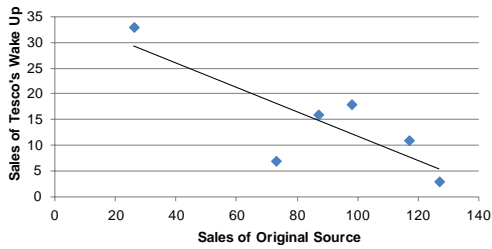


Chart I.2.1: Original Source and Tesco Wake Up 24wks - Whole Market

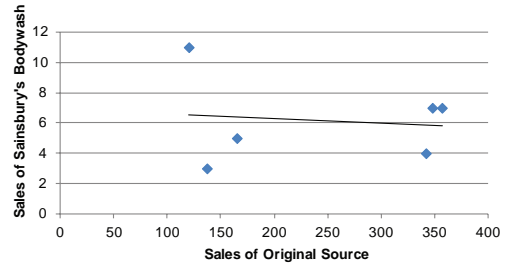


Chart I.2.2: Original Source and Sainsbury's Bodywash 24wks - Whole Market

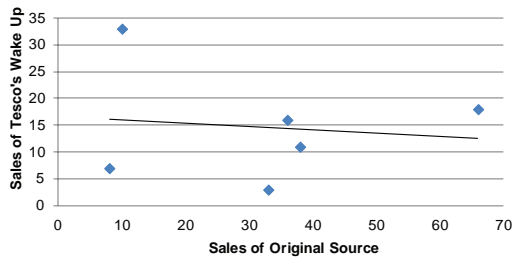


Chart I.2.3: Original Source and Tesco Wake Up 24wks - Supermarket

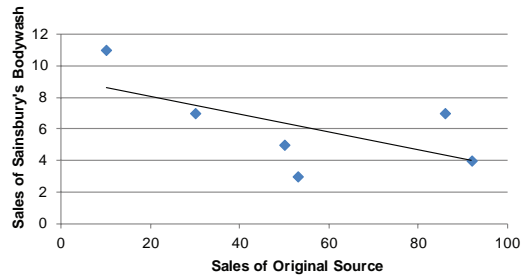


Chart I.2.4: Original Source and Sainsbury's Bodywash 24wks - SuperMarket

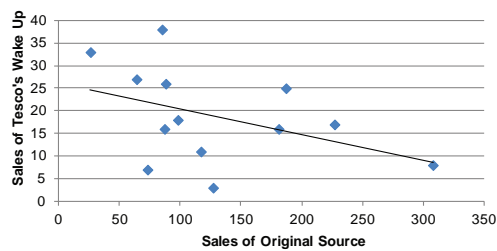


Chart I.2.5: Original Source and Tesco Wake Up 12m - Whole market

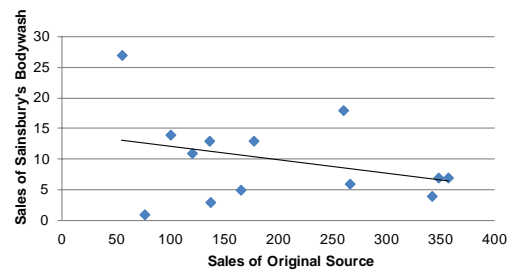


Chart I.2.6: Original Source and Sainsbury's Bodywash 12m - Whole market

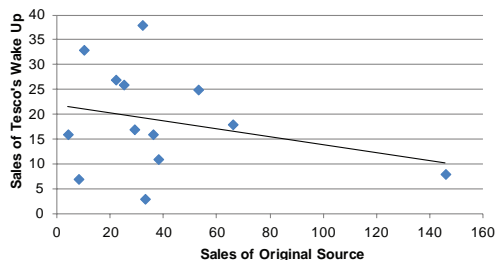


Chart I.2.7: Original Source and Tesco Wake Up 12m - Supermarket

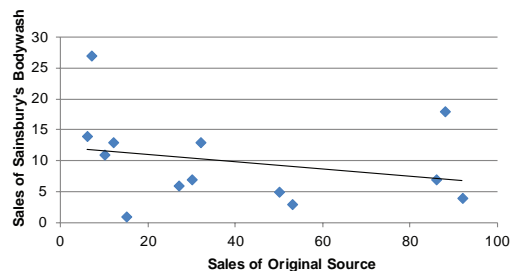


Chart I.2.8: Original Source and Sainsbury's Bodywash 12m - Supermarket

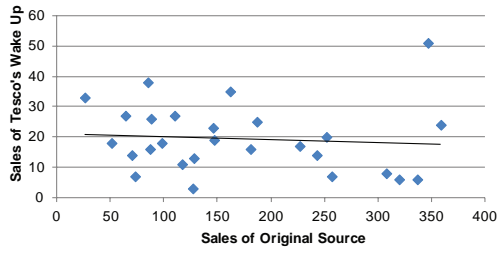


Chart I.2.9: Original Source and Tesco Wake Up All Data - Whole market

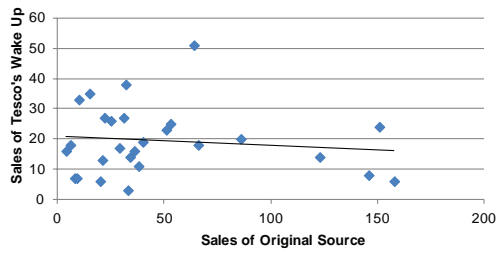


Chart I.2.10: Original Source and Tesco Wake Up All Data - Supermarket

Cheese

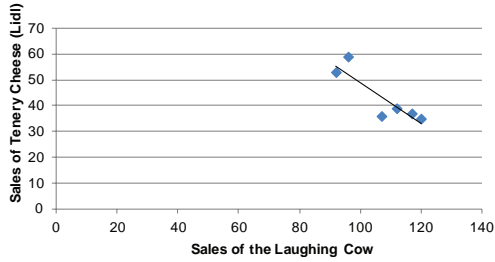


Chart I.3.1: the Laughing Cow and Tenergy Cheese (Lidl) 24wks - Whole Market

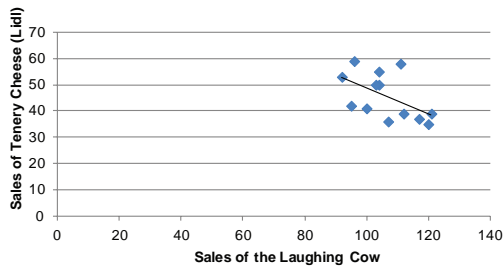


Chart I.3.2: the Laughing Cow and Tenergy Cheese (Lidl) 12m- Whole Market

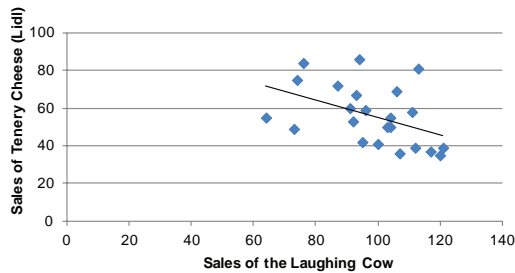


Chart I.3.3: the Laughing Cow and Tenergy Cheese (Lidl) All data - Whole Market

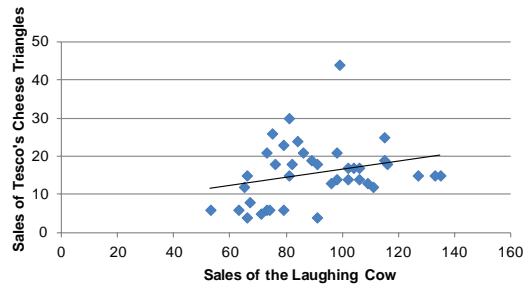


Chart I.3.4: the Laughing Cow and Tenergy Cheese (Lidl) All data - Whole Market

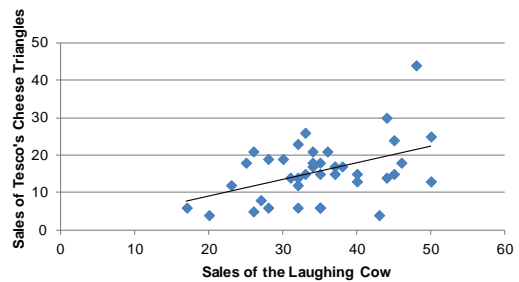


Chart I.3.5: the Laughing Cow and Tenergy Cheese (Lidl) All data - Supermarket

Razor

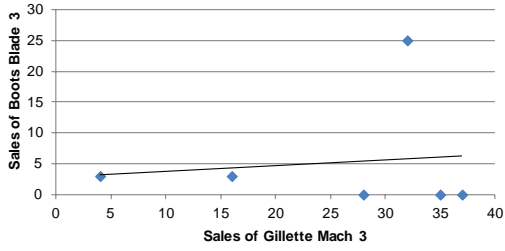


Chart I.4.1: Gillette Mach 3 and Boots Blade 3 24wks - Whole Market

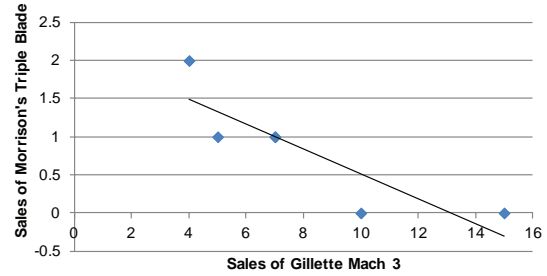


Chart I.4.2: Gillette Mach 3 and Morrison's Triple Blade 24wks - Whole Market

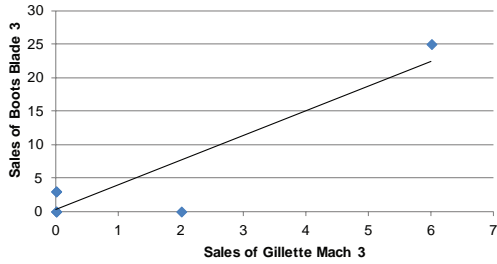


Chart I.4.3: Gillette Mach 3 and Boots Blade 3 24wks - Supermarket

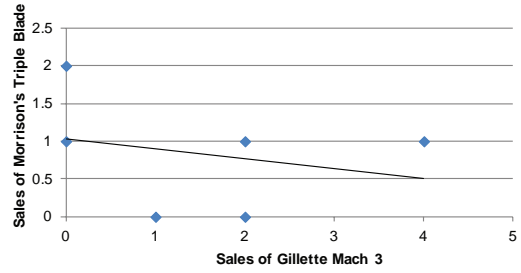


Chart I.4.4: Gillette Mach 3 and Morrison's Triple Blade 24wks - Supermarket

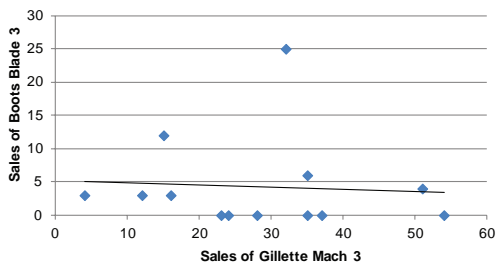


Chart I.4.5: Gillette Mach 3 and Boots Blade 3 12m - Whole Market

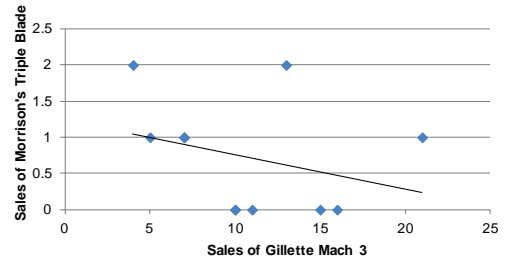


Chart I.4.6: Gillette Mach 3 and Morrison's Triple Blade 12m - Whole market

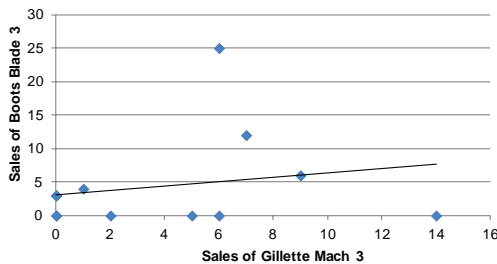


Chart I.4.7: Gillette Mach 3 and Boots Blade 3 12m - Supermarket

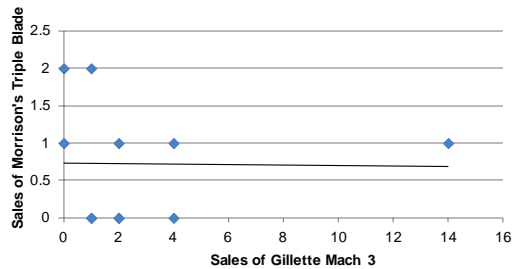


Chart I.4.8: Gillette Mach 3 and Morrison's Triple Blade 12m - Supermarket

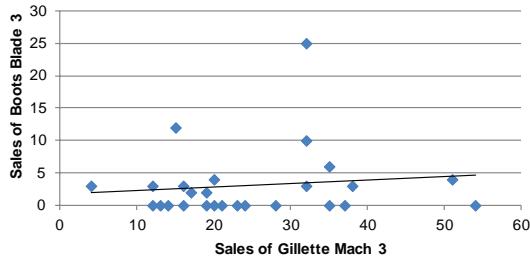


Chart I.4.9: Gillette Mach 3 and Boots Blade 3 All Data - Whole market

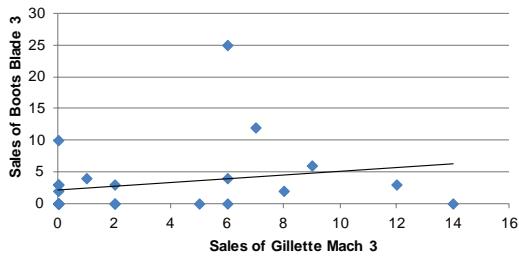


Chart I.4.10: Gillette Mach 3 and Boots Blade 3 All Data - Supermarket

Washing Up Liquid

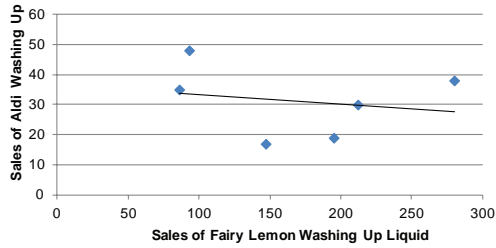


Chart I.5.1: Fairy Lemon Washing Up Liquid and Aldi Lemon Washing Up Liquid 24 wks - Whole Market

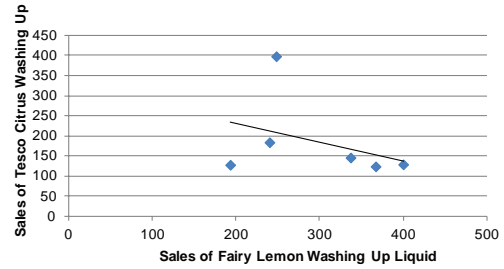


Chart I.5.2: Fairy Lemon Washing Up Liquid and Tesco Citrus Washing Up Liquid 24 wks - Whole Market

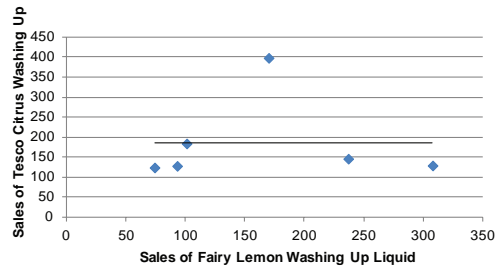


Chart I.5.3: Fairy Lemon Washing Up Liquid and Tesco Citrus Washing Up Liquid 24 wks - Supermarket

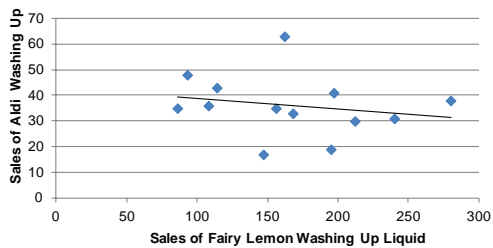


Chart I.5.4: Fairy Lemon Washing Up Liquid and Aldi Lemon Washing Up Liquid 12m - Whole Market

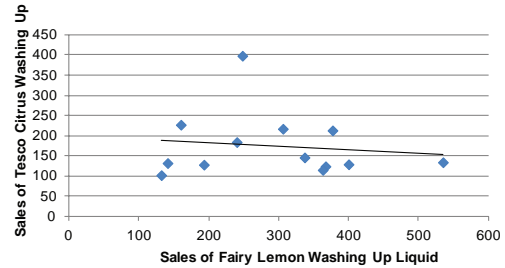


Chart I.5.5: Fairy Lemon Washing Up Liquid and Tesco Citrus Washing Up Liquid 12m - Whole Market

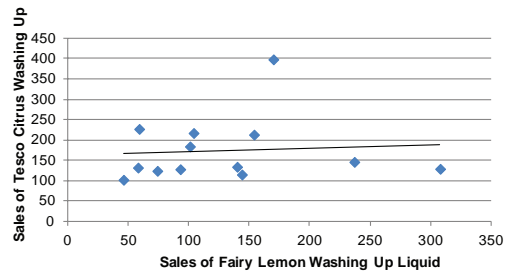


Chart I.5.6: Fairy Lemon Washing Up Liquid and Tesco Citrus Washing Up Liquid 12m - Supermarket

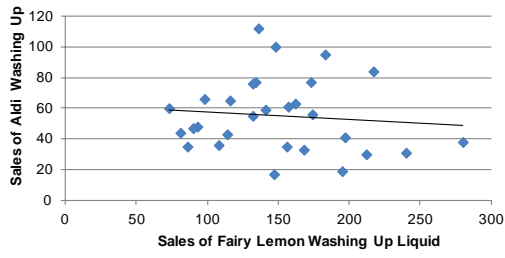


Chart I.5.7: Fairy Lemon Washing Up Liquid and Aldi Lemon Washing Up Liquid All data - Whole Market

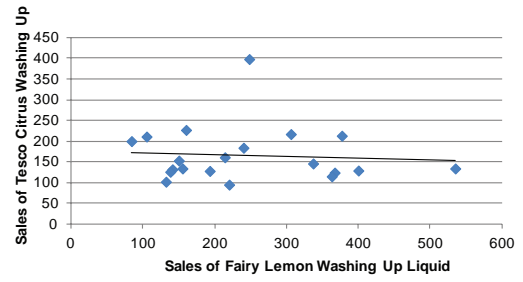


Chart I.5.8: Fairy Lemon Washing Up Liquid and Tesco Citrus Washing Up Liquid All data - Whole Market

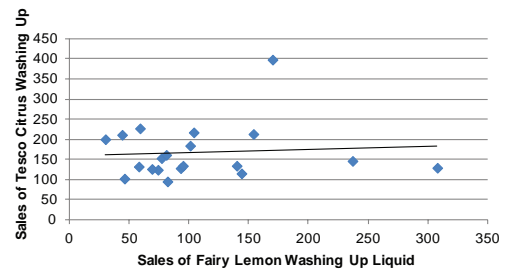


Chart I.5.9: Fairy Lemon Washing Up Liquid and Tesco Citrus Washing Up Liquid All data - Supermarket

Shampoo

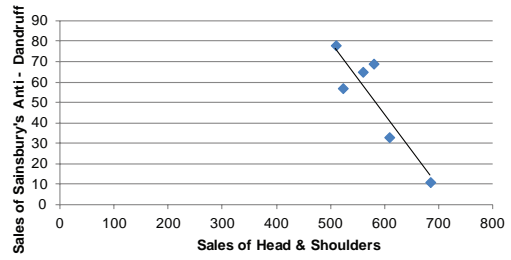


Chart I.6.1: Head & Shoulders and Sainsbury's Anti-Dandruff 24 wks - Whole Market

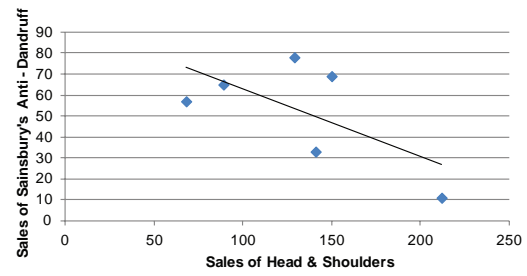


Chart I.6.2: Head & Shoulders and Sainsbury's Anti-Dandruff 24 wks - Supermarket

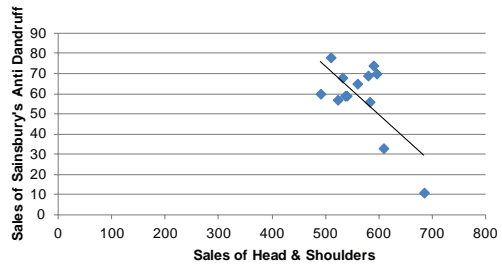


Chart I.6.3: Head & Shoulders and Sainsbury's Anti-Dandruff 12m - Whole Market

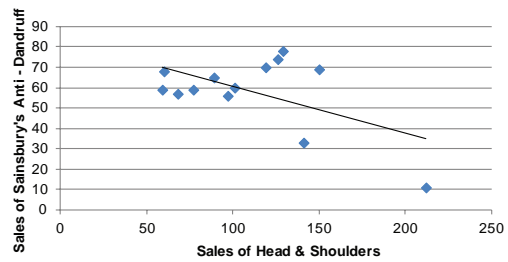


Chart I.6.4: Head & Shoulders and Sainsbury's Anti-Dandruff 12m - Supermarket

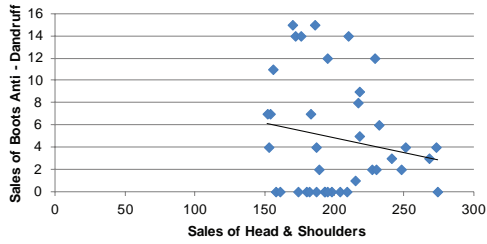


Chart I.6.5: Head & Shoulders and Boots Anti-Dandruff All Data - Whole Market

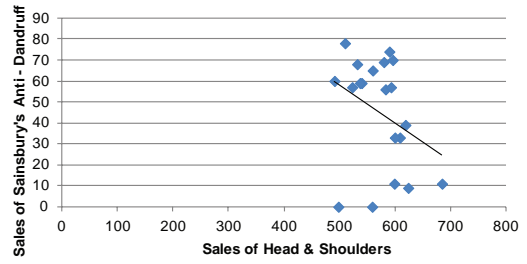


Chart I.6.6: Head & Shoulders and Sainsbury's Anti-Dandruff All Data - Whole Market

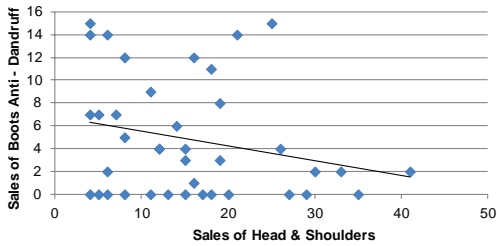


Chart I.6.7: Head & Shoulders and Boots Anti-Dandruff All Data - Supermarket

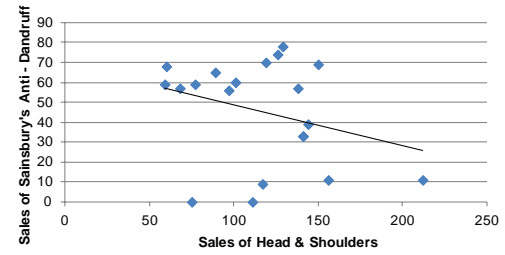


Chart I.6.8: Head & Shoulders and Sainsbury's Anti-Dandruff All Data - Supermarket

Drinks

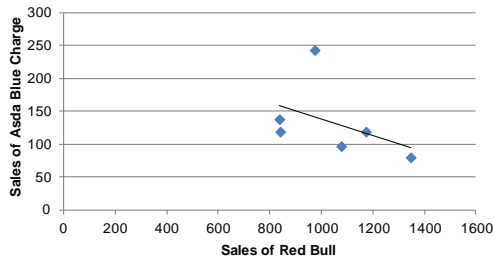


Chart I.7.1: Red Bull and Asda Blue Charge 24 wks - Whole Market

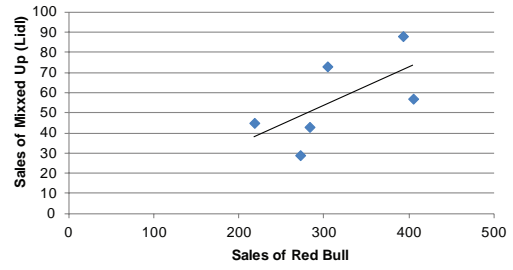


Chart I.7.2: Red Bull and Mixed Up (Lidl) 24 wks - Whole Market

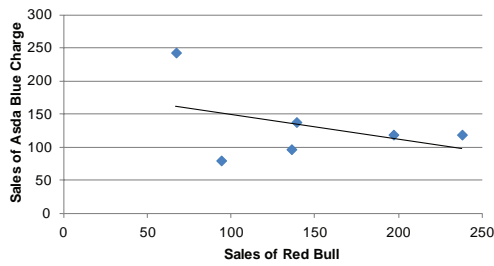


Chart I.7.3: Red Bull and Asda Blue Charge 24 wks - Supermarket

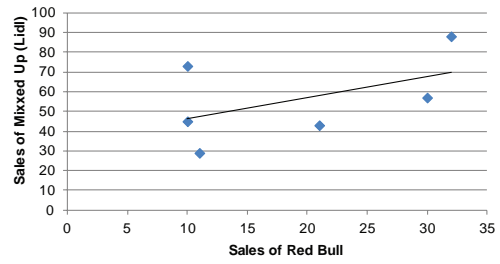


Chart I.7.4: Red Bull and Mixed Up (Lidl) 24 wks - Supermarket

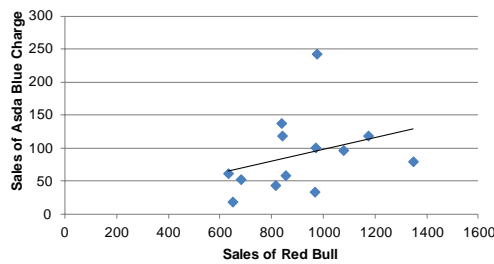


Chart I.7.5: Red Bull and Asda Blue Charge 12m - Whole Market

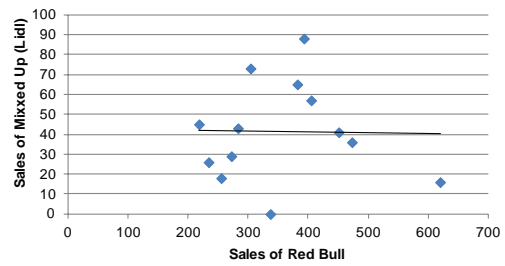


Chart I.7.6: Red Bull and Mixed Up (Lidl) 12m - Whole Market

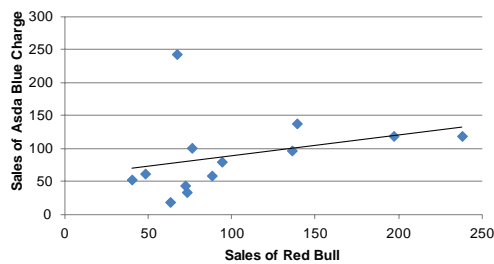


Chart I.7.7: Red Bull and Asda Blue Charge 12m - Supermarket

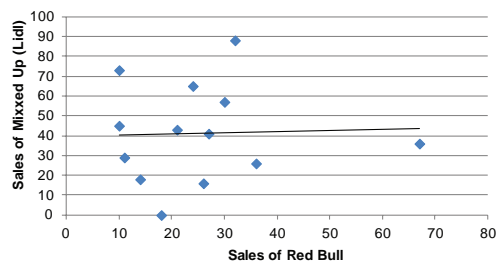


Chart I.7.8: Red Bull and Mixed Up (Lidl) 12m - Supermarket

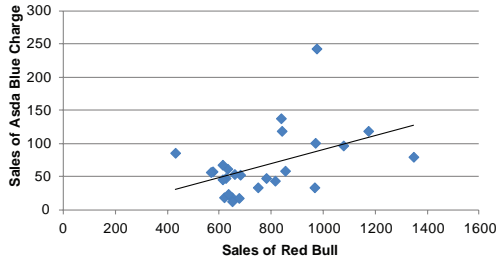


Chart I.7.9: Red Bull and Asda Blue Charge All data - Whole Market

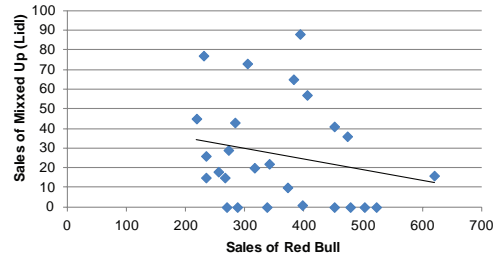


Chart I.7.10: Red Bull and Mixed Up (Lidl) All data - Whole Market

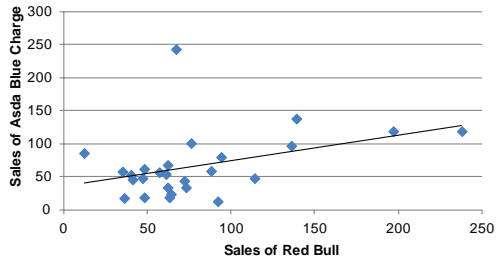


Chart I.7.11: Red Bull and Asda Blue Charge All data - Supermarket

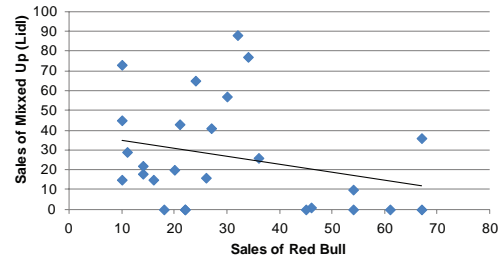


Chart I.7.12: Red Bull and Mixed Up (Lidl) All data - Supermarket

Vinegar

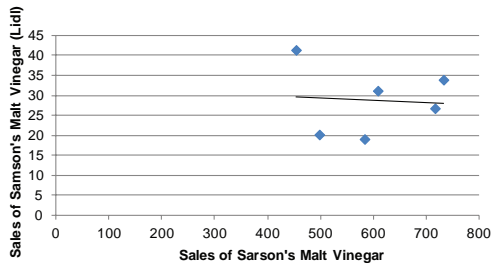


Chart I.8.1: Sarson's Malt Vinegar and Samson's Malt Vinegar 24 wks - Whole Market

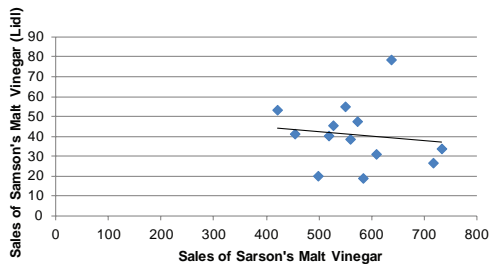


Chart I.8.2: Sarson's Malt Vinegar and Samson's Malt Vinegar 12m - Whole Market

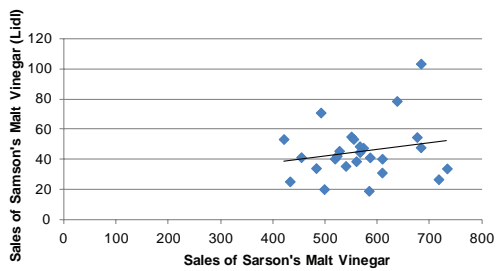


Chart I.8.3: Sarson's Malt Vinegar and Samson's Malt Vinegar All data - Whole Market

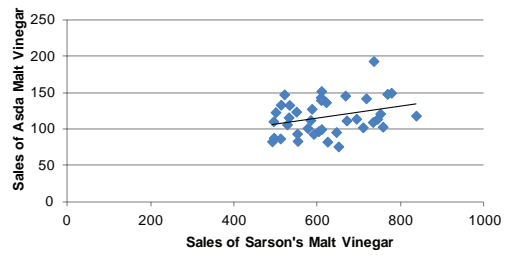


Chart I.8.4: Sarson's Malt Vinegar and Asda Malt Vinegar All data - Whole Market

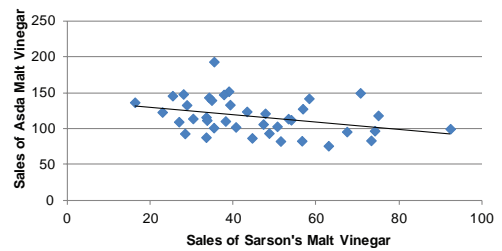


Chart I.8.4: Sarson's Malt Vinegar and Asda Malt Vinegar All data - Supermarket

Butter

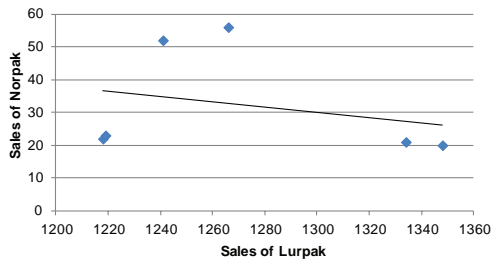


Chart I.9.1: Lurpak and Norpak 24 wks - Whole Market

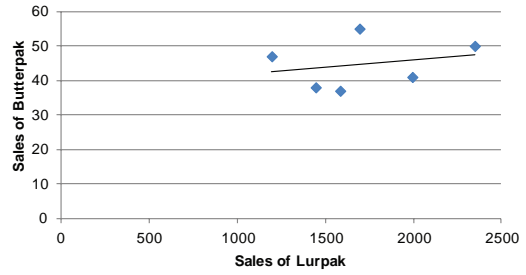


Chart I.9.2: Lurpak and Butterpak 24 wks - Whole Market

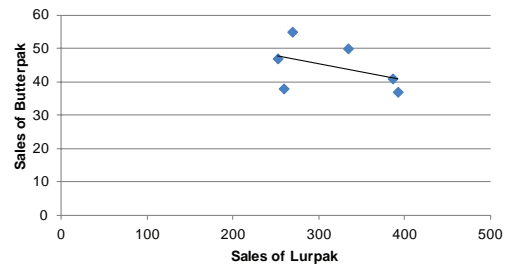


Chart I.9.3: Lurpak and Butterpak 24 wks - Supermarket

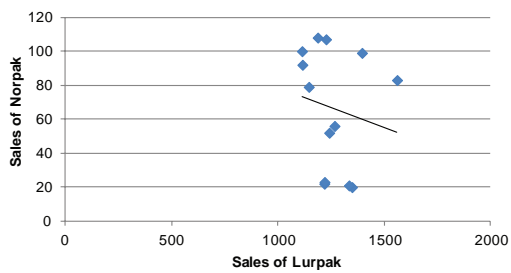


Chart I.9.4: Lurpak and Norpak 12m - Whole Market

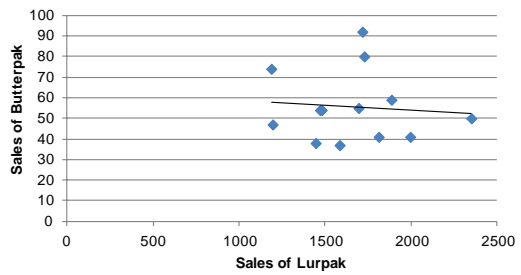


Chart I.9.5: Lurpak and Butterpak 12m - Whole Market

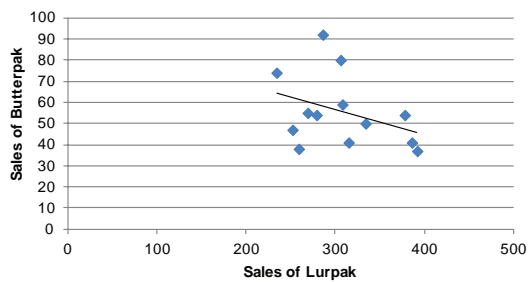


Chart I.9.6: Lurpak and Butterpak 12m - Supermarket

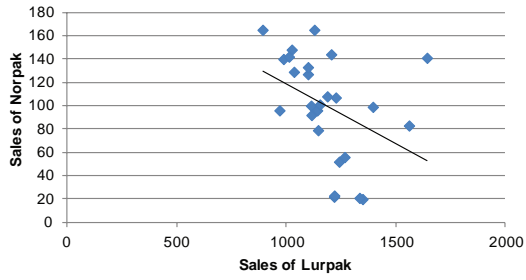


Chart I.9.7: Lurpak and Norpak All Data - Whole Market

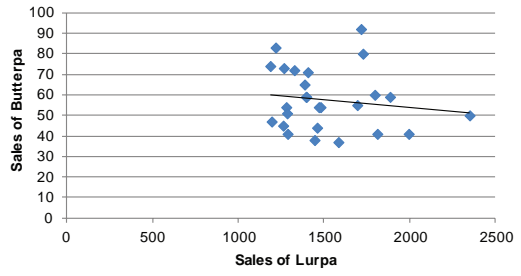


Chart I.9.8 Lurpak and Butterpak All Data - Whole Market

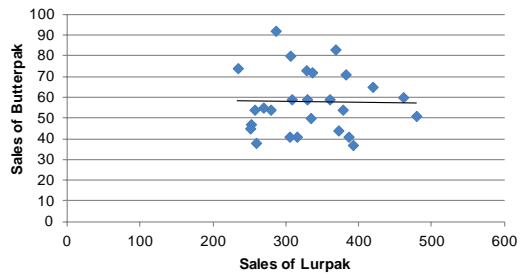


Chart I.9.9 Lurpak and Butterpak All Data - Supermarket

Ibuprofen

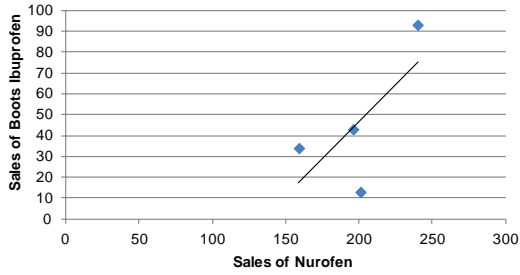


Chart I.10.1: Nurofen and Boots Ibuprofen 24 wks - Whole Market

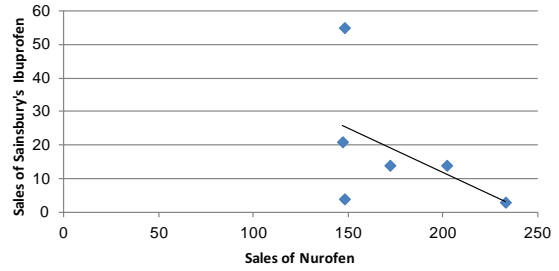


Chart I.10.2: Nurofen and Sainsbury's Ibuprofen 24 wks - Whole Market

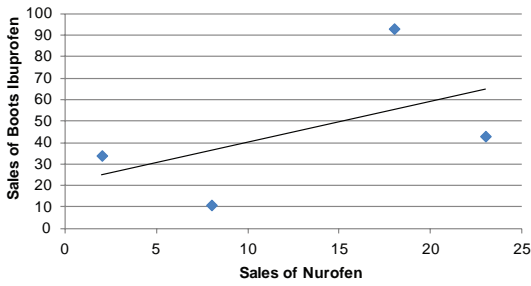


Chart I.10.3: Nurofen and Boots Ibuprofen 24 wks - Supermarket

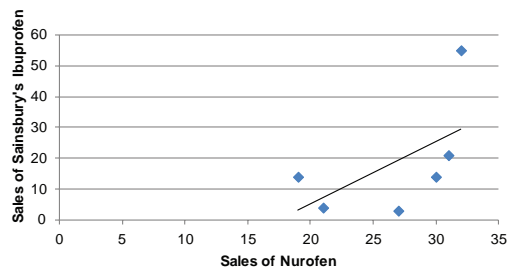


Chart I.10.4: Nurofen and Sainsbury's Ibuprofen 24 wks - Supermarket

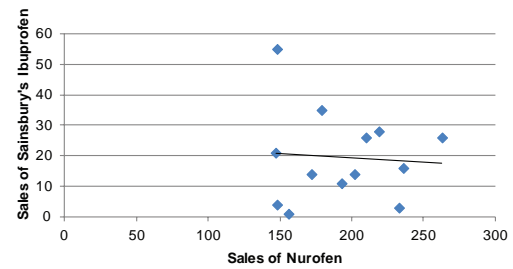


Chart I.10.5: Nurofen and Sainsbury's Ibuprofen 12m - Whole Market

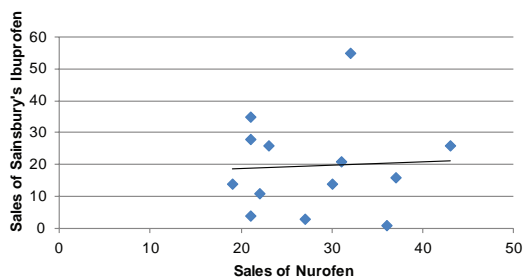


Chart I.10.6: Nurofen and Sainsbury's Ibuprofen 12m - Supermarket

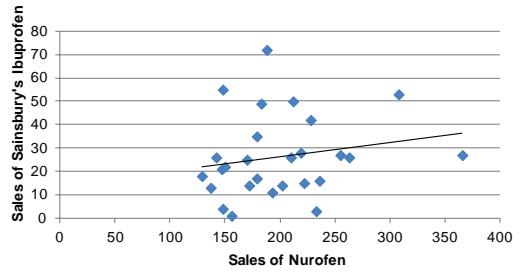


Chart I.10.7: Nurofen and Sainsbury's Ibuprofen All data- Whole Market

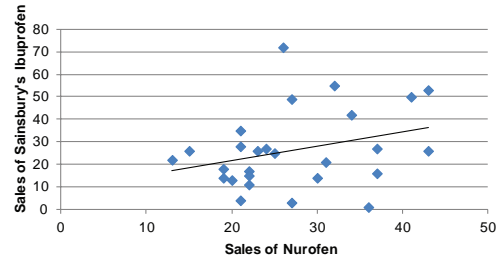


Chart I.10.8: Nurofen and Sainsbury's Ibuprofen All data- Supermarket

Skin Care

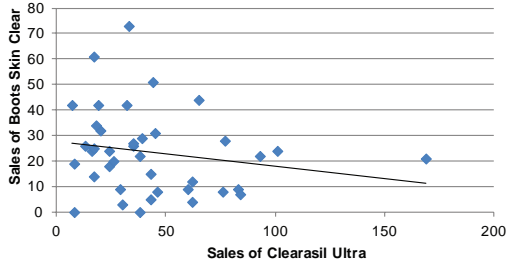


Chart I.11.1: Clearasil and Boots Skin Clear All Data - Whole Market

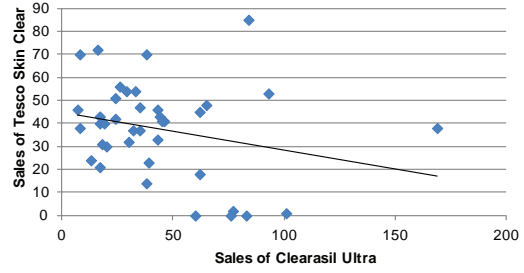


Chart I.11.2: Clearasil and Tesco Skin Clear All Data - Whole Market

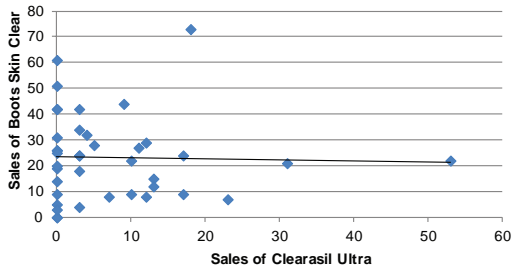


Chart I.11.3: Clearasil and Boots Skin Clear All Data - Supermarket

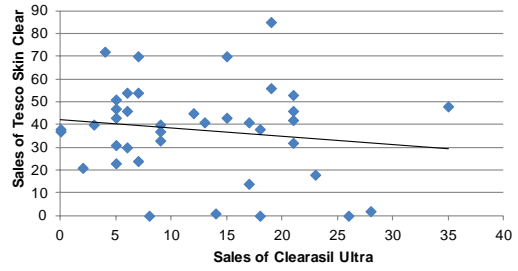


Chart I.11.4: Clearasil and Tesco Skin Clear All Data - Supermarket

Shaving Gel

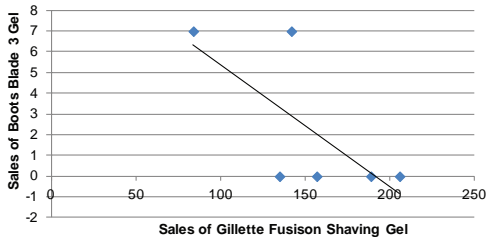


Chart I.12.1: Gillette Fusion and Boots Blade3 Gel 24 Wks - Whole Market

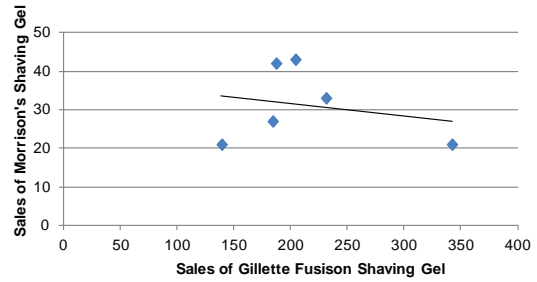


Chart I.12.2: Gillette Fusion and Morrison's Shaving Gel 24 wks - Whole Market

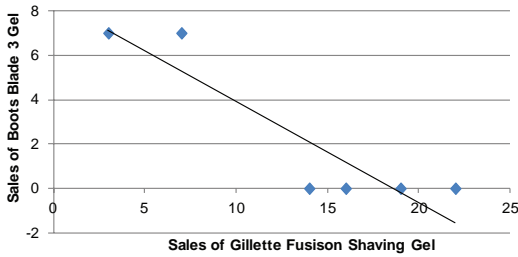


Chart I.12.3: Gillette Fusion and Boots Blade3 Gel 24 Wks- Supermarket

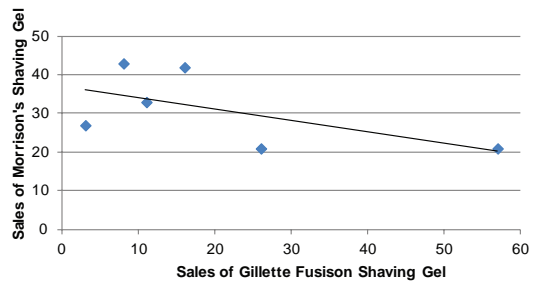


Chart I.12.4: Gillette Fusion and Morrison's Shaving Gel 24 wks - Supermarket

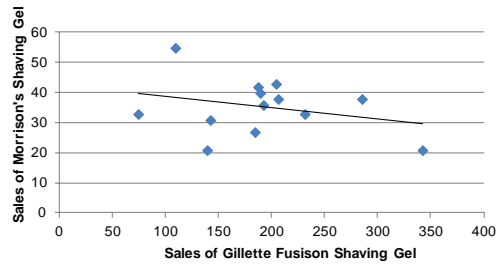


Chart I.12.5: Gillette Fusion and Morrison's Shaving Gel 12m - Whole Market

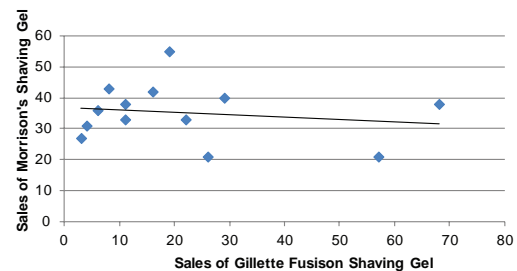


Chart I.12.6: Gillette Fusion and Morrison's Shaving Gel 12m - Supermarket

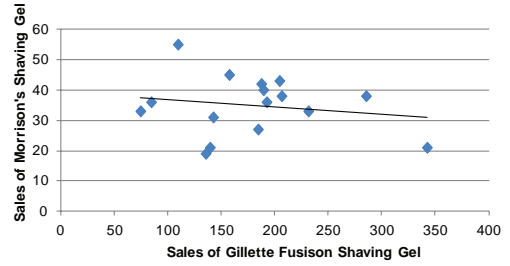


Chart I.12.7: Gillette Fusion and Morrison's Shaving Gel All Data - Whole Market

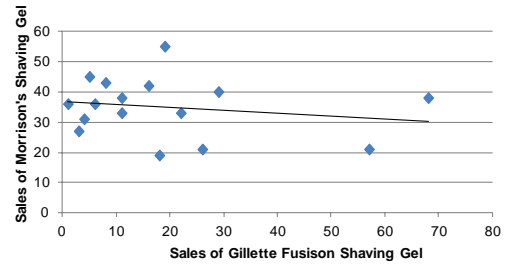


Chart I.12.8: Gillette Fusion and Morrison's Shaving Gel All Data - Supermarket



Appendix J: Sales Data - Raw data

[Chapter 8]

Bodyspray

(Charlie Pink/Tesco Sweet/Tesco Pink)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	LP
4 Nov 07	87	0	17	0	24 Apr 05	0	0	0	0
2 Dec 07	202	0	26	0	22 May 05	0	0	0	0
30 Dec 07	64	0	23	0	19 Jun 05	2	0	0	0
27 Jan 08	50	0	12	0	17 Jul 05	6	0	4	0
24 Feb 08	149	0	41	0	14 Aug 05	57	0	20	0
23 Mar 08	158	0	50	0	11 Sep 05	41	0	30	0
20 Apr 08	116	0	6	0	9 Oct 05	22	0	14	0
18 May 08	39	0	10	0	6 Nov 05	63	0	12	0
15 Jun 08	74	0	8	0	4 Dec 05	208	0	14	0
13 Jul 08	120	0	7	0	1 Jan 06	129	0	46	0
10 Aug 08	106	0	78	0	29 Jan 06	63	0	36	0
07 Sep 08	62(24)	2(28)	35(4)	2(28)	26 Feb 06	100	0	15	0
05 Oct 08	157(4)	13(17)	30(7)	13(17)	26 Mar 06	61(23)	20(24)	19(18)	20(24)
02 Nov 08	122(11)	13(17)	27(11)	13(17)	23 Apr 06	209(3)	34(9)	134(1)	34(9)
30 Nov 08	112(15)	23(13)	23(13)	23(13)	21 May 06	219(2)	27(19)	26(14)	27(19)
28 Dec 08	42(28)	10(21)	12(21)	10(21)	18 Jun 06	157(9)	22(22)	34(10)	22(22)
25 Jan 09	97(19)	10(21)	13(20)	10(21)	16 Jul 06	233(1)	39(6)	77(2)	39(6)
22 Feb 09	62(24)	10(21)	24(12)	10(21)	13 Aug 06	150(10)	34(9)	42(8)	34(9)
22 Mar 09	102(18)	10(21)	62(1)	10(21)	10 Sep 06	80(19)	30(17)	19(18)	30(17)
19 Apr 09	119(12)	32(7)	15(19)	32(7)	8 Oct 06	114(17)	25(20)	30(12)	25(20)
17 May 09	110(16)	109(1)	17(18)	109(1)	5 Nov 06	46(25)	66(1)	20(16)	66(1)
14 Jun 09	128(9)	88(3)	29(9)	88(3)	3 Dec 06	158(8)	34(9)	17(21)	34(9)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	LP
6 Sep 09	114(14)	15(16)	21(15)	15(16)	25 Feb 07	120(16)	32(13)	24(15)	32(13)
4 Oct 09	129(8)	25(11)	34(5)	25(11)	25 Mar 07	126(13)	43(4)	50(5)	43(4)
1 Nov 09	289(2)	28(9)	28(10)	28(9)	22 Apr 07	58(24)	59(2)	17(21)	59(2)
29 Nov 09	312(1)	45(4)	1(25)	45(4)	20 May 07	100(18)	49(3)	12(26)	49(3)
27 Dec 09	50(26)	13(17)	0(27)	13(17)	17 Jun 07	160(7)	35(7)	67(4)	35(7)
24 Jan 10	93(20)	9(26)	0(27)	9(26)	15 Jul 07	132(11)	35(7)	73(3)	35(7)
21 Feb 10	45(27)	7(27)	2(24)	7(27)	12 Aug 07	194(4)	42(5)	14(25)	42(5)
21 Mar 10	103(17)	27(10)	3(22)	27(10)	9 Sep 07	40(27)	19(26)	18(20)	19(26)
18 Apr 10	85(21)	24(12)	3(22)	24(12)	7 Oct 07	122(15)	31(14)	49(6)	31(14)
16 May 10	81(22)	10(21)	23(13)	10(21)	4 Nov 07	126(13)	31(14)	17(21)	31(14)
13 Jun 10	116(13)	19(14)	20(16)	19(14)	2 Dec 07	79(20)	21(23)	15(24)	21(23)
11 Jul 10	143(7)	18(15)	45(2)	18(15)	30 Dec 07	178(6)	18(27)	32(11)	18(27)
8 Aug 10	126(10)	11(20)	42(3)	11(20)	27 Jan 08	63(22)	20(24)	20(16)	20(24)
5 Sep 10	69(23)	29(8)	1(25)	29(8)	24 Feb 08	43(26)	25(20)	12(26)	25(20)
3 Oct 10	152(5)	36(6)	30(7)	36(6)	23 Mar 08	127(12)	34(9)	41(9)	34(9)

Charlie Pink (BP), Tesco Sweet (LP), Tesco Pink (CP)

Body Spray (Charlie Pink/Tesco Sweet/Tesco Pink)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	04 Nov 07 – 10 Aug 08	24 Apr 05 – 26 Feb 06
Period 2	07 Sep 08 – 09 Aug 09	26 Mar 06 – 25 Feb 07
Period 3	06 Sep 09 – 08 Aug 10	25 Mar 07 – 24 Feb 08

	Whole Market							
	Lookalike				Control			
	Charlie Pink		Tesco Sweet		Charlie Pink		Tesco Pink	
	X	SD	x	SD	X	SD	x	SD
Period 1	105.9091	49.83865	0	0	57.58333	62.89018	0	0
Period 2	112.5385	43.08444	35.38462	37.29732	138.8462	62.17696	32.61538	11.32503
Period 3	129.6923	81.23565	21.23077	11.53367	109.3077	50.56083	32.92308	12.6719

	Supermarket							
	Lookalike				Control			
	Charlie Pink		Tesco Sweet		Charlie Pink		Tesco Pink	
	X	SD	x	SD	X	SD	x	SD
Period 1	25.27273	22.64107	0	0	15.91667	14.92075	0	0
Period 2	25.92308	13.17486	35.38462	37.29732	39.76923	32.6143	32.61538	11.32503
Period 3	17.07692	16.66064	19.30769	10.49908	30.46154	21.77772	32.92308	12.6719

Bodyspray (Charlie Pink/Tesco Sweet/Tesco Pink)

Volume ('000) – Correlations

Correlations Pearson's r

R	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	0.502671	-0.21177	0.7067	0.658262
12m	11	0.399379	-0.12543	-0.18566	0.053436
All	26	0.308888	-0.00128	-0.03861	0.048676

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
28	0.63472	-0.01745	27	0.21491	0.15352

Kendall's tau b

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
28	0.44554	-0.01357	27	0.18898	0.13471

Body spray (Charlie Pink/Tesco Sweet/Tesco Pink)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
04 Nov 07	101	0	28	0	24 Apr 05	0	0	0	0
02 Dec 07	346	0	32	0	22 May 05	0	0	0	0
30 Dec 07	73	0	24	0	19 Jun 05	2	0	0	0
27 Jan 08	84	0	19	0	17 Jul 05	7	0	4	0
24 Feb 08	176	0	44	0	14 Aug 05	74	0	27	0
23 Mar 08	188	0	58	0	11 Sep 05	41	0	31	0
20 Apr 08	128	0	10	0	09 Oct 05	29	0	19	0
18 May 08	49	0	16	0	06 Nov 05	94	0	21	0
15 Jun 08	104	0	13	0	04 Dec 05	274	0	18	0
13 Jul 08	166	0	11	0	01 Jan 06	161	0	61	0
10 Aug 08	122	0	84	0	29 Jan 06	69	0	36	0
07 Sep 08	86	2	45	2	26 Feb 06	109	0	18	0
05 Oct 08	161	9	30	9	26 Mar 06	89	10	30	10
02 Nov 08	133	10	37	10	23 Apr 06	244	17	137	17
30 Nov 08	117	16	22	16	21 May 06	236	14	30	14
28 Dec 08	46	5	12	5	18 Jun 06	168	11	34	11
25 Jan 09	120	7	20	7	16 Jul 06	243	19	77	19
22 Feb 09	76	7	30	7	13 Aug 06	160	17	42	17
22 Mar 09	112	7	70	7	10 Sep 06	110	15	27	15
19 Apr 09	126	19	22	19	08 Oct 06	151	12	44	12
17 May 09	127	59	27	59	05 Nov 06	63	33	30	33
14 Jun 09	141	47	29	47	03 Dec 06	174	17	26	17
12 Jul 09	213	27	18	27	31 Dec 06	236	19	50	19
09 Aug 09	156	50	43	50	28 Jan 07	90	15	30	15
06 Sep 09	119	10	26	10	25 Feb 07	160	16	33	16
04 Oct 09	153	18	39	18	25 Mar 07	158	21	54	21
01 Nov 09	329	20	44	20	22 Apr 07	75	32	25	32
29 Nov 09	328	32	2	32	20 May 07	136	24	20	24
27 Dec 09	55	9	0	9	17 Jun 07	171	21	70	21
24 Jan 10	106	6	0	6	15 Jul 07	151	24	73	24
21 Feb 10	47	5	2	5	12 Aug 07	228	27	17	27
21 Mar 10	107	21	4	21	09 Sep 07	64	12	30	12

<i>4 week period ending</i>	<i>Lookalike</i>				<i>4 week period ending</i>	<i>Control</i>			
	<i>Whole market</i>		<i>Supermarket only</i>			<i>Whole market</i>		<i>Supermarket only</i>	
	<i>BP</i>	<i>LP</i>	<i>BP</i>	<i>LP</i>		<i>BP</i>	<i>CP</i>	<i>BP</i>	<i>CP</i>
13 Jun 10	117	15	20	15	02 Dec 07	91	13	24	13
11 Jul 10	140	13	45	13	30 Dec 07	284	12	38	12
08 Aug 10	122	8	42	8	27 Jan 08	71	14	22	14
05 Sep 10	75	21	1	21	24 Feb 08	73	17	19	17
03 Oct 10	176	26	47	26	23 Mar 08	147	23	45	23

Charlie Pink (BP), Tesco Sweet (LP), Tesco Pink (CP)

Body Spray (Charlie Pink/Tesco Sweet/Tesco Pink)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	04 Nov 07 – 10 Aug 08	24 Apr 05 – 26 Feb 06
Period 2	07 Sep 08 – 09 Aug 09	26 Mar 06 – 25 Feb 07
Period 3	06 Sep 09 – 08 Aug 10	25 Mar 07 – 24 Feb 08

	Whole Market							
	Lookalike				Control			
	Charlie Pink		Tesco Sweet		Charlie Pink		Tesco Pink	
	X	SD	x	SD	x	SD	x	SD
Period 1	139.7273	81.18016	0	0	71.66667	81.40397	0	0
Period 2	124.1538	41.57092	20.38462	19.34571	163.3846	62.94116	16.53846	5.695252
Period 3	139.3846	88.97709	15.46154	8.402533	138.2308	65.82192	19.76923	6.112199

	Whole Market							
	Lookalike				Control			
	Charlie Pink		Tesco Sweet		Charlie Pink		Tesco Pink	
	X	SD	x	SD	x	SD	x	SD
Period 1	30.81818	23.02094	0	0	19.58333	18.01746	0	0
Period 2	31.15385	15.08778	20.38462	19.34571	45.38462	30.78295	16.53846	5.695252
Period 3	19.23077	18.43074	14	7.713624	35.76923	20.44568	19.76923	6.112199

Correlations (r)

R	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	0.500816	-0.25455	0.716332	0.608536
12m	11	0.453155	-0.07531	-0.16452	0.064316
All	26	0.391631	0.038352	-0.09503	0.018963

Notes

Charlie Pink was launched on a short time before Tesco Pink and so the brand leader was only gaining market share at the time the control was launched. Otherwise, this data presents the best example as the lookalike and the control were both sold by the same retailer and were at some point on sale at the same time. It also has the full range of data sought.

Bodywash

(Original Source Lime/Tesco's Wake Up Lime Body Wash/Sainsbury's Lime Body Wash)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
25 Jan 09	185	0	153	0	18 Apr 10	23	0	4	0
22 Feb 09	111	0	37	0	16 May 10	94	0	5	0
22 Mar 09	166	0	32	0	13 Jun 10	76	0	5	0
19 Apr 09	69	0	8	0	11 Jul 10	77	0	12	0
17 May 09	134	0	98	0	08 Aug 10	180	0	9	0
14 Jun 09	126	0	81	0	05 Sep 10	183	0	123	0
12 Jul 09	306	0	263	0	03 Oct 10	231	0	6	0
09 Aug 09	277	0	28	0	31 Oct 10	290	0	74	0
06 Sep 09	206	0	78	0	28 Nov 10	68	0	13	0
04 Oct 09	90	0	39	0	26 Dec 10	72	0	6	0
01 Nov 09	233	0	161	0	23 Jan 11	349	0	44	0
29 Nov 09	224	0	30	0	20 Feb 11	275	0	115	0
27 Dec 09	127(16)	3(26)	33(14)	3(26)	20 Mar 11	243	0	63	0
24 Jan 10	73(23)	7(23)	8(25)	7(23)	17 Apr 11	137(8)	3(12)	53(4)	3(12)
21 Feb 10	117(17)	11(21)	38(11)	11(21)	15 May 11	342(3)	4(11)	92(1)	4(11)
21 Mar 10	87(21)	16(16)	36(12)	16(16)	12 Jun 11	120(10)	11(6)	10(11)	11(6)
18 Apr 10	26(27)	33(4)	10(23)	33(4)	10 Jul 11	348(2)	7(7)	86(3)	7(7)
16 May 10	98(19)	18(13)	66(6)	18(13)	07 Aug 11	165(7)	5(10)	50(5)	5(10)
13 Jun 10	88(20)	26(7)	25(18)	26(7)	04 Sep 11	357(1)	7(7)	30(7)	7(7)
11 Jul 10	85(22)	38(2)	32(15)	38(2)	02 Oct 11	260(5)	18(3)	88(2)	18(3)
08 Aug 10	187(10)	25(8)	53(8)	25(8)	30 Oct 11	55(13)	27(1)	7(12)	27(1)
05 Sep 10	181(11)	16(16)	4(27)	16(16)	27 Nov 11	100(11)	14(4)	6(13)	14(4)
03 Oct 10	227(9)	17(15)	29(17)	17(15)	25 Dec 11	136(9)	13(5)	12(10)	13(5)
31 Oct 10	308(5)	8(22)	146(3)	8(22)	22 Jan 12	266(4)	6(9)	27(8)	6(9)
28 Nov 10	64(25)	27(5)	22(19)	27(5)	19 Feb 12	76(12)	1(13)	15(9)	1(13)
26 Dec 10	70(24)	14(18)	34(13)	14(18)	18 Mar 12	177(6)	13(2)	32(6)	13(2)
23 Jan 11	320(4)	6(25)	20(21)	6(25)					
20 Feb 11	252(7)	20(11)	86(5)	20(11)					

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
15 May 11	337(3)	6(25)	158(1)	6(25)					
12 Jun 11	128(15)	13(20)	21(20)	13(20)					
10 Jul 11	347(2)	51(1)	64(7)	51(1)					
07 Aug 11	162(12)	35(3)	15(22)	35(3)					
04 Sep 11	359(1)	24(9)	151(2)	24(9)					
02 Oct 11	257(6)	7(23)	9(24)	7(23)					
30 Oct 11	51(26)	18(13)	6(26)	18(13)					
27 Nov 11	110(18)	27(5)	31(16)	27(5)					
25 Dec 11	147(13)	19(12)	40(10)	19(12)					

Original Source Lime (BP), Tesco's Wake Up Lime Body Wash (LP), Sainsbury's Lime Body Wash (CP)

Bodywash (Original Source Lime/Tesco's Wake Up Lime Body Wash/ Sainsbury's Lime Body Wash)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	25 Jan 09 – 29 Nov 09	18 Apr 10 – 20 Feb 11
Period 2	27 Dec 09 – 28 Nov 10	20 Mar 11 – 19 Feb 12
Period 3	26 Dec 10 – 27 Nov 11	18 Mar 12

Whole Market								
	Lookalike				Control			
	Original Source		Tesco		Original Source		Sainsbury's	
	X	SD	x	SD	X	SD	x	SD
Period 1	177.25	74.49847	0	0	166.2308	104.6734	0	0
Period 2	128.3077	77.54932	18.84615	10.463	195.3077	106.8514	9.923077	7.146812
Period 3	214	108.8033	19.84615	12.73346	-	-	-	-

Supermarket								
	Lookalike				Control			
	Original Source		Tesco		Original Source		Sainsbury's	
	X	SD	x	SD	x	SD	x	SD
Period 1	84	74.91692	0	0	36.84615	43.41437	0	0
Period 2	38.61538	36.60496	18.84615	10.463	39.07692	31.97515	9.923077	7.146812
Period 3	59.15385	53.84986	19.84615	12.73346	-	-	-	-

Bodywash (Original Source Lime/Tesco's Wake Up Lime Body Wash/ Sainsbury's Lime Body Wash)

Volume ('000) – Correlations

Pearson's Correlation (r)

R	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	-0.81289	-0.11946	-0.1215	-0.62106
12m	11	-0.42133	-0.27932	-0.33062	-0.26837
All	25	-0.09198	-0.1175	-	-

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	-0.15329	0.10505	13	-0.18982	-0.36314

Kendall's tau b

n	Lookalike		N	Control	
	Whole	S/Market		Whole	S/Market
26	-0.12404	0.06822	13	-0.11613	-0.27097

Bodywash (Original Source Lime/Tesco's Wake Up Lime Body Wash/ Sainsbury's Lime Body Wash) –

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
25 Jan 09	212	0	158	0	18 Apr 10	39	0	6	0
22 Feb 09	153	0	49	0	16 May 10	163	0	11	0
22 Mar 09	199	0	55	0	13 Jun 10	113	0	12	0
19 Apr 09	80	0	13	0	11 Jul 10	122	0	29	0
17 May 09	164	0	112	0	08 Aug 10	248	0	21	0
14 Jun 09	154	0	91	0	05 Sep 10	223	0	129	0
12 Jul 09	265	0	202	0	03 Oct 10	256	0	10	0
09 Aug 09	315	0	51	0	31 Oct 10	294	0	61	0
06 Sep 09	224	0	82	0	28 Nov 10	113	0	16	0
04 Oct 09	115	0	43	0	26 Dec 10	127	0	11	0
01 Nov 09	257	0	163	0	23 Jan 11	403	0	66	0
29 Nov 09	280	0	47	0	20 Feb 11	295	0	108	0
27 Dec 09	168	3	50	3	20 Mar 11	246	0	59	0
24 Jan 10	119	7	18	7	17 Apr 11	162	2	66	2
21 Feb 10	205	11	68	11	15 May 11	384	4	98	4
21 Mar 10	135	16	58	16	12 Jun 11	149	11	19	11
18 Apr 10	45	33	17	33	10 Jul 11	383	7	81	7
16 May 10	167	18	104	18	07 Aug 11	192	5	51	5
13 Jun 10	130	26	37	26	04 Sep 11	391	8	34	8
11 Jul 10	137	38	48	38	02 Oct 11	269	15	93	15
08 Aug 10	258	25	82	25	30 Oct 11	111	20	13	20
05 Sep 10	201	16	7	16	27 Nov 11	173	10	12	10
03 Oct 10	252	17	37	17	25 Dec 11	192	10	24	10
31 Oct 10	305	8	140	8	22 Jan 12	351	5	49	5
28 Nov 10	107	27	40	27	19 Feb 12	119	1	23	1
26 Dec 10	123	14	58	14	18 Mar 12	232	10	51	10
23 Jan 11	366	6	38	6					
20 Feb 11	269	20	111	20					
20 Mar 11	252	14	122	14					
17 Apr 11	174	23	57	23					
15 May 11	370	6	161	6					

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
07 Aug 11	186	35	29	35					
04 Sep 11	386	24	157	24					
02 Oct 11	265	7	11	7					
30 Oct 11	101	18	12	18					
27 Nov 11	187	25	57	25					
25 Dec 11	209	17	59	17					

Original Source Lime (BP), Tesco's Wake Up Lime Body Wash (LP), Sainsbury's Lime Body Wash (CP)

Bodywash (Original Source Lime/Tesco's Wake Up Lime Body Wash/ Sainsbury's Lime Body Wash)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	25 Jan 09 – 29 Nov 09	18 Apr 10 – 20 Feb 11
Period 2	27 Dec 09 – 28 Nov 10	20 Mar 11 – 19 Feb 12
Period 3	26 Dec 10 – 27 Nov 11	18 Mar 12

Whole Market								
	Lookalike				Control			
	Original Source		Tesco		Original Source		Sainsbury's	
	X	SD	x	SD	x	SD	x	SD
Period 1	201.5	70.73574	0	0	203.2308	100.3578	0	0
Period 2	171.4615	71.28185	18.84615	10.463	239.0769	104.8590	8.307692	5.266001
Period 3	248.5385	103.5854	19.69231	12.65164	-	-	-	-

Supermarket								
	Lookalike				Control			
	Original Source		Tesco		Original Source		Sainsbury's	
	X	SD	x	SD	x	SD	x	SD
Period 1	88.83333	58.34355	0	0	41.46154	40.38897	0	0
Period 2	54.30769	37.18285	18.84615	10.463	47.23077	29.87238	8.307692	5.266001
Period 3	73.07692	51.74692	19.69231	12.65164	-	-	-	-

Pearson's Correlations (r)

R	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	-0.70789	-0.13572	0.013108	-0.69238
12m	11	-0.43577	-0.24491	-0.2193	-0.25477
All	25	-0.06407	-0.03191	-	-

Notes

The Sainsbury's Lime body wash's launch event was in April 2011 and so it was not possible to get data for the full 24 months after launch.

Cheese

(The Laughing Cow/Tenery Cheese (Lidl)/Tesco's Cheese Triangles)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
03 Mar 02	133	0	0	0	27 Apr 03	109(8)	13(27)	40(10)	13(27)
31 Mar 02	104	0	0	0	25 May 03	98(15)	21(7)	26(34)	21(7)
28 Apr 02	103	0	0	0	22 Jun 03	127(3)	15(19)	33(23)	15(19)
26 May 02	118	0	0	0	20 Jul 03	98(15)	14(24)	31(29)	14(24)
23 Jun 02	103	0	0	0	17 Aug 03	116(4)	18(12)	46(4)	18(12)
21 Jul 02	101	0	0	0	14 Sep 03	135(1)	15(19)	40(10)	15(19)
18 Aug 02	115	0	0	0	12 Oct 03	111(7)	12(29)	32(25)	12(29)
15 Sep 02	95	0	0	0	09 Nov 03	133(2)	15(19)	45(5)	15(19)
13 Oct 02	84	0	0	0	07 Dec 03	102(12)	17(16)	34(20)	17(16)
10 Nov 02	115	0	0	0	04 Jan 04	115(11)	25(4)	50(1)	25(4)
08 Dec 02	109	0	0	0	01 Feb 04	102(9)	14(24)	44(7)	14(24)
05 Jan 03	70	0	0	0	29 Feb 04	104(11)	17(16)	37(13)	17(16)
02 Feb 03	103	0	0	0	28 Mar 04	106(9)	14(24)	32(25)	14(24)
02 Mar 03	106	0	0	0	25 Apr 04	115(5)	19(10)	28(31)	19(10)
30 Mar 03	115	0	0	0	23 May 04	91(18)	18(12)	35(16)	18(12)
27 Apr 03	107(7)	36(22)	0(2)	36(22)	20 Jun 04	76(28)	18(12)	25(26)	18(12)
25 May 03	96(13)	59(9)	0(2)	59(9)	18 Jul 04	96(17)	13(27)	50(1)	13(27)
22 Jun 03	120(2)	35(23)	0(2)	35(23)	15 Aug 04	106(10)	17(16)	38(12)	17(16)
20 Jul 03	92(16)	53(13)	0(2)	53(13)	12 Sep 04	86(21)	21(7)	34(20)	21(7)
17 Aug 03	117(3)	37(21)	0(2)	37(21)	10 Oct 04	82(23)	18(12)	34(20)	18(12)
14 Sep 03	112(5)	39(19)	0(2)	39(19)	07 Nov 04	73(31)	21(7)	36(15)	21(7)
12 Oct 03	95(14)	42(17)	0(2)	42(17)	05 Dec 04	81(24)	15(19)	37(13)	15(19)
09 Nov 03	121(1)	39(19)	0(2)	39(19)	02 Jan 05	66(35)	15(19)	35(16)	15(19)
07 Dec 03	100(12)	41(18)	1(1)	41(18)	30 Jan 05	79(26)	23(6)	32(25)	23(6)
04 Jan 04	104(9)	50(14)	0(2)	50(14)	27 Feb 05	99(14)	44(1)	48(3)	44(1)
01 Feb 04	103(11)	50(14)	0(2)	50(14)	27 Mar 05	84(22)	24(5)	45(5)	24(5)
29 Feb 04	104(9)	55(11)	0(2)	55(11)	24 Apr 05	89(20)	19(10)	30(30)	19(10)
28 Mar 04	111(6)	58(10)	0(2)	58(10)	22 May 05	75(29)	26(3)	33(23)	26(3)
25 Apr 04	113(4)	81(3)	0(2)	81(3)	19 Jun 05	81(24)	30(2)	44(7)	30(2)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
18 Jul 04	94(15)	86(1)	0(2)	86(1)	11 Sep 05	91(18)	4(38)	43(9)	4(38)
15 Aug 04	106(8)	69(6)	0(2)	69(6)	09 Oct 05	73(31)	6(32)	32(25)	6(32)
12 Sep 04	91(17)	60(8)	0(2)	60(8)	06 Nov 05	79(26)	6(32)	35(16)	6(32)
10 Oct 04	87(18)	72(5)	0(2)	72(5)	04 Dec 05	74(30)	6(32)	35(16)	6(32)
07 Nov 04	74(20)	75(4)	0(2)	75(4)	01 Jan 06	63(38)	6(32)	28(31)	6(32)
05 Dec 04	73(21)	49(16)	0(2)	49(16)	29 Jan 06	65(37)	12(29)	23(37)	12(29)
02 Jan 05	64(22)	55(11)	0(2)	55(11)	26 Feb 06	66(36)	4(38)	20(38)	4(38)
					26 Mar 06	53(39)	6(32)	17(39)	6(32)

The Laughing Cow (BP), Tenery Cheese (Lidl) (LP), Tesco's Cheese Triangles (CP)

Cheese (The Laughing Cow/Tenery Cheese (Lidl)/Tesco's Cheese Triangles)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	03 Mar 02 – 30 Mar 03	27 Apr 03 – 28 Mar 04
Period 2	27 Apr 03 – 28 Mar 04	25 Apr 04 – 27 Mar 05
Period 3	25 Apr 04 – 02 Jan 05	24 Apr 05 – 26 Mar 06

Whole Market								
	Lookalike				Control			
	Laughing cow		Lidl		Laughing cow		Tesco	
	X	SD	X	SD	x	SD	X	SD
Period 1	104.2143	15.08019	0	0	112	12.6557	16.15385	3.555422
Period 2	106.6154	9.682789	45.69231	8.731023	87.23077	13.77893	20.46154	7.752584
Period 3	91.8	14.79339	69.8	12.37201	72.84615	10.55814	10.61538	8.742029

Supermarket								
	Lookalike				Control			
	Laughing cow		Lidl		Laughing cow		Tesco	
	X	SD	x	SD	x	SD	x	SD
Period 1	0	0	0	0	37.69231	7.110844	16.15385	3.555422
Period 2	0.076923	0.27735	45.69231	8.731023	36.69231	7.250111	20.46154	7.752584
Period 3	0	0	69.8	12.37201	30.23077	8.032785	10.61538	8.742029

Cheese (The Laughing Cow/Tenery Cheese (Lidl)/Tesco's Cheese Triangles)

Volume ('000) – Correlations

Volume ('000) Correlations (r)

R	Df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	0.356187	-	-	-
12m	11	0.076355	-0.16148	-	-
All	21	-0.31393	-0.20775	-	-
36m	37	-	-	0.27009	0.449926

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
23	-0.50458	-	39	0.27429	0.33735

Correlations Kendall's tau b

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
23	-0.36727	-	39	0.15046	0.23100

Cheese (The Laughing Cow/Tenery Cheese (Lidl)/Tesco's Cheese Triangles)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
03 Mar 02	396	0	0	0	27 Apr 03	321	30	110	30
31 Mar 02	299	0	0	0	25 May 03	271	49	74	49
28 Apr 02	304	0	0	0	22 Jun 03	376	35	92	35
26 May 02	347	0	0	0	20 Jul 03	279	34	86	34
23 Jun 02	304	0	0	0	17 Aug 03	332	42	130	42
21 Jul 02	300	0	0	0	14 Sep 03	365	35	114	35
18 Aug 02	348	0	0	0	12 Oct 03	303	30	91	30
15 Sep 02	283	0	0	0	09 Nov 03	371	34	128	34
13 Oct 02	246	0	0	0	07 Dec 03	286	40	93	40
10 Nov 02	339	0	0	0	04 Jan 04	334	59	141	59
08 Dec 02	319	0	0	0	01 Feb 04	297	34	123	34
05 Jan 03	208	0	0	0	29 Feb 04	291	40	105	40
02 Feb 03	304	0	0	0	28 Mar 04	305	33	90	33
02 Mar 03	315	0	0	0	25 Apr 04	322	46	79	46
30 Mar 03	334	0	0	0	23 May 04	254	44	97	44
27 Apr 03	314	51	0	51	20 Jun 04	222	43	70	43
25 May 03	266	83	0	83	18 Jul 04	258	30	126	30
22 Jun 03	352	50	0	50	15 Aug 04	261	40	105	40
20 Jul 03	264	76	0	76	12 Sep 04	227	50	85	50
17 Aug 03	333	52	0	52	10 Oct 04	209	44	85	44
14 Sep 03	306	54	0	54	07 Nov 04	189	52	90	52
12 Oct 03	271	59	0	59	05 Dec 04	213	36	91	36
09 Nov 03	346	54	0	54	02 Jan 05	171	36	88	36
07 Dec 03	281	58	3	58	30 Jan 05	207	40	79	40
04 Jan 04	301	70	0	70	27 Feb 05	256	76	120	76
01 Feb 04	301	70	0	70	27 Mar 05	217	40	111	40
29 Feb 04	289	77	0	77	24 Apr 05	233	33	74	33
28 Mar 04	318	82	0	82	22 May 05	198	45	82	45
25 Apr 04	316	112	0	112	19 Jun 05	210	52	110	52
23 May 04	260	90	0	90	17 Jul 05	169	13	68	13
20 Jun 04	219	113	0	113	14 Aug 05	184	9	64	9

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
18 Jul 04	252	115	0	115	11 Sep 05	231	7	107	7
15 Aug 04	260	93	0	93	09 Oct 05	191	10	80	10
12 Sep 04	242	80	0	80	06 Nov 05	205	10	87	10
10 Oct 04	224	96	0	96	04 Dec 05	188	10	87	10
07 Nov 04	192	102	0	102	01 Jan 06	165	11	69	11
05 Dec 04	193	65	0	65	29 Jan 06	170	21	58	21
02 Jan 05	167	74	0	74	26 Feb 06	170	7	50	7
					26 Mar 06	143	10	44	10

The Laughing Cow (BP), Tenery Cheese (Lidl) (LP), Tesco's Cheese Triangles (CP)

Cheese (The Laughing Cow/Tenery Cheese (Lidl)/Tesco's Cheese Triangles)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	03 Mar 02 – 30 Mar 03	27 Apr 03 – 28 Mar 04
Period 2	27 Apr 03 – 28 Mar 04	25 Apr 04 – 27 Mar 05
Period 3	25 Apr 04 – 02 Jan 05	24 Apr 05 – 26 Mar 06

Whole Market								
	Lookalike				Control			
	Laughing cow		Lidl		Laughing cow		Tesco	
	X	SD	x	SD	x	SD	x	SD
Period 1	309.7333	44.14985	0	0	317.7692	35.54376	38.07692	8.19005
Period 2	303.2308	29.02055	64.30769	12.37864	231.2308	38.84189	44.38462	11.1769
Period 3	232.5	43.0768	94	17.15291	189	26.33439	18.30769	15.19531

Supermarket								
	Lookalike				Control			
	Laughing cow		Lidl		Laughing cow		Tesco	
	x	SD	x	SD	x	SD	x	SD
Period 1	0	0	0	0	105.9231	20.25858	38.07692	8.19005
Period 2	0.230769	0.83205	64.30769	12.37864	94.30769	16.75005	44.38462	11.1769
Period 3	0	0	94	17.15291	75.38462	19.77177	18.30769	15.19531

Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	-0.90708	-	-	-
12m	11	-0.5718	-0.1531	-	-
All	21	-0.47442	-0.20192	-	-
36m	37	-	-	0.406151	0.489317

Notes

Tesco's Cheese Triangles, the control, was on sale when Kantar data on its barcode began and so the only comparison possible was to examine the effect of the control product on the brand leader during a 36 month of simultaneous sales. Furthermore, the brand leader was not on sale in the same supermarket as the lookalike and so this means there would be no side by side comparisons.

Razor

(Gillette Mach 3/Boots Blade 3/Morrison's Triple Blade)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
17 Aug 03	18	0	0	0	13 Jun 10	12	0	0	0
14 Sep 03	41	0	7	0	11 Jul 10	9	0	1	0
12 Oct 03	81	0	59	0	08 Aug 10	8	0	0	0
09 Nov 03	14	0	3	0	05 Sep 10	15	0	0	0
07 Dec 03	30	0	2	0	03 Oct 10	14	0	2	0
04 Jan 04	47	0	12	0	31 Oct 10	19	0	2	0
01 Feb 04	19	0	0	0	28 Nov 10	13	0	1	0
29 Feb 04	11	0	5	0	26 Dec 10	17	0	1	0
28 Mar 04	15	0	5	0	23 Jan 11	14	0	2	0
25 Apr 04	28	0	5	0	20 Feb 11	17	0	0	0
23 May 04	22	0	7	0	20 Mar 11	12	0	3	0
20 Jun 04	20	0	0	0	17 Apr 11	13	0	1	0
18 Jul 04	51	0	0	0	15 May 11	45	0	0	0
15 Aug 04	32(7)	25(1)	6(6)	25(1)	12 Jun 11	7(8)	1(3)	2(4)	1(3)
12 Sep 04	4(26)	3(2)	0(14)	3(2)	10 Jul 11	5(10)	1(3)	0(10)	1(3)
10 Oct 04	35(5)	0(14)	2(10)	0(14)	07 Aug 11	10(6)	0(7)	2(4)	0(7)
07 Nov 04	28(10)	0(14)	0(14)	0(14)	04 Sep 11	4(11)	2(1)	0(10)	2(1)
05 Dec 04	16(19)	3(7)	0(14)	3(7)	02 Oct 11	7(8)	1(3)	4(2)	1(3)
02 Jan 05	37(4)	0(14)	0(14)	0(14)	30 Oct 11	15(3)	0(7)	1(7)	0(7)
30 Jan 05	15(21)	12(2)	7(5)	12(2)	27 Nov 11	10(6)	0(7)	1(7)	0(7)
27 Feb 05	24(11)	0(14)	6(6)	0(14)	25 Dec 11	16(2)	0(7)	4(2)	0(7)
27 Mar 05	35(5)	6(4)	9(3)	6(4)	22 Jan 12	13(4)	2(1)	1(7)	2(1)
24 Apr 05	23(12)	0(14)	14(1)	0(14)	19 Feb 12	11(5)	0(7)	2(4)	0(7)
22 May 05	51(2)	4(5)	1(13)	4(5)	18 Mar 12	21(1)	1(3)	14(1)	1(3)
19 Jun 05	12(24)	3(7)	0(14)	3(7)					
17 Jul 05	54(1)	0(14)	5(9)	0(14)					
14 Aug 05	20(14)	4(5)	6(6)	4(5)					
11 Sep 05	38(3)	3(7)	12(2)	3(7)					
09 Oct 05	13(23)	0(14)	0(14)	0(14)					

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
01 Jan 06	21(13)	0(14)	0(14)	0(14)					
29 Jan 06	12(24)	0(14)	0(14)	0(14)					
26 Feb 06	19(16)	2(12)	0(14)	2(12)					
26 Mar 06	20(14)	0(14)	0(14)	0(14)					
23 Apr 06	17(18)	2(12)	8(4)	2(12)					
21 May 06	14(22)	0(14)	0(14)	0(14)					
18 Jun 06	32(7)	3(7)	2(10)	3(7)					
16 Jul 06	19(16)	0(14)	2(10)	0(14)					

Gillette Mach 3(BP), Boots Blade 3 (LP), Morrison's Triple Blade (CP)

Razor (Gillette Mach 3/Boots Blade 3/Morrison's Triple Blade)

Volume ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	17 Aug 03 – 18 Jul 04	13 Jun 10 – 15 May 11
Period 2	15 Aug 04 – 17 Jul 05	12 Jun 11 – 18 Mar 12
Period 3	14 Aug 05 – 16 Aug 06	-

	Whole Market							
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	x	SD	x	SD
Period 1	30.53846	19.83942	0	0	16	9.237604	0	0
Period 2	28.15385	14.67904	4.307692	7.110844	10.81818	5.134553	0.727273	0.786245
Period 3	21	8.041559	1.846154	2.853248	-	-	-	-

	Supermarket							
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	x	SD	x	SD
Period 1	8.076923	15.71338	0	0	1	1	0	0
Period 2	3.846154	4.43182	4.307692	7.110844	2.818182	3.945077	0.727273	0.786245
Period 3	2.307692	3.902662	1.846154	2.853248	-	-	-	-

Razor (Gillette Mach 3/Boots Blade 3/Morrison's Triple Blade)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	0.118424	0.913097	-0.86347	-0.26278
12m (11m)	11(9)	-0.06915	0.202596	-0.31076	-0.01759
All	24	0.124174	0.22505	-0.31076	-0.01759

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	0.27515	0.26622	11	-0.39905	-0.26352

Correlations Kendall's tau b

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	0.00728	0.20877	11	-0.35653	-0.18930

Razor (Gillette Mach 3/Boots Blade 3/Morrison's Triple Blade)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
17 Aug 03	57	0	0	0	13 Jun 10	64	0	0	0
14 Sep 03	135	0	29	0	11 Jul 10	44	0	9	0
12 Oct 03	296	0	228	0	08 Aug 10	40	0	0	0
09 Nov 03	42	0	9	0	05 Sep 10	69	0	0	0
07 Dec 03	93	0	6	0	03 Oct 10	91	0	15	0
04 Jan 04	154	0	35	0	31 Oct 10	97	0	12	0
01 Feb 04	57	0	0	0	28 Nov 10	72	0	9	0
29 Feb 04	34	0	15	0	26 Dec 10	81	0	7	0
28 Mar 04	46	0	16	0	23 Jan 11	66	0	11	0
25 Apr 04	108	0	21	0	20 Feb 11	97	0	0	0
23 May 04	82	0	28	0	20 Mar 11	70	0	22	0
20 Jun 04	75	0	0	0	17 Apr 11	74	0	9	0
18 Jul 04	199	0	0	0	15 May 11	238	0	0	0
15 Aug 04	117	84	23	84	12 Jun 11	42	4	13	4
12 Sep 04	13	9	0	9	10 Jul 11	26	2	0	2
10 Oct 04	124	0	9	0	07 Aug 11	60	0	17	0
07 Nov 04	97	0	0	0	04 Sep 11	32	5	0	5
05 Dec 04	55	9	0	9	02 Oct 11	48	3	29	3
02 Jan 05	132	0	0	0	30 Oct 11	100	0	11	0
30 Jan 05	52	38	23	38	27 Nov 11	60	0	7	0
27 Feb 05	88	0	24	0	25 Dec 11	96	0	31	0
27 Mar 05	123	21	34	21	22 Jan 12	92	7	7	7
24 Apr 05	94	0	61	0	19 Feb 12	76	0	18	0
22 May 05	177	14	6	14	18 Mar 12	166	4	108	4
19 Jun 05	50	10	0	10					
17 Jul 05	197	0	17	0					
14 Aug 05	79	12	23	12					
11 Sep 05	146	10	48	10					
09 Oct 05	48	0	0	0					
06 Nov 05	63	0	0	0					
04 Dec 05	129	34	0	34					
01 Jan 06	78	0	0	0					

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
29 Jan 06	44	0	0	0					
26 Feb 06	73	8	0	8					
21 May 06	62	0	0	0					
18 Jun 06	140	10	8	10					
16 Jul 06	84	0	9	0					

Gillette Mach 3(BP), Boots Blade 3 (LP), Morrison's Triple Blade (CP)

Razor (Gillette Mach 3/Boots Blade 3/Morrison's Triple Blade)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	17 Aug 03 – 18 Jul 04	13 Jun 10 – 15 May 11
Period 2	15 Aug 04 – 17 Jul 05	12 Jun 11 – 18 Mar 12
Period 3	14 Aug 05 – 16 Aug 06	-

	Whole Market							
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	x	SD	x	SD
Period 1	106	74.88102	0	0	84.84615	49.18307	0	0
Period 2	101.4615	51.89351	14.23077	23.74571	72.54545	40.11076	2.272727	2.493628
Period 3	84.53846	33.20295	6.307692	9.621024	-	-	-	-

	Supermarket							
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	x	SD	x	SD
Period 1	29.76923	60.79495	0	0	7.230769	6.989919	0	0
Period 2	15.15385	18.10086	14.23077	23.74571	21.90909	30.30991	2.272727	2.493628
Period 3	9.384615	15.78258	6.307692	9.621024	-	-	-	-

Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	0.167743	0.894219	-0.70664	-0.21448
12m (11m)	11(9)	-0.05365	0.155209	0.01836	0.095622
All	24	0.124935	0.186758	0.01836	0.095622

Notes

The number of units of razors sold was very small indeed both the lookalike and the control had periods where "no" sales were recorded. This may significantly distort any statistical analysis.

Washing Up Liquid

(Fairy Lemon Washing Up Liquid/Aldi Lemon Washing Up Liquid/Tesco Citrus Washing Up Liquid)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
03 Feb 02	560	0	0	0	28 May 00	0	0	0	0
03 Mar 02	363	0	0	0	25 Jun 00	0	0	0	0
31 Mar 02	133	0	0	0	23 Jul 00	0	0	0	0
28 Apr 02	145	0	0	0	20 Aug 00	0	0	0	0
26 May 02	104	0	0	0	17 Sep 00	0	0	0	0
23 Jun 02	152	0	0	0	15 Oct 00	0	0	0	0
21 Jul 02	213	0	0	0	12 Nov 00	56	0	10	0
18 Aug 02	220	0	0	0	10 Dec 00	277	0	83	0
15 Sep 02	153	0	0	0	07 Jan 01	567	0	66	0
13 Oct 02	138	0	0	0	04 Feb 01	184	0	74	0
10 Nov 02	86(27)	35(22)	0	35(22)	04 Mar 01	623	0	77	0
08 Dec 02	93(25)	48(16)	0	48(16)	01 Apr 01	187	0	113	0
05 Jan 03	195(3)	19(28)	0	19(28)	29 Apr 01	232	0	104	0
02 Feb 03	147(15)	17(29)	0	17(29)	27 May 01	240(9)	184(7)	101(8)	184(7)
02 Mar 03	280(1)	38(21)	0	38(21)	24 Jun 01	337(6)	146(10)	237(2)	146(10)
30 Mar 03	212(4)	30(27)	0	30(27)	22 Jul 01	400(2)	129(14)	308(1)	129(14)
27 Apr 03	240(2)	31(26)	0	31(26)	19 Aug 01	248(8)	398(1)	170(3)	398(1)
25 May 03	156(13)	35(23)	0	35(23)	16 Sep 01	193(12)	128(15)	93(10)	128(15)
22 Jun 03	162(11)	63(10)	0	63(10)	14 Oct 01	367(4)	124(17)	74(14)	124(17)
20 Jul 03	168(10)	33(25)	0	33(25)	11 Nov 01	160(13)	227(2)	59(16)	227(2)
17 Aug 03	108(23)	36(22)	0	36(22)	09 Dec 01	306(7)	217(3)	104(7)	217(3)
14 Sep 03	114(22)	43(19)	0	43(19)	06 Jan 02	377(3)	213(4)	154(4)	213(4)
12 Oct 03	197(5)	41(20)	0	41(20)	03 Feb 02	535(1)	134(13)	140(6)	134(13)
09 Nov 03	217(3)	84(4)	0	84(4)	03 Mar 02	363(5)	115(18)	144(5)	115(18)
07 Dec 03	173(9)	77(5)	0	77(5)	31 Mar 02	132(18)	102(19)	46(18)	102(19)
04 Jan 04	157(12)	61(11)	0	61(11)	28 Apr 02	141(16)	132(11)	58(17)	132(11)
01 Feb 04	81(28)	44(18)	0	44(18)	26 May 02	105(19)	211(5)	44(19)	211(5)
29 Feb 04	90(26)	47(17)	0	47(17)	23 Jun 02	150(13)	153(9)	77(13)	153(9)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Super- market only	
	BP	LP	BP	LP		BP	CP	BP	CP
23 May 04	183(7)	95(3)	0	95(3)	15 Sep 02	155(14)	134(11)	95(9)	134(11)
20 Jun 04	134(18)	77(5)	0	77(5)	13 Oct 02	138(17)	126(16)	69(15)	126(16)
18 Jul 04	174(8)	56(14)	0	56(14)	10 Nov 02	84(20)	200(6)	30(20)	200(6)
15 Aug 04	148(14)	100(2)	0	100(2)					
12 Sep 04	132(19)	76(7)	0	76(7)					
10 Oct 04	116(21)	65(9)	0	65(9)					
07 Nov 04	98(24)	66(8)	0	66(8)					
05 Dec 04	136(17)	112(1)	0	112(1)					
02 Jan 05	73(29)	60(12)	0	60(12)					

Fairy Lemon Washing Up Liquid (BP), Aldi Lemon Washing Up Liquid (LP), Tesco Citrus Washing Up Liquid (CP)

Washing Up Liquid (Fairy Lemon Washing Up Liquid/Aldi Lemon Washing Up Liquid/ Tesco Citrus Washing Up Liquid)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	03 Feb 02 – 13 Oct 02	28 May 00 – 29 Apr 01
Period 2	10 Nov 02 – 12 Oct 03	27 May 01 – 28 Apr 02
Period 3	09 Nov 03 – 10 Oct 04	26 May 02 – 10 Nov 02

Whole Market								
	Lookalike				Control			
	Fairy		Aldi		Fairy		Tesco	
	x	SD	x	SD	x	SD	x	SD
Period 1	218.1	140.8502	0	0	163.5385	216.8812	0	0
Period 2	166	58.21512	36.07692	11.80721	292.2308	119.4049	173	79.52777
Period 3	144.4615	37.46024	68.92308	17.54262	152.2857	50.84196	154.2857	40.98664

Supermarket								
	Lookalike				Control			
	Fairy		Aldi		Fairy		Tesco	
	x	SD	x	SD	x	SD	x	SD
Period 1	0	0	0	0	40.53846	45.61728	0	0
Period 2	0	0	36.07692	11.80721	129.8462	75.77802	173	79.52777
Period 3	0	0	68.92308	17.54262	68.28571	23.07751	154.2857	40.98664

Washing Up Liquid (Fairy Lemon Washing Up Liquid/Aldi Lemon Washing Up Liquid/ Tesco Citrus Washing Up Liquid)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	Df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	-0.20266	-	-0.36689	-0.00067
12m	11	-0.20113	-	-0.13001	0.083866
All	27(18)	-0.10386	-	-0.07691	0.077762

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
29	-0.13173	-	20	-0.06020	0.06318

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n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
29	-0.05700	-	20	-0.01058	0.05805

Washing Up Liquid (Fairy Lemon Washing Up Liquid/Aldi Lemon Washing Up Liquid/ Tesco Citrus Washing Up Liquid)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
03 Feb 02	702	0	0	0	28 May 00	0	0	0	0
03 Mar 02	493	0	0	0	25 Jun 00	0	0	0	0
31 Mar 02	222	0	0	0	23 Jul 00	0	0	0	0
28 Apr 02	239	0	0	0	20 Aug 00	0	0	0	0
26 May 02	175	0	0	0	17 Sep 00	0	0	0	0
23 Jun 02	252	0	0	0	15 Oct 00	0	0	0	0
21 Jul 02	337	0	0	0	12 Nov 00	89	0	15	0
18 Aug 02	341	0	0	0	10 Dec 00	364	0	120	0
15 Sep 02	258	0	0	0	07 Jan 01	616	0	95	0
13 Oct 02	233	0	0	0	04 Feb 01	278	0	129	0
10 Nov 02	144	26	0	26	04 Mar 01	658	0	130	0
08 Dec 02	154	36	0	36	01 Apr 01	309	0	186	0
05 Jan 03	295	14	0	14	29 Apr 01	397	0	174	0
02 Feb 03	228	13	0	13	27 May 01	411	127	170	127
02 Mar 03	421	29	0	29	24 Jun 01	577	102	402	102
30 Mar 03	351	22	0	22	22 Jul 01	671	88	512	88
27 Apr 03	393	22	0	22	19 Aug 01	420	269	285	269
25 May 03	251	23	0	23	16 Sep 01	321	87	156	87
22 Jun 03	263	41	0	41	14 Oct 01	510	80	124	80
20 Jul 03	272	22	0	22	11 Nov 01	267	126	99	126
17 Aug 03	176	23	0	23	09 Dec 01	455	148	187	148
14 Sep 03	189	28	0	28	06 Jan 02	532	149	257	149
12 Oct 03	331	27	0	27	03 Feb 02	715	92	244	92
09 Nov 03	349	54	0	54	03 Mar 02	535	78	249	78
07 Dec 03	285	49	0	49	31 Mar 02	219	69	78	69
04 Jan 04	258	40	0	40	28 Apr 02	233	89	98	89
01 Feb 04	132	29	0	29	26 May 02	175	124	73	124
29 Feb 04	153	30	0	30	23 Jun 02	248	104	129	104
28 Mar 04	223	38	0	38	21 Jul 02	338	110	136	110
25 Apr 04	220	36	0	36	18 Aug 02	370	65	139	65
23 May 04	293	62	0	62	15 Sep 02	261	91	159	91

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
15 Aug 04	227	64	0	64					
12 Sep 04	193	49	0	49					
10 Oct 04	187	42	0	42					
07 Nov 04	163	43	0	43					
05 Dec 04	224	73	0	73					
02 Jan 05	114	39	0	39					

Fairy Lemon Washing Up Liquid (BP), Aldi Lemon Washing Up Liquid (LP), Tesco Citrus Washing Up Liquid (CP)

Washing Up Liquid (Fairy Lemon Washing Up Liquid/Aldi Lemon Washing Up Liquid/

Tesco Citrus Washing Up Liquid)

Value ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	03 Feb 02 – 13 Oct 02	28 May 00 – 29 Apr 01
Period 2	10 Nov 02 – 12 Oct 03	27 May 01 – 28 Apr 02
Period 3	09 Nov 03 – 10 Oct 04	26 May 02 – 10 Nov 02

Whole Market								
	Lookalike				Control			
	Fairy		Aldi		Fairy		Tesco	
	x	SD	x	SD	x	SD	x	SD
Period 1	325.2	159.701	0	0	208.5385	244.5852	0	0
Period 2	266.7692	89.26006	25.07692	7.675302	451.2308	159.622	115.6923	53.08544
Period 3	231.1538	60.03866	44.53846	11.22212	252.1429	81.90529	102.2857	23.99107

Supermarket								
	Lookalike				Control			
	Fairy		Aldi		Fairy		Tesco	
	x	SD	x	SD	x	SD	x	SD
Period 1	0	0	0	0	65.30769	74.5077	0	0
Period 2	0	0	25.07692	7.675302	220.0769	126.4875	115.6923	53.08544
Period 3	0	0	44.53846	11.22212	114.5714	39.02502	102.2857	23.99107

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wks	4	-0.17457	-	-0.29268	0.015296
12m	11	-0.14484	-	-0.03183	0.139351
All	27(18)	-0.09196	-	-0.00054	0.136214

Notes

The data provided by Kantar, in relation to the control, includes a period before the launch of the brand leader. This has meant the sales data after the "launch event" is more restricted than should be the case.

Shampoo

(Head & Shoulders/Boots Anti-Dandruff/Sainsbury's Anti-Dandruff)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
04 Dec 05	204(17)	0(27)	6(29)	0(27)	04 Oct 09	811	0	90	0
01 Jan 06	183(27)	7(11)	4(34)	7(11)	01 Nov 09	818	0	72	0
29 Jan 06	158(35)	0(27)	8(26)	0(27)	29 Nov 09	905	0	113	0
26 Feb 06	180(29)	0(27)	5(32)	0(27)	27 Dec 09	855	0	220	0
26 Mar 06	210(15)	14(3)	21(9)	14(3)	24 Jan 10	999	0	241	0
23 Apr 06	170(33)	15(1)	4(34)	15(1)	21 Feb 10	1147	0	261	0
21 May 06	186(26)	15(1)	25(8)	15(1)	21 Mar 10	1057	0	200	0
18 Jun 06	187(24)	4(16)	15(18)	4(16)	18 Apr 10	891	0	198	0
16 Jul 06	248(5)	2(22)	33(3)	2(22)	16 May 10	948	0	239	0
13 Aug 06	172(32)	14(3)	6(29)	14(3)	13 Jun 10	972	0	258	0
10 Sep 06	268(3)	3(20)	19(11)	3(20)	11 Jul 10	885	0	265	0
08 Oct 06	153(38)	4(16)	12(22)	4(16)	08 Aug 10	675	0	142	0
05 Nov 06	227(10)	2(22)	41(1)	2(22)	05 Sep 10	632	0	160	0
03 Dec 06	230(8)	2(22)	6(29)	2(22)	03 Oct 10	793	0	225	0
31 Dec 06	161(34)	0(27)	11(24)	0(27)	31 Oct 10	685(1)	11(16)	212(1)	11(16)
28 Jan 07	232(7)	6(14)	14(21)	6(14)	28 Nov 10	609(4)	33(14)	141(5)	33(14)
25 Feb 07	198(18)	0(27)	17(15)	0(27)	26 Dec 10	523(17)	57(10)	68(12)	57(10)
25 Mar 07	229(9)	12(6)	16(16)	12(6)	23 Jan 11	560(12)	65(6)	89(15)	65(6)
22 Apr 07	193(21)	0(27)	18(13)	0(27)	20 Feb 11	580(11)	69(4)	150(3)	69(4)
20 May 07	251(4)	4(16)	26(7)	4(16)	20 Mar 11	510(18)	78(1)	129(8)	78(1)
17 Jun 07	215(14)	1(26)	16(16)	1(26)	17 Apr 11	590(9)	74(2)	126(9)	74(2)
15 Jul 07	193(21)	0(27)	27(6)	0(27)	15 May 11	540(14)	59(8)	59(20)	59(8)
12 Aug 07	189(23)	2(22)	30(4)	2(22)	12 Jun 11	583(10)	56(12)	97(14)	56(12)
09 Sep 07	241(6)	3(20)	15(18)	3(20)	10 Jul 11	491(20)	60(7)	101(13)	60(7)
07 Oct 07	217(13)	8(10)	19(11)	8(10)	07 Aug 11	596(7)	70(3)	119(10)	70(3)
04 Nov 07	176(30)	14(3)	4(34)	14(3)	04 Sep 11	537(15)	59(8)	77(16)	59(8)
02 Dec 07	195(19)	12(6)	8(26)	12(6)	02 Oct 11	532(16)	68(5)	60(19)	68(5)
30 Dec 07	218(11)	9(9)	11(24)	9(9)	30 Oct 11	593(8)	57(11)	138(7)	57(11)
27 Jan 08	174(31)	0(27)	35(2)	0(27)	27 Nov 11	619(3)	39(13)	144(4)	39(13)
24 Feb 08	154(37)	7(11)	5(32)	7(11)	25 Dec 11	599(6)	11(16)	156(2)	11(16)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
18 May 08	273(2)	4(16)	12(23)	4(16)	18 Mar 12	624(2)	9(18)	117(11)	9(18)
15 Jun 08	156(36)	11(8)	18(13)	11(8)	15 Apr 12	600(5)	33(15)	141(5)	33(15)
13 Jul 08	182(28)	0(27)	20(10)	0(27)					
10 Aug 08	195(19)	0(27)	15(18)	0(27)					
07 Sep 08	187(24)	0(27)	13(22)	0(27)					
05 Oct 08	209(16)	0(27)	29(5)	0(27)					
02 Nov 08	274(1)	0(27)	4(34)	0(27)					

Head & Shoulders (BP), Boots Anti-Dandruff (LP), Sainsbury's Anti-Dandruff (CP)

Shampoo (Head & Shoulders/Boots Anti-Dandruff/Sainsbury's Anti-Dandruff)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	04 Dec 05 – 05 Nov 06	04 Oct 09 – 03 Oct 10
Period 2	03 Dec 06 – 04 Nov 07	31 Oct 10 – 02 Oct 11
Period 3	02 Dec 07 – 02 Nov 08	30 Oct 11 – 15 Apr 12

Whole Market								
	Lookalike				Control			
	Head & Shoulders		Boots		Head & Shoulders		Sainsbury's	
	x	SD	x	SD	x	SD	x	SD
Period 1	195.8462	34.47184	6.153846	6.108002	884.5871	138.8513	0	0
Period 2	209.6154	26.89343	4	4.708149	564.3077	51.0333	58.38462	18.05796
Period 3	199	39.89152	4.230769	4.585373	584.5714	43.59991	21.28571	21.94474

Supermarket								
	Lookalike				Control			
	Head & Shoulders		Boots		Head & Shoulders		Sainsbury's	
	x	SD	x	SD	x	SD	x	SD
Period 1	15.30769	11.947	6.153846	6.108002	191.7143	65.39634	0	0
Period 2	16.84615	7.61409	4	4.708149	109.8462	43.11582	58.38462	18.05796
Period 3	14.23077	9.283981	4.230769	4.585373	126	27.38613	21.28571	21.94474

Shampoo (Head & Shoulders/Boots Anti-Dandruff/Sainsbury's Anti-Dandruff)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	Df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-	-	-0.89364	-0.64184
12m	11	-	-	-0.67454	-0.54214
19m	18	-	-	-0.3331	-0.29606
36m	37	-0.17182	-0.24137	-	-

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
39	-0.08142	-0.20865	20	-0.36432	-0.14727

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
39	-0.03925	-0.16621	20	-0.25996	-0.112

Shampoo (Head & Shoulders/Boots Anti-Dandruff/Sainsbury's Anti-Dandruff)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
04 Dec 05	592	0	13	0	04 Oct 09	1788	0	244	0
01 Jan 06	504	16	6	16	01 Nov 09	1663	0	185	0
29 Jan 06	483	0	24	0	29 Nov 09	1848	0	204	0
26 Feb 06	489	0	16	0	27 Dec 09	1691	0	409	0
26 Mar 06	531	31	42	31	24 Jan 10	2064	0	500	0
23 Apr 06	481	32	12	32	21 Feb 10	2497	0	619	0
21 May 06	525	33	73	33	21 Mar 10	2333	0	539	0
18 Jun 06	496	10	26	10	18 Apr 10	2088	0	491	0
16 Jul 06	644	4	66	4	16 May 10	1809	0	409	0
13 Aug 06	427	31	16	31	13 Jun 10	1888	0	445	0
10 Sep 06	641	7	44	7	11 Jul 10	1781	0	442	0
08 Oct 06	410	8	27	8	08 Aug 10	1718	0	371	0
05 Nov 06	550	4	92	4	05 Sep 10	1657	0	424	0
03 Dec 06	644	5	27	5	03 Oct 10	2000	0	609	0
31 Dec 06	440	0	22	0	31 Oct 10	1696	9	564	9
28 Jan 07	524	11	27	11	28 Nov 10	1559	23	386	23
25 Feb 07	494	0	44	0	26 Dec 10	1439	38	227	38
25 Mar 07	624	23	37	23	23 Jan 11	1615	44	291	44
22 Apr 07	480	0	45	0	20 Feb 11	1689	50	482	50
20 May 07	646	10	59	10	20 Mar 11	1495	60	424	60
17 Jun 07	546	3	40	3	17 Apr 11	1754	57	405	57
15 Jul 07	456	0	10	0	15 May 11	1671	45	195	45
12 Aug 07	489	5	85	5	12 Jun 11	1886	48	314	48
09 Sep 07	637	3	35	3	10 Jul 11	1696	50	329	50
07 Oct 07	573	8	70	8	07 Aug 11	1994	59	383	59
04 Nov 07	443	13	15	13	04 Sep 11	1797	45	262	45
02 Dec 07	519	12	29	12	02 Oct 11	1733	52	206	52
30 Dec 07	569	9	36	9	30 Oct 11	1901	43	391	43
27 Jan 08	477	0	89	0	27 Nov 11	1962	30	404	30
24 Feb 08	422	7	12	7	25 Dec 11	2018	8	455	8
23 Mar 08	393	7	25	7	22 Jan 12	1843	0	282	0

<i>4 week period ending</i>	<i>Lookalike</i>				<i>4 week period ending</i>	<i>Control</i>			
	<i>Whole market</i>		<i>Supermarket only</i>			<i>Whole market</i>		<i>Supermarket only</i>	
	<i>BP</i>	<i>LP</i>	<i>BP</i>	<i>LP</i>		<i>BP</i>	<i>CP</i>	<i>BP</i>	<i>CP</i>
15 Jun 08	382	11	46	11	15 Apr 12	2147	25	461	25
13 Jul 08	533	0	52	0					
10 Aug 08	544	0	41	0					
07 Sep 08	465	0	34	0					
05 Oct 08	563	0	77	0					
02 Nov 08	688	0	9	0					

Head & Shoulders (BP), Boots Anti-Dandruff (LP), Sainsbury's Anti-Dandruff (CP)

Shampoo (Head & Shoulders/Boots Anti-Dandruff/Sainsbury's Anti-Dandruff)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	04 Dec 05 – 05 Nov 06	04 Oct 09 – 03 Oct 10
Period 2	03 Dec 06 – 04 Nov 07	31 Oct 10 – 02 Oct 11
Period 3	02 Dec 07 – 02 Nov 08	30 Oct 11 – 15 Apr 12

	Whole Market							
	Lookalike				Control			
	Head & Shoulders		Boots		Head & Shoulders		Sainsbury's	
	x	SD	x	SD	x	SD	x	SD
Period 1	521	71.68566	13.53846	13.39537	1916.071	254.5553	0	0
Period 2	538.1538	78.8647	6.230769	6.747269	1694.154	150.6231	44.61538	14.43687
Period 3	523	96.28517	4.230769	4.585373	2035.857	146.7531	16.14286	16.64761

	Supermarket							
	Lookalike				Control			
	Head & Shoulders		Boots		Head & Shoulders		Sainsbury's	
	x	SD	x	SD	x	SD	x	SD
Period 1	35.15385	26.81059	13.53846	13.39537	420.7857	130.3467	0	0
Period 2	39.69231	21.49955	6.230769	6.747269	343.6923	110.469	44.61538	14.43687
Period 3	37.76923	23.85775	4.230769	4.585373	403	59.34082	16.14286	16.64761

Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-	-	-0.35099	-0.3232
12m	11	-	-	0.288637	-0.3102
19m	18	-	-	-0.47425	-0.31961
36m	37	-0.12168	-0.08212	-	-

Notes

N/A

Drinks

(Red Bull/Asda Blue Charge/Mixed Up (Lidl))

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
27 Jun 99	427	0	36	0	07 Oct 07	334	0	0	0
25 Jul 99	331	0	55	0	04 Nov 07	279	0	1	0
22 Aug 99	491	0	32	0	02 Dec 07	395	0	0	0
19 Sep 99	587	0	138	0	30 Dec 07	312	0	0	0
17 Oct 99	424	0	81	0	27 Jan 08	325	0	11	0
14 Nov 99	503	0	97	0	24 Feb 08	464	0	14	0
12 Dec 99	454	0	99	0	23 Mar 08	357	0	11	0
09 Jan 00	1082	0	131	0	20 Apr 08	349	0	10	0
06 Feb 00	642	0	144	0	18 May 08	356	0	36	0
05 Mar 00	749	0	80	0	15 Jun 08	422	0	57	0
02 Apr 00	953	0	207	0	13 Jul 08	426	0	52	0
30 Apr 00	974	0	183	0	10 Aug 08	271	0	56	0
28 May 00	1275	0	139	0	07 Sep 08	307	0	25	0
25 Jun 00	1173(2)	119(3)	197(2)	119(3)	05 Oct 08	405(8)	57(5)	30(11)	57(5)
23 Jul 00	840(8)	119(3)	238(1)	119(3)	02 Nov 08	272(19)	29(10)	11(23)	29(10)
20 Aug 00	974(4)	243(1)	67(12)	243(1)	30 Nov 08	304(16)	73(3)	10(24)	73(3)
17 Sep 00	837(9)	138(2)	139(3)	138(2)	28 Dec 08	218(26)	45(6)	10(24)	45(6)
15 Oct 00	1077(3)	97(6)	136(4)	97(6)	25 Jan 09	283(18)	43(7)	21(17)	43(7)
12 Nov 00	1347(1)	80(8)	94(6)	80(8)	22 Feb 09	393(10)	88(1)	32(10)	88(1)
10 Dec 00	966(6)	34(20)	73(10)	34(20)	22 Mar 09	451(6)	41(8)	27(12)	41(8)
07 Jan 01	969(5)	101(5)	76(9)	101(5)	19 Apr 09	382(11)	65(4)	24(14)	65(4)
04 Feb 01	631(19)	62(10)	48(19)	62(10)	17 May 09	473(5)	36(9)	67(1)	36(9)
04 Mar 01	648(17)	19(23)	63(14)	19(23)	14 Jun 09	620(1)	16(15)	26(13)	16(15)
01 Apr 01	814(10)	44(19)	72(11)	44(19)	12 Jul 09	255(22)	18(14)	14(21)	18(14)
29 Apr 01	853(7)	59(11) (11)	88(8)	59(11) (11)	09 Aug 09	234(23)	26(11)	36(8)	26(11)
27 May 01	680(13)	53(15)	40(23)	53(15)	06 Sep 09	337(14)	0(20)	18(19)	0(20)
24 Jun 01	612(22)	68(9)	62(15)	68(9)	04 Oct 09	230(25)	77(2)	34(9)	77(2)
22 Jul 01	780(11)	48(16)	114(5)	48(16)	01 Nov 09	234(23)	15(16)	10(24)	15(16)
19 Aug 01	618(21)	19(23)	48(19)	19(23)	29 Nov 09	341(13)	22(12)	14(21)	22(12)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
11 Nov 01	574(24)	58(12)	35(25)	58(12)	21 Feb 10	372(12)	10(18)	54(4)	10(18)
09 Dec 01	658(15)	54(14)	61(17)	54(14)	21 Mar 10	522(2)	0(20)	61(3)	0(20)
06 Jan 02	649(16)	13(26)	92(7)	13(26)	18 Apr 10	269(20)	0(20)	54(4)	0(20)
03 Feb 02	675(14)	18(25)	36(24)	18(25)	16 May 10	397(9)	1(19)	46(6)	1(19)
03 Mar 02	612(22)	46(18)	41(22)	46(18)	13 Jun 10	287(17)	0(20)	22(15)	0(20)
31 Mar 02	567(25)	57(13)	57(18)	57(13)	11 Jul 10	502(3)	0(20)	67(1)	0(20)
28 Apr 02	748(12)	34(20)	62(15)	34(20)	08 Aug 10	451(6)	0(20)	22(15)	0(20)
26 May 02	430(26)	86(7)	12(26)	86	05 Sep 10	478(4)	0(20)	45(7)	0(20)

Red Bull (BP), Asda Blue Charge (LP), Mixed Up (Lidl) (CP)

Drinks (Red Bull/Asda Blue Charge/Mixed Up (Lidl))

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	27 Jun 99 – 28 May 00	07 Oct 07 – 07 Sep 08
Period 2	25 Jun 00 – 27 May 01	05 Oct 08 – 06 Sep 09
Period 3	24 Jun 01 – 26 May 02	04 Oct 09 – 05 Sep 10

	Whole Market							
	Lookalike				Control			
	Red Bull		Asda		Red Bull		Lidl	
	x	SD	x	SD	x	SD	x	SD
Period 1	684	297.309	0	0	353.6154	58.7034	0	0
Period 2	908.3846	208.3237	89.84615	58.50334	355.9231	114.1764	41.30769	24.68598
Period 3	629.3077	85.4092	44.07692	21.60811	358.8462	103.1292	12.30769	21.20293

	Supermarket							
	Lookalike				Control			
	Red Bull		Asda		Red Bull		Lidl	
	x	SD	x	SD	x	SD	x	SD
Period 1	109.3846	53.67423	0	0	21	22.01515	0	0
Period 2	102.3846	59.32051	89.84615	58.50334	25.07692	15.26686	41.30769	24.68598
Period 3	56.23077	25.76869	44.07692	21.60811	35.76923	19.63481	12.30769	21.20293

Drinks (Red Bull/Asda Blue Charge/Mixed Up (Lidl))

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
6m	4	-0.43375	-0.41592	0.640477	0.511169
12m	11	0.323421	0.31614	-0.01359	0.031994
24m	24	0.455173	0.394466	-0.2126	-0.27021

Correlations Spearman's rank

n	Lookalike		N	Control	
	Whole	S/Market		Whole	S/Market
26	0.38976	0.36995	26	-0.27233	-0.26587

Kendall's tau b

n	Lookalike		N	Control	
	Whole	S/Market		Whole	S/Market
26	0.21706	0.24534	26	-0.20138	-0.19007

Drinks (Red Bull/Asda Blue Charge/Mixed Up (Lidl))

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
27 Jun 99	450	0	38	0	07 Oct 07	312	0	0	0
25 Jul 99	346	0	58	0	04 Nov 07	263	0	1	0
22 Aug 99	515	0	34	0	02 Dec 07	391	0	0	0
19 Sep 99	618	0	145	0	30 Dec 07	302	0	0	0
17 Oct 99	454	0	85	0	27 Jan 08	300	0	10	0
14 Nov 99	535	0	102	0	24 Feb 08	448	0	12	0
12 Dec 99	642	0	105	0	23 Mar 08	331	0	10	0
09 Jan 00	1405	0	138	0	20 Apr 08	329	0	8	0
06 Feb 00	995	0	152	0	18 May 08	307	0	30	0
05 Mar 00	1216	0	84	0	15 Jun 08	379	0	49	0
02 Apr 00	1571	0	218	0	13 Jul 08	382	0	43	0
30 Apr 00	1211	0	162	0	10 Aug 08	259	0	48	0
28 May 00	1402	0	124	0	07 Sep 08	300	0	21	0
25 Jun 00	1307	80	174	80	05 Oct 08	362	20	32	20
23 Jul 00	1102	79	211	79	02 Nov 08	279	10	15	10
20 Aug 00	1461	163	59	163	30 Nov 08	298	26	9	26
17 Sep 00	1077	93	121	93	28 Dec 08	220	15	10	15
15 Oct 00	1643	63	134	63	25 Jan 09	320	15	20	15
12 Nov 00	1809	53	99	53	22 Feb 09	449	30	31	30
10 Dec 00	1464	23	151	23	22 Mar 09	445	14	25	14
07 Jan 01	2016	67	138	67	19 Apr 09	405	22	19	22
04 Feb 01	980	42	67	42	17 May 09	459	12	53	12
04 Mar 01	1228	13	92	13	14 Jun 09	592	5	24	5
01 Apr 01	1387	29	114	29	12 Jul 09	279	6	14	6
29 Apr 01	1285	39	140	39	09 Aug 09	225	9	29	9
27 May 01	1215	35	63	35	06 Sep 09	341	0	14	0
24 Jun 01	1116	45	68	45	04 Oct 09	236	30	27	30
22 Jul 01	1124	32	171	32	01 Nov 09	244	6	8	6
19 Aug 01	945	13	73	13	29 Nov 09	381	8	11	8
16 Sep 01	1129	16	85	16	27 Dec 09	314	6	13	6
14 Oct 01	1030	32	84	32	24 Jan 10	366	8	17	8
11 Nov 01	1205	39	57	39	21 Feb 10	435	4	48	4

<i>4 week period ending</i>	<i>Lookalike</i>				<i>4 week period ending</i>	<i>Control</i>			
	<i>Whole market</i>		<i>Supermarket only</i>			<i>Whole market</i>		<i>Supermarket only</i>	
	<i>BP</i>	<i>LP</i>	<i>BP</i>	<i>LP</i>		<i>BP</i>	<i>CP</i>	<i>BP</i>	<i>CP</i>
03 Feb 02	1286	11	180	11	16 May 10	521	0	40	0
03 Mar 02	1440	26	130	26	13 Jun 10	388	0	22	0
31 Mar 02	928	32	206	32	11 Jul 10	603	0	65	0
28 Apr 02	1254	19	234	19	08 Aug 10	593	0	24	0
26 May 02	739	49	57	49	05 Sep 10	655	0	49	0

Red Bull (BP), Asda Blue Charge (LP), Mixed Up (Lidl) (CP)

Drinks (Red Bull/Asda Blue Charge/Mixed Up (Lidl))

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	27 Jun 99 – 28 May 00	07 Oct 07 – 07 Sep 08
Period 2	25 Jun 00 – 27 May 01	05 Oct 08 – 06 Sep 09
Period 3	24 Jun 01 – 26 May 02	04 Oct 09 – 05 Sep 10

	Whole Market							
	Lookalike				Control			
	Red Bull		Asda		Red Bull		Lidl	
	x	SD	x	SD	x	SD	x	SD
Period 1	873.8462	436.8304	0	0	331	54.54814	0	0
Period 2	1382.615	297.9176	59.92308	39.25868	359.5385	107.0628	14.15385	8.600835
Period 3	1155.154	219.0585	27.61538	13.1183	435.6154	142.5146	4.769231	8.267949

	Supermarket							
	Lookalike				Control			
	Red Bull		Asda		Red Bull		Lidl	
	x	SD	x	SD	x	SD	x	SD
Period 1	111.1538	52.73652	0	0	17.84615	18.62725	0	0
Period 2	120.2308	44.83145	59.92308	39.25868	22.69231	11.90507	14.15385	8.600835
Period 3	133.2308	68.63813	27.61538	13.1183	32.23077	18.32646	4.769231	8.267949

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
6m	4	-0.24374	-0.51931	0.704609	0.373738
12m	11	0.078244	-0.03844	0.045242	0.079445
24m	24	0.177134	-0.19443	-0.42077	-0.29774

Notes

The control product was temporarily taken off the market towards the end of the data set. Again this restricts the analysis that can be undertaken.

Vinegar

(Sarson's Brown Malt Vinegar/Samson's Malt Vinegar(Lidl)/Asda Malt Vinegar)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
25 Sep 94	768	0	0	0	17 Jan 93	645(15)	96(31)	67(6)	96(31)
23 Oct 94	621	0	0	0	14 Feb 93	527(32)	106(25)	47(17)	106(25)
20 Nov 94	533	0	0	0	14 Mar 93	491(39)	83(37)	57(9)	83(37)
18 Dec 94	709	0	0	0	11 Apr 93	603(22)	97(30)	74(3)	97(30)
15 Jan 95	500	0	0	0	09 May 93	610(18)	100(29)	92(1)	100(29)
12 Feb 95	610	0	0	0	06 Jun 93	651(14)	76(39)	63(7)	76(39)
12 Mar 95	608	0	0	0	04 Jul 93	751(5)	121(16)	48(16)	121(16)
09 Apr 95	521	0	0	0	01 Aug 93	777(2)	150(3)	71(5)	150(3)
07 May 95	735	0	0	0	29 Aug 93	837(1)	118(17)	75(2)	118(17)
04 Jun 95	553	0	0	0	26 Sep 93	667(13)	146(6)	25(37)	146(6)
02 Jul 95	624	0	0	0	24 Oct 93	744(6)	114(19)	53(12)	114(19)
30 Jul 95	549	0	0	0	21 Nov 93	587(24)	128(13)	57(9)	128(13)
27 Aug 95	757	0	0	0	19 Dec 93	531(31)	116(18)	33(30)	116(18)
24 Sep 95	717(2)	27(23)	0	27(23)	16 Jan 94	495(37)	111(23)	38(23)	111(23)
22 Oct 95	733(1)	34(20)	0	34(20)	13 Feb 94	552(28)	94(32)	49(15)	94(32)
19 Nov 95	609(7)	31(22)	0	31(22)	13 Mar 94	512(34)	133(11)	39(21)	133(11)
17 Dec 95	584(10)	19(26)	0	19(26)	10 Apr 94	495(37)	88(34)	33(30)	88(34)
14 Jan 96	498(21)	20(25)	0	20(25)	08 May 94	511(35)	87(35)	45(18)	87(35)
11 Feb 96	454(23)	41(14)	0	41(14)	05 Jun 94	577(26)	101(28)	35(25)	101(28)
10 Mar 96	421(26)	53(6)	0	53(6)	03 Jul 94	591(23)	93(33)	28(34)	93(33)
07 Apr 96	518(20)	40(16)	0	40(16)	31 Jul 94	670(12)	112(21)	34(28)	112(21)
05 May 96	559(14)	39(18)	0	39(18)	28 Aug 94	694(11)	114(19)	30(32)	114(19)
02 Jun 96	527(18)	46(11)	0	46(11)	25 Sep 94	768(3)	148(4)	28(34)	148(4)
30 Jun 96	573(11)	48(9)	0	48(9)	23 Oct 94	621(17)	137(10)	16(39)	137(10)
28 Jul 96	550(16)	55(4)	0	55(4)	20 Nov 94	533(30)	133(11)	29(33)	133(11)
25 Aug 96	637(6)	79(2)	0	79(2)	18 Dec 94	709(10)	102(27)	41(20)	102(27)
22 Sep 96	676(5)	55(4)	0	55(4)	15 Jan 95	500(36)	123(15)	23(38)	123(15)
20 Oct 96	683(3)	48(9)	0	48(9)	12 Feb 95	610(18)	152(2)	39(21)	152(2)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
12 Jan 97	554(15)	53(6)	0	53(6)	07 May 95	735(7)	193(1)	35(25)	193(1)
09 Feb 97	483(23)	34(20)	0	34(20)	04 Jun 95	553(27)	84(36)	73(4)	84(36)
09 Mar 97	432(25)	25(24)	0	25(24)	02 Jul 95	624(16)	83(37)	51(13)	83(37)
06 Apr 97	586(9)	41(14)	0	41(14)	30 Jul 95	549(29)	124(14)	43(19)	124(14)
04 May 97	566(12)	49(8)	0	49(8)	27 Aug 95	757(4)	103(26)	51(13)	103(26)
01 Jun 97	566(12)	45(12)	0	45(12)	24 Sep 95	717(9)	142(8)	58(8)	142(8)
29 Jun 97	491(22)	71(3)	0	71(3)	22 Oct 95	733(8)	110(24)	27(36)	110(24)
27 Jul 97	522(19)	42(13)	0	42(13)	19 Nov 95	609(20)	140(9)	35(25)	140(9)
24 Aug 97	683(3)	103(1)	0	103(1)	17 Dec 95	584(25)	112(21)	54(11)	112(21)

Sarson's Brown Malt Vinegar (BP), Samson's Malt Vinegar(Lidl) (LP), Asda Malt Vinegar (CP)

Vinegar (Sarson's Brown Malt Vinegar/Samson's Malt Vinegar(Lidl)/ Asda Malt Vinegar)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	25 Sep 94 – 27 Aug 95	17 Jan 93 – 19 Dec 93
Period 2	25 Sep 95 – 25 Aug 96	17 Jan 94 – 18 Dec 94
Period 3	26 Sep 96 – 24 Aug 97	15 Jan 95 – 17 Dec 95

Whole Market								
	Lookalike				Control			
	Sarsons		Lidl		Sarsons		Asda	
	x	SD	x	SD	x	SD	x	SD
Period 1	622	92.86293	0	0	648	105.0763	112	21.91363
Period 2	568	91.47427	41	16.08545	594	90.78179	112	20.25984
Period 3	568	78.89129	49	19.70078	623	86.43216	127	30.39458

Supermarket								
	Lookalike				Control			
	Sarsons		Lidl		Sarsons		Asda	
	x	SD	x	SD	x	SD	x	SD
Period 1	0	0	0	0	59	18.06771	112	21.91363
Period 2	0	0	41	16.08545	34	8.366752	112	20.25984
Period 3	0	0	49	19.70078	43	13.88494	127	30.39458

Vinegar (Sarson's Brown Malt Vinegar/Samson's Malt Vinegar(Lidl)/Asda Malt Vinegar)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-0.07016	-	-	-
12m	11	-0.12511	-	-	-
24m	24	0.198752	-	-	-
36m	37	-	-	0.296617	-0.34891

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	0.92466	-	39	0.32164	-0.34329

Kendall's tau b

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	0.07188	-	39	0.23745	-0.23449

Vinegar (Sarson's Brown Malt Vinegar/Samson's Malt Vinegar(Lidl)/Asda Malt Vinegar)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
25 Sep 94	93	0	0	0	17 Jan 93	362	44	40	44
23 Oct 94	76	0	0	0	14 Feb 93	312	53	28	53
20 Nov 94	75	0	0	0	14 Mar 93	322	39	39	39
18 Dec 94	52	0	0	0	11 Apr 93	422	52	47	52
15 Jan 95	55	0	0	0	09 May 93	376	51	51	51
12 Feb 95	60	0	0	0	06 Jun 93	403	36	45	36
12 Mar 95	58	0	0	0	04 Jul 93	473	53	36	53
09 Apr 95	59	0	0	0	01 Aug 93	514	71	55	71
07 May 95	73	0	0	0	29 Aug 93	556	67	44	67
04 Jun 95	44	0	0	0	26 Sep 93	452	69	16	69
02 Jul 95	39	0	0	0	24 Oct 93	498	59	32	59
30 Jul 95	68	0	0	0	21 Nov 93	382	68	43	68
27 Aug 95	55	0	0	0	19 Dec 93	350	48	22	48
24 Sep 95	72	8	0	8	16 Jan 94	281	51	25	51
22 Oct 95	60	10	0	10	13 Feb 94	338	51	30	51
19 Nov 95	77	9	0	9	13 Mar 94	324	58	26	58
17 Dec 95	63	6	0	6	10 Apr 94	296	40	19	40
14 Jan 96	56	6	0	6	08 May 94	315	47	36	47
11 Feb 96	52	12	0	12	05 Jun 94	393	49	24	49
10 Mar 96	50	15	0	15	03 Jul 94	377	48	16	48
07 Apr 96	52	16	0	16	31 Jul 94	416	61	23	61
05 May 96	41	11	0	11	28 Aug 94	486	58	17	58
02 Jun 96	49	13	0	13	25 Sep 94	574	93	15	93
30 Jun 96	73	14	0	14	23 Oct 94	415	76	9	76
28 Jul 96	77	16	0	16	20 Nov 94	355	75	16	75
25 Aug 96	69	23	0	23	18 Dec 94	508	52	22	52
22 Sep 96	81	16	0	16	15 Jan 95	333	55	13	55
20 Oct 96	90	14	0	14	12 Feb 95	389	60	22	60
17 Nov 96	84	10	0	10	12 Mar 95	409	58	25	58
15 Dec 96	56	12	0	12	09 Apr 95	320	59	22	59
12 Jan 97	46	16	0	16	07 May 95	474	73	24	73

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
06 Apr 97	59	12	0	12	30 Jul 95	371	68	25	68
04 May 97	60	14	0	14	27 Aug 95	474	55	29	55
01 Jun 97	53	13	0	13	24 Sep 95	595	72	34	72
29 Jun 97	54	21	0	21	22 Oct 95	513	60	16	60
27 Jul 97	66	12	0	12	19 Nov 95	466	77	20	77
24 Aug 97	67	32	0	32	17 Dec 95	404	63	31	63

Sarson's Brown Malt Vinegar (BP), Samson's Malt Vinegar(Lidl) (LP), Asda Malt Vinegar (CP)

Vinegar (Sarson's Brown Malt Vinegar/Samson's Malt Vinegar(Lidl)/ Asda Malt Vinegar)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	25 Sep 94 – 27 Aug 95	17 Jan 93 – 19 Dec 93
Period 2	25 Sep 95 – 25 Aug 96	17 Jan 94 – 18 Dec 94
Period 3	26 Sep 96 – 24 Aug 97	15 Jan 95 – 17 Dec 95

Whole Market								
	Lookalike				Control			
	Sarsons		Lidl		Sarsons		Asda	
	x	SD	x	SD	x	SD	x	SD
Period 1	62	14.61779	0	0	417	76.6224	55	11.46572
Period 2	61	11.87562	12	4.758164	391	88.2174	58	14.63699
Period 3	60	17.40133	15	6.200562	428	75.5402	60	10.97447

Supermarket								
	Lookalike				Control			
	Sarsons		Lidl		Sarsons		Asda	
	x	SD	x	SD	x	SD	x	SD
Period 1	0	0	0	0	38	11.22847	55	11.46572
Period 2	0	0	12	4.758164	21	7.109242	58	14.63699
Period 3	0	0	15	6.200562	26	7.798468	60	10.97447

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-0.19057	-	-	-
12m	11	0.034904	-	-	-
24m	24	0.155724	-	-	-
36m	37	-	-	0.535606	-0.29341

Notes

The brand leader was not on sale in the same supermarket as the lookalike and so this means there would be no side by side comparisons.

Butter

(Lurpak/Norpak Spreadable (Aldi)/Butterpak Spreadable (Tesco))

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
28 Mar 04	1470	0	0	0	28 Apr 02	1548	0	377	0
25 Apr 04	1262	0	5	0	26 May 02	1447	0	316	0
23 May 04	1397	0	5	0	23 Jun 02	1474	0	347	0
20 Jun 04	1387	0	0	0	21 Jul 02	1251	0	349	0
18 Jul 04	1288	0	0	0	18 Aug 02	1355	0	258	0
15 Aug 04	1280	0	0	0	15 Sep 02	1274	0	201	0
12 Sep 04	1266	0	6	0	13 Oct 02	1533	0	215	0
10 Oct 04	1285	0	0	0	10 Nov 02	1309	0	327	0
07 Nov 04	1460	0	0	0	08 Dec 02	1408	0	302	0
05 Dec 04	1406	0	23	0	05 Jan 03	1666	0	233	0
02 Jan 05	1796	0	0	0	02 Feb 03	1208	0	197	0
30 Jan 05	1395	0	0	0	02 Mar 03	1295	0	198	0
27 Feb 05	1327	0	0	0	30 Mar 03	1383	0	280	0
27 Mar 05	1218(10)	22(24)	3(2)	22(24)	27 Apr 03	1694(8)	55(13)	269(21)	55(13)
24 Apr 05	1348(4)	20(26)	0(5)	20(26)	25 May 03	2349(1)	50(18)	334(12)	50(18)
22 May 05	1334(5)	21(25)	0(5)	21(25)	22 Jun 03	1584(9)	37(26)	392(4)	37(26)
19 Jun 05	1219(9)	23(23)	0(5)	23(23)	20 Jul 03	1994(2)	41(22)	386(5)	41(22)
17 Jul 05	1241(7)	52(22)	0(5)	52(22)	17 Aug 03	1195(25)	47(15)	252(24)	47(15)
14 Aug 05	1266(6)	56(21)	0(5)	56(21)	14 Sep 03	1445(13)	38(25)	259(22)	38(25)
11 Sep 05	1113(18)	100(14)	0(5)	100(14)	12 Oct 03	1811(4)	41(22)	315(15)	41(22)
09 Oct 05	1145(14)	79(20)	0(5)	79(20)	09 Nov 03	1716(7)	92(1)	286(19)	92(1)
06 Nov 05	1226(8)	107(12)	0(5)	107(12)	07 Dec 03	1727(6)	80(3)	306(17)	80(3)
04 Dec 05	1395(3)	99(25)	0(5)	99(25)	04 Jan 04	1885(3)	59(10)	308(16)	59(10)
01 Jan 06	1560(2)	83(19)	2(3)	83(19)	01 Feb 04	1187(26)	74(4)	234(26)	74(4)
29 Jan 06	1115(17)	92(18)	0(5)	92(18)	29 Feb 04	1480(10)	54(14)	378(7)	54(14)
26 Feb 06	1187(12)	108(11)	0(5)	108(11)	28 Mar 04	1470(11)	54(14)	279(20)	54(14)
26 Mar 06	1025(22)	148(3)	0(5)	148(3)	25 Apr 04	1262(23)	45(20)	251(25)	45(20)
23 Apr 06	1205(11)	144(4)	0(5)	144(4)	23 May 04	1397(15)	59(10)	329(13)	59(10)
21 May 06	1099(19)	127(10)	0(5)	127(10)	20 Jun 04	1387(17)	65(8)	419(3)	65(8)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
13 Aug 06	969(25)	96(16)	0(5)	96(16)	12 Sep 04	1266(22)	73(5)	328(14)	73(5)
10 Sep 06	1035(21)	129(9)	0(5)	129(9)	10 Oct 04	1285(20)	51(17)	479(1)	51(17)
08 Oct 06	1099(19)	133(8)	2(3)	133(8)	07 Nov 04	1460(12)	44(21)	372(8)	44(21)
05 Nov 06	987(24)	140(7)	4(1)	140(7)	05 Dec 04	1406(14)	71(7)	382(6)	71(7)
03 Dec 06	1128(16)	165(1)	0(5)	165(1)	02 Jan 05	1796(5)	60(9)	461(2)	60(9)
31 Dec 06	1642(1)	141(6)	0(5)	141(6)	30 Jan 05	1395(16)	59(10)	360(10)	59(10)
28 Jan 07	892(20)	165(1)	1(4)	165(1)	27 Feb 05	1327(18)	72(6)	336(11)	72(6)
25 Feb 07	1012(23)	142(5)	0(5)	142(5)	27 Mar 05	1218(24)	83(2)	368(9)	83(2)

Lurpak (BP), NorpakSpreadable (Aldi) (LP), Butterpak Spreadable (Tesco) (CP)

Butter (Lurpak/Norpak Spreadable (Aldi)/Butterpak Spreadable (Tesco))

Volume ('000) – Mean, and Standard Deviation

Lookalike (4 w/e)

Control (4 w/e)

Period 1	28 Mar 04 – 27 Feb 05	28 Apr 02 – 30 Mar 03
Period 2	27 Mar 05 – 26 Feb 06	27 Apr 03 – 28 Mar 04
Period 3	26 Mar 06 – 25 Feb 07	25 Apr 04 – 17 Mar 05

	Whole Market							
	Lookalike				Control			
	Lurpak		Aldi		Lurpak		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	1386.077	143.0422	0	0	1396.231	133.6894	0	0
Period 2	1259	125.0393	66.30769	35.40806	1656.692	319.9996	55.53846	16.98831
Period 3	1106.692	182.636	132.8462	23.09706	1366.692	147.7201	59.76923	12.74202

	Supermarket							
	Lookalike				Control			
	Lurpak		Aldi		Lurpak		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	3	6.442049	0	0	276.9231	64.09428	0	0
Period 2	0.384615	0.960769	66.30769	35.40806	307.5385	52.14182	55.53846	16.98831
Period 3	0.538462	1.198289	132.8462	23.09706	357.4615	68.63383	59.76923	12.74202

Butter (Lurpak/Norpak Spreadable (Aldi)/Butterpak Spreadable (Tesco))

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-0.27788	-0.30025	0.253775	-0.43412
12m	11	-0.16422	-0.24383	-0.08337	-0.36302
All	24	-0.39282	0.023484	-0.14432	-0.01701

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	-0.58125	0.18815	26	-0.21000	-0.16787

Kendall's tau b

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
26	-0.42679	0.15519	26	-0.16226	-0.01248

Butter (Lurpak/Norpak Spreadable (Aldi)/Butterpak Spreadable (Tesco))

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
28 Mar 04	1730	0	0	0	28 Apr 02	1650	0	430	0
25 Apr 04	1566	0	4	0	26 May 02	1546	0	353	0
23 May 04	1698	0	5	0	23 Jun 02	1535	0	396	0
20 Jun 04	1662	0	0	0	21 Jul 02	1362	0	396	0
18 Jul 04	1538	0	0	0	18 Aug 02	1377	0	287	0
15 Aug 04	1538	0	0	0	15 Sep 02	1369	0	240	0
12 Sep 04	1547	0	6	0	13 Oct 02	1567	0	240	0
10 Oct 04	1587	0	0	0	10 Nov 02	1385	0	353	0
07 Nov 04	1849	0	0	0	08 Dec 02	1551	0	346	0
05 Dec 04	1764	0	22	0	05 Jan 03	1759	0	275	0
02 Jan 05	2058	0	0	0	02 Feb 03	1320	0	241	0
30 Jan 05	1706	0	0	0	02 Mar 03	1411	0	238	0
27 Feb 05	1631	0	0	0	30 Mar 03	1496	0	344	0
27 Mar 05	1496	28	3	28	27 Apr 03	1681	76	332	76
24 Apr 05	1615	26	0	26	25 May 03	2349	74	353	74
22 May 05	1544	27	0	27	22 Jun 03	1685	55	365	55
19 Jun 05	1427	30	0	30	20 Jul 03	1989	60	388	60
17 Jul 05	1426	67	0	67	17 Aug 03	1228	69	257	69
14 Aug 05	1455	73	0	73	14 Sep 03	1542	57	327	57
11 Sep 05	1307	129	0	129	12 Oct 03	1890	61	389	61
09 Oct 05	1345	102	0	102	09 Nov 03	1928	110	359	110
06 Nov 05	1450	137	0	137	07 Dec 03	1990	118	397	118
04 Dec 05	1610	127	0	127	04 Jan 04	2092	94	399	94
01 Jan 06	1677	107	2	107	01 Feb 04	1426	117	307	117
29 Jan 06	1290	118	0	118	29 Feb 04	1838	86	470	86
26 Feb 06	1390	140	0	140	28 Mar 04	1730	86	360	86
26 Mar 06	1235	191	0	191	25 Apr 04	1566	71	318	71
23 Apr 06	1352	186	0	186	23 May 04	1698	93	431	93
21 May 06	1253	164	0	164	20 Jun 04	1662	103	496	103
18 Jun 06	1299	132	0	132	18 Jul 04	1538	65	369	65
16 Jul 06	1320	134	0	134	15 Aug 04	1538	86	315	86
13 Aug 06	1141	124	0	124	12 Sep 04	1547	117	435	117

<i>4 week period ending</i>	<i>Lookalike</i>				<i>4 week period ending</i>	<i>Control</i>			
	<i>Whole market</i>		<i>Supermarket only</i>			<i>Whole market</i>		<i>Supermarket only</i>	
	<i>BP</i>	<i>LP</i>	<i>BP</i>	<i>LP</i>		<i>BP</i>	<i>CP</i>	<i>BP</i>	<i>CP</i>
10 Sep 06	1160	166	0	166	10 Oct 04	1587	81	566	81
03 Dec 06	1310	213	0	213	02 Jan 05	2058	95	589	95
31 Dec 06	1550	182	0	182	30 Jan 05	1706	95	466	95
28 Jan 07	1002	213	1	213	27 Feb 05	1631	114	449	114
25 Feb 07	1225	184	0	184	27 Mar 05	1496	132	500	132

Lurpak (BP), NorpakSpreadable (Aldi) (LP), Butterpak Spreadable (Tesco) (CP)

Butter (Lurpak/Norpak Spreadable (Aldi)/Butterpak Spreadable (Tesco))

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	28 Mar 04 – 27 Feb 05	28 Apr 02 – 30 Mar 03
Period 2	27 Mar 05 – 26 Feb 06	27 Apr 03 – 28 Mar 04
Period 3	26 Mar 06 – 25 Feb 07	25 Apr 04 – 17 Mar 05

	Whole Market							
	Lookalike				Control			
	Lurpak		Aldi		Lurpak		Tesco	
	x	SD	x	SD	X	SD	X	SD
Period 1	1682.615	148.408	0	0	1486.769	129.9462	0	0
Period 2	1464	120.6103	85.46154	45.52951	1797.538	295.8385	81.76923	22.41337
Period 3	1247.769	130.4206	172.4615	28.41542	1664.615	156.1695	94.92308	20.30789

	Supermarket							
	Lookalike				Control			
	Lurpak		Aldi		Lurpak		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	2.846154	6.162334	0	0	318.3846	68.26851	0	0
Period 2	0.384615	0.960769	85.46154	45.52951	361.7692	51.59159	81.76923	22.41337
Period 3	0.538462	1.198289	172.4615	28.41542	458.8462	85.70963	94.92308	20.30789

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-0.58938	-0.30888	0.211284	-0.33732
12m	11	-0.3217	-0.24634	0.100135	0.100194
All	24		0.020376	-0.05631	0.354945

Notes

The brand leader was not on sale in the same supermarket as the lookalike and so this means there would be no side by side comparisons.

Ibuprofen

(Nurofen Caplets/Boots Ibuprofen Caplets/Sainsbury's Ibuprofen Caplets)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
19 Apr 09	278	0	23	0	12 Aug 07	173	0	52	0
17 May 09	224	0	3	0	09 Sep 07	181	0	33	0
14 Jun 09	235	0	5	0	07 Oct 07	178	0	38	0
12 Jul 09	321	0	5	0	04 Nov 07	197	0	27	0
09 Aug 09	375	0	0	0	02 Dec 07	214	0	28	0
06 Sep 09	237	0	12	0	30 Dec 07	271	0	35	0
04 Oct 09	198	0	10	0	27 Jan 08	192	0	16	0
01 Nov 09	204	0	0	0	24 Feb 08	306	0	42	0
29 Nov 09	186	0	5	0	23 Mar 08	237	0	20	0
27 Dec 09	219	0	17	0	20 Apr 08	281	0	48	0
24 Jan 10	214	0	4	0	18 May 08	320	0	67	0
21 Feb 10	147	0	0	0	15 Jun 08	163	0	17	0
21 Mar 10	151	0	2	0	13 Jul 08	233(6)	3(20)	27(11)	3(20)
18 Apr 10	155	0	16	0	10 Aug 08	202(12)	14(21)	19(24)	14(21)
16 May 10	266	0	35	0	07 Sep 08	148(22)	55(2)	32(8)	55(2)
13 Jun 10	227	0	3	0	05 Oct 08	172(18)	14(21)	30(10)	14(21)
11 Jul 10	139	0	7	0	02 Nov 08	148(22)	4(25)	21(20)	4(25)
08 Aug 10	169	0	11	0	30 Nov 08	147(24)	21(16)	31(9)	21(16)
05 Sep 10	199	0	0	0	28 Dec 08	179(16)	35(7)	21(20)	35(7)
03 Oct 10	192	0	11	0	25 Jan 09	236(5)	16(19)	37(4)	16(19)
31 Oct 10	215	0	25	0	22 Feb 09	156(20)	1(27)	36(6)	1(27)
28 Nov 10	186	0	0	0	22 Mar 09	193(13)	11(24)	22(17)	11(24)
26 Dec 10	183	0	0	0	19 Apr 09	263(3)	26(11)	43(1)	26(11)
23 Jan 11	188	0	0	0	17 May 09	219(9)	28(8)	21(20)	28(8)
20 Feb 11	137	0	3	0	14 Jun 09	210(11)	26(11)	23(16)	26(11)
20 Mar 11	141	0	8	0	12 Jul 09	308(2)	53(3)	43(1)	53(3)
17 Apr 11	196	0	4	0	09 Aug 09	366(1)	27(9)	37(4)	27(9)
15 May 11	208	0	49	0	06 Sep 09	228(7)	42(6)	34(7)	42(6)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
07 Aug 11	163	0	9	0	29 Nov 09	170(19)	25(14)	25(14)	25(14)
04 Sep 11	204	0	0	0	27 Dec 09	212(10)	50(4)	41(3)	50(4)
02 Oct 11	184	0	23	0	24 Jan 10	179(16)	17(18)	22(17)	17(18)
30 Oct 11	198	0	33	0	21 Feb 10	137(26)	13(23)	20(23)	13(23)
27 Nov 11	266	0	59	0	21 Mar 10	142(25)	26(11)	15(26)	26(11)
25 Dec 11	267	0	23	0	18 Apr 10	150(21)	22(15)	13(27)	22(15)
22 Jan 12	201(2)	13(4)	8(3)	11(4)	16 May 10	255(4)	27(9)	24(15)	27(9)
19 Feb 12	159(4)	34(3)	2(4)	34(3)	13 Jun 10	222(8)	15(20)	22(17)	15(20)
18 Mar 12	240(1)	93(1)	18(2)	93(1)	11 Jul 10	129(27)	18(17)	19(24)	18(17)
15 Apr 12	196(3))	43(2)	23(1)	43(2)					

Nurofen Caplets (BP), Boots Ibuprofen Caplets (LP), Sainsbury's Ibuprofen Caplets (CP)

Ibuprofen (Nurofen Caplets/Boots Ibuprofen Caplets/Sainsbury's Ibuprofen Caplets)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	19 Apr 09 – 25 Dec 11	12 Aug 07 – 15 Jun 08
Period 2	22 Jan 12 – 15 Apr 12	13 Jul 08 – 14 Jun 09
Period 3	-	12 Jul 09 – 11 Jul 10

Whole Market								
	Lookalike				Control			
	Nurofen		Boots		Nurofen		Sainsbury's	
	x	SD	x	SD	X	SD	x	SD
Period 1	205.9722	51.21243	0	0	226.0833	55.31309	0	0
Period 2	199	33.13608	45.75	33.91534	192.7692	38.26041	19.53846	14.88632
Period 3	-	-	-	-	204.9286	67.91676	32.57143	17.66228

Supermarket								
	Lookalike				Control			
	Nurofen		Boots		Nurofen		Sainsbury's	
	x	SD	x	SD	X	SD	x	SD
Period 1	11.77778	14.09987	0	0	35.25	15.27401	0	0
Period 2	12.75	9.5	45.25	34.56757	27.92308	7.576956	19.53846	14.88632
Period 3	-	-	-	-	26.28571	9.243947	32.57143	17.66228

Ibuprofen (Nurofen Caplets/Boots Ibuprofen Caplets/Sainsbury's Ibuprofen Caplets)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
16 (24) wks	2 (4)	0.697027	0.518943	-0.49049	0.57778
12m	11	-	-	-0.06721	0.058026
All	25	-	-	0.187148	0.305407

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
4	0.4	0.6	27	0.2965	0.32895

Kendall's tau b

n	Lookalike		N	Control	
	Whole	S/Market		Whole	S/Market
4	0.33333	0.33333	27	0.21614	0.21866

Ibuprofen (Nurofen Caplets /Boots Ibuprofen Caplets /Sainsbury's Ibuprofen Caplets)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
19 Apr 09	502	0	36	0	12 Aug 07	287	0	82	0
17 May 09	428	0	6	0	09 Sep 07	319	0	54	0
14 Jun 09	444	0	9	0	07 Oct 07	327	0	76	0
12 Jul 09	602	0	9	0	04 Nov 07	411	0	47	0
09 Aug 09	502	0	0	0	02 Dec 07	464	0	59	0
06 Sep 09	388	0	23	0	30 Dec 07	553	0	61	0
04 Oct 09	377	0	20	0	27 Jan 08	406	0	35	0
01 Nov 09	331	0	0	0	24 Feb 08	607	0	95	0
29 Nov 09	311	0	7	0	23 Mar 08	455	0	32	0
27 Dec 09	370	0	32	0	20 Apr 08	500	0	94	0
24 Jan 10	410	0	7	0	18 May 08	536	0	129	0
21 Feb 10	288	0	0	0	15 Jun 08	300	0	28	0
21 Mar 10	300	0	4	0	13 Jul 08	445	2	58	2
18 Apr 10	305	0	32	0	10 Aug 08	373	10	35	10
16 May 10	502	0	64	0	07 Sep 08	268	38	56	38
13 Jun 10	416	0	6	0	05 Oct 08	331	9	55	9
11 Jul 10	264	0	15	0	02 Nov 08	299	3	48	3
08 Aug 10	331	0	22	0	30 Nov 08	315	15	78	15
05 Sep 10	355	0	0	0	28 Dec 08	376	24	51	24
03 Oct 10	385	0	23	0	25 Jan 09	498	11	90	11
31 Oct 10	416	0	48	0	22 Feb 09	317	1	86	1
28 Nov 10	357	0	0	0	22 Mar 09	386	7	54	7
26 Dec 10	356	0	0	0	19 Apr 09	477	18	101	18
23 Jan 11	369	0	0	0	17 May 09	417	19	41	19
20 Feb 11	264	0	5	0	14 Jun 09	397	18	44	18
20 Mar 11	271	0	15	0	12 Jul 09	577	35	81	35
17 Apr 11	324	0	4	0	09 Aug 09	490	18	68	18
15 May 11	362	0	90	0	06 Sep 09	372	28	52	28
12 Jun 11	350	0	20	0	04 Oct 09	347	33	54	33
10 Jul 11	306	0	17	0	01 Nov 09	306	48	52	48
07 Aug 11	313	0	17	0	29 Nov 09	284	17	48	17

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
30 Oct 11	362	0	59	0	21 Feb 10	268	9	41	9
27 Nov 11	487	0	116	0	21 Mar 10	281	17	30	17
25 Dec 11	496	0	44	0	18 Apr 10	295	15	26	15
22 Jan 12	383	16	16	14	16 May 10	482	18	48	18
19 Feb 12	288	45	5	45	13 Jun 10	408	10	43	10
18 Mar 12	423	91	30	91	11 Jul 10	244	12	38	12
15 Apr 12	356	44	39	44					

Nurofen Caplets (BP), Boots Ibuprofen Caplets (LP), Sainsbury's Ibuprofen Caplets (CP)

Ibuprofen (Nurofen Caplets/Boots Ibuprofen Caplets/Sainsbury's Ibuprofen Caplets)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	19 Apr 09 – 25 Dec 11	12 Aug 07 – 15 Jun 08
Period 2	22 Jan 12 – 15 Apr 12	13 Jul 08 – 14 Jun 09
Period 3	-	12 Jul 09 – 11 Jul 10

	Whole Market							
	Lookalike				Control			
	Nurofen		Boots		Nurofen		Sainsbury's	
	x	SD	x	SD	X	SD	x	SD
Period 1	377.3333	78.38003	0	0	430.4167	106.8512	0	0
Period 2	362.5	56.78321	49	31.05908	376.8462	70.05218	13.46154	10.26008
Period 3	-	-	-	-	361.4286	97.1911	21.71429	11.72393

	Supermarket							
	Lookalike				Control			
	Nurofen		Boots		Nurofen		Sainsbury's	
	x	SD	x	SD	X	SD	x	SD
Period 1	21.97222	26.60664	0	0	66	30.28651	0	0
Period 2	22.5	15.02221	48.5	31.77525	61.30769	20.62921	13.46154	10.26008
Period 3	-	-	-	-	50	16.07674	21.71429	11.72393

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
16 (24) wks	2 (4)	0.414863	0.370111	-0.64109	0.180704
12m	11	-	-	-0.1585	-0.10191
All	25	-	-	0.052322	0.094924

Notes

The lookalike was only launched very recently and so the data available is very restricted indeed.

Skin Care

(Clearasil Ultra/Boots Skin Clear/Tesco Clear Skin)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
19 Apr 09	62(9)	4(36)	3(18)	4(36)	19 Apr 09	62(9)	18(33)	23(4)	18(33)
17 May 09	38(18)	0(38)	0(24)	0(38)	17 May 09	38(18)	14(34)	17(13)	14(34)
14 Jun 09	101(2)	24(17)	17(5)	24(17)	14 Jun 09	101(2)	1(36)	14(17)	1(36)
12 Jul 09	60(11)	9(29)	0(24)	9(29)	12 Jul 09	60(11)	0(37)	18(11)	0(37)
09 Aug 09	83(5)	9(29)	17(5)	9(29)	09 Aug 09	83(5)	0(37)	8(23)	0(37)
06 Sep 09	77(6)	28(12)	5(16)	28(12)	06 Sep 09	77(6)	2(35)	28(2)	2(35)
04 Oct 09	76(7)	8(32)	12(9)	8(32)	04 Oct 09	76(7)	0(37)	26(3)	0(37)
01 Nov 09	35(20)	26(14)	0(24)	26(14)	01 Nov 09	35(20)	37(24)	9(20)	37(24)
29 Nov 09	84(4)	7(34)	23(3)	7(34)	29 Nov 09	84(4)	85(1)	19(9)	85(1)
27 Dec 09	43(15)	5(35)	0(24)	5(35)	27 Dec 09	43(15)	46(12)	21(5)	46(12)
24 Jan 10	33(22)	73(1)	18(4)	73(1)	24 Jan 10	33(22)	54(6)	6(27)	54(6)
21 Feb 10	20(28)	32(9)	4(17)	32(9)	21 Feb 10	20(28)	30(29)	6(27)	30(29)
21 Mar 10	169(1)	21(22)	31(2)	21(22)	21 Mar 10	169(1)	38(22)	18(11)	38(22)
18 Apr 10	43(15)	15(26)	13(7)	15(26)	18 Apr 10	43(15)	33(26)	9(20)	33(26)
16 May 10	29(25)	9(29)	10(12)	9(29)	16 May 10	29(25)	54(6)	7(24)	54(6)
13 Jun 10	93(3)	22(20)	53(1)	22(20)	13 Jun 10	93(3)	53(8)	21(5)	53(8)
11 Jul 10	38(18)	22(20)	10(12)	22(20)	11 Jul 10	38(18)	70(3)	15(15)	70(3)
08 Aug 10	8(37)	19(24)	0(24)	19(24)	08 Aug 10	8(37)	70(3)	7(24)	70(3)
05 Sep 10	44(14)	51(3)	0(24)	51(3)	05 Sep 10	44(14)	43(15)	15(15)	43(15)
03 Oct 10	62(9)	12(28)	13(7)	12(28)	03 Oct 10	62(9)	45(14)	12(19)	45(14)
28 Nov 10	7(39)	42(5)	0(24)	42(5)	28 Nov 10	7(39)	46(12)	6(27)	46(12)
26 Dec 10	13(36)	26(14)	0(24)	26(14)	26 Dec 10	13(36)	24(30)	7(24)	24(30)
23 Jan 11	35(30)	27(13)	11(11)	27(13)	23 Jan 11	35(30)	47(11)	5(30)	47(11)
20 Feb 11	16(35)	24(17)	3(18)	24(17)	20 Feb 11	16(35)	72(2)	4(35)	72(2)
20 Mar 11	17(32)	25(16)	0(24)	25(16)	20 Mar 11	17(32)	43(15)	5(30)	43(15)
17 Apr 11	18(31)	34(8)	3(18)	34(8)	17 Apr 11	18(31)	31(28)	5(30)	31(28)
15 May 11	17(32)	61(2)	0(24)	61(2)	15 May 11	17(32)	40(20)	3(36)	40(20)
12 Jun 11	8(37)	0(38)	0(24)	0(38)	12 Jun 11	8(37)	38(22)	0(38)	38(22)
10 Jul 11	17(32)	14(27)	0(24)	14(27)	10 Jul 11	17(32)	21(32)	2(37)	21(32)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
02 Oct 11	32(23)	42(5)	3(18)	42(5)	02 Oct 11	32(23)	37(24)	0(38)	37(24)
30 Oct 11	24(27)	18(25)	3(18)	18(25)	30 Oct 11	24(27)	51 (9)	5(30)	51 (9)
27 Nov 11	30(24)	3(37)	0(24)	3(37)	27 Nov 11	30(24)	32(27)	21(5)	32(27)
25 Dec 11	19(30)	42(5)	0(24)	42(5)	25 Dec 11	19(30)	40(20)	9(20)	40(20)
22 Jan 12	46(12)	8(32)	7(15)	8(32)	22 Jan 12	46(12)	41(18)	17(13)	41(18)
19 Feb 12	26(26)	20(23)	0(24)	20(23)	19 Feb 12	26(26)	56(5)	19(9)	56(5)
18 Mar 12	24(27)	24(17)	3(18)	24(17)	18 Mar 12	24(27)	42(17)	21(5)	42(17)
15 Apr 12	45(13)	31(10)	0(24)	31(10)	15 Apr 12	45(13)	41(18)	13(18)	41(18)

Clearasil Ultra (BP), Boots Skin Clear (LP), Tesco Clear Skin (CP)

Skin Care (Clearasil Ultra/Boots Skin Clear/Tesco Clear Skin)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	19 Apr 09 – 21 Mar 10	19 Apr 09 – 21 Mar 10
Period 2	18 Apr 10 – 20 Mar 11	18 Apr 10 – 20 Mar 11
Period 3	17 Apr 11 – 15 Apr 12	17 Apr 11 – 15 Apr 12

	Whole Market							
	Lookalike				Control			
	Clearasil		Boots		Clearasil		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	67.76923	38.89977	18.92308	19.34538	67.76923	38.89977	25	26.41023
Period 2	33.75	25.12921	24.5	11.85902	33.75	25.12921	50	14.83852
Period 3	29.28571	15.08656	26.42857	17.39458	29.28571	15.08656	38.64286	9.723937

	Supermarket							
	Lookalike				Control			
	Clearasil		Boots		Clearasil		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	10	10.35213	18.92308	19.34538	16.38462	7.365895	25	26.41023
Period 2	9.416667	14.81067	24.5	11.85902	9.416667	5.230302	50	14.83852
Period 3	2.857143	3.88007	26.42857	17.39458	11.07143	10.2991	38.64286	9.723937

Skin Care (Clearasil Ultra/Boots Skin Clear/Tesco Clear Skin)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
36m	37	-0.18846	-0.02843	-0.25501	-0.15125

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
39	-0.23011	-0.03608	39	-0.23260	-0.07172

Kendall's tau b

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
39	-0.15754	-0.03474	39	-0.15458	-0.04164

Skin Care (Clearasil Ultra/Boots Skin Clear/Tesco Clear Skin)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
19 Apr 09	276	12	18	12	19 Apr 09	276	34	104	18
17 May 09	178	0	0	0	17 May 09	178	26	77	14
14 Jun 09	325	56	90	56	14 Jun 09	325	2	65	1
12 Jul 09	204	26	0	26	12 Jul 09	204	0	58	0
09 Aug 09	405	26	86	26	09 Aug 09	405	0	40	0
06 Sep 09	247	88	0	88	06 Sep 09	247	3	93	2
04 Oct 09	261	17	25	17	04 Oct 09	261	0	85	0
01 Nov 09	152	72	0	72	01 Nov 09	152	41	31	37
29 Nov 09	312	23	81	23	29 Nov 09	312	57	64	85
27 Dec 09	214	11	0	11	27 Dec 09	214	32	102	46
24 Jan 10	150	222	75	222	24 Jan 10	150	43	30	54
21 Feb 10	98	94	23	94	21 Feb 10	98	22	32	30
21 Mar 10	845	56	180	56	21 Mar 10	845	27	92	38
18 Apr 10	183	48	42	48	18 Apr 10	183	24	39	33
16 May 10	144	33	55	33	16 May 10	144	40	34	54
13 Jun 10	394	58	203	58	13 Jun 10	394	50	100	53
11 Jul 10	128	47	32	47	11 Jul 10	128	65	49	70
08 Aug 10	32	50	0	50	08 Aug 10	32	71	27	70
05 Sep 10	145	160	0	160	05 Sep 10	145	32	50	43
03 Oct 10	200	42	69	42	03 Oct 10	200	32	39	45
28 Nov 10	21	146	0	146	28 Nov 10	21	33	16	46
26 Dec 10	54	84	0	84	26 Dec 10	54	21	23	24
23 Jan 11	130	74	43	74	23 Jan 11	130	53	21	47
20 Feb 11	51	76	10	76	20 Feb 11	51	77	12	72
20 Mar 11	77	91	0	91	20 Mar 11	77	47	15	43
17 Apr 11	65	97	10	97	17 Apr 11	65	35	16	31
15 May 11	60	175	0	175	15 May 11	60	40	12	40
12 Jun 11	31	0	0	0	12 Jun 11	31	58	0	38
10 Jul 11	64	36	0	36	10 Jul 11	64	36	10	21
07 Aug 11	136	95	44	95	07 Aug 11	136	39	20	23
04 Sep 11	219	156	30	156	04 Sep 11	219	60	119	48
02 Oct 11	109	150	14	150	02 Oct 11	109	35	0	37

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
25 Dec 11	67	147	0	147	25 Dec 11	67	35	24	40
22 Jan 12	216	29	35	29	22 Jan 12	216	66	84	41
19 Feb 12	138	60	0	60	19 Feb 12	138	50	105	56
18 Mar 12	81	84	18	84	18 Mar 12	81	35	63	42
15 Apr 12	246	74	0	74	15 Apr 12	246	24	73	41

Clearasil Ultra (BP), Boots Skin Clear (LP), Tesco Clear Skin (CP)

Skin Care (Clearasil Ultra/Boots Skin Clear/Tesco Clear Skin)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	19 Apr 09 – 21 Mar 10	19 Apr 09 – 21 Mar 10
Period 2	18 Apr 10 – 20 Mar 11	18 Apr 10 – 20 Mar 11
Period 3	17 Apr 11 – 15 Apr 12	17 Apr 11 – 15 Apr 12

Whole Market								
	Lookalike				Control			
	Clearasil		Boots		Clearasil		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	282.0769	188.4704	54.07692	58.97664	282.0769	188.4704	22.07692	19.41847
Period 2	129.9167	101.8648	75.75	40.31495	129.9167	101.8648	45.41667	18.37715
Period 3	116.6429	67.0942	83.92857	56.22819	116.6429	67.0942	44.57143	16.32702

Supermarket								
	Lookalike				Control			
	Clearasil		Boots		Clearasil		Tesco	
	x	SD	x	SD	X	SD	x	SD
Period 1	44.46154	54.66659	54.07692	58.97664	67.15385	27.4343	25	26.41023
Period 2	37.83333	57.64757	75.75	40.31495	35.41667	24.06604	50	14.83852
Period 3	11.42857	15.0216	83.92857	56.22819	43.85714	41.14488	38.64286	9.723937

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
36m	37	-0.25008	-0.07976	-0.31938	-0.13392

Notes

The control and the lookalike were both on the market before the lookalike. Accordingly, the 36 months of comparison data was used.

Shaving Gel

(Gillette Fusion Shaving Gel/Boots Blade 3 Shaving Gel/Morrison's Shaving Gel)

Volume ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
19 Apr 09	0	0	0	0	19 Apr 09	0	34	0	34
17 May 09	0	0	0	0	17 May 09	0	21	0	21
14 Jun 09	0	0	0	0	14 Jun 09	0	12	0	12
12 Jul 09	0	0	0	0	12 Jul 09	0	25	0	25
09 Aug 09	0	0	0	0	09 Aug 09	0	33	0	33
06 Sep 09	0	0	0	0	06 Sep 09	0	29	0	29
04 Oct 09	0	0	0	0	04 Oct 09	0	23	0	23
01 Nov 09	0	0	0	0	01 Nov 09	0	21	0	21
29 Nov 09	0	0	0	0	29 Nov 09	0	24	0	24
27 Dec 09	0	0	0	0	27 Dec 09	0	13	0	13
24 Jan 10	0	0	0	0	24 Jan 10	0	23	0	23
21 Feb 10	0	0	0	0	21 Feb 10	0	22	0	22
21 Mar 10	0	0	0	0	21 Mar 10	0	16	0	16
18 Apr 10	0	0	0	0	18 Apr 10	0	24	0	24
16 May 10	0	0	0	0	16 May 10	0	30	0	30
13 Jun 10	0	0	0	0	13 Jun 10	0	28	0	28
11 Jul 10	0	0	0	0	11 Jul 10	0	104	0	104
08 Aug 10	0	0	0	0	08 Aug 10	0	50	0	50
05 Sep 10	0	0	0	0	05 Sep 10	0	30	0	30
03 Oct 10	0	0	0	0	03 Oct 10	0	26	0	26
31 Oct 10	0	0	0	0	31 Oct 10	0	31	0	31
28 Nov 10	0	0	0	0	28 Nov 10	0	34	0	34
26 Dec 10	0	0	0	0	26 Dec 10	0	44	0	44
23 Jan 11	0	0	0	0	23 Jan 11	0	34	0	34
20 Feb 11	184	0	31	0	20 Feb 11	184(9)	27(13)	3(15)	27(13)
20 Mar 11	342	0	73	0	20 Mar 11	342(1)	21(14)	57(2)	21(14)
17 Apr 11	187	0	4	0	17 Apr 11	187(8)	42(4)	16(8)	42(4)
15 May 11	231	0	30	0	15 May 11	231(3)	33(10)	11(9)	33(10)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
07 Aug 11	74	0	9	0	07 Aug 11	74(16)	33(10)	22(5)	33(10)
04 Sep 11	285	0	92	0	04 Sep 11	285(2)	38(6)	68(1)	38(6)
02 Oct 11	192	0	0	0	02 Oct 11	192(6)	36(8)	6(12)	36(8)
30 Oct 11	109	0	13	0	30 Oct 11	109(14)	55(1)	19(6)	55(1)
27 Nov 11	142(4)	7(1)	7(5)	7(1)	27 Nov 11	142(11)	31(12)	4(14)	31(12)
25 Dec 11	189(2)	0(3)	22(1)	0(3)	25 Dec 11	189(7)	40(5)	29(3)	40(5)
22 Jan 12	206(1)	0(3)	19(2)	0(3)	22 Jan 12	206(4)	38(6)	11(9)	38(6)
19 Feb 12	135(5)	0(3)	16(3)	0(3)	19 Feb 12	135(13)	19(16)	18(7)	19(16)
18 Mar 12	84(6)	7(1)	3(6)	7(1)	18 Mar 12	84(15)	36(8)	1(16)	36(8)
15 Apr 12	157(3)	0(3)	14(4)	0(3)	15 Apr 12	157(10)	45(2)	5(13)	45(2)

Gillette Fusion Shaving Gel (BP), Boots Blade 3 Shaving Gel (LP), Morrison's Shaving Gel (CP)

Shaving Gel (Gillette Fusion Shaving Gel/Boots Blade 3 Shaving Gel/ Morrison's Shaving Gel)

Volume ('000) – Mean and Standard Deviation

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	20 Feb 11 – 30 Oct 11	19 Apr 09 – 23 Jan 11
Period 2	27 Nov 11 – 15 Apr 12	20 Feb 11 – 22 Jan 12
Period 3	-	19 Feb 12 – 15 Apr 12

Whole Market								
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	X	SD	x	SD	X	SD	x	SD
Period 1	194.7	79.19884	0	0	0	0	20.45833	17.90793
Period 2	152.1667	43.18063	2.333333	3.614784	0	0	35.23077	9.292953
Period 3					191.0769	70.24892	33.33333	13.20353

Supermarket								
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	X	SD	x	SD
Period 1	29.4	30.12271	0	0	0	0	30.45833	17.90793
Period 2	13.5	7.231874	2.333333	3.614784	0	0	35.23077	9.292953
Period 3	-	-	-	-	21.53846	20.05665	33.33333	13.20353

Shaving Gel (Gillette Fusion Shaving Gel/Boots Blade 3 Shaving Gel/ Morrison's Shaving Gel)

Volume ('000) – Correlations

Pearson's Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-0.70259	-0.91042	-0.2325	-0.58662
12m	11	-	-	-0.28418	-0.17375
15m	14	-	-	-0.17914	-0.19008

Correlations Spearman's rank

n	Lookalike		n	Control	
	Whole	S/Market		Whole	S/Market
6	-0.62106	-0.82808	16	0.06637	-0.06937

Kendall's tau b

n	Lookalike		N	Control	
	Whole	S/Market		Whole	S/Market
6	-0.54772	-0.73030	16	0.01695	-0.04256

Shaving Gel (Gillette Fusion Shaving Gel/Boots Blade 3 Shaving Gel/ Morrison's Shaving Gel)

Value ('000)

4 week period ending	Lookalike				4 week period ending	Control			
	Whole market		Supermarket only			Whole market		Supermarket only	
	BP	LP	BP	LP		BP	CP	BP	CP
19 Apr 09	0	0	0	0	19 Apr 09	0	39	0	39
17 May 09	0	0	0	0	17 May 09	0	24	0	24
14 Jun 09	0	0	0	0	14 Jun 09	0	14	0	14
12 Jul 09	0	0	0	0	12 Jul 09	0	26	0	26
09 Aug 09	0	0	0	0	09 Aug 09	0	31	0	31
06 Sep 09	0	0	0	0	06 Sep 09	0	28	0	28
04 Oct 09	0	0	0	0	04 Oct 09	0	22	0	22
01 Nov 09	0	0	0	0	01 Nov 09	0	20	0	20
29 Nov 09	0	0	0	0	29 Nov 09	0	23	0	23
27 Dec 09	0	0	0	0	27 Dec 09	0	12	0	12
24 Jan 10	0	0	0	0	24 Jan 10	0	22	0	22
21 Feb 10	0	0	0	0	21 Feb 10	0	22	0	22
21 Mar 10	0	0	0	0	21 Mar 10	0	16	0	16
18 Apr 10	0	0	0	0	18 Apr 10	0	24	0	24
16 May 10	0	0	0	0	16 May 10	0	26	0	26
13 Jun 10	0	0	0	0	13 Jun 10	0	27	0	27
11 Jul 10	0	0	0	0	11 Jul 10	0	88	0	88
08 Aug 10	0	0	0	0	08 Aug 10	0	50	0	50
05 Sep 10	0	0	0	0	05 Sep 10	0	25	0	25
03 Oct 10	0	0	0	0	03 Oct 10	0	25	0	25
31 Oct 10	0	0	0	0	31 Oct 10	0	26	0	26
28 Nov 10	0	0	0	0	28 Nov 10	0	33	0	33
26 Dec 10	0	0	0	0	26 Dec 10	0	41	0	41
23 Jan 11	0	0	0	0	23 Jan 11	0	30	0	30
20 Feb 11	397	0	69	0	20 Feb 11	397	27	12	27
20 Mar 11	701	0	157	0	20 Mar 11	701	21	137	21
17 Apr 11	472	0	15	0	17 Apr 11	472	41	48	41
15 May 11	522	0	90	0	15 May 11	522	33	43	33
12 Jun 11	289	0	76	0	12 Jun 11	289	22	51	22
10 Jul 11	427	0	38	0	10 Jul 11	427	46	15	46
07 Aug 11	205	0	28	0	07 Aug 11	205	35	43	35

<i>4 week period ending</i>	<i>Lookalike</i>				<i>4 week period ending</i>	<i>Control</i>			
	<i>Whole market</i>		<i>Supermarket only</i>			<i>Whole market</i>		<i>Supermarket only</i>	
	<i>BP</i>	<i>LP</i>	<i>BP</i>	<i>LP</i>		<i>BP</i>	<i>CP</i>	<i>BP</i>	<i>CP</i>
30 Oct 11	226	0	11	0	30 Oct 11	226	55	38	55
27 Nov 11	298	11	10	11	27 Nov 11	298	31	9	31
25 Dec 11	427	0	37	0	25 Dec 11	427	40	97	40
22 Jan 12	471	0	35	0	22 Jan 12	471	38	31	38
19 Feb 12	285	0	40	0	19 Feb 12	285	20	36	20
18 Mar 12	180	10	6	10	18 Mar 12	180	39	2	39
15 Apr 12	328	0	39	0	15 Apr 12	328	45	20	45

Gillette Fusion Shaving Gel (BP), Boots Blade 3 Shaving Gel (LP), Morrison's Shaving Gel (CP)

Shaving Gel (Gillette Fusion Shaving Gel/Boots Blade 3 Shaving Gel/ Morrison's Shaving Gel)

Value ('000) – Mean, Standard Deviation and Pearson's Coefficient

	Lookalike (4 w/e)	Control (4 w/e)
Period 1	20 Feb 11 – 30 Oct 11	19 Apr 09 – 23 Jan 11
Period 2	27 Nov 11 – 15 Apr 12	20 Feb 11 – 22 Jan 12
Period 3	-	19 Feb 12 – 15 Apr 12

Whole Market								
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	x	SD	x	SD
Period 1	420.7	156.8644	0	0	0	0	28.91667	15.10519
Period 2	331.5	104.7182	3.5	5.43139	0	0	35.84615	9.397217
Period 3					415.6154	141.0517	34.66667	13.05118

Supermarket								
	Lookalike				Control			
	Gillette		Boots		Gillette		Morrison's	
	x	SD	x	SD	x	SD	x	SD
Period 1	66.8	62.44429	0	0	0	0	28.91667	15.10519
Period 2	27.83333	15.51021	3.5	5.43139	0	0	35.84615	9.397217
Period 3	-	-	-	-	52.53846	43.56722	34.66667	13.05118

Correlations (r)

r	df	Lookalike		Control	
		Whole	S/Market	Whole	S/Market
24wk	4	-0.66231	-0.98407	-0.12727	-0.556
12m	11	-	-	-0.26863	-0.17503
15m	14	-	-	-0.18565	-0.17814

Notes

The sales of the lookalike shaving gel were very low indeed, sometimes being recorded as zero. This would affect the quality of the data analysis.

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