

APPENDIX 3

**Hogan Lovells' summary of Member States' CLP's responses
to Phase 1A parasitic copying questionnaire**



MEMBER STATE	SPECIFIC LEGISLATIVE PROVISIONS TO PROTECT AGAINST PARASITIC COPYING		OTHER LEGAL PROVISIONS TO SECURE PROTECTION	FURTHER LEGAL OR ADDITIONAL PROTECTIONS AVAILABLE				ELEMENTS NECESSARY FOR SUCCESSFUL COMMENCEMENT OF LEGAL PROCEEDINGS FOR PARASITIC COPYING
	Yes	No		Unfair Competition/ Consumer protection or Unfair commercial practices	Trade mark	Design/ Copyright	Patent	
Austria	✓		Misleading commercial practices law	✓ Unfair competition and unfair commercial practices	✓	✓ both	---	<ul style="list-style-type: none"> - Individuality of the product and/or get-up - Product and/or get-up has obtained sufficient degree of distinctiveness - Danger of confusion or dilution between lookalike and original - Different product design/get-up avoiding a danger of deception is deemed to be reasonable for the imitator
Belgium		✓	---	✓ Trade practices law and tort law	✓	✓ both	✓	<p>Two types of unfair competition (actions contrary to honest commercial practices): (a) classic; and (b) parasitic unfair competition. Each has 3 elements:</p> <p><u>Classic</u> (servile or quasi-servile imitation which confuses consumer):</p> <ul style="list-style-type: none"> (1) overall impression of visual appearance of the copied product is identical for the average consumer (2) resulting risk of confusion in minds of public to whom the copy is directed (3) the copied product must have a degree of originality so the copy is an expression of creative service <p><u>Parasitic</u>:</p> <ul style="list-style-type: none"> (1) copying/imitation must be systematic and continuous, i.e. several acts rather than just one (2) the copied product must have a degree of originality (3) the imitator must have taken unfair advantage and derived profit from the copied product

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Bulgaria		✓	---	✓ Unfair competition and unfair commercial practices	---	---	---	Consumer protection unfair commercial practices law requires consumer complaint of confusion. Unfair competition requires: (1) offering goods whose appearance, packaging, name or other characteristics mislead as to their origin or other characteristics (2) use of identical or similar brand to company brand in a way that would harm competitors' interests (3) use of identical or similar domain name or website to a company's domain name or website in a way that would harm competitors' interests or cause confusion
Cyprus	✓		Unfair competition and passing off, unfair commercial practices law, commercial descriptions law	✓ All	---	---	---	<u>Unfair competition</u> - civil action - copying of name, character or description of goods which leads to consumer confusion and appropriate factual evidence to support the claim <u>Unfair commercial practices</u> - civil action - misleading or deceptive including in overall appearance which leads consumer to make a different consumer decision than it would otherwise have made - factual evidence of consumer deception is required <u>Consumer protection</u> - criminal offence - factual evidence to criminal standard is required
Czech Republic	✓		Unfair competition law	---	---	---	---	Unfair competition claims must be brought by affected competitors, consumers or other customers

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Denmark	✓		Marketing law, unfair competition law, civil law	---	---	---	---	<p>Any person who believes that another person's product infringes his rights may commence legal proceedings. The burden of proof lies with the injured party.</p> <p>All types of products are covered, but the original product must have a certain degree of distinctive character and innovation. The copied product must be based on an exploitation of the original product's goodwill and reputation.</p> <p>The court will balance the need for protection against the need for fair competition.</p>
Estonia	✓		Unfair competition law and misleading advertising law	---	---	---	---	<p>Non-exhaustive list of what constitutes unfair competition acts - "dishonest trading practices" and "acts contrary to good moral practices" are unfair competition.</p> <p>Misleading advertising – advertising that is likely to deceive a consumer and which affects the consumer's economic behaviour.</p>
Finland		✓	---	✓ Unfair competition	---	---	---	<p>Parasitic copying prohibited by the use of any practice which violates good business practice or is unfair to other entrepreneurs.</p> <p>Protection is granted where there may be a risk of consumer confusion or confusion as to trade origin, but generally denied where there is a risk of association but no confusion.</p> <p>The essential element to be established is that the original product and its characteristics are so unique and so well-known in the market that they are commonly associated with a particular commercial source.</p>

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France		✓	Law of tort based on Article 1382 of French Civil Code	✓ Unfair competition law (which involves acts of competitor)/ parasitism (which concerns acts of third party)	---	---	---	<p>General elements:</p> <p>(1) plaintiff who risks being affected and has interest to act (2) a specific defendant (3) limitation period of 10 years from the date on which plaintiff became aware of act (4) evidence of above and of the following:</p> <p>(a) prior existence of plaintiff's products (b) wrongful acts (with or without intention) - for parasitism; acts must be distinct from acts of unfair competition (c) damages (in particular, loss of a competitive advantage, misappropriation of customers, loss of business opportunity, moral prejudice or commercial nuisance) (d) link between wrongful act and damages (e) for unfair competition only - likelihood of confusion</p>
Germany	✓		---	---	---	---	---	<p>Unfair competition - legal action brought by any competitor or any person directly affected by parasitic copying in any court in Germany</p> <p>Substantive requirements:</p> <p>(1) copied/imitated product must have "competitive distinctiveness" (2) imitated product must enjoy certain "awareness" in relevant trade circles. For dilution, higher degree of reputation is needed (3) where no market awareness or presence on German market - rare and difficult possibility to run "obstruction of market entry" (4) no clear guidance as to whether different brand name on product excludes confusion or not (5) all claims require "unfair element", e.g. likelihood of confusion, exploitation of reputation, dilution or obstruction of market entry</p>

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Greece	✓		Unfair competition law, consumer protection law - misleading and comparative advertising law	✓	✓	✓	✓	Legal basis for proceedings before civil courts: (1) Comparative originality of the violated distinctive feature (2) Establishment of the violated distinctive feature in commercial transactions (3) Risk of creating confusion for consumers (4) Similarity of products
Hungary	✓		Unfair competition law and under general law, claims for damages and unjust enrichment	---	---	---	---	(1) Unfair competition claims must be made by one competitor against another (2) Plaintiff must show it has prior proprietary rights over trade dress or other elements copied by the defendant sufficient to show consumer association with plaintiff's product for those elements (3) Copied elements must be distinctive, applying test similar to test for distinctiveness in trade mark infringement cases (4) Likelihood of confusion
Republic of Ireland		✓	Misleading advertising and comparative advertising law, consumer law (unfair commercial practices), criminal law (deception/theft offences), common law tort of passing off	✓ Unfair commercial practices	✓	✓	✓	<u>Tort of passing off</u> : misrepresentation made in course of trade by trader to prospective or ultimate customers which it is reasonably foreseeable will injure the goodwill or business of another trader and thereby causes actual damage to the other trader's business <u>Consumer law</u> : harmonised misleading advertising provisions
Italy		✓	---	✓ Unfair competition	---	---	---	Three types of unfair competition in Article 2598 ICC. Common elements: (1) similarity of visible shape or packaging of products at point of consumer purchase (2) high individual character of products copied capable of distinguishing original product as originating from unique source. Other elements depend on type of unfair competition pleaded

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Latvia		✓	Trade marks, geographical indications, unfair commercial practices, competition law, advertising law, civil law	✓ Unfair commercial practices	✓	---	---	Obtain sample of parasitic copy – show that the original product has been used in Latvia in good faith and that the parasitic copy would mislead consumers about the origin of the goods/services
Lithuania	✓		Unfair competition law	✓ Unfair competition	---	---	---	(1) Two parties must be competitors (2) Defendant's actions are intended to compete with plaintiff by using plaintiff's reputation or by imitating its products or markets or by confusing consumers
Luxembourg		✓	---	✓ Unfair competition, tort law	---	---	---	(1) Product or service must be copied (2) Copied product or service must be the result of intellectual or financial effort (3) Copying enables the infringer to save development costs or to profit from the reputation of the competitor
Malta		✓	---	✓ Commercial law	✓	---	---	Potential confusion amongst relevant market sector
The Netherlands		✓	---	✓ Unfair competition (civil law - slavish imitation)	---	---	---	(1) Plaintiff's product must be distinctive (2) Defendant's product must confuse public (3) Defendant's product must be similar to plaintiff's product regarding features that are not important for reliability or usefulness of the product (4) Defendant must have failed in doing what is reasonably possible to prevent confusion

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Poland	✓		Unfair competition law	✓ Unfair competition	---	---	---	(1) Plaintiff and Defendant must be traders (2) Act is a breach of law or an activity contrary to good practices (3) Act is imitating finished product by copying external image (4) Imitation is not of functional features (5) Imitating is by way of technical means of reproduction (6) Risk of misleading customers as to identity of producer or product
Portugal		✓	---	✓ Unfair competition	---	---	---	Act of unfair competition if unauthorised statements or references are made to benefit from the credit or reputation of the name or trade mark or establishment of a competitor. Statements or references must: (1) be made without the authorisation of the competitor (2) be contrary to honest uses and standards (3) have the purpose of achieving an unlawful benefit for its author Act of unfair competition in relation to parasitic copying of a trade mark: (a) trade mark has priority (b) both trade mark and imitation designate identical or similar goods or services (c) trade mark and imitation are so similar that consumers could be easily misled or confused or there is a risk of association with the trade mark so that the consumer can only distinguish between them after attentive scrutiny or comparison
Romania	✓		Unfair competition law as part of civil law, criminal law	✓ Unfair competition law if involving packages	---	---	---	(1) Defendant's packages are confusingly similar to the Plaintiff's (2) Plaintiff must have launched its packages on the market in Romania before the Defendant (3) Defendant must have known its packages were confusingly similar to the Plaintiff's and intended to gain an unfair commercial advantage from it

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Slovak Republic	✓		Unfair competition	---	---	---	---	Court action required using factual evidence that Defendant copies or imitates the products of the Plaintiff and/or introduces them to the market, which may lead to confusion between the Defendant's products and those of the Plaintiff.
Slovenia		✓	Consumer Protection Act, Consumer Protection against Unfair Commercial Practices Act and Protection of Competition Act	✓ Unfair competition law within the Consumer Protection Act, Consumer Protection against Unfair Commercial Practices Act and Protection of Competition Act	---	---	---	<p>Under the Consumer Protection Act or Consumer Protection against Unfair Commercial Practices Act, one of the elements of misleading commercial practice must be established.</p> <p><u>Consumer Protection Act:</u> Comparative advertising must not: (1) take unfair advantage of the reputation of a trade mark or service mark, trade name or other distinguishing mark of a competitor, or of the origin of competing products; (2) present goods or services as imitations or replicas of those bearing a protected trade mark, service mark or trade name.</p> <p><u>Consumer Protection against Unfair Commercial Practices Act:</u> Commercial practices shall be regarded as misleading if they cause the average consumer to take a decision which they would not otherwise have taken and include any method of marketing a product, including comparative advertising which creates confusion with any other product, brand, trade name or other distinguishing mark of a competitor.</p> <p><u>Protection of Competition Act:</u> Acts of unfair competition include: (1) promotion, advertising or offering of goods or services by stating untrue data or making use of terms alluding to the prestige of another company, its products or services;</p>

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								(2) sale of goods bearing designations or data which will or might lead to confusion concerning the origin, methods of production, quantity, quality or other properties of the goods; (3) unjustified use of a name, business name, mark or any other designation of another company regardless of whether that company granted approval when this would or could lead to confusion in the market.
Spain	✓		Unfair competition law - parasitic copying section	---	---	---	---	<p>Imitation of third party services, products or initiatives is generally permitted. High burden of proof must be met for claim of unfair imitation. Elements required:</p> <p>(1) Imitation of essential element of third party's product, service or initiative - essential element confers competitive singularity on imitated product or service (2) Risk of consumer confusion (3) Imitation occurred in the market (4) Risk of confusion could have been avoided by imitator (5) Original has competitive merit, i.e. (a) it has competitive singularity and (b) it is sufficiently well-established and known in the marketplace (necessary to prove unfair advantage of reputation claims).</p> <p>Can also make claims for taking unfair advantage of third party's reputation or third party's efforts. The latter requires the plaintiff to establish (i) identity between products or services, (ii) the innovator has not yet recovered his production costs, (iii) that these costs were substantial and (iv) that the imitation causes the innovator substantial harm.</p>

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Sweden		✓	---	✓ Unfair competition	✓	✓ both	---	<p><u>Unfair competition</u> - designed to protect consumers. Requires that the product is distinctive and known on the market. Civil and criminal law orders and penalties available.</p> <p><u>Copyright law</u> - original works, including applied art, receive protection. Civil and criminal orders and penalties available.</p> <p><u>Trade mark law</u> - based on registered or use-based protection. Civil and criminal orders and penalties available. Harmonised infringement provisions.</p> <p><u>Designs law</u> - harmonised infringement provisions for registered Swedish and community designs and unregistered community designs.</p>
UK		✓	---	✓ Passing off	✓	✓ both UK and EC registered and un-registered designs	---	<p><u>Trade mark law</u> - harmonised infringement provisions</p> <p><u>Designs law</u> - harmonised infringement provisions</p> <p><u>Copyright law</u> - copying of quantitatively or qualitatively substantial part of original copyright work without permission</p> <p><u>UK unregistered designs law:</u> Primary infringement - copying design so as to produce articles exactly the same or substantially similar to the design or the production of a design document recording the design to enable such articles to be made. Secondary infringement - defendant imports into UK for commercial purposes, possesses, sold, hired or offered for sale an infringing article (according to test for primary infringement) and defendant knows or has reason to believe that imported article is an infringing copy.</p>

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								<p><u>Passing off</u>: misrepresentation made in the course of trade by trader to trader's prospective or ultimate customers which it is reasonably foreseeable will injure the goodwill or business of another trader and thereby causes damage to the other trader's business.</p>