

***The following summaries are intended to act as an overview of the CLP responses to the Phase 1A and Phase 1B parasitic copying questionnaires set out in Appendix 2 and Appendix 4 to this report. The summaries have not been reviewed or confirmed by the CLP save in those instances where clarification was sought by Hogan Lovells.***

## AUSTRIA

Specific legislative provisions provide protection against parasitic copying under the Austrian Federal Act Against Unfair Competition 1923, as restated in 1984 and last amended in 2007 ("**UCA**"), namely, No. 13 of the Annex to the UCA (on misleading commercial practices) and Section 9 UCA (on misuse of signs of an enterprise). Further protection is provided under Section 1 UCA (on unfair business practices). Section 1 UCA has been used successfully in legal proceedings against look-alikes such as in cases relating to the use of a similar get-up for a range of dog food and a similar packaging for kitchen knives.

To commence successfully legal proceedings for parasitic copying it is necessary to establish: (i) the "individuality" of the original product and/or its get up; or (ii) that the product and/or its get up have obtained a sufficient degree of distinctiveness. It is also necessary to show a danger of confusion between the look-alike and the original product or a danger of dilution of the original product.

The civil remedies available in an action for parasitic copying include a claim for the defendant to cease and desist (regardless of fault); either damages (fundamental prerequisite that the defendant is at fault) or an account of profits; and publication of the judgment. The remedies are cumulative.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and the Enforcement Directive are not considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities, eg. the Federal Chamber of Labour, the Federal Economic Chamber and the Federal Competition Authority. While public authorities are permitted to enforce the UCPD it is not considered to be an effective way to prevent the sale of parasitic copies. The primary focus of the public authorities is to protect consumers. No examples of action having been taken by public authorities against parasitic copies on behalf of brand owners were known at the time of writing.

## BELGIUM

No specific legislative provisions provide protection against parasitic copying. To secure protection, different legal grounds can be used. The key provision is Article 95 of the Market Practices and Consumer Protection Act of 6 April 2010 (on unfair competition between companies) (the "**Act**"). Where appropriate, Article 96 of the Act (on misleading advertising between companies), intellectual property laws and the Civil Code of 21 March 1804 (on tort law) can also be used.

Belgian case law distinguishes between two types of unfair competition where an imitator's behaviour is contrary to honest commercial practices: "classic unfair competition" where the look-alike gives rise to the risk of confusion; and "parasitic imitation" where confusion is not required but the imitator must benefit improperly from the creative efforts expended on the original product.

To commence successfully legal proceedings for "classic unfair competition", it is necessary to demonstrate that: (i) the look-alike is a copy; (ii) there is a risk of confusion for consumers to which the look-alike is directed; and (iii) the original product has a degree of originality. For "parasitic imitation", the plaintiff must show that: (1) several acts of imitation have been committed (a single isolated copy is not sufficient, the copying must be systematic and continuous); (2) the original product has a degree of originality; and (3) the imitator has taken an unfair advantage and derived some profit from the creative efforts expended on the original product.

The civil remedies available in an action for parasitic copying include injunctions, cease and desist orders, declaratory judgments and publication of the judgment, as well as damages (these are rarely claimed since separate proceedings must be commenced for damages to be awarded) and legal costs (awarded according to a fixed scale). The remedies are cumulative.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and the Enforcement Directive have not caused substantial changes or improvements to a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities, eg. the Ministry of Consumer Protection and the Ministry of Economic Affairs. In practice, the public authorities take action where the collective interests of consumers may be harmed. They are unlikely to intervene except in cases concerning flagrant breaches of consumer protection provisions. No examples of action having been taken by public authorities against parasitic copies were known at the time of writing. When questioned, the Ministry of Economic Affairs confirmed that, in principle, it would not intervene in cases concerning parasitic copying.

## BULGARIA

No specific legislative provisions provide protection against parasitic copying. In order to secure protection, Article 68 of the Law of Protection of Consumers of 10 June 2006 (as amended) on unfair and misleading commercial practices that confuse consumers, and Article 35 of the Law on Protection of Competition of 28 October 2008 (as amended) on unfair and misleading commercial practices that harm competitors, can be used.

There is one civil remedy available in an action for parasitic copying under the Civil Procedure Code which is compensation paid by the infringer to all legal and natural persons who have suffered damage, irrespective of whether the damage was directed against them. No further remedies are foreseen by the law.

It is not possible to say whether the enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and the Enforcement Directive have improved a plaintiff's chances of bringing a successful claim for parasitic copying as there are no known cases or published court decisions to date. The absence of any such cases would suggest they have not.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities. Legal proceedings are brought before the Commission for Protection of Competition ("**CPC**") either at: (1) CPC's own instigation; or (2) on request by a Public Prosecutor; or (3) on request from persons whose rights are or are in danger of being infringed under the Law on Protection of Competition 2007.

Enforcement by public authorities might be effective if the CPC and Public Prosecutor's Office are vigilant and well-informed about the possibility of infringement and the particulars of the brands at risk. As this is unlikely to be the case, the most efficient means for enforcement should be a co-operative effort between the public authorities and private rights holders.

## CYPRUS

No specific legislative provisions provide protection against parasitic copying. To secure protection, different legal grounds can be used. Namely, Article 35 of the Civil Wrongs Law N.82(I)/2008 (on passing-off/unfair competition) ("**Civil Wrongs Law**"), consumer protection provisions under the Unfair Commercial Practices of Businesses Against Consumers Law N.103(I)/2007 ("**UCPB**") (on practices that mislead consumers) and the Commercial Descriptions Law N.5/1987 (on inaccurate descriptions that amount to a criminal offence).

To commence successfully legal proceedings for parasitic copying under the Civil Wrongs Law it is necessary to show that a person has presented his goods as those of another trader in such a manner as to cause consumers to believe the goods they are purchasing are those of the other trader. To successfully commence legal proceedings for parasitic copying under the UCPB it is necessary to establish that a commercial practice is unfair because it deceives or attempts to deceive the average consumer about the nature or characteristic of a product, or leads or attempts to lead the average consumer to take a decision they would not have otherwise taken.

The civil remedies available in an action for parasitic copying include injunctive relief and damages. These remedies are not cumulative. However, under the UCPB, the Consumer Protection Authority ("**CPA**") has the power: (a) to order the person responsible to stop the unfair commercial practice; (b) to impose an administrative fine (up to 5% of the annual value of the infringer's trade in the previous year or up to 150,000 Cyprus Pounds); (c) to award subsequent fines in cases of continuing infringement (up to 1,000 Cyprus Pounds per day); and (d) to make an application to Court for an injunction, including a temporary order against any person responsible for the infringement. These remedies are cumulative.

The enactment of the EC Unfair Commercial Practices Directive ("**UCPD**") has improved a plaintiff's chances of bringing a successful claim for parasitic copying because of the availability of penalties imposed by the CPA under the UCPB. If penalties are imposed and the plaintiff proceeds with an action for trade mark infringement and/or passing off to cover parasitic copying, the imposition of the CPA's penalties could act as strong evidence in support of the plaintiff's case. The enactment of the Enforcement Directive has not improved the plaintiff's chances of success.

The UCPD has been implemented so as to permit enforcement by public authorities, namely the CPA which is the enforcement and competent authority for the UCPD. Enforcement by the CPA is an effective way to prevent the sale of parasitic copies. However, to date, cases have involved counterfeit goods and there are no examples of the CPA using the UCPB to stop the sale of parasitic copies.

## CZECH REPUBLIC

Legal protection against parasitic copying is available under unfair competition law. Section 44 of Act No. 53/1991 Coll., as amended ("**Commercial Code**") prohibits unfair competition which is generally described as conduct in economic competition or economic relations which conflicts with good competition practices and which may be detrimental to competitors, consumers or customers.

In cases where unfair competition can be established, certain specific provisions of the Commercial Code may be used to secure protection against parasitic copying, namely Section 46 (on the misleading marking of goods or services) and Section 47 (on causing a risk of confusion by, *inter alia*, imitating a competitor's products).

To commence successfully legal proceedings for parasitic copying the plaintiff must prove that there is unfair competition and the defendant is liable for it. In some circumstances, proceedings may be brought by legal entities authorised to act on behalf of competitors or consumers. Such entities are entitled to request a cease and desist order but none of the other remedies listed below.

The civil remedies available in an action for parasitic copying under the Commercial Code are: (a) cease and desist orders; (b) compensation (monetary or non-monetary); (c) damages; and (d) surrender of unjust enrichment. These remedies are cumulative. A plaintiff may also request one of the following civil remedies under the Civil Procedure Code, Act No.99/1963 Coll., as amended: (a) preliminary injunction; (b) determination order; (c) securing of evidence; or (d) publication of judgement. These remedies are not cumulative.

The enactments of the EC Unfair Commercial Practice Directive ("**UCPD**") and the Enforcement Directive have not had a significant impact on a plaintiff's chances of bringing a successful claim for parasitic copying unless industrial property rights (eg. trademark, industrial design) have been infringed.

Implementation of the UCPD substantially amended Act No. 634/1992 Coll., Consumer Protection Act, ("**CPA**") by incorporating provisions on misleading commercial practices but it did not have any major impact on unfair competition under the Commercial Code (only amending one section on comparative advertising). The CPA deals with business to consumer practices and not business to business practices. Right holders are only entitled to ask the Czech Trade Inspectorate ("**CTI**") to take proceedings under the CPA. Therefore, the UCPD has only had a positive impact on the chances of a consumer bringing a successful claim for parasitic copying and not a competitor.

The CPA can be enforced by the CTI or other public authorities, depending on the product. The provisions can also be enforced by persons whose rights have been jeopardised as a result of unfair competition or a legal entity designed to protect the interests of consumers and competitors. When questioned, the CTI indicated that it was unlikely to investigate parasitic copying if there had seen no infringement of registered intellectual property rights. There are many examples of action having been taken by public authorities on the basis of such infringement but these are usually cases of counterfeit and not look-alike products.

## DENMARK

Specific legislative provisions provide protection against parasitic copying under the Danish Marketing Practices Act of 31 August 2009 ("**DMPA**"), namely Section 1 which stipulates that traders shall exercise good marketing practices with regard to consumers, other traders and the public interest. According to the guidelines to the DMPA and comprehensive case law, parasitic copying can amount to a violation of Section 1 DMPA.

The main objective of the DMPA is to provide protection against acts of unfair competition and other types of behaviour which conflict with good marketing practice in order to protect the goodwill and reputation of traders. Section 1 DMPA has a number of supplementary provisions. Parasitic copying is not specifically mentioned in any of these provisions but is covered by the general principle of Section 1 DMPA.

To commence successfully legal proceedings for parasitic copying it is necessary for the plaintiff to establish that the original product is distinctive and innovative and that the person responsible for the look-alike was familiar with the original product.

The civil remedies available in an action for parasitic copying include prohibitions, injunctions (including preliminary injunctions), the destruction and recall of the parasitic copies, compensation and/or damages. These remedies are cumulative.

The enactment of the EC Unfair Commercial Practices Directive ("**UCPD**") has had a limited impact on Danish law as, for the most part, the DMPA was already compliant with the UCPD. Consequently, the enactment has not changed a plaintiff's chances of bringing a successful claim for parasitic copying. The enactment of the Enforcement Directive has made it easier for rights holders to claim compensation for non-financial loss.

The UCPD has been implemented so as to permit enforcement by both private rights holders and public authorities, ie. the Danish Consumer Ombudsman ("**DCO**"). The DCO may file a lawsuit to claim for a prohibition or injunction or it may issue an injunction itself if the action is clearly in breach of the DMPA and the matter cannot be settled by negotiation.

While the DCO is permitted to enforce the DMPA it is not considered to be an effective way to prevent the sale of parasitic copies. Private rights holders are more likely to take action against parasitic copying because they have an immediate interest in filing a lawsuit and if they do not file a lawsuit themselves they cannot obtain certain remedies such as compensation and damages. The DCO is preoccupied with enforcing other aspects of the DMPA and most likely prioritises those cases. There are no reported decisions of the DCO taking action against parasitic copying either by lawsuit or by having issued its own injunction.

## ESTONIA

No specific legislative provisions provide protection against parasitic copying. The most relevant legal grounds that can be used are Section 50 (prohibition on unfair competition) of the Competition Act, RT I 2001 ("**Competition Act**") and Section 4 (prohibition on misleading advertising) of the Advertising Act, RTI 2008 ("**Advertising Act**").

To commence successfully legal proceedings for parasitic copying under the Competition Act it is necessary to establish the existence of unfair competition. Unfair competition is defined as dishonest trading practices and/or acts contrary to good morals and practices. Section 50 of the Competition Act contains a non-exhaustive list of acts which constitute unfair competition such as the publication of misleading information or the disparagement of a competitor or its goods.

To commence successfully legal proceedings for parasitic copying under the Advertising Act it is necessary to establish the existence of advertising that misleads. Advertising is misleading if it deceives or is likely to deceive consumers (as to, for example, the manufacturer of the look-alike) or is likely to affect the economic behaviour of the consumer or which, for those reasons, injures or is likely to injure a competitor of the advertiser. The Advertising Act is supervised by a government authority, the Consumer Protection Board ("**CPB**"), and is a matter of public law. Injured parties must notify the CPB in order for the matter to be dealt with by the CPB.

The civil remedy available in an action against parasitic copying is according to Section 1043 of the Law of Obligations Act of 26 September 2001 which provides that a person who unlawfully causes damage (tortfeasor) to another person shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law.

It is not possible to say whether the enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive have improved a plaintiff's chances of bringing a successful claim for parasitic copying as there are no known cases where the relevant provisions have been used. Traditional intellectual property rights (trade marks, etc.) are more commonly enforced against infringers by state authorities (customs) as well as the rights holders themselves.

The UCPD has been implemented so as to permit enforcement by a public authority, ie. the CPB. The primary objective of the CPB is to protect the rights and interests of consumers. The CPB also conducts extra-judicial proceedings in respect of unfair commercial practices (punishable by fines). There are no known cases of the CPB enforcing the UCPD in order to prevent the sale of parasitic copies. It is anticipated that effective enforcement lies in the joint enforcement and general co-operation of public authorities and private rights holders. Enforcement by public authorities alone may not prove as effective.

## FINLAND

No specific legislative provisions provide protection against parasitic copying. In the absence of specific provisions, protection is considered to be a matter for unfair competition law. Protection may be sought under the Unfair Business Practices Act 1061/1978, as amended ("**UBPA**") which prohibits any practice that violates good business practices or is unfair to other entrepreneurs.

The Finnish courts have taken the view that protection against parasitic copying is granted where there is a risk of consumers mistaking the look-alike for the original product or confusing the commercial origin of the look-alike. In *Lego v. Biltoma*, the Market Court and Supreme Court agreed that the marketing and/or sale of so called "confusingly similar copies" (which, due to their close resemblance of a product, benefit from the reputation of that product as some consumers mistake the copy for the original or assume that the copy originates from the same source) violates good business practices and is prohibited under the UBPA.

Protection is generally denied where the look-alike benefits from the popularity of a well-known product merely by association but where there is no risk of confusion.

The essential element which must be established in order to obtain protection against parasitic copying is therefore a risk of confusion as regards the commercial origin of the look-alike. As, in general, confusion is considered possible only where the original product and its characteristics are so unique and well-known in the market that it is commonly associated with a particular source, it is also necessary to establish that the original product is sufficiently original and well-known to possess the kind of reputation and commercial value that are necessary for the product to merit protection.

The civil remedies available in an action for parasitic copying include in the Market Court: (1) prohibitions of infringing acts (breach of which is punishable by fine); (2) orders to take measures to avoid and correct the unfair practice (breach of which is punishable by fine); and (3) publication of the decision in the press. These remedies are cumulative. If an injured party wishes to claim damages it has to file a separate claim at the District Court. A claim for damages at the District Court may be filed in addition to a claim at the Market Court.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive have not caused any material change to a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been implemented by the UBPA so as to permit enforcement by private rights holders only, although the Market Court may notify the Consumer Ombudsman of cases of parasitic copying. The Consumer Ombudsman may then intervene or commence a separate action to protect the position of consumers under the Finnish Consumer Protection Act. It is however very rare that the Consumer Ombudsman would take such action.

## FRANCE

No specific legislative provisions provide protection against parasitic copying. Article 1382 of the French Civil Code (law of tort) has been used to develop protection under the principles of both unfair competition (abuse of free trade) and/or parasitism (benefitting, at no expense, from another's efforts or know-how).

To commence successfully legal proceedings for parasitic copying it is necessary to establish: (i) the prior existence of the original product on the market (if the product is well-known the chances of success are increased); (ii) wrongful act(s) (with or without intention) of the defendant such as the misappropriation of a product shape or use of a similar slogan; and (iii) damage resulting from the defendant's act(s). In cases of unfair competition it is also necessary to show a likelihood of confusion between the original product and the parasitic copy. There is a limitation period of ten years from the date upon which the plaintiff became aware of the copy.

The civil remedies that are available in an action against parasitic copying include damages (for economic loss as well as moral damages, although the latter is usually limited), cease and desist orders, the destruction of any remaining stock, publication of the judgment in the press and on the defendant's website, and the plaintiff's legal fees and costs. These remedies are cumulative.

The implementation of the EC Unfair Commercial Practices Directive ("**UCPD**") by the French Consumer Code ("**FCC**") has improved a plaintiff's chances of bringing a successful claim for parasitic copying where the plaintiff is a consumer (but not where the plaintiff is a business as the FCC only applies to business to consumer practices and not business to business practices). There are no known cases of an action against parasitic copying being brought under the FCC.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities, eg. the General Directorate for Competition Policy, Consumer Affairs and Fraud Control ("**DGCCRF**"). There are no known examples of the DGCCRF taking action against sales of parasitic copies and it seems unlikely they would launch an investigation in the absence of the reproduction of a trade mark or distinctive sign on the suspect products. The DGCCRF appears to consider parasitic copying to be too broad and subjective a matter for it to assess whether the conditions of parasitic copying are met.

If the DGCCRF were to take action it would be based on criminal law and the DGCCRF would have to submit its case to the Public Prosecutor who may or may not launch proceedings before the examining magistrate and/or the criminal court. This is not likely to be the most efficient or appropriate way to fight parasitic copying. The proceedings can be stopped at the discretion of the magistrate. Where they continue, it can take several years to reach a decision. The DGCCRF is bound by a strong duty of confidentiality and cannot disclose information to the plaintiff. Therefore, even if the plaintiff were to join the proceedings, information about the defendant and the nature of its parasitic copying may be withheld from the plaintiff until the case is brought before a magistrate.

## GERMANY

Specific legislative provisions provide protection against parasitic copying under the Act against Unfair Competition of 3 July 2004, last amended on 22 December 2008 ("**AUC**"). The relevant provisions include: Section 3 AUC (prohibition against unfair commercial practices); Number 13 of the Annex to Section 3 AUC (unlawful promotion of goods and services similar to those of a competitor with the intention of deceiving the consumer as to their commercial origin); Section 4, Number 9 AUC (examples of unfair commercial practices including the offer of imitations of a competitors' goods or services) and Section 5 AUC (misleading commercial practices).

To commence successfully legal proceedings for parasitic copying it is necessary to establish: (i) the "competitive distinctiveness" of the product; (ii) that the product enjoys a certain "awareness" among the relevant trade circles or that the imitation causes "obstruction of market entry"; and (iii) an "unfair element", such as (a) likelihood of confusion; (b) exploitation of reputation; (c) dilution; or (d) obstruction of market entry. In addition, the following procedural requirements must be met: (i) the plaintiff must be either (a) a competitor or a party directly affected by the parasitic copying; or (b) an industry or consumer protection association (that can take action in specific circumstances); and (ii) the court before which proceedings are commenced must be the domestic court of the defendant or located in a jurisdiction in which the parasitic copy has been or is likely to be offered or distributed.

The civil remedies available in an action for parasitic copying include: a claim for the defendant to cease and desist from advertising or distributing the products at issue and to disclose the source and purchasers of the products; damages; reimbursement of gains based on the principle of "unjustified enrichment"; and publication of the judgment. The remedies are cumulative.

To date, the enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and the Enforcement Directive are not considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying. However, the Federal Supreme Court has not yet had the opportunity to clarify some of the questions raised by the enactments such as whether the requirements for a claim against parasitic copying have been lowered as a result of the implementation of the UCPD.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities, eg. the Chambers of Commerce. While public authorities are permitted to enforce the UCPD it is not considered to be an effective way to prevent the sale of parasitic copies. Previous cases have been brought by rights holders or industry associations and in both instances have been triggered by the party directly affected by the act of copying.

## GREECE

Specific legislative provisions provide protection against parasitic copying under Law 146/1914 on unfair competition ("**LUC**"), namely Article 1 LUC (general prohibition against acts contrary to fair practice and principles of morality), Article 13 LUC (acts of unfair competition resulting in civil proceedings) and Article 14 LUC (acts of unfair competition resulting in criminal proceedings). In circumstances where the parties are not competitors, Articles 914 and 919 of the Greek Civil Code can be used (law of tort).

To commence successfully legal proceedings for parasitic copying before the civil courts it is necessary to establish: (i) the originality of the distinctive feature which has been copied, ie. a specific characteristic of the product which is well-known by consumers and which enables them to identify the product and its origin; (ii) the similarity of the products at issue; and (iii) a risk of confusion on the part of consumers.

The civil remedies available in an action for parasitic copying are twofold: (1) interim measures such as injunctive relief; and (2) in regular proceedings, cease and desist orders to prevent further violations of the plaintiff's rights and, in cases where the defendant was or should have been aware that the abuse might create confusion, payment of indemnity for the restitution of damages (actual and moral) suffered by the plaintiff. These remedies are cumulative.

The enactment of the EC Unfair Commercial Practices Directive ("**UCPD**") is considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying as it reverses the usual burden of proof provided that the plaintiff is a consumer. Where the plaintiff is a consumer, the defendant has to show that the allegations concerning the unfair commercial practices are false. This does not apply in cases where the plaintiff is a business.

The UCPD has been enacted so as to permit enforcement by private rights holders, consumer associations and public authorities, ie. the Minister of Development. In the first two cases the procedure is judicial whereas in the latter it is administrative. While the Minister of Development is permitted to enforce the UCPD he is only permitted to do so in cases of public interest, eg. health and safety. The General Secretariat for Consumers (Ministry of Employment and Social Security) has been designated as the competent authority to enforce Greek UCP law for the protection of consumers and to date has imposed fines amounting to 225,000 Euros. These fines were imposed for offences such as misleading commercial practices and the distribution of unsafe products.

## HUNGARY

Specific legislative provisions provide protection against parasitic copying as a form of unfair competition under Act LVII of 1996 on the Prohibition of Unfair Trade Practices and the Restraint of Competition Act (the "**Competition Act**"). Section 6 of the Competition Act prohibits traders from manufacturing, distributing and advertising goods with a characteristic appearance, packaging or labelling, or from using a name, mark or designation by which a competitor or its goods are recognised.

To commence successfully legal proceedings for parasitic copying as a form of unfair competition it is necessary for the plaintiff to establish that: (i) the parties are actual or potential competitors; (ii) the plaintiff has proprietary rights over the copied element (eg. plaintiff was first to use on the market and consumers have grown to associate it with plaintiff or its products); (iii) the copied element has a degree of distinctiveness (based on dominant and characteristic parts of the product); and (iv) there exists a likelihood of confusion between the original and the look-alike.

The remedies available in an action for parasitic copying are twofold: (1) remedies under Section 86 of the Competition Act such as cease and desist orders and public statements or acknowledgements of the infringement; and (2) remedies under the general rules of civil law such as claims for damages or unjust enrichment. All of these remedies are cumulative.

The EC Unfair Commercial Practices Directive ("**UCPD**") has not been implemented for a sufficient amount of time to have brought about developments in respect of consumer protection practice. For the time being, the impact of the UCPD, including its impact on claims against parasitic copying, appears to be limited.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities - namely, ex officio proceedings of the consumer protection authorities which are the National Consumer Protection Authority, Hungarian Competition Office and Hungarian Financial Supervisory Authority. Private individuals may enforce the UCPD by filing suit in the Hungarian courts or by initiating an investigation through the National Consumer Protection Authority. As for the latter, the alleged infringement is reported to the consumer protection authorities and, if the competent authority decides to initiate administrative proceedings, it will control the case. While public authorities are permitted to enforce the UCPD, no proceedings have been brought to date. It is thought that the active involvement of these authorities would deter infringers from parasitic copying.

## REPUBLIC OF IRELAND

No specific legislative provisions provide protection against parasitic copying. However, the Consumer Protection Act 2007 ("**CPA**"), which implemented the EC Unfair Commercial Practices Directive ("**UCPD**"), the common law tort of passing off and the EC (Misleading and Comparative Marketing Communications) Regulations (the "**Regulations**") can each be used as a legal basis upon which to prevent parasitic copying.

Under the CPA, namely Sections 43 and 67, a successful claim can be made if the unfair or misleading commercial practice causes the average consumer to be misled in relation to certain matters and to make transactional decisions that it would not otherwise have made. The civil remedy available to private rights holders under Section 71 CPA is the ability to apply for a prohibition order preventing the trader from engaging in the unfair or misleading practice.

In order to mount a successful claim in passing off, the applicant must prove that the trader made a misrepresentation to consumers which was calculated to injure the business or goodwill of the applicant (or it was reasonably foreseeable that it would do so) and which causes (or will cause) actual damage to the business or goodwill of the applicant. Cases have shown that it will also be necessary for the features of the products to be unique to, or distinctive of, the applicant and also recognised by the public as being so. Recently, the tort of passing off has been relied on to obtain an interlocutory injunction in a case concerning look-alike biscuit packaging.

The civil remedies available in an action for passing off are injunctive relief, damages or an account of profits, aggravated and/or exemplary damages, and delivery up or destruction of the goods at issue. The remedies are cumulative.

In relation to the presentation or promotion of look-alike products, brand owners could also seek an order preventing misleading marketing under the Regulations.

The enactments of the UCPD and Enforcement Directive have improved a plaintiff's chances of bringing a successful claim for parasitic copying. Although there are few reported cases, plaintiffs are seeking to rely on the UCPD and Enforcement Directive (as implemented) in addition to more traditional infringement and passing off actions.

The CPA permits enforcement by both private rights holders and public authorities, eg. the National Consumer Agency ("**NCA**"), although most remedies are made available to consumers and the NCA only. The NCA can enforce the CPA, however resources are insufficient and to date no enforcement action has been taken by the NCA against parasitic copying.

## ITALY

No specific legislative provisions provide protection against parasitic copying. However, there is protection under unfair competition law and, in particular, Article 2598 of the Italian Civil Code ("**ICC**"). Whilst the provisions of Article 2598 ICC do not specifically address parasitic copying, case law has held that acts of parasitic copying can constitute unfair competition under Article 2598, Nos 1, 2, and 3 ICC depending on the circumstances of the case.

To commence successfully legal proceedings for unfair competition under Article 2598, Nos 1, 2 or 3 it is necessary to establish: (i) the similarity between the shape or packaging of the products; and (ii) the highly individual character of the shape assumed to have been copied. Additional elements must also be established depending on the provision on which the claim is based: Article 2598, No. 1, requires a likelihood of confusion and/or association between the products due to their similar shape or packaging; Article 2598, No 2, requires that the similarity between the shape or packaging of the products may allow the imitator to take unfair advantage of the reputation of the original product's shape on the market; and Article 2598, No. 3, requires that the means used to reproduce the original product's shape are inherently unfair.

The civil remedies available in an action for unfair competition are: (1) injunctions; (2) publication of the decision in newspapers, websites and/or on radio or TV programmes (provided that would contribute to restore the damage); (3) penalties for further violation or delay in carrying out the judge's orders; and (4) damage compensation at the end of proceedings on the merits. The remedies are cumulative.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are not considered to have substantially improved a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been enacted so as to permit enforcement by (a) the Italian antitrust authority, which is an independent public authority; (b) any single consumer which has an interest; (c) any private Italian organisation that represents consumers and is included in the list managed by the Italian Ministry of Financial Affairs; and (d) any non-Italian public or private organisation recognised under the country of origin, whenever the right of a citizen of the country is jeopardised by an unfair commercial practice carried out in Italy.

While the Italian antitrust authority and foreign public authorities or organisations are permitted to enforce the UCPD, it is considered that the UCPD may not provide effective tools to prevent parasitic copying. To date, there have been no reported decisions concerning the enforcement of the UCPD by the Italian antitrust authority or by any foreign public authorities or organisations against pure parasitic copying.

## LATVIA

No specific legislative provisions provide protection against parasitic copying. Some protection is afforded by the Law on Trademarks and Indications of Geographical Origin of 16 June 1999, the Unfair Commercial Practices Prohibition Law of 22 November 2007, the Competition Law of 4 October 2001 and the Law on Advertising of 20 January 2000.

To commence successfully legal proceedings for parasitic copying it is necessary to submit, as proof, the alleged infringing product. It must also be shown that the original product has been used in Latvia in good faith and to such an extent that the look-alike may mislead the consumer as to the origin of the product.

The civil remedies available in an action for parasitic copying include a claim for cease and desist, the removal of goods or means of producing them from trading channels (e.g. by destruction), awards of compensatory damages and moral damages (as for the latter, where there has been irreparable harm to the reputation of the products the subject of copying) and the publication of the judgment in newspapers or magazines. In each case there is a fundamental prerequisite that the defendant is at fault. The remedies are cumulative with the exception of monetary damages. The plaintiff cannot recover unjust enrichment damages and lost profit damages and damages analogous to if a licence had been paid. However, a plaintiff can claim one of these types of damages together with moral damages and litigation expenses.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying, although they are rarely applied in such cases.

The UCPD has been enacted so as to permit enforcement by public authorities only. These authorities include the Consumer Rights Protection Centre and the Competition Council, which monitor the general observation of unfair commercial practices, advertising and competition law, and various other state institutions. Although enforcement of the UCPD is only carried out by public authorities, private rights holders also refer to the UCPD provisions in civil cases as means of interpreting the meaning of certain terms like "misleading commercial practices". To date, there are no known examples of action being taken against parasitic copies by brand owners citing the UCPD.

## LITHUANIA

Specific legislative provisions provide protection against parasitic copying under the Law on Competition, No VIII-1099 of 23 March 1999, namely Article 16 subsection 1(5), which prohibits imitation of the product or product packaging of another undertaking, or copying the shape, colour or other distinguishing feature of the product or packaging, where this might be misleading or aimed at taking advantage of the other undertaking's reputation.

To commence successfully legal proceedings for parasitic copying it is necessary to establish: (i) a competitive relation between the undertakings; and (ii) that the purpose of the imitation (or other unfair act such as the confusion of consumers) is to compete and use the other undertaking's reputation.

The civil remedies available in an action for parasitic copying include claims for termination of the infringing acts, damages, and seizure or destruction of the infringing products. The remedies are cumulative.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying.

The provisions of the UCPD are enforced by public bodies, namely the State Consumer Rights Protection Authority ("**SCRPA**") and the Competition Council of the Republic of Lithuania. Consumers have the right to apply to the SCRPA concerning infringements. However, the role of the public authorities is limited and they are not considered to be an effective way to prevent parasitic copying because they only enforce the UCPD after the infringement is reported by consumers or businesses and they seldom act ex officio. To date, there are no examples of action having been taken by public authorities against parasitic copying.

## LUXEMBOURG

No specific legislative provisions provide protection against parasitic copying. However, protection can be sought through Article 1382 of the Civil Code (law of tort) and Article 14 of the Unfair Competition Law of 30 July 2002 ("**UCL**"), which regulates commercial practices and prohibits unfair competition. Case law has also developed the notion of parasitic copying as "economic parasitism". This has been described by the courts as following in the wake of another person to take advantage, without spending any money, of know-how resulting from their intellectual efforts and investments. In a recent case, the slavish copying of the plan of a machine was considered to be economic parasitism and therefore was an act of unfair competition.

To commence successfully legal proceedings for parasitic copying it is necessary to establish that a product or service, which is the result of an intellectual or financial effort, has been copied and the copying enables the infringer to save development costs or to take profit from the reputation of the competitor.

The remedies available in an action against parasitic copying are that the President of the Commercial Court can grant a permanent injunction on the basis of Article 14 UCL but he cannot grant an award of damages or compensation. A claim for damages and/or compensation must be brought before the District Court and based on tort law. These remedies are cumulative.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive have not improved a plaintiff's chances of bringing a successful claim for parasitic copying although they remain relatively favourable.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities, eg. the Minister for Consumer Protection and consumer protection organisations. Public authorities could be an effective way to enforce the UCPD against the sale of parasitic copies but there are no known examples of any such action being taken to date.

## MALTA

No specific legislative provisions provide protection against parasitic copying. Article 32 of the Commercial Code ("**CC**") may provide some protection but its application to cases of parasitic copying untested before the local courts. Article 32 CC prohibits the use of any name, mark or distinctive device capable of creating confusion with those names, marks or devices lawfully used by another person, even where the latter is not protected by registration under the Trademarks Act.

To commence successfully legal proceedings for parasitic copying it is necessary to establish the potential for confusion among the relevant sector of the public.

Any trader who contravenes Article 32 CC shall be liable, at the option of the injured trader, to a claim for damages and interest in accordance with the civil law or to a penalty which is fixed by the Civil Court or the Magistrates Court, depending on the circumstances, but is subject to a minimum (approx. 465 Euros) and maximum (approx. 4,650 Euros).

Prior to the commencement of a lawsuit against parasitic copying the following remedies are available to a plaintiff: (1) judicial protest, calling upon the defendant to cease and desist and to pay damages; and (2) warrant of prohibitory injunction, provided that the Civil Court is satisfied that the continuing actions of the defendant would prejudice the plaintiff to a greater extent than the defendant would be prejudiced if it were ordered to stop.

The enactment of the EC Enforcement Directive is considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying by introducing a series of judicial "tools". The enactment of the Unfair Commercial Practices Directive ("**UCPD**") might strengthen a plaintiff's case in convincing the Court that parasitic copying should be stopped but its effectiveness is limited.

The implementation of the UCPD has been enacted so as to permit enforcement both by public authorities, by way of criminal and/or administrative proceedings, and by consumers, through a claim before the Consumer Claims Tribunal. The UCP provisions cannot be enforced by traders against other traders. Enforcement by public authorities is considered to be an effective deterrent because of the administrative fines and criminal penalties available in those proceedings. However, there are no known examples of public authorities taking action in cases of parasitic copying to date.

## NETHERLANDS

No specific legislative provisions provide protection against parasitic copying. Some protection is available under Article 6:162 of the Dutch Code of Civil Procedure ("**DCCP**") (a person who commits a tort attributable to him must repair the damage suffered in consequence thereof) and case law. While the starting point for products that are not protected by a specific intellectual property right is that profiting from the efforts of others to achieve a successful trading result does not constitute an unlawful act pursuant to the DCCP, the Dutch Supreme Court has held that profiting from the efforts of others may constitute an unlawful act in certain circumstances and this is certainly the case where an imitated product causes needless confusion to the public as to its origin.

To commence successfully legal proceedings for parasitic copying it is necessary to establish that: (1) the plaintiff's product is distinctive; (2) the defendant's product is likely to confuse the public; (3) the defendant's product is similar to the plaintiff's product (based on those features that are not important to the reliability or usefulness of the product); and (4) the defendant has failed in doing what is reasonably possible to prevent confusion.

The civil remedies available in an action for parasitic copying include cease and desist orders/injunctions, damages, declaratory judgments that the defendant's actions are unlawful, and rectification, including publication of content on the defendant's website or sending a letter to its customers. These remedies are cumulative. The only exception relates to damages: a plaintiff cannot claim damages and a surrender of profits. The plaintiff will have to choose between them but is free to choose whichever is the most attractive.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are not considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been enacted so as to permit enforcement by private rights holders, interest groups and public authorities, eg. the Consumer Authority and Netherlands Authority for Financial Markets (where the unfair commercial practice relates to a financial service or activity). While the public authorities are permitted to enforce the UCPD it is not considered to be an effective way to prevent the sale of parasitic copies as individual consumers are not able to enforce their rights directly through the authorities but must submit a complaint. Neither authority will take action except where the collective interests of consumers are breached and where the system of private enforcement does not function effectively.

## POLAND

Specific legislative provisions provide protection against parasitic copying under the Act on Combating Unfair Competition of 16 April 1993 ("**ACUC**"), namely Article 13 ACUC (copying the external appearance of a product so as to mislead the customer as to the identity of the product or its producer) and Article 24 ACUC (penalties resulting from such acts of unfair competition).

To commence successfully legal proceedings for parasitic copying it is necessary to establish, among other things, that: (i) the parties are "entrepreneurs", meaning that they participate in economic activity; (ii) the act constitutes a breach of law or is contrary to good practices; (iii) the external image of the original product has been copied; and (iv) the imitation does not concern the functional features of the product. It is also necessary to show there is risk of misleading customers as to the identity of the products or their origin.

The civil remedies available in an action for parasitic copying include a claim for the cessation of the prohibited act and the removal or destruction of the goods at issue, as well as an award of damages and the handing over of any unjustified benefits. The remedies are cumulative. However, the cumulative effect of an award of damages together with any unjustified benefits must not exceed in total the damage sustained by the plaintiff.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are not considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been implemented by the Unfair Commercial Practices Act ("**UCPA**") so as to permit enforcement by consumers (other private parties such as traders whose products have been copied cannot take action under the UCPA) and by public authorities, eg. the Polish Ombudsman (an independent central office which protects the freedoms and human rights guaranteed by Polish law), municipal and district consumer ombudsmen and national or regional organisations concerned with the protection of consumer interests.

While the public authorities can enforce the UCPA, enforcement by public authorities is not an effective way to prevent the sale of parasitic copies because the UCPA only applies to the protection of consumers (not traders) and the UCPA does not include express provisions for bringing claims for parasitic copying. No examples of action taken by public authorities against parasitic copies are known to date.

## PORTUGAL

No specific legislative provisions provide protection against parasitic copying. Article 317 of the Industrial Property Code, approved by the Decree Law No.33/2003 of 5 March, as republished and amended ("**IPC**"), on acts of competition contrary to honest practices, can be used to secure protection against parasitic copying as a form of unfair competition. Any act contrary to Article 317 IPC is considered to be a "misdemeanour" under Portuguese law. Article 323 IPC which concerns the copying or imitation of a registered trade mark can be used to secure protection against parasitic copying as a criminal offence.

To commence successfully legal proceedings for parasitic copying as a form of unfair competition under Article 317 IPC it is necessary to establish that: an unauthorised statement or reference has been made; which is contrary to honest practices; and the purpose of which is to benefit from the credit or reputation of a name, trade mark or establishment which belongs to a competitor.

The civil remedy available in an action for parasitic copying as a form of unfair competition under Article 317 IPC is a claim for damages taking into account the profit made by the defendant and the damages and loss of profits suffered by the plaintiff including expenses incurred in bringing the claim.

The enactment of the EC Unfair Commercial Practices Directive ("**UCPD**") is not considered to have brought about any considerable improvements to a plaintiff's chances of bringing a successful claim for parasitic copying.

The UCPD has been enacted so as to permit enforcement by both private rights holders and public authorities, eg. the Authority for Food and Economic Safety ("**ASAE**"). While public authorities are permitted to enforce the UCPD its provisions are mostly applied in cases related to advertising. The public authorities (including the ASAE) that monitor violations of IP rights (including cases of parasitic copying) base their actions on the enforcement of the IPC. Presumably, this is because of a lack of knowledge regarding Portuguese UPC law and some public awareness campaigns would help in alerting the authorities to this law.

## ROMANIA

Specific legislative provisions provide protection against parasitic copying under Law No. 11/1991 on the Prevention of Unfair Competition ("**PUC**"), namely Article 1 PUC (traders must act in good faith according to fair practices and in compliance with consumer interests and the requirements of fair competition) and Article 2 PUC (any act contrary to honest commercial practices in the sale of goods or provision of services shall be regarded as unfair competition). Any breach of such provisions can result in civil, administrative and/or criminal liability.

To commence successfully legal proceedings for parasitic copying it is necessary to establish that: (i) the defendant's packaging or get-up is confusingly similar to that of the plaintiff; (ii) the plaintiff launched its packaging or get up on the Romanian market prior to the launch of the defendant's; and (iii) the defendant was aware that its packaging or get-up was confusingly similar to that of the plaintiff and intended to gain an unfair commercial advantage from the confusing similarity.

The civil remedies available in an action for parasitic copying include a claim for damages, including moral damages, an injunction to stop any act of parasitic copying which is seen as an act of unfair competition, and an order for the defendant to publish the court's decision in a newspaper. The remedies are cumulative and a plaintiff usually claims for all three remedies.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are not considered to have brought about any considerable improvements to a plaintiff's chances of bringing a successful claim for parasitic copying.

The laws implementing the UCPD regulate business to consumer relations. Only consumers (meaning individuals acting outside any commercial or professional activity) can seek damages under them and consumers lack the financial resources to pursue such claims. The laws implementing the Enforcement Directive apply to the infringement of copyright or other industrial property rights such as designs or trade marks and are not relevant to parasitic copying per se.

The UCPD has been enacted so as to permit enforcement by both consumers and public authorities, ie. the National Agency for Consumer Protection ("**NACP**"). While the NACP is permitted to enforce the UCPD it is not considered to be an effective way to prevent the sale of parasitic copies. Businesses can notify cases to the NACP. However, it is unlikely that the NACP will take action unless there is a significant risk of harm to consumers. The NACP is more likely to be concerned about counterfeit goods rather than parasitic copying. There are no known examples of action taken by the NACP against parasitic copies to date.

## SLOVAK REPUBLIC

Specific legislative provisions provide protection against parasitic copying. Such provisions are contained within Act No. 513/1994 Coll., Commercial Code, namely Section 44 (on unfair competition, which includes *inter alia* deceptive advertising) and Section 47 (on misrepresentation causing confusion, including the use of look-alikes).

To commence successfully legal proceedings for parasitic copying it is necessary to establish that the defendant has copied or imitated the plaintiff's product, and/or has introduced such copy or imitation into the market, and that such acts may cause confusion between the defendant's copy or imitation and the plaintiff's product. Under Slovak law there are no prescribed pre-action steps which the plaintiff must undertake prior to commencing proceedings.

The civil remedies available in an action for parasitic copying are an injunction, "removal of the consequences of parasitic copying" (being, in effect, a remedy to correct the altered state of the market caused by the unfair behaviour, for instance by the removal of products from the market), damages, surrender of the proceeds of unjust enrichment and appropriate compensation (by way of apology and/or monetary compensation). These remedies are cumulative.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying, although there was already a legislative framework established within the relevant provisions of the Commercial Code to regulate unfair competition.

The UCPD was implemented by the adoption of the Consumer Protection Act which relates to unfair commercial practices that harm the economic interests of consumers. The enactment permits enforcement by consumers, public authorities and rights holders. While public authorities are permitted to enforce the UCPD, it is not frequently used nor considered to be an effective way to prevent the sale of parasitic copies. The more effective means is enforcement by rights holders who have an interest in preventing the sale of parasitic copies. The primary focus of public authorities is consumer protection, for example preventing the sale of dangerous products and tackling unfair commercial practices that harm consumers. There were no known examples of action having been taken by public authorities against parasitic copies at the time of writing.

## SLOVENIA

No specific legislative provisions provide protection against parasitic copying. The provisions which could be construed as offering protection against look-alikes are in the Consumer Protection Act No.98/2004 ("**CPA**"), the Consumer Protection against Unfair Commercial Practices Act No. 53/2007 ("**UCPA**") and the Protection of Competition Act No.110/2002 ("**ZVK**").

Neither the CPA nor the UCPA include specific provisions with regard to the prohibition of manufacturing or offering look-alikes for sale. Prohibitive provisions exist only in respect of the advertising of look-alikes, namely Section 12 CPA (on misleading advertising), Section 12b CPA (on misleading business practices), Section 12c CPA (on comparative advertising) and Section 5 UCPA (on misleading commercial practices). The ZVK does cover the offer for sale and sale of look-alikes in the context of unfair competition law (rather than intellectual property law), namely Section 13 ZVK.

To commence successfully legal proceedings for parasitic copying it is necessary to establish one of the elements of misleading commercial practice, which are defined in the abovementioned provisions of the CPA and UCPA, or one of the elements of unfair competition, as defined in Section 13 ZVK. Enforcement of the CPA and UCPA is controlled by the Market Inspectorate (acting under the authority of the Ministry of the Economy of the Republic of Slovenia). Enforcement of the ZVK is controlled by the Competition Protection Office (acting under the same authority). However, in the event of a contravention of Section 13 ZVK, any affected (legal) person may bring proceedings against the wrongdoer and report them to the Market Inspectorate, which has the power to temporarily prohibit the activities alleged to be acts of unfair competition.

The civil remedies available in an action for parasitic copying based on the CPA or UCPA include a temporary injunction (a "decree") and monetary fine of up to 40,000 Euros. For contravention of the ZVK, civil remedies include a temporary injunction, restitution and a fine of up to around 10,200 Euros (for a legal person) or around 4,100 Euros (for an individual). These remedies are essentially cumulative. However, the Market Inspectorate may only impose a monetary fine under either the CPA or the UCPA, not both.

Case law relating to parasitic copying and look-alike advertising is scarce. From the limited number of judgments handed down in such cases, it is apparent that plaintiffs have often encountered difficulties in proving conclusively before the court that the commercial practice complained of would be liable to mislead the consumer into taking a decision he or she might otherwise not have taken. In addition, the process by which the level of resemblance between the trade-marked product and the look-alike product is assessed is highly subjective. Courts have exhibited a tendency to adopt a restrictive approach, mindful of avoiding restrictions on fair competition or any conflict with free market legislation.

## SPAIN

Specific legislative provisions provide protection against parasitic copying. Such provisions are contained within Section 11 of the Unfair Competition Act, Law 3/1991 of 10 January ("**UCA**"). Paragraph 2 of Section 11 prohibits the imitation of third party products or services, even if they are not protected by an exclusive right (ie. trade mark, design right or copyright), provided that the imitation is capable of creating an association with the third party product or service; or it takes unfair advantage of the reputation or effort expended by the third party. The imitation shall also be considered unfair if it is systematic and aimed at preventing or hindering the position of the third party in the market.

To commence successfully legal proceedings for parasitic copying under Section 11 UCA it is necessary to establish that: there has been an imitation of an "essential" element of the product or service; the imitation is capable of creating confusion amongst consumers (no requirement for actual confusion); the imitation occurred in the market; and the risk of confusion could have been avoided by the imitator.

In cases where it is alleged that an advantage has been taken of a third party's reputation, it is also necessary to establish the competitive merit of the original, ie. the product or service must be sufficiently established and well-known in the market. In cases where it is alleged that an advantage has been taken of a third party's efforts, the relevant case law is less consistent as to the requisite elements. The most restrictive case law requires the plaintiff to establish: identity between the products or services; that the innovator of the copied product or service has not yet recovered his production costs; that such costs were substantial; and that the copy causes the innovator serious commercial harm.

The civil remedies available in an action for parasitic copying are: a declaration of parasitic copying; an injunction; "removal of all effects caused by the imitation" (being, in effect, a means of eliminating market distortion caused by the unfair behaviour); rectification of the misleading/inaccurate/false information (and a judge may order publication of a declaration of such rectification); compensation for damage (conditional upon the infringer acting negligently or with knowledge of the infringement); compensation for unjust enrichment; and full or partial publication of the court's decision at the defendant's cost. These remedies are cumulative. Moreover, the plaintiff may request a preliminary injunction under the general provisions of the Spanish Civil Procedural Act of 7 January 2000, and is expressly entitled pursuant to Section 36 UCA to launch pre-trial inspection proceedings when it is unable to confirm by any other means whether the defendant is carrying out prohibited acts under the UCA.

It is considered that the enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive have improved a plaintiff's chances of bringing a successful claim for parasitic copying, albeit not substantially. The UCPD did not directly affect Section 11 UCA, although it did add a new Section 15 UCA (on misleading practices causing confusion). The Enforcement Directive amended Spanish intellectual property (IP) legislation but did not alter the UCA. Although some provisions of the Civil Procedural Act were amended the most relevant changes affect the more traditional IP rights.

The enactment permits enforcement by private rights holders, associations and public authorities, eg. the National Institute of Consumer Affairs and Public Prosecutor's office. While public authorities are permitted to enforce the UCPD, it is not considered to be an effective way to prevent parasitic copying. The Public Prosecutor's enforcement of IP rights is limited, not least because of the lack of resources which are focused on criminal proceedings. The sale of parasitic copies is not considered to pose sufficient harm to consumers such that action by public authorities is necessary. No examples of action taken by public authorities against parasitic copies on behalf of brand owners are known to date.

## SWEDEN

No specific legislative provisions provide protection against parasitic copying. The provisions which could be construed as offering protection against look-alikes are included in the Swedish Marketing Act (2008:486) ("**SMA**"), namely Section 14 SMA, which prohibits use of copies that are misleading in that they can easily be confused with another trader's known or distinctive products, as well as Sections 5, 6, 8 and 10 SMA, on unfair and misleading commercial practices. The main focus of the SMA is however to provide protection for consumers, not traders.

To commence successfully legal proceedings for parasitic copying under Section 14 SMA it is necessary to establish that the original product is distinctive and known to the market and that there is a risk of confusion as to the commercial origin of the look-alike product. Depending on what legal grounds are used the plaintiff may also be required to show that the defendant has deliberately misled the consumer into believing that the look-alike originates from the plaintiff; that the defendant is taking unfair advantage of the plaintiff's reputation for its own economic benefit; that the defendant's behaviour would typically damage the plaintiff and cause deterioration of the product in the market.

The civil remedies available in an action for parasitic copying are: a prohibition on marketing the parasitic copy (which can be preliminary and is given subject to a conditional financial penalty unless circumstances render this unnecessary); a market disruption charge (for intentional or negligent contraventions); and damages. These remedies are cumulative subject to the caveat that a fine for disruptive marketing practices may not be ordered against a person for breach of an injunction or failure to comply with an order issued in conjunction with a conditional fine.

The enactment of the EC Unfair Commercial Practices Directive ("**UCPD**") is considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying. It introduced into the SMA an alternative means of preventing parasitic copies, namely Section 14 SMA, which introduces a stricter assessment of whether an alleged product is in fact a parasitic copy, as the commercial practices mentioned within Section 14 are all considered to be unfair.

The enactment of the UCPD permits enforcement by both private rights holders and public authorities, eg. proceedings for a prohibition on marketing might be started by the Consumer Ombudsman, a trader affected by the marketing in question or a group of consumers or traders. Proceedings in respect of a market disruption charge shall be started by the Consumer Ombudsman. However, if the Consumer Ombudsman decides not to commence proceedings, an individual trader affected by the marketing in question or a group of traders may institute such proceedings. The Consumer Ombudsman has commenced proceedings but none of which related to cases of parasitic copying.

## UNITED KINGDOM

No specific legislative provisions provide protection against parasitic copying. Depending on the extent and nature of the parasitic copying, a brand owner may bring proceedings against a look-alike using any of the following: statute (in the form of trade mark, copyright and designs law); statutory regulations (Consumer Protection from Unfair Trading Regulations 2008 ("**CPRs**")) and common law (tort of passing off).

The requirements to commence successfully legal proceedings for parasitic copying vary widely depending upon which legal grounds are used. For example, under statute, the requirements may relate to use of signs identical or similar to the plaintiff's registered trade mark, or use of designs which do not produce a different overall impression on the informed user from the plaintiff's registered design. Whereas, under the common law tort of passing off, it will be necessary to establish that the plaintiff's goods or services have acquired goodwill; that the defendant has misrepresented (intentionally or unintentionally) to members of the public that its goods or services originate from, are somehow associated with, or are endorsed by, the plaintiff; and the plaintiff has suffered or is likely to suffer loss as a result of the misrepresentation.

The civil remedies available in an action for parasitic copying include injunctions (both interim and final), delivery up/destruction and compensatory remedies such as damages or an account of profits. The remedies are cumulative although, notwithstanding the drafting of the Enforcement Directive, no English court has to date awarded damages as well as an account of profits.

The enactments of the EC Unfair Commercial Practices Directive ("**UCPD**") and Enforcement Directive are not considered to have improved a plaintiff's chances of bringing a successful claim for parasitic copying. Whilst the CPRs, which implement the UCPD, seek to ensure that traders act honestly and fairly towards their customers and introduce provisions addressing misleading practices, brand owners cannot use the CPRs themselves to bring civil proceedings.

The CPRs may only be enforced by public authorities, who control their implementation and regulation, ie. Local Authority Trading Standards ("**TSS**"), the Department of Enterprise, Trade and Investment in Northern Ireland and the Office of Fair Trading ("**OFT**").

Enforcement by public authorities is not considered to be effective in preventing the sale of parasitic copies. The public authorities are unlikely to regard parasitic copying as serious as, for example, issues involving unsafe or harmful products. It is therefore likely that they will focus their efforts in these areas. No examples of action taken by public authorities against parasitic copies on behalf of brand owners were known at the time of writing. Further, despite calls by brand owners to the OFT and TSS to investigate and take action where breaches of the CPRs occur, TSS have specifically stated they will not act in the absence of consumer complaints. The general feeling of brand owners in the UK appears to be that the authorities with the power to act do not do so, due to lack of resources, funding or other priorities, and that companies in other European countries are much better placed to take action in similar cases.