Editorial

Confused about Coke?

There appears to be an idea abroad in the intellectual property world, that where there is a wrong (or a perceived one) there should be a remedy. Protection is still being demanded for TV show formats, denied by the Privy Council in *Green v Broadcasting Corporation of New Zealand.*[1] The former British Leyland Motor Corporation, wherever it may be, might be excused for finding this situation ironic.[2]

Now there comes a demand for protection from "lookalike" consumer products, and the calls are heard most loudly – and for reasons we probably all know – from the Coca-Cola Corporation.

To recap: Sainsbury's, the largest UK food retailer, launched a new own brand cola. Nothing remarkable about that; own brand goods are common enough in UK supermarkets, cola drinks included. But Sainsbury's chose packaging which looks remarkably like that of Coca-Cola's "Classic" product: similar (though not identical) script, similar (though not identical) colour, and the word "Classic". No trademark infringement, or so it seems: nor a passing off. But Coca-Cola, and owners of other well-known brands subjected to similar treatment by the retailers, are not happy. Indeed, they have been trying to get the law changed to provide them with a remedy. But a remedy against what?

Intellectual property laws are limited in their scope, for good reason. Statutory monopolies or quasi-monopolies are granted under them for *pro bono* purposes: they are not extendable *ad lib.* In the Victoria Park Racecourse case[3] the Australian court declined to hold that the racecourse owner had some sort of property rights in the spectacle held on his land. Copyright law had well-defined limits. So Hughie Green found when he tried to protect the format – the idea, if you will – of "Opportunity Knocks".

Trademark law finds its justification in the efficiency with which brands convey information to consumers. In the cola case, the argument is that the packaging adopted by Sainsbury's cries out "cola": the brand-owner's counter-argument is that is cries out "Coke".

We cannot know what went on in the minds of the marketing spin doctors at Sainsbury's as they worked on the new product. What is plain is that their advertising carried one overwhelming message: "NOT Coke." The unique selling point is that this is a product as good as "The Real Thing" (a registered trademark in itself, I believe) but not the genuine article. The attraction is that fewer millions have been expended on its promotion, so fewer millions need to be recouped from its consumers.

So the protectionist argument stresses that consumers are confused. They believe that the owners of the world's strongest brand have started manufacturing for sale under a supermarket's own brand, and there are figures to show it. But this is surely the only recorded instance of the public actually being told who the true manufacturer is. What more can be done to avoid confusion?

The answer is that the brand owner who feels violated (and given the proprietary nature of brands this is a natural enough feeling) should tell the world, as another famous brand-owner already does, that they do not manufacture for anyone else. Fight fire with fire. But there is no fundamental right to restrain something which is not an infringement of an existing trademark or a passing off: to seek to extend the law into this new territory is not the way to fight marketing battles.

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[1] [1989] RPC 700.
[2] *British Leyland Motor Corporation v Armstrong Patents Ltd,* [1986] AC 477.
[3] [1937] CLR 479.