

## Unjust enrichment claim upheld in copycat cookie jar case

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Unfair use  
Passing off

In *Plasto-Vack (1990) Ltd v MAG Plastic Ltd* (Case 1561/03, November 26 2008), the Tel Aviv District Court has dismissed the plaintiff's passing off claim, but upheld its claim for unjust enrichment.

**Plasto-Vack (1990) Ltd** manufactures an unusually shaped plastic cookie jar which is not protected by any registered IP right. Plasto-Vack alleged that MAG Plastic Ltd had copied its product. It brought an action for passing off under the [Commercial Torts Law - 1999](#) and for unjust enrichment under the Unjust Enrichment Law - 1979. Plasto-Vack sought:

- a permanent injunction preventing MAG Plastic from manufacturing a product identical to its cookie jar;
- an order for accounts; and
- statutory damages under the Commercial Torts Law.

The court first analyzed the elements of passing off under the Commercial Torts Law - namely:

- whether Plasto-Vack had goodwill in its product; and
- whether there was a reasonable apprehension of consumer deception.

The test to determine whether there is a likelihood of confusion among the relevant public is based on:

- the visual and aural similarity between the marks;
- the type of goods and the target customers; and
- other relevant circumstances.

The court reiterated the principle that copying a product does not in itself constitute passing off, as long as this does not prejudice the plaintiff's proprietary rights (whether in the form of goodwill or protected IP rights). While intentional copying led to an increased likelihood of consumer deception, Plasto-Vack had to demonstrate that the public had come to identify the goods with a particular source through their appearance or get-up. In addition, the court pointed out that stronger evidence is necessary in order to show goodwill in a less distinctive design. The court also stated that the distinctive elements of the product should not be functional, as the tort of passing off does not protect functional features.

Plasto-Vack presented evidence regarding:

- the distinctive character of the external appearance of its product; and
- the resources invested in its development.

Plasto-Vack also demonstrated that certain consumers identified its product through its

shape. However, the court found that:

- the product's oval shape was not unique; and
- the product's other features were functional and were not part of its external appearance.

Thus, the court concluded that the product had no distinctive feature that could enable consumers to identify it based on its external appearance. Moreover, the court found that the product was marketed to consumers through wholesale agents. Therefore, consumers were not aware of the identity of the manufacturer and no goodwill was created. Consequently, the court held that there was no likelihood of consumer confusion and dismissed Plasto-Vack's passing off claims.

The court then turned to the unjust enrichment claim under the Unjust Enrichment Law. The court held that in the absence of registered IP rights, a claim for unjust enrichment requires an "additional element". The court analyzed the case law of the Supreme Court and held that such additional element may consist of unfair competition or bad faith - for example, where:

- the plaintiff's product has original and novel elements compared with the current state of the art;
- the plaintiff has spent time and effort in developing its product; and
- the external appearance of the plaintiff's product has been copied in its entirety without functional justification.

The court found that Plasto-Vack had succeeded in its claim for unjust enrichment, taking into account:

- the originality and novelty of its product; and
- the fact that MAG Plastic had intentionally copied Plasto-Vack's product in its entirety.

Turning to the issue of damages, the court reiterated that although permanent injunctions are not set out in the list of remedies available under the Unjust Enrichment Law, they may be granted according to case law. However, an injunction will not be granted where monetary damages are sufficient, and such remedy must not be used to create a monopoly over an unregistered right. Therefore, the court held that the appropriate remedy was restitution.

The court also ordered that MAG Plastic pay legal costs in the amount of IS10,000 and attorneys' fees in the amount of IS70,000.

*David Gilat and Sonia Shnyder, Reinhold Cohn Group, Tel Aviv*

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