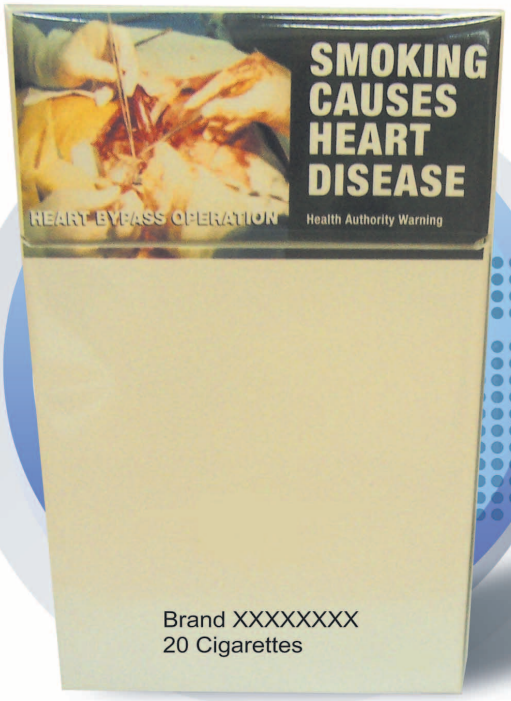
The case for the plain packaging of tobacco products



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Cover image: An example of cigarettes in proposed plain packaging

Source: Becky Freeman

The case for the plain packaging of tobacco products

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The case for the plain packaging of tobacco products

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Abstract

The global Framework Convention on Tobacco Control (FCTC) requires nations to ban all tobacco advertising and promotion. In the face of these restrictions, tobacco packaging has become the key promotional vehicle for the tobacco industry to interest smokers and potential smokers in tobacco products.

This paper reviews available research into the likely impact of mandatory plain packaging and internal tobacco industry statements about the importance of packs as promotional vehicles. It critiques legal objections raised by the industry about plain packaging violating laws and international trade agreements, showing these to be without foundation. Plain packaging of all tobacco products would remove a key remaining means for the industry to promote its products to billions of the world's smokers and future smokers. Governments have appropriated large surface areas of tobacco packs for health warnings without legal impediment or need to compensate tobacco companies. Requiring plain packaging is consistent with the intention to ban all tobacco promotions. There is no impediment in the FCTC to interpreting tobacco advertising and promotion to include tobacco packs.

> **"In our opinion, [after taxation] the other two regulatory environment changes that concern the industry the most are homogenous packaging and below-the-counter sales. Both would significantly restrict the industry's ability to promote their products."** Morgan Stanley Research (2007)[1]

Introduction

The global Framework Convention on Tobacco Control (FCTC) is the most significant development in international tobacco control in the past 40 years.[2] The FCTC defines tobacco advertising and promotion as "any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly" and requires that each country shall "undertake a comprehensive ban on all tobacco advertising, promotion and sponsorship"[3] In 1995, Cunningham and Kyle[4] argued for the plain, "generic" packaging of tobacco products, stressing that the pack was a key promotional vehicle and as such should be subject to the same controls that apply to all forms of tobacco advertising. While there have since been further major advances in banning tobacco advertising and promotions, no nation has yet required plain packaging. With global acceleration in tobacco advertising and sponsorship bans, the pack assumes unprecedented importance as a promotional vehicle for reaching potential and current smokers[5] [6-12]. British American Tobacco and Philip Morris have predicted that in the future, pack design alone will drive brand imagery.[13]

Governments have appropriated extensive areas of tobacco packs for mandatory health warnings, including 14 nations (at July 2007) which require pictorial warnings.[14] The largest appropriations are in Australia and New Zealand where warnings cover 30% of the front and 90% of the back of packs. No nation has compensated any company for the loss of brand identity in this process. As will be discussed, these major incursions onto pack design, often alleged by the industry to be inviolable commercial property, show that governments can override commercial concerns in the public interest when it comes to packaging.

This paper reviews evidence from internal tobacco industry documents and trade publications, and a relatively small public health research literature about the likely impact of plain packaging; recent industry statements about packs as vehicles for tobacco promotion, and its efforts to counteract nascent momentum toward plain packaging.

Background

Packaging differentiates brands, being particularly important in homogenous consumer goods categories like cigarettes.[15] Marketing literature routinely highlights the critical role played by pack design in the overall marketing mix, emphasising that the "product package is the communication life-blood of the firm", the "silent salesman" that reaches out to customers[16] and that packaging "act[s] as a promotional tool in its own right."[17] Cigarette packaging conveys brand identity through brand logos, colours, fonts, pictures, packaging materials and shapes. The world's most popular cigarette brand, Marlboro,[5] can readily be identified through its iconic red chevron. The Marlboro brand is estimated to be worth $US27 billion, making it the tenth most valuable (all product) brand in the world.[18]

Unique among industries, the tobacco industry has always claimed that it has no interest in attracting new customers (ie. non-smokers) but is interested only in stimulating brand-switching among current smokers and in maintaining brand loyalty in current customers. Notwithstanding the commercial absurdity of any industry professing disinterest in attracting new recruits, this position has been comprehensively undermined by a multitude of revelations from industry documents acknowledging the vital importance of attracting new smokers (predominantly youth).[19-26] It is therefore taken as read that in designing tobacco packs to appeal to potential purchasers, tobacco companies count among these, those already smoking their brand, those smoking competitors' brands and those not yet smoking but who might be persuaded to start.

Several nations (Norway, Iceland, Ireland, Thailand and regions of Canada) have banned the open display of tobacco products in retail locations, reasoning that "Power walls and counter top displays are highly visible and eye-catching. They present an unavoidable and unfortunate spill of promotional imagery and product reminders to vulnerable consumers including young people, former smokers … and smokers of all ages who are trying to quit."[27] Bans on retail display of tobacco will likely further increase industry investment in innovative pack design, with the pack functioning as a portable advertisement. Packs can not only communicate the "personality" of a brand to smokers, but smokers can project these characteristics by handling and displaying the package throughout their daily routines.[6] Just as designer clothing, accessories and cars serve as social cues to style, status, values and character so too can cigarette packs signify a range of attributes about users. As "badge products" cigarettes can reinforce the characteristics conjured by brand image.[6, 28-31]

Features of plain packaging

Plain packaging would require the removal of all colours, brand imagery, corporate logos and trademarks, permitting manufacturers to only print the brand name in a mandated size, font and place, in addition to required health warnings and other legally mandated product information such as toxic constituents, tax-paid seals, or package contents (Figure 1).[4] A standard cardboard texture would be mandatory and the size and shape of the package and cellophane wrappers would also be regulated to prevent novelty pack shape varieties and covers replacing on-pack imagery. Plain packaging would encompass pack interiors and the cigarette itself, given the potential for manufacturers to use colours, bandings and markings and different length and gauges to make cigarettes more "interesting" and appealing (Figure 2). Any use of perfuming, incorporation of audio chips or affixing of "onserts" would be banned. Plain packaging would thus standardise the appearance of all cigarette packages and cigarettes, greatly reducing the status signalling roles and appeal of cigarettes.

Figure 1 An example of cigarettes in proposed plain packaging

Source: Garfield Mahood, Non-Smokers' Rights Association, Canada

Figure 2 A cigarette printed with the colours of the Dutch soccer team

Source: Simon Chapman private collection.

Methods

Medline (1966 – November 2006) and Business Source Premier (1922 – November 2006) were searched. With Medline, all articles with the keyword "smoking" and the wildcards packag$, plain packag$, generic packag$ were located, yielding 241 articles. With the BSP search, the wildcards smoking and packag*, plain packag* and generic packag* were combined, yielding 167 articles. A Google search for grey literature including government documents, research reports, and non-governmental organisation papers was completed. Search terms with "tobacco" included: plain packaging, generic packaging, plain pack, and generic pack. The first 30 items returned for each search were examined. Tobacco document archives at: http://bat.library.ucsf.edu/index.html and http://legacy.library.ucsf.edu/ were searched using the exact phrase terms plain pack, plain package, plain packaging, generic pack, generic package, and generic packaging. Combined results from both archives yielded 1,298 documents. A hand search of the industry trade publication, *World Tobacco*, was also conducted.

Results

History of advocacy for plain packaging

In 1989, the New Zealand Department of Health's Toxic Substances Board first recommended that cigarettes be sold only in white packs with simple black text and no colours or logos.[32] During the 1989 industry legal challenge to Canadian legislation banning tobacco advertising, industry testimony stimulated tobacco control groups to call for plain cigarette packs. Imperial Tobacco Ltd's vice president of marketing agreed that packaging was vital in marketing: "it's very difficult for people to discriminate blind-tested. Put it in a package and put a name on it, then it has a lot of product characteristics."[33] This corroborated an earlier comment from a BAT official that "one of every two smokers is not able to distinguish in blind (masked) tests between similar cigarettes …for most smokers and the decisive group of new, younger smokers, the consumer's choice is dictated more by psychological, image factors than by relatively minor differences in smoking characteristics."[34] In Australia in 1992 the Centre for Behavioural Research in Cancer recommended that "regulations be extended to cover the colours, design and wording of the entire exterior of the pack".[35]

Plain packaging was examined by the Canadian government's Standing Committee on Health in 1994.[4] Referring to lack of evidence that plain packing would reduce tobacco consumption, the Committee recommended that legislation be implemented pending the outcome of

government sponsored research on the likely effectiveness of plain packs.[36, 37] Subsequent changes in health ministers and intense tobacco industry lobbying saw the legislation fall from the government's policy agenda.[38]

Experimental studies of plain packaging

As plain packs have never been legislated, evidence about their possible impact necessarily derives from experimental studies where subjects have been presented with mock-up plain and branded packs and their associations and preferences explored. A 1995 Canadian report, *When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products*, containing several such studies, remains the most comprehensive review of the likely effects of plain packaging.[39] Such studies have shown consistently that compared to branded packs, plain packs are perceived as "dull and boring", cheap looking and reduce the flair and appeal associated with smoking.[40-45] Teens are much less likely to associate specific brands with specific types of people when packs are plain.[44] Students have enhanced ability to recall health warnings on plain packs, suggesting that imagery can distract from health warnings.[41, 45] Health warnings on plain packs were seen as being more serious than the same warnings on branded packs, suggesting that brand imagery diffuses the impact of health warnings.[43]

The Canadian report concluded: "Plain and generic packaging of tobacco products (all other things being equal), through its impact on image formation and retention, recall and recognition, knowledge, and consumer attitudes and perceived utilities, would likely depress the incidence of smoking uptake by non-smoking teens, and increase the incidence of smoking cessation by teens and adult smokers."[44]

Cigarette packaging as a key site for marketing

The tobacco industry trade magazine, *World Tobacco*, contains numerous examples of appeals to manufacturers to utilise packaging as an advertising vehicle.[9-11, 46-48] Manufacturers were advised "if your brand can no longer shout from billboards, let alone from the cinema screen or the pages of a glossy magazine…it can at least court smokers from the retailer's shelf, or from wherever it is placed by those already wed to it."[7]

Industry documents confirm that companies invest significant research effort into pack design in order to communicate particular messages to specific demographic groups, chiefly young people.[6] [13] Philip Morris saw opportunities in packaging innovation among young people as they "are ready for change" and "once exposed to innovative [packaging] especially young adults see their current packaging as dated and boring."[49] Packs aimed at younger women should be "slick, sleek, flashy, glittery, shiny, silky, bold."[49]

Packaging designers remain optimistic about opportunities to increase the appeal of cigarette packs despite intrusive health warnings: "With the uptake of printed inner frame cards what we will increasingly see is the pack being viewed as a total opportunity for communications – from printed outer film and tear tape through to the inner frame and inner bundle. Each pack component will provide an integrated function as part of a carefully planned brand or information communications campaign."[50] One packaging firm urged tobacco companies to skirt "Draconian legislation" by using pack over-wrapping to create an in-store advertisement. "Where cigarette advertising is banned by law … the retailer can 'quite coincidentally' stack up a kind of billboard using the products at the point of sale if, for example, the cigarette cartons of a particular brand bear different parts of an overall design, which complete a puzzle or a caption when stacked up."[9]

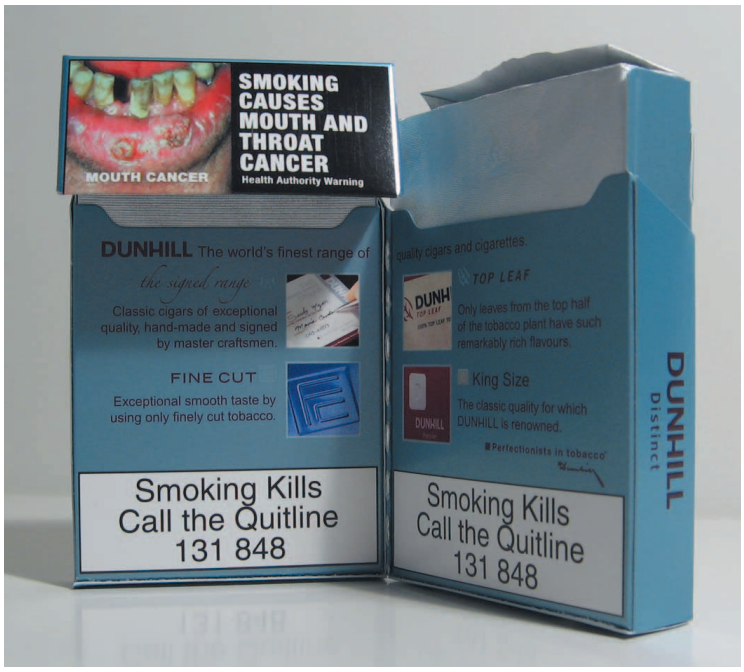
Advances in printing technology have enabled printing of on-pack imagery on the inner frame card,[50] outer film and tear tape,[9] and the incorporation of holograms, collectable art, metallic finishes,[51] multi-fold stickers,[10] photographs and images in pack design.[52-54] In the early 1900s,

collectable cigarette cards were a major form of in-pack promotion.[55] A contemporary return to the package as the primary source of advertising is apparent in the following examples.

Australia

Australia is a quintessential "dark market" where all tobacco advertising is banned.[56] Subtle changes to cigarette packs and trademarks were observed on both Benson & Hedges and Winfield cigarette packs during 2000-2002[57] When researchers called the company to inquire about the changes, an employee said they were "playing with the logo because we can't do any advertising anymore."[57]

Figure 3 Split package of Dunhill cigarettes



Source: Quit Victoria.

British American Tobacco Australia [BATA] introduced split Dunhill packs in October 2006 (Figure 3).[58] The pack could be split along a perforated line to create two mini packs, easily shared between two smokers perhaps unable to afford a full pack. Once split, one of the two packs did not bear the mandatory graphic health warning. BATA was forced to remove the packets from the market when they were found them to be in breach of tobacco product labelling laws. [59]

Canada

In June 2005, Imperial Tobacco Canada introduced octagonal packs for the du Maurier brand, presenting an eye-catching package but also obscuring the health warning by wrapping it around the angled pack sides (Figure 4).[60] Imperial's Vice President of Marketing received an international industry award for the innovative design, "considered an outstanding example of the capacity of product packaging to influence the end user." [61]

Figure 4 Octagonal packs for the du Maurier brand

Source: http://tobaccocontrol.bmj.com/cgi/content/full/15/3/150-a

New Zealand

August 2006, British American Tobacco New Zealand packaged their Benson & Hedges brand in collectable tins, priced identically to those sold in cardboard packs. The required government issued health warning was affixed to the tin with an easily removed sticker.[62]

Korea

In December 2006, KT&G, Korea's largest tobacco manufacturer, released new packaging for the Raison D'etre brand. The pack featured a "variety of colourful designs, including graffiti, Indie band, B-boy and X-sports" (Figure 5).[63] The one month limited pack release sought to create a sense of product scarcity, a common marketing tactic to enhance product desirability.[64]

Figure 5 KT&G packaging for the Raison D'etre brand

Source: http://www.kois.go.kr/news/news/newsView.asp?serial_no=20061213034&part=104&SearchDay=&page=1

Thailand

Launched in December 2004 by the Thailand Tobacco Monopoly, Chopper (as in Harley Davidson motorcycles) was described as "one of the most complex and in-depth package design undertakings." [65] The name and motorcycle imagery reflects the popularity of motorcycles in Thailand.

USA

In February 2007, R.J. Reynolds launched a new Camel cigarette aimed at women. Camel No 9 is packaged in black and pink or teal (menthol variety) designed to conjure images of sophistication, as in being "dressed to the nines" (Figure 6).[66] Women's internet sites featured positive commentary about the new packaging:

Figure 6 R.J. Reynolds Camel No 9 cigarette aimed at women

Source: http://www.trinketsandtrash.org/no9/no9.htm

> *"…with me being female and all, I have to say that the box and the pink foil inside are appealing, as is the actual look of the cigarette itself."*[67]

> *"...yeah my husband bought them for me last night, because I was so turned on by the black and pink package."*[67]

> *"I don't smoke at all, but I keep seeing this [sic] ads for Camel No. 9. The packaging alone makes me want to try them. It just looks damn good and doesn't follow that style that seemingly every other carton out there does."*[68]

It is not possible to determine if these comments were posted by real women, public relations people, or by R.J. Reynolds employees.

Subverting bans on light and mild descriptors

In nations where the deceptive descriptors "light" and "mild" have been banned, manufacturers have used packaging innovations to subvert the intent of those bans[69] where different colour gradations and intensities are used to perpetuate smokers' understanding that a brand is allegedly lower or higher yielding.[14] For example, a popular Philip Morris brand in Australia, Peter Jacksons substituted colour coding including red for full strength, blue and gold for milder variants and grey for light. Derby Cigarettes in Brazil also substituted red for full strength cigarettes, blue for mild and silver for light .[70]

Figure 7 Australia: cigarette manufacturers substituted red for full strength cigarettes, blue and gold for milder and grey for light.

Tobacco industry response to plain packaging proposals

The industry denies that packs are a form of advertising. For example, the Tobacco Institute of New Zealand argued "package stimuli, including the use of trade mark, are of no interest to people not already within the market for that specific product".[71] However, there is abundant evidence that privately, industry thinks differently about the promotional potential of packs. For example, in 1995 a Brown and Williamson employee stated "… if you smoke, a cigarette pack is one of the few things you use regularly that makes a statement about you. A cigarette pack is the only thing you take out of your pocket 20 times a day and lay out for everyone to see. That's a lot different than buying your soap powder in generic packaging."[72]

Revealing insights into the importance the industry places on packs arise from the international scale of its efforts to undermine plain packaging proposals.[73] In 1993 a "plain packs group" was formed representing British American Tobacco Co. Ltd, RJR Tobacco International, Gallaher, Reemtsma, Rothmans Benson & Hedges, Imperial, Rothmans International Services, and Philip Morris International.[74] The industry was adamant it did not "want to see plain packaging introduced anywhere regardless of the size and importance of the market."[75]

Agreed key public messages were developed to support the primary position that there was no evidence that plain packaging would reduce the uptake of smoking by youth.[76] Moreover, it was suggested that plain packaging would actually increase uptake as companies would be forced to compete on price alone, causing cigarettes to be more affordable for young people.[77] While seeking to frame its public concerns around fears that children might take-up smoking, the industry would have experienced a commercial windfall had plain packs in fact stimulated increased uptake.

All research undertaken on the possible effects of plain packs was dismissed as not showing what people *would* do in the face of plain packaging but only showing what people *think* they would do.[78, 79] Claims that plain packs increased knowledge of health warnings were dismissed because there "is no evidence to indicate that knowledge of warnings is related to smoking behavior". [71]

The availability of low budget generic brand cigarettes in the United States was cited as evidence that plain packaging would be ineffective in reducing demand: the market for these low budget, brandless generics being argued as demonstrating that smokers would still smoke such products.[73] However, sales of these products are marginal and their appeal is confounded by their low price. There is no evidence that plain packages are more appealing to smokers.[80] Should a price decrease accompany the introduction of universal plain packaging, a concurrent tax increase could counter that effect.

Slippery slope arguments

The industry has recruited allies from the packaging sector who have argued that there would be crippling job losses among printers and packaging suppliers should generics be mandated.[36] They also argue that plain packaging would set a dangerous precedent for other products, such as those containing high amounts sugar, chocolate, fat or additives,[32] epitomised in a brochure, *The Plain facts about Plain Packs*, produced by the New Zealand Tobacco Institute. A jar of Kraft Vegemite (a popular yeast extract product) was shown with all branding imagery removed, being simply labeled "Savory Spread" (Figure 8). This construction was patently misleading as plain packaging proposals do not ban the use of brand names, only associated brand imagery. Industry efforts to recruit supporters from the other commercial sectors such as pharmaceuticals and beverages appear to have proved fruitless.[73, 81, 82]

Figure 8 Tobacco industry slippery slope arguments against plain packaging

Source: http://bat.library.ucsf.edu/data/m/s/q/msq47a99/msq47a99.pdf

Industry consultant John Luik was commissioned by the plain packs group to produce a book on plain packaging, published in 1998.[83][84] The majority of the content was written and either signed off by, or under the review of, industry law firm Shook Hardy and Bacon (SHB).[85, 86] Funding from six tobacco manufacturers was declared but it is claimed that "the views in this book are solely those of the contributing authors"[87] who were all selected by the plain pack group,[88] with all chapters vetted through SHB.

Five opening chapters position available research on plain packaging as fraught with methodological problems and inconclusive findings. It was argued that plain packaging would serve to increase the attractiveness of smoking among youth as it would be seen as "more risky and anti-authoritarian." The remainder of the book repeats arguments summarised above that branding is entirely about capturing market share and assisting smokers to identify the right product for their personality. The book also argues that plain packaging would violate trade treaties and freedom of expression.

Legal objections to plain packaging: trademark law and international trade law

The tobacco industry is heavily reliant upon trademark protection in order to communicate to consumers, and exclude rivals and competitors from the marketplace.* It argues that plain packaging regulations would violate minimum obligations for the protection of intellectual

** For example Philip Morris has 159 trade marks listed on the United States trade mark register related to tobacco. British American Tobacco Investments, 113; Imperial Tobacco, 129.*

property rights under of international trade agreements[76, 89, 90] [91] such as the *Trade-Related Aspects of International Property Rights (TRIPS) Agreement 1994* [TRIPS], the *North American Free Trade Agreement 1994* [NAFTA], and the *Paris Convention for the Protection of Industrial Property 1883.*[36, 92] Further, the industry argues that because trademarks can only be registered if they are used, they would lose the trademark protection afforded to their logos and symbols. Industry lawyers insisted that plain packaging would curtail, or even annul, tobacco companies' most valuable assets – trademarks.

However, there is some internal acknowledgement that these "current conventions and treaties afford little protection"[77] and that there is "little joy"[82] in GATTS/TRIPS. Public health advocates have maintained that nation states should be able to take advantage of flexibilities within international trade agreements to protect public health, maintaining that plain packaging regulations are consistent and compliant with the obligations of such multilateral and regional trade agreements.

TRIPS

TRIPS lays down minimum standards for the protection of intellectual property rights – including trademarks, patent law and copyright law. In the industry funded plain pack book, Julius Katz and Richard Dearden, assert that a measure requiring plain packaging would violate a number of measures contained in the TRIPS.[93] They maintain that plain packaging of tobacco products offends Article 20 of TRIPS, which provides that use of a trademark in the course of trade is not to be unjustifiably encumbered by special requirements such as its use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. Somewhat tendentiously, they argue that plain packaging would "undermine the very purposes underlying trademark protection and the reason why trademarks are given protection under the Agreement."[93]

The logic of this argument is questionable. Trademark law does not merely serve the limited purpose of protecting private property rights; it ultimately supports the broader public interest in providing accurate information to consumers. In this light, plain packaging of tobacco seems an eminently reasonable and justifiable measure, entirely consistent with the goal of promoting consumer welfare. International trade law expert Nuno Pires de Carvalho observes that Article 20 of TRIPS presents no obstacle to special requirements for tobacco trademarks because such measures are justifiable "in order to reduce the good-will associated to those marks and thus limit their power to induce consumption."[94]

Article 8 (1) of TRIPS acknowledges that "members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement." Article 17 recognises that "members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties." It has long been recognised that member states may take advantage of flexibilities within TRIPS – such as limitations, exceptions, compulsory licensing, and state use – to address public health concerns. *The Doha Declaration on Public Health and TRIPS 2001* and the *WTO General Council Decision 2003* provide support for such measures in the context of access to essential medicines. The same would be true of tobacco regulation.

Katz and Dearden also contend that plain packaging would offend the obligation of members to comply with certain provisions of the Paris Convention for the Protection of Industrial Property 1883. They note that Article 1 (3) suggests that broad protection should be provided to all forms of industrial property, including tobacco.[93] The authors maintain that trademark protection can only be invalidated in limited circumstances. However, such a position is based

on the false assumption that trademark owners have a right to registration. As Kingston observes, trademark protection "is a privilege, it can be withdrawn in any case where the result that it is intended to bring about has not been achieved or cannot be."[95]

NAFTA Philip Morris International objected to regulations proposed by the Canadian Government, which prohibited the display of "light and mild" descriptors on tobacco packaging. The company submitted that a ban on descriptive terms in trademarks would violate NAFTA: "The ban would be tantamount to an expropriation of tobacco trademarks containing descriptive terms as well as of the substantial investment in and goodwill associated with those marks and the brands they represent."[96]

Additionally, the company protested that such a ban would violate Article 20 of TRIPS 1994: "The proposed ban unquestionably would constitute a 'special requirement' that would encumber the use and function of valuable, well known trademarks."[96] In response, J.G. Castel, a Professor of International Trade Law, observed that the threats of Philip Morris International were unfounded as "plain packaging is not concerned with encumbering the use of trademarks but with the sale of cigarettes as a product that is potentially harmful to the public." He commented: "It has to do with the packaging of goods and with the standards to be applied by manufacturers of tobacco products. The fact that most products sold today carry a trademark to identify them and distinguish them from competing products is a side issue. Therefore, considered as a measure related to the sale of goods, plain packaging falls within the provisions of the GATT, the Agreement on Technical Barriers to Trade, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and NAFTA applicable to trade in goods, which contain numerous provisions that recognise the health exception. Even if one considers the issue of trademarks in isolation, there is enough in the NAFTA chapter on intellectual property and in TRIPS to allow for a health exception."[97]

Castel observed: "It would be unheard of and contrary to international practice if Canada could not take necessary health measures to project its population without having to pay enormous sums of money to the American tobacco industry.' He concluded: 'The bottom line is whether plain-packaging legislation is necessary for the protection of the life and health of Canadians and has that effect."[97]

Accordingly, the Government of Canada was not persuaded by the arguments of Philip Morris International, finding threats of trade action to be hollow. When such legal arguments were presented at the Canadian government hearings on plain packaging they did little to sway the panel from recommending further action.[36] [98]

European Union Directive on the Manufacture, Presentation and Sale of Tobacco Products

In the European Union, there have been similar public debates about the interaction between trademark law, plain packaging, and international trade agreements.

In the 2002 case of R. *(on the application of British American Tobacco (Investments) Ltd) v Secretary of State for Health*, the European Court of Justice considered the validity of the European Parliament and Council Directive 2001/37 concerning the manufacture, presentation and sale of tobacco products.[99] The directive imposed strict requirements on the composition and designation of cigarettes – including the need for severe health warnings on packets, and the prohibition of "descriptors", such as "light and mild". British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd – supported by Japan Tobacco Inc. and JT International SA – brought legal proceedings before the High Court in the United Kingdom challenging the intention of the United Kingdom Government to transpose the directive into national law. The High Court requested the European Court of Justice to determine the directive was invalid in whole or in part by reason of infringement of Article 295 EC, the fundamental right to property, or Article 20 of the *TRIPs Agreement 1994.*

Tobacco companies claimed that the large size of the health warnings required by Article 5 of the Directive constituted a serious infringement of their intellectual property rights. The companies submitted that the warnings would dominate the overall appearance of tobacco product packaging, and so curtail or even prevent the use of their trade marks by the manufacturers of those products. The tobacco companies also argued that the absolute prohibition on using the descriptive terms – such as "light and mild" would deprive them of a number of their trade marks because they will no longer be permitted to use them.

The European Court of Justice denied that the Directive violated the fundamental right of property, emphasising that "as regards the validity of the Directive in respect of the right to property, the Court has consistently held that, while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function."[99] It further noted that "its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed." The decision of the European Court of Justice provides support for the position that plain packaging regimes are compatible with property and intellectual property rights.

Discussion

While the research body on the effects of plain packaging is small and necessarily experimental, industry candor in internal documents and trade literature shows that tobacco product packaging is seen by the industry to be a persuasive form of advertising. Plain packaging legislation remains an important but curiously under-explored part of comprehensive tobacco control legislation designed to eliminate all forms of tobacco advertising and promotion. Given the near universal appropriation by governments of sometimes substantial parts of tobacco packaging for health warnings, and the failure of any company to ever succeed in finally resisting this appropriation or in being compensated for any loss of trade predicted by the industry, the failure of international tobacco control to advance plain packaging is all the more remarkable. The absence of explicit reference to packs as a key form of tobacco promotion in the FCTC is an unfortunate omission, although there is nothing in the current wording of the Convention that could be interpreted to exclude packs as being fully embraced by the provisions on advertising and promotion.

While the industry promotes an unattainably high standard of proof for research showing that plain packaging would reduce smoking, they do not hold this same high standard with their own position that packaging only effects market share and only serves to encourage brand switching among adults. Claims that brand imagery merely facilitates product differentiation for current smokers at point-of-sale are disingenuous. Ninety percent of Australian adult smokers say that they never decide on their brand at point-of-sale, with only 1% saying that they always decide in the shop.[100] This is consistent with internal industry market analysis which highlights "both gross and net [brand] switching continue to decline indicating stability in the market" and the industry's continuing monitoring of the volume of new smokers commencing smoking with different brands.[101]

The body of plain pack research shows consistently that pack brand imagery distracts from and therefore reduces the impact of health warnings. A recent multi-country tobacco survey examining the effectiveness of warnings showed that smokers in Canada, who were at the time of the study exposed to large picture-based warnings, were significantly more likely to report thinking about the health risks of smoking, to stop from having a cigarette, and to think about quitting because of the health warnings.[102] The same study also showed that the larger and more prominent a health warning, the more likely it is to be recalled. Plain packaging would enable

the warning size to be further increased and allow for additional information elaborating on warnings and about smoking cessation to be printed on packs. The tobacco industry has attempted to complicate the issue by suggesting that tobacco control agencies are unclear about what plain packaging would require. Arguments are baseless that a "laundry list" of items has been suggested by "packaging non-professionals" thereby making it impossible to agree on a feasible design.[103]

The Technical Barriers to Trade Agreement (TBT) could be invoked to suggest that "plain packaging is not the least trade restrictive alternative to reduce tobacco related problems."[104] TBT have yet to be involved in any tobacco-related controversy, and implementation of plain packaging could result in a test case. Other international trade treaties such as GATT contain exceptions for health related issues, which have been successfully defended.[105] There is a strong case to exclude tobacco from all trade agreements and to empower the FCTC to assume priority over trade agreements.

Although we are aware of no precedents of laws requiring plain packaging for any other commercial goods, in many nations a voluntary *de facto* system of generic packaging exists for pharmaceuticals which require prescriptions. Such drugs – designed to promote and restore health – are packaged in essentially plain packs, with no attention-getting features incorporated in packaging to entice either users or the mediating doctors who are required to prescribe such drugs. Prescription-only drugs and many other non-prescription, but "under-the-counter" drugs where a sale is required to be handled by a registered pharmacist do not see their manufacturers seeking to imbue such products with qualities of "brand identity" or "personality" via packaging and other devices. The potential for abuse of such products (for example psychotropic and analgesic drugs) is such that nearly every society requires their advertising to be restricted to only prescribing doctors, that they not be displayed openly in pharmacies and that customers be counseled on their correct use and contraindications. Cigarettes, which cause the death of 50% of their long term users, are sold in very different circumstances: in nearly all nations, there are no restrictions on where they may be sold, ineffective policing of their supply to minors, and other than accommodating prescribed warnings, no restrictions on packaging. This paradox, whereby life-saving drugs are heavily regulated and life-harming drugs like nicotine sold in tobacco products are subject to few restrictions, requires radical change. Plain packaging would be an important step in that direction.

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