



Update on “plain” (more accurately, “standardised”) packaging

This trade mark issue has received much attention in the Press, although it is not one on which the Federation has taken a position.

The damage to health caused by smoking is of concern to governments. It is obviously quite impractical for most governments to ban tobacco products (a point of legal consequence discussed below). However, governments do interfere with the way tobacco products are marketed to the general public in the hope of reducing consumption. In England, supermarkets no longer display the packets of tobacco products openly; they are behind a screen, so that customers have to know what to ask for. And in many countries, the packets bear health warnings, some including shocking medical pictures.

A new front has been opened. In Australia since 1 December 2012, following a failed challenge to a new law in the courts, tobacco products have been in packs on which the brand and product names (as in “Pall Mall - Smooth Amber”) are in a standard black font on a drab-coloured standard background, together with prominent, shocking health warnings. Companies are no longer allowed to distinguish themselves from each other by means of device marks or by a distinctive colour scheme. Nor can such means be used to convey the relative quality of a company’s brands among themselves and thereby to support differential pricing according to quality.

A private member’s bill along similar lines has been introduced before the parliament of the Irish Republic. The UK government and the devolved Welsh, Scottish, and Northern Irish administrations have consulted jointly on options including Australian-style legislation. The matter is being considered also in France, Norway, India, and Canada. The UK consultation focused particularly on the potential for standardised packaging to deglamorise smoking for young people and thereby to reduce the number of young people taking up smoking.

No industry selling products directly to the general public would be happy about restrictions along the Australian lines, and it is conceivable that some countries might legislate similarly against other products that can do harm, for instance alcoholic products. Therefore, the arguments that are opposed to such legislation as the Australian may be of more general interest.

The first argument, unsuccessfully put forward by tobacco companies in the Australian courts, is that the legislation expropriated the trade mark owner’s rights. The power of such an argument would vary from country to country; it has been suggested that such an argument would be more powerful both in the UK and in Ireland.

The second argument, which has been put forward by the governments of the Dominican Republic, Honduras, and the Ukraine to the World Trade Organisation (WTO), is that such legislation is contrary to Article 20 of TRIPs, which includes the words: “The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as ... use in a special form or in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.” Professor Daniel Gervais, an expert on TRIPs, in an opinion commissioned by a tobacco company but aiming to present a neutral view, acknowledged the right of a government to

ban a product altogether;¹ *but* Professor Gervais concluded that if a government did not actually ban a product, Article 20 did put a burden of proof of justification on a government which interfered with the product's marketing. (Bilateral free trade agreements may be relevant as well as TRIPs.) A decision by a WTO panel is awaited.

The third argument is that standardised packaging would assist counterfeiters. (In 2011, tobacco products intercepted by EU member states as IPR (intellectual property right) infringements were valued at a domestic retail value of € 89 M or 7 % of all seizures.) However, it would apparently be politicians rather than courts who weighed up the health, technical, and cost arguments on this matter.

Further developments are expected in 2013.

Mike Jewess, 31 December 2012

¹ There are many products which it is illegal to manufacture in or import into the UK, and many which can be manufactured or imported, but where possession even by adults is controlled.