



# GLOBAL PUSH FOR “PLAIN PACKAGING” ON CONSUMER PRODUCTS WILL BURN INTELLECTUAL PROPERTY RIGHTS

by

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As we near the end of first decade of the 21<sup>st</sup> century, there can be no serious debate that the use of tobacco and exposure to second-hand smoke pose serious health hazards. But where should governments draw the line when devising prudent regulation of a legal but risky consumer product like tobacco? While reasonable people may disagree on where this line should be drawn, would they also favor unconstitutional regulations involving restrictions on free speech and government seizure of private property? Unfortunately, this Orwellian scenario is not far-fetched. For a glimpse of such a future, we refer you to the Framework Convention on Tobacco Control (FCTC). The FCTC's drafters believe that consumer demand for unhealthy products can be diminished by preventing consumers from being able to distinguish between competing brands of such products.

The United States (and 167 other countries) are signatories to this treaty, which was adopted in 2003 through the World Health Organization. Two FCTC guidelines in particular should catch the attention of intellectual property rights holders: Article 11, which requires that all ratifying countries' tobacco products be sold in generic packaging, and Article 13, which imposes a ban on all advertising and promotion for tobacco products.

This treaty raises serious constitutional concerns regarding the First Amendment protections that are accorded to commercial speech. Implementation of the FCTC would also likely violate the Fifth Amendment's Takings Clause, which prohibits government confiscation of private property for public use without just compensation. Owners of trademarks, copyrights and design patents (which are each federally recognized forms of private property) relating to the branding, marketing and packaging of tobacco products have invested enormous sums in developing and growing their brands. According to one study, fewer than 10% of smokers change brands annually. Cummings KM, Hyland A, Lewit E, Shopland D., *Discrepancies in cigarette brand sales and adult market share: are new teen smokers filling the gap?*, TOBACCO CONTROL 1997;6 (suppl):S38-43.

Compliance with plain packaging regulations would wipe out the value of this goodwill (often quantified in the stock prices of publicly traded companies held both individually and in mutual funds). Trademark owners would be especially hard hit.

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Use of a trademark on goods traveling in U.S. commerce is a requirement for the accrual and maintenance of trademark rights. Plain packaging laws would prohibit such use, amounting to a government seizure of private intellectual property. It is safe to assume that our government, even if it wanted to, could not provide "just compensation" for the value of the rights it would seize. But supposing that just compensation were economically feasible, multi-billion dollar payments to large corporations would be a political impossibility. Separately, but equally problematic, ratification of the FCTC would also impose conflicting treaty obligations upon the United States.

If the U.S. ratifies the FCTC and adopts plain packaging legislation, the U.S. would be in violation of its obligations under the Paris Convention and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (known more commonly as TRIPS). In particular, Article 15(4) of TRIPS states that "[t]he nature of the goods or services to which a trademark is applied shall in no case form an obstacle to registration of the trademark." TRIPS Article 20 provides that "the use of a trademark . . . shall not be unjustifiably encumbered by special requirements, such as . . . [mandating] use in [a] manner detrimental to its capability to distinguish goods and services [from one another]." Such legislation would also violate Article 7 of the Paris Convention, to which TRIPS applies and to which the U.S. is also subject. Article 7 shares the identical language of TRIPS Article 15(4), *supra*. Since tobacco companies around the world hold U.S. IP rights, it is safe to say that some countries might view FCTC legislation as improper trade barriers and set off trade disputes in wholly unrelated industries (*See, e.g.* the U.S. response to the European Union's ban on the importation of beef in 1999).

While no countries have adopted FCTC-style legislation yet, Australia is seriously considering such onerous restrictions. The Australian National Preventative Health Taskforce seeks to reduce the percentage of Australians who smoke tobacco products daily to 9% by 2020. *Australia: The Healthiest Country by 2020, A Discussion Paper*, at p. vii, available at <http://www.preventativehealth.org.au>. This Discussion Paper makes recommendations on how to achieve "major reductions in disease caused by overweight and obesity, tobacco smoking and harmful consumption of alcohol." *Id.* In a related paper, the Taskforce recommended mandating the "plain packaging of cigarettes and increas[ing] the required size of graphic health warnings to take up at least 90% of the front and 100% of the back of the pack." *Technical Report No. 2, Tobacco Control in Australia: Making Smoking History*, available at <http://www.preventativehealth.org.au>. The plain packaging requirements would "prohibit brand imagery, colours, corporate logos and trademarks, permitting manufacturers only to print the brand name in a mandated size, font and place." *Id.* at p. vii. In short, the government would outlaw tobacco branding, leaving no meaningful way to distinguish one product from another.

Counterfeiters are likely the only group that would benefit from a switch to plain packaging. Without the need to copy tobacco packaging, counterfeit tobacco packaging would become virtually impossible to detect. Counterfeit tobacco products would flood the market causing prices to drop, and, ironically, making products like cigarettes (counterfeit and legitimate alike) more affordable.

But why stop at regulating tobacco packaging? Tobacco is a relatively easy target, given the attendant health issues and increasing social stigma associated with its use. How about alcohol? Why not fast food? It is fattening and can contribute to a variety of health issues. Further, the agriculture and livestock industries upon which the fast food industry depends are harmful to the environment. Soft drinks can be bad for your teeth (yes, even diet soda).

At what point does government implementation of an admirable idea (reducing the prevalence of tobacco-related illness) cross the line into unlawful action? Where should we draw the line? We suggest that the best way not to fall down slippery slopes is to stay off of them in the first place. Governments should find less restrictive methods of achieving the worthy goal of reducing tobacco-related illness. Certainly this can be achieved without destroying intellectual property rights, violating international trade agreements, making counterfeiting easier, and violating the Constitution.