No smoke without fire

As tobacco products across the world are stripped of their branding, Lindsay Cook from the law firm Rouse, asks whether junk food will be next to face restrictions

On 1 December last year, Australia became the first country in the world where all tobacco products had to be sold in plain olive green packaging. The only differentiator allowed is now the brand name of the product, which must appear in plain standardised text and is the same size and font for all brands. The majority of the packs are taken up with health warnings and graphic pictures and are devoid of any other trademarks, logos, branding or marketing text.

Of particular concern to brand owners is the potential ‘domino effect’ that this decision could have, especially if adopted internationally, in setting a precedent both for tobacco and for other products. The next industries most likely to be targeted are alcohol and ‘junk’ food as there has been an increasing-regulation of the advertising of these perceived unhealthy products in recent years.

This article considers the rationale behind the recent introduction of plain packaging for tobacco and to what the extent those factors could equally apply to other industries. Thought is also given to the consequences of the introduction of plain packaging, which, especially if extended to other products, could have wide-reaching consequences for both brand owners and consumers alike.

The harm principle

The main justification given by supporters of plain packaging is that removal of ‘glitzy’ branding will lead to a decrease in consumption. In relation to smoking, it is hoped that plain packaging will help stop children from starting and will encourage those who are smokers to quit. If true, this is a compelling justification, given that the World Health Organization (WHO) estimates that use of tobacco is responsible for around six million premature deaths per year. However, the tobacco industry has argued that the evidence in favour of plain packaging is far from overwhelming.

The studies to date have mainly focused on comparing existing branded cigarette packs with plain cardboard packs bearing the name and number of cigarettes in small standard font. While these studies showed that consumers found branded packs more attractive and were more likely to purchase them than plain packs, they did not test whether consumers would buy fewer products altogether if there were only plain packs available. Many commentators believe that they would not, as effective advertising and packaging only increase a producer’s market share and brand loyalty, rather than increasing overall demand for the generic product per se.

Similarly, a recent study indicated that use of highly visible warnings on packs has little impact on users. Last year Deloitte, commissioned by British American Tobacco, published a study into the effect of a recent EU Regulation, which made it mandatory for tobacco products to feature larger government health warnings and gory images on packs. After analysing data from 27 countries, Deloitte concluded that there was no direct impact of the regulation on tobacco consumption. The fact that these tobacco restrictions appear not to have worked in the past does little to reassure that the introduction of plain packaging will do any better.

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However, a well-known study by Stirling University – Plain tobacco packaging: a systematic review – which looked at 37 studies on the impact of plain tobacco packaging on smoking, concluded that: “Non-smokers, lighter smokers and younger people are more likely to perceive that plain packs would discourage or reduce smoking”. The report has been heavily criticised by the tobacco industry, but if accurate, it does suggest that plain packaging could be of some benefit.

This is a highly controversial subject on which emotions run high, but on which hard fact is lacking. Australia may well provide the data that is needed to confirm whether or not plain packaging makes a difference.

Precedent for other industries

There is a worry among anti-plain pack campaigners that similar arguments may be used to push for the introduction of plain packaging for other products, such as alcohol and ‘junk food’.

There is already a huge increase in regulation of advertising in these industries aimed at decreasing consumption of perceived harmful products. Aside from tobacco, alcohol advertising is one of the most highly controlled and regulated forms of marketing and some or all forms of alcohol advertising are banned in many countries. For example, some countries, such as the Ukraine, Kenya, France, India and Norway have banned all alcohol advertising on television and billboards. Equally, health experts have also recently called for more rigorous government intervention in relation to unhealthy food products in Australia, and the New York City health commissioner has proposed government regulation of portion sizes to help fight America’s obesity problem.

However, the stark difference between tobacco and other products is that smoking, quite simply, is a health risk. Unlike sugary or fatty foods or alcohol, no one can really argue that smoking even in moderation can be good for you.

This is the hurdle that all arguments against plain packaging for tobacco come up against. They are met with an appeal to the emotions: that to be anti-plain packaging for tobacco somehow makes you a supporter of smoking. The arguments about loss of intellectual property rights, which the tobacco companies have raised, struggle to be heard against the public interest arguments raised by the plain packaging lobby.

However, such public interest arguments are less persuasive in relation to plain packaging for alcohol and food products as both can be consumed selectively in a way that is not damaging to public health. As such, the introduction of plain packaging seems a rather heavy-handed way to address public health issues in these industries, especially, given that the costs of introducing plain packaging are great, both to consumers from the reduction...
in consumer choice and confidence, and to industries from erosion of their IP rights.

Consumer confidence
Aside from the effects on companies and rights holders, plain packaging has several potential adverse affects on consumers. In particular, it increases the likelihood of counterfeiters and illicit products with no health and safety controls or production standards.

Trademarks and branding act as signposts of genuine goods and protect the public. Consumers know what they are getting, what the quality level is and that the products are safe and reliable. Removing the distinguishing features from packs will, it is said, make it much easier for counterfeiters to copy packs convincingly. Uniform plain packaging will also require less sophisticated printing techniques and materials to manufacture and will cost less to produce than branded packs, making the product cheaper for the customer and thus more attractive.

The tobacco industry is worried that the combination of these factors will lead to a significant increase in counterfeit products which in turn will lead to problems with consumer health — the very thing the plain packaging is intended to improve.

Consumer choice
As well as acting as marks of origin, trademarks and brands create something that people identify with, relate to, and recognise, so that they can buy the product again. Many brand owners believe that consumers do not use packaging to choose whether or not to smoke, but that instead they use it to differentiate between which brands of cigarette they will buy. **Removing branding from packaging removes these distinctive qualities, which could make it harder for consumers to differentiate between products and reduce their freedom of choice.**

In fact, many EU consumers have recently stated that they are against plain packaging. In a recent public consultation by the EU, 90% of the submissions received were against it.** Whether this will influence the EUs decision is yet to be seen. It could well have no influence at all, as while the commission is obliged to seek public opinion, it is not obliged to respond to it.**

Erosion of IP rights
No one wants children to start smoking or to encourage people to continue or dissuade them from giving up. But whether plain packaging really is going to make a difference is a question still to be answered.

One thing that it is certainly going to make a difference to is the ability of brand owners to differentiate their products from their competitors and erode much of the goodwill and reputation that attaches to their brands; valuable assets that have been built up over many years. The challenge for governments is to balance this against the public health issues.

The four tobacco companies in the recent Australian court case argued that the Australian Packaging Act, in removing their right to apply their trademarks to their products, in effect amounted to theft of their **IP.** It is easy to sympathise with their argument, whether or not you agree with it.

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Companies spend huge amounts of money each year investing in marketing and advertising of brands to differentiate their products from their competitors and IP rights play a significant factor in the valuation of a brand on balance sheet. Reducing the value of IP by removing the ability to exploit it, in effect erodes one of the main assets of many tobacco companies. Given that the principle of protection of private property is recognised in most countries, the companies argued that the introduction of plain packaging effectively meant that the government was taking their IP rights away. The court, however, disagreed, holding that while the introduction of the Packaging Act may harm the tobacco companies’ business, it did not amount to theft as the Commonwealth would not thereby acquire something in the nature of property itself.

Despite all the arguments to the contrary, the WHO and governments of many countries remain convinced of the merits of plain packaging and its ability to lure consumers away from products associated with adverse health conditions. In light of the public health war on alcohol, sugar, salt and fat, it seems probable that the introduction of plain packaging will at some stage spill over into other industries including alcoholic drinks, confectionery and fast food. However, unlike smoking, there is an acceptable level of consumption of these products, which makes it hard to see how the introduction of plain packaging in these industries could ever be justified.

Tobacco is a uniquely risky everyday product. In relation to other products, the public health benefits derived from the introduction of plain packaging would not outweigh the harm caused to brand owners by erosion of their IP rights and to consumers by reduction of their freedom of choice. In relation to tobacco packaging, the jury is out.

Footnotes
5. The Pack Space Appropriation Regulation.
7. This is illustrated by recent news stories about the alleged ‘forced’ resignation of the European Health Minister John Dalli and theft of laptops from health organisations, relating to their battles against the tobacco industry, which are reminiscent of the Watergate scandal.
8. Alcohol advertising bans take effect in printed media, Kyiv Post (January 1, 2010).
9. The Stirling review supports this theory to a degree in respect of existing smokers, though not new ones.
10. Although the Australian packaging will retain brand names.

Author
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