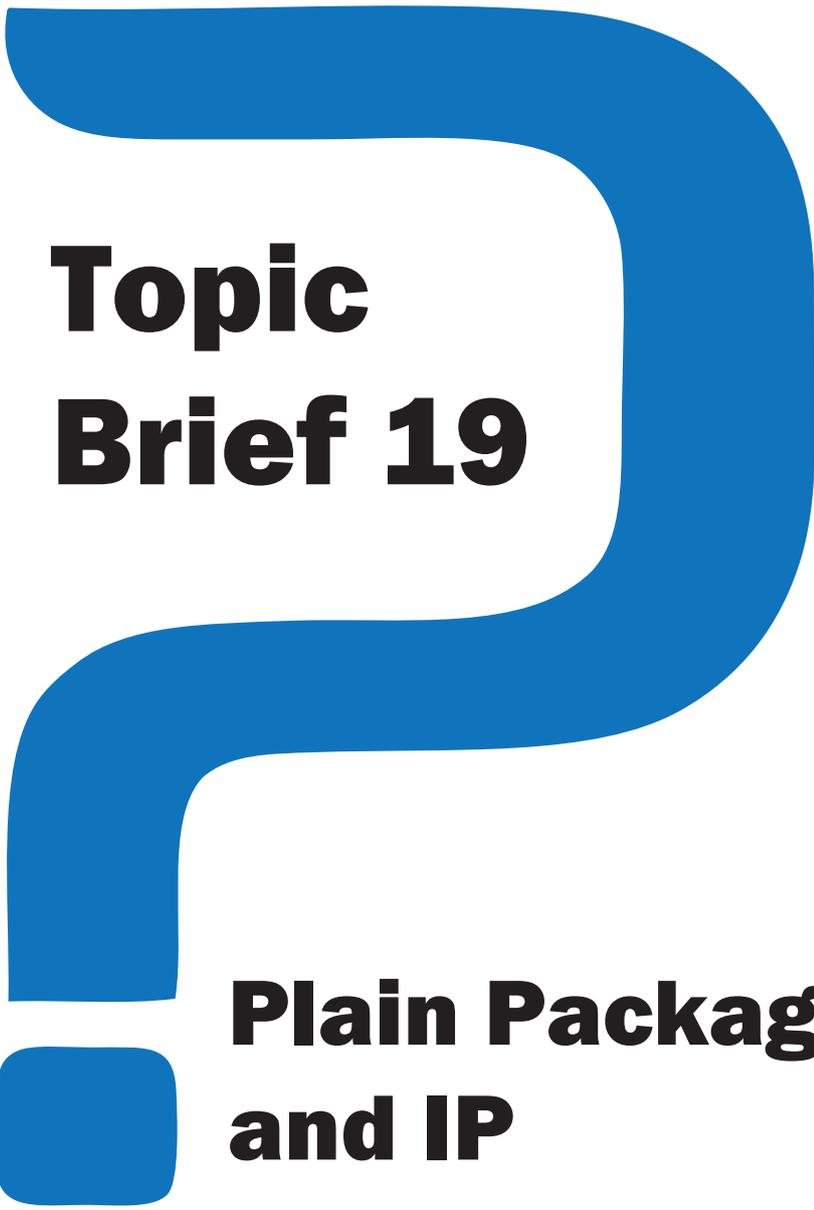




Intellectual Property Awareness Network

A large, thick blue graphic element that starts as a horizontal bar at the top, curves down and right, then curves down and left, ending in a square at the bottom left. It frames the text on the page.

Topic Brief 19

Plain Packaging and IP

© IPAN 2016

www.ipaware.org

Brief 19



Controversy is likely to focus on whether plain packaging is justifiable. In other words is it necessary in order to protect public health and is it proportionate?

Plain Packaging and IP

What is Plain Packaging?

Plain – or “standardised” – packaging involves the packaging of tobacco products in a standard format so that all products look essentially the same, bar the product name which must be in a font of standard type, colour and size located in a set place on the pack.

Such packaging has been required for all tobacco products on the Australian market since 1st December 2012 when all packs had to be the same size and shape and coloured in the same drab green. Similar measures have been considered by the European Commission via the EU Tobacco Products Directive and Member States have the option to introduce it, though not a requirement. French, Irish and UK Governments require cigarette packaging to be standardised from May 2016 and it will be illegal to sell non-standardised packs from May 2017.

The policy premise is that, by standardising pack designs, young people will be discouraged from taking up smoking, existing smokers will be encouraged to quit and lapsed smokers will be discouraged from starting again.

The IP dimension

A tobacco pack may well feature a wide range of intellectual property rights (IPRs). There will be trade marks in the product and company names, logos and potentially the pack designs themselves. The pack shape, if novel, may support registered and unregistered design rights. There will be copyright in the designs, words and layout of the pack. If an invented step has been involved in the way the pack is shaped or the way it opens, the pack may have patent protection. Finally, the whole pack representation will be protected by unregistered trade marks (the common law of passing off).

These IPRs are granted by the state and will have provided the basis for significant investment over a long period by the companies that own them. This is because the IPRs provide an important means of standing out from competitors and communicating to consumers points of difference (these may relate to quality, innovation, reputation or other rational or emotional values associated with the particular product). The IPRs are also used by consumers to inform their purchasing decisions and prompt reassurance and trust. A plain packaging policy weakens many of these IPRs and their corresponding benefits and may render some redundant.

The IP issues that arise

International treaties

A number of IPRs, and especially trade marks, are governed by international treaties, notably the Paris Convention and TRIPs. The plain packaging policy raises two particular questions:

- Would plain packaging deny the registration of trade marks or invalidate existing trade marks contrary to these international agreements?
- Would plain packaging represent an unjustifiable encumbrance on a trade mark and therefore be contrary to TRIPs?

Controversy is likely to focus on whether plain packaging is justifiable. In other words is it necessary in order to protect public health and is it proportionate?

Loss of branding

By making it hard for companies to differentiate their products, the benefits of branding will be reduced to consumers, the market and companies (see IPAN Issue Brief 11). For example:

- **Information:** Consumers will have less information on the products available and the differences between them. With all products looking the same, increasingly they will be believed to be the same.
- **Competition:** This is likely to be focused increasingly on price as differences in quality and reputation will be very difficult to signal. The benefits and necessity of competition are likely to be correspondingly reduced.
- **Innovation:** Incentives to invest in innovation will be reduced as the benefits of that innovation cannot be effectively flagged to consumers. This may lead to sclerosis in the market.
- **Reputation:** Incentives to invest in reputation will be equally reduced, for the same reason.

Counterfeiting

There are indicators that plain packaging may fuel the trade in fakes. Differentiated, complex packaging (and the frequency with which it changes) presents a barrier to counterfeiting while significantly simplifying pack designs would reduce the costs (and increase potential rewards) for the counterfeiter.

Meanwhile consumers' reduced ability to differentiate between products will affect their ability to differentiate between fake and genuine. Should purchasing decisions become more strongly price-based, this may also encourage purchases through cheaper, unregulated 'street vendor' channels (the illicit trade) which is already a significant segment of the overall tobacco market.

Any growth in fakes (whether driven by supply- or demand-side factors) would add pressure on public enforcement authorities and further reduce Government revenues from the legitimate market.

Comment

IPRs play a significant role in the functioning of markets, affecting consumer, supplier and competition dimensions. Such market effects need to be taken into account and assessed in the development of public policy if outcomes are not to have (potentially negative) unintended consequences.

Eyes have been on Australia and trends from the last three years have been seized on as supporting the case both of those who support standardised packaging and those who oppose it. A formal assessment of the policy by the Australian Government is overdue. The only safe conclusion to draw therefore at this stage is that the evidence is not yet clear either way. This suggests that, for such a significant market intervention, the outcome in terms of number of young people smoking, people giving up and lapsed smokers remaining lapsed may not be as significant as one might expect.

Suggested further reading:

The following papers focus on the IP (as opposed to the health) aspects of standardised packaging.

Consultation on the future of tobacco control – joint response from the Anti-Counterfeiting Group and British Brands Group (September 2008)¹⁵⁶;

Position papers on plain packaging in response to public consultation on possible amendment of Tobacco Products Directive 2001/37/EEC (December 2010):

- European Communities Trade Mark Association (ECTA)¹⁵⁷;
- International Trademark Association (INTA)¹⁵⁸

Plain packaging for tobacco products: some legal issues – the IPKat weblog (July 2011)¹⁵⁹.

156 <http://www.britishbrandsgroup.org.uk/upload/File/DH%20ACG%20BBG%20Plain%20P%2098.pdf>

157 http://www.ecta.org/IMG/pdf/2010_dec_15_ecta_position_paper_revision_of_tobacco_products_directive_2001-37-ec_final.pdf

158 http://www.inta.org/Advocacy/Documents/INTA_Public%20consultation%20TPD_comments%20re%20plain%20packaging.pdf

159 <http://ipkitten.blogspot.co.uk/2011/07/plain-packaging-for-tobacco-products.html>