In Hot Water – The Global Spread of Brand Restrictions

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As we know, the Earth's temperature is slowly rising due to climate change. If humanity does not confront this, the planet is in doom. Similarly, Brand restrictions (BRs) have been gradually spreading around the world. Without action, brand owners may ultimately have to confront their doom. No doubt, brands globally are in hot water.

Origin and Background

Suppose you are a tobacco manufacturer, a wine or alcohol producer, a producer of baby formula, confectionery products, or beverages. In that case, it is important to know that your brands are under a lot of scrutiny around the world and may end up being impacted by BRs. These restrictions have heavily impacted the tobacco industry with the most draconian form of restriction known as "plain packaging" (PP). It is important to look back in time to understand and help explain the basis for BRs and the policies behind them.

The first reference to PP dates to 1976 in France when the company Carrefour decided to market a series of "free" products. These were wrapped in white packaging, and the idea behind this was to promote austerity. As such, it was a choice of the brand owner with respect to its packaging. Around 1990, the World Health Organization (WHO) started a campaign to combat noncommunicable diseases (or NCDs), which are not transmitted from one person to another, yet have become a burden on social and economic development in many countries around the world. The principal NCDs are cardiovascular diseases, obesity, cancer, chronic respiratory disease, diabetes, and mental and neurological conditions. All NCDs share the following risk factors: tobacco, alcohol, air pollution, unhealthy diet, and physical inactivity.

One of the key drivers of BRs is the perception that health is directly related to trademarks and branding. The issue was discussed at the Seventh World Conference on Tobacco and Health held in Australia in 1990. One of the most significant comments from this conference was: ***"...given the importance of package designs in the promotion of tobacco products, this Conference endorses the concept of a mandatory plain packaging of all tobacco products and urges all countries to include plain packaging in their tobacco control legislation."***

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Trademarks serve as indicators of origin and quality, representing the goodwill or reputation of a business, its products, and/or its services. Consumers and trademark owners rely on trademarks to identify products and distinguish them from similar products in the market. Unsurprisingly, tobacco companies fundamentally opposed the implementation of PP based on, among other things, the fact that there was no evidence that plain packaging did or could improve health outcomes. Additionally, PP expropriates private trademark rights without the right to economic compensation, increases the ease of smuggling and counterfeiting of products, and facilitates noncompliance with the international obligations of countries (i.e., TRIPS and GATT).

By 2012, however, PP began to be implemented in legislation in many countries, with Australia introducing the first such legislation in the world, namely the Tobacco Plain Packaging Act 2011.

Tobacco is Not Alone

It is widely known that the tobacco industry is rigorously regulated in most countries. Some strong measures for tobacco products are the PP of cigarette packs, the application of minimum prices or the increase of taxes, and the placement of pictograms and health warnings on tobacco packs. Reaching beyond the package, a BR proposal has been made in Canada to introduce written health warnings printed on individual cigarettes, cigars with filters, and cigarette tubes. Recently, Panama has passed a law banning the use, import, and marketing of electronic nicotine administration systems, electronic cigarettes, vaporisers, tobacco heaters and other similar devices, with or without nicotine. Mexico has also issued a Decree that prohibits the circulation and marketing of vapes and electronic cigarettes.

Some consequences of these measures are an increase in illicit trade in cigarettes, smuggling, and the nonpayment of taxes. Further, money is generated from cigarette smuggling finances and other illicit trade such as drug trafficking, gangs, money laundering, terrorism, and other crimes. These products do not comply with the minimum obligations of legal tobacco products, such as the mandatory laboratory test for the toxicology of ingredients and chemicals, consequently creating health risks to consumers.

In the food and beverage industries, BRs have been implemented in many countries, such as Argentina, Chile, Mexico, Uruguay, and the United Kingdom. They are under discussion in many more countries across the globe. In some countries, trademarks on the packaging are marginalised in favour of predominant nutritional symbols or colours to identify food products that contain high sugar, sodium, saturated fat, and/or caffeine. Also squeezing out trademarks are tables showing the percentages of the daily value (DV) per reference amount or serving size. In Chile and Mexico, trademark "characters" are banned on all food products with high amounts of sugar.

In some countries, such as the Dominican Republic, baby formula advertising has been banned to promote breastfeeding. Also, in the formula industry, Kenya has introduced strict measures for the labelling of feeding bottles and teat and pacifier packages, diminishing trademark use for the purpose of including warnings that "Use of [product] can have [negative effects]."

Foreseen Impacts on the Industry

The implementation of BR policies has been growing over the last decade, leaving a negative impact on consumers and brand owners, all without any scientific evidence that the measures put in place will achieve the stated goals and without a genuine and open dialogue with the private sector to jointly fight NCDs. Indeed, far from creating any benefits, PP

or BRs can, in fact, confuse consumers, leading them to consider that the product in PP has not been authorised by the relevant country authorities.

As mentioned above, in Chile and Mexico, the use of branding characters on the packaging of products "high in sugars, fat, or calories" is illegal because, according to the authorities of these countries, they encourage the consumption of foods that may be harmful to children if consumed in excess. Defenders of such measures invoke the rationale that they "protect the children" by requiring the removal of labelling elements that may, in their view, attract their attention. Still, at the same time, they also defend the incorporation of technical elements that children are not able to read, much less understand. In this way, the concepts of the buyer (parents) and consumer (children) are mixed inappropriately to affect the content of containers and packaging without any consideration of the specific addressee and the way in which the decisions to purchase these types of products are made.

Measures such as PP or BRs set parameters that are not adequate to protect consumers and, in turn, threaten the distinctive power of trademarks, preventing the complete and easy differentiation of substitute products in the market. As a result, these measures undermine the economic function of the goodwill in a trademark because the products constrained by BRs or PP fail to be recognised and preferentially positioned in the market. (***KPMG. (2016). Illicit tobacco in Australia. 2015 Full year report. Londres***.)

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Does it Work?

According to INTA's June 2021 report, ***Brand Restrictions Study: A View from Gen Zers and Millennials,*** trademarks make shopping easier and safer for consumers and brands are consistently found to provide quality indicators of trustworthiness and reliability. In fact, the study found that the removal of branding elements reduced consumer trust in the same product and that brands make the choice of products safer for the public. Another finding from the study was that brands are more trusted than governments (7 in 10 consumers trust brands globally compared to 4 in 10 who trust governments). Most consumers feel that more information should be available to make healthy choices, rather than governments making the choices for them.

As mentioned, in some Latin American countries, labels have been required to be marked with "high in ..." or other brand restrictions on the food labels of food products that have been linked to high-calorie intake. Studies on the impact of these types of BR on labels in these countries show that in the beginning (e.g., the first year), the effects of the inclusion of "high in" labels produce a short-term effect of reducing the consumption of such products. Over time, however, it has been found that consumers find it difficult to orient their decisions taking into account the information on the label since more than 60 per cent of foods carry this type of warning. ***(Universidad de Chile. (2019) Cambio en la composición de productos y en los hábitos de compra: los efectos de la Ley de Etiquetado)*** This suggests that, in the long-term, such BRs are not achieving the health impact expected, putting in doubt their value. Indeed, the recent move in Canada to print a warning label on each individual cigarette where PP and graphic images on packaging have existed for a while suggests the lack of efficacy of these BR measures.

Finally, there is growing survey data and information that shows that the use of BRs in different industries has not reduced the consumption of the targeted products. Yet, according to ***Marketing Restrictions 2021, A global brand impact analysis and market research report on attitudes to brands and marketing,*** issued by Brand Finance, the estimated potential loss for companies (through loss of employment, revenue, etc.) due to BRs may exceed US$500 billion.

What Does the Industry Think?

Registered trademarks are the private intellectual property (IP) of their owners, and the net effect of plain packaging and BR legislation amounts to an expropriation of that private property.

A WTO Panel, which was created in response to Australia's Tobacco Plain Packaging Act 2011 and at the request of the Dominican Republic, noted that TRIPS do not provide for positive rights to exploit or use a particular object of IP rights; rather, TRIPs only provides for negative rights to prevent infringing acts. This WTO view gives members the freedom to pursue BRs as having legitimate public policy objectives since such measures fall outside the scope of the TRIPS' rights and do not require an exception under the TRIPS Agreement. That's why the Panel suggested governments should focus more on this view of the purpose of the TRIPS Agreement and its related treaties. Trademark owners argue that, when understood in its correct context, TRIPs protect private property rights and free global trade, ensures that consumers can distinguish between lawful products being offered for sale in an open marketplace and that owners can enforce their trademarks in cases of infringement.

Regardless of the TRIPS provisions or the comments of one Panel, there are several countries (in which BRs have been implemented) where trademark registration does, in fact, grant a positive right to use the registered mark and a defence to a claim of trademark infringement. Such positive rights that embed the notion of proprietary rights in trademarks are of fundamental importance to brand owners and are, themselves, a goal that should be pursued globally.

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As confirmed by findings in the Brand Finance report: "Brands drive innovation and are a mark of quality which helps consumers make informed choices. Brands support important social causes and help bring about change. Brands are the backbone of the global economy, especially in times of crisis."

Brands represent a way to secure the industry's innovation, and R&D investments state the ***Global Innovation Index 2020 - Who will Finance Innovation:*** "On average, firms that invest more in innovation invest more in branding; it is an important way for firms to secure returns on their R&D investments."

BRs damage businesses by reducing brand value. BRs also affect jobs. In the EU, for example, 38,9 per cent of all employment is directly or indirectly attributed to IP rights-intensive industries, according to key findings of ***IPR-intensive industries and economic performance in the European Union, 2019.*** Worse still, they promote illicit trade.

Besides harming a trademark's effective economic value and the roles of protecting consumers and fostering fair competition, BRs also eliminate the ability of brand owners to communicate about their innovative products or support certain causes. For example, what about the freedom for a brand to use rainbow symbols to support the DEI cause?

What is INTA Doing?

For years, INTA has advocated globally about the negative impact of BRs. Its position on the matter is established through **a Board Resolution**, from which all policy and education initiatives stem. A dedicated Brand Restriction Committee has been established to lead the Association's global advocacy, working to help officials and governmental bodies understand the negative impact of BRs on IP, brands, the economy, and consumers. There must be a balance between public health policies and trademark rights based on compelling and credible quantifiable (scientific) evidence.

Industry must reinforce its rejection of BRs that erode the value of their brands and instead collaborate, partner, and work hand-in-hand with governments to seek appropriate measures to address health and safety policies that do not violate international and national laws.

Governments can achieve their goals required in the fight against NCDs, but that can be accomplished by working together with the private sector in the implementation of inter-sectorial plans to educate, promote, self-educate, and even reform products ingredients, rather than by implementing aggressive brand restriction policies that deprive owners of their trademark rights and their ability to communicate innovative products.

INTA urgently welcomes brands globally to join its advocacy efforts...

Things are heating up.