

Plain Packaging: Conditions consumer's rights or protects public health?

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*"We`re not gonna take it,
No we ain`t gonna take it. We`re not gonna
take it anymore!!!
We got the right to choose it.
There ain`t no way we lose it. This is our life,
this is our song"
"We`re not gonna take it" by Twisted Sister¹*

The reason why we start with the intro and the first verse of the song "We`re Not Gonna Take It" by glam metal band Twisted Sister, is because it shares the main idea of this article, which refers to the fact that no one can impose on others their way of thinking or their way of life, since each person has the freedom to choose what suits him right.

Unfortunately, many times, the State, while dictating certain laws, tries to always tell us what is the best for us and what is more beneficial to meet our interests. This is how the "daddy state" manifests itself in our lives, trying to control our behavior and evaluating what is best for us.

An example of this is the laws that promote plain packaging in "unhealthy products", whose aim is to discourage consumption among the youth population.

Since the beginning of the 1980s, tobacco plain packaging was one of the preventive initiatives aimed at distorting not only the brand, but also any evocative quality in cigarette packs.

The various attempts to realize these initiatives failed at the time due to the strong opposition of the tobacco industry, which invoked the disturbing affectation that the measure represented for the trademarks, its main intangible asset, and for other intellectual property rights of the packs, the goodwill of the product and the packaging rights that comprise from the manufacture, sale, use and importation of the packages to the design that the proprietor of a mark decides to use to promote his product.

¹ Twisted Sister (1984) "WE`RE NOT GONNA TAKE IT". In Stay Hungry [CD] Los Angeles, EU.: Atlantic

But ... What do we mean when we talk about plain packaging?

"Plain packaging" refers to laws or regulations requiring cigarettes to be sold in standard packages (also called "generic packaging") without stylized markings, logos or colors. Instead of brand information, the packages would be dominated by large health warnings and other legally compulsory information and tax stamps with only a small space reserved for the mark in a plain and uniform font. As a result, each pack of cigarettes would appear exactly like any other package sold legally on the market².

According to the World Health Organization (WHO) plain packaging has the following objectives:

- ❖ Reduce the attractiveness of tobacco products;
- ❖ Eliminate the advertising and promotional effects of the packaging of tobacco products;
- ❖ Avoid the use of packaging design techniques that may suggest that certain of the products are less harmful than others;
- ❖ Increase the visibility and effectiveness of health warnings.

It should be noted that various public authorities from different countries, as well as activists who defend the control measures, point out that the use of plain packaging measures is justified on the grounds that tobacco should be considered a dangerous substance, making warnings of health more visible.

On the other hand, the big tobacco companies are not entirely persuaded with respect to the validity of this suggested reform or the arguments behind it, because they defend their right to fully use their trademarks linked to their products. They also emphasize that the increase in information regarding the harmful effects of tobacco reduces consumption because there is no evidence that knowledge of the warnings is related to the behavior of the consumer. They suggest that competition based solely on prices will reduce the cost of the packs, making them affordable especially to the pockets of teenagers.

Therefore, we can see that in this issue there are three edges in conflict:

a) The Right to Health:

Everyone has the right to health. It refers both to the right of people to obtain a certain level of health and health care, and to the obligation of the State to guarantee certain level of public health with the community in general.

In our country, the right to health is recognized at the constitutional level, through Article 7 of the Peruvian Constitution of 1993, which recognizes two rights: The right to Integral Health and the recognition of the right of the disabled person to the respect for their dignity and a legal protection regime.

Likewise, it should be noted that Peru has a General Health Law (Law N° 26842), which in its Preliminary Title specifically states that health is an indispensable condition of human development and a fundamental means to achieve individual and collective well-being; that the protection of health is in the public interest, being the responsibility of the State to regulate it, monitor it and promote it, as well as pointing out that public health is its primary responsibility.

² Rotundo Zocco, Carmela: PLAIN PACKAGING: A GROWING THREAT TO TRADEMARK RIGHTS, Les Nouvelles, June 2013, Page 140.

b) Trademark Distinctiveness:

The main function of a brand lies in its distinctiveness, so that the other functions simply derive from the capacity or submit to it.

The distinctiveness radiates its effects beyond obtaining the registration and must persist throughout the brand's life as a preservation requirement of the record, in other words, if the distinctive feature of the brand is lost, the rights granted to the owner of the brand may be endangered from the registration granted at the time.

Tobacco trademarks, like any other brand, have a multiplicity of characters, shapes and colors that, when differentiated from those of their competitors and associated with an implicit concept and a specific public, make it possible for the consumer to choose one or the other, depending on factors that go beyond the same product, that is, the perception that the brand is an object.

If these measures were applied, only a very fine margin of differentiation would be left between competing brands, which could be so narrow that it would eliminate the *raison d'être* of tobacco trademarks by decimating their distinctive capacity almost entirely.

c) The freedom or right of the consumer to choose between products and services:

Julio Durand Carrión points out that the right to choose is "*the right to access a variety of products and services, valuably competitive, for the satisfaction of consumer needs. The valuably competitive expression aims to simplify or establish the principle of security over quality, adequate satisfaction of a need and a fair price of the product or service. This right allows us to highlight our freedom of decision and calls for the knowledge and exercise of other rights*"³.

As we noted above, the brand helps the consumer to exercise their right to choose, because it creates in the mind of the consumer the psychological recognition that not only links the product and the service with the brand, but also manages to enhance the goodwill of the company or of the brand itself.

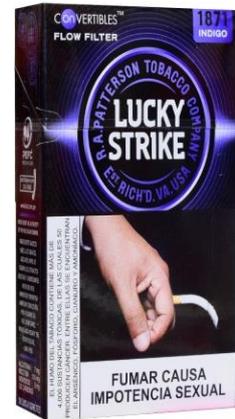
The application of the measures of plain packaging to a product will prevent the association of the marks to these distinctive features and therefore will annul its commercial value in that territory, while limiting the right of the consumers to decide for the quality of a product associated with its trademark.

In the case of Peru, on September 26, 2016, the Legislative Proposal No. 291/2106-CR, "LEGISLATIVE PROPOSAL ON TOTAL PROHIBITION OF TOBACCO", was presented before the Commission for the Defense of Consumers and Regulatory Bodies of Public Services of the Congress, which proposes the application of plain packaging measures to cigarettes.

What draws the attention of this project, is that in our country there have always been anti-smoking regulations that restricted in some way the advertising of cigarettes and the consumption of cigarettes in public places such as banks, cinemas, theaters, among others, as well as it is also established the prohibition on the sale of products made with tobacco to minors, among other restrictions, long before WHO promulgated the Framework Convention for the Control of Tobacco. Even the new anti-smoking regulation, which was enacted in 2008, includes the suggestions of said agreement regarding the

³ Durand Carrión, Julio: TRATADO DEL DERECHO DEL CONSUMIDOR EN EL PERU, Universidad San Martín de Porres, Lima, 2007, page. 166

restrictions on the advertising and presentation of cigarette packaging in a moderate way, allowing the consumer to decide if he/she consumes or does not consume said products.



In conclusion we can point out the following:

a) Brands are intangible assets that contribute to creating value in the products and services offered in the market, which allows companies to differentiate themselves in quality and attributes. They also play an increasingly important role, not only because companies can position themselves better and achieve greater value, but because they also protect the general interest of consumers, since it prevents or limits confusion and doubts when purchasing products and services and/or services.

b) Plain packaging does threaten the right to choose between products or services since it practically nullifies a primary function of brands: the distinctive function, causing that the consumer is not able to acquire the brand of their preference, becoming confused and acquiring another product.

c) Peru fully complies with the provisions of the Framework Convention for the Control of Tobacco, complying with the restrictions established by this international document in a manner that respects the intellectual property rights of tobacco companies and the right to health of people. Therefore, the Legislative Proposal 291/2106-CR should be rejected.

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