

Tobacco Plain Packaging in Sweden?

In Sweden, tobacco advertising is now prohibited via most communication channels. As a result, tobacco product package design is one of the few remaining marketing opportunities for sellers of tobacco products. In 2012, Australia was the first country to legislate neutral (plain) tobacco packaging, which only permits the name of the brand to be printed on a plain background. The subject has since been hotly debated in many countries and currently is under investigation in Sweden and will be reported in spring 2016.

The Australian plain packaging legislation raised the question of the extent to which a country may improve public health by limiting the use of trademarks and trade dress. One issue is how neutral packaging legislation relates to the Trade-Related Aspects of Intellectual Property Rights Agreement (“**TRIPS**”), which contains minimum rules all World Trade Organization (“**WTO**”) members must follow and protocols on the legal protection of trademarks. TRIPS allows countries to take measures necessary to protect public health if they adhere to WTO rules. However, Article 20 of TRIPS states that trademark use must not be unjustifiably prevented by the imposition of specific requirements that may damage a trademark’s ability to distinguish goods and services from each other. Some countries have accused Australia of violating TRIPS and this issue is under WTO review with a decision expected in spring 2016.

A new Tobacco Products Directive (2014/40 / EU) (the “**Directive**”) is expected to be introduced in all EU countries by spring 2016. The Directive contains no mandatory neutral packaging provisions but it does not prohibit them either. Each EU member country can decide how tobacco packaging is regulated; however the Directive does require textual and pictorial warnings covering 65% of the front and back of a cigarette package and a cuboid shape on cartons. Neutral packaging legislation will be introduced in France, Ireland and the United Kingdom but is not yet in force. Extensive plans are also underway in Canada, New Zealand, South Africa and Uruguay to pass similar legislation. So far, Norway has passed the most extensive packaging laws as it also requires plain packaging for snuff boxes.

While plain packaging for cigarettes may be easily accepted since smoking is known to be unhealthy, the broader consequences of such rules must also be considered. In Sweden, and probably elsewhere, it must be asked if people are prepared to sacrifice even more freedom of expression via the imposition of plain packaging rules. This article explores how plain packaging relates to trademark law.

Swedish Rules for Tobacco Advertising

Under the Freedom of the Press Act (the “**FPA**”), constitutional protection means public institutions are barred from intervening against abuses of freedom of expression, or complicity in such abuses, other than in those cases and in such manner as set forth in the FPA.

The FPA explicitly exempts alcohol and tobacco advertising regulations from constitutional protection. Constitutional support for such legislation was deemed necessary because it was uncertain whether total bans on advertising for certain products would comport with FPA 1:2, which specifies that no written matter may be scrutinized prior to printing and the printing of such matter cannot be prohibited. According to FPA 1:9, notwithstanding the FPA, laws must govern bans on commercial ads if used in the marketing of alcoholic beverages or tobacco products. Such laws govern bans on commercial ads introduced to protect health, or the environment, pursuant to European Community accession obligations. Thus, the above exemption from the FPA’s exclusive scope enables rules on the marketing of tobacco products in the Tobacco Act (the “**TA**”). However,

while the advertising ban applies to commercial ads, advertising brochures, labels, packaging and package printing, price lists and the like fall outside the advertising ban.

Since the 1970s, Swedish tobacco advertisement regulations have become stricter and the TA generally prohibits marketing tobacco products to consumers. However, the TA does permit certain advertising, such as that used to sell tobacco products or commercial messages inside sales premises if the ad is not intrusive and does not actively target consumers or encourage tobacco use. Additionally, the TA requires such ads to be positioned so they are as invisible as possible from the outside of the premises.

In the Government bill (2001/02: 162) that implements the Labeling Directive for tobacco products, the Council on Legislation states (2001/02: 162s. 53), among other things, packages with warning labels and content declarations are to be viewed as printed matter per the FPA. Additionally, rules requiring a publication to have certain content would generally conflict with the prohibition on obstructive measures of the FPA. However, according to the Council on Legislation, ordinary law should be able to regulate instances where written matter must be accompanied by textual warnings, provided they do not influence public opinion. The Council questioned whether certain textual warnings specified in the Directive, expressed in the imperative, are compliant with the FPA, such as “Smoking is highly addictive, do not start,” which is grammatically expressed in the imperative, as opposed to “Smoking can kill,” which is FPA compliant. The Council on Legislation has also questioned whether the textual warning requirement is so extensive that a trader would be unable to design a package with text content of its choice.

In connection with the adoption of the revised Tobacco Products Directive (2014/40 / EU), the Swedish Government found that the size of health warnings may also contravene the Swedish Constitution by limiting a trader’s ability to choose text content. However, the Government has since decided the Directive does comport with the FPA in this respect (see Government Bill 2015/16:82). The TA also mandates that text, names, trademarks and figurative marks or other indicia giving the impression a particular tobacco product is less harmful than another cannot be used on tobacco product packaging. This provision was introduced in order to comply with the Labeling Directive.

The Council on Legislation has clearly specified in the Government Bill 2001/02: 162, that the provision mentioned above does not qualify for the tobacco advertising ban exemption in 1:9 FPA, as this is defined by the content of “commercial ads,” as distinct from packaging. The Council on Legislation stated “It connects...to the restrictions on commercial marketing in printed matter that...has been considered to be made in ordinary law, [to be] outside the scope of the FPA.” It seems the Council on Legislation is referring to the specific moderation requirement, whereby marketing must not be intrusive or encourage tobacco use. Therefore, the Council on Legislation found the provision mentioned above does not conflict with the FPA.

The Swedish Constitution

The Instrument of Government (“IG”) 2:15 states provisions restricting owners’ rights to dispose of their property (i.e., land and buildings) constitutes interference in the right of ownership that is subject to the protection of property under the IG. Other provisions restricting an owner’s right of disposal that applies to property other than land and buildings falls outside the scope of the provision (see Government Bill 2004/05: 188 p. 27 ff). Therefore, trademark rights are not a protected property class covered by a right to compensation. Thus, neutral packaging should be treated as a restriction on ownership rights under laws other than the IG.

Since one may use a word mark, if not a logo, the introduction of neutral packaging is compatible with the IG property protection provision even if it poses limitations on the right to dispose of the trademark. However, the exclusive right to a trademark as protected property is also covered under the European Convention (the “**ECHR**”). The fundamental rule protecting individual property rights is incorporated into Swedish law.

Per Article 1 of the First Additional Protocol to the ECHR on the protection of property, any natural or legal person is entitled to the peaceful enjoyment of his/her possessions and no one may be deprived of such possessions except in the public interest and subject to conditions provided by law and by general principles of international law. Article 1 also states such provisions may in no way impair the right of the state to enforce such laws as it deems necessary or to control the use of property in accordance with the general interest, among others.

According to ECHR Article 10, everyone has a right to freedom of expression, which includes the freedoms of opinion and to receive and impart information and ideas without interference from public authorities and regardless of frontiers. However, there are exceptions and such freedoms may be limited by laws necessary to balance competing interests that exist in democracies. The requirement of necessity is met if a restriction on the freedom of expression is necessitated by an urgent societal interest that is reasonably proportionate to the objective to be met. Therefore, restricting freedom of expression to protect public health comports with ECHR Article 10, if it is proportionate to the intended objective. Furthermore, Chapter 2.13 IG specifically states commercial freedom of speech may be restricted.

Illicit censorship?

As a matter of principle, it must be asked how appropriate it is to restrict the freedom of expression and permit further interventions in marketing products and services. For example, when not absolutely necessary to protect public health, it might be possible to achieve the same goal by means other than neutral packaging. Constitutional law also covers commercial advertisements as protected expression, though less so than non-commercial opinions.

Some aspects of the freedom of expression have no exceptions, such as the ban on censorship, which is the essence of Swedish freedom of expression and is fully applicable with respect to commercial advertising. 1:2 explicitly states, “No written matter shall be scrutinized prior to printing, nor shall it be permitted to prohibit the printing thereof. Nor shall it be permitted for a public authority or other public body to take any action not authorized under this Act to prevent the printing or publication of written matter or its dissemination among the general public on grounds of its content.”

Previous investigations into limitations on direct/indirect tobacco advertising have determined those restrictions to be compatible with provisions protecting the freedom of expression under the RF, FPA and ECHR. However, neutral packaging rules mean further limitations that may violate our freedom of expression.

The censorship ban means that a public authority, or other public body, cannot prevent anyone from publishing material. Consequently, whether a limitation on the freedom of expression has occurred must be assessed retrospectively because the preemptive suppression of written matter, for any reason, contravenes the FPA unless solely to maintain public order.

Current restrictions include advertising bans via various communication channels. However, the introduction of plain packaging differs substantially because authorities have the discretion to

control a trader's packaging design. This kind of control in advance is what the censorship ban is meant to protect since a key premise of the censorship prohibition is that censorship impedes the right to communication. Thus, plain packaging could be considered censorship of information to consumers. Therefore, it seems apparent that the introduction of plain packaging rules in Sweden would require constitutional amendments.

The Swedish Trademark Act

Some argue the Swedish Trademark Act (the "TMA") does not give a trademark holder the unconditional right to use a registered or established trade symbol. Some also argue that the exclusive right conferred via registration or establishment in the market only provides protection from other parties using a trade symbol that is confusingly similar with the trademark. The TMA does not give an explicit right to use a trademark; however, it seems far-fetched that this right should not be implied. The entire point of a trademark is to allow its protected use.

There is also a concern of whether plain packaging prevents a trademark holder from complying with TMA requirement to make genuine use of a registered mark in Sweden, creating the potential for a mark's owner to risk cancellation of the mark's registration for non-use. The bill on certain tobacco issues (Government Bill 2001/02: 64 p.39) indicates that a restriction on the right to use a registered trademark would not likely extend beyond that point if there is still room for a trade mark owner to make "genuine use" of the mark, such as by using it in the passive marketing of goods.

Even if neutral packaging laws are passed, word marks could still be used. Furthermore, 3:2 TMA states that a trademark registration cannot be revoked for a justifiable failure to use. Provisions on neutral packaging should constitute such a valid reason for non-use of a trademark. Since passive marketing is, in principle, the only method available for tobacco products in Sweden, plain packaging will likely have a serious impact on the ability to establish a trademark in the Swedish market.

Soft drinks are also harmful to health

This article has been written in the context of regulations regarding plain tobacco packaging. What if such rules were applied to sugary soft drinks? Reports exist that show daily consumption of soft drinks not only damages the teeth but also the liver - indications of an unhealthy product. Coca-Cola is a famous trademark attached to a product with a well known and distinctive bottle design, which itself tells a buyer what they are purchasing. If a Coca-Cola bottle was required to look like a Swedish RIGELLO bottle, with a green-brown color, it would be very difficult for a consumer to differentiate between the two products. An entire store shelf would be filled with virtually identical soft drink bottles with only the word mark in neutral font to differentiate them.

If one accepts neutral packaging for cigarettes, one probably must also be prepared to accept the slippery slope that potentially accompanies it in the application of such a concept to other more or less unhealthy products such as soft drinks, unhealthy low-calorie foods, weight loss products, foods containing hydrogenated oils and alcohol, among others.

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Alexander May assisted in editing and translation of the original Swedish version of this article

Subsequent to the publication of the original Swedish version of this article, the Swedish Inquiry (see Swedish Government Official Reports 2016:14) determined the plain tobacco packaging requirement to be incompatible with the FPA. The Inquiry found that no requirement for plain packaging can be introduced until the Swedish Constitution is amended. A constitutional inquiry is investigating this and a proposal on this is expected in autumn 2016; however, it should be noted that Constitutional amendments can take many years.

The Inquiry has also proposed a prohibition against tobacco product displays and other commercial tobacco messages at sales premises. Additionally, the inquiry has proposed that tobacco products sold to consumers should not be offered in a way that gives a customer access to a tobacco product before payment is made.