

COURT OF APPEAL OF ENGLAND AND WALES UPHOLDS UK PLAIN PACKAGING JUDGMENT

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UPDATE: On 12 April 2017, the Supreme Court of the United Kingdom [declined to hear an appeal from the Court of Appeal's judgment](#). The Court of Appeal's decision will therefore stand as the final decision in this litigation.

On 30 November 2016, the Court of Appeal of England and Wales upheld the High Court of Justice of England and Wales's judgment on the United Kingdom's standardised (plain) tobacco packaging, dismissing an appeal brought by three tobacco companies and four tipping paper manufacturers. The [Court of Appeal's judgment](#) affirms the [finding of the High Court](#) in May that standardised tobacco packaging is consistent with the powers and obligations of the UK government.

The appellants had appealed the High Court's findings on most of the original grounds of challenge. The Court of Appeal's key findings on these grounds of appeal can be grouped into the following four points:

- there is no positive right to use a trademark in UK, European, or international law

- the regulations do not violate protections for private property under the European Convention on Human Rights, the Charter of Fundamental Rights of the EU, or the common law
- the regulations are proportionate to their public health aims, and
- the regulations are otherwise consistent with the UK's obligations under European Union law, including the European Union's 2014 Tobacco Products Directive (TPD).

In this post, we focus on the Court of Appeal's findings about the scope of trademark rights and protections for private property, both of which are [common arguments](#) in industry legal challenges at the international level and in domestic jurisdictions. We also examine more briefly the Court's findings on the proportionality of the regulations

We've previously written on the [key points of the High Court decision for other jurisdictions](#). A summary of the UK regulations is included in that paper (at pp.2-3), and we do not repeat it here.

The nature of trademark rights

The Court of Appeal finds that trademark registration does not confer a positive right to use a trademark under UK, European, or international law. Rather, whether the trader is able to use a mark is independent of trademark registration. Registration of a trademark simply confers the negative right to exclude others from also using the mark – a right that remains unaffected by the standardized packaging regulations. The Court also concludes that there is no positive right to use a design (para 86).

The Court further rejects arguments by the appellants that plain packaging is inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS') of the WTO. In addition to finding that TRIPS grants no right to use a trademark, it emphasises that the TRIPS Agreement must be interpreted consistently with the 2001 [Doha Declaration on TRIPS and Public Health](#), which states that TRIPS 'can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health'. The Court of Appeal emphasises that while the Doha Declaration was adopted in the context of access to medicines, it applies more broadly. It notes that the [Punta del Este Declaration of the FCTC Conference of the Parties](#) recalls the Doha Declaration and affirms that parties 'may adopt measures to protect public health including regulating the exercise of intellectual property rights' (para 144). Further, the interpretive principles in TRIPS art 8(1) affirm members' ability to adopt measures to protect public health without restriction to particular public health objectives (para 145). The Court then notes that any requirement under TRIPS Article 20 that the 'use of a trademark in the course of trade' not be 'unjustifiably encumbered by special requirements' applies only to *unjustifiable* encumbrances. It considers that its findings on proportionality demonstrate that standardized packaging is not an 'unjustifiable' encumbrance.

As we've noted elsewhere, that trademarks are negative rights has been affirmed in the Australian High Court's judgment on [plain packaging](#), in the Philip Morris v. Uruguay investment [award](#), and in

World Trade Organization panel decisions [outside of tobacco](#). The Court of Appeal's judgment is one more addition to this line of jurisprudence. Like the High Court of Justice, the Court of Appeal also emphasises that TRIPS itself recognises that intellectual property rights must be balanced with public health, and that it does not prevent parties from restricting the use of intellectual property rights for this purpose.

Right to property

The Court of Appeal also rejected arguments that the plain packaging regulations violated protections for property rights under Article 1, Protocol 1 of the European Convention on Human Rights ('ECHR'), Article 17 of the Charter of Fundamental Rights of the European Union ('CFREU'), and the common law.

On Article 1, Protocol 1 of the ECHR, the Court found that the plain packaging regulations were a 'control of use' rather than a 'deprivation of property'. It then noted that the appellants retained legal title to their trademarks, that the trademarks remained registered, and that the trademarks could still be used in wholesale contexts and trade publications, and against unauthorised parallel imports or counterfeiters. It concluded that:

'the fact that there is a residual utility in these negative rights coupled with the retention of legal title means, in our judgment, that it cannot be said that the Tobacco Appellants have been deprived of their national marks' (para 106)

Having found the regulations to constitute a control of use, the Court of Appeal found that there was no case for compensation, and that the Regulations struck a 'fair balance' between the public interests pursued and the private interest affected.

The Court also rejected arguments that plain packaging impaired the 'essence' of the right to property under Article 17 of the CFREU. The Court reiterated that the essence of a trademark right was the negative right to exclude others from using similar marks, not to use the trademark. The Court also found that, like Article 1 Protocol 1 of the ECHR, Article 17 of the CFREU recognised that property rights were not absolute and could be regulated for public interest purposes.

Finally, the court found that the common law did not protect property against a control of use.

Proportionality

The tobacco companies also challenged the High Court's proportionality analysis on a number of grounds, both in the context of the right to property and as a freestanding ground of challenge. All of these grounds of challenge were rejected by the Court of Appeal. The Court found that the judge did

not err in how he treated the UK government's evidence versus that of the tobacco companies.

Three aspects of the Court's reasoning will be particularly useful to other jurisdictions:

- the Court rejected BAT's argument, made both at first instance and appeal, that the UK government could have implemented a tax increase in lieu of plain packaging. The Court of Appeal, like the High Court of Justice, recognised that tobacco control measures work as a complementary package, not as 'alternatives', and that in assessing what measures could achieve its public health objectives, the government was entitled to consider not only the overall effect on smoking prevalence but also intermediate objectives such as restricting the promotional effect of the pack (paras 241-243).
- The court upheld the High Court's use of the WHO FCTC article 11 and 13 guidelines, finding that the European Court of Justice had consistently attached 'considerable weight to the views and opinions of the WHO on health issues', and noting that the ECJ had considered that 'the guidelines are intended to assist the parties in implementing the binding provisions of the FCTC; they are based on the best available scientific evidence and the experience of the parties, and have been adopted by consensus; and they are intended to have a decisive influence on the content of the rules adopted in the area under consideration' (para 234).
- The court upheld the High Court's consideration of FCTC article 5.3, which requires parties to protect their public health policies from the 'commercial and other vested interests of the tobacco industry', and its guidelines, in assessing the tobacco companies' evidence. The court noted that the judge was 'entitled to treat as telling in favour of subjecting the evidence of the tobacco companies to rigorous scrutiny'. In any case, the High Court's reliance on article 5.3 had not caused it to 'disregard or marginalise' the tobacco companies' evidence - the court noted that the judge had nonetheless reviewed and scrutinised *all* of the evidence (para 205).

Conclusion

The Court of Appeal judgment is the latest in a growing body of jurisprudence that weighs the objectives of public health against the commercial interests of the tobacco industry, and finds in favour of public health. It makes a number of important observations on the nature of the legal rights and interests at stake, while largely affirming the findings of the High Court's meticulous and comprehensive 386-page judgment. The judgment will be relevant to a wide range of other jurisdictions, particularly those where the tobacco industry has launched or is threatening challenges based on intellectual property rights.

Cross-posted on the [McCabe Centre blog](#)