

Foreword

I am very pleased to write the foreword to this book edited by Alberto Alemanno and Enrico Bonadio. They have assembled very interesting contributions on the intersection between intellectual property (IP) law and the protection of public health. This has been done in a way that pays full regard to the role of IP regimes in the modern economy. While acknowledging in Part 1 and Part 2 of the book that IP protection may sometimes interfere with public policies aimed at enhancing human health, it is pointed out that this body of law can also be used as a tool to promote this objective, as clearly emerges in the last part of the volume.

Can IP be protected as a fundamental right, or as a form of international investment, if this results in limiting governments' actions aimed at reducing the known health risks caused by the consumption of unhealthy products? This and other questions will find interesting answers in the volume. The red thread which links many chapters is simply one: packaging. More and more countries have started restricting the ability of IP owners in several industries (tobacco, alcohol, food, pharma) to fully use their brands and other eye-catching features on the packaging.

It remains to be seen whether such restrictions, for example plain packaging of cigarettes, are compliant with IP regimes and are also capable of meeting the expectations of public health measures designed to reduce the appeal of packaging and thereby prompt people not to consume harmful products and to make more educated purchasing choices. This volume is the first valuable attempt in providing insights into such intriguing issues.

The potential clash between IP regimes and the protection of health has in particular emerged at European Union (EU) level. There has been an inexorable trend in this direction due to the high level of activity of EU institutions in dealing with the protection of consumers and the promotion of public health. This activity was first sparked by the revelations surrounding the food scares of the 1990s, mainly associated with BSE and the contamination of food by the presence of cancer-causing dioxins. It was clear that the EU framework for food safety was inadequate and demands were made for effective protection of public

health and the welfare of the consumer to be enshrined in law. The EU Commission responded by establishing a new directorate general, DG Health and Consumer Protection, better known as DG Sanco.

Following the publication in 2000 of a White Paper on Food Safety outlining policy changes and identifying legislation proposed for the production of safe food, a raft of new laws were enacted by Council and Parliament over the following years. Consumers were now fully recognised as stakeholders and public health achieved a position of central importance. The White Paper also emphasised the need to develop a policy on nutrition, including nutritional labelling. This was matched by a determination to avoid the risk of consumers being misled by unsubstantiated health and nutrition claims. This led to the adoption by the Commission in 2003 of the Nutrition and Health Claim Regulation (NHCR) (Regulation 1924/2006) to regulate the making of health and nutrition claims and to establish a procedure to be adopted by a food company wishing to make any such claims. In addition, by also severely restricting the use of trademarks, the NHCR limited food operators' commercial freedom and freedom to use their IP assets. This prohibitive measure has moved food labelling law some distance beyond its usual function of facilitating consumer information. It now affects IP rights. Nevertheless, no court challenges were made.

The encroachment on IP rights in the NHCR was preceded some years earlier by similar provisions contained in the Tobacco Products Directive (TPD) (2001/37/EC), which had as one of its aims the promotion of public health by reducing the consumption of tobacco. Labelling requirements contained in Article 7 of the directive banned the use of descriptors such as 'light' or 'mild' on cigarette packaging due to the perceived risk of the consumer being misled. Court proceedings were instituted in the UK, which resulted in a reference to the Court of Justice of the European Union (CJEU) for a preliminary ruling (C-491/01, *Japan Tobacco* case). Japan Tobacco challenged Article 7, contending that the ban would have the effect of prohibiting the use of its established trademark 'Mild 7s', which they said would 'expropriate their intellectual property rights'. In rejecting this claim, the Court in its judgment noted that

'In respect of the right to property, the Court has consistently held that while that right forms part of the general principles of Community Law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed'.

This standard has featured prominently in the judicial proceedings instituted by the tobacco industry against the UK and Ireland challenging the legislation enacted in both jurisdictions requiring tobacco to be sold in ‘plain packaging’. As has been affirmed by Mr Justice Green in his 2006 decision in the UK proceedings (British American Tobacco) ‘the use of trademarks can be curtailed according to the public interest’ (para 832).

We are now beyond ‘plain packaging’ as this book proclaims. The richness of academic analysis is impressive. Not surprisingly, having regard to the decisions of the CJEU in the *Japan Tobacco* case and the High Court in *British American Tobacco*, that property rights can be restricted in certain circumstances, at the core of the analysis conducted by Alemanno, Bonadio and their co-contributors to the book is the question of the balancing of rights. The authors point out that IP rights can be considered as fundamental rights as confirmed by the EU Charter of Fundamental Rights. However, so also are the rights to health and consumer protection.

As said, a major theme of the book examines the emerging trend of regulation which directs the use of the space on packaging not just for the purpose of consumer information, but increasingly to direct messages designed to warn and dissuade the consumer from purchasing the product concerned. Such messages are obviously in conflict with messages from the producer which are intended to achieve the opposite effect. Can this trend survive a legal challenge by producers asserting interference with a fundamental right? After all, the label is often regarded as the producer’s last opportunity for marketing. Yet when balancing these conflicting rights courts may be prompted to favour the right to health and stress the effectiveness of packaging-related measures. Indeed, as noted by Advocate General Juliane Kokott in her recent opinion rejecting challenges to the validity of the new Tobacco Directive (Directive 2014/40) (Cases C-357/14, C-477/14, C-547/14), ‘the less extravagant the packaging of a product is, the less consumers, and above all young consumers, will be tempted to purchase it’ (para. 191).

It is to be expected that tensions will exist in the interpretation of competing rights and where harmonious interpretations cannot be found courts are required to make a choice. In many chapters of the book the authors point to indicators likely to assist in judicial interpretation. For instance, Enrico Bonadio discusses whether trademark registrations offer their owners exclusively negative rights to prevent unauthorised exploitation by third parties, or positive rights to use the asset. It is rightly suggested that the answer to this question will carry considerable weight and will greatly influence the outcome, particularly if the correct view favours negative rights.

Another helpful indicator can be found in the general objectives of food law which guarantee a high level of protection of human life and health and the protection of consumer interests. This principle of law has been referred to on many occasions in court judgments as being determinative.

This book is published at a time when scientific discoveries, developments in technology, globalization in trade and the enhanced awareness of consumers through social media combine to give huge political impetus to public debate on these issues, not least in the European Parliament. Therefore it is probable that the trends identified in the book will gain widespread attention and it is certain that the debate will be enlightened by the clarity and scholarship of its authors.

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