

REFLEXION ON TO THE ADOPTION OF “PLAIN PACKAGING” LEGISLATIONS



The signatories of this statement, based upon the expertise and experience of their members – including professional representatives and other practitioners, in-house counsel, IP owners representing all industry lines, IP judges and law professors -are dedicated to the protection and development of Intellectual Property Rights (IPRs) in general and trade marks in particular.

We have on many occasions over the last few years expressed strong concerns about any possible legislation which will restrict the legitimate use of trademarks as well as undermine the value of Intellectual Property Rights (IPRs) as a whole.

In the framework of the revision of the Tobacco Product Directive (TPD), the EU elected representatives and the Council have sent a strong message to the EU Commission by rejecting the inclusion, in the proposed TPD, of extreme measures against IPRs such as mandatory plain packaging also known as “standardized”/ “generic” packaging. Under the amended TPD shortly to come into force, it is nevertheless possible for member states to opt for plain packaging measures.

**The signatories of this statement call upon national member states not to introduce any extreme legislation or policy options which will preclude, whether fully or in part, brand owners from the ability of making legitimate use of their Trade Marks, undermine the legal protection offered by IPRs and fundamental rights as required by plain or standardized packaging or measures tantamount to standardized packaging and may increase the prevalence of counterfeit and illicit goods.**

As previously emphasized in several IPRs association’s joint statements of 23 April 2012 : <http://apram.com/wp-content/uploads/2012/10/EUROPEANSISTERORGANISATIONJOINTSTATEMENTPRESSRELEASE23APRIL2012.pdf>, 3 July 2012 <http://apram.com/wp-content/uploads/2012/10/APRAMUKStandardisedPackagingProposal.pdf> and 4 October 2013 : <http://apram.com/wp-content/uploads/2012/08/JOINT-STATEMENT APRAM-BMM-ECTA-GRUR-MARQUES-UNION TPD-EP-PLenary-VOTE-8-OCTOBER-2013.pdf> , the signatories to this statement are all united by the principle of advancing the cause of IP laws to ensure that lawfully acquired IPRs are properly protected against any diminution, abuse and misappropriation. Furthermore, we consider that the interests of right holders need to be reconciled with the public interest in a balanced and well-functioning IP system, in order to protect the consumers from being deceived or confused.

IPRs are a strong cornerstone of the European economic system and the Internal Market. They provide significant value to their owners and wider wholesale and retail circles. They are likewise

essential to safeguard the confidence of the public and the interests of consumers. The Study *"Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union"* of 30 September 2013, carried out jointly between the Office for Harmonization in the Internal market, acting through the European Observatory on Infringements of Intellectual Property Rights, and the European Patent Office, strongly confirms the importance of IPRs for EU industries and EU economy : [https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/home/joint\\_report\\_epo\\_ohim\\_en.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/home/joint_report_epo_ohim_en.pdf)

Trade marks and trade dress (also called 'get-up') are relied upon by consumers as signposts for genuine goods and services of the proprietors of such rights. They serve to indicate the source of goods and services and to assure consumers on the quality of the products that they purchase or that they would consider purchasing. This fundamental function cannot be fulfilled if trade marks are not visible, or are unavailable, to consumers when selecting a product. The inability to recognize a brand or trade mark on a product would lead to consumer confusion, and thereby diminish the goodwill acquired in that brand through considerable investment and effort over a significant period of time. In reality the inability to call for or recognize a brand also takes away a consumer's freedom of choice.

Plain packaging legislation will preclude brand owners from the ability to make legitimate use of their trade marks. It will also amount to an indirect legislative expropriation of private IPRs and lead to the extinction of their property rights.

Any such legislation will adversely affect the markets, with harmful impacts on the economy as a whole as would be derived from facilitating and escalating counterfeiting and piracy throughout the EU and worldwide. Such measures will reduce Customs authorities' and trademark owners' ability to take action against such counterfeiting and piracy activities.

Where there is a need to achieve important public objectives such as health, any proposed legislation and/or policy options should not deviate from maintaining an appropriate balance with legitimate IPRs, especially when there is no compelling evidence that extreme measures will improve public objectives.

Plain packaging conflicts with European and International trademark protection rules (EC Regulation 207/2009, Trademark Directive 2008/95, WTO's agreement on Trade Related Aspects of Intellectual Property Rights- TRIPS- , Paris Convention, European Convention on Human Rights and the EU Charter of Fundamental Right), as well as against International trade protection rules (Technical Barriers to Trade treaty).

EC Regulation 207/2009 and Directive 2008/95, in common with most trade mark laws, make clear that registered trade marks are property rights. Trade mark rights are also recognized as property rights under the ECHR (First Protocol art 1) and expressly under art 17 of the EU Charter of Fundamental Rights. Under the TRIPS agreement, states may restrict the right of trade mark owners only in limited circumstances and only taking into account the interest of such trademark

owners. Although Art 8 of TRIPS allows for measures necessary to protect public health, such provision is subject to compliance with other provisions of TRIPS. In particular, Art 20 prohibits unjustifiable encumbrances, as these would clearly result from plain packaging laws, on the use of trade marks. This provision in itself imports a right to use validly registered trade marks.

Any governmental measure cannot be deemed “necessary” to protect key goals -like public health- when there is no evidence that it will effectively support such objectives. Less trade distorting options are often available and should be explored while pursuing public health goals, before moving on to disproportionate measures such as plain packaging. Trade Mark owners rightfully expect all public health objectives to be properly and legally balanced with an appropriate protection of their proprietary rights. The EU legal framework, as well as additional international IP treaties and obligations, require the protection of IP and IPRs unless a public health concern clearly demonstrates an overriding benefit to the public. It is clear that IP in and of itself is not the cause of any public health concern.

**Any legislation or policy options** introducing plain packaging measures will therefore:

- undermine the ability of Consumers to make informed purchasing decisions,
- effectively deprive Brand Owners from the right to use their IPRs
- contravene to EU member states’ long standing IPR regulations as well as International Treaties
- generate Governments’ loss of revenues by increased ease of counterfeiting
- negatively impact economy creating barriers to free trade, and discouraging innovation and investments

**It is crucial that the Member States do not send a worrying message to the IP and business community about its commitment to respecting and protecting IPRs, especially in the context of any trade negotiations, including the ongoing EU-US trade negotiations (TTIPs). This sets a dangerous and alarming precedent for any kind of industry willing to invest in the EU.**

**Consequently, the signatories of this joint statement encourage all the EU Member States not to adopt any plain packaging legislation.**

## ASSOCIATIONS PRESENTATION



**APRAM** - Association of Trademarks and Designs rights Practitioners— is an international Association for French-speaking specialists in industrial and intellectual property, in particular Trademarks and designs. The association, which now has more than 850 members, was founded 35 years ago and is open to all French-speaking lawyers practicing, all over the world, in the field of Trademarks and designs. It gathers together in-house intellectual property specialists, Attorneys at law and Trade mark Attorneys.

The purpose of the association is notably to play an active role in, and be at the forefront of, further to consultation or on its own initiative, discussions concerning intellectual property and business law in France, Europe and the world.

As a prominent international intellectual property association, **APRAM** is notably member of the OHIM's users group and the OHMI's Observatory, and is observer at the World Intellectual Property Organization (WIPO). More information about **APRAM** and its initiatives is available at <http://www.apram.com>



Counterfeiting and piracy have become a global epidemic, leading to a significant drain on businesses and the global economy, jeopardizing investments in creativity and innovation, undermining recognized brands and creating consumer health and safety risks. In response, ICC launched BASCAP to connect and mobilize businesses across industries, sectors and national borders in the fight against counterfeiting and piracy; to amplify the voice and views of business to governments, public and media; and to increase both awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm. Visit BASCAP on the web at: [www.iccwbo.org/bascap](http://www.iccwbo.org/bascap)



The Benelux Trademark Association (**BMM** or Beneluxverenigingvoor Merken- en Modellenrecht / l'Association Benelux pour le droit des marques et des modèles) is the professional organization that defends the interests of all trademark professionals in the three Benelux countries. The association has more than 600 members, which are active as trademark agents, in-house counsels, attorneys and academics. The **BMM** promotes trademark law and other forms of intellectual property law and guarantees the professional quality of the services rendered by its members, by organizing conferences and giving training. The organization imposes an ethical code to its members. The organization keeps close contacts with the Benelux Office for Intellectual Property Law and with OHIM. More information is available on the website <http://www.BMM.eu>.



Czech Association for Branded Products (ČSZV – České sdružení pro značkové výrobky) represents leading manufacturers, importers and distributors of fast moving consumer goods (FMCG) operating on the Czech market. The main objective of the Czech Association for Branded Products is to protect and support the common interests of branded products manufacturers in areas affecting their production, marketing, distribution, sale and IP rights in the Czech Republic. For more information please see [www.cszv.cz](http://www.cszv.cz).

**ECTA**

European Communities Trade Mark Association

**ECTA**, the European Communities Trade Mark Association, was formed in 1980.

**ECTA** numbers approximately 1.400 members, coming from all the Member States of the European Union with associate members from all over the world. It brings together all those persons practicing professionally in the Member States of the European Community in the field of trade marks, designs and related IP matters. These professionals are lawyers, trade mark advisors, trade mark attorneys, in-house counsel and others who can be considered specialist practitioners in these areas.

The Association has always concentrated on those issues where the interests of all

members coincide and has refrained from taking a position on matters in which there is no common viewpoint. The extensive work carried out by the Association so far, following the above guidelines, combined with the high degree of professionalism and recognized technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognized expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
- Community Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organization and practice of the OHIM.

In addition to having close links with the European Commission and the Office for Harmonization in the Internal Market (Trade Marks and Designs)(OHIM), ECTA is recognized by WIPO as a non-Government Organization(NGO).ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy. For more information: <http://www.ecta.org>



**MARQUES** is the European association representing brand owners' interests. The **MARQUES** mission is to be the trusted voice for brand owners.

Established in 1986 and later incorporated in the United Kingdom as a not-for-profit company limited by guarantee, **MARQUES** unites European and international brand owners across all product sectors to address issues associated with the use, protection and value of IP rights, as these are vital to innovation, growth and job creation, which ultimately enhance internal markets. Its membership crosses all industry lines and includes brand owners and IP professionals in more than 80 countries. The trademark owners represented in the Association together own more than two million trademarks which are relied upon by consumers as signposts of genuine goods and services.

**MARQUES** is an accredited organisation before the Office for Harmonisation in the Internal Market (OHIM), appointed observer at the OHIM Administrative Board and Budget Committee, an official non-governmental observer at the World Intellectual Property Organisation and a registered interest representative organisation (ID 97131823590-44) in the Transparency Register set up by the European Parliament and the European

Commission, which extends and replaces the former Register of Interest Representatives, opened by the commission in 2008.

An important objective of **MARQUES** is to safeguard the public interest by ensuring the proper protection of trademarks and to preserve the interests of trademark proprietors with regard to the regime of trademark protection. **MARQUES** attempts to achieve these objectives by advancing the cause of trademark laws, which protect the public from deception and confusion. Intellectual property rights are a crucial aspect of the global economy and trademarks play a significant role in free trade and competition in the marketplace.

More information about **MARQUES** and its initiatives is available at [www.marques.org](http://www.marques.org).



"Union des Fabricants is the French association against counterfeit. It includes 300 companies and professional federations from all sectors of the economy. It is a unique observatory of the protection of intellectual property rights, a source of information and a discussion forum."



*Foundation* - In 1961, twenty two far-sighted Patent Attorneys from nine European countries founded the "union of European Patent Attorneys" with the intention of providing European colleagues with a forum for discussing and influencing forthcoming draft laws and international agreements, and also helping the profession in Europe to grow together. Although originally restricted to Patent Attorneys in the countries of the European Economic Community, **union** has meanwhile removed these limitations from its statutes today welcomes free and employed intellectual property practitioners from all (geographical) European countries, as expressed in the present name "union of European Practitioners in Intellectual Property". Still retained are the limitations to European membership and the concentration of activities on problems and

developments which especially affect the professionals in Europe.

*Aims* – **union**, also referred to as **UNION-IP**, is an association of practitioners in the field of Intellectual Property, that is, of individuals whose principal professional occupation is concerned with Patents, Trademarks, Designs or Copyright and related subjects and who carry on their profession independently or as employees. **UNION-IP** is a private, free, international association that is not dependent on any national or international authority: it approves its own members, in accordance with its statutes, in total independence, and likewise decides on its own activities and its own budget. It aims on the one hand to work continuously on current developments in Intellectual Property in Europe, especially by making early submissions during the preparation of proposed laws and treaties with the intention of influencing them and on the other hand to devote itself to the improvement of professional and personal understanding between European practitioners in the Intellectual Property field in different countries and different branches of the profession.

For more information: <http://www.union-ip.or>