

22 June 2015

Ms Louisa YU
Clerk to Panel on Health Services
Legislative Council Secretariat
Legislative Council of the Hong
Kong Special Administrative
region of the People's Republic
of China
1 Legislative Council Road
Hong Kong

Dear Ms YU,

Re: Legislative proposals to strengthen tobacco control

I write in response to the invitation from the Panel on Health Services for submissions regarding the above proposals.

About BASCAP

Business Action to Stop Counterfeiting and Piracy (BASCAP) is an initiative of the International Chamber of Commerce (ICC) that unites the global business community across all product sectors to address issues associated with intellectual property theft and to petition for greater commitments by local, national and international officials in the enforcement and protection of intellectual property rights.

BASCAP supports the protection of public health as an underlying principle. As such, our views pertain to extenuating impacts on intellectual property rights and counterfeiting, and not the health-related aspects of the Legislative Council's proposals. Furthermore, we acknowledge that BASCAP membership comprises, inter alia, companies engaged in the manufacture and sale of tobacco products. Nonetheless, these views are registered on behalf of the cross-sector representation of BASCAP member companies equally concerned about the wider implications of the proposal. BASCAP's primary concern is the impact the introduction of Graphic Health Warning's (GHWs) for tobacco products will have on our on-going battle against counterfeiting and the illicit tobacco trade.

BASCAP's concerns about the proposed GHW changes

Whilst BASCAP supports the protection of public health as an underlying principle and supports regulations that have been shown to be effective and not unjustifiably interfering with intellectual property rights (IPRs), including trademarks, BASCAP is concerned that the imposition of an 85% GHW is an unjustified interference with Intellectual Property rights (IPRs), trademarks and freedom of expression. Specifically, any restriction to normal use of trademarks could:

- Increase the prevalence of counterfeit goods in the market and reduce trademark owners' ability to take action against such activity;
- Exacerbate the illicit trade problem in tobacco products. Restricting the use of trademarks makes the job of counterfeiters a lot easier and poses difficulty on consumers to differentiate genuine and fake cigarettes;
- Increase rather than decrease burdens on already overstretched public agencies working to enforce IPR protections throughout Hong Kong and worldwide;

- Effectively limit the use of private IPRs and facilitate similar restrictions on intellectual property rights in other sectors;
- Compromise and undermine Hong Kong's IPR policies and the laws established to protect them, including international laws and trade agreements assuring protection of IPRs;
- Undermine the ability of consumers to make informed purchasing decisions.

Ineffectiveness of Graphic Health Warnings

Apart from an unjustified restriction on the use of trademarks, BASCAP is not aware of any science based evidence that GHWs will actually discourage or reduce tobacco use. According to the OECD¹, smoking is more prevalent in Canada where there is a 75% GHW than in the United States where there is no similar sized GHW in place. BASCAP's experience is that GHWs do not have a strong record of advancing public health.

In the European Union, an attempt by the European Commission to introduce a 75% GHW was rejected by the European Parliament. In its Legal Opinion, the European Parliament's Committee on Legal Affairs raised serious doubts about a number of provisions in the Commission's proposal and their non-conformity with fundamental rights such as the right to property, the right to freedom of expression and information and the freedom to conduct business. In referring to an earlier ruling from the Court of Justice of the European Union (CJEU), the Committee stated:

Reducing the space available on the front and back surfaces to less than 25% would, however, make it difficult to sufficiently distinguish the products of one producer from those of others, thereby depriving the trade marks of one of their main functions. The trade marks could also not properly fulfill their other functions such as its advertising function. This would also not be in accordance with national constitutional law as well as international treaties such as the TRIPS Agreement.

The European Parliament and the Council subsequently voted to reduce the mandatory picture and text health warnings to 65% of the pack, in contrast to the 75%, which was originally proposed by the Commission.

IPRs have to be upheld and protected

From a global and trade perspective, BASCAP believes that the restriction of branding on products undermines the goals of the Legislative Council, Hong Kong's trading partners, and prospective investors, namely to foster and encourage trade and growth of legitimate markets for Hong Kong and global products. Brands and trademarks indicate the source of goods and services which likewise assure proper accountability. The restriction of branding creates a severe restraint on trade thus interfering with the growth of legitimate markets. This would also have genuine adverse implications for other legal and branded products and services as this could provide the basis of violating IPRs in the future on the pretext of promoting public health.

From the citizen-consumer and the brand's perspective, the proposed new measures would increase confusion amongst consumers. This could then put consumers at risk which is not a solution that serves public interests. Restricting the use of trademarks and branding of products removes a valuable accountability and responsibility mechanism that consumers depend upon to make the best possible choices in the marketplace.

As a member of the World Trade Organization, we urge Hong Kong to ensure that law regarding the packaging of tobacco packaging does not create unnecessary obstacles to international trade and expose Hong Kong to breaches of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement and Agreement on Technical Barriers to Trade (TBT).

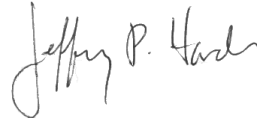
¹ <http://www.oecd-ilibrary.org/sites/factbook-2013-en/12/02/01/index.html?itemId=/content/chapter/factbook-2013-98-en#>

Conclusion

On behalf of global business, we urge the Legislative Council to carefully review and re-consider the proposal to implement an 85% GHW within the wider context of IP protection, foreign investments, the impact on illicit trade and the Legislative Council's objective to promote public health.

We truly appreciate the opportunity given to us to express our views on behalf of the global business community

Yours sincerely,

A handwritten signature in black ink that reads "Jeffery P. Hardy". The signature is written in a cursive, flowing style.

Jeffery Hardy
BASCAP Director