



TRANSCRIPT

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George Hook:

Welcome back to the Right Hook and George Hook here on Newstalk. I'm joined now in the studio by the Director of the Law Society its Director General in fact Ken Murphy, he was at the Oireachtas Health Committee today. Why would a lawyer be at the Oireachtas Health Committee Ken Murphy?

Ken Murphy – Director General, Law Society:

Well the committee was taking evidence as they put it. They weren't actually dealing with the legislation today, they were having a public consultation in relation to a proposal which is quite a well formulated and progressed proposal at the moment to introduce standard packaging for tobacco. And the intention is that there will be a Bill very shortly on this. The Law Society makes submissions on all sorts of legislation. I think we've made twenty in the last two years. Government Departments ask us, Oireachtas committees ask us and really just for the expertise to offer and we did this on the intellectual property law aspects of this.

George Hook:

Now the theory is that if the ciggies are just in a white paper packet you'll be less sort of seduced than if they are in nice gorgeous red, white and blue.

Ken Murphy:

That is the theory. The tobacco industry – which we weren't by any means associated with or representing – they were there before us separately. And they were saying that, you know, it is a false theory but that is the theory by the proponents of it.

George Hook:

Now the tobacco industry of course has fought a rear-guard action over decades in relation to links with cancer and so on. Why did the Law Society get involved though?

Ken Murphy:

We've a committee, the Intellectual Property Law Committee. They've great expertise in areas like trademarks and design marks which are actually very important for the Irish economy. And we were able to give figures to the committee today on just how much of the Irish economy, in terms of foreign direct investment, how important it is to protect this. And we were there to argue to say that the decision as to whether this should be proceeded with or not, we don't claim any expertise in health matters, we just say that there are serious legal issues here, property rights in relation to...

George Hook:

Okay I'm beginning to get this, I think. So down the road for instance you could have a very committed health minister because we saw it in New York, you know soft drinks for instance he says no you can't have soft drinks. So the iconic coca-cola bottle can't be on the shelf anymore it has to be in a plain bottle. So now you have a case because coca-cola have that patented or trademarked or whatever is that what the argument is here?

Ken Murphy:

That is certainly a concern of intellectual property lawyers recognising the value that these marks have and the way in which products are distinguished one from another in this way.

We actually said to the health committee today that the Law Society's concern about undermining intellectual property rights would be the same whether the underlying product was medicine or food stuff or any other product. It wasn't to do with tobacco. In fact we would prefer not to be associated with tobacco which is a pretty toxic product with all sorts of toxic political implications. But we are saying let's look through the implications of this. The only country in the world where this is being done is Australia. It only came into effect there in December 2012 just over a year ago, and arguably maybe they should wait for a little while and see what the effects of that are.

George Hook:

Well has there been litigation in Australia?

Ken Murphy:

Yes, the matter was challenged in the courts in Australia and the Supreme Court which in Australia is technically called the High Court upheld it as constitutional. So...

George Hook:

But hold a while now, I mean you know there are a lot of products which many people are unhappy about, they don't want to see them, hamburgers, they don't want to see...

Ken Murphy:

Full fat milk!

George Hook:

Yeah (laugh) soft drinks, now it is conceivable for somebody to say you know you can't have that yellow sign with the M or whatever the heck it is, you can't have that because you are encouraging people to eat hamburgers. Now knowing nothing about the law but you do, surely the whole point about trademarks and patenting is that you actually can use it in the jurisdiction. Because Ireland has a patent office specifically and they say yeah we grant you a patent.

Ken Murphy:

Yes, these are all territorial and they are international, and it isn't just actually the constitution in Ireland which recognises property rights. But also the European Convention of Human Rights and various other international agreements involving intellectual property law. There's a network of these around the world. These are valuable property rights, which big commercial companies have. So if the beginning is with tobacco where would it end in terms of you know, would Kerrygold Butter not longer be allowed to have a gold package, if it is seen as fattening?

George Hook:

Yeah but I mean there is a great phrase isn't there, hard cases make bad laws. So like this is a hard case. Smoking cigarettes gets you cancer. So like it's not the most popular position maybe the Law Society has ever took.

Ken Murphy:

No, no.

George Hook:

To be associated with that but the downside is that this could create a precedent; law is all about precedent one imagines. That somebody says well you did it for tobacco; you didn't do it for hamburgers.

Ken Murphy:

Well, again I would reiterate the Law Society did not and is not supportive of the tobacco lobby on this thing; we are raising the issue in general in terms of the balancing of the public interest. We said to the Oireachtas Health Committee members there today, first of all we don't claim any expertise in public health matters this is just a legal issue and we are saying among the issues to be taken into consideration in bringing forward or deciding whether or not to bring this forward. I think Minister Reilly, the Health Minister, has already said on the record he anticipates this will end up in the Courts.

And we are saying that these are the kind of legal issues that will arise and you need to prepare yourself for them and look also at the long term effects of a policy such as this and its implications on Ireland internationally.

George Hook:

Okay, now you used the word intellectual property rights whereas I've been talking about iconic coca-cola bottles or golden Ms for hamburgers. Intellectual property rights are a little more complicated surely, how does this affect that?

Ken Murphy:

What you are talking about are intellectual property rights, this is a broad phrase which covers trademarks, copyright, patents, all sorts of, these are actually true property rights. And they are recognised in European Law and in international law as rights, valuable rights of companies. The coca-cola company that iconic way in which the coca-cola name is written, the shape of the bottle. All of those things are immensely valuable marketing tools which help the consumers also to distinguish products and to recognise the consistency of products. Ultimately this is an important and sophisticated marketing matter.

George Hook:

Now, we won't pre-empt the case that is more than likely to come but surely these property rights that you talk about are so enshrined in law, have been around for so long surely they would be enviable against somebody saying you can't use that bottle anymore.

Ken Murphy:

Yes, I think this will be but it will ultimately come down to all property rights, constitutional rights generally, are subject to the common good and it becomes a balancing issue. And as I said to the committee members today, of course we are in a political forum in front of an Oireachtas committee where opinion is, you know, and argument is currency. But in a court of law only evidence is currency. It won't be sufficient to say what they think might happen. They will actually have to have evidence of that, on which a Court might reach conclusions.

George Hook:

All right, but to go back then finally to the discussion we are talking about cigarettes, I mean cigarette packaging itself has been incredibly seductive over the years. There were the American packages you know that you kind of flick to with your thumbs, all this sort of thing. Then there were the early days of John Player and Wills Woodbines and all these. The packaging was crucial for people to make decisions about which to buy. Doesn't the tobacco industry have a right for its rights no?

Ken Murphy:

Well, yes, we would say but its rights have to be balanced among all the other rights including other rights of citizens.

George Hook:

But can you, I mean look, you can't pre-empt the law I understand that, but when you talk about the common good, pre-empting something else does the law actually say that people getting sick trumps the marketing advantage of a trademark. Is that where you talk about the common good? Is that what it is?

Ken Murphy:

I think that would be the case that would be made in support of this proposal and the common good. But I think, as I said, one of the things that would be a contested piece of evidence is does this packaging and plain packaging designed to, in the words of the proposal, to reduce the appeal of tobacco and tobacco products, to minimise the effectiveness of their marketing, does it actually affect consumption or not? Because the tobacco industry says it won't affect consumption in any way.

George Hook:

All right but something just struck me right at the end of our chat, we have one of the biggest smuggling operations in tobacco I think anywhere, this is going to make smuggling immeasurably easier if you don't have to get expensive designed packaging. If you can just get your own bit of white paper and throw them in, surely this is going to be a huge boom for the smugglers.

Ken Murphy:

This is part of the evidence and the arguments of the tobacco industry. As I say the Law Society has taken a completely neutral position on this.

George Hook:

No, no, I understand that, got it.

Ken Murphy:

And we say that it's a question of balancing all of these rights but there's no doubt that if this is proceeded with it will be challenged in Irish Courts and in European Courts in all likelihood and preparing for, or at least anticipating the outcome of that and the consequences also for, if this idea caught on and went beyond the toxic tobacco lobby and industry and began to be applied to other food stuffs, alcohol for example, why shouldn't alcohol which is seen as also damaging to public health also have to be delivered in plain packaging? In other words we are concerned about the effect on other manufacturers.

George Hook:

So your Paddy, Power, Bushmills would all just be in a plain bottle, you wouldn't know which is which.

Ken Murphy:

You see the pint of plain is 'a pint of plain' already!

George Hook:

(Laughing) this is it. However does the Australian verdict have any weight in Irish Courts?

Ken Murphy:

Not as such because it seems to be that the principles underlying the constitutional provisions in Australia may be slightly different from the ones here.

George Hook:

All right, well there you are let me know, 53106, would you buy a packet of fags if it was in a white packet? I wonder how Michael Noonan is thinking about all the revenue he's going to lose with all these smuggled cigarettes. My thanks to my guest, the Director General of the Law Society Ken Murphy who was in front of the Oireachtas Health Committee on that very issue today.

George would you eat your beloved Bounty Bars in a plain white package? Oh I don't know I'll have to try a plain white package on Saturday Stephen and see what happens. All right more coming up.

Ends