Reconciling international obligations to protect health and trademarks: A defense of trademarks as property

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I. INTRODUCTION

This chapter explores the increasing confrontations between states’ obligations to protect trademarks under international agreements and states’ duties to protect their citizens’ health under international human rights law. Trademark holders have asserted international protections for their logos, images, symbols and words to thwart regulatory efforts to use graphic warnings to inform consumers about the risks of alcohol and tobacco consumption, fight child malnutrition through promotion of breastfeeding and protect consumers from packaging and labeling tactics which hide health risks. In response, governments have invoked their responsibility to respect, protect and fulfill the right to health, including the duty to protect citizens from threats posed by third parties.1 Scholars exploring these confrontations have tended to include trademark holders’ challenges as another variety of the problems caused by ‘propertization’ of trademarks. According to their critique, lawmakers in industrialized states have over recent decades expanded the circumstances under which trademark holders may assert their rights to prohibit unauthorized uses of their marks (even for political commentary or truthful comparative advertising), enjoin actions by third parties that might diminish the value of a mark (even if it is not an unauthorized use nor in the course of


trade), and demand compensation where regulatory measures result in direct or indirect expropriations of marks.

Critics of trademark propertization assert that before this process unfolded, trademark law focused on the effect a mark or tradename had on consumers, providing an inexpensive source of product information that the law reasonably protected from imitators. This protection benefited both firms and consumers. Now, however, trademark law focuses on the investments made by the trademark holder and the corresponding (though speculative) goodwill generated by those investments, including acts by third parties with attenuated and difficult-to-prove effects on the value of a mark.

Industrialized states have sought to export stronger trademark protection through bilateral, regional and multilateral investment and trade treaties. The World Trade Organization’s (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), for example, requires participating governments to define minimum criteria for trademark registrability and resulting rights of use; limits the exceptions governments may impose; and establishes an enforcement regime that orients judicial authorities in particular towards robust protection of trademarks and other intellectual property. Regional integration instruments like NAFTA and EU Council Directives have similarly broadened the protections trademark proprietors enjoy from both commercial competitors and regulatory obstacles. Bilateral investment and trade treaties have further ratcheted up these protections by equating trademarks with more secure forms of property and enabling foreign trademark holders to (1) demand

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that governments justify to international arbitrators any regulatory measures and (2) demand compensation for direct and indirect expropriations resulting from regulatory action.\(^6\)

With respect to states’ duty to protect citizens’ health from threats posed by third parties, this chapter challenges the property critique of expanding trademark protection with two arguments.\(^7\) First, while the critical commentary focuses on the ‘propertization’ driven by international trademark law, it neglects trademarks’ increasing ‘expressification,’ that is, executive, legislative and judicial measures equating trademarks and other distinguishing symbols with generally more protected forms of social and political expression. The expressification of trademarks poses a more significant challenge for states’ obligations to protect the right to health. Instead of trademark law focusing on the informational content of a mark so far as it affects consumers’ health-related decisions, it focuses on the right of a trademark proprietor to speak and impart information about its product or its corporate self. Second, the health objectives embodied in trademark restrictions are more likely to be achieved the more trademarks are evaluated as a form of property, not expression. The trend toward ‘propertization’ should therefore be viewed as relatively preferable to a world where commercial speech is treated as artistic, political and/or social speech and protected accordingly by strong domestic and international human rights law. Regulators enjoy far more flexibility in defining and limiting property rights than speech rights, which often impose a comprehensive bar to regulatory action.

Strong trademark protections carry substantial implications for international obligations to respect, protect and fulfill the right to health. In product sectors like alcohol, breastmilk substitutes, food, non-alcoholic beverages, and tobacco, trademarks and tradenames can subtly convey dubious health information. They may also obscure (and thus undermine) warnings intended to achieve better informed health decisions. These effects are often intended. For example, where it is still permitted, cigarette manufacturers use the words ‘light’ and ‘mild’ and associated color spectra in their brands to suggest those cigarettes are less risky than ‘full flavor’ cigarettes.\(^8\) Similarly, combinations of pictograms, colors and


\(^7\) ICESCR, art 12(1).

descriptors shape consumers’ perception of the nutritional value of packaged food and the safety of consuming alcohol.9

Focusing on the duty of states to protect individual and public health sheds light on the normative hierarchy taking shape in the treaties and agreements that form international trademark law. Those agreements, both in the hands of drafters and their judicial and arbitral interpreters, are dismantling trademarks as an independent field of law where optimal balancing of public and private interests is likely. Rather, shaped by international agreements, trademark law worldwide is now the subject of a subtle but critical confrontation between expression and property analogies.10 It therefore does little good to call for a return of trademark law to its golden age of consumer protection; rather, the focus must be on which of these analogies better accommodates the flexibility that judges, legislators and regulators must enjoy in order to reconcile competing international obligations.

II. THE GLOBAL EXPANSION OF TRADEMARK PROTECTIONS

The basic purpose of trademark law has been remarkably consistent over the course of history.11 Within limits, trademark protection provides an incentive for firms to invest in the quality of goods and services and, relatedly, to reduce the costs to consumers of identifying products with desirable quality and price.12 Without laws prohibiting trademark infringement or misappropriation, imitators are enabled to free-ride on those investments and dupe consumers.13 Where the product supplied is not only inferior but hazardous – for example, as may be true of foods

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and medicines – the concern about quality is magnified. Trademark protection thus promises a mutual benefit to firms and consumers.

In recent decades trademark protections have expanded from a relatively narrow focus on protecting consumers’ expectations to protecting firms’ investments in the creation, advertising and marketing of goods or services. This expansion ranges from the incremental and procedural to the substantive and sweeping.14 In the United States, the Lanham Act has historically provided injunctive and monetary relief for firms able to prove that a competitor’s mark created a ‘likelihood of confusion’ as to the source of goods or services.15 In 1995 and 2006, Congress strengthened protections for well-known marks, enabling trademark holders to enjoin activities that affected marks even absent a ‘likelihood of confusion.’16 Rudolph Rayle has traced the progress of German trademark law from relatively modest protections based on consumer expectations in brands to a 1979 German Federal Constitutional Court judgment determining that trademarks constituted ‘property’ under the Constitution of Germany.17 Because trademarks are an ‘expression of an entrepreneur’s achievement motivation’,18 German law protects as trademark holders artists, holding companies and advertising firms.19 Rayle views this progress as largely consistent with relevant EU Council Directives, ‘i.e., de-emphasizing the traditional source identifying function and emphasizing the trademark owner’s rights’.20 Under French law, trademarks have the same protections as copyrights and patents, and ‘the [trademark] proprietor must be entitled to enjoin any kind of unauthorized use, no matter for which purpose’.21

15 Lanham Act 1946 (US) ss 32, 43.
18 Ibid 236.
19 Ibid 270.
20 Ibid.
These non-confusion based protections have been exported through investment and trade agreements. Developed states introduced at the 1986 Uruguay Round of negotiations for the WTO a set of uniform protections for trademarks (TRIPS). TRIPS grants trademark holders rights to prevent confusing uses of an identical or similar mark on identical or similar goods and limits conditions states may impose on trademark rights. In addition to substantive provisions, TRIPS also outlines minimal enforcement obligations. Many WTO member states have passed trademark laws exceeding the minimum requirements set by TRIPS. Some bilateral and regional investment and trade treaties define trademarks as covered investments without the normal public interest exceptions domestic law or TRIPS allows; others require governments to justify regulatory measures and, even then, mandate compensation for direct or indirect expropriations.

For many areas of consumer products, expanding the property protections of trademarks generates benign or welfare-enhancing effects for consumers. Consumers who know that a particular brand of product

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24 TRIPS Agreement, art 16(1). Owners of well-known marks receive additional protection against uses of their marks on dissimilar goods: arts 16(2)–(3). Article 20 limits the encumbrances that can be placed on trademarks. According to Nuno Pires de Carvalho, art 20 did not contemplate restrictions on health, food, or security measures; rather, restrictions specifically related to a course of trade required, for example, that a foreign trademark be associated with a domestic licensee. Nuno Pires de Carvalho, The TRIPS Regime of Trademarks and Designs (Aspen Publishers 2006) 331. According to Daniel Gervais and Susy Frankel, health measures are also subject to review under art 20 but the public health nature of the measure may be used as a justification under that article. Daniel Gervais and Susy Frankel, ‘Plain Packaging and the Interpretation of the TRIPS Agreement’ (2013) VAND. J. TRAN’L. L.
25 TRIPS Agreement, art 21.
offers them the right balance of quality and price spend less time comparing prices or searching for third-party evaluations. Trademark law justifiably acts to protect from encroachment by competitors the expectations that consumers build into those brands. Internationally, ensuring stronger trademark protection lowers the costs for manufacturers to do business across national boundaries because their well-known brands facilitate entry into new markets.29

However, it is in the economic sectors most likely to affect health that the welfare-enhancing benefits of trademark protection give way to efforts to suggest false product attributes and hide health risks. A 1999 study, for example, concluded that the ‘three most valuable brand names were Marlboro, Coca-Cola and Budweiser, in that order.’30 The extraordinarily competitive environment of consumer products guarantees that firms will use trademarks to increase consumer demand in ways other than quality improvement.31 Common tactics include minimizing or obfuscating mandatory health warnings, using descriptors likely to lead to false impressions, and shaping packaging and labeling to appeal to target populations.32 Trademark holders can communicate certain product qualities by way of design suggestion and implication, circumventing prohibitions against explicitly deceptive representations.33

Tobacco firms, for example, accompanied ‘light’, ‘mild’ descriptors in cigarette brands with corresponding color schemes such that even after governments slowly adopted bans on those marks, the ‘light’ and ‘mild’ message remained effectively communicated:

Even after the [EU] ban, Benson & Hedges Lights will be recognizable by their silver color, contrasting with the gold of the regular packs. White-and-gold Marlboro Lights will still suggest ‘lightness’ just by the stark contrast to

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the red, full-strength Marlboros. The powder-blue Camel Lights with their pastel camel will still look milder than the ornery desert-ocher animal on the regular ‘Filters’ pack.\textsuperscript{34}

This strategic marketing is not limited to cigarettes. The symbols and color schemes on alcoholic beverage containers effectively obscure government-mandated warnings,\textsuperscript{35} and the image of a healthy, smiling baby or cartoon characters held in breastfeeding positions on an infant formula container may lead consumers to misunderstand the nutritional inferiority and risks inherent in food alternatives for infants.\textsuperscript{36} In states in which illiteracy rates are high and symbols are a principal means to both warn and sell, trademark protections pose greater barriers to the promotion of individual and public health.\textsuperscript{37}

As governments across the globe enhance trademark protections, they are undertaking an unprecedented effort toward fulfilling obligations to secure their citizens’ right to the highest attainable standard of health.\textsuperscript{38} Governments have both aspirational and pragmatic reasons for doing so. The right to health has been a principle of international human rights law since the Universal Declaration on Human Rights. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) ensures ‘‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’\textsuperscript{39} Moreover, ‘the right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil . . . . The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees.’\textsuperscript{40} Even


\textsuperscript{37} Surendra J Patel, ‘Trademarks and the Third World’ (1979) 7 WORLD DEVELOPMENT 653, 653.

\textsuperscript{38} David Fidler, ‘After the Revolution: Global Health Politics in a Time of Economic Crisis and Threatening Future Trends’ (Fall 2008/Spring 2009) 2(2) GLOBAL HEALTH GOVERNANCE 1.

\textsuperscript{39} ICESCR, art 12(1).

\textsuperscript{40} ECOSOC, ‘Substantive Issues Arising in the Implementation of the ICESCR – General Comment No. 14’ (11 August 2000) UN Doc E/C.12/2000/4
in states that are not parties to the ICESCR, the state’s responsibility to safeguard individual and public health is either constitutionally codified or a generally understood obligation.41

The increasing costs of an unhealthy population encourage policies aimed at controlling sources of communicable and noncommunicable disease. There is a close relationship between this latter public health burden – cancer, diabetes, heart disease, obesity – and the products associated with some of the most valuable and well-known trademarks. Tobacco consumption, which annually kills approximately five million people worldwide, represents the principal preventable threat to individual and public health in both developed and developing countries.42 Alcohol consumption not only results in greater harm to third parties relative to other drugs like cocaine and heroin,43 but also increases risks of cancer and heart disease in users.44

Interventions to address these health threats conflict with trademark protections in at least two ways. First, prohibiting or restricting certain word or stylistic trademarks conflicts generally with trademarks’ purpose of source identification. Second, large or graphic warnings, especially if required on packaging and labeling, may distort trademarks’ appearance.45 Prohibitions on tobacco trademarks that create false impressions are now common as are graphic warnings. Governments are now exploring ‘traffic light’ systems to inform consumers about the nutritional content of packaged food.46 In 2010, Thailand proposed legislation requiring that graphic warning labels cover 30 percent of the surface of

(General Comment 14) [33] (emphasis added). General Comment 14 further states that ‘violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States’. ibid, para 48.

beer, wine, and spirits containers. Regulators are likely to push for trademark restrictions on products that impose direct costs on governments.

Critics of trademark ‘propertization’ contest the social worth of expanding trademark protections based on their conflict with a number of public interests, including health. In a well-known critique of judicial and legislative expansion of grounds for infringement claims in the U.S., Mark Lemley concluded that

[P]ropertizing trademarks comes at a rather significant cost to society … Important political and social commentary and works of art may be suppressed entirely . . . . And perhaps most important, trademark licensing is expensive. The more we propertize, the more transaction costs we impose on everyone.

Kal Raustiala echoes this criticism in the context of the global expansion of IP rights, noting that trademarks often impose strong protections ‘upon developing countries that neither need nor desire’ them, and concluding that ‘propertization will serve to wall off still more from the public domain, further draining an already reduced global commons.’ Valentina Vadi has broadly criticized the propertization of trademark protections in the context of international investment law and public health, drawing examples from Canada, the EU, Guatemala and Nicaragua.

III. THE EXPANSION OF SPEECH-BASED PROTECTIONS FOR TRADEMARKS

Analogizing the expansion of trademark holders’ rights to stronger property protections is understandable. The basic motivation of trademark law is to give the trademark proprietor the right to exclude others and control use. Generally, trademarks may be freely bought, sold, or licensed. Trademarks are regularly assigned a monetary value.

50 Vadi (n 41) 802.
‘propertization’ of trademark law is, in essence, the expanding circumstances under which a trademark right holder is empowered to invoke the power of the state to ensure these rights to exclusion, alienation and compensation, mostly against other private parties.

The trademark holder’s ability to exclude and control, of course, is largely exercised over specific forms of aural and visual communication.51 Trademark protection is therefore fundamentally tied to expression and speech. This relationship presents a dilemma for judges and legislators who are forced to draw lines between a trademark proprietor seeking to assert a lawful claim to protect the integrity and value of a mark and a private party seeking to parody or criticize the party with whom the mark is associated. For example, the environmental advocacy group Greenpeace adapted the logo of the French firm Esso as part of a campaign criticizing the company’s industrial activities.52 Esso sued Greenpeace, and the trial court awarded Esso an injunction, along with potential fines of €5,000 per day.53 The French civil supreme court (Cour de cassation) ultimately vindicated Greenpeace’s position, finding the parody within the scope of free expression implicit in French trademark law. It is exactly this situation that TRIPS Article 17 contemplates, creating the flexibility for a state to adopt a conforming trademark law that nevertheless allows the use of a trademark for artistic, political or social commentary.54

Relative to property, however, free expression enjoys substantially wider protection under international human rights law. Article 19 of the International Covenant on Civil and Political Rights provides that:

> everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.55

51 Landes and Posner (n 12) 275–80.
International human rights law protects persons’ rights to seek, receive and impart information as part of this crucial democratic right.\textsuperscript{56} Exceptions are permitted for, inter alia, ‘public health’ but measures limiting rights to speech and information must be ‘necessary,’ a frequently fatal requirement if less speech restrictive means are available.\textsuperscript{57} The European Convention on Human Rights, The American Convention on Human Rights, and the Canadian Charter of Freedoms broadly track ICCPR Article 19’s structure and content. The European Court of Human Rights has emphasized that freedom of expression is necessary for ‘each individual’s fulfillment.’\textsuperscript{58}

Trademark holders have successfully tied the source identification function of trademarks with the human right to impart information and the right to define the self. In a recent case adjudicating South Africa’s restrictions on the display of tobacco trademarks, the South Africa Supreme Court of Appeal concluded that:

> It is clear that under s 16(1)(b) of the Constitution that [British American Tobacco] is entitled to the right to freedom of expression, which includes the ‘freedom to receive or impart information or ideas’, in this case, to consenting adult consumers of its tobacco products … The right to freedom of expression guarantees the intrinsic right of persons to communicate information and ideas. It is an indispensable element of a democratic society.\textsuperscript{59}

In short, the self-distinction identified as a core part of freedom of expression overlaps considerably with the justifications proffered for strong trademark protections. Relatedly, in some industry sectors a trademark’s value may comprise the majority of a company’s worth


\textsuperscript{57} A similar analysis obtains for trade-restrictive public health measures in the WTO system. However, other trademark-specific flexibilities allow substantial space for public health regulation.

\textsuperscript{58} \textit{Ceylan v Turkey} (1999) 30 EHRR 73, para. 32.

\textsuperscript{59} \textit{British American Tobacco South Africa (Pty) Ltd v Minister of Health} (463/2011) [2012] ZASCA 107, [2012] 3 All SA 593 (SCA) (20 June 2012) [13].
precisely because of indivisibility of advertising, promotion, and marketing costs from consumer preference for the trademark. As the CEO of a major brewer noted, ‘A beer is a beer is a beer … so therefore it is all about brands … We are not selling beer, we are selling image.’ Firms express themselves, indeed make themselves distinct, through their trademarks. Wally Olins phrased the concept this way:

Identity is expressed in the names, symbols, logos, colours and rites of passage which the organization uses to distinguish itself, its brands and its constituent companies. At one level, these serve the same purpose as religious symbolism, chivalric heraldry or national flags and symbols … At another level, they represent consistent standards of quality and therefore encourage consumer loyalty.

Yet corporate identity does not play the role conventionally associated with the public opinion shaping importance of freedom of expression. The purpose of the expression is always to sell a product. The more fiercely firms compete to distinguish themselves and their products through distinctive emblems, logos, and other protected symbols, the more that expression looks like the self-actualizing activity strong international human rights law is intended to protect. Rebecca Tushnet has explored this phenomenon in the U.S. context where she anticipates that trademark law’s ability to regulate commercial expression will collapse as the U.S. Supreme Court abandons distinctions between commercial, political and social speech. Even when a substantial public interest justifying a speech restriction is asserted, it is balanced against the full force of free expression and its constituent human rights norms. Market pressures ensure that this expression will not aim only to distinguish, but will also aim to increase consumption, especially by appealing to young consumers. Alcohol, food and tobacco industries have

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60 Shawn K Baldwin, ‘“To Promote the Progress of Science and Useful Arts”: A Role for Federal Regulation of Intellectual Property as Collateral’ (1995) 143 U PENNSYLVANIA L REV 1701, 1704.
61 Jernigan and O’Hara (n 9).
all used trademarks like cartoon characters and color schemes to appeal to children and adolescents.65

IV. PROPERTY, SPEECH AND THE DUTY TO PROTECT HEALTH IN INTERNATIONAL TRADEMARK LAW

Trademarks as a ‘form of expression the speaker is entitled to issue’ or a ‘form of property with narrow rights to exclude and alienate’ are analogies which will influence the ability of lawmakers to safeguard individual and public health. Given the strength accorded to free expression under international human rights law and many national constitutions, the property paradigm for trademark law offers greater flexibility for judges, legislators and regulators confronted with situations in which trademarks create false impressions or where a product warning regime interferes with trademark expectations.

A property-based approach to trademarks allows regulators to tailor their protective scope to their commercial function. Indeed, one of the possibilities Lisa Ramsey explores for reconciling private parties’ use of trademarks under TRIPS for artistic, political and social commentary is Article 16’s specification that trademark holders be empowered to prevent third parties’ use of identical, similar or confusing marks ‘in the course of trade.’66 This limitation may be similarly read to exempt regulatory measures which prohibit certain trademarks (like misleading descriptors) or affect trademarks by requiring large warnings on packaging and labeling or other point of sale restrictions. The plain language of TRIPS, after all, confers no positive right to use a trademark.67 In other words, as a form of property the existence of which is the result of state largesse, the state can similarly confine its use against competitors and their ilk.

66 Ramsey (n 54), 407.
But TRIPS flexibilities do little in the context of bilateral investment treaties, which include some of the strongest trademark protections. For example, the Switzerland-Uruguay bilateral investment treaty, under which Philip Morris International is pursuing a trademark-based investment claim against Uruguay’s cigarette packaging regulations, categorically defines trademarks as ‘investments,’ imposes a requirement that measures affecting investments be adopted for ‘reasons of the public interest, as defined by the law and on the condition that such measures are not discriminatory’ and, even then, requires compensation for measures having the direct or indirect effect of expropriation.68

Expropriation is fundamentally a question of property rights, so both the extent of those rights and their derivative financial worth may be shaped by the state. National authorities and international arbitrators enjoy sufficient flexibility to craft an expropriation proceeding that balances the state’s duty to protect individual and public health with the trademark holder’s legitimate interest in the distinguishing characteristics of its mark.69 For example, lawmakers and adjudicators may place an evidentiary obligation on the trademark holder to show that a state-imposed trademark restriction actually causes consumers to switch to competing goods, effectively aligning the economic structure of trademark ownership and use with the interests trademark protections are intended to promote.

As a preliminary matter, many states sensibly require trademark holders to police the use of their trademarks. Because trademarks grant the holder control over the use of a particular form of communication, trademark holders abandon the right to that monopoly when the trademark becomes synonymous with the underlying product.70 Trademark holders are also obligated to police their marks to show that consumers may be confused by similar marks and to prove damages like lost sales.71 Indeed, many

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68 Indeed, NAFTA and many other trade and investment agreements include this as an explicit requirement. NAFTA, art 1110. See also Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay On the Reciprocal Promotion and Protection of Investments (Switzerland–Uruguay) (adopted 7 October 1988, entered into force 22 April 1991) 1976 UNTS 413 (Switzerland–Uruguay BIT) art 3.


70 Landes and Posner (n 12) 291.

Trademark holders maintain elaborate trademark policing systems to guard against infringement as well as counterfeiting. Tobacco firms, for example, long ago adopted worldwide trademark registration, policing, and exploitation programs. Similar infrastructure exists for alcohol and packaged-food brands. Manufacturers and their trademark developers excel in gathering information as to what causes consumers to prefer one brand, image, or logo over another. Trademark holders are served by global consultancies that report the (admittedly subjective) value of trademarks as a function of competitors’ market share.

Requiring trademark proprietors to show that consumers are switching to competitors’ goods or services furthers the presumptive goal of trademark restrictions: better-informed consumers. Government-mandated warnings and trademark restrictions are, after all, aimed at influencing consumption through better information. For example, when the U.S. banned the descriptors ‘light’ and ‘low’ from cigarette brands, it recognized that the elimination might lead some consumers to quit smoking and prevent others from starting to smoke. In the product
sectors most closely tied to health, requiring that trademark holders prove consumer switching is consistent with their asserted reasons for wanting strong trademark protections: firm and product distinction. By definition, trademarks are protected only to the extent that they effectively distinguish the producer’s products.\textsuperscript{78} Trademark holders have no general right to a given level of consumption and certainly no right to attract young persons, which is often an ulterior objective of certain trademarks. As such, the trademark holder is not entitled to recoup its investments in trademark quality or advertisements; rather, it may recoup only its narrow interest in distinguishing its product from products of others.

A property-based paradigm, of course, would not always require compensation. As Professor GC Christie argues, if a prohibition concerning the use of property ‘can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no “taking” of property’.\textsuperscript{79} When the state encumbers or ‘takes’ a trademark by partially or totally prohibiting its use or by requiring additional product information (including warnings),\textsuperscript{80} the state has in effect concluded that some or all of the mark \textit{as it appears to consumers} must be taken for a public purpose.\textsuperscript{81}

Critics of expanding trademark protections are correct that the dominant paradigm in international trademark law now is the ‘propertization’ trend. So why worry about trademarks as expression? The first reason is the expanding protections given to commercial speech worldwide. Tamara Piety and Rebecca Tushnet have noted not only the expanding reach of First Amendment protection for commercial speech in the U.S., but the evident willingness of a majority of U.S. Supreme Court justices to dispense with the commercial speech doctrine entirely. The latter has specifically anticipated the problems that dispensation will cause for

\textsuperscript{78} TRIPS Agreement, art 15(1) (emphasis added).


trademark regulation. Roger Shiner has documented the expansion of free speech protections to commercial advertising in Canada, the U.S. and in both the constitutional courts of Europe as well as the European Court of Justice and the European Court of Human Rights. While there is no right to free expression, per se, protected in international trade law, the WTO Appellate Body has also made relatively strong statements as to the expressive nature of trademarks:

Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function .... Taking account of that interest will also take account of the trademark owner’s interest in the economic value of its mark arising from the reputation that it enjoys and the quality that it denotes.

V. CONCLUSION

The growing burden of cancer, diabetes, and heart disease and the relationship of that burden to the practices of global alcohol, food and tobacco industries will force more confrontations between international trademark protections and the right to the highest attainable standard of health. The “propertization” critics of modern trademark law are correct as to its deleterious effects on the public domain and the costs of consumer products. Yet the expressification of trademarks engenders even more significant threats to regulatory action. Giving trademarks the legal status of artistic, political or social expression presents a powerful tool to prevent sensible public health interventions in favor of far less effective ones like governmental education campaigns. Through large pictorial warnings and aggressive restriction of implied health messages, regulators attempt to bring information about long-term health effects as close to the time of purchase or consumption as possible. As a form of property, trademarks present less of an obstacle to accomplishment of individual and public health objectives than as expression, where their clearly persuasive influence is imagined to be just one of many voices in the market.

82 Tamara R Piety, Brandishing the First Amendment (U Michigan Press 2012); Tushnet (n 63).