

Branding law – milked to the max

Many of us fondly remember the days when milk was delivered to our doors in unbranded, foil-capped milk bottles.

Today, there is an incredible variety dairy products to choose from in range of brands, colours, packaging shapes, flavours and more. Each of these features influences a customer's buying decision, making branding even more important in the face of competition.

Consumers are making fast, low-involvement buying decisions in a visually cluttered dairy product market. The dairy industry faces the challenge that comes with its products belonging to the world of 'fast moving consumer goods'. That means your brands need to stand out now more than ever.

The question is, are you doing enough to protect your brands?

While a descriptor such as 'no fat' cannot be trade marked, Yoplait has gained protection for some of its sub-brands, such as 'yoplus', 'go-gurt' 'elivae', and even the word 'yop' on its own to designate a flavoured milk beverage.



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Trade mark registration

Trade mark registration is by far the most powerful protection that you can obtain for a brand in Australia. That is because the owner gets exclusive rights to use the brand (whether it be a name, logo or otherwise) in relation to the goods or services for which it is protected Australia-wide. This protection lasts 10 years and is generally renewable indefinitely. Displaying the ® symbol beside the trade mark will also deter would-be copycats.

Be aware that a business, company or domain name registration is often not enough protection. This gives you no ownership over the brand itself.

Distinctiveness

The most important issue with trade mark registration is that the mark must be distinctive. For example, descriptive terms such as 'bitter-lemon', could not be used for a bitter lemon flavoured drink.

Having said that, there is no general prohibition against the registration of ordinary English words, so long as they do not describe the product. They might be used for the association or suggestion that they create in the minds of consumers. Examples include Kraft Singles, and the Laughing Cow silver wrapped cheese

triangles manufactured by French company Fromageries Bel.

A newly coined or invented name is always going to be distinctive, if no one else is using it. However, these sometimes require more marketing expenditure at the outset to generate recognition. Examples of invented names are Kraft and Colby.

What can you protect as a trade mark?

Once it was true to say that trade mark protection was limited to words, logos and other two-dimensional marks. However, since 1996 Australia's trade mark laws have adapted to the new world of 'sensory branding' and expanded to include non-traditional types of marks. This includes colours, shapes, sounds and aspects of packaging, all of which play a significant role in the branding equation.

While words and logos are still the most popular types of trade marks protected in Australia, food and beverage companies have jumped on the bandwagon.

There are many registered trade marks in the dairy category. A good example is the colour silver for the packaging of, you guessed it, Kraft's Philadelphia cream cheese.

Yakult has also been able to register the shape of its distinctive bottle.

Even sounds can be registered. For example, McCain Foods (Australia) Pty Ltd has registered the distinctive 'ping' sound in its ads "Ah McCain, [ping] you've done it again!" for certain frozen foods.

But before you get too excited, be warned – not all shapes are registrable.

Trade marks must be distinctive and not functional. Examples of words that are not distinctive enough would include the





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word 'milky' for a milk-based product or descriptors 'low fat' or 'skim' for a low-fat dairy product.

In terms of colours, 'yellow' for cheese packaging would also not be distinctive enough in its own right, and yet 'yellow' might be distinctive in another context, such as for bank services.

Just like word trade marks, for the sake of fair competition, colour and shape trade marks are not registrable if other traders have a genuine need to use them for their dairy goods. For this reason, Cadbury has been facing some challenges in getting the colour purple trade marked for its packaging and Guylian could not register the shape of sea shells for its praline chocolates.

Don't forget taglines and sub-brands

Taglines are also registrable. Have you registered yours?

Taglines are being recognised more and more as an important aspect of a brand.

"Moments like these" brings to mind a mint flavoured sweet, and the tagline "Wouldn't it be nice" leaves no doubt to its origin – Cadbury.

A sub-brand may also be protected, and often is. Take Yoplait as an example. Flavour descriptions such as 'creamy lite', 'creamy original' and 'forest berries' are purely descriptive and therefore not registrable. However, some of sub-brands that identify individual products have been successfully registered – 'yoplus' featuring four culture boosts, 'go-gurt' marketed as "cool tubes for the lunch box", 'elivae', 'Yoplait le rice' and even the word 'yop' on its own to designate a flavoured milk beverage.

Nestlé is another great example of a company that has been innovative in developing a whole language around the prefix 'Nes-'. In Australia, it has registered many brands, including Nescafe, Nestea, Nescore, Nestle, Nes, Nexpresso, Nesfit, Nesquik, Nesvital, Neswell, Nesvita and Nesfrappe. As at 29 October 2009, the company had 29 registered trade marks incorporating the "Nes-" prefix.

Don't delay, protect today

Trade mark protection is an extremely valuable tool that can give you a monopoly over your brand. However, it is important to get it right from the outset to make sure that you are properly protected. Also, remember that trade mark registrations are generally granted on a 'first-come, first-served' basis, so the sooner you apply to protect yours the better. ■

About the author

Sharon Givoni is an intellectual property lawyer who has registered hundreds of brands for clients across many industries Australia-wide. She can also help you protect your brands in New Zealand. Her practise has a strong focus on the food, beverage and packaging industry. When not eating chocolate, Sharon also advises in other areas of intellectual property, such as copyright law and disputes. She can be contacted at sharon@iplegal.com.au. For more information visit www.sharongivoni.com.au.

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