

Luscious Lips Outline Trade Mark Principles

In a sweet battle for the name 'Luscious Lips' to be used on confectionery products, Nature's Blend lost their appeal against Nestlé, when the Court found that Nestlé did not infringe the trade mark 'Luscious Lips' owned by Nature's Blend.

Case Study

In March 2007, Nature's Blend registered 'Luscious Lips' as a trade mark. In May 2007, Nestlé commenced selling their mixed bag of lollies known as the 'Retro Party Mix', which contained a lolly described on the back of the packet as 'Luscious Lips'. In August 2008, Nestlé changed their packaging and the description of the lollies to no longer include 'Luscious Lips'. The reason for the packaging change was not related to the registered trade mark of Nature's Blend.

Trade Mark Principles

The Full Federal Court relied on the following fundamental trade mark principles when they determined if Nestlé's use was an infringement of the Nature's Blend trade mark:

1. The trade mark must be used as a 'badge of origin' to distinguish goods of one trader from those of another trader;
2. The trade mark may be descriptive and still be considered a 'badge of origin';
3. The infringing trade mark appears to consumers as possessing the character of the brand;
4. The purpose and nature of the use of the trade mark was important;
5. The totality of the packaging and the way in which the words are displayed in relation to the goods and the existence of a label of a clear and dominant brand; and
6. The Court will also consider what a consumer looking at the label would see and take from it, when it determines the nature and purpose of the infringing words.

The Result

Nestlé's 'Retro Party Mix' did not use the words 'Luscious Lips' on the front of the packaging. The only use of the words was in a blurb on the rear of the packaging that contained a description of seven lollies contained in the 'Retro Party Mix'. The words 'Allen's' and 'Nestlé' were both prominently placed on the rear of the packaging and are both registered and well known trade marks that consumers could clearly identify as the origin of the confectionery goods. In addition, 'Allen's' is a well recognised brand for confectionery.

Nestlé was unaware of the existence of Nature's Blends' trade mark when they approved the art work for the 'Retro Party Mix' packaging as Nature's Blend had not yet applied for the trade mark, nor were they selling the Luscious Lips product. Nestlé was therefore acting in good faith.

What Does This Mean for Your Business?

This case clearly illustrates how to identify a trade mark and the importance of branding. It is imperative that you and your business understand the trade mark principles to ensure your branding does not potentially infringe on existing trade marks. If you already have registered trade marks for your business it is crucial that you understand how and when it is appropriate to enforce your rights.

If you believe that your intellectual property rights are being breached email us at info@mslawyers.com.au or visit our website <http://www.mslawyers.com.au>. Alternatively, contact our professional team at our Gold Coast or Brisbane office.



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