

Got beef? McDonald's does.

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Hungry Jack's has released a burger called the Big Jack, with the tagline '*Two flame-grilled 100% Aussie beef patties, topped with melted cheese, special sauce, fresh lettuce, pickles and onions on a toasted sesame seed bun.*' Sound familiar? McDonald's thinks so.

McDonald's wants damages and the Big Jack trade mark cancelled.

Hungry Jack's has thrown some shade, claiming no one is going to confuse the Big Jack with the famed 'Big Mac,' because 'burgers are better at Hungry Jack's.' Burn. In an advertising campaign released this week, Hungry Jack's pokes fun at the lawsuit in a sassy advert with a photo of the Big Jack accompanied by the caption "as per my last email." We digress.

So, what's going to happen?

To establish trade mark infringement, McDonald's will have to establish that the Big Jack trade mark is deceptively similar to the Big Mac trade mark; however, if Hungry Jack's can establish that its trade mark is not likely to deceive or cause confusion, then there will be no such infringement.

Strictly speaking, reputation is not a factor when determining deceptive similarity. It is not as simple as Hungry Jack's claiming 'Honestly, who is going to buy a Big Jack from Hungry Jack's and think they are eating a Big Mac from McDonald's?'

How do you decide whether someone will be confused without considering the reputations of the two brands? What you do is:

1. compare the Big Mac Big Jack marks;
2. from the recollection of a person of ordinary intelligence and memory;
3. in the context of the relevant market (the excessively large burger market).

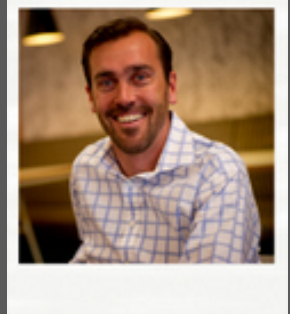
One problem McDonald's may face is just how well known the Big Mac is - this is likely to lessen the likelihood of imperfect recollection and therefore the likelihood of deception. That said, if reputation is not considered, on a simple comparison, Big Jack is clearly very similar to Big Mac.

What will be interesting is whether Hungry Jack's will try to establish that customers are unlikely to be confused and, if so, how they'll go about it.

A trade mark infringement claim operates very differently from the alternative claims common law passing off and misleading or deceptive conduct under the Australian Consumer Law, in each of which reputation is highly relevant. This may be the path McDonald's ultimately goes down.

This case is a big one, and not just because of the extra patty.

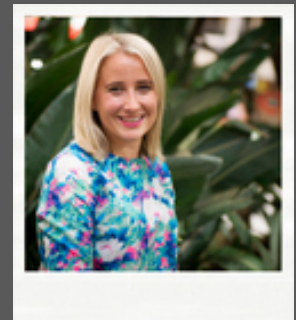
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