

Colour Trade Marks: Whiskas purple will be successfully registered after a cat fight in the Federal Court

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Following the landmark decision to allow Cadbury to register five shades of purple as trade marks for its chocolate packaging after a ten year dispute with Darrell Lea, brand owners are rushing to secure their colour trade mark registrations. Wedgewood Limited owns blue for ceramics and porcelain, Telstra has trade marked its yellow phonebooks, Australian Postal Corporation owns yellow for mail delivery services and Kraft Foods Limited owns silver for cream cheese.

Mars Australia Pty Ltd (Mars) recently won a battle in the Federal Court against Societe de Produits Nestle SA (Nestle) to secure trade mark protection for its customised shade of purple (known as the Whiskas Purple) for its cat food packaging.

Nestle successfully opposed the application in the Trade Marks Office, however, Mars appealed the decision of the Delegate of Registrar of Trade Marks to the Federal Court of Australia and was successful after Nestle dropped its opposition in the final stages of the Appeal. It's believed that Nestle struck a deal with Mars to allow them to continue to use purple on their Purina brand cat food.

The case

Mars, the owner of the popular cat food Whiskas had used its Whiskas Purple colour on its cat food packaging and marketing materials since 2000.

In November 2002, Mars applied for trade mark protection for its Whiskas Purple. The application was accepted for registration; however, Nestle opposed the application.

The Delegate of the Registrar of Trade Marks hearing the opposition found that the Whiskas Purple mark did not distinguish Mars' goods from the goods of other traders. Mars appealed the decision to the Federal Court.

Court's decision

Justice Bennet considered whether the Whiskas Purple was capable of distinguishing Whiskas products.

Justice Bennet observed that Mars *"adopted an entirely new colour as a trade mark and promoted it heavily from the outset with... the clear intention of giving the colour a trade mark significance"*.

Justice Bennet found that Whiskas Purple did function as a badge of origin by which consumers identified Mars' goods in contrast to the goods of other traders.

What does this decision mean for brand owners?

Brand owners should register their colour and other non-traditional marks given the important role that they can play in a company's overall branding strategy. However, it should be noted that registration for a single colour will not be easily obtained.

It is very important to develop a good branding strategy from the outset to ensure that the trade mark is promoted and used extensively. A trade mark attorney should also be involved to ensure that the distinctiveness of the trade mark colour can be proven.