Protecting and Growing your Food Business
11 June 2019
Welcome

Wendy Hederman, Partner & Head of Food, Beverage & Agriculture, Mason Hayes & Curran
IP Protection

Gerard Kelly, Partner & Head of IP, Mason Hayes & Curran
Protecting the Goods!

- Trade marks and passing off
- Extended form passing off
- Copyright
- Designs
- Comparative advertising
Trade marks

• Importance of clearance searches before choosing branding.

• Words that identify or describe a product, its ingredients, or purpose are not generally protectable as trademarks

• Early filing is key

• Register marks across all countries in which the brand is being used e.g. countries of both manufacture and sale.
Trade Marks

Nestlé SA v Mondelez UK & Ors; C-84/17 P, C-85/17 P and C-95/17; 25 July 2018

- Where a mark is devoid of inherent distinctive character throughout the EU, it is not sufficient to prove that the mark has acquired distinctive character through use in a significant part of the EU.

- Unitary evidence acceptable where Member States are grouped in the same distribution network.
Mac Wars

Supermac’s (Holdings) Ltd v McDonald’s International Property Company Ltd
Mac Wars
Board of Appeal Decision 17 June 2016

• McDonalds opposition against word SUPERMAC’S July 2014 on basis of similarity between name and the Big Mac

• Opposition Division partially upheld the opposition by decision January 2016

• Supermac’s withdraw appeal in May 2016

• Board Of Appeal declares appeal closed
Mac Wars

EUIPO Cancellation Division Decision

• Application by Supermac’s to revoke the BIG MAC mark in its entirety is upheld

• The mark had not been put to genuine use – insufficient evidence offered
“Cystus”

Pandalis v EUIPO (Case C-194/17 P)

• Mark registered for food supplements containing plant extracts as the essential active ingredient

• Latin name of the plant was cistus

• General Court revoked it on basis of lack of genuine use

• Use of the term on the packaging would be perceived by the public as descriptive of the main ingredient and not as an identification of commercial origin

• ECJ upheld the revocation
Registering wine

J. Portugal Ramos Vinhos, C-629/17

• Words “adega” meaning “cellar” and “Borba” being a geographical name were refused registration designating wine products

• ECJ upheld the refusal

• The former designated the sites in which the wine was produced and the latter was descriptive and devoid of distinctive character
Trade Marks and passing off
Galway Free Range Eggs Limited -v- O'Brien, CoA, 22 January 2019

- “O’Briens of Galway Free Range Eggs”
- Possible to establish goodwill in the name ‘Galway’
- Confusions demonstrated by survey evidence
- Appropriation of goodwill constituted damage
Extended form passing off
C-44/17 Scotch Whisky Association v Klotz

- German whisky called Glen Buchenbach

- Scotch Whisky Association - use of the Gaelic term “glen” could mislead buyers to think it was scotch

- Not enough for the word “glen” to evoke some kind of association with Scotland - it must actually bring to mind scotch whisky. Does not matter that the label said the product was made in Germany

- Referred back to German National Court to determine whether the “average European consumer” would be misled
‘Tartan Glory’

• Mark applied for in respect of “Scotch Whisky, vodka, gin, spirits”

• Opposed by the Scotch Whisky Association on basis of being highly evocative of Scotland

• Comparison drawn with words such as ‘Glen’ and ‘Loch’

• Hearing Officer held in favour of the opponent – the application was to be refused unless suitably amended
Copyright
C-310/17 Levola Hengelo

• Taste of spreadable cheese must be capable of being classified as a ‘work’

• “Original intellectual creation”

• ‘Expression’ of that intellectual creation in a manner which makes its identifiable with sufficient precision and objectivity
Designs
How the cookie crumbles

‘Foodstuffs’, EUIPO Third Board of Appeal Decision
How the cookie crumbles
‘Foodstuffs’, EUIPO Third Board of Appeal Decision
How the cookie crumbles

‘Foodstuffs’, EUIPO Third Board of Appeal Decision

- Decision of Invalidity Division dated 2 May 2017 declared the ‘foodstuffs’ registered design invalid for lack of novelty
- Products were ‘Oreo Thins’
- Design holder appealed the finding of invalidity
- Claimed that the RCD is for a thin, sleek and slender cookie – the prior design is for a thicker and less elegant cookie
- Lack of individual character – same overall impression
- Informed user interested in cookies – knows two outer layers and filling
- Appeal was ultimately dismissed
Comparative Advertising
Aldi Stores (Ireland) Ltd & Anor -v- Dunnes Stores

- Comparative Advertising Directive 2006 – 2007 Regulations

- Permitted if:

  - Not misleading
  - Compares goods or services meeting the same needs or intended for the same purpose
  - Objectively compares one or more material, relevant, verifiable and representative features of those goods and services including price
  - Not discredit or denigrate
  - Same designation of origin
  - Not take unfair advantage of the reputation of the trade mark
  - Not imitation or replica
  - Not create confusion amongst consumers
Aldi Stores (Ireland) Ltd & Anor -v- Dunnes Stores

- Injunction granted by Cregan J
- Not comparing like with like

Peach

6.9% Fruit

Peach & Nectarine

10% Fruit
Aldi Stores (Ireland) Ltd & Anor -v- Dunnes Stores

• Court of Appeal overturned HC decision

• “erroneous interpretation” that all material and relevant features of both products should be set out in the comparative advertisement

• Preference of evidence of one expert not enough on its own
**Aldi Stores (Ireland) Ltd & Anor -v- Dunnes Stores**

<table>
<thead>
<tr>
<th>HIGH COURT</th>
<th>COURT OF APPEAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is there an objective comparison of one or more features when differences exist</td>
<td>Are the products comparable – same need or intended purpose</td>
</tr>
<tr>
<td>Therefore misleading</td>
<td>Objective comparison of one or more features, i.e. price</td>
</tr>
<tr>
<td></td>
<td>Is it misleading?</td>
</tr>
</tbody>
</table>
Aldi Stores (Ireland) Ltd & Anor -v- Dunnes Stores

• Leave to Appeal to SC granted

• Perceived injustice to the unsuccessful party does not mean the matter is “in the interests of justice”

• Competition between retailers and the rules on such conduct are issues of “general public importance”
Aldi v Dunnes Stores [2019] IESC 41

- Lidl SNC v Vierzon Distribution SA (C-159/09) - Products do not need to be identical to be comparable under the 2007 regulations.

- Fact that there are differences between the products does not, in principle, mean that they cannot be the subject of lawful comparative advertising. Foodstuffs can be compared even if not identical.

- Use of slogan “Lower Price Guarantee” considered to be acceptable hyperbole
## Aldi v Dunnes Stores [2019] IESC 41

<table>
<thead>
<tr>
<th>FOODSTUFF</th>
<th>ALDI PRODUCT</th>
<th>DUNNES STORES PRODUCT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tomato Ketchup</td>
<td>189g per 100g</td>
<td>115g per 100g</td>
</tr>
<tr>
<td>Pork Sausages</td>
<td>Bord Bia Label (17.2g of fat)</td>
<td>No Bord Bia Label (26g of fat)</td>
</tr>
<tr>
<td>Sparkling Orange</td>
<td>7.6% juice</td>
<td>2% juice</td>
</tr>
<tr>
<td>Yogurt</td>
<td>10% fruit</td>
<td>6.9% fruit</td>
</tr>
<tr>
<td>Dog Food</td>
<td>4% Chicken 4% carrot</td>
<td>4% Chicken no carrot</td>
</tr>
<tr>
<td>Toilet Tissue</td>
<td>29.48m</td>
<td>23.1m</td>
</tr>
<tr>
<td>Day cream</td>
<td>Sun protection factor 6</td>
<td>No sun protection factor</td>
</tr>
</tbody>
</table>
Lessons learned

- Higher level of care should be taken with comparisons of broadly comparable goods

- Particularly where there is a distinguishing feature likely to be of significance to customers

- Differences which will affect a decision to purchase needs to be highlighted to be a valid comparison

- Comparative advertising is in principle of considerable benefit to consumers, since it necessarily promotes competition
Employment law developments

Ronnie Neville, Partner, Mason Hayes & Curran
EPLOYMENT (MISCELLANEOUS PROVISIONS) ACT 2018

• Signed by the President on 25 December 2018

• Effective from:
  ❑ 4 March 2019
What does it do?

1. Changes the law on drafting and issuing contracts;
2. Prohibits zero hour practices in certain cases;
3. Provides minimum payments to zero hours workers;
4. Creates a new right to be placed in a “band of hours” reflecting actual hours worked; and
5. Prevents penalisation of employees.

Amendments

- Previously, core terms to be provided in writing within 2 months.
- Changes to 5 days to provide statement of 5 core terms.
- After 1 month - possible employee claim, with award of up to 4 weeks’ remuneration.
- **AND** – an offence if:
  i. without reasonable cause,
  ii. you fail to provide the statement within 1 month.

- **NB** – providing false or misleading information (or being reckless as to whether or not information is false or misleading) is an offence.
5 Core Terms in 5 Days

1. Names of employer and employee;
2. Address of employers;
3. Expected duration of temporary employment of the end date of a fixed-term employment
4. Method of calculation of pay and pay reference period of employee’s remuneration for the purposes of the National Minimum Wage Act 2000;
5. The number of hours which the employer reasonably expects the employee to work:
   i. per normal working day; and
   ii. per normal working week.

• *NB – Previous provisions of 1994 Act still apply
“Reasonably expects”

- No definition in the Act.
- You may not know for certain the daily/weekly hours.
- Tip – give some thought to the hours and days you expect the employee to work.
- Can’t be reckless – potential for triggering offence.
Possible clauses

• “You will work 8 hours per day, three days per week, for a total of 24 hours per week”

• “You will work on the days as determined by the employer from time to time, for 6 hours per day and 30 hours per week”

• “You will work 4 hours per day on such days as will be determined by the manager on a weekly basis”

• “You will work such hours per day and per week as determined by XYZ Limited on a periodic basis”
What is a zero hour employee?

• 2018 Act sets out three types of employees covered by the zero hours practices prohibition in section 18(1).

• Contracts which operate to **REQUIRE the employee to make themselves available** to work for the employer in a week:
  a) a certain number of hours;
  b) as and when the employer requires them to do so; or
  c) Both a certain number of hours and otherwise as and when the employer requires them to do so.

• Distinction – e/e is not **required** to be available because of pattern and/or history of casual work, even if it gives rise to reasonable expectation on the e/e’s part that they would be required by the employer.

• **Requirement** must be clear and express.
Prohibits zero hours working practices

- Section 18(2) now introduces a prohibition on certain zero hours contracts.
- Workers required to be available for work for a certain number of hours must not get zero hours, i.e. eliminating zero hours practices.
- Section 18(3) provides exclusions from this prohibition:
  - Work done in emergency circumstances; and
  - Short-term relief work to cover routine absences.
- Workers engaged on these terms can be left without hours in a week i.e. zero hours practice can persist.
Minimum payments for zero hours workers

• Existing law in Organisation of Working Time Act provided for minimum payment for workers, which was the lower of:
  - 25% of the weekly contract hours (or 25% of the type of similar work done for the employer in a week); or
  - 15 hours, whichever is less

• 2018 Act introduces new provision that the minimum payment must be at least 3 times the National Minimum Wage hourly rate.

• *NB – “on-call” workers excluded from minimum payments
Banded hours contract

New employee rights

- If contract hours not reflective of actual hours per week over a 12 month reference period → employee entitled to be placed in a band of weekly hours as appropriate.
- Banding must be requested by employee in writing.
- Must be placed in band within 4 weeks of request from employee.
- Does not apply to banded hour arrangements entered into following collective bargaining.
### Banding

<table>
<thead>
<tr>
<th>Band</th>
<th>From</th>
<th>To</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>3 hours</td>
<td>6 hours</td>
</tr>
<tr>
<td>B</td>
<td>6 hours</td>
<td>11 hours</td>
</tr>
<tr>
<td>C</td>
<td>11 hours</td>
<td>16 hours</td>
</tr>
<tr>
<td>D</td>
<td>16 hours</td>
<td>21 hours</td>
</tr>
<tr>
<td>E</td>
<td>21 hours</td>
<td>26 hours</td>
</tr>
<tr>
<td>F</td>
<td>26 hours</td>
<td>31 hours</td>
</tr>
<tr>
<td>G</td>
<td>31 hours</td>
<td>36 hours</td>
</tr>
<tr>
<td>H</td>
<td>36 hours and over</td>
<td></td>
</tr>
</tbody>
</table>

- **Example** - if an employee has written contract for 18 hours per week, but for last 12 months they have worked an average of 24 hours → they are entitled to be placed in Band E.
- If employee is placed in a given band, average weekly must reflect their banding for the next 12 months.
Right to refuse

Limited circumstances

1. No evidence to support claim;
2. Significant adverse changes to business, profession or occupation during or after the reference period;
3. Exceptional circumstances or emergency which could not have been avoided despite all due care or circumstance beyond the employers control; and
4. Hours worked were due to temporary scenario that no longer exists.

*NB - WRC can adjudicate on banding and mandate that an employee be placed in a band. However no compensation liability for employer.
Penalisation

2 strands of liability


• Prohibition on penalising employee for seeking to vindicate their rights.

• Identical protections.

• Presumption in favour of employee having acted reasonably and in good faith.
Penalisation

What constitutes penalisation?

- Suspension, lay-off or dismissal.
- Demotion or loss of opportunity for promotion.
- Transfer of duties, change of location of place of work, reduction of wages or change in hours.
- Administering or imposing any discipline, reprimand or other penalty (including financial penalty).
- Coercion or intimidation.

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What’s next?

Development of law on casual workers

• Interpretation of the 2018 Act in case law.
• Designation – protections against bogus designation of self-employed and contractor status removed from 2018 Act at final legislative stage.
• Government envisages standalone bill to be introduced to fully address bogus designations.
• Likely to include robust criminal sanctions.

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Supply Chain, Sales & Advertising of Food
Wendy Hederman, Partner & Head of Food, Beverage & Agriculture, Mason Hayes & Curran
Trends in the Food Industry
Drivers and challenges

Health
- Vegan
- Flexitarian
- Lo alcohol / no alcohol
- Free-from products
- Sports nutrition
- Low sugar
- Less processed

Environment
- Carbon footprint
- Air miles
- Sustainably sourced
- Palm Oil
- Food Waste
- Packaging
- EAT Lancet Report

Technology
- Data analytics
- DNA scanning
- Traceability
- Agri-tech
- Blockchain

Dublin    London    New York    San Francisco
Trends in the Food Industry

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Supply Chain

Benefits of Blockchain Technology

- Traceability
- Food Safety
- Sustainability
- Food fraud
- Brand Trust
- Food Waste
- Supply Chain efficiencies

Examples
Downstream Beer
Carrefour
Moyee Coffee Ireland
Walmart
Unfair Trade Practices

Directive 2019/633

- Protect suppliers from unilaterally imposed agreements and redress imbalance between SMEs with weak bargaining power and powerful buyers

- Business-to-business transactions
- Thresholds
- Date of transposition: 1 May 2021 / November 2021

Prohibited practices:

• Delayed payment for perishable goods – more than 30 days
• Delayed payment for agricultural (non-perishable) - more than 60 days
• Cancellation of perishable goods order at short notice such that a supplier cannot find an alternative means of commercialising the produce
• Unilateral changes to a supply agreement by the buyer
• Payments charged by buyer unrelated to the sale of produce of the supplier
• Charging supplier for deterioration or loss which occurs on the buyer’s premises
• Refusal of the buyer to agree to a supply agreement in writing
• Unlawful disclosure by the buyer of the supplier’s trade secrets
• Retaliation against the supplier for exercising its contractual or legal rights

Prohibited unless clear and unambiguous terms in Contract

• Return of unsold produce to the supplier without payment
• Payment charged by buyer for stocking, listing or displaying supplier’s goods
• Requiring supplier to bear the cost of discounts and promotions
• Payments charged by buyer for advertisement, for marketing, for fitting-out premises for sale of supplier’s produce
Regulation re Trans Fats Maximum

Directive 2019/649

• 24 April 2019, the EU adopted a maximum limit on the use of industrially produced trans-fat in foods in the EU.

• 2g / 100g of fats

• **Health measure - fight heart disease and strokes in Europe**

• Transition until April 2021 – non-compliant foods can continue to be sold.
Single Use Plastic

DIRECTIVE (EU) 2019/…

- EU Directive to restrict single use plastics
- Based on protection of marine life
- Ambitious plan combining
  - Prevention / Consumption reduction
  - Bans where alternatives available
  - Collection targets for plastic bottles by 2029
  - Plastic bottles will contain at least 30% recycled content by 2030
## Single Use Plastic

<table>
<thead>
<tr>
<th>Part</th>
<th>Action</th>
<th>Products</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Reduction</td>
<td>Cups and ready to eat food containers</td>
</tr>
<tr>
<td>B</td>
<td>Ban</td>
<td>Plates, straws, cutlery, cotton buds, stirrers</td>
</tr>
<tr>
<td>C</td>
<td>Lids attached</td>
<td>Bottles ↑3L</td>
</tr>
<tr>
<td>D</td>
<td>Markings</td>
<td>Sanitary towels, wipes, cigarette filters</td>
</tr>
<tr>
<td>E</td>
<td>Producer liability for costs</td>
<td>Ready to eat food containers, bottles, wrappers, cups, plastic carrier bags</td>
</tr>
<tr>
<td>F</td>
<td>Waste collection thresholds</td>
<td>Bottles ↑3L</td>
</tr>
<tr>
<td>G</td>
<td>Awareness</td>
<td>Ready to eat food and drinks containers, wrappers, cups, filters, wipes, balloons, plastic carrier bags, sanitary towels</td>
</tr>
</tbody>
</table>
Labelling

Dairy vs. Non-Dairy

- EU *TofuTown* case in Germany, Case C-422/16
  - Risk of confusion with regard composition of products
  - Labelling plant-based products as “Soyatoo Tofubutter”, “Pflanzenkäse” and “Veggiecheese” infringed the EU competition rules

Meat and non-meat products

EU Parliament proposal to reserve “sausage” and burgers” for meat products only → Vegan “discs and tubes”.
Advertising

Recent advertising complaints to the ASAI

Mullers Naked Men (2018)

➢ Complaint regarding sexuality not upheld by ASAI.

https://www.youtube.com/watch?v=rFv8X-epp2I
Advertising
Recent advertising complaints to the ASAI

The National Dairy (2018)
- Received over 100 complaints
- Complaints not upheld

Milk is Milk. Or is it?
Completely Natural Plant-based Milk
Advertising

Recent advertising complaints to the ASAI

Largo (Tayto Crisps) (2018)

- Facebook post
- “Just have one”
- Complaint upheld for failure to have due regard to national dietary guidelines
- Encouraging excessive consumption
Advertising
Recent advertising complaints to the ASAI

Joyce’s Supermarket (2019)
➢ Complaint upheld

Avonmore Super Milk:
Free Flights Promotion with 30 tokens
➢ Unclear terms, more restrictions, promotion misleading
➢ Complaint upheld
Thank you

Questions?

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