

McFringement? McDonald's take Hungry Jack's to court over new Big Jack burger

By [Jani Cronjé](#) and [Jared de Canha](#)

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On 31 August 2020, companies in the McDonald's group filed a lawsuit against the Hungry Jack's franchise in the Australian federal court. The Hungry Jack's chain, founded by fast-food mogul Jack Cowin in 1971, consists of approximately 400 stores across Australia (in comparison to McDonald's estimated 970 stores). These conglomerates have had a tenuous relationship in the past, dating as far back as 2014, when Hungry Jack's was accused of "hijacking" the McDonald's Monopoly campaign by inviting McDonald's customers to redeem their winning Monopoly food vouchers at Hungry Jack's stores.



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The source of this new beef between these two powerhouses traces back to July, when Hungry Jack's began selling the "Big Jack" burger, and its heartier sibling, the "Mega Jack". Hungry Jack's stand accused of deliberately adopting or imitating the "distinctive appearance or build" of the world-famous Big Mac burger, as well as its ingredients, tagline and infringing the registered Big Mac and Mega Mac marks. In this regard, the Hungry Jack's registration of the Big Jack trade mark in November 2019 is alleged to have been done "in bad faith".

The Big Mac burger has been advertised with the tagline "two all-beef patties, special sauce, lettuce, cheese, pickles, onions – on a sesame seed bun", since its creation in the 1970s. The new kid on the block, the "Big Jack", has been promoted online as containing "two flame-grilled 100% Aussie beef patties, topped with melted cheese, special sauce, fresh lettuce, pickles and onions on a toasted sesame seed bun".

In a statement dated 4 September 2020, a Hungry Jack's spokesperson has indicated that the company is "bemused by the trade mark lawsuit filed against it in the Federal Court", which it believes is "without basis". The spokesperson argues that "Big Jack" is a registered trade mark in the name of Hungry Jack's, and that it is clearly evident that consumers will not be confused or misled by the use of "Big Jack" and "Mega Jack".

What would local law say?

Were McDonald's to find itself in a similar pickle in South Africa, the provisions of section 34 of the Trade Marks Act 194 of 1993 ("the Act") would be applicable to any claim of infringement of the registered marks. Section 34(1)(a) of the Act, of course, provides that a registered trade mark will be infringed by the unauthorised use of an identical mark, or a mark so nearly resembling it that it would be likely to cause deception or confusion, in the course of trade in relation to goods or services for which the trade mark is registered. Clearly, the Big Jack and Mega Jack trade marks are being used for the identical goods which one would expect to be covered by the Big Mac and Mega Mac registrations. The question would, therefore, simply be whether Hungry Jack's marks so nearly resemble the Big Mac and Mega Mac marks, so as to cause confusion.

Should McDonald's lose its appetite to litigate on the basis of trade mark infringement, it may also consider pursuing recourse in terms of the Advertising Regulatory Body's Code of Advertising Practice. The Code contains provisions to curb any salty behaviour, stating clearly that advertisements may not take advantage of the advertising goodwill relating to the trade name or symbol of the product or service of another, or advertising goodwill relating to another party's advertising campaign or advertising property.

The Code further provides that an advertiser should not copy an existing advertisement or any part thereof in a manner that is recognisable or clearly evokes the existing concept and which may result in the likely loss of potential advertising value. This will apply notwithstanding the fact that there is no likelihood of confusion or deception. In considering whether or not an infringement has taken place consideration will be given to, inter alia, whether the concept is central to the theme, distinctive or crafted, as opposed to in common use.

How special is McDonald's special sauce? One has to wonder what other ingredients could be used to make a burger, other than those listed in both advertising campaigns?

This is not the first instance of McDonald's pursuing trade mark infringement proceedings to protect its Big Mac trade mark in Australia. Recently, independent Burger chain "Burger Urge" was taken to task for selling the "Big Pac", made with alpaca patties, sauce, cheese, pickles, lettuce and onion on a bun. This resulted in Burger Urge removing its product and promotional materials from the market.

It looks like the bun fight may well be super-sized and worth following.

ABOUT THE AUTHOR

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