

It's the Name of the Game: The Relationship Between Goodwill and Branding

By **Tara Koh**, Solicitor, Addisons

Last year's surge of re-branding of iconic brands is spilling into 2021, many of which have been around for decades with generations of consumers buying their products. If a brand is so well established in the minds of its consumers what would drive it to change its name or logo? The Black Lives Matter (BLM) movement saw consumers petitioning companies to evaluate the appropriateness of their brands in 2020. The responses of the target companies exemplify the relationship between goodwill and branding, and the underlying influence of brand friendships.

What is goodwill?

The concept of goodwill is difficult to define in concrete terms. It has been described as "the benefit and advantage of the good name, reputation and connection of a business" and "the attractive force which brings in custom".¹ Sources of goodwill may include manufacturing and distribution techniques, superior management practices, competitive pricing, the extent of advertising and promotion and even geographical location.²

Goodwill is a valuable intangible asset of a business which is able to be protected from wrongful appropriation through the tort of passing off and closely-related actions under the Australian Consumer Law. Goodwill is a unique asset in that it is inseparable from the business to which it adds value,

and cannot be dealt with except in conjunction with the sale of that business.³

In *FCT v Krakos Investments Pty Ltd*⁴ Hill J identified at least four sources of goodwill: (1) site goodwill; (2) personal goodwill; (3) monopoly goodwill; and (4) name goodwill. "Name goodwill" encompasses a company's brand, name and reputation. Justice Hill described it as:

*"[A] particular reputation in a name which the law will protect. In such a case, custom may be attracted to the business by the very use of the name. In turn, the value of that name may be turned to account by its proprietor".*⁵

Such is the "attractive force" of a successful brand that consumers might not even be actual purchasers, yet they will still associate themselves with the brand. For example, it is unlikely that all 23.7 million of Louis Vuitton's Facebook followers have purchased Louis Vuitton products.

The power of branding

A valuable brand has high "salience"; in other words, it is likely to be remembered in the moment of making a purchase decision. Salience is generated through marketing tools, trade marks, logos, names and other distinctive assets, such as colour. Individuals are so impressionable to branding that even babies as young as six months are capable of forming mental

images of logos, and by the time they reach three years of age 20% of children will directly request specific brand name products.⁶

Salient brands can prompt strong emotional responses from consumers. History is littered with examples of "marketing fails" resulting in consumer backlash. In the early 2000's British Royal Mail embarked on a £2 million, two year long process to re-brand as "Consignia" which lasted only 16 months before it bowed to public pressure and reverted to its original name.

Brand friendships

A "brand friendship" is where a brand embeds itself into a community whose members define their identity by, and find meaning in, their shared enjoyment of the brand. Because brand friendships are emotionally asymmetrical (that is, consumers project and graft their emotions onto brands) consumer perceptions of loyalty will be greater when consumers and brands share the same "conscience".⁷

An excellent example of a successful brand friendship is Coca-Cola. In 2008, two fans started their own Facebook Coca-Cola fan page which quickly accumulated millions of "spontaneous" followers. Instead of shutting it down Coca-Cola collaborated with the two fans, resulting in the most popular Facebook page of 2009 second only to President Obama. Since then,

1 *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217 (per Lord MacNaghten).

2 *Commissioner of Taxation v Murry* (1998) 193 CLR 605, [25]-[28]

3 *Kraft Foods Group Brands LLC v Bega Cheese Limited (No 8)* [2019] FCA 593, 401 [105].

4 (1995) 61 FCR 489.

5 *Ibid* 497.

6 Jonathan A J Wilson and Joseph E Morgan, 'Friends or Freeloaders? Encouraging Brand Conscience and Introducing the Concept of Emotion-Based Consumer Loss Mitigation' (2011) 18(9) *Journal of Brand Management* 1, 2, quoting M J Dotson and E M Hyatt, 'Major Influence Factors in Major Children's Consumer Socialization' (2005) 22 *Journal of Consumer Marketing* 35, 35.

7 Wilson and Morgan (n 5) 4.

the Coca-Cola Facebook page has employed many consumer driven marketing techniques, such as Expedition 206, where selected fans travelled to 206 countries to promote the Coca-Cola brand, and the “#ShareaCoke” campaign involving customised Coke bottles. Instead of posting its own content, Coca-Cola asks its fans to share their own thoughts and feelings about Coke to create “a collection of your stories showing how people from around the world have helped make Coke into what it is today”.⁸

Brand friendships demand responsibility from the brand to act with sincerity and integrity so as not to isolate or sideline its consumers. The BLM movement has agitated consumers’ animosity towards outdated brands and illustrates how a brand friendship can turn sour. On the international stage for example, since the 1940s Mars’ “Uncle Ben’s” brand of rice has featured an African American man. In 2007 Uncle Ben,⁹ a rice farmer, was re-marketed as the “chairman”. At the time Mars said it did not want to make significant modifications because consumers described Uncle Ben as having “a timeless element to him”.¹⁰ At the height of the BLM movement in 2020, Mars announced plans to “evolve” the Uncle Ben’s brand.¹¹

In the Australian context, “COON” cheese – a brand with an 85 year history – will be rebranding as “CHEER” cheese following a 21 year-long campaign led by an Indigenous activist; and Nestlé will be renaming its Allen’s confectionary “Red Skins” and “Chicos” to “Red Ripper” and

“Cheekies” after acknowledging the names have “overtones” which are “out of step”.¹²

These cases illustrate the importance of a brand’s need to pre-empt consumer sentiment and engage proactively if consumer loyalty is to be preserved.

The relationship between goodwill and branding

As can be seen, a brand’s relationship with its consumers, its salience and its goodwill are interdependent. For this reason, companies are reluctant to make significant alternations to their brands and will at a minimum try to retain the key elements that consumers recognise.

For instance, Uncle Ben’s will be rebranded as “Ben’s Original” and the distinctive orange packaging will remain, presumably because Mars’ market research revealed that the name “Ben” and the colour orange are what consumers associate with the brand and recognise at the point of purchase. In doing so Mars will appease consumers, retain salience and minimise impact on the brand’s goodwill.

Saputo, the owners of COON, have stated:

“We wanted to ensure we listened to all the concerns surrounding the Coon brand name, while also considering comments from consumers who cherish the brand and recognise the origin of its founder Edward William Coon, which they feel connected to”.¹³

“The name change follows Saputo’s careful and diligent review to honour the brand-affinity felt by our consumers.”¹⁴

The “cherishment”, “connection” and “brand-affinity” said to be felt by COON’s consumers is a clear reference to the goodwill and salience that COON has established over its 85 years on the Australian market. Interestingly Dr Stephen Hagan, the activist leading the campaign, responded that “...it’s just a little piece of cheese ... [it] will still taste the same.”¹⁵ However technically correct Dr Hagan’s statement may be, it does not take into account the emotional response that Saputo have astutely identified.

Similarly, in response to Allen’s post announcing the change of its confectionary one Facebook user said:

“Change the name. Change the packaging. As long as the taste is still the same why would it matter. You don’t buy the lollies cause of what they are called. You buy them for the flavour...”

As Uncle Ben’s, COON and Allen’s would all appreciate, this is not true. Consumers’ purchasing decisions are not guided purely on taste or quality. They are influenced, whether consciously or not, by the goodwill or “pull” of the brand. Many of Allen’s’ Facebook followers called to boycott the brand because they were upset at losing the entrenched and endearing associations they have with the confectionary:

“It’s a lolly name, that has been around for Generations. Please wake up and get over it.”

“Allen’s as you obviously don’t care about generation after generation of customers I will be boycotting your products.”

8 Coca-Cola, Facebook – About <https://www.facebook.com/pg/Coca-Cola/about/?ref=page_internal>.

9 The titles “aunt” and “uncle” were historically used to avoid referring to African American persons as missus or mister.

10 Stuart Elliot, ‘Uncle Ben, Board Chairman’, *The New York Times* (online, 30 March 2007) <<https://www.nytimes.com/2007/03/30/business/media/30adco.html>>.

11 Mars, ‘Uncle Ben’s Brand Evolution’ (Web Page, 17 June 2020) <<https://www.mars.com/news-and-stories/press-releases/uncle-bens-brand-evolution>>.

12 Allen’s Lollies (Facebook) 22 June 2020 9:03pm AEDT <<https://www.facebook.com/allens.lollies/posts/at-allens-we-are-about-creating-smiles-today-we-announced-that-we-will-change-th/3027777277338058/>>; Nestlé, ‘Nestlé announces new product names’ (Web Page, 16 November 2020) <<https://www.nestle.com.au/en/media/news/nestle-announces-new-product-names>>.

13 Saputo Dairy Australia, ‘COON Cheese Statement’ (Web Page, 24 July 2020) <<https://www.saputodairyaustralia.com.au/en/our-company/newsroom/coon-cheese-statement>>.

14 Saputo Dairy Australia, ‘Introducing CHEER™ Cheese’ (Web Page, 13 January 2012) <<https://www.saputodairyaustralia.com.au/en/our-company/newsroom/introducing-cheer-cheese>>.

15 Elias Visontay, ‘Australia’s Coon Cheese to Change Name in Effort to Help “Eliminate Racism”’, *The Guardian* (online, 24 July 2020) <<https://www.theguardian.com/australia-news/2020/jul/24/australias-coon-cheese-to-change-name-in-effort-to-help-eliminate-racism>>.

“How ridiculous, I do not understand the need to change a name of a [lolly] that has been around for a long [time].”

The difficulty that these companies faced amid the BLM movement was the risk of sidelining consumers and disturbing the goodwill which had been established over many decades.

An example of the correlation between branding and goodwill in the legal sphere is the 1996 *Duff Beer* case.¹⁶ A South Australian brewery launched a beer under the name “Duff Beer”. Twentieth Century Fox, producers of “The

Simpsons”, sued the brewery for passing off. One of the elements of the tort of passing off is that the plaintiff must have a distinct reputation or goodwill attached to its product or service. “The Simpsons” Duff Beer, an imaginary product, had only featured on the show for a total of less than seven minutes out of almost 3,000 minutes over 132 episodes.¹⁷ The brewery claimed that the fictional Duff Beer could not have garnered adequate goodwill or reputation of its own. Ironically, it was the brewery’s own market evidence that revealed that consumers only associated the word “Duff” with

concepts such as “fun”, “trendy” and “cool” because of their association of the word with the show, and that “Duff” was impressed in consumers’ consciousness as “The Simpsons” beer.

The Court found that not only was “Duff Beer” a component of the goodwill of “The Simpsons”, but that Duff Beer of itself had sufficient reputation to ground an action in passing off. The Court also found that a substantial section of the public would assume that Twentieth Century Fox or its licensees had some form of commercial arrangement in place with the South Australian brewery, and that the brewery had engaged in a course of deceptive conduct in seeking to exploit the strong association between the name “Duff Beer” and “The Simpsons”. *Duff Beer* shows that even a fictional and derivative brand can elicit a strong emotional response from consumers, generating valuable goodwill.

Key points to note

The social issues raised by the BLM movement are persuading companies to re-consider their values and re-connect with their consumers. It is clear that consumer sentiment has shifted, and what used to be considered traditional and comforting is no longer appropriate.

At the risk of undermining significant investment and marketing, re-branding may be necessary in order to maintain brand friendships going into the future. By retaining the most salient features and responding to consumers’ genuine concerns, companies will be in the best position to recuperate any damage to their goodwill and value to the brand caused by the re-branding.

After all, when it comes to branding and goodwill, it is important not to lose sight of the end game: to create a profitable and valuable asset.

¹⁶ *Twentieth Century Fox Film Corporation & Anor v South Australian Brewing Co Ltd & Anor* (1996) 34 IPR 225 (“Duff Beer”).

¹⁷ In addition to two episodes in which repeated references were made to Duff Beer: *ibid* 240.

CAMLA CUP TRIVIA NIGHT

THURSDAY 26TH AUGUST
DOORS: 6:00PM - STARTS: 6:30PM

SKY PHOENIX
WESTFIELD SYDNEY
188 PITT STREET

\$700 PER TABLE OF TEN
\$70 PER PERSON
DRINKS PACKAGES ALSO AVAILABLE



BOOK NOW AT: WWW.CAMLA.ORG.AU/SEMINARS
ENQUIRIES: CONTACT@CAMLA.ORG.AU

SUBJECT TO COVID DEVELOPMENTS