

Politicising the trade mark

By [Kathy Lee](#)

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Late last year it was reported that a Russian entrepreneur had managed to get a trade mark registration for the name Yulia's Icicles, which will be used in relation to lollipops. But these are lollipops with a difference - they will be in the shape of the braids famously sported by Ukrainian politician, Yulia Tymoshenko.

Tymoshenko is a former prime minister of Ukraine who now heads the opposition party from a jail cell, as a result of charges that she claims were fabricated by the country's president. Said an opposition party spokesman about the trade mark registration: "This is the latest dirty business. She is an ill woman, an opposition leader, harassed and tortured in prison. She is being mocked, only filth and scum could do such nasty things" (trade mark registrations do sometimes raise eyebrows, but this is quite an extreme reaction!). The same entrepreneur previously launched vodka brands called Putinka (a reference to Russian president Vladimir Putin), and Volodya i Medvedi. "Volodya" is a nickname for Vladimir, while "medved", meaning bears, not only refers to Russian Prime Minister Dmitry Medvedev but also to Putin's United Russia party which has a bear as its mascot.

Capitalising on the reputation of a politician

Politicians aren't always held in highest regard, but some are admired and there may be circumstances where a business may want to capitalise on the reputation of a politician. It's well known, for example, that a number of people have tried to capitalise on Nelson Mandela's reputation and that, as a result, his IP rights are fiercely guarded - a famous example involved a golf estate called Nondela which used a Mandela sound-a-like in radio ads.

So what legal issues come up here? Well, if you use the name or image of a politician you might well be sued; but what would you be sued for? Assuming that the politician does not have any trade mark registrations, you might be sued for passing off. Passing off is all to do with reputation (goodwill) and the likelihood of confusion about the origin of the product, but will consumers seeing a product that bears the name of a politician really assume that it is in some way linked with the politician, for example that it has been endorsed? Or will they assume that the use of the name is purely fanciful, perhaps a bit of fun - the entrepreneur behind Yulia's Icicles said this about his choice of name: "Yulia's Icicles is a very fun title that children should like"?

It seems to me that consumers are less likely to assume a commercial relationship like one of product endorsement in the case of a politician than in the case of a sportsman or a film star. But, as with everything, it all depends on the facts. For starters, I think that it is more likely that consumers will assume endorsement in the case of a live politician than in the case of a politician who is dead (in which case the endorsement would obviously have to come from the estate). And it may well depend on the politician involved - there are clearly some politicians who are more commercially-minded than others, and

who would be more likely to agree to product endorsement.

The politician might try to bring a case based on personality rights, or image rights as they are called in some jurisdictions. A recent US case, where the heirs of the estate of Albert Einstein tried to stop GM using a photo of the great man in an ad, failed because the court held that his image rights had already expired - he died some 57 years ago. In a case involving the former Miss South Africa, Basetsana Kumalo, the court held that Cycle Lab had violated her right to identity by using a photo of her in an ad, in a way that suggested endorsement. In the same way, the aggrieved politician might also try to bring a case under the Code of the Advertising Standards Authority (ASA), which says that you cannot portray a live celebrity without their consent, except in cases where it doesn't interfere with their right of privacy and doesn't amount to unjustifiable commercial exploitation. In one well-known case, the ASA held that a former head of South African Airways, who had left in controversial circumstances, did not have a valid complaint about a Nando's ad that made reference to him, because the ad was simply a witty commentary about an issue of public importance. Finally, if the use of the name or image is hurtful, the politician may sue for defamation.

Trade marking a name or image

So much for using the name or image, what if you try to get a trade mark registration for it? Well, there's a fairly good chance that the application will be refused, certainly in South Africa. There is a provision in the Trade Marks Act which says that an application for a trade mark will be refused if the trade mark contains a word that suggests state patronage - it's arguable that the use of the names of certain people in government (the president and cabinet ministers for example) might suggest patronage. There's also the general requirement that a trade mark application will be refused if it's likely to deceive or cause confusion - the argument here would again be that consumers would assume some form of endorsement by the politician. And there's a provision that says that if a mark consists of the name or representation of a person, the authorities can require the written consent of that person to be filed.

Lastly, what happens if the politician tries to register their own name or image as a trade mark, much like celebrities in the worlds of sport and entertainment do? For example, the Beckhams have multiple registrations covering things like name, image and signature. The politician may face some problems here. For starters, you must have a genuine intention to use a trade mark in order to validly register it - a politician who registers speculatively or defensively may not qualify. In addition, a trade mark registration must in fact be used in order to stay valid. Furthermore, trade marks are registered for particular goods or services, and there are 45 different categories or classes in which they can be filed.

Does the politician simply choose the most obvious goods and categories, say clothing and fragrances? Or do they break the bank and go for 45 classes? It's no easy matter. Perhaps they should just concentrate on politics!

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