

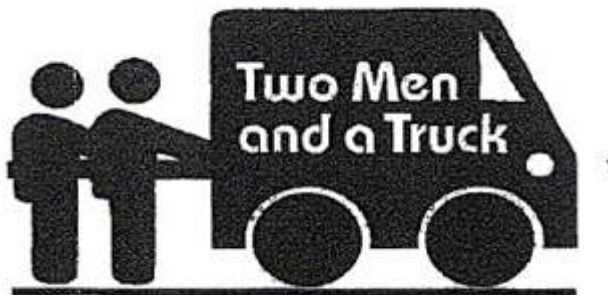
TWO MEN AND A TRUCK – A LESSON IN TRADE MARKS

A recent decision involving the trade marks of two similarly named removalist companies shows just how easily any business can fall foul of the law protecting trade marks.

In this issue, we take a look at the Federal Magistrates Court's decision in the case of *Two Men and A Truck Aust Pty Ltd v Three Men & A Truck Removals and Storage Pty Ltd & Anor*, where word and image marks were held to be deceptively similar to each other.

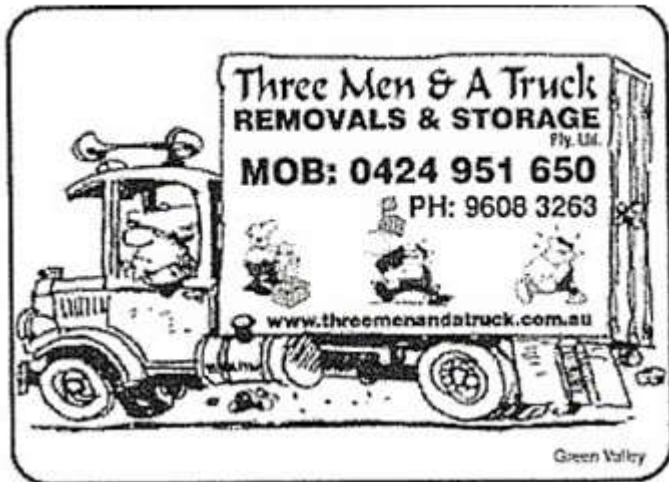
BACKGROUND

Since 1995, Two Men and A Truck Australia Pty Ltd (the **Applicant**) has been engaged in the business of transportation, storage and removalist services. The Applicant has been the owner of Australian Trade Mark No. 949361 for the words “*Two Men and A Truck*” and Australian Trade Mark No. 949362 for the following image:



Both of the Applicant's trade marks were registered from April 2003 for a period of 10 years in class 39 for “*Transportation, packing and storage of goods including removalist services; transportation and storage of waste including rubbish removal; rental of storage containers*”.

In August 2007, the Applicant became aware that Three Men & A Truck Removals and Storage Pty Ltd and its director and sole shareholder, Joseph O'Leary, (the **Respondents**) were offering and promoting a range of home and business transportation and removalist services under and by reference to the name or mark, “*Three Men & A Truck*”, in the *White Pages* and *Yellow Pages*, and by way of its domain name <threemenandatruck.com.au>, business cards and advertisements using the following image:



The Respondent did not own any registered trade marks for the words “*Three Men and A Truck*” or for the above image.

The Applicant commenced court proceedings against the Respondents on the basis that the Respondents’ business activities had infringed both of the Applicant’s registered trade marks.

THE COURT’S DECISION

The critical question before the Court was whether the use of the words or name, “*Three Men & A Truck*” and/or the above image infringed the Applicant’s trade marks, by being deceptively similar to either or both of the Applicant’s registered trade marks.

In answering this question the Court assessed whether they so nearly resembled the Applicant’s trade marks that they were likely to deceive or cause confusion.

The Court held that both of the Respondents’ trade marks were deceptively similar to both of the Applicant’s registered trade marks for the following reasons:

- the word marks, “*Two Men and A Truck*” and “*Three Men & A Truck*” were visually and orally similar;
- the common element consisting of the words “*Men and A Truck*” were identical (and differed only in the manner of representation of the word “and”), the phrases were approximately the same length and conveyed the same idea of removalist services provided by men and a truck;
- both word trade marks conveyed an idea of simplicity and conjured up a similar image, causing the customer to wonder whether the difference between “*Two*” and “*Three*” was simply a variation in the number of workers provided by the same source;
- while there were differences in the image trade marks as to the number of men and the manner in which they were portrayed, both images used and conveyed the same idea (the words and figures were shown as if written on the curtain of a removal truck), such that a comparison of the trade marks did not remove deceptive similarity; and
- the impression of the Respondents’ word mark or image that would be left in the mind of a person of ordinary intelligence was such that the person would be caused to wonder whether the services came from the same source as those of the Applicant.

WHAT DOES IT MEAN?

Word marks and image marks could be an infringement of each other, especially where the words feature prominently in the image and the rest of the image is merely descriptive of the words. This is so even if the alleged infringing mark differs in style and composition from the registered trade mark.

When:

- developing a brand name for your product or service; or
- considering a change of your company or business name;

appropriate searches in the marketplace and the trade marks register should be conducted to determine whether there are any businesses (trading in the same or similar product or service) that could cause deception or confusion in the public as to the origin of your product or service. This should be undertaken before you go through the time and expense of developing your logo, business name and stationery.

It is much better to discover a similarity early so you can adopt a different brand, company or business name to remove/minimise any risk of trade mark infringement action being taken against you.

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