



In the News

What Intellectual Property Protection is Necessary for Ghost Kitchens?

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by Dan Venglarik, Mar. 23, 2020

Emerging technologies spawn new opportunities, but also require new thinking in ancillary fields such as law. The growth in food delivery apps such as DoorDash®, GrubHub®, and Postmates® paved the way for so-called “ghost kitchens,” which in turn have necessitated new thinking about the legal needs for such enterprises.

Ghost kitchens are retail food service enterprises with no meaningful brick-and-mortar *service* space, as opposed to *food preparation* space. Conventional restaurants exploit food delivery to augment existing dine-in, to-go, and/or curbside pickup food service at brick-and-mortar locations. Pop-up restaurants simply repurpose existing retail locations for a conventional—if temporary—restaurant. By contrast, a ghost kitchen is centered around food delivery, leveraging food delivery apps and commercial kitchen space in a model resembling Amazon Stores for meals. While avoiding front-of-house headaches such as wait staff and décor, ghost kitchens face overlapping but differently weighted challenges from conventional restaurateurs—including in the area of legal protection.

Branding, branding, branding

A branding plan with appropriate trademark and copyright protection can be critical both to the successful launch of a ghost kitchen and to enduring revenue streams afterward. Akin to the aphorism about real estate price, value for ghost kitchens derives in large measure from branding, branding, branding. The same is true for conventional restaurants, but to a different degree: where conventional restaurants can benefit from walk-ins, alcohol sales, ambiance, and social gatherings, ghost kitchens have no analogous opportunities apart from food quality and branding. Customers have no dine-in experience to trigger cravings for a specific dish emotionally linked to a past memorable visit. Instead, ghost kitchens must rely on word-of-mouth and/or food genre (street tacos, pad thai, etc.) as the sole proxies for prior experience.

Branding for ghost kitchens necessarily focuses on distinctiveness and appeal. While memorable names and logos are foundational requirements for virtually every retail enterprise, appealing and evocative product descriptions are also vitally important to food service. Along similar lines, successful restaurant menu designs use professional food photography to promote sales. Since the customer-facing aspects of a ghost kitchen are almost entirely its food listings on a delivery app or website, trademark and copyright protection for such brand aspects must be designed for proactive but cost-effective enforcement. For example, detecting and addressing a competitor's use of proprietary food images and/or descriptions must be prompt but pragmatic.

Preparing a branding plan for a ghost kitchen rather than a traditional restaurant also involves novel considerations—or at least a novel level of importance for such considerations. Given the role of food delivery apps within the business model, familiarity with the respective intellectual property policies is a higher priority imperative for ghost kitchens. For example, whether a food delivery app developer will block reported trademark and copyright infringement by others using the app is a significant concern.

Non-compete and trade secrets

Employment non-compete provisions and trade secret protection also have heightened importance for ghost kitchens. Barriers to entry are significantly lower than for conventional restaurants, making employee knowledge of recipes and suppliers more likely to result in competition from former employees. Fortunately, ghost kitchens have characteristics allowing non-compete clauses to be crafted to overcome longstanding judicial reluctance to enforce such provisions. Similarly, the effective trade secret practices that often receive short shrift at conventional restaurants are easier to follow and with better return with the lower number of employees at ghost kitchens.

Non-traditional intellectual property

Current technology has given rise to non-traditional forms of “intellectual property,” such as rights associated with search engines and search engine optimization. No enterprise wants competitors to be able to purchase “sponsored” search results on keywords including the enterprise’s name, product name, or trademarks, even if listed together with the enterprise. Rights of this nature are most frequently based on unfair competition or on contract. Once a ghost kitchen establishes a reputation, the search function of a food delivery app may be a major sales driver.

As a new form of enterprise, ghost kitchens require thought and novel strategies in developing associated intellectual property protection, rather than canned strategies previously employed for analogs such as conventional restaurants.

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