

Competing for New York's Best Lobster Roll: Failed Trade Protection



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INSTRUCTOR'S MANUAL

Case Synopsis

Pearl Oyster Bar, founded in 1997, had a reputation in Manhattan for making the best lobster rolls in New York City. Pearl Oyster Bar's owner Rebecca Charles created a unique atmosphere over the years with specialty menu items, such as the popular "Pearl Lobster Roll with Shoestring Fries." Rebecca filed a law suit against her former *sous chef*, Ed McFarland, alleging that he infringed on her restaurant identity. Furthermore, Rebecca claimed that Ed had a fiduciary obligation to keep the secrets of the business confidential and refrain from duplicating the recipes and identity of her restaurant. Rebecca further alleged that Ed tried to reproduce Pearl's success on the upper east side of Manhattan by copying every element of her bar including the atmosphere, the furniture, the paint job and even the Caesar salad dressing. What can Rebecca do now? What could she have done to protect her business from this flagrant copycat?

Learning Objectives

Students should be able to:

1. Differentiate between the types of Intellectual Property (IP)
2. Demonstrate understanding of four key forms of IP as they apply to the incident
3. Identify business processes/measures that can help protect a business's trade secrets and trade dress

Target Audience

This case was designed for undergraduate students enrolled in introduction/principles of entrepreneurship, hotel management, general business, or small business management courses. This critical incident is designed to engage the students on the topic of Intellectual Property, including trade secrets and trade dress issues as they apply to a restaurant setting.

Research Methodology

This critical incident was written using public domain information about the legal case including news media coverage of the law suit. The authors were able to access the original law suit (*Pearl*

Oyster Bar vs. Ed McFarland and Ed's Lobster Bar. 07-cv-06036, 2007) and track its progress

©2010 by the author and *The CASE Journal*. Contact the author at desplacesd@cofc.edu through public records (mostly electronic news coverage). The critical incident has been tested in both *principles of entrepreneurship* and *small business management* courses.

Discussion questions:

- a. *What type of intellectual property interests may Rebecca have in her restaurant? How are they held and how can they be protected? Give specific examples under each type. For example a recipe: can it be copyrighted as an original authored work?*
- b. *What are the employment issues that may apply to this critical incident and the protecting of trade secrets?*
- c. *What should be included in a legal checklist to protect the IP rights of a restaurant owner/entrepreneur?*

Pedagogy

Although this exercise can easily be altered to fit various approaches to teaching, we recommend the following approach:

Preparation

Facilitate student learning by assigning chapters/readings on the topic prior to class discussion. *Since the case has been settled out of court, students can quickly identify the recent settlement in the case without offering any reasoning or lessons learned.*

Handout Preparation

We recommend that you create handouts of both Appendices A and B to distribute to the students along with the critical incident. Pictures of the restaurants and the Google map showing the distance between the two restaurants are copyrighted materials and therefore protected from reproduction, however we provided instructions on how to access them on the internet.

In Class Team Preparation

1. Review various types of Intellectual Property (distribute Exhibit I)
2. Distribute the incident in class including the Appendices (A, B & C). Students should be instructed NOT to search the Web where they can easily find out the outcome.
3. Share handouts or show slides of Appendices A & B to the class.
4. Tell students that they must try to answer the discussion questions (and draw conclusion) on their own (step can be ignored if instructor does not have sufficient time):
 - a. *What type of intellectual property interests may Rebecca have in her restaurant? How are they held and how can they be protected? Give specific examples under each type. For example a recipe: can it be copyrighted as an original authored work?*
 - b. *What are the employment issues that may apply to this critical incident and the protecting of trade secrets?*
 - c. *What should be included in a legal checklist to protect the IP rights of a restaurant owner/entrepreneur?*
5. Instruct students to form groups charged with clarifying the legal premise of the case as it applies to intellectual property, trade secrets, trade dress, and employment law.

Variations/Options

1. Assigned groups can take a position or role play for Rebecca or Ed.

2. Groups are instructed to draft a memo (possible take home assignment) that must include:
 - a. an analysis of the situation (using pictures, menus and described employment relationship between Rebecca and Ed)
 - b. answers to the discussion questions
 - c. offer recommendation(s) to either Rebecca or Ed or any of the parties in this incident.
3. Groups could also be asked to offer recommendations to the owner of another restaurant on how to prevent future issues/problems by talking about the discussion questions and preparing a position for class discussion.
4. Possible follow-up question include discussing industry specific code of conduct/standards (See proposed follow up question).

General Debriefing

Students have reported that:

- It is unfair, Rebecca should not have to take any further action
- Rebecca missed an opportunity to protect her business
- It is New York and is a competitive world out there

Students should be challenged to review the facts and work to develop arguments in support of both Rebecca and Ed.

Discussion/Study Questions

1. *What types of intellectual property interest may Rebecca have with her restaurant? How are they held and how can they be protected? Give specific examples under each type that may relate to this case. For example a recipe: can it be copyrighted as an original authored work*

Any industry (even restaurants) should work to protect their intellectual property so as to avoid a situation similar to the one described in the critical incident. Intellectual property is a product of human intellect that is intangible but valuable in the marketplace. It can be protected in several different ways including trademarks, copyrights, patents, and trade secrets. Appendix I offers a detailed summary of each of the different forms of intellectual property. Let us review how each type of IP as they apply to the critical incident:

- A. Patent - method of cooking such as special oil for cooking the fries, a process of controlling inventory, a special stove used in the restaurant. There is no information in the case indicating that a special method or process has been used to cook any of the dishes prepared by Rebecca.
- B. Copyright - menu, specials list, names of dishes, published cookbooks. Rebecca could have a claim her Caesar salad or other dishes are copyrighted if she can prove that the recipes that are used in Ed's restaurant are identical to hers and show proof of publication, such as a cookbook. The recipe in the publication must match the name used on her current menu for the menu item name to be protected under the copyright law.

According to the Copyright Office (<http://www.copyright.gov/fls/fl122.html>):

Mere listings of ingredients as in recipes, formulas, compounds, or prescriptions are not subject to copyright protection.

However, the copyright office also states:

..... when a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook, there may be a basis for copyright protection.

Protection under the copyright law (title 17 of the U.S. Code, section 102) extends only to "original works of authorship" that are fixed in a tangible form (a copy). "Original" means merely that the author produced the work by his own intellectual effort, as distinguished from copying an existing work. Copyright protection may extend to a description, explanation, or illustration, assuming that the requirements of the copyright law are met.

Copyright protects only the particular manner of an author's expression in literary, artistic, or musical form. Copyright protection does not extend to names, titles, short phrases, ideas, systems, or methods.

- C. Trademark - any word, name of house dishes, slogans that differentiate Pearl from the competition, symbol, or device used to identify the source or origin of products or services and to distinguish those products or services from others (including packaging). In the case of Rebecca it would include the name of the business, dishes, and other distinguishing factors such as trade dress (see next), that allow Pearl Oyster Bar to be recognized as unique. Although there are a lot of similarities across the two menus, Rebecca could not claim that Caesar, Oyster, and other names were unique named dishes to Pearl.
- D. Trade dress - lighting fixtures, tables and colors = an entire look. This is the only dimension of Intellectual Property that appears to be copied or imitated considering the proximity of the restaurants, the theme of the restaurants, and the previous employment relationship between the two restaurant owners. Trade dress is the overall look of a business, including overall design, colors, and configuration of décor which would apply in the restaurant business. According to McCarthy, T., Schecter, R. & Franklyn, D. (2004) the modern definition of trade dress includes "all elements making up the total visual image by which the product is presented to customers" (p. 606). The certain atmosphere that Rebecca created in her restaurant can also qualify as a trademark for her restaurant and unique to her only, because it was her original design and it solely represents how she wants her restaurant to be displayed to the public. Her lawsuit did specify that she had picked up her design ideas from other restaurants across the country. However, the larger question is did Ed copy her décor and "formula"? A review of Exhibit B (photo comparison instructions) indicates some striking resemblances:

- Chairs have a similar design in the back (possibly a shell form – consistent with the theme of a restaurant selling lobsters)
- Chalk board menus: fairly common in restaurants
- Green on white tones.
- Chrome light fixtures.

In the landmark case *Two Pesos, Inc. v. Taco Cabana, Inc.*, (1992), Two Pesos was found guilty of infringing the identity of Taco Cabana and ordered to pay damages as well as modify certain aspects of their restaurants in order to eliminate the likelihood of confusion caused by copying the trade dress of Taco Cabana. The jury had found that Taco Cabana was inherently distinctive and this originality symbolized the good will of the company that is uniquely associated with Taco Cabana. Using this landmark case, Rebecca's lawyer appears to make a case that the good will of Pearl's owner was infringed upon.

- E. Tradeseecret - recipes, suppliers, regular client names. There is no evidence presented in the incident (or lawsuit) indicating that a recipe was copied by Ed. Such claim would be difficult to prove in a restaurant setting.

2. *What are the employment issues that may apply to this critical incident and the protecting of trade secrets?*

Anytime an individual is hired, it is often necessary to share intellectual property with them in order for them to do their job (especially in the restaurant business), which creates an inherent risk that the information may be "stolen" or copied elsewhere by competitors. In this case Rebecca, owner of Pearl Oyster Bar, claimed that Ed, her former sous chef had stolen her intellectual property by opening Ed's Lobster Bar, which she says, copies "each and every element" from the décor to the menu of Pearl Oyster Bar. This illustrates an important employment issue that applies to this case. That issue is confidentiality and non-compete clauses to protect trade secrets. The owner of Pearl should have protected her intellectual property by requiring all employees to sign a non-disclosure and confidentiality agreement, which states that they will not under any circumstances share or use protected information without prior consent, and also states that Pearl Oyster Bar reserves the right to legally enforce the agreement. Rebecca could have also protected herself by making all kitchen staff sign a non-compete clause before sharing any recipes or trade secrets. It is important to note that Rebecca did not make any of her employees sign such documents. Furthermore, non-compete clauses are extremely difficult to enforce especially if the livelihood of the employee is at stake (Ed's case). The state of New York is also known for not strictly enforcing these agreements. Summary information on New York law related to trade secrets can be found at:

<http://www.citmedialaw.org/legal-guide/new-york/trade-secrets-law-new-york>

Furthermore, New York is one of a few states current not adhering to the Uniform Trade Secrets Act (UTSA) adopted by 45 states and the District of Columbia that seeks to prevent the disclosure and use of a trade secret by employees (further limiting Rebecca's legal grounds). Appendix III lists all the states adhering to the UTSA.

3. *What should be included in a legal checklist to protect the IP rights of a restaurant owner/entrepreneur?*

- ✓ Formulate and clearly set out your creative contribution to the enterprise e.g. name, theme, logos, symbols etc.....
- ✓ Categorize each idea within the IP framework:
 - A. Copyright
 - B. Trademark, trade dress
 - C. Patent
 - D. Trade secrets

(This may require consultation with an IP attorney. First perusal may be done by going to relevant Web sites - copyright.gov, uspto.gov).

- ✓ Determine if you can protect each one of these creative contributions. In other words make sure that they do not belong to someone already. This is done through a copyright, patent or trademark search. Once again simple searches may be done at the appropriate Web sites while more sophisticated searches may require the input of an IP attorney.
- ✓ If a restaurant has a written document, such as an employee manual or recipes, that it has authored and seeks to protect, it may do that by obtaining a copyright.
- ✓ Restaurant owners should hire an attorney to write a non-disclosure, non-compete and confidentiality agreement to protect the owner's intellectual property. Restaurant owners should then require all employees to sign the agreement before allowing them to begin work.
- ✓ If restaurant owners feel their rights have been violated, they should seek legal action against the individuals that are harming them through infringement lawsuits

Follow Up Question

Did Ed act appropriately?

While this critical incident involves a legal case, it is not uncommon for some students to raise questions about whether Ed's actions toward Rebecca were appropriate. The ethical/social norms of trust, honesty, integrity, and fair dealings are necessary when engaging in business. Regardless of whether a contract or agreement exists between two parties, an implicit principle exists that business people must be able to engage in trustworthy, honest, and fair business relationships and transactions. Otherwise, if their actions are viewed as dishonest, unfair, or lacking in trust, few individuals and businesses will want to engage with them. Ed's actions might have been legal (given current intellectual property laws and the absence of formal legal agreements between Rebecca and Ed); however, Ed's actions may have been also viewed as inappropriate according to many. According to IACP Code of Professional Ethics (Exhibit II), all members of the profession should "maintain the highest standards of accuracy and honesty in ... dealings with colleagues and clients" and "respect the intellectual property rights of others and not knowingly use or appropriate to [their] own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition." Not only is Rebecca claiming that Ed copied her recipes (but does not provide much evidence that she owns the original work), she also claims that Ed cloned her restaurant's look and feel (including her menu and the type of food made available to customers), and therefore infringed on both her good name and reputation. In her eyes he acted unethically, however this does not mean that he acted illegally (intellectual property infringement).

Epilogue

Rebecca's lawsuit was settled out of court after a delay imposed by the court. Ed agreed to change his décor as well as some of his menu items although he proclaimed that he did not mean to infringe on Rebecca's intellectual property. In effect Rebecca was able to enforce her rights to a certain extent even though she did not take all the appropriate preparatory steps. This might be explained by the strength of the trade dress she created through her lobster roll and restaurant. It is also important to note that engaging in litigation can be costly for all parties involved. The alternative to litigation is mediation or attorney negotiation. The average hourly rate for an attorney is \$250 an hour with attorney's receiving 30% of all case settlements on top of all courts and legal fees associated with pursuing a lawsuit.

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- United States Personal Chef Association Code of Ethics. Retrieved on February 8, 2010. <http://www.uspca.com/codeofethics/>
- Wood, D. J. 2007. *Business Ethics: Text and Workbook*. Cedar Falls, IA: Woodhaven Press.

Useful Supplemental Resources

Any secretary of state website, for state filing requirements

National restaurant Association (economic impact of industry by state):

<http://www.restaurant.org/research/state/>

The importance of intellectual property (2008). In Barringer, B. R. & Ireland, R. D. (Ed.), *Entrepreneurship: Successfully launching new ventures* (pp. 346-379). Upper Saddle River, NJ: Prentice Hall.

United States Copy Rights Office (details about fees and filings)

<http://www.copyright.gov>

United States Patent and trademark Office (patents, trademarks, Lanham Act)

<http://www.uspto.gov>

In re The Place, Inc., USPTO Trademark Trial and Appeal Board, serial no.

76436826, <http://www.uspto.gov/web/offices/com/sol/foia/ttab/2eissues/2005/76436826.pdf>. (restaurant tradedress issue)

Exhibit 1

Summary of the types of intellectual property

Trademarks

A trademark is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods or service of one party from those of others. Trademarks can be protected by filing representative samples with the US Patent Trademark Office or by legitimate use of the mark. Protection through filing is the most secure method of assuring that a trademark holder will be able to protect the mark through federal infringement suits.

Trademarks are protected by the Lanham Act of 1946. The Act protects names, designs and logos, and trade dress. Trademarks are best protected by selecting and registering a trademark through the U.S. Patent and Trademark Office (at some cost to the business owner which is why many simply do not do it). It is held for a renewable period of 10 years, and can theoretically be held indefinitely as long as it stays in use.

Copyrights

A copyright is ownership in original works of authorship fixed in a tangible form of expression. Examples are literary works, musical works, dramatic works, pantomimes and choreography, motion pictures, sound recordings and architectural works. Copyrights exist in the 'author' upon creation of the work but protection of the right is easier if federal protection is sought through filing the copyright with the US Copyright Office. Copyrights give the creator of an original work exclusive rights for a period of time, the creator's lifetime plus seventy additional years, after which the work enters the public domain. Written work is automatically protected, however copyright protection can be enhanced by attaching a "copyright bug" or © with the year of publication and the name of the author or owner onto the document. If concerned about infringement, authors should register with the U.S. Copyright Office.

Patents

A patent holder gains exclusive rights to the use of their novel idea once the United States Patent Trademark Office accepts their application and issues a registered patent. Patents are granted in three categories, utility or function (machines and processes), design (unique features of a product) and plant (hybrids). This exclusive use is permitted for 20 years if the patent is utility or plant and 14 years if design. During these patent periods the holder of the patent has exclusive rights so no one may infringe on the patent without permission. Patents typically do not apply to the restaurant industry because they refer to rights granted to an inventor or discoverer of a new and useful process, machine, article of manufacturing, or composite of matter. But it is possible that methods of cooking foods or special machines used in food preparation could be patented but the patent is likely to be held by the inventor and is only used by the restaurant

Tradeseecret

A tradeseecret is generally defined as any information that cannot be copyrighted, trademarked or patented, but has economic value. Tradeseecrets are the most difficult to protect since there is no registration requirement. Protection is left to contracts with key employees containing confidentiality clauses or covenants not to compete.

Trade secrets are information, formulas or ideas that provide the owner with a competitive advantage in the marketplace. Trade secrets are not known outside the company, and are shared inside the company/business on a "need-to-know" basis because they provide the company with a compelling competitive advantage. Secrets are usually developed at great cost, time and effort by the company. The companies can protect trade secrets by restricting access, labeling documents and by maintaining adequate overall security measures. In this case, recipes may fall under the protection of trade secrets, which are any pattern, physical device, idea, process, or other information that provides the owner of the information with a competitive advantage. However, in the restaurant business it would be hard for the chef not to share contents of a recipe, especially with a *sous chef*. There is a Uniform Trade Secrets Act but New York has not adopted it. See resources for those states which have.

Tradedress

A tradedress is a form of trademark that can encompass anything that makes the business distinctive. It must be non-functional in nature and distinctive of the source in commerce. In restaurants, this can be menus, colors, style, lighting or any look. Often a holder will register components of tradedress as a trademark. It is not necessary to register a trade dress to receive protection, however it does offer advantages such as the use of the register symbol: ®, and the right to block importation of infringing goods into the U.S. Restaurant owners can protect their recipes by publishing a recipe book which could include the specific recipe use as well as protecting décor/formula. Tradedress will be subject to protection under the Lanham Act whether registered or not if it is inherently distinctive.

Exhibit 2

IACP Code of Professional Ethics

As a member of the International Association of Culinary Professionals, I pledge myself to:

- Support the growth of knowledge and the free interchange of ideas within the profession, and respect the views and opinions of my colleagues and honor their right to express them.
- Strive to achieve and maintain excellence in my culinary work.
- Constantly strive to improve and expand my culinary knowledge.
- Accurately represent my professional training and qualifications and not knowingly permit, aid, abet or suffer the misstatement of my training and qualifications by others.
- Maintain the highest standards of accuracy and honesty in my dealings with colleagues and clients.
- Not publish, or knowingly permit to be published on my behalf, any advertising or promotional material which contains false, deceptive or misleading statements.
- Respect the intellectual property rights of others and not knowingly use or appropriate to my own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition.
- Respect my students and my colleagues, and strive always to ensure that professional comment and criticism of their work is both constructive and appropriate.
- Dedicate myself to support and assist the association in serving the profession and the public.
- Refrain from any act or omission, and not permit to suffer any act or omission, which would discredit or bring dishonor to the association or any member thereof.
- Acknowledge ethics and morality as inseparable elements of doing business and will test every decision against the highest standards of honesty, legality, fairness, impunity, and conscience.
- Conduct myself at all times such as to bring credit to the industry at large.
- Concentrate my time, energy and resources on the improvement of my own product and services and will not denigrate our competition in the pursuit of our own success.
- Provide every employee at every level all of the knowledge, training, equipment and motivation required to perform his or her tasks according to our published standards.
- Strive constantly, in words, actions and deeds, to develop and maintain the highest level of trust, honesty and understanding among clients, colleagues, employees, employers and the public at large.

This Code of Ethics for members of the International Association of Culinary Professionals has been adopted to promote and maintain the highest standards of association service and personal conduct among its members. Adherence to these standards is required for membership in the Association, and serves to assure public confidence in the integrity and service of Culinary Professionals.

(Source:

<http://www.iacp.com/associations/7870/files/Downloads/About%20IACP/Ethical%20Guidelines/ethicalguidelines.pdf>)

Exhibit 3

Uniform Trade Secrets Act

Uniform Trade Secrets Act has been adopted in the following states to better define and remedy common law trade secret issues:

- **Alabama** Ala. Code. Secs. 8-27-1 et seq.
- **Alaska** Alaska Stat. Secs. 45.50.910 et seq.
- **Arizona** Arizona R.S. Secs. 44-401 et seq.
- **Arkansas** Ark. Stat. Ann. Secs. 4-75-601 et seq.
- **California** Cal. Civ. Code Secs. 3426 et seq.
- **Colorado** Col. Rev. Stat Secs. 7-74-101
- **Connecticut** Conn. Genl. Stat. Secs. 35-50 et seq.
- **Delaware** Del. Code Ann. Title 6 Secs. 2001 et seq.
- **District of Columbia** D.C. Code Ann. Secs. 48-501 et seq.
- **Florida** Fla. Stat Ann. Secs. 688.001 et seq.
- **Georgia** Ga. C.A. Secs. 10-1-760 et seq.
- **Hawaii** Haw. Rev. Stat. Secs. 482B-1 et seq.
- **Idaho** Idaho Code Secs. 48-801 et seq.
- **Illinois** Ill. Ann. Stat. ch. 140 Secs. 351-59
- **Indiana** Ind. Code. Ann. Secs. 24-3-1
- **Iowa** 1990 90 Acts, ch 1201 Section 550.1 et seq.
- **Kansas** Kan. Stat. Ann. Secs. 60-3320 et seq.
- **Kentucky** Ky. R.S. Secs. 365.880 et seq.
- **Louisiana** La. Rev. Stat. Ann. Secs. 51:1431 et seq.
- **Maine** M.R.S.A. Title 10 Secs. 1541 et seq.
- **Maryland** Md. Com. L. Code § Secs. 11-1201 et seq.
- **Michigan** M.C.L.A. Secs. 445.1901 to 445.1910
- **Minnesota** Minn. Stat Ann. Secs. 325C.01 et seq.
- **Mississippi** M.C.A. Secs. 75-26-1 et seq.
- **Missouri** Mo. Stat. Secs. 417.450 to 417.467
- **Montana** Mont. Code Ann. Secs. 30-14-401 et seq.
- **Nebraska** Neb. Rev. Stat. Secs. 87-501 et seq.
- **Nevada** Nev. Rev. Stat. Secs. 600A.010 et seq.
- **New Hampshire** N.H. R.S.A. Secs. 350-B:1 et seq.
- **New Mexico** N.M. Stat. Ann. Secs. 57-3A-1 et seq.
- **North Carolina** N.C. Gen. Stat. Secs. 66-152 et seq.
- **North Dakota** N.D. Cent. Code Secs. 47-25.1-01 et seq.
- **Ohio** R.C. Secs. 1333.61 et seq.
- **Oklahoma** Okl. Genl. Laws Secs. 6-41-1
- **Oregon** Or. Rev. Stat. Secs. 646.461 et seq.
- **Rhode Island** R.I. Gen. Laws Secs. 6-41-1 et seq.
- **South Carolina** S.C. C.A. Secs. 39-8-1 et seq.
- **South Dakota** S.D. Cod. Laws Secs. 37-29-1 et seq.
- **Utah** Utah Code Ann. Secs. 13-24-1 et seq.
- **Vermont** Ch. 143 Section 4601 et seq.
- **Virginia** Va. Code. Ann. Secs. 59.1-336 et seq.
- **Washington** Wash. Rev. Code. Ann. Secs. 19.108.010 et seq.

- **West Virginia** W. VA. Code. Secs.47-22-1 et seq.
- **Wisconsin** Wis. Stat. Ann. Secs.134.90