

Restaurant Industry Insight--The Evolving Trademark Portfolios of Restaurants

06.01.2021 By [Kyle-Beth Hilfer](#) and [Jeremy Berman](#)

The Covid-19 pandemic has put innovative pressure on the restaurant industry. As restaurants have changed or grown their goods and services since early 2020, their trademark portfolios have also expanded into new trademark registration classes.



When inside dining closed across the United States, the existing trend towards food delivery accelerated. While an already high 58% of adults said that they ordered takeout or delivery for dinner during the last week of February 2020, a remarkable 66% of adults said that they ordered takeout or delivery for dinner in a given week in November 2020, with takeout or delivery lunch up from 37% to 47%. (Source: <https://www.restaurant.org/articles/news/consumers-to-continue-using-takeout-and-delivery>).

As demand grows for contactless delivery of food, restaurants and related brands have adopted broad strategies, including partnerships with ghost kitchens or the sale of food through temperature-controlled lockers. At the same time, these new areas of business created an enhanced need to review a restaurant brand's trademark portfolio and identify new areas for which the brand's trademarks should be protected.

The U.S. Patent and Trademark Office (USPTO) registers marks in 45 international classes. The classification system is mainly to facilitate searches of the register, and the USPTO and the courts generally disregard the specific classes in deciding whether there is a likelihood of confusion between similar trademarks for goods or services that are related to each other in the marketplace. Nevertheless, protection of a restaurant's brands for its expanded activities may involve the filing of new trademark applications in classes other than Class 43, the traditional class for restaurant services. As discussed below, such applications have covered goods or services in Classes 7, 9, 12, 35, 36, 39, or 42, in addition to Class 43.

Ghost Kitchens

During the pandemic, front-of-house brick and mortar dining has no longer been consumers' predominant way of receiving restaurant services. As such, companies in the restaurant space

have expanded the use of “ghost kitchens” (also known as “dark kitchens” or “virtual kitchens”). In ghost kitchens, chefs prepare food only for delivery or pickup with no customer seating. One ghost kitchen can serve as the cooking space for multiple brands, allowing operators to multiply their customer base without investing in a separate space for each brand. The ghost kitchen concept also promotes experimentation because a brand can launch rapidly with little additional overhead. For example,

- **Red Robin International, Inc.**, a recent notable entrant into the ghost kitchen sphere, opened three ghost brands in 2020 - CHICKEN SAMMY’S, THE WING DEPARTMENT, and FRESH SET - all of which operate out of its existing Red Robin kitchens. The brand made certain to shore up its associated intellectual property rights, applying to register design marks for these ghost brands. Each application listed services focused exclusively on delivery and takeout: “restaurants featuring home delivery,” “take-out restaurant services,” and “preparation of food and beverages” in **Class 43** (the traditional class for restaurant and food services). Appl’n Nos. 90573195, 90573131, 90573237.
- **Inspire Brands, Inc.**, the parent company of Dunkin’, Arby’s, Buffalo Wild Wings, and many more famous brands, is opening a 7,500 square foot restaurant called Alliance Kitchen in Atlanta. Alliance Kitchen will offer food for delivery and take-out from its existing brands, and possibly from new brands that will only exist in ghost form. Inspire filed intent to use applications to register the marks ALLIANCE KITCHEN and INSPIRE KITCHEN for “food delivery; delivery of food by restaurants” in **Class 39** (the class for transportation services), and for “restaurant services; restaurant services, namely, offering food and drink via online and mobile ordering for delivery or pick up; restaurant services, namely, providing ghost kitchens and commercial kitchens for use in preparation of meals and beverages for consumption off premises; preparation of food, drink, and prepared meals; providing information about restaurants” in **Class 43**. Appl’n Nos. 88747995, 88748014.

Given that meals from ghost kitchens are usually ordered on mobile apps, other ghost kitchen operators have expanded the classes for which they seek trademark protection to encompass these digital services. For example,

- **Shane Poda** registered PLATEPROFIT for “hosting software for use by others for use in profit accounting for restaurants, cafes, bakeries, coffee shops, food trucks, and commissary or ghost kitchens” in **Class 42** (the class for software services). Reg. No. 6100162.

Evolving Classes of Trademark Protection

Companies offering ghost kitchen services have applied for marks in classes even further afield from traditional Class 43 applications. For example,

- **Creating Culinary Communities LLC (C3)**, a leader in virtual kitchen development, launched eight PLANTNATION vegan locations in Los Angeles, with plans for nationwide expansion, and applied to register that mark for “delivery of food prepared in ghost and dark kitchen facilities” in **Class 39**. Appl’n Nos. 88632364, 90119627. In other food halls, various chefs would design their own menus to be prepared in C3 ghost kitchens. C3 has applied to register the “C3” word mark for “business management and operation services for others in the field of hospitality, restaurants,

bars, food hall and courts, ghost kitchens and food and beverage mobile delivery services,” among other services in **Class 35** (the class for business management services), and for “investment consulting, namely, consulting in the field of financial investment in restaurants, bars, food halls and courts, ghost kitchens and food and beverage mobile delivery services,” “real estate development and construction of restaurants, bars, food halls and courts and ghost kitchens” and “design and development of restaurant, bar, food hall and court, ghost kitchen and food and beverage mobile delivery service concepts, namely, consulting in the field of menu planning for others,” among other services in **Class 36** (the class for financial and real estate services). Appl’n Nos. 90482535, 90482610.

- **Kmt Kitchens, LLC** plans to open six ghost kitchens across the East Coast in 2021, at which restaurants can rent a 200-400 square foot kitchen suite. It has applied to register the CHEFSUITE word mark for a mobile app from which its partner restaurants can order restaurant supplies in **Class 9** (the class for downloadable software). Appl’n No. 90481762.
- **Cameron M. Rafati**, another ghost kitchen operator, has applied for the CHOWCLOUD mark in **Class 9** for a customer-facing mobile app from which food can be ordered, as well as in **Class 35** for various restaurant management services. Appl’n No. 90124249.

Restaurants as Co-Working Spaces

In addition to adding services with ghost menus, some restaurants are renting out unused or underutilized space in their dining rooms as low-cost workspace for companies or individuals. Co-working represents a new direction for restaurant brands.

- **KettleSpace, Inc.** and **Spacious Technologies, Inc.** (a company owned by WeWork Companies Inc.), have emerged in this space as services connecting restaurants to businesses and freelancers seeking workspace. KettleSpace has obtained a trademark registration for services including “business consultation services in the operation of restaurants providing co-working space” in **Class 35**. Reg. No. 6045017. Spacious has submitted a similar application in **Classes 9 and 35**. Appl’n No. 87900958.

Celebrity Partnerships

Ghost kitchens additionally provide novel opportunities to partner with celebrities to drive customers to existing restaurants.

- **MrBeast** (also known as Jimmy Donaldson), a popular YouTuber, has opened a burger franchise called MrBeast Burger, with an entire menu of options named after himself and his collaborators. The menu is only served via delivery from the kitchens of existing brick and mortar local restaurants. This ghost franchise has hundreds of “locations” across the United States, delivered from a number of different restaurants and chains. MrBeast’s company, Beast Holdings, LLC, applied to register three word and design marks for MRBEAST BURGER for “food delivery” in **Class 39**, and for “restaurant services, namely, providing a ghost kitchen for use in preparation of meals and beverages for consumption off premises” in **Class 43**. Appl’n Nos. 90327424, 90327247, 90327253.

- **Celebrity Virtual Dining, LLC** is now working with other celebrities on similar brands. **MARIAH'S COOKIES**, for example, is associated with singer Mariah Carey, and Celebrity Virtual Dining applied to register that mark for “restaurant services, namely, providing a ghost kitchen for use in preparation of baked goods and beverages for consumption off premises” in **Class 43**. Appl'n No. 90373468.

Contactless Food Delivery

Food lockers for contactless pickup has also emerged as a trend during the pandemic. Of course, these lockers, vending machines, or automats, have been in use for many decades. FEBO, perhaps the most famous fast food chain native to the Netherlands, is well known for serving its sandwiches through automats. More recently, in the United States, chains, including KFC, Burger King, and Smashburger, have begun rolling out similar heated or cooled food lockers for contactless pickup. These restaurants are experimenting with different ways to interface with the lockers, including through touch screens on the lockers themselves, or through an app on the customer's mobile phone.

- **Sprinkles Cupcakes, LLC** has famously sold cupcakes from its Cupcake ATMs in several cities since 2012. It has registered CUPCAKE ATM and SPRINKLES ATM, both for “vending machines”, in **Class 7**. Reg. Nos. 1351177, 4549049.
- **Chipotle Mexican Grill**, following another path, recently announced its investment in Nuro, Inc., a self-driving robotic delivery company. Nuro filed an intent to use application to register the NURO word mark for “computer software for communicating with robotic transport vehicles” in **Class 9**, for “robotic transport vehicles” in **Class 12** (the class for vehicles), and for “transport and delivery of goods” in **Class 39**. Appl'n No. 87764793.

Elsewhere in the world of mechanized food delivery, the Japanese model of serving sushi to customers on a conveyor belt inside the restaurant is now widespread in the United States as well.

- **Akindo Sushiro Co. Ltd.** obtained a registration for its SUSHIRO mark. This registration was the first to identify “providing sushi with conveyor belt winding through the restaurant” as one of the services in its application in **Class 43**. Reg. No. 6224411.

Caution is Required in Selecting Names

As ghost brands and other innovative restaurant services proliferate, many of these brands have not sought any trademark protection. Perhaps operators see little upside in investing in their ghost operations that may be short-term and easily renamed.

Nonetheless, these operators may be putting their brands at risk if they have not vetted the names. For example, ghost brands currently operate in New York with names such as Pancake Snob, Breakfast Burrito Snob, Village Breakfast Snob, and Pad Thai Snob. If these are not owned by the same entity or even associated entities, each runs the risk of a trademark infringement claim.

The lesson is that even if not pursuing a trademark registration, all trademarks should be cleared to mitigate against a third-party infringement claim. While it would be a simple matter for any of these brands to pivot to a new name, such a pivot would not protect the owner from any trademark liability it had incurred while using the previous name.

Conclusion

The pandemic has driven restaurants to innovate. Ghost kitchens, delivery services, technology services, and even novel uses of restaurant real estate, are all driving an increase in trademark applications beyond the typical Class 43 restaurant services. The legal consequences arising out of the different classes and descriptions of services applied for by ghost kitchens and brands is still evolving. Regardless of what lies ahead, restaurants and related entities should think expansively when filing for trademark protection and enforcing their rights.

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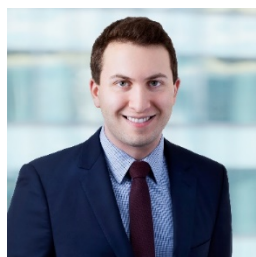


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