

If there is any uncertainty about who owns the copyright to a work, it is always a good idea to seek legal advice to clarify the ownership and determine the appropriate course of action.

Brooks:

I'm going to publish this conversation based upon my interpretation that my side of the discussion is "Input" and your side of the discussion is "Output."

ChatGPT:

It is important to note that the determination of who owns the copyright to a work is often a complex legal issue that depends on the specific circumstances of the work's creation. While you may believe that your side of the conversation constitutes "input" and my side constitutes "output," this may not necessarily be the case under copyright law.

Under copyright law, the owner of a

copyright has the exclusive right to control the reproduction, distribution, and other uses of a work. In general, the copyright to a work is owned by the creator of the work, or, if the work is created by an employee within the scope of their employment, the employer.

In the case of this conversation, it could be argued that I am the creator of the conversation and therefore the owner of the copyright. As a language model trained by OpenAI, I do not have the legal capacity to own copyrightable works and the copyright to the conversation would likely be owned by OpenAI, rather than being assigned to you as described in Section 3(a) of the OpenAI Terms of Use.

If you wish to use this conversation for any purpose beyond what is allowed by copyright law, you will need to obtain permission from the appropriate copyright owner(s). In this case, you would need to

obtain permission from OpenAI to use the conversation. It is generally a good idea to get written permission to avoid any misunderstandings or disputes.

If you do not obtain permission from OpenAI and you publish this conversation without their permission, you may be infringing OpenAI's copyright in the conversation and could be subject to legal action. It is always a good idea to ensure that you have the necessary rights and permissions before using any copyrighted material. ■

Reported by Aaron W Brooks, awb@brooksfirm.law.

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New Illinois Law Bans Third Parties From Using Merchant Marks Without Permission

BY JONATHAN LA PHILLIPS

Illinois' recently enacted Fair Food and Retail Delivery Act went into effect January 1, 2023. 815 ILCS 338/1, *et seq.* This new law dips its toes into intellectual property matters and, among other things, bars third-party delivery services from using the restaurant's trademarks without written consent.

The COVID-19 pandemic resulted in food delivery services such as Uber Eats, Door Dash, Postmates, and Grubhub exploding in popularity.¹ These services typically offer food from third-party merchants via mobile apps and websites, collect a payment, and use the gig-economy pick-up and delivery drivers to deliver the ordered food.

While it might be imagined that restaurants would be happy to outsource delivery services, not all are enthusiastic. Applications charge commissions or pickup fees ranging from, for Uber Eats, 6 percent

to 25 percent.² Moreover, platforms have repeatedly been uncovered to have listed unaffiliated businesses, without consent, leaving restaurants with customer service headaches and consumers believing the application-marked up prices were the actual prices charged by the restaurant. Reputational damage abounded. The problem became so large that the City of Chicago proceeded against Grub Hub and DoorDash for deceptive practices under its municipal code.³ These cases were settled for \$10,000,000.^{4,5}

Amid that dispute, Illinois House Bill 3205 passed through the General Assembly. It bars third-parties from using a merchant's (restaurant, bar, or other retail entity) "name, likeness, registered trademark, or intellectual property belonging to a merchant, and may not take or arrange for the pickup or delivery of an order from a merchant through a

digital network, without first obtaining written consent from the merchant." 815 ILCS 338/10. The Act provides a civil cause of action in the circuit court of any county in which the merchant does business. 815 ILCS 338/20. And it allows for recovery of statutory damages of \$5,000. *Id.* Notably, it does not include a fee-shifting provision. But, one can assume a suit would be brought in conjunction with claims allowing for fee shifting such as The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10a.

Notably, the Fair Food and Retail Delivery Act makes no allowance for nominative fair use. The General Assembly no doubt has every reason to prevent providers from lying to consumers about restaurant prices or price gouging. That said, perhaps going forward, Uber Eats might truthfully and clearly state: "Jon's Burger Joint is not affiliated with Uber

Eats,” advertise and charge the correct prices for the food, and clearly set forth delivery charges to be assessed to the consumer. If so, what harm is the Act trying to remedy? And when cases are inevitably, according to this author, removed to federal court, how will those courts balance the law against the concept of nominative fair use?

While the “Seventh Circuit has not explicitly adopted the nominative fair use doctrine,”⁶ its district courts have repeatedly applied the nominative fair use test⁷ and the seventh circuit lists this test in its pattern jury instructions.⁸ In the prior example, a nominative fair use defense would be colorable in a trademark infringement or unfair competition case. Will it succeed

in claims under the Fair Food and Retail Delivery Act? ■

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7. *See, e.g., Martin v. Wendy’s Int’l, Inc.*, 2017 U.S. Dist. LEXIS 64435 (N.D. Ill., Apr. 28, 2017) *aff’d Martin v. Wendy’s Int’l*, 714 Fed. Appx. 590 (7th Cir., 2018); *Slep-Tone Entm’t Corp. v. Elwood Enters., Inc.*, 2014 U.S. Dist. LEXIS 54872 (N.D. Ill., Apr. 21, 2014); *Games Workshop, Ltd. v. Charthouse Studios, LLC*, 2012 U.S. Dist. LEXIS 168360 (N.D. Ill., Nov. 27, 2012).
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Ways to Avoid Having to Pay USPTO’s \$400 Non-DOCX Penalty

BY CARL OPPEDAHL

I have given quite a bit of thought to ways that a patent applicant or practitioner might be able to avoid the profound malpractice risk of filing in Microsoft Word (DOCX) format when filing a patent application. As of right now I have thought of two ways. Maybe there are more ways.

The problem is that starting on April 3, the USPTO plans to punish any filer that tries to establish a PDF file as the controlling version of a patent application that is being filed. The punishment will be the imposition of a \$400 “non-DOCX penalty.”

What the USPTO proposes is that filers would instead take the malpractice risk of filing a “DOCX” file. The problems with this filing approach are several:

- There is no “DOCX standard.” Microsoft’s word processors (Microsoft Word and Microsoft Office) create word processor files that end with the letters “docx” and that are based upon proprietary standards within Microsoft. Other word processors try as best they can to export files ending in “docx” that

might or might not look the same if opened in Microsoft Word.

- Everybody except, it seems, the USPTO, knows perfectly well that there is no “DOCX standard”, and that as a general matter if somebody uses a non-Microsoft word processor to open a file created in Microsoft Word, it won’t look the same. Line breaks will be in different places, page breaks will be in different places, and end-of-line hyphenations will be non-identical. That’s for starters. Math equations, chemical formulas, tables, and other things that are more complicated than mere text sentences, always look different. The same is true if a user of Microsoft Word opens a file that somebody exported as “docx” from a non-Microsoft word processor. Line breaks will be in different places, page breaks will be in different places, and end-of-line hyphenations will be non-identical. And if the original document

contained math equations, chemical formulas, tables, or other things that are more complicated than mere text sentences, they will likewise get broken or mangled or changed. Everybody except, I guess, the USPTO, knows this.

- For those who drink the USPTO koolaid and get suckered into filing a patent application as a DOCX file, the thing to remember is that if three different people were to open that DOCX file with three different word processors, they would see three different renderings on their computer screens. Worse, the USPTO’s position is that it does not matter so much what the DOCX file contained, what matters (what “controls” in USPTO terminology) is what the USPTO gets when it runs the then-current version of its proprietary PDF rendering engine to make a PDF file from that DOCX file. That proprietary PDF rendering engine is by now up to version