Hospitality Review

Volume 12
Issue 1 *Hospitality Review Volume 12/Issue 1*

Article 1

January 1994

Ethical Challenges of the Industry: Are Graduates Prepared?

Matt A. Casado
Northern Arizona University, null@nau.edu

Gary K. Vallen

William E. Miller

Ethical Challenges of the Industry: Are Graduates Prepared?

Abstract
Hospitality graduates often enter their first jobs unaware of the difficult ethical dilemmas they will face. By having ethics teaching in a curriculum, the authors of this article believe that the perceptions of ethics of senior hospitality students at Northern Arizona University were comparable to those of operating industry managers.

Keywords
Matt Casado, Asia

Ethical Challenges of the Industry: Are Graduates Prepared?

by
Matt A. Casado
and
William E. Miller
and
Gary K. Vallen

Hospitality graduates often enter their first jobs unaware of the difficult ethical dilemmas they will face. By having ethics teaching in a curriculum, the authors of this article believe that the perceptions of ethics of senior hospitality students at Northern Arizona University were comparable to those of operating industry managers.

"A good reputation is more valuable than money."
(Publius Syrus, Roman philosopher).

This spring, hundreds of young HRM/HRIM graduates—armed with newly acquired bachelor's degrees, youthful enthusiasm, and four years of knowledge from the academic hospitality education environment—will begin making their mark on the industry. Shortly thereafter, however, impetuous idealism could turn to frustration. Their attitude of *"Look out world, here I come"* could disappear, and their professional lives could become a routine series of daily fires.

The problem for many is not one involving industry knowledge or skills; rather it revolves around the relatively unfamiliar area of ethics in the workplace, and the problem is more widespread than most people imagine. The HRM/HRIM graduates of today are being sent out into the hospitality industry only partially equipped to function in their new environments. Although their degrees provide sharp skills in computers, finance, marketing, management, and accounting, their ethical commitment, consciousness, and competency is questionable. Graduates enter their first job unaware of the difficult ethical dilemmas which they will face. The question as to whether or not hospitality management programs are doing a good

FIU Hospitality Review, Volume 12, Number 1, 1994

job in turning out ethically "prepared" managers remains to be answered.

Ethics of American Youth Decline

Recent studies conclude that the ethical quality of society has worsened in the last few decades. In fact, evidence suggests there is a continuing downward spiral with regard to the ethical and moral behavior of the college-age generation.

A comprehensive report by the Josephson Institute of Ethics entitled *The Ethics of American Youth: A Warning and a Call to Action* concluded that an unprecedented proportion of today's youth has severed itself from the traditional moral anchors of American society; honesty, respect for others, personal responsibility, and civic duty are all found lacking.[1] For evidence of this erosion in ethical values, consider some of the highlights of the report:

• **Dishonesty:** Cheating in college is rampant (about 50 percent at most colleges). Anywhere from 12 percent to 24 percent of resumes contain materially false information and there is an increasing willingness to lie on financial aid forms and in other contexts where lying benefits the applicant. Because teachers and employers have their own agendas, liars and cheaters are rarely caught and are seldom punished.

• **Civic Duty:** Young people are detached from traditional notions of civic duty. They are less involved, less informed, and less likely to vote than any other generation previously measured.

• **Ethical Values:** A significant proportion of the present 18 to-30-year old generation has adopted attitudes and ethical behavior patterns that subordinate the traditional moral principles of honesty, respect for others, and personal responsibility. Today's youth exhibit self-centered values stressing personal gratification, materialism, and winning at any cost.[2]

Further evidence of ethical and character erosion in America is found in the book, *The Day America Told the Truth—What People Really Believe About Everything that Really Matters*.[3] This treatise, based upon a national survey, takes a statistical look into the heart and soul of America's populace. The author's findings produce a disturbing portrait of a nation devoid of common morality. Among the "revelations" reported in this study are the following:

• Lying has become an integral part of the American culture. Individuals do not even think about it.

• The number one cause of business decline in America is unethical behavior by executives.

FIU Hospitality Review, Volume 12, Number 1, 1994

- There is an epidemic problem with "moral ambivalence." Most Americans see the great moral issues of this time in shades of gray rather than as clear-cut moral choices.
- The majority of Americans are malingerers, procrastinators, or substance abusers in the workplace.
- Americans have little respect for the property of others. They have a penchant for taking anything that isn't nailed down—from work, at stores, and on the road.[4]

Are Ethical Skills Carried into the Workplace?

Most students should enter their first jobs with a value system in place and a fairly well-developed character. They should feel a need to be ethical, to be confident in themselves, and to be proud of their profession. Self-esteem and self-respect depend on the private assessment of one's own character.

In a recent survey of psychological research, James R. Rest concluded that moral development continues throughout formal higher education and that a commitment to ethical behavior can be enhanced by well-developed educational interventions.[5] Acting ethically requires certain intellectual skills that develop with both maturity and formal education. Thus, the most critical period in the formation of operational or applied ethics occurs as students are about to graduate college and begin their careers. If ethical principles have been internalized during college, they will be readily carried into the workplace.

In one *FIU Hospitality Review* article, nearly 400 hotel managers responded to a questionnaire asking the degree to which they agreed or disagreed with 15 hypothetical scenarios.[6] Each scenario presented an ethical dilemma to be decided upon by a hypothetical manager. Respondents evaluated the way each scenario was handled and stated their opinion along a five-point Likert scale ranging from "strongly agree" to "strongly disagree."

The hospitality operators surveyed generally agreed (showed little ethical concern) with the scenarios considered as survival practices in the industry, which include hiring a professional snoop to spy on bartenders, advertising a discount from inflated rack rates, and overbooking reservations to compensate for chronic no-shows.

Respondents generally disagreed (showed ethical concern) with practices considered "wrong" or "dishonest" in terms of hospitality operations, including placing high cholesterol items on the menu because the manager prefers this type of food, walking a confirmed guest to accommodate an influential customer, taking advantage of a contractor to make repairs at the manager's residence, hiring part-time employees to avoid paying health insurance, providing guest names and addresses for educational fundraising purposes, accepting free wine from purveyors, and removing monthly service charges from large city ledger accounts.

FIU Hospitality Review, Volume 12, Number 1, 1994

In his study, Schmidgall assigned the remaining five scenarios to a category called "mixed results."[7] These five scenarios include accepting a large raise in spite of the fact the hourly employees receive nothing, asking a hotel employee to "moonlight" at the manager's residence, slipping $50 into a cashier's drawer to test integrity, reducing housekeeping time per room to lower labor costs, and purchasing additional stock upon hearing favorable (yet unpublished) earnings figures.

Hospitality Students Provide Replication

In an attempt to address preparedness of hospitality graduates with regard to ethical standards, a replication of Schmidgall's 1992 study was undertaken. Using the same 15 hypothetical scenarios, 82 graduating seniors from Northern Arizona University's School of Hotel and Restaurant Management were surveyed, with their responses plotted along the same five-point Likert scale. Data collected were processed using the crosstabs tables of SPSS-x.

As with lodging managers, graduating seniors generally agreed with practices commonly used for business survival (see Exhibit 1): 80.5 percent agreed to use a spotter in the bar (compared to 87.3 percent of lodging managers); 54.8 percent agreed on advertising inflated room discounts (compared to 70.1 percent of lodging managers); and 63.5 percent agreed on overbooking to compensate for guest no-shows (compared to 73.4 percent of the lodging managers).

Students generally matched lodging managers in disagreeing with the seven "wrong" or "dishonest" practices (see Exhibit 1): 78.1 percent of students disagreed with using a cholesterol-laden menu for their own satisfaction (69.5 percent of managers disagreed); 79.3 percent of students disagreed with bumping a confirmed reservation to accommodate a preferential guest (89 percent of managers disagreed); 50 percent of students disagreed with taking advantage of a contractor to repair their own residence (70.8 percent of managers disagreed); 79.3 percent of students disagreed with depriving workers of health benefits by hiring them as part-time employees (72.8 percent of managers disagreed); 84.1 percent of students disagreed with providing guest names and addresses for educational fund-raising purposes (91.9 percent of managers disagreed); 53.6 percent of students disagreed with accepting free wine from purveyors (65.5 percent of managers disagreed); and 70.6 percent of students disagreed with removing monthly service charges from large city ledger accounts (78.1 percent of managers disagreed).

Student Attitudes Parallel Those of Managers

With regard to the five scenarios categorized under "mixed results," senior HRM students generally paralleled lodging managers:

FIU Hospitality Review, Volume 12, Number 1, 1994

47.5 percent of students agreed with accepting a large raise in spite of the fact the hourly employees received nothing (35.6 percent of managers agreed); 45.1 percent of students agreed with asking a hotel employee to "moonlight" at the manager's residence (55 percent of managers agreed); 37.9 percent of students agreed with slipping $50 into a cashier's drawer to test integrity (62.1 percent of managers agreed); 28 percent of students agreed with reducing housekeeping time per room (31 percent of managers agreed); and half of the students agreed with purchasing additional stock upon hearing favorable (yet unpublished) earnings figures (45.2 percent of the managers agreed).

Hospitality managers face decisions with ethical implications on a fairly routine basis. The method in which they handle those decisions can have a significant impact on the success or failure of the organization.[8]

The School of Hotel and Restaurant Management at Northern Arizona University incorporates the teaching of ethics into its Hospitality Introduction, Senior Seminar, and Hospitality Law courses. It may be for this reason that the perceptions of seniors were comparable to industry managers in terms of the ethical dilemmas designed by Schmidgall.

Ethics Must Be Taught

The approach to ethical decision-making suggested by the Josephson Institute of Ethics is grounded in 10 major principles which form the basis for decisions and establish the standards or rules of behavior within which an ethical person functions. They should form the basis for an integrated hospitality ethics program: Honesty, integrity, promise-keeping, loyalty, fairness, concern for others, respect for others, law-abiding, commitment to excellence, and accountability.[9] Integration of these topics into the curriculum should result in an increased awareness of ethical considerations among future hospitality managers.

An ethical decision-making model was initially introduced in a publication entitled *Making Ethical Decisions*.[10] In this model, Michael Josephson, president of the Josephson Institute of Ethics, suggests three steps:

- Decisions must reflect a concern for the interests and well-being of all stakeholders.
- Ethical values and principles always take precedence over nonethical ones.
- It is only proper to violate an ethical principle when it is clearly necessary in order to advance another true ethical principle. And, it is only proper to do so if, according to the decision maker's conscience, it will produce the greatest balance of good in the long run.

FIU Hospitality Review, Volume 12, Number 1, 1994

During the 1980s, scores of books and hundreds of articles in professional journals and industry magazines were written on the topic of business ethics, or, more often, the lack thereof. In addition, a dozen or more applied ethics centers were created at universities throughout the country to study and teach about business ethics. While this new concern for ethics seemed to be everywhere in the 1980s, Andrew Sikula predicts that "the 1990s will be an era in which management ethics will be the focus of administrative activities."[11] For this supposition to become true, hotel and restaurant management programs need to integrate an ethics curriculum into their classrooms.

References

[1]*The Ethics of American Youth: A Warning and a Call to Action,* (Marina Del Rey, CA: The Josephson Institute of Ethics, 1990), p. 1.

[2]*Ibid.*, p. 2.

[3]J. Patterson and P. Kim, *The Day America Told the Truth*, (New York: Prentice Hall Press, 1991).

[4]*Ibid.*, pp. 235-239.

[5]J. Rest, *Development in Judging Moral Issues.* (Minneapolis: University of Minneapolis Press, 1989), pp. 88-93.

[6]R. Schmidgall, "Hotel Managers' Responses to Ethical Dilemmas," *FIU Hospitality Review*, (Spring 1992), pp. 11-18.

[7]*Ibid.*,

[8]Patterson and Kim, *op. cit.*, p. 237.

[9]M. Josephson, "Teaching Ethical Decision-Making and Principled Reasoning," *Ethics: Easier Said Than Done,* (Winter 1988), pp. 27-33.

[10]M. Josephson, *Making Ethical Decisions*, (Marina Del Rey, CA: The Josephson Institute of Ethics, 1991), p. 3.

[11]A. Sikula, *A New Environmental Ethical Era*, Proceedings from the Fourth Annual National Conference on Ethics in America, Long Beach, CA, 1993, pp. 93-94.

Matt A. Casado is assistant professor, **William E. Miller** is associate professor and director of the Marion W. Isbell Center for Hospitality Ethics, and **Gary K. Vallen** is assistant professor in the School of Hotel and Restaurant Management at Northern Arizona University.

FIU Hospitality Review, Volume 12, Number 1, 1994

Exhibit 1
Comparisons Between Lodging Managers and HRM Seniors in Three Categories

Category 1: Comparison of practices considered necessary for business survival in the hospitality industry.

Scenario Number/Title:	Agreement		Unsure		Disagreement	
	Man.	Stud.	Man.	Stud.	Man.	Stud.
3 Spotter Spies	87.3	(80.5)	3.3	(2.4)	9.4	(17.1)
13 Price Reduction	70.1	(54.8)	7.3	(17.1)	22.6	(28.1)
15 Overbooking	73.4	(63.5)	4.8	(6.1)	21.8	(30.5)

Category 2: Comparison of practices considered dishonest in the hospitality industry.

Scenario Number/Title:	Agreement		Unsure		Disagreement	
	Man.	Stud.	Man.	Stud.	Man.	Stud.
2 New Menu	21.6	(12.1)	8.9	(9.8)	69.5	(78.1)
5 Bumped Reserv.	6.4	(18.3)	4.6	(2.4)	89.0	(79.3)
6 Roof Repair	23.1	(39.0)	6.1	(11.0)	70.8	(50.0)
8 Fringe Benefits	18.3	(9.7)	8.9	(11.0)	72.8	(79.3)
9 Education Mat'l	4.6	(9.8)	3.5	(6.1)	91.9	(84.1)
10 Free Wine	23.9	(39.0)	10.6	(7.3)	65.5	(53.7)
12 Service Charge	15.0	(20.8)	6.9	(8.5)	78.1	(70.7)

Category 3: Comparison of "mixed results" scenarios.

Scenario Number/Title:	Agreement		Unsure		Disagreement	
	Man.	Stud.	Man.	Stud.	Man.	Stud.
1 New Salary	35.6	(47.5)	16.2	(4.9)	48.2	(47.6)
4 Yard Work	55.0	(45.1)	6.9	(15.9)	38.1	(39.0)
7 Cash Integrity	62.1	(37.9)	9.4	(24.4)	28.5	(37.8)
11 Work Standards	31.0	(28.0)	11.2	(11.0)	57.8	(61.0)
14 Stock Purchase	45.2	(50.0)	21.3	(19.5)	33.5	(30.5)

FIU Hospitality Review, Volume 12, Number 1, 1994

FIU Hospitality Review, Volume 12, Number 1, 1994

decor could be trademarked because of its distinctiveness, and, therefore, be protected from being copied by others. The Court ruled that, provided certain criteria were met, a decorative style could be trademarked.

It has been said that there are only five basic plots and that literature is mainly variation on a handful of themes. Is it possible that the same lack of originality and differentiation could be true of restaurants and hotels? Or should the theme, decor, style, and service of a restaurant be viewed as an individual expression so unique and attractive to consumers that it should be protected as an asset?

According to a recent United States Supreme Court decision, the image, decor, or "trade dress" of a restaurant can be protected under trademark law from being copied, even if the image has not been formally registered with the Patent and Trademark Office. Protection is available even if customers have not yet come to associate that particular style or image with the restaurant in question.

In the recent opinion, *Two Pesos, Inc. v. Taco Cabana, Inc.*,[1] (referred to as *Taco Cabana*) the U. S. Supreme Court found that a restaurant's trade dress or decor is protectable if it is "inherently distinctive." Trade dress is inherently distinctive if it is capable on its own of indicating the restaurant (or hotel) it represents. For example, if shown a photograph of the interior of a Hard Rock Cafe, most people who have been to the restaurant or who know what it is supposed to look like would be able to identify it as a Hard Rock Cafe. At the very least, a person would be able to state that the decor of the restaurant is very distinctive and that the style probably belonged to only one restaurant (or chain).

FIU Hospitality Review, Volume 12, Number 1, 1994

Many in the hospitality industry, restaurant and hotel businesses alike, believe that their decor and design is the visual representation of their product. In fact, success for many hospitality businesses is based in large part on the uniqueness of the decor or ambiance. What is an entrepreneur to do? Clearly, one can only go so far in picking up on a good idea. The remaining questions are, how far can one go, and how does a restaurant or hotel show that its image is inherently distinctive and that no one else should be allowed to copy it?

Lanham Act Deals with Copying

The Trade-Mark Act of 1946, also known as the Lanham Act, sets forth the prohibitions regarding the copying of goods and services. Section 43 (a)[2] of the act states, in relevant part, that:

> (1) Any person who ... in connection with any goods and services, ... uses in commerce any word, term, name, symbol, or device ... or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
>
> > (A) is likely to cause confusion ... mistake, or ... deception as to the ... origin ... of his or her goods, services, or commercial activities ...shall be liable in a civil action by any person who believes that he is or is likely to be damaged by such act.[3]

From such legalistic language comes the concept of the trademark. Trademarks represent protection from infringement on one's ability to do business because of copying ideas or misrepresentation (of such things as ownership or affiliation) by another party.

The Lanham Act defines a trademark as "any word, name, symbol or device or any combination thereof ... used ... to identify and distinguish ... goods ... from those manufactured or sold by others and to indicate the source of the goods ...."[4] There are two categories of trademarks: those which are formally registered, and those which qualify as trademarks but are unregistered. Both types are protected under the Lanham Act through use of the same criteria.[5] To be protected from copying, the mark (or decor) must show that the goods in question come from or represent a particular source, such as a restaurant. Generic marks and those which are only descriptive of the product are not protected.[6] The question then is, how can a restaurant's or hotel's image become a mark?

The "mark" of a restaurant's decor or ambiance is called "trade dress," which consists of "the total image of a business."[7] Initially, trade dress cases involved the dress (packaging) of a product, or the display of a product. The Ninth Circuit Court of Appeals, in addressing for the first time a restaurant's desire for protection of trade dress, stated the following:

FIU Hospitality Review, Volume 12, Number 1, 1994

> This case expands the boundaries of trade dress infringement, seeking protection for a combination of elements employed in the marketing of restaurant services. Fuddruckers' suit seeks protection for more than the visual elements of a package or restaurant exterior. Fuddruckers claims that it is entitled to protection of the total visual image of its restaurant services under the rubric of trade dress protection.[8]

In *Taco Cabana*, the Fifth Circuit Court of Appeals approved the district court's statement that "trade dress may include the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior kitchen floor plan, the decor, the menu, the equipment used to serve food, the servers' uniform and other features reflecting the total image of the restaurant."[9] Should one or a combination of elements clearly point to their source, the image or style of the restaurant can be protected from being copied by others.

Taco Cabana Sets Up Requirements

The *Taco Cabana* case as decided by the Supreme Court, however, shows that the requirements for protection of trade dress include more than simply showing that a particular restaurant has a certain type of decor. The first requirement is that the complaining restaurant must prove that the image, or sum of its parts making up the image, is "nonfunctional" and that it is either "inherently distinctive" or, if not inherently distinctive, has acquired a "secondary meaning."[10]

To protect the decor of a restaurant from being copied by other restaurants, a restaurant owner will have to show that the decor is what is legally termed as "nonfunctional."[11] In other words, the owner must demonstrate that the image or combination of items in the image for which protection is being sought are not items required by others in order to compete in the marketplace. The word "nonfunctional" might be better termed "unnecessary." The intent of trademark and trade dress protection is to guarantee fair competition. Fair competition is promoted when businesses are prohibited from copying the original or innovative design ideas of others.

On the other hand, the law realizes that many items and ideas necessary to the industry must be available to marketplace competitors and therefore may not be protected as a part of design. For example, a restaurateur could not receive trade dress protection for using a cash register on the premises, thereby keeping all others from using cash registers, since a cash register is a functional item, not unique to one particular restaurant's decor. Citing the Fifth Circuit, the Supreme Court stated that, "a design is legally functional, and thus unprotectable, if it is one of a limited number of equally efficient options available to competitors and

FIU Hospitality Review, Volume 12, Number 1, 1994

free competition would be unduly hindered by according the design trademark protection....This serves to assure that competition will not be stifled by the exhaustion of a limited number of trade dresses."[12] Thus, most fast food restaurants contain a counter, a menu board, a drive-thru, a visible kitchen, and a dining area. The fast food industry would be at a disadvantage if only one company was able to claim this sort of design as its "trade dress" because these items are fairly necessary to the operation of a fast food business.

Requiring a showing of nonfunctionality does not mean, however, that each item included in the decor or trade dress must be mechanically or technically nonfunctional. Many of the items found in the decor and interior design of a restaurant are highly functional as individual items. It is the combination of those many items which make up the ambiance of the restaurant that must be nonfunctional, that is, not necessary to others in the industry to do business. Here, the whole (the restaurant's decor) can be more than just the sum of its parts (tables, chairs, neon, plants). For example, imagine that a seafood restaurant has a bar which is a large 12 foot-long aquarium. The cocktail tables are also aquariums; the dining tables are small glass-topped boats filled with shells; food is served in large shells, and the wait staff is allowed to dress in any type of nautical outfit they can come up with. Under the holding in *Taco Cabana*, the restaurant owner could keep others from duplicating this decor.

However, other restaurant owners could not be prevented from using aquariums, shells, or boats so long as those items were not put together as were the items in the previous example. As the Court of Appeals in *Taco Cabana* stated, "Taco Cabana cannot preclude Two Pesos or anyone from entering the upscale Mexican fast-food market....A competitor can use elements of Taco Cabana's trade dress, but Taco Cabana 'can protect a combination of visual elements that, taken together,...may create a distinctive visual impression.'"[13] Some of those visual elements may be functional and, on their own, both unprotectable and copyable, but when those elements, both functional and nonfunctional, are combined in a certain way, the total effect maybe protectable.

Inherent Distinctiveness Must Be Established

Another point which a restaurant or hotel must establish in order to gain protection for its interior design is that such design is "inherently distinctive." A trade dress which is inherently distinctive is one which, on its face, specifies the origin of the product, origin meaning the company or organization which created the product. The Court of Appeals in *Taco Cabana* approved the district court's definition of distinctiveness as a term "used to indicate that a trade dress serves as a symbol of origin" which "distinguishes...products and services from those of other restaurants. . ."[14]

FIU Hospitality Review, Volume 12, Number 1, 1994

In order to be deemed inherently distinctive, the restaurant's trade dress must not be merely descriptive; it must be more than just somewhat indicative of the source of the product or the product itself. If trade dress is only descriptive, it merely "'identifies a characteristic or quality of an article or service'...such as its color, odor, function, dimensions or ingredients."[15] Of course, there may be singular items within the makeup of the trade dress which are descriptive, just as there may be some items which are functional. However, taken as a whole, the trade dress must be distinctive and not just descriptive in order to gain trade dress protection.

Taco Cabana stated that its trade dress consisted of a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings, and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme.[16]

The jury in *Taco Cabana* found that the elements of Taco Cabana's decor and design, taken as a whole, were not descriptive or functional, although various individual items (like awnings and umbrellas) could be. The jury further found that the decor and design were inherently distinctive so that the decor specified Taco Cabana as its source of origin.[17]

The main issue considered by the Supreme Court in *Taco Cabana* was whether a restaurant should be required to show that even an inherently distinctive decor had acquired a "secondary meaning," a significance based on public use or identification. What Two Pesos wanted the Supreme Court to hold was that, in order to gain protection for its decor Taco Cabana would have to show not only that the decor itself identified its source as being Taco Cabana, but that the decor "had come through use to be uniquely associated with a specific source."[18] The Supreme Court declined to impose this additional burden on businesses seeking protection for trade dress, provided the dress was inherently distinctive. If, for some reason, a business could not satisfy the requirements necessary to show such distinctiveness, but could show that, through use, the public identified the decor as uniquely belonging to that business, then such decor deserved protection from being copied by others. The Court could see no reason for making the difficult task of showing the distinctiveness of a restaurant's interior design or ambiance more difficult, and, in fact, felt that to do so "would undermine the purposes of the Lanham Act. Protection of trade dress, no less than that of trademarks, serves the Act's purpose to 'secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers...'"[19]

FIU Hospitality Review, Volume 12, Number 1, 1994

Consumer Confusion Is a Key

In order, then, for a restaurant's or hotel's image to be protected from copying, the business must show either that the image is inherently distinctive or has acquired a secondary meaning. Once protectability has been established, the business must then show that the hotel or restaurant being sued has a decor so similar that consumers are very apt to confuse the two. While proof of consumers actually confusing the two businesses is helpful, it is only one of a number of items that might show what is known as the "likelihood of confusion."[20] Other evidence which would indicate that consumers are likely to confuse the two businesses can include the following:

> (a) the type of trade dress at issue; (b) the similarity between the trade dresses; (c) the similarity of products or services provided; (d) whether plaintiff and defendant were in market competition for the same customers; (e) whether plaintiff and defendant were likely to use the same advertising media; (f) defendant's intent in its adoption of its restaurant trade dress; and (g) instances of actual confusion.[21]

If the restaurant suing for protection can show that the similarity in decor is enough to confuse consumers, then the copycat restaurant will be liable for unfair competition. If the suing restaurant cannot establish that the images are likely to confuse, then, even if there is inherent distinctiveness in the design, there has been no illegal copying. The jury in *Taco Cabana* found that the similarity of image and design between Taco Cabana and Two Pesos was such that consumers would likely be confused and that, therefore, Two Pesos had unfairly competed against Taco Cabana.[22]

Once unfair copying has been established, money damages must be assessed. The question here becomes how much an image is worth and on what basis should this worth be assessed. The Lanham Act states that a plaintiff may recover "(1) defendant's profits, (2) any damages sustained by plaintiff, and (3) the costs of the action."[23] The Court of Appeals in *Taco Cabana* agreed that a proper measure of damages included the profits lost by Taco Cabana when Two Pesos foreclosed a major and natural market for Taco Cabana; Two Pesos had taken over the "upscale Mexican fast food" market in a town which would have been a natural next step for Taco Cabana. In using this "headstart theory," the court approved the jury award of $306,000 in lost profits and $628,300 in lost income.[24]

The Lanham Act also allows the court to assess up to three times the amount of actual damages, plus reasonable attorney fees, depending on the circumstances surrounding the case.[25] The Court of Appeals upheld the district court's assessment of damages at twice the amount of actual damages, or $1,868,600, and

FIU Hospitality Review, Volume 12, Number 1, 1994

attorney fees amounting to $937,500, noting that the district court found evidence of willful infringement on the part of Two Pesos.[26] Additionally, Two Pesos was required to make changes to its image and decor, and to inform customers, through use of a sign posted in the restaurant, that Two Pesos had unfairly copied Taco Cabana.[27] In affirming the Fifth Circuit, the U.S. Supreme Court did not disturb this award of damages. There is obvious incentive here for a restaurant or hotel operation which has had its image "lifted" to pursue a claim against the copier.

There are currently several hospitality industry lawsuits being pursued for trade dress infringement. For example, the Hard Rock Cafe feels that the restaurant, Planet Hollywood, has come far too close to the Hard Rock Cafe image and ambiance to avoid any customer confusion.[28] Microtel recently won a $2.5 million suit against Choice Hotels for use of a trade secret guest room design.[29] The possibilities for concept copying suits in the hospitality industry are many. A restaurant owner may bring suit not only under the Lanham Act, but also under state law. Many states have statutes prohibiting copying under theories such as a tort claim for misappropriated trade secrets or a contract claim for franchise agreement violations. There is also the possibility of expanding the mark or trade dress of a restaurant or hotel to include the type or style of service used on the property, for example, food servers who spontaneously break into song, dance, impressions, and skits in order to create a "hip" or patron interactive atmosphere in a restaurant. Images or designs which could be termed innovative, attention-getting, or unique in the hospitality industry could become the subject of concept copying lawsuits. As markets become more narrowly defined and businesses aim specifically in terms of atmosphere and image at those narrow markets, the chances for such suits will increase.

The amount of damages which may be awarded in a concept copying or trade dress infringement case should cause those who wish to enter the hospitality industry by using an already tested concept to realize that the use of another restaurant's or hotel's image or decor is serious business. Statutes which prohibit such copying are written in regard to fair competition and reasonable business practices. While it may sometimes be difficult for a hospitality business to prove all of the requirements of an action for trade dress infringement, it is far from impossible and there is great financial incentive to do so. As the Supreme Court said in *Two Pesos*, "National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation."[30] When a restaurant or hotel has produced as part of its product a popular atmosphere through its decor and design, it should be allowed to "enjoy the benefits" of its good reputation.

FIU Hospitality Review, Volume 12, Number 1, 1994

References

[1]*Two Pesos, Inc. v. Taco Cabana, Inc.*, U.S. 112 S. Ct. 2753 (1992).

[2]Trade-Mark Act of 1946 (Lanham Act), ch. 540, § 43a, 60 Stat. 441 (1946) (codified as amended at 15 U.S.C.A. § 1125a (West Supp. 1993)).

[3]15 U.S.C.A. § 1125(a) (West Supp. 1993).

[4]15 U.S.C.A. § 1127 (West Supp. 1993).

[5]*Taco Cabana*, 112 S. Ct. at 2757.

[6]*Id.*

[7]*Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113,1118 (5th Cir. 1991).

[8]*Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 841 (9th Cir. 1987).

[9]932 F.2d at 1118. See also, *Blue Bell Bio-Medical v. Cin-Bad, Inc.*, 864 F.2d 1253, 1256(5th Cir. 1989).

[10]112 S. Ct. at 2758.

[11]*Id.* at 2760.

[12]*Id.* (citations omitted).

[13] 932 F.2d at 1118 (quoting *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F. 2d 837, 842-43 (1987) (citations omitted)).

[14]*Id.* at 1120.

[15]*Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790 (5th Cir. 1983) (citations omitted).

[16]*Taco Cabana*, 932 F.2d at 1117.

[17]*Id.*

[18]Restatement (Third) of Unfair Competition § 13, cmt. e (Tent. Draft No. 2, 1990).

[19]*Two Pesos*, 112 S. Ct. at 2760 (quoting Park' N Fly v. Dollar Park and Fly, Inc., 469 U.S. 189, 198, (1985) (citations omitted)).

[20]*Taco Cabana*, 932 F.2d at 1122.

[21]*Id.* at n.9.

[22]*Id.* at 1117, 1122.

[23]15 U.S.C.A. § 1117(a) (West Supp. 1993).

[24]932 F.2d at 1125-26.

[25]15 U.S.C.A. § 1117 (West Supp. 1993).

[26]*Taco Cabana*, 932 F.2d at 1127-28.

[27]*Id.* at 1125.

[28]Richard Martin, "Hard Rock Hits Planet Hollywood With Copycat Suit," *Hotel Motel Management*, (March 1992), p. 3.

[29]Tony Dela Cruz, "Choice Hotels Loses Suit Over Microtel's Design," *Hotel Business*, (October 21, 1992), p. 1.

[30]*Taco Cabana*, 112 S. Ct. at 2760 (quoting Park' N Fly v. Dollar Park and Fly, Inc., 469 U.S. 189, 198. (1985) (citations omitted)).

Jolie R. Gaston is an assistant professor of hotel law in the William F. Harrah College of Hotel Administration at the University of Nevada, Las Vegas.

FIU Hospitality Review, Volume 12, Number 1, 1994