



THE PASC UK GHOSTING PAPER VERSION 3

Self-catering holiday homeowners are continuing to see their listings on some online travel agencies (OTA) and some self-catering agencies after they have removed their accommodation from the service. The use by OTAs and agents of properties (or details, photos and descriptions of properties) they are no longer agent for is being termed “ghosting” and could significantly harming homeowners’ businesses.

What is ghosting?

Ghosting is when holiday homeowners request removal of their listings from online travel agencies’ and some self-catering agency booking sites website, but they continue to advertise the listing, either on their core website or on ancillary listings (e.g. Google and Expedia). This means consumers are still engaging with the OTA or agency via the advertisement for the original property. When the consumer interacts with that advertisement, they are told that the property is fully booked/not available and are usually presented with alternative comparable options (based on cost/location/property type). This practice continues to increase traffic to the OTA’s or agency website.

Some of the platforms that do this advertise that they list your property on hundreds of other platforms. When you come to leave the service, getting these removed becomes additionally difficult as the homeowner did not place the listing, so in many cases holiday homeowners will need to get the original platform they signed up with to ask for removal. As the holiday homeowner is no longer with them, this is hardly a priority.

If you are thinking of signing up with one of these platforms it may be possible to negotiate that they will remove all details of your property on all platforms that they put them on when you come to terminate the contract. Good properties are in great demand currently and rather than just focussing on the lowest commission rate, holiday homeowners should look at these clauses too.

At law, ghosting is usually an infringement of a property owner’s intellectual property rights (IPR). In order to reduce the risk of ghosting a property owner should ensure their IPR is properly protected.

An increasing practice is for OTAs/agents to specifically grant themselves permission to use a property owner’s IPR in respect of a property even after the property is removed from the OTA’s/agents website. It is very important to make sure you have read and fully understand the OTA’s/agents terms and conditions before agreeing to them – the terms and conditions are a negotiable document and you should ensure you are entirely happy with them and understand the effect of entering in to the contract before you do so. Terms and conditions can include clauses that strip away, dilute or restrict IPRs, leaving you with little control over the advertisement and marketing of your property on these websites. Seeking legal advice can help you navigate the terms of the agreement and ensure that you are fully protected.

What to do to stop it

If you are about to sign up with an OTA/agent platform, and you have checked the contract and it includes the perpetual right to images, etc, you could write to them and simply state that you will not sign up to the platform if they don't give you an undertaking to remove all your images and content when you leave the platform. This is unlikely to work with uncontactable offshore OTA's but could work with UK based agents, particularly if you have a desirable property that they are keen to let. There is no good business case that we can think of for ghosting, so it's likely that you could secure agreement at this early stage.

It may also be possible to get the Agent to give you an undertaking to remove all images content when you leave if you are under contract with them, and the contract includes the clause about perpetual rights to use images, content etc. You could simply say that if they do not agree to that undertaking you will serve notice. Again, if you have a property that generates good bookings for them, there is no real cost to them agreeing to do this.

Protect Your Intellectual Property Rights

Register your trade mark

Registering your property name/logo as a trade mark will give you the exclusive right to prevent others from using your mark. A trade mark is an asset and it can be exploited to increase revenue and protect you from others trying to use your marks without your consent. If someone does try to use your mark, this will be a form of trade mark infringement and you can take legal action. Other than giving you legal protection, your trade mark also prevents confusion in the marketplace. If OTA's/agents advertise your letting using your registered trade marks without your permission, you will likely have a strong case of trade mark infringement against them.

Passing Off

If you have been using your trade mark, but not secured a registration, it may still be possible to take action against someone who is using your mark without your permission. This can be done under the action of "passing off." Establishing "passing off" is normally higher from an evidential standpoint, but it protects all ways in which a claimant's product or business may be identified, stops others as "passing off" as representing your business and is not confined only to marks that meet the criteria for registration.

In most circumstances a claim for passing off need to meet this three-part test:

- Existence of a reputation or goodwill in the trade mark and;
- The other party made a misrepresentation that led to confusion between your product and the offending product; and
- Whether damage has been caused to your reputation by virtue of any confusion established.

Goodwill is the "benefit and advantage of a good name, reputation and connection of a business." It is important to prove that the public associates the trade mark with the claimant's business. The claimant must also show that their mark distinguishes their business and the services they provide from others. It is not enough for consumers to simply know that a particular brand identifies with certain goods and services – in practice this means the test can be very hard to "pass".

The second element is for the claimant to prove that the defendant's misrepresentation has led or is likely to lead to confusion and deceit. They must also prove that it misleads a

proportion of the public into believing that their goods and services belong to the claimant's business. The deception does not need to be intentional.

For the final element, the damage must arise from the consumer's reliance on the defendant's misrepresentation. This can arise where the claimant has lost sales because of the defendant's misrepresentation or as a result of dilution to their reputation.

In some circumstances, sending a letter claiming that passing off has been committed will be enough to solve the issues with OTAs/agents. However, OTAs/agents have recently become aware of this tactic and often challenge passing off claims, due to the subjective nature of the three-part test. They are also more likely to challenge you, or ignore your letter, if they have been granted an exclusive licence over your IPRs.

A trade mark cannot be descriptive or non-distinctive; e.g. "The Old Corn Barn" is not capable of protection. Higher Wiscombe would also not be capable of protection. This is because it is a geographical location and therefore does not distinguish the good and/or services of the proprietor from those from other providers. However, if a mark is stylised (i.e. an element of distinctiveness is introduced) then it may be capable of protection. An example is given below.



If you obtain protection for your stylised mark it is important that you then consistently and comprehensively use that mark in trade (e.g. as a water mark or logo on images, on website banners, documentation and any marketing materials).

In the UK, the trade mark process from filing to registration typically takes around 4 months if there are no substantial refusals or oppositions raised. The official fees for a standard trade mark application in 1 class costs £170 with each additional class costing £50. Once a mark is filed it cannot be amended, so we recommend trade mark applications are conducted by a professional on your behalf. Stephens Scown are one of the largest trade mark filers in the UK and have dedicated trade mark professionals who can obtain trade mark protection for you from £430 (+ VAT) (plus official filing fees).

Assignment

The general rule is that the individual that created the work, including photographs, videos, marketing material, owns the material. If you hire a photographer to take photographs of your properties, unless you assign the rights to yourself, you do not own the photos. It is the same if the OTA/agent took photos of your property (or arranged for the photography) to use for advertisement on their website; they own the work and the copyright.

To avoid this problem, it is important to include in a contract that all the work will be assigned over to you. Assignment is an outright transfer of an owner's rights, title and interests in certain intellectual property rights (IPRs). The transferring party (the "assignor") transfers to the receiving party (the "assignee") its ownerships in IPRs.

Negotiate the contract

Self-catering accommodation owners are not protected by consumer laws when it comes to dealing with OTAs/agents. As such, their relationship with OTAs/agents is often not fair –

OTAs/agents may have onerous conditions in the contracts. You should not agree to terms you have not read, do not understand or are unfairly weighted against you.

Even where you have a registered trade mark and can prove ownership of your copyright, an OTA/agent may have a sophisticated intellectual property clause in the contract that grants them a licence (i.e. right to use) the same, even after the contract has ended. This could mean that once you sign up to using their platform, you allow your IPR to be used by the OTA/agent as they see fit. The wording may vary but key terms to watch for are “irrevocable”, “perpetual”, “exclusive” licence to use your photos, videos, marketing material, etc. Once the agreement is signed, you will not be able to remove that permission and it will be near impossible to get those intellectual property rights back – even if you have registered trade mark rights, they could be subject to this licence and become unenforceable against an OTA/agent. This would make it more difficult to argue that the OTA/agent is “ghosting” your letting, as they have a right to use your IPR.

5 steps to stop being ghosted

1. Identify if you are being ghosted

If you attended the webinar, you can follow Clockwork’s instructions on how to identify whether you’re being ghosted. If not, the webinar recording is available here: <https://www.pascuk.co.uk/webinars/>

Otherwise, the following steps can help you search for your accommodation on OTA/agent websites:

- a. Open Google Chrome and search for a photo of your accommodation either through your own website, on Google images or on an OTA/agent website.
- b. Right click on the image of your accommodation.
- c. Select “Search Google for image.”

2. Make a list

Make a list of the OTA/agent websites who are continuing to use your accommodation photos after you have requested removal of your listing.

3. Check whether you have (or had) a contract in place with the OTA/agent

If you do, check the terms in the contract to ensure the OTA doesn’t have a right to use your imagery.

4. Send a letter

Send the suggested letter by email to each of the OTA/agent websites that are ghosting you. In the letter, you should tell them to remove your images and content from their website. You should set a deadline by which images should be removed.

5. Take Advice

If the OTA/agent continues to use your imagery, refuses to cease use or just don’t respond, you should seek legal advice.

Stephens Scown have developed a specific package to help self-accommodation businesses deal with ghosting. We charge a fixed fee of £800 (+ VAT) to:

1. conduct an initial review of the OTA/agent terms and conditions (focussed the issues of termination, IPR licenced and continued marketing);
2. give initial advice on the legal position provided by email; and
3. provide a precedent letter which can be used as a basis for writing to an OTA/agent to request cessation of the property owner’s IPR/use of the Property.

Stephens Scown can offer bespoke services specific to your needs in addition or instead of the above. For more information, you can contact them [here](https://www.stephens-scown.co.uk/business/specialist-sectors/leisure-and-tourism): <https://www.stephens-scown.co.uk/business/specialist-sectors/leisure-and-tourism>

Since publishing version 1 of this paper other solutions have been successful for holiday homeowners.

These are worth investigating too.

SOME OTHER OPTIONS TO CONSIDER

If you don't want to start by going through the suggestion above, then here are a couple of other routes. If these don't work, some Trading Standards officers will take it more seriously than others and the ASA may also vary in its responses you may need to consider the options above.

It is always best to try and get the offending platform to remove images by asking them nicely first. If at first you don't succeed you may have to keep trying, persistence can pay off.

APPROACH 1

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibits 31 commercial practices which are unfair in all circumstances. One of these practices is described as:

Making an invitation to purchase products (or services)... without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able offer to supply, or to procure another trader to supply those products(or services)...

Businesses that carry out a prohibited commercial practice are guilty of a criminal offence. Moreover these are "strict liability offences". This means that it only has to be demonstrated that the prohibited act has occurred; there is no need to demonstrate intent to mislead a customer.

Enforcement of the CPRs is primarily the responsibility of Local Authority Trading Standards Services. So one route to getting the ghost listings stopped would be to contact the relevant Trading Standards and ask them to take action. Note: you may need to go through your local Citizens Advice Bureau first.

Alternatively, property owners could send an email to the platform that is ghosting the property direct to the management of the platform saying that they are listing the owners' property in contravention of the Consumer Protection from Unfair Trading Regulations 2008.

Depending on how strongly you feel you could then state that by listing the property on the platform (and allowing it to appear on secondary websites) the platform is

carrying out one of the 31 Prohibited Practices set out in the legislation and this is a criminal offence.

You could state that unless the listing of your property is removed from the platform, and all secondary websites, within, say, 7 days, you will notify the relevant Trading standards of this criminal offence and that you will press for individual officers and the body corporate to be prosecuted and punished.

You will need to gather appropriate evidence to show to Trading Standards if it goes that far (dated screen shots should suffice) but I would anticipate that platforms will not want to risk criminal prosecution and will act promptly.

APPROACH 2

If you have contacted a platform about a Ghost Listing, and they have failed to remove a property from their website in good time, you can make a complaint to the Advertising Standards Authority. Their online complaint form is easy to complete and you can upload images.

<https://www.asa.org.uk/make-a-complaint.html>

In January 2021 the ASA made a ruling (see below) against an estate agency that had been advertising a property for several years after it had been withdrawn from the market. This is the real estate version of 'ghosting'.

https://www.asa.org.uk/rulings/overstreet-co-uk-a20-1073146-overstreet-co-uk.html?fbclid=IwAR30vAOmIGhEWRgJsX0_Fci89Gv2vm0BGWVIUnr1r60XKXj3i3LrAGCDedg

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