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& By: Commentary: Steve Fedder @ February 2, 2017

The new film "The Founder" is an ironically titled story of how the real-life Ray Kroc leveraged a single fast-food restaurant Dick and Mac McDonald started into an international franchise phenomenon – without the brothers. A dark and mostly realistic bioplc, the film reveals that the self-described visionary Kroc was neither the founder of McDonald's nor the founder of modern franchising, yet he is often mistakenly credited with both. (Isaac Singer, the inventor of the Singer sewing machines is generally credited with having started franchising in the United States in the 1850s. Still, the film offers some real world franchise insights.

Michael Keaton is brilliantly cast as Ray Kroc, an ambitious-but-less-than successful salesman of milkshake machines to drive-in style restaurants of the early 1950s. While following-up on his first large order, Kroc discovers the distinctive, assembly-line process and carryout food format the California-based McDonald brothers developed for their successful hamburger stand. Not to let this good idea go to waste, Kroc nearly stalks and ultimately convinces the brothers to let him franchise their business, using the brothers' trademark (McDonald's), trade dress (the golden arches design), and unique, speedy method of doing business.

Wanting to maintain the quality of their operations in the franchises, the McDonalds reserve the right to control all decisions relating to the products and methods of operation. Without having his own lawyer present for a contract signing, Kroc agrees to receive 1.5 percent of the McDonalds' businesses from franchise sales. When later asked whether he thought it was a mistake for the McDonalds to share their assembly-line operations, Kroc scoffs. It was "that glorious name, 'McDonald's,''' he says. "I had to have it."

Facing money troubles due to the small returns on the franchising royalties, Kroc encounters Harry Sonnenborn, a former vice president at Tastee Freez, another growing franchise. Sonnenborn helps Kroc see the way to achieve real money was in owning the real estate to lease back to the franchisees. Kroc started doing just that, leading to McDonald's immense growth and a not-too-surprising rift with the McDonald brothers over quality and growth. Lacking the resources to fight Kroc in legal disputes, the brothers are forced to accept a \$2.7 million buyout from Kroc in 1961 and could not even enforce royalty rights. Worse yet, Kroc used the courts to sue them to the point they could not use their own name to identify their remaining, original restaurant.

Required viewing

The three principal elements of franchising are a recognizable trademark; the payment of a fee; and significant control over the method of doing business. "The Founder" demonstrates the importance of all three and should almost be required viewing for those interested in franchising their business concept or purchasing a franchise from an existing system.

The film raises a number of issues pertinent to any franchising decision:

- Does the concept have a trademark that will be recognized as representative of a quality product or service by potential consumers?
- Is the mark sufficiently unique so as to associate the goods or services with your business and not be confused with the goods and services of another?
- Is the mark protectable under state and federal trademark laws?
- Does the product or service have appeal beyond a narrow geographical or ethnic market?
- Is there sufficient capital to promote the brand and assure quality control and adherence to system standards?

Dick and Mac McDonald had a terrific trademark, but they didn't protect it. They had devised a unique and effective operating method, but couldn't protect it. They had sufficient capital to operate their single stand but insufficient capital to prevent Ray Kroc from stealing their name and their concept. And, for sure, they did not seek legal advice before entering into a contract that resulted in someone else getting credit as the founder of McDonald's and the immense wealth ultimately associated with it.



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