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Placing culinary creations in the Scope of Intellectual Property Rights

Mythri Medam^a

^aDamadoram Sanjivayya National Law University, Visakhapatnam, India

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The food industry is growing and changing with creative expression and fast-paced food innovation. Food businesses are building massive resources in promoting and developing unique brands, and they are beginning to look for intellectual property (IP) protection as a platform to determine or maintain their supremacy in the sector. Intellectual property rights focus on promoting creative thinking by offering creators with legal protection for their work, boosting them to continue creating. Apart from extended trademark usages as well as some limited design protection adhered to packaging, intellectual property (IP) protection has customarily been underutilized in the Culinary sector. Throughout this article, we will first provide an outline of all the Intellectual property right options available for culinary creativity. We will then discuss the various challenges to IP protection in this sector before moving on to the opportunities and long-term prospects provided by IP in the food business.

Keywords: *intellectual property rights, copyrights, trade dress, culinary creations.*

INTRODUCTION

*"Food has long been a subject of art in traditional media."*¹ We live in a world that is profoundly fascinated with food. Food and culinary programs are the fastest-growing niches on television. Food blogs have grown into a successful business. Before diving in, guests at every fine dining restaurant may be seen snapping photographs of their meal and publishing pictures on social networking sites. A specialised restaurant's most valuable asset may be a one-of-a-kind recipe. Chefs, restaurateurs, and many others engaged in the culinary industry frequently perceive their recipes and food designs as pieces of art.²

Intellectual Property Rights provides a variety of methods that allow businesses to secure their inventions in the food sector. Trade secrets, trademarks, utility and design patents, and copyrights, and trade dress are the most well-known types of intellectual property protection. Depending on the source of articulation of the culinary invention, the potential of protection will vary. Food is no longer something that only satisfies our dietary requirements; it has evolved into a platform for creative expression and also a means to exhibit intellectual ideas via presentation. It is true that the process of preparing food products, and also the subsequent plating technique, requires a significant deal of ingenuity. Most chefs spend a lot of effort and originality into beautifully plating their culinary dishes, therefore it's fair to say that food plating is a type of intellectual property that must be protected.

Foodies actively seek out new and unique culinary delights, willing to pay premium prices for foods that please their senses. Original recipes and techniques have become a competitive weapon in the battle for public acceptance, therefore it is legitimate for chefs to want to use intellectual property rights to safeguard the substantial value in what they create from infringement by opponents. In 2017, the *Star Athletica* case received widespread attention for

¹ Cathay Y N Smith, 'Food Art: Protecting "Food Presentation" Under U.S. Intellectual Property Law' (2014) 14 J Marshall Rev Intell Prop L 1

² *Ibid*

being among the uncommon cases involving copyright and industry with utilitarian features to approach the Court.³

IPR: PROTECTION OF FOOD ART

The contemporary fusion of cuisine and technology leads to a certain chefs' demand for enhanced intellectual property rights. Today, a handful of artistic chefs is developing innovative food by utilising technology, materials, and procedures that were previously designated for scientific research. This incredibly popular cooking method, known as "molecular gastronomy," incorporates the use of scientific procedures in the preparation of food. IP protection provides a variety of methods that allow firms to preserve their inventions in the food sector.

Each unique product, any spice blend utilised, every one-of-a-kind design of packaging and labeling, and the formulation and preparation of the food all give the manufacturer and owners with the opportunity to be safeguarded from rivals. The types of Intellectual property rights were applicable to the food sector.

COPYRIGHTS

The law of copyright protects original works of authorship that are established in a physical form of expression. To be eligible for copyright protection, the creator must demonstrate a specific level of originality and that the intellectual components of the creative output are distinct from its utilitarian function. Copyright-protected derivative work is one that is essentially a new work but contains previously registered work.

The Berne Convention of 1886, which governs copyright on a global scale, serves to protect "each creation in the literary, scientific, and artistic realm, whatever is the method or form of its expression, including original literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audio-visual, and architectural works of authorship". Culinary preparations and

³ *Ibid*

recipes aren't on the list of copyrighted subject material, but they're also not explicitly exempt from copyright protection.

*"Copyright law protects art-works. Food, cooked and plated by a chef who seeks to express himself in his creation, designing a dish that presents patterns of harmonious or contrasting flavors, textures, colour combinations, layering, and placement, difficulty cannot be considered a work of art worthy of copyright protection."*⁴ If a recipe meets the standards of creativity and originality, it really should be deemed a piece of artwork copyrightable, even though the relevant statute does not explicitly state so.⁵ *Star Athletica*⁶, often known as the cheerleading uniform lawsuit, gained huge attention because of its subject material of chevrons and stripes. Consequently, the Supreme Court of the USA granted *Star Athletica* certiorari in order to provide a clear barrier separating artistic and industrial designs, as well as their connection.

In order to obtain copyright protection, the courts must evaluate whether such a visual, graphical, or sculptural characteristic integrated into a valuable product (1) can be recognized separately from and (2) is capable of surviving independently of the utilitarian features of the product to receive protection of Copyright.⁷ *"With food design, the imagination test and the second requirement under the new Star Athletica test offer lower barriers to copyright protection."*⁸ Despite copyright protection in the food sector encounters its own set of problems, it may still offer significant safety measures for creative and innovative businesses.

TRADE DRESS

Trade dress is a subcategory of trademark law that protects a product's design, shape, colour, packing, or look as far as these aspects function as a source identification for the customer. Briefly said, trade dress safeguards a product's entire appearance and feel as long as the owner can prove that the customer would instantly correlate that look and style with their brand.

⁴ Ciani Jacopo, 'Intellectual Property Rights and the Growing Interest in Legal Protection for Culinary Creations' [2015] J Marshall Rev Intell Prop L 1

⁵ *Ibid*

⁶ *Star Athletica, LLC v Varsity Brands, Inc* 137 S Ct 1002, 1007 (2017)

⁷ *Ibid*

⁸ Shelby Dolen, 'Chef's Canvas: Recognizing Rights as Artists under Copyright Law' (2020) 18.2 Colo Tech L J 393

The objective of trade dress is to prevent people from purchasing products or services through one brand assuming that they are from the other due to similar complete packing or presentation.⁹ *"In order to own a protectable trade dress, a party must prove that its trade dress is either inherently distinctive or that it has acquired secondary meaning."*¹⁰

Trade dress safety also might not be asserted for functional product aspects. Ultimately, in order to win in a trade dress violation case, a plaintiff must demonstrate that customers are likely to be confused due to identical trade dress. A product's characteristic is deemed functional if it impacts the price and quality of the product or is required for its usage. The objective of this principle is to prohibit companies from utilising trade dress legislation to monopolize product attributes that are helpful to a product in order to restrict competitiveness. The process of food plating is a piece of artwork. Each design, texture, layering, and positioning of various food components on the plate involves a great degree of creativity. As a result, the ultimate result of a food plating technique is an artwork that is protected as IP rights since it has aesthetic value.

In *Powerful Katinka, Inc. v McFarland*¹¹ case, Rebecca Charles, the proprietor and head chef of Pearl Oyster Bar initiated a trade dress infringement action on Edward McFarland, her ex-sous chef. McFarland's new hotel, Ed's Lobster Bar, was accused of infringing on Charles' business's trade dress, especially food presentation. McFarland subsequently had to alter several of his menu options in order to satisfy the infringement lawsuit. Accordingly, food plating can be safeguarded by trade dress law if it is original and distinctive from the other restaurants' plating practices for the very same meal. Furthermore, a trade dress infringement action can be brought only when it is evident that the imitation of that specific plating technique would cause some confusion between consumers and may impair the reputation of the actual dish and its plating method.

Accordingly, it can be definitely said that culinary plating is a type of intellectual property because it requires certain creative abilities and the end result has a level of artistic

⁹ *Ibid*

¹⁰ Ciani Jacopo (n 4)

¹¹ *Powerful Katinka, Inc v McFarland & Ors* 1:2007 cv 06036 (S D N Y June 26, 2007)

significance. Duplicate plating concepts may potentially harm the credibility of a certain food company that takes pleasure in its distinctive plating techniques. As a result, IPR protection for culinary plating concepts is critical for the culinary world.¹²

Photographing plating designs and publishing them on social media sites would be deemed nominative acceptable usage and would not constitute a copyright or trade dress violation. Furthermore, a claim of design patent infringement might emerge only if the individual who photographed the image profits financially from it. The conduct of publishing it on a social networking site does not constitute a violation of a design patent. It would be entirely up to the chefs and restaurateurs to decide whether or not to prohibit customers from photographing food products in order to avoid infringement of IPR. However, stealing or reposting a photograph on any site without providing adequate credit is considered intellectual infringement, except if the image is utilised for educational reasons.¹³

PATENT

Patents provide protection for any innovative, beneficial, and non-obvious procedure, machine, product, or substance. Whereas patents may appear to be an optimum choice for protecting any creative recipe, manufacturing method, or packing, the originality and non-obviousness thresholds are so stringent that patents remain generally underused in the food industry. In the food business, patent rights are frequently given in areas other than recipes, such as equipment, packaging, and new procedures. More notably, this method has been used to protect innovative dishes, such as the Olive Oil Caviar patent secured by chef Ferran Adria.

Patents can be used to safeguard gastronomic technologies. The contemporary fusion of cuisine and science/technology relates to certain chefs' demand for stronger intellectual protection, specifically through patents. This appears plausible in terms of contemporary culinary trends, such as so-called molecular gastronomy. It is increasingly trendy to claim that nothing on the plate is as it looks. We have faux caviar manufactured of sodium alginate and calcium, scorching sherbets, vegetable pasta, lamb with mastic-infused cream, dried bacon

¹² *Ibid*

¹³ *Ibid*

twisted on a wire and adorned with strands of desiccated apple puree, and instantaneous ice cream froze in liquid nitrogen. *“Molecular gastronomy is practiced by both scientists and food professionals who study the physical and chemical processes that happen while cooking.”*¹⁴

DESIGN PATENTS

In the food business, design patents are not restricted to plating designs. Design patents embrace innovative and decorative food arrangements. If the dish's aesthetic look is new, unique, and relates to a product, it can be safeguarded as a design. Chefs may register for their unique and interesting plating presentations or culinary design as design patents if they met the “innovative, original, and artistic” and previously unknown standards. A chef expects to be able to apply for and receive a design patent in his distinctive and original approach to culinary presentation, and, as previously mentioned, courts have acknowledged the legality of design patents involving food plating. However, the costs of patent protection and upholding a chef's distinctive food plating may exceed the profits. Ultimately, design patents lapse after 15 years, letting anybody to inexpensively duplicate or replicate the plating design.

*“Design patents require the disclosure of recipes and plating styles and technique, which a chef may be reluctant to disclose, especially if she has been holding such information as a trade secret.”*¹⁵ A design patent grants the right to prevent others from manufacturing, using, retailing, importing, or attempting to sell items that have the same or nearly identical look to the patented design. In order to prove breach of a design patent, the alleged design must be similar or nearly identical to the original design. *Contessa Food Products, Inc. v. Conagra, Inc.*¹⁶, provides to be an example for Design patent violation suits including food-related products.

TRADE SECRETS

¹⁴ Morgan P Arons, ‘A chef’s guide protections available for cooking techniques and recipes in the era of postmodern cuisine and molecular Gastronomy’ (2015) 10 Journal of Business and Technology Law 137

¹⁵ Y N Smith (n 1)

¹⁶ *Contessa Food Prods, Inc v Conagra, Inc* (2002) 282 F 3d 1370, 1377 (Fed Cir 2002)

*“Trade secret protection promotes the diffusion of knowledge, economic development, and the maintenance of standards of commercial ethics.”*¹⁷ A trade secret is a commercial knowledge that has real or prospective economic benefit and must be kept hidden through appropriate means. Trade secret security can endure indefinitely as long as the knowledge is not widely revealed to the public, has a significant economic benefit or competitive edge for the business, and is subject to appropriate measures to preserve its confidentiality. Trade secrets do not need to be registered, however, they do need to be protected in a myriad of areas. Technical and economic data, recipes, formulas, data collections, computer programs, equipment, methods, strategies, procedures, and lists of existing or future sellers or buyers are all examples of trade secrets.¹⁸

*“Some of the more well-known protected formulas and recipes are the original recipe for Kentucky Fried Chicken, the recipes for Twinkies and Krispy Kreme donuts, and, for a time, McDonald’s special sauce”*¹⁹ Trade secrets may be immensely useful, and these formulas will be safeguarded as long as it stays hidden. However, trade secrets may be hard, time-consuming, expensive to implement, and their security remains shaky because exposure of the secret destroys the desired monopoly. They seem to be less successful in promoting food security and transparency when consumers are much more conscious of these challenges.

CHALLENGES AND FUTURE OPPORTUNITIES OF IPR IN THE FOOD SECTOR

A wide range of possible protections is accessible for foods, packaging materials, production methods, and other food sector inventions. Most of these protective methods, however, encounter difficulties that might be exceptionally tough to achieve in the food business. These restrictions also include the elimination of functionalities, the necessity for uniqueness, and some security requirements peculiar to this business. In general, trademark, copyright, design patent, and patent rights do not extend to any forms, aspects, or qualities that are merely utilitarian or required to achieve a technological objective. Based on the above findings, courts

¹⁷ *Kewanee Oil Co v Bicron Corp* (1974) 416 US 470, 481–93 (1974)

¹⁸ *Ibid*

¹⁹ Babak Zarin, ‘Knead to Know: Cracking Recipes and Trade Secret Law’ (2016) 8 *Elon L Rev* 183

all over the world often deny the aforementioned IPR protections for a wide range of food products.

In contrast to certain other sectors, it is difficult to say that "there is no limit" when it comes to creativity in the food industry. Start-ups and creators cannot simply end up selling their food items or packaging materials in any form, materials, dimension, or colour for fundamental health and food safety concerns, but also for practical considerations. *"The removal of an indefinite number of sources to imitate from the culinary public domain and the fear that riffing on another chef's dish would constitute copyright infringement could potentially chill innovative expression in cooking."*²⁰

IP's Increasing Relevance as a Competing Instrument in diversifying food designs, textures, packing, and ingredients through creativity, innovation, and scientific advancement including such 3d printing technology has created a whole new realm in the food industry. While these instruments must be utilised with caution regarding health and safety concerns, they provide limitless opportunities to investigate protection under trademark, trade dress, as well as patent law. The rising consumer and market concern for environmental effects, food and hygiene issues, raises the potential for research and innovation, and therefore potential opportunities for intellectual property protection.²¹ In this environment, it is not only conceivable but also very essential for a food firm to strengthen its intellectual property protection in order to stay in business. While acquiring IP protection in the food sector offers unique obstacles, IP is gaining importance for companies wanting to gain a competitive advantage.

CONCLUSION

The culinary sector is one that is rapidly expanding nowadays. Chefs and restaurateurs are becoming more inventive with their cuisine in an attempt to get a competitive advantage. Finally, IPR protections are beneficial to creators and innovators, artists, and most importantly to business. They integrate the legal, commercial, and food industries in ways that nobody could have imagined a century earlier. The correlation is strong and consistent, and the pace at

²⁰ Ciani Jacopo (n 4)

²¹ *Ibid*

which originality, innovation, and creativity are developing suggests that there is only room for more and more progress.

This is one of several grounds on why there is a need for particular IP regulations that would safeguard chefs' innovation and plating designs with extensive standards guiding the extent of plating design protection. While today's cuisine has more in common with technologies than it has ever been, chefs participating in this new culinary revolution are nevertheless influenced by the efforts of those who came in front of them in numerous aspects. One can only expect that improved intellectual property regulations will be enacted in the forthcoming years to ensure that such chefs' innovation is safeguarded in the greatest way imaginable.