



Protection of Cuisine under Intellectual Property Law: A Global Perspective

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We have observed for a very long time that, in various instances, food and recipes are considered the subject matter of art. Different chefs and restaurants have received global recognition for their creativity and talent. Their creation forms an integral part of intellectual assets, which are exploited commercially. Although in popular opinion, the culinary industry is often considered a representation of derivative art, however, with the advancement of culinary techniques and creativity of chefs across the world, various forms of intellectual property laws are claimed by these proprietors and stakeholders in order to protect their unique creations from encroachment. Signature dishes and the unique ambiance of a restaurant are always the subject matter of well-known controversies. In this article, the author makes an attempt to analyze various culinary conflicts observed across the world and examines the various possibilities of protecting the artistic arrangement or plating of their dishes under traditional as well as the non-traditional scope of intellectual property laws. The article discusses the statutory and judicial pronouncements pertinent to this issue in the light of notable principles of Copyright, Trademark, Trade Secret, and Patent laws, along with ramifications involved in safeguarding the same. The findings and suggestions provided in this research, in the end, put forward the efficacy of confidential agreements and the requirement of strict statutory provisions on trade secret laws to protect the unique creation of culinary industries.

Keywords: Cuisine, Food & Beverages, Intellectual Property Law, Patent, Trade Secrets, Taste Mark

“A chef may create art when he designs a dish or a meal that presents patterns of harmonious or contrasting flavors, textures, colors and plating arrangements that are intended to stimulate his patrons’ aesthetic sense, and patrons may act as art critics when they contemplate their dishes and appreciate them as visual and flavorful expressions of art.” – Broussard.

Restaurants play an indispensable role in the occupational, collective, intellectual and creative life of a prospering society. Significant milestones of life are often celebrated in restaurants with our near and dear ones. Confrères become friends in a soothing environment of a restaurant, and individuals become lovers over a cup of coffee in a neighbourhood café. When you have associated with that restaurant or even a food blog, there are often questions regarding ownership of a recipe, protection of the creative dish you came up with, and various other culinary rights. Across the globe, we have observed various incidents of claiming exclusive rights over signature preparations of world-famous chefs. For example, when a chef quits and starts his own restaurant chain,

does that amount to any unfair competition in any way if they steal the flavors of the signature recipe? In the year 2011, Martha Stewart filed charges against television desert diva chef Anne Thornton for plagiarizing her signature dishes¹. This is not just one instance, there are several such charges where we have seen the claims of protection of culinary creations across the world. This paper tries to analyze these culinary issues and examines the possibility of protection available to them under the domain of Intellectual Property Law.

Culinary Conflicts

Recipes and Attribution: Frequent Culinary Replicas

In the past, we have seen that the common recipes are often shared, copied, and passed along generations which often form a close tie with the roots of any culture. This is major because it is believed that there are not many ways to recreate an item. However, recipe plagiarism has always been a very debatable issue. This debate is mainly segregated into two major ideologies. On the one hand, there are those people who believe that recipes cannot be owned by any individual and on the other hand, are those who believe that recipes are a vital part of one’s creativity

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and can be included within the idea of intellectual property rights and hence embody concepts like plagiarism and infringements.²

Along with the matter of Martha Stewart and Anne Thornton, various other issues such as the tussle between Rebecca Charles and Ed McFarland and; the Coca-Cola dispute are noteworthy. In the year 2007, the chef and proprietor of Pearl Oyster Bar, New York, Rebecca Charles, filed a suit against her sous-chef Ed McFarland, who had left his job and started his new restaurant. She claimed that the defendant had replicated her dishes, menu, layout, and designs without her authorization in order to increase his sales and gain popularity. This is one of the early instances of intellectual property theft in the culinary industry.³

It was also observed in the year 2006 that the e-Gullet Society for Culinary Arts and Letter banished the work of 2014 Young Age Chef winner Robin Wickens for copying signature dishes of popular restaurants where he previously worked in America.⁴

The restaurant industry not only is a beneficial sector for that the employees, owners, shareholders but also secondarily forms the backbone of peripheral trades like farming, food and beverage suppliers, restaurant technology, etc. that often shapes their business structures to facilitate the development of restaurant industry and employ millions more workers across the globe. Hence if such reluctant copying activities are encouraged, then it will deeply impact the overall importance of this sector immensely.

Derivation of Traditional Culture

In most popular opinion, the culinary industry is often considered a representation of derivative art. The chefs often draw inspiration from their role models and enhance significant dishes with their magic and creativity and expand the popularity of well-known cuisines to another new level. The majority of the time these chefs openly admit that they have seen or eaten one of their signature creations beforehand from where they got the idea.

It is also believed that culinary cultures are traditional collective rights that are created through hundreds of generations through which it is passed along in the families. Food forms an integral part of one's happiness, and one can enhance it by sharing it with others.

Many celebrity chefs do not contemplate any dish as a unique one. But what they do is that they consider their own respective form of food to be unique and different from others. For example, let us

consider that there are multiple ways to cook Paneer Tikka Masala, yet an individual chef will be able to craft a distinctive variety by incorporating various trivial alterations to the original recipe. Hence, even though the broad recipe is exposed, the trivial details that make it stand out would never be disclosed and belong to the chef himself.

The ethical guidelines of the International Association of Culinary Professionals mandate the members to take a pledge that they shall not knowingly use any recipe or intellectual property belonging to another for their own financial or professional advantage, but they also provide for use with proper recognition, further reflecting the industry's norms of sharing.⁵ The Association states that:

“(1) Where one obtains a recipe from another source and makes minor changes, but the recipe remains fairly intact, one should credit the source; (2) where one has made changes to a recipe, but the original essence still remains, one should indicate that the recipe is adapted from or based on another; and (3) where one has changed a recipe considerably, but still wants to indicate derivation from the original, one should indicate it as loosely adapted from or inspired by another recipe. The American Culinary Federation explains the goals of apprenticeship as gaining knowledge of the history, evolution, and diversity of the culinary arts, practicing basic and advanced food preparation skills, and developing knowledge about food composition.”⁶

Adding Science to Food

“The qualities of an exceptional cook are akin to those of a successful tightrope walker: an abiding passion for taste, courage to go out on a limb, and an impeccable sense of balance.” —Bryan Miller.

With the advancement of technology, modern culinary practices often involve the application of scientific methods, equipment, ingredients, etc., to create unique versions of food. For instance, the process of Molecular Gastronomy is often undertaken by chefs to enhance their creative creation with the use of science. Molecular gastronomy is a new method of combining scientific understanding and principles to understand cooking at a molecular level. Examples of techniques used in molecular gastronomy include low temperature-immersion (sous-vide) cooking, fast freezing and shattering of liquid nitrogen, and dehydrator-made fruit jerky.

Notably, molecular gastronomy makes extensive use of hydrocolloids (e.g., starch, pectin, and gelatin) in the creation of novel foods.

Such process and outcomes, with the help of the chef's creativity and application of knowledge, strongly require the defense of Intellectual Property Rights so that the same shall not be infringed upon or commercially exploited by others without authorization.

Cuisines under the Subset of Intellectual Property Laws

Cuisines in the Light of Copyright Laws

Copyright laws protect the right of an author/creator over their literary and artistic works. It includes books, painting, music, computer games, sculpture, and various other forms of expression.

Idea v Expression

In the case of Culinary Industry, enlisting ingredients or mentioning the basic steps are not sufficient to claim ownership or authorship rights under Copyright Laws as they are merely basic facts. But along with that, if the chef puts forward a story along with the recipe or an illustration with photographic representation, then this unique style of expression can be safeguarded under copyright laws.

The Universal Copyright laws are very clear about the protection of expression over merely an idea. This Idea Expression Dichotomy is also observed clearly in our Copyright Act, 1957. In this sector, the initial recipe is often considered a common idea, and it becomes difficult to protect an idea under Copyright. Hence if the chef takes his own way of re-creating the recipe and expresses it in a proper medium, the same can be subject to legal protection.⁷

For instance, a Chocolate Cake is an idea, which means everyone can make it or commercially exploit it, but they cannot step on the chef's way of recreating the recipe put forward through a written book or video made by him.⁸

Copyright Protection over a Cookbook

In the case of that of a published cookbook, it is well protected by that the Copyright laws, where the description and all the writings fall within the ambit of literary work along with photographic representation, which falls within the category of artistic work. The chef shall have exclusive rights for sale, the printing of copies, distribution of copies, translating the book, etc.

It is the creative approach of the chef that makes the book unique and more appealing to the buyer than that of the other chefs all around.

Taste Mark: An Attempt to Protect Flavors under Non-Conventional Trademark

Taste is often considered a very useful tool for consumers to associate with the origin of a product. The significance of taste in the culinary industry is equally indispensable. But with the application of the functionality principle, the taste of a dish cannot be protected as a Trademark, even though some consumers may think that taste forms an inseparable source to identify a particular proprietor who has created the same.

This instance was observed in the case of *In re NV Organon*,⁹ where a company tried to protect the orange flavor used on an anti-depression pharmaceutical pill. The court observed in this case that the orange flavor used by this company on their product is to overpower the bitter taste of the medicine and hence is functional in nature. Thus, the application for the protection of taste, in this case, was rejected due to the application of the functionality principle. The Court stated in the case of *Inc Qualitex Co. v Jacobson Products Co.*¹⁰ that the functionality doctrine "*forbids the use of a product's feature as a trademark were doing so will put a competitor at a significant disadvantage because the feature is essential to the use or purpose of the article or affects [its] cost or quality.*"¹⁰

In the popular case of *NY Pizzeria, Inc. v Syal*,¹¹ the famous Italian restaurant chain claimed that the defendant had infringed their intellectual property rights by copying the same flavours and taste in their recipes and plating. However, the court observed that in this case, Plaintiff failed to identify the secondary function of the elements of this dish, such as ziti, egg-plant, and chicken, and thus dismissed their claims.

Hence from the above decisions and application of the functionality principle, it can be understood that flavors with respect to food items cannot be protected under the concept of Taste under Non-Conventional Trademarks. Taste is only possible to be protected when it is applied to a product that is not meant for human consumption, like the candy flavor used on a pencil or eraser. Similarly, we can assume that the Spanish Tangy Tomato or Magic Masala flavors of Lays Chips can be used by its competitors unless the ingredients are protected under Trade Secrets. But the debate still arises with regard to the use of taste on an

unassociated product. For example, we commonly use the Mango flavor with that of deserts, but what if the same mango flavor is used for that of Naan. These are the common difficulties observed across the globe with the protection of taste and flavor.

Possibility of Trade Dress Protection

Trade dress is the general packaging of an item or overall appearance that connects the consumers with the foundation of the product. One of the exemplary instances of trade dress is the pictorial allure of a Coca-Cola bottle. If we look into the shape of the container, the red-coloured mark alongside the red-coloured cap all involves a trade dress. To put it plainly, trade dress is the total guise and impression of the product. Another image of product design trade dress can be the setup of the iPhone with that of the rectangular body with adjusted corners. It embodies the very idea of how the visual sensibilities of a consumer can be used by that of the proprietor to gain popularity and allow the consumers to associate with the source and beyond the product itself. The Trade Marks Act, 1999 in India majorly incorporates furthermost of the areas of trade dress protection under the definition of the mark, but with the dynamics of the world, various aspects of trade dress are now commonly seen. The term “mark” has been defined “to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;”¹² and “package” includes “any case, box, container, covering, folder, receptacle, vessel, casket, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork.”¹³ There were two vodka firms involved in the *Gorbatschow Wodka K.G. v John Distilleries*¹⁴ dispute. Gorbatschow's unusual bulbous form was inspired by Russian architecture; therefore John created a bottle with the similar shape. The court found that there are chances that, consumers may be misled because of the shape's deceptive similarity and hence the same cannot be used by John Distilleries. In the case of *Colgate Palmolive & Co. v Anchor Health and Beauty Care Pvt. Ltd.* 2003 (27) PTC 478 (Del.)¹⁵ the dispute was regarding the distinctive get up and colour schemes used by Anchor which was similar to that of Colgate Tooth Powder. Taking the cognizance of the rival containers, the Court ruled it to be an instance of passing-off based on the overall similarity of trade dress of the two products. Again the same can be applicable for the overall allure and appeal of a

restaurant. Trade dress, under the Lanham Trademark Act of U.S.A. (Lanham Act), “*Constitutes a symbol or device. It is a form of a trademark to which the standard principles of trademark law apply.*”¹⁶

The very objective of this trade-dress protection is to ensure fair-minded opposition in the market and stop the encroachers from misusing the name and goodwill of another company. The significant economic objective of trademark and trade dress law comprises decreasing consumer exploration time and capital growth for that of proprietors to retain their good reputations for a proper feature of goods. In order to raise a claim under Trade Dress Protection, one has to establish that he has legal protection under the statute with respect to its appearance and is not likely to cause any confusion in the minds of the people. The claimant must also prove that the infringing party doesn't have any right over the said appearance and hence have the chance of confusing the consumer and harming the reputation of the authorized proprietor. In addition to consumer confusion, he must also prove that the said trade dress is unique and non-functional. It must be innately distinguishing and shall have ancillary meaning through which consumers can easily recognize the product and its origin.

In the case of Two Pesos, Inc. v Taco Cabana, Inc., Taco Cabana¹⁷, a fast-food Mexican restaurant chain in San Antonio, Texas, had a festive eating atmosphere with distinctive decorations and colour combinations. Two Pesos, an alternative restaurant chain of a similar nature based in Houston, Texas, established a restaurant with an analogous appearance. In the year 1987, Taco Cabana filed a suit against Two Pesos in the United States District Court for the Southern District of Texas for trade dress transgression under Section 43(a) of the Lanham Act and also for stealing the of trade secrets under Common law practice of Texas. In this dispute, the Supreme Court pronounced that “*trade dress can be protected under the Lanham Act based on inherent distinctiveness even if there is no proof of secondary meaning. Recovery is usually available for trademark infringement without secondary meaning, and there is no persuasive reason for treating trade dress differently from other types of trademarks.*”¹⁷

Although, as we have seen, the total ambiance or layout of a food joint can be protected under the aspect of Trade Dress, the protection available for the signature dishes of popular restaurants still remains

debatable. Incorporating cuisines within the aspect of Trade Dress remains difficult because food forms a significant purposeful feature of that of the restaurant. Cuisine or signature dishes created by the Chef are the primary way to appeal to the consumer and the source of economic earning for most the restaurant. The variety of food presented and elements used in the same directly impact the cost and quality of the items presented in the menu, and chefs choose this menu with purposeful thoughts in mind so that the food is easy to consume, healthful, and pleasing to the customers. However, trademark and trade dress cannot judiciously defend the cuisine itself, but they can safeguard the distinctive form of presentation in case it is non-functional and has attained secondary meaning, and there is a possibility of customer confusion.

The Potentials of Patent Protection

In the case of Trademark and Trade dress protection, we have majorly seen that the product itself cannot be protected, but the same can be protected under that the Patent Law. Patent law not only tries to protect the interest of the Patentee but also ensures that the patent product is useful to people in the society. The objective of patent law is to inspire originality and ingenuity among individuals and ensures legal rights to the rightful patent holders as well. If one needs to protect their invention, the three criteria of patentability must be met, i.e., utility, novelty, and non-obviousness. But however, it becomes a challenging issue for those culinary creations to meet these criteria of patent law. Even though it becomes difficult to prove novelty and non-obviousness, there are some successful culinary creations as well, such as various methods and mechanisms of creating “fruit ganache,”¹⁸ “yogurt cream cheese,”¹⁹ “microwaveable sponge cake,”²⁰ “sugarless baked goods,”²¹ etc. In the case of patents, the details of the products are available on the application, which can be accessed by everyone. Once the period of patent, i.e., 20 years, comes to an end, the product comes into the public domain, and everyone is allowed to use the same without any hindrance.

Restaurant chain businesses and major food manufacturing companies have claimed various patents over their food products, but the practice is not much observed among individual chefs. It has to be also kept in mind that it also becomes financially burdensome for that individual chefs to file an application and proceed with litigation mechanisms in

the absence of a corporate setup backing it up from behind. Homaru Cantu, a chef from Chicago, tried to patent his cotton flavoured edible paper²² in the US Patent Office, which is one of the classic examples of patent protection over food items. However, the difficulty of protecting dishes remains over establishing novelty and no obviousness regarding the dish in question. New York based Chef Wylie Dufresne, an expert in the use of molecular gastronomy, has observed that it is not possible to patent a recipe as “*we are all standing on the shoulders of chefs who came before us.*”²³

There is high competition in the market among restaurants, and that encourages the chefs to become more and more creative day by day. Such practices make it even more difficult to comply with the condition of non-obviousness and meet the patentability criteria. Hence, we can state that the chances of protection of a food product are more when there is an innovative cooking mechanism and novel preparation compared to that of simply admixing existing ingredients. In the mid-1970s the term “nouvelle cuisine” was coined by Gault and Millau to focus on the technological know-how used to create refreshing cuisines.²⁴ It is not only limited to using chemicals in food but also applies advanced lab techniques and explores protecting a variety of astonishing and unprecedented products such as “*micro-greens and garlic roots, blue Araucana eggs and milk-fed poulard, lamb raised on specially grown alfalfa or hand-made cheeses, etc.*”²⁵

So, in a nutshell, can you protect your recipe in India under Patents? In India, we try to follow the 3-step rule to check patentability, i.e., novelty, inventiveness, and utility. Section 3 (e) of the Patent Act states that “*mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance cannot be protected as an invention.*” However, various products can be found to be protected in India as they have qualified the three steps, such as:

- i) A process for the preparation of deep fat fried potato chips- Patent No. 192889
- ii) The process of making fried masala banana chips – Patent No. 198069
- iii) Process for producing baked potato slices with expanded texture (by Frito Lay) – Patent No. 257367
- iv) A wheat chocolate bar for sustained energy release – Patent No. 229291

- v) A process for the preparation of binder formulation useful for the preparation of agglomerated flavored tea – Patent No. 250962.²⁶

Strength of Trade Secrets and Confidential Information

Trade Secrets protection enables the proprietor or the business house to keep their intellectual assets a secret from that public knowledge. These assets are not protected under the traditional variety of Intellectual property such as Copyright, Patent, or Trademark due to their undisclosed nature. Before the emergence of the concept of Trade Secret through various legal mechanisms and intellectual property regimes, the very idea of secrecy was a prominent feature in major business houses. The most common example of such an instance is the formulae of Coca-cola, which has been considered one of the most popular kept secrets of the world for over a century, and the ingredients of KFC which have been secretly preserved in a digital safe for over 70 years.

Article 39 of the TRIPS Agreements discusses the need and importance of a Trade Secret from the perspective of a commercial entity and why the protection of the same is vital for the interest of the company. It is the incarnation in the global legal system of the American and European belief of safeguarding confidential information as a method of fully guarding intellectual property rights, irrespective of whether any disclosure to Society has not been made. European Union shields data such as novel origination, manufacture commotion, and archives of traders and client under trade secrets.²⁷ Section 1 of the USTA also has provided extreme prominence to the “efforts made to keep information secrets, such as formula, pattern, compilation, program, technique or process.”²⁸ Japan is also a proactive member of this league. Unfair Competition Prevention Act (UCPA) of Japan also gratifies the protection standards mentioned in the TRIPs Agreement for that trade secrets. Article 2(6) of UCPA protects “*technical subject matter and business information useful for business activity including records of customer and suppliers, manufacturing process, sales records, and product design.*”²⁹

We have seen over the years that the Chefs and proprietors of food joints have successfully protected their creations and ingredients through the Trade Secret regime. A trade secret is “information, including a formula, pattern, compilation, program device, method, technique, or process that: (i) derives independent economic value, actual or potential, from

not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”³⁰

Thus, we can state that the product which is in question must be available in a limited manner, and enough secrecy along with economic potential must be identified in order to cover under trade secret. In the case of *Buffets, Inc. v Klinke*,³¹ the Court held that “*trade secret law does not protect dishes offered at an all-you-can-eat Old Country Buffet restaurant because cuisine such as barbecue chicken and macaroni and cheese are American staples, which restaurants across the country serve.*”³¹ Similarly, in the case of *Li v Shuman*,³² the Court discussed the possibility of protecting Asian spices. The contended parties, in this case, were previous trade partners who started an Asian eatery together. One of them, who was also the head chef, claimed the secret recipe was a trade secret and sought protection for the same as the same was made through a novel process. The Court held that these recipes do not qualify to be a trade secret because the most significant characteristic of a trade secret is not a novelty but secrecy. The dishes prepared were common Asian cuisines, and thus the Court declared that “the head chef could not meet his burden that the information derived independent economic value from not being generally known or readily ascertainable.”³²

Various restaurants protect their recipe through trade secrets and non-disclosure agreements. The formulae of Coca-cola, herbs and ingredients of KFC (Kentucky Fried Chicken), Italian traditional pizza recipes, and the spicy special sauce of McDonald’s have received protection under trade secret laws. Hence the chefs take precautionary measures to maintain secrecy to protect their creation from public knowledge and to ensure the flow of monetary gains alongside praise and goodwill. In order to protect their secret from being disclosed or misappropriated, chefs often use the tool of a non-disclosure agreement with those who are associated with their business. Non-disclosure agreements are legally binding on both parties. Not only the employees but visitors of the kitchen are also often made to sign the agreement. In the Indian context, as of now, there is no existence of trade secret legislation but the application of the provisions of Section 27 of the Indian Contract Act 1872, may be invoked in the matters of trade secrets.³³

Analyzing Culinary Issues beyond Traditional Scope of Protection

Artistic Aspect and Utilitarian Function

We have seen for a very long time that food and recipes are often considered the subject matter of art. World-famous paintings such as Mound of Butter by Antoine Vollon (kept in the National Art Gallery of Washington DC), The Potato Eaters by Vincent van Gogh (kept at the Van Gogh Museum, Amsterdam), Figure with Meat by Francis Bacon (kept at Art Institute of Chicago), Apples and Oranges by Paul Cézanne (kept in the Musée d'Orsay, Paris) took inspiration from food.³⁴ Infact Jason Micier, a sculpture artist took inspiration from food and designed mosaics using potato chips and hamburger buns, Jim Victor used butter, chocolate, and cheese to make renowned sculptures. However, these structures are for the purpose of adding creativity to art and not used for eating, and hence such intellectual creation can easily be protected under the sphere of copyright protection. Along with these, the chefs in popular restaurants have also come up with trending and innovative ideas for presenting food to their customers, such as David Chang's poached eggs on a conclave plate, plating of Grant Achatz's Salsify with smoked samon puree where the salsify roots are cut in such a manner that it can stand in its own without any support have gained global recognition.

Under Copyright law, sculptures are protectable if the artistic form is separable from its utilitarian function. Such understanding raises the question, whether Chang's 5:10 Eggs and Achatz's Salsify can be protected under the same. In one of the case, *Kim Seng Company v J&A Importers, Inc.*³⁵ the Court discussed about the originality involved in the sculpture of a fruit bowl and whether the same can be protected under copyright laws. The parties argued that the arrangement was a product of thousand possibilities of placing food items, but however, the court declared that it lacked originality and hence cannot be protected by copyright laws.

Another difficulty in protecting food is the application of the principle of conceptual separability in copyright laws. Section 101 of the US Copyright laws defines it as:

"A useful article is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a useful article."³⁶

It means the useful articles possessing unusual designs that include pictographic, lifelike, or sculptural demonstration can be recognized distinctly and are capable of prevailing self-sufficiently out of the utilitarian aspects of the article are kept under the pictographically and sculpture work. Such creations and articles are subjected to special scrutiny. Hence if a chef is trying to copyright his work, he has to prove that his item can be recognized separately, and also the same exists independently from that the utilitarian side of the food design.

Growing Practice of Amateur Food Photography

With the spread of social media and its influence on our life, another aspect that has developed which is a popular practice associated with culinary business, is food photography. Diners who visit the restaurants often take pictures of the chef's creation and share the same on the public forum through Facebook, Instagram and Twitter. There are special classes and training also available for learning food photography techniques. Many food blogs are also created across the internet where there are bloggers and photographers only having the work of capturing edible creativities.

But such practices are harmful to that chefs many times. When a creative plating is photographed and shared in public, intruders can easily replicate the same by just referring to the picture. That is why in various popular restaurants, the new norms prohibit food photography in order to stop the exact replication of their plating. Renowned chef David Chang does not allow food photography in his restaurant.³⁷ Similarly, Moe Issa is also against food photography in her restaurant as they believe that flashlights can misbalance the ambiance of the restaurant. However, those food photographs which are taken for critics and commentaries are considered under that of fair use doctrine.³⁸ Despite such practices, there are restaurants that encourage food photography as well because they believe that it helps them to gain popularity and can be used as an easy advertisement tool.

Findings

Taste is often seen as a highly effective tool for customers in establishing a connection between a product and its place of origin. When it comes to the food sector, the importance of flavour cannot be overstated. However, with the application of the functioning principle, the fundamental flavour of a

dish cannot be protected as a trademark, even if some consumers believe that taste is an inseparable source of identification for a certain owner who has produced the dish.

This occurred in the case of *In re N.V. Organon*,⁹ in which a firm attempted to protect the orange taste of an anti-depression medicinal tablet. In this instance, the court found that the orange flavour utilised by this corporation on their product is useful in nature since it overpowers the bitter taste of the drug. As a result of the application of the functioning principle, the claim for taste protection in this instance was denied. The functionality doctrine “forbids the use of a product’s feature as a trademark where doing so will put a competitor at a significant disadvantage because the feature is essential to the use or purpose of the article or affects [its] cost or quality,” according to the Court in *Qualitex Co. v Jacobsen Products Co. Inc.*¹⁰

The prominent Italian restaurant business alleged that the defendant had infringed on their intellectual property rights by duplicating the same flavours and tastes in their recipes and plating in the case of *N.Y. Pizzeria, Inc. v Syal*.¹¹ The Court, however, noted that the Plaintiff in this instance failed to explain the secondary purpose of ingredients such as ziti, egg-plant, and chicken, and so rejected their claims.

As a result of the above judgements and application of the functionality principle, it is clear that flavours in relation to food products are not protected under the notion of Taste under Non-Conventional Trademarks. Only when a taste is added to a product that is not intended for human consumption, such as the candy flavour on a pencil or eraser, can it be protected. Similarly, unless the ingredients are protected under Trade Secrets, we may infer that Lays Chips’ Spanish Tangy Tomato or Magic Masala flavours can be exploited by rivals. However, the use of taste on an unrelated product continues to be a source of contention. For example, we often associate mango taste with desserts, but what if the same mango flavour is used for naan? These are the most typical issues with taste and flavour protection seen across the world.

As a result, we may conclude that the product in issue must be provided in a restricted quantity, and sufficient secrecy, as well as economic potential, must be determined in order to be protected as a trade secret. *Buffets, Inc. v Klinke*³¹ found that “trade secret legislation does not protect foods supplied at an all-

you-can-eat Old Nation Buffet restaurant since cuisines like barbecue chicken and macaroni and cheese are American mainstays served in restaurants throughout the country.”²⁷ Similarly, in the case of *Li v Shuman*,³² the Court debated whether Asian spices may be protected. In this instance, the disputants were former business partners who opened an Asian restaurant together. One of them, who also happened to be the head chef, claimed the secret recipe as a trade secret and sought protection for it since it was created using a revolutionary method. The Court determined that these recipes do not qualify as trade secrets since the most important feature of a trade secret is secrecy, not innovation. The court ruled that “the head chef could not sustain his burden that the knowledge drew independent economic worth from not being widely known or easily ascertainable since the meals cooked were familiar Asian cuisines.”³²

Various eateries use trade secrets and non-disclosure agreements to preserve their recipes. Coca-cola formulas, KFC (Kentucky Fried Chicken) herbs and spices, Italian traditional pizza recipes, and McDonald’s spicy special sauce have all been protected by trade secret laws. As a result, chefs take precautions to retain secrets in order to safeguard their inventions from public awareness and to secure a steady supply of monetary rewards in addition to acclaim and goodwill. Chefs often utilize non-disclosure agreements with individuals who are affiliated with their company to safeguard their secrets from being revealed or misused. Both sides are legally bound by non-disclosure agreements. Visitors to the kitchen, as well as personnel, are often required to sign the agreement.

Conclusion

New York based Pastry Chef Ansell, in early 2013, came up with a dessert dish where he filled a donut with cream, and the same became a global sensation within a very short span of time. The name of this unique creation was named ‘Cronut,’ which was even protected under Trademark laws. Such creativity brought him recognition and tons of profit, which encouraged him to open his restaurant chain in various corners of the world, such as London, Japan, and Los Angeles. Such innovative steps must be protected from encroachment and must be distinguished.

Because of the functionality concept, any product meant for human consumption is unlikely to be

eligible for taste trademark protection under the law. In other words, Coca-Cola cannot prevent another company from selling a beverage that tastes exactly like Coca-Cola simply because it tastes exactly like Coca-Cola. This is true unless the manufacturer of the competitive beverage hires away key Coca-Cola employees who illegitimately disclosed the closely guarded secret formula to the public. Trade secret litigation, not "taste infringement" litigation, is the method by which trade secret litigation is carried out.

Thus, it may be concluded that taste is only a viable non-traditional trademark when applied to a product that is not intended for human consumption (e.g., flavoured ear rests on eyeglasses and flavoured ballpoint pen caps). Based on the functioning theory, trademark protection in the taste or flavour of foods, drinks, and other oral items that are designed to be ingested or put in the mouth and have a pleasant taste are likely to be excluded.

Intellectual property arguments are generally an outcome of divergences among stake holders, like, between co-owners or partners working in an eatery business or even among former employer-employees. Thinking ahead with regard to the management of intellectual property assets in case of dissolution of the business is also needed to fairly handle the same. Confidentiality agreements for significantly high-ranked employees who generally look after intellectual property such as recipes, ingredients, and technical know-how are also vital. Non-competency clause can also be helpful in this regard to protect the secrets from being exposed to competitors in the market. The first and foremost thing to do for a restaurant is to identify what is unique and desired about them, and accordingly, the same can be protected and capitalized in a strategic way to enhance the profit and goodwill of the business.

References

- 1 Food Network drops Chef Anne Thornton for allegedly plagiarizing Martha Stewart recipes, *Fox News via New York Post* (Online), 2014, <https://www.foxnews.com/entertainment/food-network-drops-chef-anne-thornton-for-allegedly-plagiarizing-martha-stewart-recipes-report-says> (accessed on 15 January 2022).
- 2 Emily C, Protecting cuisine under the Rubric of Intellectual Property Law: Should the Law play a bigger role in the kitchen, *Journal of High Technology Law*, 9 (1) (2009) 21.
- 3 Ben L, Rebecca Charles Sues Ed McFarland Over Fish Shack Concept, *Eater New York* (Online), 2007, <https://ny.eater.com/2007/6/27/6815303/rebecca-charles-sues-ed-mcfarland-over-fish-shack-concept> (accessed on 15 January 2022).
- 4 Jason K, In situ, SFMOMA's aggregated restaurant, *Kotte Org* (Online) <https://kottke.org/tag/Robin%20Wickens> (accessed on 15 January 2022).
- 5 International Association of Culinary Professionals, IACP Code of Professional Ethics, *Webcite* (Online), <http://www.webcitation.org/5WIKb5OEZ> (accessed on 15 January 2022).
- 6 American Culinary Federation, Education, Apprenticeships, *Webcite* (Online), <http://www.webcitation.org/5WIPZ0HBr> (accessed on 15 January 2022).
- 7 Sophie P, Protecting your culinary creation and eating it too: An Exploration into How Australian Copyright Law Can and Should Expand its Menu to Embrace Culinary Works, *The University of Western Australia Law Review*, 41(2) (2017) 151.
- 8 Michael G, Cooking and copyright: When chefs and restaurateurs should receive copyright protection for recipes and aspects of their professional repertoires, *Seton Hall Journal of Sports and Entertainment Law*, 23 (1) (2013) 153.
- 9 *In re N. v Organon* (2006) 79 U.S.P.Q.2d 1639, 1648.
- 10 *Qualitex Co. v Jacobson Products Co. Inc.* (1995) 514 U.S. 159.
- 11 *NY Pizzeria, Inc. v Syal* (2014) U.S. Dist. LEXIS 143433.
- 12 Section 2(m) of the Trademarks Act, 1999.
- 13 Section 2(q) of the Trademarks Act, 1999.
- 14 *Gorbatschow Wodka K.G. v John Distilleries Limited* 2011 (47) PTC 100 (Bom).
- 15 *Colgate Palmolive & Co. v Anchor Health and Beauty Care Pvt. Ltd.* 2003 (27) PTC 478 (Del.).
- 16 15 U.S.C. § 1125 (a).
- 17 *Two Pesos, Inc. v Taco Cabana, Inc.* (1992) 505 U.S. 763.
- 18 Dimitri D & Jean-Luc R S, Process of making a fruit ganache, U.S. Pat No. 5,958,503 (to *Puratos Naamloze Vennootshcap*, Belgium), 28 September 1999.
- 19 Nordahl L, BrueJon R. & Gutknecht J B O, Yogurt Cream Cheese, U.S. Pat No. 7,258,886 (to *Franklin Food Inc., USA*), 21 August 2007.
- 20 Andrew E, McPherson W, Chen A & Akashe M M, Method for making a microwaveable sponge cake, U.S. Pat No. 6,410,074 (to *Kraft Foods Global Brands LLC, USA*) 25 June 2002.
- 21 Glenn W, Sugarless bakery good, U.S. Pat No. 5,804,242 (to *Bunge Oils Inc, USA*) 8 September 1988.
- 22 Homaro C, System and methods for preparing substitute food items, U.S. Pat No. 20060081619, 20 April 2006.
- 23 Jason K, When Can Chefs Sue Other Chefs? Defining legitimate legal claims in the restaurant world, *Chow.Com* (Online), <http://www.webcitation.org/5WICxyGMO> (accessed on 15 January 2022).
- 24 Tania S L C, Copyright protection of haute cuisine: Recipe for disaster?, *European Intellectual Property Review*, 30 (3) (2008) 93.
- 25 Staff R H, The New New Cuisine, *WebCite* (Online), <https://www.webcitation.org/5aLXIIzVQ> (accessed on 15 January 2022).

- 26 Malla P, Intellectual property protection for the Creative Chef, or How to copyright a cake: A modest proposal, *Cardozo Law Review*, 12 (1991) 1477.
- 27 Caroline M R, Sweet or Sour: Extending Copyright Protection to Food Art, *Jof Art, Technology and Intellectual Property Law*, 22 (2011) 41.
- 28 Uniform Trade Secrets Act § 1.
- 29 Unfair Competition Prevention Act art 2, Cl. 6.
- 30 Uniform Trade Secrets Act § 1.
- 31 *Buffets, Inc. v Klinke* (1996) 73 F.3d 965, 968.
- 32 *Li v Shuman* (2016) WL 7217855.
- 33 Harshwardhan, Keshari S, Trade secrets: A secret still to unveil, *Journal of Intellectual Property Rights*, 13 (2008) 208.
- 34 Austin B, An intellectual property food fight: Why Copyright Law should embrace culinary innovation, *Vanderbilt Journal of Entertainment and Technology Law*, 10 (2008) 691.
- 35 *Kim Seng Company v J & A Importers, Inc* (2011) 810 F. Supp. 2d 1046.
- 36 Section 107 of US Copyright Act, 1976.
- 37 Hannah B, Having your cake and eating it too: Intellectual property protection for cake design *IDEA – The Journal of the Franklin Pierce Center for Intellectual Property*, 56 (1) (2016) 31.
- 38 Naomi S, Trade dress protection for cuisine: Monetizing creativity in a low-IP industry, *UCLA Law Review*, 60 (2012) 182.