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Exploring Culinary Intellectual Property Protection: Safeguarding Creations and Unauthorized Transfer of Related Knowledge under Traditional IPR

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Abstract

Great effort and time go into the careful selection of ingredients, the formulation of the cooking procedures, and the creation of an engaging and attractive appearance for a culinary item. Given this reality, it is not surprising that recipes, food designs, and other culinary innovations have the potential to be safeguarded through diverse forms of intellectual property safeguards. Culinary innovations and recipes surely may be considered original and creative expressions, yet somewhere fail to meet entirely the criteria for copyright protection. Intellectual property safeguards already exist for a range of items, such as crackers shaped like dinosaurs, hamburger patties with unique shapes, cupcakes featuring swirled icing, and hot dogs adorned with crisscross cuts. However, unprotected and unauthorised use of knowledge, and infringement of protected knowledge have all given rise to a host of issues that need careful examination. This paper aims to advocate intellectual property protection for culinary creations while bringing out the flaws of the judicial precedent set, that completely omits the idea of protecting any recipe to date. The research paper concludes that the grounds on which the recipes are denied protection are vague, and protection can be extended to the recipes by incorporating certain flexibilities in the current copyright regime.

Keywords: Food design, Recipe, Trade Secret, Traditional Knowledge, TRIPS Agreement

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1. Introduction

The protection of new and unique dishes is a topic of considerable significance within the culinary domain, warranting scholarly inquiry and formal consideration. These culinary creations represent the culmination of innovative processes, blending diverse ingredients, techniques, and cultural influences to craft original gastronomic experiences.[1] Safeguarding such dishes serves as a pivotal incentive for chefs, food artisans, and restaurateurs, encouraging ongoing experimentation and the evolution of culinary artistry. Moreover, the intellectual property invested in the development of these dishes, including rigorous research, meticulous experimentation, and creative expression, necessitates acknowledgement and legal protection akin to other forms of artistic endeavour. [2] Additionally, the preservation of new and unique dishes contributes profoundly to cultural heritage, ensuring the perpetuation of traditional and regional cuisines amidst the currents of globalization. From an economic standpoint, dish protection holds the potential to catalyse tourism, bolster local food industries, and yield substantial financial returns for creators and stakeholders. The imperative to safeguard new and unique dishes extends far beyond culinary appreciation, encompassing broader considerations of cultural preservation, intellectual property rights, and economic vitality within the culinary landscape. [3] Since the inception of the TRIPS agreement and the enforcement of the same, Intellectual Property law has been given significant priority in different

[1]Saunders, K.M. and Flugge, V., 2020. Food for Thought: Intellectual Property Protection for Recipes and Food Designs. Duke L. & Tech. ev., 19, p.159.

[2] Smith, C.Y., 2014. Food Art: Protecting Food Presentation Under US Intellectual Property Law. J. Marshall Rev. Intell. Prop. L., 14, p.1.

[3]Bonadio, E., & Weissenberger, Food Presentations and Recipes: Is There a Space for Copyright and Other Intellectual Property Rights? (2021)

countries through their respective legislations. Copyright, patents, trademarks, etc., have emerged on the surface for the purpose of protecting the creative spirit of the human race. However, among many other subjects, food recipes, foodstuffs, or traditional food habits have always been restricted within a vague territory under the intellectual property rights (hereinafter IPR) law and none of the countries who are member states to the TRIPS agreement have been successful in defining the scope of food recipes within the ambit of IPR despite the express existence of elements of creativity in the same.[4]

While it is true that no clear distinction has been made by any of the countries to protect foodstuffs or food recipes within the purview of Intellectual Property law, there exist certain safeguards that are not always provisional in nature. Under the disguise of many precedents, recipes have been provided with part protections under different branches of intellectual property laws in different countries such as the US and EU. However, despite such efforts by the judiciary, legislative actions seem faint in the particular segment of protecting food recipes or traditional food dishes, and to date, foodstuffs are either protected owing to their geographical origin, their designs or shapes, which essentially shows less regard for the core concept of a food recipe. The geographical extent of the research extends to US and EU, to give a global perspective of the issue at hand.

2. Intellectual Property Protection for Recipes and Food Design

2.1 Trade Secret

A trade secret is a confidential information which has an economic value in exchange for keeping particular information

[4]Smith, C.Y., Food Art: Protecting Food Presentation Under US Intellectual Property Law. *J.* Marshall Rev. Intell. Prop. L., 14, p.1. (2014)

a secret. It mostly gives a competitive advantage to the other competitors in the market. The protection is indefinite in nature and trade secrets cover a broad array of information that shall primarily include the procedural data in the nature of technology or mechanical and fiscal data. Additionally, it shall range from every kind of recipe or chemical formula, programming or computer system, and technique to the list containing the names of the customers or potential or targeted customers [5]. Responsibility for unauthorized use can be countered by demonstrating the legitimate reverse engineering of a product obtained legally and containing the trade secret[6]. Alternatively, liability can also be negated by showing a separate innovation invented by a person that might consist of the same confidential information that forms a trade secret[7]. Specifically, food designs clearly cannot be protected under Trade Secrets as it has to be displayed to the public and cannot be kept a secret. Certainly, certain recipes, manufacturing, formulas or the process of preparation can be protected. The formulation for Kentucky Fried Chicken, the recipes of Twinkies and Krispy Kreme doughnuts, along with McDonald's special sauce recipe were all considered valuable trade secrets of their time[8]. The recipe has to have a very strong economic value for getting protected under trade-secret law. The drawback here, however, is that the process of cooking, preparation or the related concepts cannot come under its ambit[9]. In the absence of a specific law on trade secrets in India,

[5] Mark A Lemley, 'The surprising virtues of treating trade secrets as IP rights', 61 *Stan. L. Rev.* 311 (2008)

[6] *Id* at 351

[7] Babak Zarin, 'Knead To Know: Cracking Recipes And Trade Secret Law', 8 Elon Law Review 183 (2019)

[8] *Id*

[9] Caroline M. Reebs, 'Sweet or Sour: Extending Copyright Protection to Food Art 22', DePaul J. Art Tech. &Intell. Prop. L 41 (2011)

the same is governed by non-disclosure agreements for contractual obligations and issues on misappropriation[10].

In the case of Buffets[11], which essentially dismissed the concept of trade secret, it applied to the subject of barbeque chicken, which constituted a common dietary dish that most Americans consume on a daily basis. However, on the other hand, in the case of *Peggy Lawton Kitchens, Inc. v. Hogan,*[12] it was held that a recipe that large-scale consumers do not commonly consume and a product that has a closely protected recipe should be subjected to the concept of a trade secret. In the case of *Magistro v. J. Lou, Inc*[13]., the matter revolved around pizza dough and tomato sauce recipes employed within a family-owned restaurant. Exclusive family members were responsible for crafting and using these recipes, and their contents remained confidential. To safeguard them, the owners sealed the recipe components in packets, storing them refrigerated until use, at which point an employee would incorporate water to form the sauce and dough. The court determined that these measures conferred independent economic worth upon the recipes, as they remained undisclosed. Legal action can only be pursued if there is evidence of actual or imminent misappropriation. Despite these limitations, trade secrecy remains appealing due to its potential for long-lasting protection and the relatively informal process of establishing it. Even though the position of 'recipe' has got better with time[14], Indian traditional recipes stand ineligible for legal

[10]Sarah Segal, 'Keeping it in the kitchen: An analysis of intellectual property protection through trade secrets in the restaurant industry', 37Cardozo L. Rev. 1560 (2015)

[11] Buffets, Inc. v. Klinke, 73 F.3d 965 (9th Cir. 1996)

[12]Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 466 N.E.2d 138 (Mass. App. Ct. 1984)

[13] Magistro v. J. Lou, Inc, 270 Neb. 438, 703 N.W.2d 887 (Neb. 2005)

[14] Kurt M. Saunders & Valerie Flugge. "Food for Thought: Intellectual Property Protection for Recipes and Food Designs." 19 *Duke L. & Tech. Rev.* 159 (2020)

protection as it is already known to the public at large. Any new economically valued recipe which has been kept a secret can still get trade secret protection.[15] Taking the example of Bubba Burger, where the shape of the hamburger was "Irregular" and had no functional nature as it did not add any taste or cost benefit to the manufacturer but included some additional cost to it, was declared to be entitled to protection.[16]

The possessor of a product design can seek a design patent. Should the application succeed, the owner gains the ability to exclude competitors from the market throughout the patent's duration. During this period, they can establish secondary meaning without competition. Once secondary meaning is established, trademark registration becomes attainable. Unlike design patents, trademarks can have indefinite validity. Notably, data suggests that obtaining design patents is relatively straightforward[17].

2.1.1 Implications of Recipe Protection on Trade Secrecy:

a. Creativity vs. Instruction

The creators may opt in favour of attributing their contributions to dishes while keeping the core recipe a secret. This approach allows for variations and innovations while maintaining the secrecy of the original recipe. This model suggests that a "fair use" exception, akin to copyright law, could be introduced in trade secrecy, permitting selective sharing of trade secrets without compromising their core value.[18]

Implementing such an exception would necessitate defining the boundaries of the "core" of a trade secret and addressing potential challenges in its application.

[15]*Id* at 162

[16] Tommy Tobin and Jeannie Heffernan. Want Fries with That Trademark? *American Bar Association* (2019) (last visited on 07th September, 2023)

[17]Supra n. 4

[18]Supra n.4 at pgno. 196

Nonetheless, this could offer a balanced solution that fosters innovation, prevents trade secret loss, and aligns with evolving perceptions of creativity and instruction. Overall, the evolving landscape of culinary intellectual property demonstrates how the principles of trade secrecy can adapt to changing values, raising the potential for broader application across various industries.[19]

The conflict between skillset and artistry is another challenge that extends beyond the culinary realm as it pertains to the perceived value of labour and the recognition of the artistic element within various professions. This issue revolves around the dichotomy between labour seen as a practical necessity and labour considered an expression of artistry. This conflict can be observed in fields such as craftsmanship, blue-collar work, and even some white-collar professions. The distinction between "artisan" craftsmen and those who perform practical work underscores the differentiation between skilled labour and artistic expression. Likewise, workers in various domains, from musicians to taxi drivers, may face similar challenges in how society values their contributions.[20] In the context of trade secrecy, the resolution of this conflict holds implications for the extent of protection afforded to different fields based on their perceived economic value. Highly skilled and economically valuable labour is more likely to be deemed deserving of trade secrecy protection to safeguard profits. Conversely, occupations historically seen as having little economic value might struggle to establish their eligibility for

[19]Supra n.4 at pgno. 198

[20] Jeremy Anderberg, Reviving Blue Collar Work: 5 Benefits of Working in the Skilled Trades, The Art Of Manliness (Nov. 24, 2014) (last visited on 07th September, 2023)

trade secret protection.[21] The evolving perception of cooking as an art form and its increasing economic worth bodes well for the broader application of trade secrecy. As cooking has transitioned from being viewed as a menial task to a skilful art, other fields undergoing similar shifts may also see increased recognition of their economic value. However, this broader application of trade secrecy may require a more comprehensive approach to establish economic value, potentially based on factors like utility and ease of utilization. This shift could allow for trade secrecy protection for a wider range of materials, including data that might not have significant economic value but holds considerable utility. Overall, the changing perception of skillset and artistry can influence how trade secrecy is applied across various domains, underscoring the evolving nature of intellectual property protection[22].

b. Secrecy vs. Openness

The tension between secrecy and openness is a central conflict in various fields, including the culinary world, brought about by factors like training, internet sharing, and the evolving nature of work. Chefs, for instance, must strike a balance between sharing information for training purposes and safeguarding personal or valuable recipes and dishes. This challenge is amplified by the digital age and the sharing economy, which are transforming how information is disseminated[23]. This conflict is not unique to cooking but applies to other sectors influenced by similar shifts. As workers move between jobs and information becomes easily accessible online, various domains, from artisans to knowledge

[21] *Id*

[22] Supra n. 4 at pgno.200

[23] Meredith G. Lawrence, Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age, 14 *Vand. J. Ent. & Tech. L.* 187 (2011)

workers, must grapple with the decision to share information openly or maintain secrecy. This dichotomy has broader implications for intellectual property protection.

The resolution of this conflict in the culinary realm can offer insights for other fields. Industries emphasizing the free flow of information might opt for reduced secrecy to foster skill and product development. Conversely, those valuing secrecy, such as pharmaceutical research, may favour stringent protection to prevent imitation and innovation by competitors. In the culinary world, the practice of attribution is notable. Cooks often seek to protect recipes that are particularly identifiable with them and demand acknowledgment for their contribution. This approach can be applied to other professions, where only specific, distinctive aspects of one's work are safeguarded as trade secrets. For instance, a musician might protect specific playing styles rather than every method of performance[24]. Similarly, a company might only seek protection for select research results that establish its market reputation. The concept of creating a registry for trade secrets, akin to trademark registries, is proposed as a means to address this issue. However, establishing such a registry poses challenges, including the risk of tempting misappropriation and the balance between listing enough information to identify a trade secret without disclosing its entirety. These challenges mirror those faced in other aspects of intellectual property law and can likely be mitigated through legal mechanisms, legislative action, or court-defined tests[25].

[24]Supra n. 4 at pgno. 202
[25] Supra n.4

Henceforth, the ongoing struggle between secrecy and openness has implications beyond the culinary field. How different sectors navigate this conflict can shape the future of trade secrecy, intellectual property protection, and the evolving nature of work and information sharing in a rapidly changing world.

2.2 Copyright

The basis of copyright law is rooted in three fundamental principles: 1) promoting learning and the progress of science; 2) protecting authors' rights to profit from their works; and 3) enriching the public domain by limiting the duration of exclusive rights[26]. These principles are achieved by granting authors a temporary monopoly on their works, encouraging innovation while ensuring that the works eventually enter the public domain. The traditional justification for copyright is that it safeguards authors' investments in their creative works from unauthorized copying, thereby fostering creativity. When considering the extension of copyright protection to culinary creations, it's crucial to evaluate whether these principles would be upheld[27]. Granting intellectual property rights to chefs for their dishes could potentially contribute to the public domain, but the extent of this contribution is uncertain[28]. However, the current approach to copyrighting dishes suffers from two issues: focusing on recipes already in the public domain and confusing the recipe itself with the dish as a creative work. To properly assess copyrightability, attention should shift to original and expressive dishes while

[26] Dennis S. Karjala & Keiji Sugiyama, Fundamental Concepts in Japanese and American Copyright Law 36 *Am. J. Comp. L.* 613 (1988)

[27]Supra n.5 at pg no. 44

[28]Supra n. 21

understanding the distinct roles of the dish, recipe, and cooking technique[29].

For a dish to be copyrightable, it must exhibit sufficient creativity and not be merely a functional combination of Flavours. Many chefs believe that cuisine is capable of expressing culinary relationships, as well as broader social and cultural aspects, making it eligible for copyright protection[30]. Yet, the question remains whether granting copyright to chefs would align with copyright's objectives. It's argued that monopolizing dishes might not significantly reward innovators, enhance knowledge, or contribute to the public domain. In fact, it could potentially hinder these goals[31]. Considering the views of chefs within the culinary profession, the concept of a "culture of hospitality" prevails. Chefs often view recipes as shared knowledge rather than strictly "intellectual property." They are willing to share recipes as long as proper norms of attribution are observed[32]. This suggests that copyright's goals might be better served by existing informal professional norms rather than expanding the copyright statute. In conclusion, while copyright law is designed to promote creativity, incentivise innovation, and enrich the public domain, extending copyright protection to dishes might not align with these goals[33]. The copyright status of recipes experienced significant evolution over time. Until 1963, questions regarding whether recipes could be copyrighted were scarce in court proceedings, and the few

[29]Jeremy Anderberg, Reviving Blue Collar Work: 5 Benefits of Working in the Skilled Trades, The Art Of Manliness (Nov. 24, 2014) (last visited on 07th September, 2023)

[30]J. Austin Broussard, An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation, 10 *Vand. J. Ent. & Tech. L.* 691 (2008)

[31]*Id* at 707

[32] Supra n.30, at Pg no.709

[33]Cathay Y. N. Smith, Food Art: Protecting Food Presentation under U.S. Intellectual Property Law, 14 *J. Marshall Rev. Intell. Prop. L.* (2014)

cases that did surface primarily focused on a recipe's inclusion in labels or cookbooks rather than the recipe itself. However, in 1963, before courts could rule on the matter, Melville Nimmer addressed this issue comprehensively in his Treatise on Copyright Law.[34] According to Nimmer, recipes were unlikely candidates for copyright due to their functional nature. He argued that "the content of recipes are clearly dictated by functional considerations, and therefore may be said to lack the required element of originality, even though the combination of ingredients contained in the recipes may be original in a non-copyright sense.[35] This view was built upon Section 102(b) of the Copyright Act[36], where Nimmer contended that since recipes lacked originality, granting them copyright protection would be pointless as anyone could replicate the same dish[37].

This perspective was echoed in *Publications International, Ltd. v. Meredith Corp.*,[38] a case in which the United States Court of Appeals for the Seventh Circuit cited Nimmer's definition. In this case, the court held that the "Discover Dannon: 50 Fabulous Recipes with Yogurt" cookbook was not eligible for copyright protection due to the recipes' absence of creative expression. This interpretation has since become the prevailing consensus. "Meredith case" has been cited in two other significant cases, Barbour v. Head,[39] where the court denied a motion to dismiss, implying genuine concerns over whether recipes were protected expressions.

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[34] Christopher J. Buccafusco, On The Legal Consequences Of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable? 24 *Cardozo Arts & Ent. L.J.* 1121 (2007)

[35]Supra n. 14 at pg no. 198

[36]The Copyright Act, 1976 17 U.S. Code § 102

[37]Supra n. 4

[38] Publications International, Ltd. v. Meredith Corp, 88 F.3d 473 (7th Cir. 1996)

[39] Barbour v. Head, 200 F. Supp. 2d 687 (S.D. Tex. 2002)

In more recent high-profile cases, the notion of recipes being ineligible for copyright protection resurfaced. In *Lapine v. Seinfeld*,[40] the court rejected a plaintiff's claim, asserting that concepts like "stockpiling vegetable purees for covert use in children's food" were not copyrightable ideas. Similarly, in *Lambing v. Godiva Chocolatier*, a plaintiff alleged menu theft, which eventually resulted in an out-of-court settlement. The case of Robin Wickens further supported this view, as a chef faced backlash for serving replicas of dishes by famous American chefs. In summation, recipes are generally deemed unsuitable for copyright protection due to their functional, instructional nature. These principles have been reinforced through various court cases, both historical and recent.

2.2.1 The Idea Expression Dichotomy

Copyright law protects original works of authorship fixed in a tangible medium of expression, typically requiring independent creation, creativity, and permanence. While recipes meet most of these criteria, they often fall short of copyright protection due to the idea-expression dichotomy. Recipes' simple lists of ingredients or directions are considered factual and functional, thus deemed uncopyrightable. Courts have consistently held that recipes primarily convey facts and lack the requisite creativity for copyright protection. However, recipes accompanied by substantial literary expressions, such as detailed explanations or creative descriptions of the cooking process, may qualify for copyright protection. Cookbooks, as compilations of recipes, can be protected under copyright law if their selection, arrangement, and coordination exhibit creativity. Nonetheless, the copyright for a compilation does not extend to the individual recipes themselves but rather to the organization and presentation of the collection. Consequently, while copyright protection for recipes may be limited, compilations like cookbooks can enjoy copyright

[40] Lapine v. Seinfeld, 375 F. App'x 81 (2d Cir. 2010)

safeguards if they meet the requisite creative threshold in their selection and arrangement.

2.2.2 Extending copyright protection to recipes

The authorities clearly have denied copyright protection in terms of the originality and fixability of the recipes. The initial conceptual statements made by authorities lie in their emphasis on existing recipes for dishes rather than innovative creations. When considering recipes for well-established dishes, like apple pie or coq au vin, the focus on functionality and lack of originality might seem valid[41]. However, this approach overlooks groundbreaking creations like Thomas Keller's "Oysters and Pearls," a blend of tapioca pudding, Malpeque oysters, and caviar.[42] These novel, inventive dishes cannot be equated to statements of facts. This is a conceptual mistake of confusing the work of authorship with the instructions on how to execute it. Considering a recipe as an uncopyrightable procedure is akin to deeming dance steps' schematic representation as a process.[43]

2.2.3 Dealing with 'fixation'

The concept of "fixation" isn't universally required for protection under international copyright law. This means that creations like "unfixed" paintings, body paintings, and sand carvings can be protectable under international principles. The requirement of "fixation" only applies in countries, often

[41]Sophie Pemberton, 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, 41 *U.W. Austl. L. Rev.* 151 (2017); *Supra* 11

[42] Christopher J. Buccafusco, On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?, 24 *Cardozo Arts & Ent. L.J.* 1121 (2007)

[43] Allyson M. Ayoob, Just Desserts: Recipe Copyright and the Plagiarism of Edible Creations, 1(2) *Line by Line: A Journal of Beginning Student Writing* (2015)

common law jurisdictions that have chosen to mandate it at the national level.[44]

In truth, recipes, drawings, and musical notations are vehicles for fixing a work in a tangible medium. The cuisine is akin to performative arts, wherein words are integral to conveying the culinary performance's essence. Copyright resides in the specific "dish" itself, while the recipe serves to meet the fixation requirement. Culinary creations are distinct creative expressions utilizing cooking techniques. This doesn't hinder copyright in dishes crafted with specific techniques as long as they fulfil statutory prerequisites. There's no contradiction with copyright restrictions on facts or processes, allowing dishes to potentially be copyrighted without issue.[45] According to Chef Charlie Trotter, cooking embodies an expressive fusion of ideas about cooking and eating, intelligible to both home cooks and professionals. The key is that the expression needs to be understandable beyond the chef.[46] Similar to music, conveying the essence of a dish can be challenging to articulate, yet chefs believe they can achieve this through tasting, preparing, or even reading a recipe. Reading recipes allows chefs to grasp meanings, whether relating to technique, style, or connections with nature and seasons.[47]

Chef Thomas Keller perceives dish combinations mentally to assess their harmony and whether they convey the intended

[44] Wipo/Grtkf/Ic/13/4(B) Rev., Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, Thirteenth Session Geneva, October 13 To 17, 2008

[45] Gregory S Donat, Fixing Fixation: A Copyright with Teeth for Improvisational Performers. 97 *Colum. L. Rev.* 1363 (1997)

[46]Supra n. 30 at Pg no.1153

[47]Emily Cunningham, Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen, 9 Journal of High Technology Law (2009)

meanings.[48] Chef Wylie Dufresne enjoys presenting familiar tastes in novel ways, like his pickled beef tongue sandwich with unique condiments.[49] Chef Van Aken likens traditional recipes to major chords in a culinary symphony. Culinary creations can express diverse sensations, emotions, and ideas, and while copyright law protects expressiveness only if separable from functional aspects, denying culinary expressivity would be unjustified.[50]

Recognizing that the analysis of dish copyrightability should focus on new culinary creations, viewing the dish as the work of authorship and the recipe as a means of communication, and acknowledging that dishes can hold layers of meaning, copyright jurisprudence poses no obstacle to granting chefs copyrights for their gastronomic creations.

2.3 Considering Patent Protection

In India, the concept of Utility Patents is not present, unlike in the USA, where it's actively practised. Utility patents primarily protect products rather than processes. While novelty is a consistent requirement, different jurisdictions have varying standards for novelty. The standards for non-obviousness and inventive steps are jurisdiction-specific and often less stringent. Utility patents are well-suited for incremental innovations. In several regions, utility patents undergo only a preliminary procedural review before being granted without a comprehensive substantive assessment.[51] These patents offer similar rights to regular patents but with a shorter protection duration of 6 to 15 years, in contrast to the standard 20-year

[48]Hendrik N.J. Schifferstein, Barry M. Kudrowitz& Carola Breuer, Food Perception and Aesthetics - Linking Sensory Science to Culinary Practice 20(4) *Journal of Culinary Science & Technology* 293-335 (2022)

[49] K. Vetter, Chefs are designing flavours for meals, Meals in Science and Practice 509-526 (2009)

[50]Norman Van Aken, *No Experience Necessary* 302 (Taylor Trade Publishing, New York, 2013)

[51]Supra n. 15

term. The costs associated with obtaining and maintaining utility patents are usually lower. Moreover, the registration process for utility patents is generally faster due to limited pre-registration scrutiny in most jurisdictions.[52]

A utility patent can be granted for a 'process, machine, manufacture, or composition of matter or any new and useful improvement thereof.' A recipe typically entails ingredients and instructions, rendering it a process, and the resulting dish can be seen as a composition of matter or a manufacture. If granted, the protection term is 20 years from the application date[53]. For patent eligibility, the invention must be useful, novel, and non-obvious[54]. In the case of food recipes, establishing novelty may be difficult as most of the dishes and recipes are commonly known among the masses. Similarly, a dish which may be achieved by following a particular method of preparation may not have any inventive step and may not be non-obvious to the person skilled in the art. However, a quicker method of preparation of the same recipe or using a unique ingredient to increase the shelf life of the dish may be considered novel and inventive[55]. Many a time, the recipe, owing to its nature, is hit by Section 3(e) of the Patents Act[56], thus, not patentable. In the famous case of *Lallubhai ChakubhaiJarivala v. Shamaldas Sankalchand Shah*[57], which

[52]Adam B Jaffe, The US patent system in transition: policy innovation and the innovation process. 29(4) *Research policy* 531-557 (2000)

[53]*Id*

[54]Michael Carley, Deepak Hedge and Alan Marco, What is the probability of receiving a US patent? 17 *Yale JL & Tech.* 203 (2015)

[55]Isheta T Batra, *Culinary Creations Safeguarded: Navigating IP Protection for Recipes- An In-depth Overview,* Trail Blazer Advocates, https://www.tbalaw.in/post/culinary-creations-safeguarded-navigating-ip-protection-for-recipes-an-in-depth (August 21, 2023).

[56] The Patents Act of 1970, S.3(e), No.39, Acts of Parliament, 1970

[57]Lallubhai ChakubhaiJarivala v. Shamaldas Sankalchand Shah *(1934) 36 BOMLR 881.*

involved patenting the procedure of whitening almonds, the Hon'ble Bombay High Court held that,

> A new combination may be the subject-matter of a patent although every part of the combination per se is old, for here the new part is not the parts themselves, but the assembling and working them together, which ex hypothesis is new. If the result produced by such a combination is either a new article, or a better article, or a cheaper article than before, such combination is an invention within the statute and may well be the subject-matter of a patent.

Usefulness is determined by practical application or benefit. In the context of food, this could pertain to edible preparations. Novelty means no prior public disclosure worldwide before the patent application date. This requires no earlier identical invention. Food-related patents need to present new ingredient combinations or variations on known recipes.[58]

In *Proctor & Gamble Co. v. Nabisco Brands*[59], a patented dual-textured cookie recipe faced a challenge. Despite the novelty, the court invalidated it due to an earlier cookbook recipe. Apart from novelty, non-obviousness is vital. These two aspects are distinct, implying that even if a recipe is novel, it might still be deemed obvious and ineligible for patent protection. In the case of Kretchman[60], it was held that a patent application for a certain kind of crustless peanut butter should be deemed invalid owing to its obviousness. Ordinary skill suggested applying peanut butter on both sides of the bread to prevent sogginess and contain the jelly. Nonetheless, patents have been granted for culinary inventions. Examples include a process for crafting "fruit ganache," yoghurt, cream cheese,

[58]Supra n.14 at pgno.33
[59] Proctor & Gamble Co. v. Nabisco Brands, 711 F. Supp. 759 (D. Del. 1989)
[60] Kretschmann v. Strange, [1922] QWN 14

microwaveable sponge cake, and sugarless baked goods. Notably, various food industry giants and restaurant chains have effectively used patents to safeguard their culinary innovations. However, due to enforcement costs and the need to establish novelty, patents have found limited application in the culinary realm.

A Design Patent safeguards the visual appearance of articles. They protect new, original, and ornamental designs for manufactured items. An 'article of manufacture' is a product resulting from manufacturing. Design encompasses visual ornamental features applied to the article. The protection term is 15 years from the patent grant.[61] Instances of food-related design patent infringement are rare, in the case of *Contessa Food Products, Inc. v. Conagra Inc*.[62], involving shrimp serving trays. The patent covered circular trays with sauce receptacles and aligned rows of shrimp. A competitor sold similar trays, and the court ruled on substantial similarity through the 'ordinary observer' test. This test encompasses all ornamental features during normal use, including those not visible at the point of sale. Focus on overall ornamental appearance, particularly in simple designs, was emphasized in another case involving garlic and onion storage containers.

2.4 Trademark and Trade Dress

Trademarks encompass words, names, symbols, devices, or combinations used by producers to differentiate their goods and indicate their source. Trademark law extended to trade dress, originally referring to overall packaging, but now

[61] Morgan P Arons, A Chef's Guide to Patent Protections Available for Cooking Techniques and Recipes in the Era of Postmodern Cuisine and Molecular Gastronomy. 10 *J. Bus. & Tech. L.* 137 (2015)

[62] Contessa Food Products, Inc. v. Conagra Inc, 282 F. 3d 1370. 5

includes various elements presenting products or services. Trade dress laws protect the product's presentation alone.[63]

However, chefs face challenges when trying to use trademarks or trade dress to protect specific dishes. Trademarks and trade dress safeguard presentation, not the recipe. A cuisine can't serve as a restaurant's "symbol" due to its consumer-oriented function. Chefs can trademark names, dish names, or restaurant names but not recipes.[64]. In *Taco Cabana International Inc. v. Two Pesos, Inc*.[65], a court upheld a restaurant's "festive eating atmosphere" as trade dress, including layout, colours, and decorations, akin to product packaging. In the context of food products, trade dress protection demands the non-functionality of a specific design or packaging. In Application of World's Finest Chocolate, Inc.[66], the packaging of a chocolate candy bar wasn't functional as it didn't offer utilitarian advantages and alternative designs were feasible.

Food designs with federally registered trademarks include Pepperidge Farm's Milano Cookies, Carvel's Fudgie the Whale Ice Cream Cake, Dairy Queen's distinctive ice cream curl on top, Hershey's Kisses, Hershey's Chocolate Bar, Frito Lay Sun Chips, Izzy's ice cream shop's ice cream cones, J. Dawgs for hotdogs with crisscross cuts, General Mills' Bugles, Tootsie Rolls Tootsie Pops, and Magnolia Bakery's cupcakes featuring signature swirl icing[67]. Later cases constrained this by requiring a layout to attain secondary meaning for distinctiveness as trade dress. Whether trade dress could cover

[63] Caroline M. Reebs, Sweet or Sour: Extending Copyright Protection to Food Art, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 41, 41 (2011).

[64] Kiran Mary George, Trade Dress Law in the Commercial Kitchen: Exploring the Application of the Lanham Act to Food Plating in the Culinary Industry, 10 *NUJS L. Rev.* 609 (2017)

[65] Taco Cabana International Inc. v. Two Pesos, Inc, 505 U.S. 763 (1992)

[66] World's Finest Chocolate, Inc v. World Candies, 409 F. Supp. 840 (1976)

[67] Supra n. 48

a recipe remains uncertain. Instances have led parties to settle instead of pursuing court rulings. Hence, trademark and trade dress provide protection primarily for the visual presentation of cooked products, not the recipes themselves.

2.5 Trade Dress or Design Patent?

2.5.1 Functionality test

2.5.1.1 Utilitarian functionality

The concept of utilitarian functionality strongly suggests the advantages of trade dress or the absence of alternative designs, and it is one of such functions that is the established traditional test gauges that decide on the factor whether a particular article has usage value or economical value or quality.[68] Advertising emphasizing a design's usefulness and cost-effective manufacturing method is also relevant. Utilitarian functionality applied to food has been dealt with in the case of *Ezaki Glico Kabushiki Kaisha v. Lotte International America Corp.*[69] It concerned 'Pocky', a chocolate-covered cookie stick with an uncoated end. The court found the design functional since the uncoated end prevented the chocolate mess while holding it. In *Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*[70], the design of Dippin' Dots contributed to taste, deeming it functional and not trade-dress protected, similarly, in *William R. Warner & Co. v. Eli Lilly & Co.*[71], adding chocolate to a pharmaceutical mixture for better taste was deemed functional.

[68] Stephen Langs. The Definitional Scope of an Intrinsic Utilitarian Function Under the 1976 Copyright Act: One Man's Use is Another Man's Art. 20 *W. New Eng. L. Rev.* 143 (1998)

[69] Ezaki Glico Kabushiki Kaisha v. Lotte International America Corp, 101 (D.N.J. 2017)

[70] Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F. 3d 1197 (2004)

[71] William R. Warner & Co. v. Eli Lilly & Co., 265 U.S. 526 (1924)

2.5.1.2 Aesthetic Functionality

The competitive necessity test is the second form of non-functionality assessment, inquiring if the exclusive use of a design would significantly disadvantage competitors. Aesthetic functionality, the other form, pertains to a product's essential appearance. Design elements like colour are intrinsic to the product and must be available to competitors, especially if the product's appeal is visual.[72] In *Wallace International Silversmiths, Inc. v. Godinger Silver Art, Co., Inc.*[73], baroque patterns on silverware handles were deemed aesthetically functional, regardless of pattern source. Similarly, white icing's aesthetic functionality for wedding cakes is due to its connection with bridal gowns and Western weddings.

In *Norwich Pharmacal Co. v. Sterling Drug, Inc.*[74], Pepto-Bismol's pink colour was ruled an unprotectable trade dress since pink comforted upset consumers. In *McNeil Nutritionals, LLC v. Heartland Sweeteners LLC*, color-coded sweeteners' industry standard was relied upon by consumers. As many food designs enhance attractiveness or enjoyment, food design isn't solely about identifying the origin, making a case that it serves broader purposes. Indeed, given that numerous food designs contribute to enhancing the visual appeal and enjoyment of consuming the food, it becomes compelling to argue that food design serves a purpose beyond merely identifying the product's origin. It's reasonable to assume that no food product manufacturer would opt for an unappetizing design solely for source identification.

[72] Alfred C Yen. Copyright opinions and aesthetic theory 71 *S. Cal. L. Rev.* 247 (1997)

[73] Wallace International Silversmiths, Inc. v. Godinger Silver Art, Co., Inc., 735 F. Supp. 141, (S.D.N.Y. 1990)

[74] Norwich Pharmacal Co. v. Sterling Drug, Inc, 271 F.2d 569, (2d Cir. 1959)

3. Protection of knowledge and information from unauthorised transfers

Knowledge as a public good is deemed non-rivalrous and non-excludable. A good is considered non-rivalrous when one person's use or consumption of the good does not diminish its availability to others. In other words, multiple individuals can use the good simultaneously without reducing its quantity or quality. On the other hand, non-excludable goods are goods that do not exclude a certain class of people from using the good, regardless of whether they have paid for it or not. Hence, access to knowledge and information has been rooted as basic human rights embedded as part of the larger 'right to life'.

The protection of traditional knowledge faces a myriad of challenges, chief among them being the unauthorized dissemination of this invaluable wisdom without proper informed consent or equitable access and benefit sharing. Traditional knowledge encompasses a wealth of expertise passed down through generations within Indigenous communities, offering insights into sustainable practices, herbal remedies, and cultural heritage. However, due to its informal nature, it often lacks formal documentation or legal recognition. Although TRIPS, in its Article 7[75] and Article 8[76] supports the transfer of knowledge or know-how for the international transfer and dissemination of technology and technical knowledge, free and unchecked transfers of information which may be protectable under trade secrets can be a major intellectual property concern. Today, intellectual property rights are mainly seen from the perspective of incentivizing creativity, and redeeming the monetary benefits in lieu of the hard work, effort, time and labour that goes into creation is of utmost importance to the inventor/creator. At the same time, ensuring rightful access and availability of

[75] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1995, Article 7

[76] Supra n.75, Article 8

protected intellectual property is crucial to public interest. Maintaining this balance between individual monopoly rights and public interest has been the toughest challenge to accomplish.

The lack of legislation which may encompass and provide for all types of traditional knowledge is what makes this knowledge so vulnerable to misappropriation. This vulnerability allows external entities to exploit these resources for commercial gain without fair compensation or acknowledgement of its custodians. The lack of legal frameworks and intellectual property protections specifically tailored for traditional knowledge aggravates this issue. Furthermore, navigating the complexities of informed consent and equitable benefit-sharing can be challenging, especially when traditional knowledge holders may have limited access to legal resources or face power imbalances when engaging with external stakeholders. Striking a balance between safeguarding traditional knowledge, respecting the rights and autonomy of indigenous communities, and promoting innovation and progress remains a critical global concern. Policymakers, legal experts, and advocacy groups continue to work towards establishing frameworks that respect and protect traditional knowledge, ensuring that its custodians receive due recognition, compensation, and involvement in any commercial applications.

The Nagoya Protocol[77] on Access and Benefit Sharing is a significant international agreement adopted under the Convention on Biological Diversity. It addresses the fair and equitable sharing of benefits arising from the utilization of genetic resources and traditional knowledge associated with biodiversity. One of the key contributions of the Nagoya Protocol is that it establishes a clear framework for accessing

[77] The Nagoya Protocol on Access and Benefit Sharing, Convention on Biological Diversity, https://www.cbd.int/abs/

genetic resources and traditional knowledge. It requires countries to obtain prior informed consent from the providers of genetic resources and traditional knowledge, ensuring that their rights and interests are respected. Furthermore, the protocol promotes the idea of mutually agreed terms (MAT) in benefit-sharing agreements. This means that countries and indigenous communities can negotiate specific terms and conditions for the use of their resources, including issues related to intellectual property rights, technology transfer, and monetary benefits. Prior Informed Consent (PIC) and Access and Benefit Sharing (ABS) are crucial principles aimed at safeguarding traditional knowledge and ensuring fair and equitable treatment of Indigenous communities. PIC refers to the process through which traditional knowledge holders grant or withhold their consent for the use and potential commercialization of their knowledge. This ensures that any utilization of traditional knowledge is done with the informed agreement of the communities or individuals who possess it. ABS, on the other hand, focuses on establishing a framework for fair compensation and benefits to traditional knowledge holders when their knowledge is used for commercial purposes. It emphasizes that the benefits derived from the utilization of traditional knowledge should be shared in an equitable manner with the communities that are the custodians of this knowledge.

4. Conclusion

The concept of edible intellectual property might not sit well, yet both recipes and food designs are eligible for various forms of intellectual property protection. However, the suitability varies across these forms. While all come with constraints, like requirements and scope of rights, recipes kept confidential can be guarded as trade secrets, securing them from unauthorized use. Protection through utility patents, fitting for food designs and processes, can be challenging due to the rigour of novelty and non-obviousness requirements. Copyright, though tough

for recipes, is plausible for original expressions beyond their factual and procedural aspects or for compilations. Design patents seem more apt for safeguarding food designs' ornamental facets, while trade dress works if they're distinct as source indicators. Broader protection's implications for free competition and the legal considerations tied to 'articles of manufacture' and aesthetic functionality are also addressed. As the realm of inventive culinary creations is cherished, these issues merit serious consideration. The parallels between the conflicts in the culinary field and those potentially present in other sectors seeking trade secrecy protection offer several implications for trade secrecy as a whole. In the realm of cooking, the challenge lies in sharing recipes and techniques while safeguarding valuable ones. This suggests that trade secrecy needs to adapt to allow greater control over what is protected. This could involve introducing a "fair use" exception for trade secrets, determining value based on data utility, or establishing a public registry of trade secrets. While some argue that refining patent, copyright, or trademark protections for cooking would be more fitting, trade secrecy possesses unique advantages. Trade secrets have unlimited protection duration, provided the information remains secret, unlike the time-limited nature of other intellectual property rights. Trade secrecy also doesn't necessitate information disclosure, as the core requirement is keeping the information secret, which aligns well with the culinary context. Trade secrecy is relatively easier to establish compared to patent, copyright, and trademark protections, which require higher thresholds of novelty and originality. Trade secrets place more emphasis on demonstrating effective protection, such as restricting access and implementing security measures. These aspects make trade secrecy adaptable and potentially conducive to expansion in various sectors, including those facing similar conflicts to cooking.

In the context of the appropriation of traditional knowledge, these principles, particularly PIC, ABS, and MAT, serve as essential ethical and legal frameworks. They aim to protect the rights, autonomy, and cultural heritage of Indigenous communities, ensuring that their knowledge is used in a respectful and mutually beneficial manner while also promoting innovation and sustainable development. Adhering to these principles is crucial for fostering a more equitable and just approach to the utilization of traditional knowledge in a globalized world. The application of trade secrecy to recipes indicates that it could be extended to other areas with relatively minor adjustments. The evolution of trade secrecy remains uncertain, but the continued observation of how the culinary world applies its standards of protection could shed light on potential developments. As sectors navigate the conflicts between secrecy and openness, creativity and instruction, and skillset and artistry, trade secrecy might evolve to strike a balance between protecting valuable information and fostering innovation. At the outset, recipes might occur to one as purely 'literary work' and one which is copyrightable. However, as discussed, there are issues with the ingredients list and the method of preparation mostly being generic and part of common practices, thus lacking originality. This yet does not imply that culinary creations are entirely out of the scope of copyright protection. Going by the idea-expression dichotomy in copyright in cases of recipes, it is clear that a written recipe isn't copyrightable because it simply lists the ingredients and steps needed to make a dish, which are factual. However, when recipes are part of a cookbook that includes additional expressions such as the author's personal experiences and comments on the taste, texture, and appearance of the food, the entire cookbook qualifies as a copyrightable 'literary work'. Nonetheless, the recipes themselves remain uncopyrightable, as they are just statements of unoriginal facts, separate from the other creative valuable content in the cookbook.

The debate over the copyrightability of recipes underscores authorities' denial based on originality and fixability, emphasizing existing recipes over innovative creations. Yet, groundbreaking dishes like Thomas Keller's "Oysters and Pearls" challenge this notion, highlighting the conceptual error of equating culinary works with factual statements. While fixation is a requirement in some jurisdictions, culinary creations serve as tangible expressions of artistic endeavour, deserving of copyright protection. Chefs like Charlie Trotter and Thomas Keller view dishes as expressive amalgamations of ideas and Flavors, suggesting that copyright jurisprudence should acknowledge the nuanced layers of meaning inherent in gastronomic creations. In conclusion, recognizing the creative essence of dishes and their communicative potential in recipes warrants consideration for copyright protection, aligning with the expressive nature of culinary arts.