



Beyond Bon- Appetite: Intellectual Property Protection For Culinary Creativity

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Abstract: Plating of food is a skill that a chef develops over the years of training and involves creativity and technical knowledge. The influence of social media and foodstagram has taken the need to protect the rights of chefs to the next level as they tend to lose their right over the plate of food as soon as someone adds a post on Instagram or Facebook and these days the trend has taken an elevating turn. There is protection granted to recipes and signature dishes of chefs which brings in the question of why it is not extended to the plating of food. The chef is adding his/her heart and soul into the dish when it is plated and it is essential to find a way to protect it either under copyright law, trademark, specifically trade dress or even design patent. This paper delves into the problem of protecting the “Art of food plating” and how different realms of Intellectual property react to this subject. It analyses the complexities and lacuna in each law also suggesting the steps that can be taken to extend protection to the art of plating food. The paper also delves into the different cases in the past which have tried to break the orthodoxy surrounding the subject and have enabled the courts to interpret the law to be more accommodative.

Index terms- *Art of food plating, foodstagram, copyright, trade dress, Design patent.*

Introduction:

“A scoop of vanilla bean ice cream sits nestled in the centre of a crisp white plate, its smooth surface catching the light. A vibrant raspberry sauce pools around the base, creating a dramatic halo. A single sprig of mint, with leaves a perfect shade of emerald, rests beside the ice cream, adding a touch of freshness and a burst of colour. The whole composition is minimalist yet elegant, a delightful prelude to the sweet indulgence to come.”

This description sculpts a rather decadent image of a dessert in one’s mind, the picturization of which is sufficient to deem it scrumptious. This dessert could be just plated without any complications and attention to

detail about the colours and texture. It would not have the same effect as plating it as described above. Plating of food has gained more significance throughout the years. It is more than just an element of fine dining. It is the mark of quality that the chef is presenting showcasing the inner artist producing a vision that is absolutely beaming with creativity. In today's day and age where the food is being judged solely based on its presentation and aesthetics to make it appetizing for consumers, it has become extremely essential to focus on perfecting the art of food plating. It is a skill perfected with time by chefs to deliver the best plate of food to the customers. Even the restaurant business demands these skills and creativity from the chefs who work there. Given the circumstances, it is only fair to assume that some form of protection has to be provided to the art produced by these chefs on a plate. But the question that needs to be answered here is which form of Intellectual property can protect the "Art of plating food".

Copyright protection for food plating:

Copyright is granted to any work of art, the art of food plating can come under the ambit of artistic work and if the law is tweaked to extend to unconventional works of art, which do take the same level of labour, creativity and intricacy and thereby should be given protection under copyright law to the chef. However, there are challenges which are dealt herewith.

Copyright laws require the subject matter to come under the ambit of "work" as mentioned in the Section 13 of the Copyright Act of 1857. The aspect of art in relation to food plating can come under the ambit of 13(a) that deals with artistic works, according to Section 2(c) of the Copyright act-

"artistic work" means, - (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;(ii) a 'work of architecture; and(iii) any other work of artistic craftsmanship; therefore enabling the art of food plating to be accommodated under sub clause (iii) which states that "a work of artistic craftsmanship" can be considered a work that can be granted protection under copyright law. But to be eligible for such protection the work has to be (i) Original and (ii) Fixed in a tangible medium.

Originality can be achieved in food plating as one chef's vision of the same dish need not be the same as another's. The plating of a dish encapsulates the creativity and motivation that was the driving force behind the chef's art. Presentation of food may involve techniques like the tempering of chocolate or making a perfect quenelle of cream that the chef has perfected throughout the years and has involved a lot of skill and labour.

It was alleged on the online restaurant forum e-Gullet, that Robin Wickens, chef at Interlude in Melbourne, Australia, had copied dishes by renowned American chefs Wylie Dufresne (WD-50), Jose Andres (Minibar), and Grant Achatz (Alinea). It is not uncommon for chefs to borrow recipes or techniques from other chefs. Indeed, there has been a long culture of sharing in the cuisine industry. Most chefs would acknowledge that "the world's culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations

of cooks. However, what made Wickens' actions especially scandalous was the presentation and plating of his dishes to some, they looked almost identical to dishes created by Dufresne, Andres, and Achatz.¹

The Central District of California conducted an examination in the case of *Kim Seng Company v. J&A Importers, Inc*². to determine the level of originality of a "bowl-of-food" sculpture and its eligibility for copyright protection. In this particular scenario, the plaintiff, Kim Seng Company (Kim Seng), and the defendant, J&A Importers, Inc. (J&A), were engaged in a competitive relationship as Chinese-Vietnamese food supply companies. Both parties employed comparable packaging methods for their respective rice stick food products. Both companies employed packaging that featured an image depicting a bowl containing food items, namely rice sticks, egg rolls, grilled meat, and garnishes. Kim Seng asserted its ownership of the copyright for the bowl-of-food sculpture, stating that one of its employees deliberately selected the items shown in the sculpture from a vast array of options and arranged them in a specific manner from an unlimited variety of alternatives. Nevertheless, the court determined that the act of combining a typical bowl with the ingredients of a typical Vietnamese dish demonstrated a "deficiency in originality," rendering it ineligible for copyright protection.

The other requirement would be fixation in a tangible medium, this is one of the major reasons why food plating is a complex subject matter to be granted protection. The Seventh Circuit examined the issue of whether an artistically organized garden qualifies as "fixed" under the Copyright Act. In the prominent case of *Kelley v. Chicago Park District*³, which pertains to the copyrightability of organic works. Chapman Kelley, a renowned artist, exhibited a wildflower exhibition within Grant Park, a notable public park situated in the heart of Chicago. The garden was highly praised by both critics and the public, and was marketed as a form of "living art." The Chicago Park District made significant alterations to the garden without obtaining Kelley's consent, including lowering its dimensions, rearranging the flower beds, and altering certain planting materials. In the case of Kelley's lawsuit against the Park District, the Seventh Circuit determined that Kelley's living garden did not meet the criteria for copyright protection due to its lack of originality and fixation, which are often necessary to establish copyright protection. The court's judgment explicitly stated that it does not imply that copyright protection is limited to works that are static or permanently fixed (since no medium of expression can last indefinitely), nor does it imply that artists who use natural or living components in their work are ineligible for copyright protection. Nevertheless, Kelley's living garden lacked the necessary stability and permanence to be considered a work of definitive authorship. This showed the conservative approach that the US courts had to the concept of fixation of a work to its material or tangible form as an ultimatum to grant copyright protection.

The amendment in the Indian copyright law drew inspiration from the legal case of *Indian Performing Right Society v. Eastern India Motion Pictures*⁴, when it was established that compulsory fixing of musical compositions resulted in the disentanglement of the vocalist, while solely safeguarding the rights of the author. Therefore, Indian law has followed diverse paths in relation to fixation. This requirement forms a part of the

¹ Sincerest Form, E Gforums A Service Of The Soc'y Of Culinary Arts & Letters, (2006).

² Kim Seng Company v. J&A Importers, Inc 810 F. Supp. 2d 1046 (C.D. Cal. 2011).

³ Kelley v. Chicago Park District, Nos. 08-3701 and 08-3712 (7th Cir. Feb. 15, 2011)

⁴ Indian Performing Right Society v. Eastern India Motion Pictures AIR 1977 SC 1443.

idea-expression dichotomy which forms the fundamental base of the copyright law. The term 'expression' refers to the state of being perceptible, rather than necessarily existing in a tangible form. The absence of fixation in a tangible medium eliminates the concern of the transitory duration of work. The courts have applied these principles while granting protection to perfumes like in the case of in the case of *Roberts A.D v. Chanel*⁵, the French Court expressed the view that the objective of fixation is solely to function as evidentiary support in a copyright infringement lawsuit, rather than being a prerequisite for the existence of copyright. The existence of copyright in a work commences upon its manifestation in a perceptible form.

Therefore, it can be concluded that certain revisions made to the copyright law will help accommodate the art of food plating in the ambit of work that can be granted copyright, if the courts do away with the absolute requirement of fixation in a tangible medium in the most literal sense and expand the definition of the same to include art and work that cannot be fixed in the literal sense like the courts interpreted the law in *Roberts A.D. v. Chanel et al*⁶.

Protection of food plating under the Trademark law:

Trade dress law safeguards the visual appearance of a product, and food plating can potentially fall under this umbrella. In essence, it allows a restaurant to prevent competitors from copying their unique plating style if it meets certain criteria. But securing trade dress protection for food plating isn't a simple recipe. We'll delve into the legal requirements, explore successful cases, and understand the challenges involved in this growing area of intellectual property law.

Section 2 (zb) of the Trademark Act, 1999 defines "trade mark" as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours etc., the packaging of the good or trade dress is a concept that can be related to the presentation of food. To grant trademark protection the registry looks into two main aspects of the work (i) Functionality and (ii) Secondary meaning. The Court said trade dress is functional (1) when the claimed design is essential to the purpose of the article or affects the cost or quality of the article, or (2) if it is competitively necessary to use the feature of the design in the relevant market.

In the *Hershey's case*⁷, the refusal of the mark that pertains to a candy bar arrangement comprising twelve recessed rectangular panels of equal size. These panels are arranged in a four panel by three panel formats, with each panel featuring a raised border within a larger rectangle. The registration of the proposed trademark was denied by the Trademark Office Examining Attorney who assessed Hershey's application. According to the Examining Attorney, the configuration was deemed "functional", to be more specific has a utilitarian function as it helps get bite sized pieces of the chocolate and registration was denied based on the rationale that functional

⁵French court of Cassation (2008)-Estelle Derclaye Journal of Intellectual property & practice.

⁶ *Id.*

⁷ In Re Hershey Chocolate and Confectionery Corporation, Serial No. 77809223 (TTAB June 28, 2012)

properties are not eligible for federal registration. Later this was reversed as even though parts of it seemed non-functional the mark as a whole could not be considered functional.

The Eleventh Circuit, in the case of *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*⁸, determined that the "free-flowing small spheres or beads of ice cream" produced by Dippin' Dots were deemed functional and so not eligible for trademark protection. The colour of the ice cream served a functional purpose by indicating its flavour. Similarly, the size of the ice cream contributed to its creamy taste. Lastly, the shape of the ice cream was functional as it indicated the creation process of dropping the ice cream mixture into a freezing chamber, resulting in the formation of bead-like shapes. Consequently, the court determined that the design of the Dippin' dots was deemed functional, as any flash-frozen ice cream product inherently possesses numerous characteristics similar to Dippin' dots. Consequently, the court concluded that dippin' dots did not meet the criteria for trade dress protection.

Acquired Distinctiveness, commonly referred to as Secondary Meaning, plays a significant role in influencing the safeguarding and acknowledgment of trademarks that may originally lack inherent Distinctiveness. The purpose of trademark law is to protect the interests of consumers and encourage fair competition by granting exclusive rights to unique marks that indicate the origin of goods or services.

Even though there are no actual instances of chefs claiming trade dress protection for their dishes that are presented. There are instances of goods or food that are sold in commercial packaging and small businesses that have been granted protection under the trademark law in the US. The Second Circuit Court of Appeals in the case of *Nabisco, Inc. v. PF Brands, Inc.*⁹. determined that the goldfish-shaped crackers produced by Pepperidge Farm demonstrated a reasonable level of distinctiveness. Pepperidge Farm has been engaged in the marketing and sale of goldfish-shaped cheese crackers since 1962. The company has allocated a significant number of financial resources towards advertising their goldfish crackers, resulting in considerable media attention and establishing itself as one of the leading cheese snack crackers in the United States. The marketing of Nabisco's own cheese crackers in various shapes such as cats, dogs, bones, and fish commenced in 1999. A trademark complaint was brought by Pepperidge Farm against Nabisco. The court determined that the goldfish crackers produced by Pepperidge Farm were deemed to be "non-functional, distinctive, and renowned." Furthermore, the court concluded that the fish-shaped crackers produced by Pepperidge Farm lacked any logical connection to a cheese cracker. Furthermore, the lower court determined that the duration, promotion, and sales of Pepperidge Farm's goldfish crackers provided further evidence in favour of Pepperidge Farm's assertion that its goldfish had acquired a secondary significance in the perception of customers.

New York Pizzeria, Inc. (NYPI) has initiated legal proceedings against a previous proprietor and his newly established restaurant¹⁰, accusing them of violating trade dress regulations by imitating NYPI's unique plating techniques. NYPI asserted that their "plating methods effectively showcase NYPI's products to customers in a

⁸ *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1200 & 1203 (11th Cir. 2004).

⁹ *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 217 (2d Cir. 1999).

¹⁰ *N.Y.Pizzeria, Inv., v. Syal*, No. 3:13-CV-335, at *2 (S.D. Tex. Oct. 20, 2014).

unique visual manner." The New York Product Innovation (NYPI) asserts its ownership of a protected trade dress interest in the unique visual representation of the product to consumers. The trade dress encompasses various elements, such as the arrangement of baked ziti, eggplant parmesan, and chicken parmesan, among others. The Southern District of Texas acknowledged that there are exceptional situations in which food plating can be safeguarded by trade dress if it is unique and lacks practical value. Additionally, a party may be able to establish infringement of food plating if there is a high probability of confusion.¹⁰⁸ However, the court rejected NYPI's claim on the grounds that it did not provide evidence on the specific food plating that were safeguarded by trade dress, as well as the specific meals that violated these protections.

The same law that has been applied in these cases of processed food can be extended to the purview of dishes served in the restaurant and if they do not possess functionality and would possibly have acquired distinctiveness if it is a pretty common and simple art work of plating. As discussed, there is high potential of extending trade dress protection to food plating which possess the essentials of qualifying for trademark protection under Indian law.

Protection of food plating under the Design Patent with special reference to the US law.

A design patent in the United States pertains to the decorative design of a product that possesses functional utility. Design patents necessitate that a design must possess the qualities of novelty, originality, ornamentality, and non-obviousness. In order to interpret a design patent claim, the claimed design must encompass both its overall visual appearance and the visual impression it generates. To determine infringement, it is not necessary for the products of both parties to be identical. What matters is the overall appearance of the patented design in comparison to the accused product.

A patent for a design titled "Serving Tray with Shrimp" is depicted in the accompanying image. The provided design patent depicts a circular serving tray including a central circular receptacle designed for the purpose of holding cocktail sauce. The shrimp are arranged in close proximity on the serving tray, creating two circular patterns. The shrimp heads are oriented towards the cocktail sauce in the middle, while their tails are oriented towards the tray's edge. The upper layer of shrimp exhibits overlapping tails that rest upon the heads of the lower layer, resulting in an overlap between the two shrimp circles. The arrangement of the shrimp in the plating gives the image of a clockwise rotating wheel.¹¹

The same design was contended in *ZB Industries, Inc. v. Conagra, Inc., ZB Industries (Contessa)*¹² where a design of shrimp arrangement that was nearly similar to Contessa's was said to have infringed upon their design patent. The concentric circles of shrimp with the cocktail sauce in the middle was direct infringement of their design and upon appeal they were found guilty of infringement and the matter was ultimately settled.

There was also the case of a peace symbol pretzel that was given protection under design patent and when infringed the owner of the design could claim her rights over it as the design was given protection under patent

¹¹ Contessa Food Products, Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002)

¹² Contessa Food Products, Inc. v. ConAgra, Inc., 282 F.3d 1370, 1378 (Fed. Cir. 2002)

law.¹³ Therefore, design patents are a viable option for protection of food plating as the ones that are given protection come very close to what the chefs do in restaurants. Especially the case of the Contessa shrimp design. The reason this makes it a very good option to accommodate the protection of food plating is the limited time the protection is given for which would be around 14 years and it cannot be renewed after making it a part of public domain after the expiry of this term for any chef to use. This would benefit the owner of the design and the other competing chefs as well.

Although Design patent is governed under the Design Act, 2000 of India, it does not explicitly cover food plating. The Act protects the overall design of an article, which includes the features of shape, configuration, pattern, ornament or composition of lines or colours applied to an article, whether in two- or three-dimensional form, by any industrial process or means, in a finished article or article ready for use.

Conclusion:

In today's Instagram era, the problem of protection of food plating has become a bigger issue. People have started the trend of food blogging and most of these designs have reached the public domain. Therefore, all the chefs have lost their right to protection of their culinary creativity as soon as their food goes out the door. This brings us to the urgency of the matter of protection of the art of food plating. David Chang is among a group of chefs who have a policy prohibiting food photography within the premises of their restaurant, Momofuku Ko. Chefs use several justifications for banning the shooting of dishes within their establishments. Moe Issa, the chef at Brooklyn Fare, prohibits photography in his restaurant because he believes it disrupts the dining experience and diverts attention from the other patrons. Photography is prohibited at Soho House New York to safeguard its patrons' privacy. Restaurants Per Se, Le Bernardin, and Fat Duck prohibit using flash photography to avoid disrupting the restaurant's atmosphere.

Certain chefs, like Daniel Boulud, opt to manipulate the quality of photographs by letting diners into the kitchen to capture his delicacies, thereby enhancing the visual appeal of the shots.¹⁴

Apart from the traditional protection granted under Intellectual Property law, the chefs may depend on Non-disclosure Agreements (NDA) with their colleagues for protection of their food presentation and recipes which are trade secrets. They also abide to the code of ethics prescribed by the International Association of Culinary Professionals which helps form a mutual understanding between chefs to ensure they do not infringe upon each other's rights.

It is true that this is an unconventional art form as food can be perceived in the same way by a lot of chefs and it is easy for certain dishes to look the same as the others if similar techniques are applied. Therefore, it cannot be considered an easy issue to address as the complexity of the matter has to be acknowledge, however protection is not impossible and can be granted if the laws and statues permit.

¹³ Leslie Friend v. Keystone Pretzels and Laurel Hill Foods, Inc

¹⁴ "Food Art: Protecting "Food Presentation" Under U.S. Intellectual Property Law" Cathay Y. N. Smith- The John Marshall Review of Intellectual Property (2014)

Suggestions:

Chefs work on a single dish for months, perfecting every detail including its presentation. They deserve to be granted protection under any law, copyright, trade dress or even design patent. But it is essential to remove the limitations in the law as of now which restricts it from granting protection to the new fields of work that is coming up.

The copyright law would have never granted rights for performers if they were stuck with the fixation aspect which is considered the principal requirement to grant copyright. But this would restrict many upcoming artistic works from claiming protection under copyright law even though they qualify under every other criterion.

The trade dress provisions in India have been quite conservative as compared to that of the other countries like United States. It is important to tune the legislations and accommodate dishes by chefs into the ambit of trade dress and this protection would be limited to 10 years like every other trademark and therefore would be simpler as compared to copyright that would give the author a lifetime protection which would curb creativity in the culinary field.

Finally, the design act can also accommodate presentation of dishes as seen in the above scenario, it has been done successfully in US which can be imitated in India but the provisions have to be put out there explicitly for the creators of the work to exploit and again there is the advantage of term of the design patent that is limited as discussed above and would not give any sort of monopoly right over the art itself.

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