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THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



FOOD ART: PROTECTING "FOOD PRESENTATION" UNDER U.S. INTELLECTUAL PROPERTY LAW

CATHAY Y. N. SMITH

ABSTRACT

In 2006, a scandal broke in the culinary world. It was alleged that Robin Wickens, chef at (now closed) Interlude restaurant in Melbourne, Australia, had copied dishes by renowned American chefs Wylie Dufresne, Jose Andres, and Grant Achatz. It is not uncommon for chefs to borrow recipes from other chefs, and there has been a long culture of sharing in the cuisine industry. However, what made Wickens' actions scandalous was that he had purportedly copied the artistic presentation and plating of other chefs' dishes, not just their recipes.

This Article examines whether chefs can protect the artistic presentation or plating of their dishes under U.S. copyright law, trademark law, or design patent law. The analysis proceeds in three parts: (1) whether artistic food plating could fulfill copyright's requirement of being an original work of authorship fixed in a tangible medium of expression containing artistic aspects separable from its utilitarian functions; (2) whether artistic food plating could function as protectable trade dress that is nonfunctional and able to acquire secondary meaning; and (3) whether artistic food plating could be protectable as new, original, ornamental, and nonobvious design patent. This Article concludes that a chef may not be able to copyright her artistic food presentation because of copyright law's fixation and conceptual separability requirements, but—in limited circumstances—a chef may be able to claim trademark protection of a signature dish, or apply for a design patent for her ornamental plating arrangement. Nevertheless, even though chefs may have these options under intellectual property law, they are not guaranteed to prevail in an infringement action, nor would chefs necessarily want to use intellectual property laws to protect their dishes in light of the accepted culture of sharing and borrowing in the cuisine industry.

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FOOD ART: PROTECTING "FOOD PRESENTATION" UNDER U.S.
INTELLECTUAL PROPERTY LAW

CATHAY Y. N. SMITH

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FOOD ART: PROTECTING "FOOD PRESENTATION" UNDER U.S. INTELLECTUAL PROPERTY LAW

CATHAY Y. N. SMITH*

I. INTRODUCTION

In 2006, a scandal broke in the culinary world. It was alleged—on the online restaurant forum eGullet—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).¹ 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 “[t]he world’s culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks.”² 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. Photographs comparing Wickens’ dishes (left) to their original “inspirations” (right) are presented below.³



* © Cathay Y. N. Smith 2014. Author Bio.

¹ *Sincerest Form*, EGFORUMS A SERVICE OF THE SOC’Y OF CULINARY ARTS & LETTERS, (Mar. 20, 2006, 12:44 AM), at <http://forums.egullet.org/topic/84800-sincerest-form/> (last visited Aug. 19, 2013).

² Ferran Adria, Heston Blumenthal, & Thomas Keller, *Statement on the ‘new cookery’*, THE GUARDIAN, (Sept. 12, 2006), at <http://www.theguardian.com/uk/2006/dec/10/foodanddrink.obsfoodmonthly>.

³ *Sincerest Form*, *supra* note 1.



There has been much discussion surrounding intellectual property rights involving original *recipes*.⁴ Recipes have generally been held to be mere statements of fact not entitled to copyright protection.⁵ The purpose of this Article is not to add to that discussion. The purpose of this Article is to examine the potential intellectual property rights chefs may or may not have in the *presentation, arrangement, or appearance* of their food, sometimes referred to as the *plating* of dishes. Section II of this Article discusses food presentation as visual or sculptural art. Section III examines whether food plating may be protected under U.S. copyright law. Section IV analyzes whether a chef's signature dish could be protected as trade dress under U.S. trademark law. Section V examines whether dish arrangements may qualify as design patents under U.S. patent law. Section VI discusses the recent trend involving amateur food photography and its relevancy to food presentation. Finally, Section VII concludes this Article.

II. FOOD PRESENTATION AS VISUAL OR SCULPTURAL ART

Food has long been a subject of art in traditional media. Famous paintings such as Anne Vallayer-Coster's 1781 *Still Life with Lobster*, Paul Cezanne's 1893 *Still Life with Drapery, Pitcher and Fruit Bowl*, and Giuseppe Arciboldo's 1573 *Summer* are a few of many examples. These traditional paintings of food—if created today—would no doubt be protected under U.S. copyright law, which protects works of original authorship fixed in a tangible medium of expression. Photographs of food may also be protected under copyright law if they meet the “originality” standard discussed in Section III.A below.

Food has also served as a medium for sculptural works. Sculptural artists have used food as a medium to create works of art, such as Jason Mercier—who designs mosaics made with potato chips, beans, hamburger buns, candy, cookies, noodles and pretzels; Jim Victor—who creates sculptures using butter, chocolate and cheese; Carl Warner creates landscapes using vegetables and fish; Song Dong creates city models using biscuits; and David Cretu designs intricate sculptures made entirely of fruit.⁶

⁴ See, e.g., Malla Pollack, *Intellectual Property Protection for The Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991); 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); J. Austin Broussard, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691 (2008); Emmanuelle Fauchart and Eric von Hippel, *Norms-based Intellectual Property Systems: The Case of French Chefs*, MIT Sloan Research Paper No. 4576-06 (2006); Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 J. HIGH TECH. L. 21 (2009).

⁵ See 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §2.18[I] (2007).

⁶ See *Jason Mercier—Unconventional Mosaic Art*, ARTAIC: Innovative Mosaic, at <http://www.artaic.com/jason-mercier-unconventional-mosaic-art/> (last visited Aug. 22, 2014); Jim Victor & Marie Pelton, *Food Sculptures*, at <http://www.jimvictor.com/AssetsFood/foodsculpture.html> (last visited Nov. 19, 2014); Carl Warner, “Foodscapes”, at <http://www.carlwarner.com/foodscapes/> (last visited Nov. 19, 2014); Andrea Gyrody and Charles Changduk Kang, *Edible Landscapes: Song Dong's Food Installations*, GASTRONOMICA: THE JOURNAL OF FOOD AND CULTURE, Vol. 10, No. 3, 10 (Summer 2010); *Food Art Sculptures By Dan Cretu*, Creative Visual Art (June 26, 2013), at <http://www.creativevisualart.com/2013/06/26/food-art-sculptures-by-dan-cretu> (last visited Aug. 19, 2013).

This type of “food art” uses food as its medium, instead of wood, metal, or stone, and is artistic sculpture made purely for the purpose of art, not to be eaten. If they were created with traditional materials instead of food, they would certainly be protected by copyright law, but in their food form, their copyrightability would need to be determined on a case-by-case basis due to copyright’s fixation requirement, discussed further in Section III.B. below.

Distinct from these more traditional notions of art is the question of whether the presentation of food, intended for eating, can be considered “art” worthy of intellectual property protection. Even though their creations are ultimately meant to be eaten, chefs create part of the dining experience through the artistic presentation and plating of dishes. At many high-end or avant garde restaurants, food is intricately created and designed and placed with artistic precision and perfection on each plate before being delivered to diners. Color combinations, along with textures, layering, and placement, are all considerations a chef uses to create artistically designed dishes. According to Broussard,

“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.”⁷

Indeed, a number of commentators, such as Pollack and Telfer, have argued that certain foods should be considered mainstream or legitimate “art.”⁸ The New School collaborated with SoFAB Center for Food Law, Policy & Culture and New York University to hold a panel discussing the question “Is Food Art?”⁹ The Drawing Center in Soho, New York City even exhibited the work of Ferran Adria, chef of famed Spanish restaurant El Bulli, demonstrating that Adria’s work at El Bulli had “transcended mere hospitality” and that Adria had achieved the status of “artist.”¹⁰

Chefs like Adria may see themselves as artists, but beautiful presentation of dishes also serve practical functions, such as influencing the taste of the dish, creating a unique and special dining experience, and signifying the quality of a restaurant. David Chang’s famous 5:10 Eggs (pictured above¹¹) is one example of art incorporated into food. It is served in a wide shallow bowl, almost like a concave plate. The right half of the plate is sprinkled with onion soubise, two-thirds of the left half is filled with potato chips, and the center of the plate is piled with fines herbes salad. There is a small indentation in the onions where a poached egg is nestled. The egg is split open more than halfway, allowing yellow yolk and caviar to spill out onto the plate.¹²

⁷ See Broussard, *supra* note 4, at 718.

⁸ See Pollack, *supra* note 4, at 1489-97. See also Chapter 3 “Food as Art” in Elizabeth Telfer’s *Food for Thought: Philosophy and Food* (pp. 41-60). London and New York: Routledge (1996).

⁹ Is Food Art?, Panel Discussion at The New School (Sept. 5, 2013).

¹⁰ Jason Farago, *Chef Ferran Adria and the Problem of Calling Food Art*, BBC Online, Jan. 14, 2014.

¹¹ Photograph of David Chang’s signature 5:10 Eggs. “Momofuku’s 5:10 Eggs,” *Fitbomb* (Oct. 23, 2010), at <http://www.fitbomb.com/2010/10/momofukus-510-eggs.html> (last visited Aug. 18, 2013).

¹² Description from “Momofuku’s 5:10 Eggs,” *supra* note 12.



Grant Achatz's artistically designed cuisine for his world famous restaurant, Alinea, is another example of art incorporated into cuisine. For instance, the plating of Achatz's "Salsify" (pictured below¹³) includes first plating the dish with smoked salmon puree, prepared to the texture of mayonnaise, then adding parsley root puree, braised mustard seeds, parsley sauce, and fresh parsley tips with mini black radish strips. Salsify root is sliced at angles to make strips that can freely stand on their own, like a mini statue, which are placed carefully on the plate with micro-planed fresh lemon zest and steelhead roe drizzled on top.

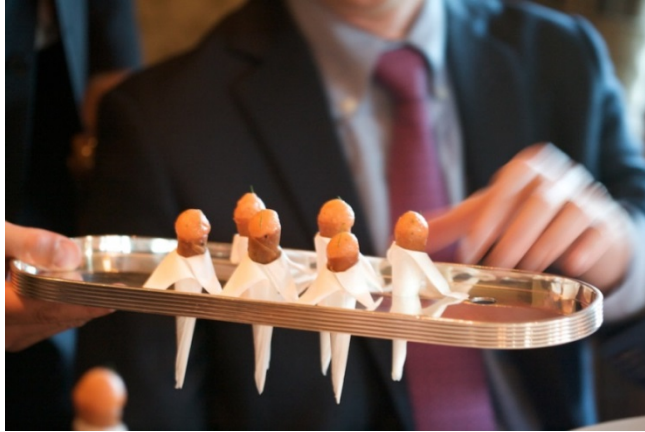


Thomas Keller, chef at the three Michelin-starred restaurant The French Laundry, is another chef known for incorporating art into his cuisine. His signature appetizer, the Salmon Cornet (pictured below¹⁴), was inspired by a Baskin-Robbins ice

¹³ Photograph of Grant Achatz's signature "Salsify" dish from Alinea Restaurant's website, at https://content.alinearestaurant.com/html/pages/gallery/gallery_cuis.html (last visited Aug. 19, 2013).

¹⁴ Photo of Keller's Salmon Cornets. "Fat Tuesday French Laundry", *piecedgoods* (Sept. 5, 2011), at <http://piecedgoods.wordpress.com/2011/09/05/fat-tuesday-french-laundry/> (last visited Aug. 19, 2013).

cream cone standing rack.¹⁵ It consists of salmon roe and sweet red onion crème fraiche topped with salmon tartare, molded into a dome resembling a scoop of ice cream, placed into a cone-shaped black sesame tuile, and served to diners in a standing rack.¹⁶



This Article examines whether this type of “food art”—dish presentations or plating arrangements created for the purpose of being admired and then eaten by diners—are protectable under U.S. copyright, trademark, and design patent law.

III. PROTECTING “FOOD PRESENTATION” UNDER COPYRIGHT LAW

Under U.S. copyright law, “[a] sculptural work is copyrightable if it is a work of original authorship fixed in a tangible medium of expression that demonstrates sufficient creativity, and contains artistic aspects that are separable from its utilitarian functions.”¹⁷ Could the plating of Chang’s 5:10 Eggs, Achatz’s Salsify, or Keller’s Salmon Cornet qualify as copyrightable sculptural work?

A. Original Work of Authorship

Copyright protection extends only to “original works of authorship.”¹⁸ Thus, in order for a chef to claim copyright over food presentation, the chef must first prove that his work is creative enough to meet the originality standard of copyright law. “Although the amount of creative input by the author required to meet the originality

¹⁵ “Chef Thomas Keller at ICE”, Institute of Culinary Education (Sept. 12, 2012), at <http://blog.ice.edu/2012/09/12/chef-thomas-keller-at-ice/> (last visited Aug. 19, 2013).

¹⁶ Description from “Salmon Tartare Cornets with Sweet Red Onion Crème Fraiche”, Zen Can Cook (Dec. 23, 2011), at <http://www.zencancook.com/2011/12/salmon-tartare-cornets-with-sweet-red-onion-creme-fraiche/> (last visited Aug. 19, 2013).

¹⁷ *Kim Seng Co. v. J&A Importers, Inc.*, 810 F.Supp.2d 1046, 1053 (C.D. Cal. 2011). See also 17 U.S.C. § 101; *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

¹⁸ 17 U.S.C. § 102.

standard is low, it is not negligible.”¹⁹ Furthermore, “a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”²⁰

In *Kim Seng Company v. J&A Importers, Inc.*, the Central District of California examined whether a “bowl-of-food” sculpture was original enough to be entitled to copyright protection.²¹ In that case, plaintiff Kim Seng Company (Kim Seng) and defendant J&A Importers, Inc. (J&A) were competing Chinese-Vietnamese food supply companies that used similar packaging for their respective rice stick food packages.²² Both companies used packages that displayed a photograph of a bowl filled with food—specifically, rice sticks, topped with egg rolls, grilled meat, and garnishes.²³ Kim Seng claimed that it owned the copyright to the underlying bowl-of-food sculpture—that one of its employees “chose the foods [depicted in the sculpture] out of thousands of possibilities, and directed their arrangement to be in a certain fashion out of infinite possibilities.”²⁴ The court, however, held that the combination of a common bowl with the contents of a common Vietnamese dish indicated a “lack of originality,” and was therefore not eligible for copyright protection.²⁵

The court in *Kim Seng Company v. J&A Importers, Inc.* was not persuaded that a *common* Vietnamese food dish could be “original” enough to warrant copyright protection. However, compare Kim Seng’s “bowl-of-food” to Chang’s creatively presented 5:10 Eggs, Achatz’s Salsify, or Keller’s Salmon Cornet. Based on their descriptions above—the intricate designs of the eggs, the creative display of salmon, the artistic precision and perfection of the structure and plating of salsify root—a court would have a harder time finding that these latter three dishes lack originality. Furthermore, even though each element in those dishes—such as the poached egg in Chang’s 5:10 Eggs or the free standing salsify root in Achatz’ Salsify—may not be entitled to copyright protection individually, a “compilation” of uncopyrightable items may be copyrightable if it “embodies more than a trivial degree of creative selection.”²⁶ The compilation of foods in Chang’s, Achatz’s, and Keller’s dishes certainly embody more than a trivial degree of creative selection. Take, for example, Achatz’ Salsify, which combines smoked salmon puree, parsley root puree, braised mustard seeds, parsley sauce, fresh parsley tips, mini black radish strips, thinly sliced salsify root, fresh lemon zest, and steelhead roe, all placed with precision, each ingredient with its own aesthetic purpose, artistically adorning the plate like a mini statue. It is unlikely that a court would find the arrangement of Achatz’ Salsify, or Chang’s 5:10 Eggs, or Keller’s Salmon Cornet “so mechanical or routine as to require no creativity whatsoever”²⁷ as to not qualify for copyright protection as a compilation.

¹⁹ *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

²⁰ *Id.* at 811.

²¹ *Kim Seng*, 810 F.Supp.2d at 1053-54.

²² *Id.* at 1050.

²³ *Id.*

²⁴ *Id.* at 1053.

²⁵ *Id.*

²⁶ *Id.* at 1054; *Feist*, 499 U.S. at 362.

²⁷ *See Feist*, 499 U.S. at 362.

Accordingly, a U.S. court could find original food presentations by chefs in restaurants to be original or creative enough to meet copyright law's "original work of authorship" criteria.

B. Fixed in a Tangible Medium

The harder hurdle for chefs to overcome is the Copyright Act's fixation requirement. "A work is 'fixed' in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of time more than transitory duration."²⁸ There are a number of reasons copyright law requires a work to be fixed in a tangible medium of expression in order to be protected. For instance, requiring a work to be fixed will limit attempts to assert copyright over mere utterances or ideas.²⁹ The fixation requirement further serves as tangible evidence of copyrighted matter, providing fixed boundaries for works claiming copyright protection.³⁰ Finally, the fixation requirement upholds copyright's monopoly bargain—specifically, providing monopoly rights in copyright law to incentivize artistic creation for the greater good. If a work is not fixed and cannot be appreciated or enjoyed, it does not hold up its end of the bargain of providing art for the greater good. Therefore, under U.S. copyright law, in order for a chef to claim copyright over the presentation of a food dish, the chef would need to prove that his food is "fixed" in a tangible medium of expression.

In *Kim Seng Company v. J&A Importers, Inc.*, the court examined whether Kim Seng's "bowl-of-food" sculpture satisfied the fixation requirement of copyright law.³¹ Kim Seng admitted that the bowl-of-food sculpture was comprised of "a perishable Vietnamese dish purchased by [an employee] from a local restaurant."³² In analyzing whether Kim Seng's bowl-of-food sculpture met the fixation requirement, the court compared it to the living garden in *Kelley v. Chicago Park District*, which was inherently changeable and ultimately perishable.³³

In *Kelley v. Chicago Park District*, the current leading case on copyrightability of organic works, the Seventh Circuit analyzed whether an artistically arranged garden was "fixed" for the purpose of the Copyright Act.³⁴ A famous artist, Chapman Kelley, installed a wildflower display in Grant Park, a prominent public park in downtown Chicago.³⁵ His garden received critical and popular acclaim, and was promoted as "living art."³⁶ Without permission from Kelley, the Chicago Park District dramatically modified the garden by reducing its size, reconfiguring the flower beds, and changing

²⁸ 17 U.S.C. § 101.

²⁹ Douglas Lichtman, *Copyright As a Rule of Evidence*, 52 DUKE L.J. 683, 722, 729 (2003); *Falwell v. Penthouse International, Ltd.*, 521 F.Supp. 1204 (W.D. Va. 1981).

³⁰ Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1400 (1997).

³¹ *Kim Seng*, 810 F.Supp.2d at 1053-55.

³² *Id.* at 1054.

³³ *Id.*

³⁴ *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011).

³⁵ *Id.* at 291.

³⁶ *Id.*

some of the planting materials.³⁷ Kelley sued the Park District.³⁸ The Seventh Circuit found that Kelley's living garden could not be eligible for copyright protection because it "lack[ed] the kind of authorship and stable fixation normally required to support copyright."³⁹ In its opinion, the court clarified that it was "not suggesting that copyright attaches *only* to works that are static or fully permanent (no medium of expression lasts forever), or that artists who incorporate natural or living elements in their work can *never* claim copyright."⁴⁰ However, Kelley's living garden was "not stable or permanent enough" to be a work of fixed authorship.⁴¹ Similarly, the Central District of California found in *Kim Seng Company v. J&A Importers, Inc.* that Kim Seng's "food-in-bowl" sculpture, created with perishable foods, was ultimately perishable and not eligible for copyright protection.⁴²

Chefs' creation of food dishes in a restaurant are meant to be eaten. They are created with perishable foods, and—like Kim Seng's food-in-bowl sculpture—will ultimately perish if left to nature. According to U.S. courts, this factor alone would prevent a chef's food presentation—no matter how creative or original—from gaining copyright protection in the U.S. To better understand fixation, it is helpful to consider the two modes of "transience" examined in Brandriss' *Writing in Frost on a Window Pane: Email and Chatting on RAM and Copyright Fixation*, specifically: writing in disappearing ink and writing in the sand.⁴³ According to Brandriss, writing in disappearing ink is similar to writing in frost on a window pane.⁴⁴ It may be seen for a time, but is destined to vanish.⁴⁵ Writing in sand on the seashore does not vanish on its own accord, but it is considered transient because, inevitably, it will vanish when a wave washes over it.⁴⁶ Considered in terms of these models, food dishes created by chefs in restaurants are most like writing in disappearing ink. They are destined to vanish because they are created and destined to be eaten by the diner. Even if the dishes are not created to be eaten, nature will ultimately overtake them and they will perish—like writing in sand on the seashore.

Accordingly, a chef's food presentation is transient in nature, and not likely to satisfy the fixation requirement under U.S. copyright law.⁴⁷

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 303.

⁴⁰ *Id.* at 305.

⁴¹ *Id.* The Seventh Circuit's decision in *Kelley v. Chicago Park District* has been criticized by a number of commentators, including Megan Carpeter and Steven Hetcher, in *Function Over Form: Bringing The Fixation Requirement Into The Modern Era*, 82 FORDHAM L. REV. 2221, 2234 (2014), and Lily Ericsson in *Creative Quandary: The State of Copyrightability of Organic Works of Art*, 23 SETON HALL J. SPORTS & ENT. L. 359, 370 (2013).

⁴² *Kim Seng Co. v. J&A Importers, Inc.*, 810 F.Supp.2d 1046, 1053 (C.D. Cal. 2011).

⁴³ Ira L. Brandriss, *Writing in Frost on a Window Pane: E-mail and Chatting on RAM and Copyright Fixation*, 43 J. COPYRIGHT SOC'Y U.S.A. 237, 257 (1996).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ It is interesting to note that Edible Arrangement, a retail and delivery company that designs and delivers bouquets made with fruit, has several copyright registrations for its various "fruit sculptures." See, e.g., "Berry Bouquet," Reg. No. VA0001021475; "Blooming daisies," Reg. No. VA0001021473; "Delicious celebration," Reg. No. VA0001021474; "Delicious fruit design," Reg. No. VA0001021472; and "Hearts and berries," Reg. No. VA0001021476. These copyright registrations for fruit sculptures, however, may not survive litigation because they do not meet the fixation standard

C. Artistic Aspects Separable from Utilitarian Function

Another difficult hurdle for chefs to overcome is copyright's conceptual separability test for useful articles and applied art.⁴⁸ 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."⁴⁹ A work of "applied art" is a piece of art "that perform[s] a dual function: both expressing aestheticism as well as functioning as [a] utilitarian object[] to be used for some purpose."⁵⁰ Because chefs create food primarily to serve a utilitarian function, *i.e.* to be eaten, it qualifies as useful article or applied art. Copyright protection extends to applied art,⁵¹ but "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."⁵² Therefore, in order for a chef to claim copyright over food presentation, the chef would need to prove that his creation can be identified separately from, and is capable of existing independently of, the utilitarian aspects of his food design.

In *Kim Seng Company v. J&A Importers, Inc.*, the court found that the food items in Kim Seng's bowl-of-food sculpture could not be separated from their utilitarian function, which was to be eaten.⁵³ This would seem to automatically preclude all food presentation from passing the conceptual separability test. However, not all commentators agree. For instance, Buccafusco argues in *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?* that there are dishes whose "aesthetic merits are separable from the basic need to provide calories," and that each dish should be analyzed on a case-by-case basis to determine whether it is conceptually separable from the utilitarian aspects of the dish.⁵⁴ Similarly, Straus argues in *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry* that "courts should easily be able to conceptually separate plating from the functional content of the dish, as plating does not reveal or affect (significantly) the flavors or caloric content of the dish."⁵⁵

Could Chang's 5:10 Eggs, Achatz's Salsify, or Keller's Salmon Cornets—all original and creative dishes—be separated from their utilitarian functions? There are several tests that courts in the U.S. have used in the past to determine conceptual separability, such as: examining whether artistic features are "primary" and utilitarian features are "subsidiary";⁵⁶ examining whether the article "stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function";⁵⁷ examining whether the artistic design was animated by

of copyright law. Similar to writing in invisible ink or writing in sand on the seashore, they are transient in nature and are created to be eaten and will ultimately perish.

⁴⁸ *Brandir Intern., Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1144 (2d Cir. 1987).

⁴⁹ 17 U.S.C. § 101.

⁵⁰ Broussard, *supra* note 4, at 722.

⁵¹ 17 U.S.C. § 102(a)(5)

⁵² 17 U.S.C. § 101.

⁵³ *Kim Seng*, 810 F.Supp.2d at 1053.

⁵⁴ Buccafusco, *supra* note 4, at 1139.

⁵⁵ Naomi Straus, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. REV. 182, 212 (2012).

⁵⁶ See *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

⁵⁷ *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985).

functional considerations;⁵⁸ examining whether the useful article “would still be marketable to some significant segment of the community simply because of its aesthetic qualities”;⁵⁹ and examining whether the artistic features “can stand alone as a work of art traditionally conceived.”⁶⁰ Under these tests, Chang’s 5:10 Eggs, Achatz’s Salsify, or Keller’s Salmon Cornet probably would not be conceptually separable from their utilitarian function—which is to be eaten. For instance, the utilitarian features of a chef’s food presentation are not subsidiary—because those dishes would not have been created *but for* the possibility of being eaten. The artistic design of food presentations are animated by functional considerations, because the foods used in the food presentations are chosen primarily because of their taste. Additionally, if Chang’s 5:10 Eggs, Achatz’s Salsify, and Keller’s Salmon Cornets could not be eaten, they would not likely be marketable to a significant segment of the community simply because of their aesthetic qualities, and the artistic features of those dishes would not be able to stand alone “as [] work[s] of art traditionally conceived.”⁶¹ Accordingly, because a chef’s food presentation is a useful article or applied art that cannot be conceptually separated from its utilitarian function, it is likely not copyrightable.

In conclusion, even though a chef’s food presentation may meet the original work of authorship standard under U.S. copyright law, it is likely not entitled to copyright protection because it would not be able to overcome U.S. copyright law’s fixation requirement or pass the conceptual separability test for applied art.

IV. PROTECTING FOOD PRESENTATION UNDER TRADEMARK LAW

Under U.S. trademark law, a trade dress encompasses characteristics or the overall visual appearance of a product or its packaging that signifies the source of the product or service to consumers.⁶² Like a brand, the purpose of trade dress is to protect consumers from mistakenly purchasing goods or services from one company believing them to be from another because of their similar overall packaging or appearances.⁶³ In order to own a protectable trade dress, a party must prove that its trade dress is either inherently distinctive (*i.e.*, it is not merely descriptive) or that it has acquired secondary meaning (*i.e.*, through use it has come to signify a particular source).⁶⁴ Trade dress protection also may not be claimed for product features that are functional.⁶⁵ Finally, in order to prevail in a trade dress infringement action, a plaintiff must show that, because of similar trade dress, there is a likelihood that consumers would be confused.⁶⁶ Could Chang’s 5:10 Eggs, Achatz’s Salsify, or Keller’s Salmon

⁵⁸ *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d at 1142, 1143 (citing Professor Robert Denicola’s test).

⁵⁹ 1 Nimmer on Copyright § 2.08[B][3], at 2-101 (2004).

⁶⁰ 1 Paul Goldstein, Copyright § 2.5.3, at 2:67 (1996).

⁶¹ 1 Nimmer on Copyright § 2.08[B][3], at 2-101 (2004).

⁶² Robert P. Mergers, Peter S. Mendell, Mark A. Lemley. *Intellectual Property in the New Technological Age* (4th rev. ed.) (p. 650). New York: Wolters Kluwer (2007); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 n. 1 (1992).

⁶³ *Id.*

⁶⁴ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 763 (1992).

⁶⁵ *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001).

⁶⁶ *Id.*

Cornets serve as trademarks? And, if so, could chefs use trademark law to prevent other chefs from creating dishes with similar overall appearances?

A. Secondary Meaning

The first step in examining whether a chef's signature dish could qualify as a trademark is to determine whether the dish has achieved secondary meaning⁶⁷ in the minds of consumers.

In *Nabisco, Inc. v. PF Brands, Inc.*, the Second Circuit found that Pepperidge Farm's goldfish shape crackers (pictured below) exhibited a "moderate degree of distinctiveness."⁶⁸ Pepperidge Farm has been marketing and selling cheese crackers in the shape of goldfish since 1962.⁶⁹ It has spent hundreds of millions of dollars advertising its goldfish crackers, it received substantial media coverage, and it was one of the top selling cheese snack crackers in the U.S.⁷⁰ In 1999, Nabisco began to market its own cheese crackers in the shapes of cats, dogs, bones, and fish.⁷¹ Pepperidge Farm filed a trademark complaint against Nabisco. The court found that Pepperidge Farm's goldfish crackers were "nonfunctional, distinctive and famous," and that the fish shape of Pepperidge Farm's crackers had no logical relationship to a cheese cracker.⁷² Additionally, the lower court found that the length of time, marketing and sales of Pepperidge Farm's goldfish crackers also supported Pepperidge Farm's claim that its goldfish had achieved secondary meaning in the minds of consumers.⁷³ Pepperidge Farm successfully enjoined Nabisco from selling cheese crackers in the shape of fish.⁷⁴



Based on the *Nabisco, Inc. v. PF Brands, Inc.* case, a court could, theoretically, find that certain dish presentations have achieved secondary meaning in the minds of consumers. For instance, Straus argues that a chef could use newspaper articles, reviews, and advertisements to show that the chef has become well-known for a

⁶⁷ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 216 (2000). According to the Supreme Court in *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, product design cannot be inherently distinctive, and must show secondary meaning to be protectable trade dress. *Id.* This Article analyzes food plating as product design instead of product packaging (which could be inherently distinctive) by following the Court's suggestion to classify "ambiguous trade dress" as product design requiring secondary meaning. *Id.* at 215.

⁶⁸ *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 217 (2d Cir. 1999).

⁶⁹ *Id.* at 212.

⁷⁰ *Id.* at 213-14.

⁷¹ *Id.* at 213.

⁷² *Nabisco, Inc.*, 191 F.3d at 214.

⁷³ *Nabisco, Inc. v. PF Brands, Inc.*, 50 F.Supp.2d 188, 202-03 (S.D.N.Y. 1999).

⁷⁴ *Nabisco, Inc.*, 191 F.3d at 228-29.

particular signature dish.⁷⁵ Similarly, Krizman argues that “a decorative ingredient used in a signature dish,” such as a “glob of grape jelly on top of a piece of lasagna,” could be distinctive and serve to signify its source.⁷⁶ However, the bar for a chef to prove a dish has achieved secondary meaning is high. Neither Chang’s 5:10 Eggs nor Achatz’s Salsify would likely meet this standard, as average consumers are probably unaware of Chang or Achatz or their respective restaurants, let alone familiar with their signature dishes. Keller’s Salmon Cornet would probably not qualify either. Even though many people may have enjoyed salmon cornets at catered events, the average consumer would not identify Keller as the source of these appetizers. On the other hand, if a popular chain restaurant, such as Burger King, started marketing and selling hamburgers shaped like stars, it would probably be better able to claim that its “signature dish has achieved secondary meaning in the minds of consumers because of the restaurant’s popularity, high advertising and sales volume, and mass market visibility.

B. Functionality

Trade dress protection may not be claimed for product features that are functional.⁷⁷ A product feature is considered functional if it affects cost and quality of a product or it is essential to the use of the product.⁷⁸ The purpose of this rule is to prevent parties from using trade dress law to prevent competition by monopolizing product features that are useful to a product.⁷⁹ For instance, if a party could claim a product’s functional features as protectable trade dress, it could obtain a perpetual monopoly over such features without regard to whether they qualify as patents.⁸⁰ Therefore, even if customers have come to identify functional features in a unique dish presentation with a particular chef, those functional features may not qualify as protectable trade dress, because doing so would impede competition—not by protecting the reputation of the chef, but by frustrating competitors’ legitimate efforts to use similar functional features in their dishes.⁸¹

In *Application of World’s Finest Chocolate, Inc.*, the Federal Circuit found the design packaging of a candy bar (pictured below)⁸² to be registrable as a trade dress.⁸³ In that case, the court found that the candy bar’s trade dress was not “so functionally oriented . . . that . . . a private right to use it exclusively should be denied in favor of a more pressing public interest in copying.”⁸⁴ Because competitors could use other packaging styles, no utilitarian advantages flowed from the package design as opposed

⁷⁵ See Straus, *supra* note 56, at 242.

⁷⁶ Lisa Krizman, *Trademark Protection for Restaurant Owners: Having Your Cake and Trademark It, Too*, 99 TRADEMARK REP. 1004, 1025-26 (2009).

⁷⁷ *TrafFix Devices*, 532 U.S. 23 at 29.

⁷⁸ *Universal Frozen Foods, Co. v. Lamb-Weston, Inc.*, 697 F.Supp. 389, 391 (D. Or. 1987).

⁷⁹ *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 164-65 (1995).

⁸⁰ *Id.*

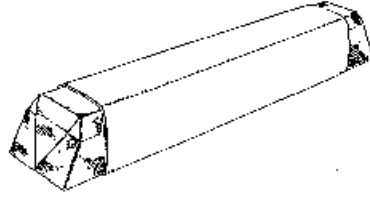
⁸¹ *See id.*

⁸² U.S. Trademark Registration No. 0967132.

⁸³ *Application of World Finest Chocolate, Inc.*, 474 F.2d 1012, 1015 (Fed. Cir. 1973).

⁸⁴ *Id.* at 1014.

to others, and the candy bar's trade dress was not primarily functional, it was trade dress capable of being registered.⁸⁵



In contrast, in *Universal Frozen Foods, Co. v. Lamb-Weston, Inc.*, the District Court of Oregon found that the product configuration of Universal's frozen "curlicue fries" were functional and not entitled to trademark protection.⁸⁶ Specifically, the court relied on evidence that the curlicue shape of the fries offered several utilitarian advantages, including "superior yield, better taste, better cosmetic plate coverage, slightly faster frying and service time and, possibly, a lower portion cost."⁸⁷ The Court found the curlicue fries to be functional and not entitled to trade dress protection because their shape affected the cost and quality of the fries.⁸⁸

Similarly, in *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, the Eleventh Circuit found Dippin' Dots' "free flowing small spheres or beads of ice cream" (pictured below)⁸⁹ to be functional and not entitled to trademark protection.⁹⁰ The color was functional because it indicated the flavor of the ice cream, the size was functional because it contributed to the creamy taste of the product, and the shape was functional because it was indicative of its creation process—by dropping ice cream mixture into a freezing chamber—which created the bead-like shapes.⁹¹ Accordingly, the court found that "the totality of the dippin' dots design [was] functional because any flash-frozen ice cream product will inherently have many of the same features as dippin' dots," and therefore, dippin' dots were not eligible for trade dress protection.⁹²

⁸⁵ *Id.*; see also *In Re Hershey Chocolate and Confectionery Corporation*, Serial No. 77809223 (TTAB June 28, 2012) (reversing refusal to register applicant's mark "a configuration of a candy bar that consists of twelve (12) equally-sized recessed rectangular panels arranged in a four panel by three panel format with each panel having its own raised border within a large rectangle" because, even though features of the mark may be functional, the mark as a whole is not functional).

⁸⁶ *Universal Frozen Foods*, 697 F.Supp. at 392-93.

⁸⁷ *Id.* at 392.

⁸⁸ *Id.*

⁸⁹ Photo of Dippin' Dots. Tyler Trimble, "Around The Culinary World", *Out of The Culinary* (Nov. 7, 2011), at <http://outoftheculinary.blogspot.com/2011/11/around-culinary-world.html> (last visited Aug. 19, 2013).

⁹⁰ *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1200 & 1203 (11th Cir. 2004).

⁹¹ *Id.* at 1203-04, 1206.

⁹² *Id.* at 1206.



Unlike curlicue fries or dippin' dots, a chef's choice of designs and ingredients in his food presentation are not necessarily functional. Indeed, Straus argues that food presentations may overcome the functionality bar to trade dress because many forms of plating are employed for presentation and branding purposes, and not purely for functional or utilitarian purposes.⁹³ Consider Achatz's Salsify—the salsify root is split into thin slices free standing like a statue on the plate.⁹⁴ Various garnishes are then sprinkled on the salsify root.⁹⁵ No *utilitarian* advantages flow from Achatz's design, and other chefs could certainly serve salsify root in other shapes, forms or designs. In fact, other chefs could achieve the same taste, and use the same ingredients, without having to imitate Achatz's unique style of plating. Similarly, recall Keller's Salmon Cornet, which is placed inside a cone tuile and served to diners in a standing rack.⁹⁶ Other chefs could, and do, serve salmon tartare in other ways and forms, and no utilitarian advantages flow from serving it inside a cone shaped tuile. The specific plating designs of Chang's 5:10 Eggs, Achatz's Salsify, and Keller's Salmon Cornet are not functional.⁹⁷

Accordingly, it would seem that a chef could have a legitimate argument that his food presentation is not functional for the purpose of trade dress protection.

C. Likelihood of Confusion

Even if a chef can overcome the secondary meaning and functionality hurdles to show that he owns a valid trade dress in her dish presentation, she may not be able to prevent others from imitation. In order to succeed in a trade dress infringement claim,

⁹³ See Straus, *supra* note 56, at 239-42.

⁹⁴ See *supra* note 13.

⁹⁵ *Id.*

⁹⁶ See *supra* note 14.

⁹⁷ Utilitarian functionality should not be confused with aesthetic functionality. Just because some consumers may prefer the aesthetics of a certain trade dress, or that the aesthetics of a dish may influence the taste of the dish, create a unique and special dining experience, and signify the quality of a restaurant, should not render the dish presentation "functional" under trademark law. Aesthetic functionality has been questioned and rejected by many courts and commentators as a bar to trade dress protection. See Straus, *supra* note 56, at 240-42 for a more thorough discussion of courts' treatment of aesthetic functionality; see also 1 McCarthy on Trademarks and Unfair Competition § 7:80 (4th ed.) (survey of courts' positions on aesthetic functionality).

a chef must show that consumers are likely to be confused by a third-party's use of a similar dish plating.

There have been instances where chefs have brought trade dress claims against other chefs for copying presentation of dishes. For instance, in 2007, Rebecca Charles, owner and executive chef of the critically acclaimed Pearl Oyster Bar, filed a trade dress infringement claim against her former sous chef, Edward McFarland.⁹⁸ In her complaint, Charles alleged that McFarland's new restaurant, Ed's Lobster Bar, infringed Charles' restaurant's trade dress.⁹⁹ Among the aspects that Charles alleged McFarland copied were "all aspects of Pearl's presentation of its dishes," and Charles accused McFarland of "prepar[ing] and plat[ing] the dishes in the same manner as Charles does at Pearl."¹⁰⁰ This case ultimately settled with McFarland changing aspects of his restaurant, including certain items on the menu.¹⁰¹

A similar lawsuit was filed by Vaca Brava against Hacienda Vaca Brava & Steak House in 2009.¹⁰² In that case, Vaca Brava complained that Hacienda infringed its unique trade dresses in its plating styles.¹⁰³ In its complaint, Vaca Brava claimed that it had created the original trade dresses of its plates, and that "[e]ach plate serves more than three persons and the food served is arranged and designed to create a specific look to which the plate name relates."¹⁰⁴ Vaca Brava's plating trade dresses (left) are pictured below next to Hacienda's "copied" styles (right).¹⁰⁵ This case settled without a decision.



⁹⁸ See Complaint, *Powerful Katinka, Inc. v. McFarland et al.*, 1:2007 cv 06036 (S.D.N.Y. June 26, 2007).

⁹⁹ *Id.* at ¶59-72.

¹⁰⁰ *Id.* at ¶3, ¶43.

¹⁰¹ See Order of Dismissal, *Powerful Katinka, Inc. v. McFarland et al.*, 1:2007 cv 06036 (S.D.N.Y. Apr. 27, 2008).

¹⁰² See Complaint, *Vaca Brava, Inc. v. Hacienda VacaBrava & Steak House, Inc.*, No. 3:09-cv-01633 (D.P.R. July 8, 2009).

¹⁰³ *Id.* at ¶1

¹⁰⁴ *Id.* at ¶16.

¹⁰⁵ *Id.* at ¶22.



More recently, New York Pizzeria, Inc. (NYPI) filed an action against a former owner and his new restaurant alleging, among other things, trade dress infringement “for copying NYPI’s distinctive plating methods.”¹⁰⁶ Specifically, NYPI claimed that its “plating methods present NYPI’s products to customers in a distinctive visual manner. NYPI claims a protected trade dress interest in the distinctive visual presentation of the product to customers. Such trade dress includes, but is not limited to, the presentation of baked ziti, eggplant parmesan, and chicken parmesan.”¹⁰⁷ In its opinion, the Southern District of Texas recognized that there were “rare circumstances” where food plating may be protected by trade dress if it is distinctive and serves no functional purpose, and that a party may be able to prove infringement of food plating if there is a likelihood of confusion.¹⁰⁸ Nevertheless, the court dismissed NYPI’s claim because it failed to allege which food plating were protected by trade dress, and which dishes infringed them.¹⁰⁹

Proving likelihood of confusion in a food plating claim consists of more than simply showing that another chef is serving an identical or similar-looking dish. Even if a diner orders an appetizer at a different restaurant that looks identical to Keller’s Salmon Cornet, as long as the diner knows the source of his food, and does not believe his appetizer was created by Keller, there is no consumer confusion. In order to prove likelihood of confusion, a chef must show that diners are likely to see the similar food presentation at another restaurant and mistakenly believe that it is being offered by, or associated with, the original chef. Without other factors to support a chef’s trade dress claim, such as similar restaurant décor, this would be a difficult hurdle for any chef to achieve—especially chefs at high end restaurants that are only patronized at unique locations by a small subset of society. Nevertheless, celebrity or TV chefs, chefs

¹⁰⁶ *N.Y.Pizzeria, Inc., v. Syal*, No. 3:13-CV-335, at *2 (S.D. Tex. Oct. 20, 2014).

¹⁰⁷ *Id.* at *7.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *7-8.

with highly commercialized images, brands or product-lines, and chefs with numerous restaurants or franchises may be in better positions to allege likelihood of confusion if their food presentation is being knocked-off by another.

In conclusion, it would be difficult for the average chef to claim that his signature dish has achieved secondary meaning in the minds of consumers. Additionally, even if a chef could prove secondary meaning and that his food presentation is nonfunctional, it would be difficult for him to prove infringement by showing that consumers are likely to be confused as to the source of their food.

V. PROTECTING FOOD PRESENTATION UNDER DESIGN PATENTS

A U.S. design patent covers the ornamental design of a product that has practical utility. Design patents require a design to be “new, original and ornamental”¹¹⁰ and nonobvious.¹¹¹ To construe a design patent claim, the scope of the claimed design covers “its visual appearance as a whole” and “the visual impression it creates.”¹¹² In order to assess infringement, the two parties’ products do not have to be identical—it is the appearance of the patented design as a whole compared to the accused product that is controlling.¹¹³ Can chefs apply for design patents for their unique and original food presentation or plating?

There have been instances where parties have applied for, and successfully registered, design patents for presentation or plating of food. For instance, Contessa Food Products owned a design patent for “Serving Tray with Shrimp” (pictured below).¹¹⁴ The design patent illustrates a circular serving tray with a circular receptacle in the center for cocktail sauce.¹¹⁵ On the serving tray, shrimp are placed snugly next to each other, forming two circular designs of shrimp around the trays, with the heads of the shrimp pointing towards the cocktail sauce in the center, and their tails pointing towards the edge of the tray.¹¹⁶ The tails of the upper layer of shrimp overlap and rest upon the heads of the lower layer of shrimp, creating an overlap between the two circles of shrimp.¹¹⁷ Viewed from above, the plating creates an impression of a clockwise turning wheel of overlapping shrimp.¹¹⁸

¹¹⁰ 35 U.S.C. §171.

¹¹¹ 35 U.S.C. §103.

¹¹² *Contessa Food Products, Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1376 (Fed. Cir. 2002) (internal citations omitted).

¹¹³ *Id.* at 1376.

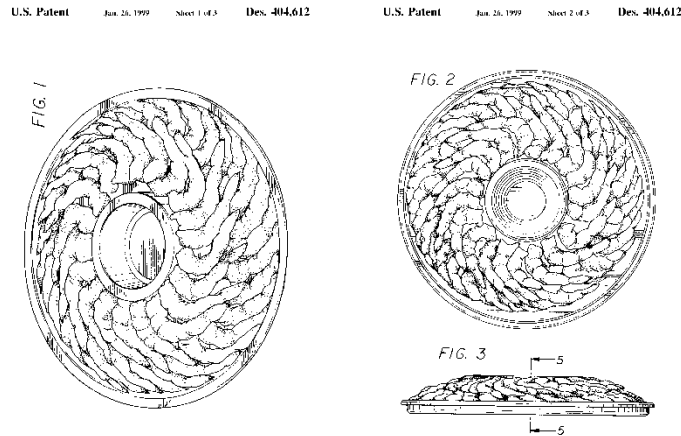
¹¹⁴ See Patent Number Des. 404,612.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; *ZB Industries, Inc. v. Conagra, Inc.*, 56 U.S.P.Q.2d 1739, 2000 WL 1863561, at *2 (C.D. Cal. 2000).

¹¹⁷ *Id.*

¹¹⁸ *Id.*



In *ZB Industries, Inc. v. Conagra, Inc.*, ZB Industries (Contessa) brought a patent infringement suit in the Central District of California against its competitor Conagra that was using a similar tray and arrangement of shrimp.¹¹⁹ In that case, the court found that there was no question that the arrangement of shrimp in Conagra's products was nearly identical to the arrangement of shrimp in Contessa's design patent.¹²⁰ "Each of [Conagra's] products contain[ed] two concentric circles of overlapping shrimp, with their heads pointing toward a central cup of cocktail sauce and their tails abutting or near the outer edge of the tray."¹²¹ The court found that Conagra's shrimp plating infringed Contessa's design patent.¹²² On appeal, the Federal Circuit vacated and remanded this case because district court failed to compare the bottom of the parties' trays.¹²³ On remand, the District Court again found Conagra's shrimp plate and arrangement to infringe Contessa's design patent.¹²⁴ This case was ultimately settled.

Design patents in the food industry are not limited to plating arrangements. New and ornamental shapes of food—such as various shapes of pasta,¹²⁵ waffles,¹²⁶ even a "peace symbol shaped pretzel"—have been the subject of design patents.¹²⁷ In fact, the

¹¹⁹ *Id.* at *1.

¹²⁰ *Id.* at *3.

¹²¹ *Id.* at *3.

¹²² *Id.*

¹²³ *Contessa Food Products, Inc. v. ConAgra, Inc.*, 282 F.3d 1370, 1378 (Fed. Cir. 2002).

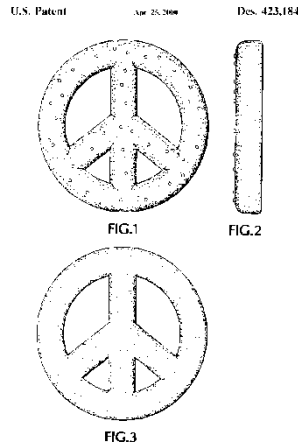
¹²⁴ *Contessa Food Products, Inc. v. ConAgra, Inc.*, CV 99-04145-GHK(RCx), Document 139 (August 6, 2004).

¹²⁵ See Dan Lewis, "How Kraft Uses Patents to Dominate the Mac and Cheese Wars," *Smithsonian.com*, Jan. 15, 2013, at <http://www.smithsonianmag.com/arts-culture/how-kraft-uses-patents-to-dominate-the-mac-and-cheese-wars-1679578/?no-ist..>

¹²⁶ U.S. Patent No. Des. 373,452.

¹²⁷ U.S. Patent No. Des. D0423184 (Apr. 25, 2000). See, e.g., Rich Lord, "Patent of pretzels shaped like peace signs at center of Pittsburgh federal lawsuit," *Pittsburgh Post-Gazette* (July 17, 2012), at <http://www.post-gazette.com/stories/business/legal/patent-of-pretzels-shaped-like-peace-signs-at-center-of-pittsburgh-federal-lawsuit-695764/>.

owner of the peace symbol shaped pretzel design patent, shown below, asserted her patent in a design patent suit against two pretzel companies that were both selling peace symbol shaped pretzels.¹²⁸ The plaintiff eventually voluntarily dismissed her case.



Based on the above, it seems that chefs could apply for and patent their unique and original plating arrangements or food design as design patents as long as they meet the “new, original and ornamental” and nonobvious standard.¹²⁹ However, even though a chef may own a valid design patent in her unique plating arrangement, she would still need to show that “in the eye of an ordinary observer, giving such attention as a [diner] usually gives, [the] two [plating arrangements] are substantially the same” in order to succeed in a design patent suit.¹³⁰ There are also several downsides to design patents. First, prosecuting a patent is expensive, and could take several years. During this time, anyone is free to copy and imitate the unique plating styles of a chef. Additionally, design patents require the disclosure of recipes and plating styles and technique, which a chef may be reluctant to disclose—especially if she has been holding such information as a trade secret. Finally, design patents expire in 14 years, allowing anyone to freely copy or imitate the plating style after expiration.¹³¹

In conclusion, it seems that a chef may be able to apply for and obtain a design patent in his unique and original style of food arrangement, and, as discussed above, courts have recognized the validity of design patents covering food plating. However, the cost to a chef in patenting his unique food plating and enforcing his patent may outweigh the benefits.

¹²⁸ See Complaint, *Leslie Friend v. Keystone Pretzels and Laurel Hill Foods, Inc.*, No. 2:2013cv01028 (W.D.Pa. July 17, 2013).

¹²⁹ 35 U.S.C. §171 and 35 U.S.C. §103.

¹³⁰ *Revision Military, Inc. v. Balboa Mfg. Co.*, 700 F.3d 524, 526 (Fed. Cir. 2012) (quoting *Gorham Co. v. White*, 81 U.S. 511 (1871)).

¹³¹ 35 U.S.C. 173 (2012).

VI. “FOODSTAGRAM” A.K.A. THE RISING TREND OF AMATEUR FOOD PHOTOGRAPHY

If chefs are able to protect their food presentations under intellectual property law, could they prevent diners from taking photographs of their food? Amateur food photography—also referred to as “foodstagram” or “food porn”—is a new cultural phenomenon inspired by the social media culture and the desire to document moments of one’s life on social media sites such as Facebook, Instagram, and Twitter. The trend has become so popular that there are entire blogs, such as Foodie.com or Ramentology.com, devoted to amateur food photography. Whole Foods even offers classes in “iPhone food photography” to teach diners how to capture perfect photographs of their dishes.¹³²

Many chefs are beginning to prohibit diners from photographing dishes in their restaurants. David Chang is one of several chefs who prohibits food photography in his restaurant Momofuku Ko.¹³³ Chefs cite to different reasons for banning photography of dishes in their restaurants. For instance, Moe Issa (Chef’s Table at Brooklyn Fare) bans photography because he believes it disturbs the other diners and distracts from the dining experience.¹³⁴ Soho House New York bans photography to protect the privacy of its diners.¹³⁵ Restaurants Per Se, Le Bernardin, and Fat Duck discourage *flash* photography in order not to disturb the ambience of the restaurant.¹³⁶ Some chefs, such as Daniel Boulud (Daniel) choose to control the quality of photos by inviting diners into the kitchen to photograph his dishes so that the photos look more appetizing.¹³⁷ Other chefs, such as Sean Brock (Husk and McCrady’s) and Michael White (Marea, Osteria Morini, Ai Fiori, Nicoletta), claim to welcome diners to photograph their food.¹³⁸ Ambience or disturbing other diners are not the only concerns chefs have with this latest trend of amateur food photography. Chef Michael White believes that the real reason chefs are upset about food photography is because they are concerned that someone will “steal their ideas.”¹³⁹ RJ Cooper (Rouge 24) even claims that diners publishing amateur food photos without the chef’s consent are “taking intellectual property away from the restaurant,” a view that is shared by Giles Goujon (l’Auberge du Vieux Puits), who claims that each time a photograph of his food creation appears on social media, it “takes away the surprise, and a little bit of my

¹³² See, e.g., iPhone Food Photography Workshop offered at Whole Foods, at http://calendar.boston.com/dedham_ma/events/show/328754403-iphone-food-photography-workshop (last visited Aug. 19, 2013).

¹³³ Gabe Ulla, “Blinded by the Light: Chefs on Photography in Restaurants”, *Eater* (May 23, 2012), at <http://eater.com/archives/2012/05/23/chefs-and-bloggers-on-photography-in-restaurants.php> (last visited Aug. 19, 2013).

¹³⁴ Helene Stapinski, “Restaurants Turn Camera Shy,” *The New York Times* (Jan. 22, 2013), at http://www.nytimes.com/2013/01/23/dining/restaurants-turn-camera-shy.html?pagewanted=2&pagewanted=all&_r=0 (last visited Aug. 19, 2013).

¹³⁵ Christina Lopez, “New York Restaurants Have Informal Ban on Food Photos”, *ABC News* (Jan. 25, 2013), at <http://abcnews.go.com/Technology/restaurants-placing-informal-ban-food-flash-photography/story?id=18302662> (last visited Aug. 19, 2013).

¹³⁶ See Stapinski, *supra* note 135.

¹³⁷ Ulla, *supra* note 134.

¹³⁸ *Id.*

¹³⁹ *Id.*

intellectual property.”¹⁴⁰ However, as detailed in the Wickens scandal, the rising trend of food photography may actually assist in documenting blatant copying of food presentations, allowing for easier policing of such actions via the Internet.

As to the diners/amateur food photographers—practically speaking, it is unlikely that a chef would ever risk bad publicity to bring suit against a diner for photographing cuisine for personal use. Furthermore, because food presentation is not protectable under copyright law (as discussed above), taking a photograph of uncopyrighted work is not creating an unauthorized derivative.¹⁴¹ Photographing food for the purpose of commentary or criticism is also fair use.¹⁴² Similarly, under trademark law, even if a chef can claim trade dress in his food plating, a diner’s use of that food plating on social media to describe or refer to the chef’s food would be considered nominative fair use.¹⁴³ Finally, patent infringement occurs when a party, without authority, “makes, uses, offers to sell, or sells” a patented product;¹⁴⁴ patent infringement does not occur when a diner takes a photo of a patented design and posts it on Facebook. In conclusion, taking a photo of a beautiful and delicious plate of food and posting it on Facebook is not “taking intellectual property away from the restaurant,” and a diner would have valid defenses against most intellectual property claims against him. Nevertheless, a restaurant on private property could create a “no photography” policy for any reason, and ask its diners to obey this policy.

VII. CONCLUSION

The U.S. Supreme Court recognized that “copying is not always discouraged or disfavored by the laws which preserve our competitive economy,”¹⁴⁵ and, in many instances, allowing competitors to copy will have beneficial effects to society.¹⁴⁶ According to commentators who have examined cuisine and intellectual property, this is certainly true in the cuisine industry. For instance, Buccafusco interviewed a number of famous U.S. chefs, including Thomas Keller, Norman Van Aken, Charlie Trotter, Wylie Dufresne, who all expressed an idea of sharing between chefs that seems in contrast with the exclusivity granted by intellectual property law.¹⁴⁷ Some commentators, such as Buccafusco and Cunningham, are concerned that the exclusivity that intellectual property rights grant to a chef could undermine the restaurant industry’s culture of openness and sharing, to the detriment of society.¹⁴⁸ Commentators like Straus, on the other hand, believe these concerns are overstated,

¹⁴⁰ *Id.*; “France: Top chefs crack down on ‘food porn’”, BBC News from Elsewhere (Feb. 16, 2014) at <http://www.bbc.com/news/blogs-news-from-elsewhere-26189607> (last visited Mar. 17, 2014).

¹⁴¹ *Kim Seng*, 810 F.Supp.2d at 1055 (“in order to create a derivative work, the underlying work must be copyrightable”) (citing *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1080 (9th Cir. 2000)).

¹⁴² See 17 U.S.C. § 107.

¹⁴³ See, e.g., *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 809 (9th Cir. 2003) (nominative fair use is applicable in the trade dress context).

¹⁴⁴ 35 U.S.C. § 271(a).

¹⁴⁵ *TrafFix Devices*, 532 U.S. at 29 (citing to *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989)).

¹⁴⁶ *TrafFix Devices*, 532 U.S. at 29-30.

¹⁴⁷ See Buccafusco, *supra* note 4, at 1151-55.

¹⁴⁸ *Id.* at 1156; see Cunningham, *supra* note 4, at 38.

because protecting the image of food merely means that chefs—instead of copying another chef's dish—will be forced to create new ways of presenting a dish.¹⁴⁹

Based on the analysis above, a chef may not be able to copyright his food presentation or plating arrangement, but—in limited circumstances—he may be able to claim trademark protection of a “signature dish,” or apply for a design patent for his original plating arrangement or food design. Even though chefs may have these options, they may not always be able to prevail in an intellectual property infringement action over food plating, nor would chefs necessarily *want* to use intellectual property laws to protect their dishes in light of the long tradition and culture of sharing and borrowing in the cuisine industry. However, with cases such as *Powerful Katinka, Inc. v. McFarland, Vaca Brava, Inc. v. Hacienda VacaBrava & Steak House, Inc.*, and *New York Pizzeria, Inv. v. Syal* on the rise, with food increasingly being embraced as art, and with evidence of dish plating imitation more easy to come by through the rise of amateur food photography, there may be a growing trend for chefs and restaurants to use intellectual property laws more aggressively to protect the artistic presentation of their food.

¹⁴⁹ See Straus, *supra* note 55, at 256-57.