



## COPYRIGHTABILITY OF FOOD DESIGN : A COMPARATIVE ANALYSIS

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### Abstract

Intellectual Property rights promote creativity and protect rights associated with original works. This protection gives an incentive for authors, artists, performers to work and create more. Chefs have always been denied copyright protection on food designs. Food design is originally crafted by chefs. Copyrightability of food design belongs to a grey area where it is flourishing without protection on the internet. U.S. Court on *Star Athletica* Judgment brings a ray of hope on infringement claims over food design. This article will discuss the origin of food design and the scope of copyright in culinary world. With the ever-growing technology, food design has become a trend on social media platforms like Facebook, Instagram, YouTube and helped many chefs become celebrity overnight. Therefore, the article will analyze the impact of complete denial of copyright on food design. The purpose of article is to check whether food design fulfill the criteria of expression, originality and fixation. Even though, chefs continue to bring creativity and earn reputation for their recipes, copyright on food design lacks certainty. The article will conduct a comparative study and conclude

the legal nuances of copyright protection in U.S.A, E.U and India.

Keywords: Food design, copyright, expression, originality, fixation.

### Introduction

Chefs are artist of “Food design”. Due to technology development, “Food porn” as a phrase has become an internet trend making chefs “artist” on online platforms like Twitter, Instagram, Facebook. In 1984, it was Rosalind Coward who coined “Food porn” much before it exploded on all social media platforms.<sup>1</sup> The term food porn was explained in “Female Desire” based on the idea in an using through food in an exotic way.<sup>2</sup> The trend was initiated with the use of hashtag. It is based on the fact that a person who perceives a food to be delicious would in all probability eat the food and enjoy and therefore food’s appearance matters. Now we see chefs coming up with their own television shows, channels, blogs, You Tube videos. They get featured in reputed magazines and get invitations in talk shows. A new trend of online cooking competitions like Top Chef, Food Network, and Iron Chef America have made them a celebrity. Online websites like “Art of Plating” is solely dedicated to chefs now.

A recent claim on food video is yet to be decided. In, “*Sugar Hero v. Food Network*”<sup>3</sup> is an example of infringement claims over How to food videos, an independent food blogger “Elizabeth Labau” sued food

<sup>1</sup> Caroline M. Reeb, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 Depaul J. Art Tech & Intell.Prop.L.41 (2011)

<sup>2</sup> Shelby Dolen, *Chef’s Canvas: Recognizing rights as artists under Copyright Law*, 18, Colo. Tech.L.J. 393(2020)

<sup>3</sup> Sreyoshi guha, *Sugar Hero v. Food Network, copyright infringement of how to food videos*, SPICY IP. (July 8, 2021, 9:00PM)<https://spicyip.com/2017/06/sugar-hero-v-food-network-copyright-infringement-of-how-to-food-videos.html>



network for copyright infringement. “Labau through her website shared innovative, self-created recipes which includes videos, pictures etc. One recipe she made was “the snow globe cupcake recipe” which went viral instantly. The website was her primary source of revenue. Soon she discovered a food network Facebook page posting a similar video which copied her video with the same framed. She bought a suit where the food network views went high which should have been the plaintiff. Now whether she would be able to establish her case is what we would examine in this article. We will analyze if Food design can be copyrightable or not and whether copyright infringement can be claimed in USA in comparison to European Union and India.

Is food design copyrightable? - Position in USA

Law of copyright is applicable only to expressions, not ideas. In 1879, the first case on idea-expression dichotomy was “*Baker v. Selden*”<sup>4</sup>. The plaintiff’s claim for copyright protection on a new method of double entry bookkeeping. “The court concluded that the processes, systems, methods of operation cannot be a copyrightable subject matter.” “There can be no copyright on idea, procedure, and process system, method of operation, concept, principle or discovery.” But the issue of Functionality aspect of artistic works was addressed in the case of “*Mazer v. Stein*”<sup>5</sup> the case involves the manufacturing of electric lamps. The respondents crafted sculptures in human figures. The Copyright Office has granted copyright over the sculptures except the lamp

parts. The petitioners copied human statue on their lamps. It was held that respondents can get copyright protection on human statue as it shows original expression. The aftermath is evident in the Copyright Act as amended in 1976 and reflects the decision by defining the useful article as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”

There were two separability tests prevalent among the circuit courts in order to distinguish a useful article from its design. The Physical separability based on the idea that design of a useful article can be protected even if separated will not hamper the article’s utility as well as it would still be a work of art. It was held in “*Esquire Inc. v. Ringer*”<sup>6</sup> that the shape of a lighting fixture is physically not separable from its utility function. The D.C. Circuit concluded that conceptual separability is not sufficient. On the flip side, in *Kieselstein cord v. Accessories by Pearl Inc.*<sup>7</sup> the Second circuit applied the physical separability test and concluded that plaintiff’s crafted belt buckles with ornamental designs “Vaqueri and Winchester Buckles” could be conceptually separated from its utilitarian function. Then after, the Second Circuit explored the physical separability tests in various decisions namely “*Carol Barnhart, Inc v. Econ Cover Corp*”<sup>8</sup>, “*Brandir Int’l, Inc v. Cascade Pac. Lumber Co*”<sup>9</sup> and finally concluded that a design element can be conceptually separated on artistic factors and can stand independently of utilitarian functions.

<sup>4</sup> Baker v. Selden, 101, U.S. 99, 100 (1879).

<sup>5</sup> Mazer v. Stein 347 U.S. 201 (1954)

<sup>6</sup> Esquire, Inc v. Ringer, 591, F. 2d. 796,798( D.C.Cir. 1978).

<sup>7</sup> Kielsen Cord 632 F. 2d.at 990-91.

<sup>8</sup> Carol Branhart, Inc v. Econ Cover Corp 773 F.2d. 411 ( 2d. Cir. 1985).

<sup>9</sup> Brandir Int’l v. Cascade Pac. 834 F.2d. 1142 .



There has been disagreements amongst circuit courts on the applicability of Physical separability for decades. The disagreement started with the “*Star Athletica*” judgment’s plaintiff, Varsity Brand made and sold cheerleading uniforms. The plaintiffs filed a complaint against another cheerleader uniform manufacturer Star Athletica. The decision of the U.S. District court was that plaintiffs cannot get copyright protection over cheerleading uniform designs as it could not be separated from the utilitarian aspects. The Sixth Circuit reversed the judgement and held the uniform designs has utilitarian aspects and could be copyrightable. The circuit rejected all the previous Circuit court tests and framed a new one. The Supreme court accepted the Sixth Circuit’s findings and coined its own test. A two part test was developed in which an artistic feature of a design of a useful article could be copyrightable.

The court applied the test on Varsity Brand uniform design and concluded that the designs had features capable of being pictorial, graphic, sculptural. The Court observed that the uniform design could be separated from the uniform and can be applied in two dimensional mediums. The court used an imaginative approach and stated if the design is removed from the uniform and applied in another medium, it will not result in the replica of the uniform itself and proves that design could stand alone and independent of utility aspects. Therefore, the physical separability test that survived a few centuries was finally

discarded by Supreme Court and coined the “Imaginative separability test”. There can be certain disadvantages of the Imaginative test as its applicability is not clear and might complicate copyright over designs. It can be said that even though food and design are interlinked, the design would exist as for example if we imagine a plate with rhubarb mousse flower, and we place flower in two-dimensional medium, it would still be work of art.

When we talk about originality, it is important to note that for a work to be original requires a de minimis of creativity. It was held in “*Fiest Publications, Inc v. Rural telephone Service Co.*<sup>10</sup>” that a telephone directory could not be original work because it was just a mere compilation of facts. However, it can be observed that a food design would pass the originality criteria because of its aesthetic characteristics. Chefs arrange design plates, food with their own creativity. Hence, it will pass the originality requirement. In copyright, fixation means “to be fixed in such a manner that is sufficiently permanent nature and capable of reproduction and could be communicated for a period more than transition period.<sup>11</sup>” The sole case on fixation of food design is “*Kim Seng Co. v. J & A Importers Inc.*<sup>12</sup>” Kim the plaintiff claimed copyright over a bowl of Vietnamese noodles. The California Central District Court denied copyright as it lacked fixation.<sup>13</sup>

<sup>10</sup> *Fiest Publications Inc v. Rural Telephone Service Co.* 499 U.S.340,363 (1991)

<sup>11</sup> *Supra.*

<sup>12</sup> *Kim Seng Co.* 810 F. Supp.2d at 1053-54.( C.D. Cal. 2011)

<sup>13</sup> Nicholas J. Isaacson, *Modern Opinion on Copyrightability of food*, JIPEL, (July 14, 2021, 7:09PM),

<https://blog.jipel.law.nyu.edu/2019/11/modern-opinions-on-the-copyrightability-of-food/>



Court referred *Kelley v. Chicago Park District*<sup>14</sup> where an artistically arranged garden could not fulfill the fixation requirement as it lacked permanent nature. It was observed by court that a garden will perish with time, similarly the basic nature of food is changeable and would perish too. The court indirectly made it clear that anything perishable would always lack fixation. The judgement can be criticized based on an incorrect understanding of what fixation means. Under the Copyright Act in order for a work to be fixed, it can be in “any tangible medium” which could be reproduced, perceived, communicated.

Food design can be reproduced, perceived and communicated easily. In the internet era, the food design could be communicated via photos, videos, cookbooks, menus etc. It can be pointed out that for a copyright protection a work need not be permanent for a long period of time relying on the decision of “*Cartoon Networks v. CSC Holdings*”<sup>15</sup>. Therefore, a food design would pass second Circuit Court test. In a restaurant, a chef creates, composes, and plates the dish. The customer observes the dish’s appearance, they take a photo and post it on social media. Hence this proves a food design survives longer than 1.2.seconds.

If perishable materials are generally denied copyright protection, it will fail to protect expression which is to be safeguarded. It can be seen why food design is in negative space. Cuisine has thrived without any legal protection. In fact in the internet era, chefs get public attention through a television show, a

contract for their cookbooks, internet blogs, online magazines etc. As we understand the culinary world in digital era, Copying is powerful for their reputation. Dishes are not copies but reinterpretations. The ingredients and quality may vary from dish to dish. The chefs may change the composition and the ingredients and may not be exact every time. Even in restaurants the chef making the dish may not be the original creator. Social norms -a form of protection? Many legal scholars have observed the social norms followed amongst top notch chefs and analyzed their experiences.

A culture of hospitality was prevalent and enabled chefs to reshape the professionalism in culinary world. In case of chefs copying chefs, a chef could pay a licensing fee to the creator in order to copy the dish and sell it. Generally, chefs do not want a legal regime for protection. Chefs can opt for infringement claims if customers use social media to share their food design. With the *Star Athletica* Judgement<sup>16</sup>, chefs can stop customers from posting on social media under hashtag food porn if its not their creations per se. Apart from copyright, chefs can apply for trade secrets, trademarks, patents but the protection would be a limited one. So, it can be said that copyright protection gives a fruitful option for chefs but illustrating the protection is unnecessary and a norm based system is best suited for culinary world.

Copyright and Food Design: Position in EU In 2018<sup>17</sup>, The Court of Justice of European Union has declared the taste of the product cannot be considered a work within the

<sup>14</sup> *Kelley v. Chicago Park District* No. 08-3701 (7<sup>th</sup> Cir.2011).

<sup>15</sup> *Cartoon Network LP, LLLP v. CSC Holdings Inc.* 536. F.3d. 121,129( 2d Cir.2008).

<sup>16</sup> *Star Athletica*, 137 S.Ct. at 1010,1012.

<sup>17</sup> *Levola Hangeloo BV v. Smilde Foods BV* Case C-310/17



meaning of work in Directive 2001/29/EC and that the member states legislation could not be interpreted otherwise.<sup>18</sup> However, CJEU did not completely deny the copyrightability of the taste but mentioned that the present status in scientific development would not allow the identification of the taste of the food product. The CJEU had to decide and clarify the issue of copyright protection by a Court of Appeal in Netherlands after the intellectual property owner claimed the taste of its product namely, the spreadable cream cheese dip was given copyright protection.

It was clearly stated that the taste of the food product cannot be “work” within meaning of Article 2 of Directive 2001/29/EC. The reasoning given was that the subject matter of copyright protection requires expression in a tangible medium with sufficient precision. It was observed that unlike the literary, musical works which is precise and can be expressed with objectivity, the taste of the food product cannot have the precision. It can be easily identified by any third persons on the basis of taste which is highly subjective and varies. The argument put by the plaintiffs that it was possible to classify and recognize the food product as a work of literature or science or art and that it is analogous to the recognition of the copyright over scent of a perfume<sup>19</sup>. The argument was completely denied by CJEU as the copyright protection was not possible even for scent of a perfume in EU and there is no threshold to differentiate in

between the taste of a food product from the taste of other similar products. Hence, EU Copyright law would definitely avoid copyright over a food product and the laws strictly cannot grant to taste of a food at all.

Copyright and Food Design: Position in India As chefs in America are known for their special recipes, similarly in India, many renowned chefs namely “Sanjeev Kapoor, Vikas Khanna, Ranjeev Brar are the most celebrated face of Indian cuisine.” “Tarla Dalal is known as bestselling cookery author” who wrote the book “pleasures of vegetarian cooking” and sold more than 10 million copies. Many chef celebs like Sanjiv Kapoor is running cooking shows like Khana khazana, Wonder Chef etc. Report says about Sanjiv Kapoor’s success rate <sup>20</sup> “What Sanjeev Kapoor has is 5.6 million followers on Facebook, his Twitter and Instagram reach stand at 1.7 million and 189,000 respectively. He established his influence on other digital platforms like Google Plus and You-Tube-1.5 million followers, and 1.65 million subscribers with 330 million video views, respectively.”

So we can say, they have gained reputation without any copyright protection over their recipes. Can they claim copyright on food recipes in India? With respect to Originality, The “Copyright Act, 1957” does not define the term originality. In a landmark decision of “*EBC v. D.B. Modak*,”<sup>21</sup> it was held that originality standard for India lies in between

<sup>18</sup> Benjamin Beck & Konstantin Von Werder , *European Union : No Copyright Protection for the taste of Food – For Now* , MONDAQ( July 12 , 2021, 8:00PM)

<https://www.mondaq.com/germany/copyright/761282/court-of-justice-of-the-eu-no-copyright-protection-for-the-taste-of-food-for-now>

<sup>19</sup> Supra.

<sup>20</sup>Rajiv Singh, *How Chef Sanjeev Kapoor built a business empire*, ECONOMIC TIMES ( July 10,2021, 7:20PM)<https://economictimes.indiatimes.com/magazines/panache/how-chef-sanjeev-kapoor-built-a-business-empire-that-is-valued-at-over-rs-1000-crore/articleshow/61165877.cms?from>

<sup>21</sup> EBC v D.B.Modak ( 2008) ISCC 1



Sweat of the brow doctrine and Modicum of creativity doctrine. But when comes to Culinary world as a chef can modify and create a somewhat different presentation of such cuisine and would easily satisfy originality criteria. In India, there is no landmark decision or specific law on intellectual property protection over food design as such but it can be a growing industry in the coming years due to online food blogging websites, videos. The second criteria is whether it qualifies as a copyrightable subject matter or not? If we look into the “section 2(c) (iii) of the Act”, it defines artistic works.

Now if we decipher what is artistic work, plating could fall under the category of “any other work of artistic craftsmanship”. “Therefore, it can be concluded that food presentation is an artistic work.” In India, food dishes cannot be protected through designs as design so created must be through an industrial method.<sup>22</sup> The third criteria is “Whether Food can be fixed in a tangible medium?” Due to the lack of certainty in fixation, a bowl of Vietnamese noodles was denied copyright in USA. This might not be the case in India as the term “Fixation” has been interpreted to be broad. The moment a chef is ready with the dish and presented to customers, it lasts longer and sufficiently fixed in a tangible medium.<sup>23</sup> It is an original art work made straight out of Chef’s intellect. Now the question remains, whether the “Imaginative approach” could be made applicable to Indian cases? In my opinion, it

cannot be applied as the application is ambiguous. But the Star Athletica Judgment can be a good chance of legal claims in infringement matters where customers taking photographs of food items is an infringement under “sec 14(c) (i)(a) and (b) of Copyright Act, 1957” as it would constitute reproduction of a three dimensional work in two dimensional form or storing of work by electronics means.<sup>24</sup> In my opinion, a statutory explanation on copyright over food design as well as a norm based can be given in India.

#### Conclusion

A comparative study revealed future of copyright on food design is vague, ambiguous in nature. In USA, culinary world is growing with technology. An in-depth analysis of precedents shows disparities in copyright protection on food design due to lack of “fixation” in USA. However, the Star Athletica judgement is a ray of hope in copyright infringement matters on food design in USA. But the position in EU is clear, no copyright can be claimed in food design as it does not fall under any subject matter of copyright laws. The judgement given by CJEU is certain about the lack of expressions and tangible medium in taste of food product and lacks any test to differentiate recipes of same category. However, approach in India is yet to develop. Online food blogging is an emerging industry and therefore infringement through photographs could be a potential threat in India. Surprisingly, there has been no

<sup>22</sup>Mohan Dewan, *Food sculptures and the art of it*, AIPLA ( July 11, 2021,7:00PM) <https://www.aipla.org/list/innovate-articles/food-sculptures-and-the-art-of-it>

<sup>23</sup> Arpita Nigam & Viksit Singh , *the scrumptious art-IP protection to food plating styles*, MONDAQ( July

11,2021, 6:08PM) <https://www.mondaq.com/india/trademark/680984/the-scrumptious-art-ip-protection-to-food-plating-styles>  
<sup>24</sup> Id.



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copyright claims on food design. However, a flexible approach can be adopted, since in India we see food recipes from different cultures and communities, a special recognition mechanism can be adopted.

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