

**TRADE DRESS LAW IN THE COMMERCIAL KITCHEN:  
EXPLORING THE APPLICATION OF THE LANHAM ACT  
TO FOOD PLATING IN THE CULINARY INDUSTRY**

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*The culinary industry has become a creative zone, with revered chefs from all around the world producing magnificently innovative plating designs that have, along with wide critical acclaim, also unintentionally birthed equally expensive and often rather impressively imitated culinary knockoffs. The laborious task that is the designing and plating of a beautifully presented dish has often come to result in the dish’s plating becoming the restaurant’s unique selling point, with its market tending to associate the dish exclusively with its source-restaurant/chef. Herein emerges the need for an evaluation of existing intellectual property law regimes to examine whether their protective ambit may be extended to include innovation food plating designs, to ascertain legality of similar/identical reproductions emerging from other commercial kitchens. In this paper, I have restricted the discussion to an investigation of the protection offered to chefs for the presentation and appearance of their dishes exclusively to trade dress law under the USA’s Lanham Act.*

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**I. INTRODUCTION**

Food as far as the subject of originality goes, is rather analogous to music – the often-deliberate failure to discern the blurred lines<sup>1</sup> between inspiration and imitation has cost many an expensive litigation or two.<sup>2</sup> Culinary wonders that are the progeny of chefs that

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<sup>1</sup> The infamous Blurred Lines controversy had spouted controversial debates across various music and IP communities alike as to the difficulties associated with drawing the line between inspiration and imitation in the musical industry. The legal battle had the Marvin Gaye estate alleging that Robin Thicke and Pharrell Williams’s popular “Blurred Lines” track was a rip off of Gaye’s 1977 hit “Got to Give It Up”. See Rolling Stone, *Robin Thicke, Pharrell Lose Multi-Million Dollar 'Blurred Lines' Lawsuit*, March 10, 2015, available at <http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310> (Last visited on November 27, 2017).

<sup>2</sup> See *Powerful Katinka, Inc. v. McFarland et al*, 07 Civ. 6036 (SAS), available at [http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?\\_r=0](http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?_r=0) (Last visited on November 27, 2017) (Rebecca Charles, chef of Manhattan’s Pearl Oyster Bar sued her former sous chef claiming he had copied “each and every element” her restaurant, extending to the plating and presentation of her dishes in the new restaurant that he had started nearby – the case was ultimately settled out of court, but kick-started a storm of a

dare to venture outside the box, ironically thrive in an industry that is marked by a gross lacking in IP security, and thrives in the intellectual property (IP) “negative space”.<sup>3</sup> The underlying cause of this peculiarity is that the industry itself operates on the basis of an open source model, with prominent chefs deeming cooking a derivative art.<sup>4</sup> Despite innovation thriving at the very core of its existence, there is ample, and mostly unacknowledged, borrowing and sharing, unashamedly undertaken in the attempt to put together that perfectly balanced representation of culinary artistry.

While one may be prone to agree that no recipe per se is by itself inventive in its entirety so as to entitle its creator to intellectual property rights over the ingredient combinations in themselves, I opine that this does not necessarily apply as far as the component arrangements of artistically plated food are concerned. There exists an impending necessity to explore the possibilities of extending IP protection<sup>5</sup> to artistically designed food arrangements; and I have sought to examine through the lens of the USA’s prevailing trademark statute, whether it is plausible for chefs to anticipate any reasonable degree of protection for their food’s distinctive component arrangements. The Lanham Act lays down three *sine qua nons* for a subject matter to be deemed protectable trade dress, and in this paper, I attempt to speculate whether select elements of presentation of technical culinary preparations can sprint or crawl, even, past the high thresholds of each pedestal in the test of distinctiveness, functionality and likelihood of confusion, for them to be held entitled to trade dress protection.

Part II of the paper explores the importance of food plating, and the impact that it has on a diner’s perception of the food. Part III pits norms-based IP systems against law-based IP systems in order to enable the reader to pin-point the necessity for food plating to be explicitly recognized as subject matter that is worthy of legal-IP protection. Part IV of the paper examines the need and the possibility of recognizing food plating as “trade dress” by speculating whether select elements of presentation of technical culinary preparations can sprint or crawl, even, past the high thresholds of each pedestal in the test of distinctiveness, functionality and likelihood of confusion, for them to be held entitled to trade dress protection. Part V concludes the paper by summarising its primary arguments, and re-emphasising the need for courts to grant recognition to food plating as legally-protectable subject matter in relation to trade dress.

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debate across the industry); The Guardian, *Can You Copyright a Dish?*, March 24, 2006, available at <https://www.theguardian.com/lifeandstyle/2006/mar/24/foodanddrink.uk> (Last visited on November 27, 2017) (In a case that was ultimately settled out of court, Vaca Brava sued Hacienda Vaca Brava & Steak House in 2009, claiming that the latter copied the way it plated its meat, where “[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”); In another controversy, Chef Robert Wickens of Melbourne’s Interlude restaurant was accused of food plagiarism when it was discovered that Interlude’s website displayed photos of food that bore uncanny similarities to dishes served at two other restaurants – WD50 and Alinea – without any credit whatsoever.

<sup>3</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA.L.REV. 1687, 1764 (2006) (The authors define the term “negative space” as “a substantial area of creativity into which copyright and patent do not penetrate and for which trademark provides only very limited propertization”).

<sup>4</sup> The Guardian, *Statement on the ‘New Cookery’*, December 10, 2006, available at <https://www.theguardian.com/uk/2006/dec/10/foodanddrink.obsfoodmonthly> (Last visited on November 27, 2017) (“[t]he world’s culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks.”).

<sup>5</sup> *Id.*; *Supra* note 1.

## II. THE ART OF PLATING: WHY MAKE FOOD LOOK GOOD?

It is no secret that the plating and presentation of the dish has just as much to do with consumer satisfaction as the taste of the food itself.<sup>6</sup> Innovative food plating is a powerful instrument in the hands of a chef seeking to thrive in the inherently competitive restaurant space, by continually transforming diners' perception of what their food is supposed to look like, often resulting in an indelible mark of association in the consumer's mind between the dish and its source restaurant. Thus, even for a restaurant, its food's 'trade dress' possesses tremendous exploitability to constitute one of its most valuable assets.

However, the culinary world seems equally divided on the subject of extending IP protection to food. The half that holds a grouse against copycat chefs for blatantly duplicating plating approaches seems to take particular issue with more with the lack of attribution that violates common courtesy in the culinary community, than anything else.<sup>7</sup> The other half strongly believes that the existing concepts of food blending and ingredient combinations are the cumulative result of inspiration drawn from traditional handed down from generation to generation, and hence, cannot ever be said to constitute an individual chef's brainchild.<sup>8</sup> They, therefore, worry that the high degree of exclusivity

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<sup>6</sup> Amanda Ray, *Food Plating: The Art of Food Presentation*, The Art Institutes, January 22, 2015, available at <https://www.artinstitutes.edu/about/blog/food-plating-the-art-of-food-presentation> (Last visited on November 27, 2017) ("When you are plating food, you want to balance out the tastes, colors, and textures," Crispin says. "Make it like a painter's pallet.").

<sup>7</sup> Gabe Ulla, *Inspiration and Attribution in Cooking: How and When Should Chefs Credit Their Sources?*, December 3, 2012, available at <http://www.eater.com/2012/12/3/6524745/inspiration-and-attribution-in-cooking-how-and-when-should-chefs> (Last visited on November 27, 2017) (Momofuku's David Chang says that "a lot of people spend a lot of time developing new, really cool stuff — often not operating at a profit — and then get their new ideas swiped by someone else without attribution. We're all guilty of not giving enough credit, but there are some cases that are too obvious"); See also KAL RAUSTIALA, CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION*, 75 (2012) (The author cites Alinea's managing partner's comment on the popular blog eGullet that featured a debate among commentators on the Interlude Controversy, who stressed that the primary issue, if at all, was that not economic or legal, but a violation of "unwritten ethical guidelines", whilst later admitting that in his personal opinion such an imitation would likely not endanger the industry's "open source" model).

<sup>8</sup> See Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?*, (2007) 24 *Cardozo Arts & Entertainment Journal* 1121 (quoting from Michael Symons, *A History of Cooks and Cooking* 100 (2000), "so many of the most basic culinary actions, such as slicing, stirring and spooning out, are plainly distributive", and concludes that a cook's "central task is sharing") (In an interview with Chef Thomas Keller, the latter stated "Look at the [salmon] cornets for example. Where did it really come from? . . . Did I really invent it? Did I create it? Or was it an inspiration from an ice cream cone that I just looked at differently? . . . Do I have the right to say that this is mine and nobody else's? I don't know. . . What happens to my salmon cornet if they copyright it? Does somebody have to get my permission to use it? Does somebody have to pay me royalties? . . . I kind of have a problem with that. I really do"); See also Josh Sims, *Should Chefs Copyright their Recipes*, Belmont, September 2015, available at <http://now.belmond.com/should-chefs-copyright-their-recipes> (Last visited on November 27, 2017) (According to Ian Minnis, executive chef at Belmont Grand Hotel Europe, in St Petersburg - "When I think of my training, the chefs I worked with all had recipes passed down to them and we all worked by bouncing ideas of each other...It would be very hard for me to claim a dish as being mine"); Tampa Bay Times, *Hey! that Seafood Joint Was My Idea*, July 11, 2007, available at [http://www.sptimes.com/2007/07/11/Food/Hey\\_That\\_seafood\\_join.shtml](http://www.sptimes.com/2007/07/11/Food/Hey_That_seafood_join.shtml) (Last visited on November 27, 2017) ("No matter who invented the oyster bar or the retro oyster bar, originality in restaurants is overrated and nigh impossible. . . . [C]ooking is a craft, art and science best handed down by one cook to another, in the home, restaurant or market."); Mike Masnick, *Recipes: Shared and Improved on For Years...Now Targeted by Copyright Cops?*, Oct. 19, 2007, available at <http://www.webcitation.org/5WIDM2gfo> (Last visited on November 27, 2017) ("..Historically, recipes have always been a type of content that was eagerly and willingly shared and passed around -- and it has always been common for people to create "derivative works" in modifying and adjusting the ingredients and the instructions to try to improve upon the product...")

associated with intellectual property rights will undermine the food industry's celebrated culture of sharing.

Whipping up magnificent culinary delights is no easy feat, and if you run a restaurant in the heart of a city with a burgeoning food culture, your job just gets that much harder. The restaurant industry, like the corporate business market, is a ruthless, dog eat dog world, where eateries competing for top spots on their consumers' *go-to* lists might often find themselves scampering for new tactics to entice new consumers and keep the old ones in a desperate bid to stay relevant.<sup>9</sup> But Gordon Ramsay,<sup>10</sup> Thomas Keller<sup>11</sup> and Heston Blumenthal,<sup>12</sup> to name a few, have made their way to the pinnacle of glory by exploiting an oft overlooked factor in the restaurant business that greatly impacts consumer experiences and thereby, consumer loyalties – *the art of plating*.<sup>13</sup> The skill that entails bringing together the myriad elements that make up the dish itself, to create perfect culinary harmony that goes beyond simply fulfilling the purposes of decorative refinement. Thomas Keller's *Salmon Corne*, for instance, that 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<sup>14</sup> exemplifies that the art of plating is more than just an act of superficial beautification. In laboriously binding together all the ingredients to create a delectably palatable union, it strives to work up a compelling interaction between contrasting flavours on the plate that can transform dining experiences.<sup>15</sup>

<sup>9</sup> O Deroy, *The Plating Manifesto (I): From Decoration to Creation*, Flavour 3(1) (2014), available at <https://flavourjournal.biomedcentral.com/articles/10.1186/2044-7248-3-6> (Last visited on November 27, 2017) (“Instead of being a chef’s signature, reproducible from plate to plate, as on canvases, the visual presentation of a dish is now supposed to be as unique as the food itself. More specifically, plating and presentation are used more and more as a way to stress, not just the chef’s culinary artistry, but the uniqueness of the experience that is being performed in front of the diner. They now form one of the multisensory keys that the chefs and staff in prestigious restaurants can use in what can be considered a new form of performance art, the staging and orchestrating of culinary experiences…”).

<sup>10</sup> Debra Birnbaum, *How Gordon Ramsay Built His Name into a Billion Dollar Brand*, October 28, 2014, available at <http://variety.com/2014/tv/spotlight/how-gordon-ramsay-built-his-name-into-a-billion-dollar-brand-1201340276/> (Last visited on November 27, 2017).

<sup>11</sup> Riana Kelley, *How Thomas Keller Transformed American Dining*, September 14, 2010 available at <http://europe.newsweek.com/how-thomas-keller-transformed-american-dining-72399?rm=eu> (Last visited on November 27, 2017).

<sup>12</sup> Rebecca Burn-Callender, *Heston Blumenthal: from brink of bankruptcy to giant of gastronomy*, May 21, 2016, available at <http://www.telegraph.co.uk/business/2016/05/21/heston-blumenthal-from-brink-of-bankruptcy-to-giant-of-gastronom/> (Last visited on November 27, 2017).

<sup>13</sup> *Supra* note 9 (The author discusses “If, as the popular expression goes, we ‘eat with our eyes’, then the visual presentation of food may also turn out to be almost as rich and important as the sensory qualities of the food itself in terms of determining the expectations, experience and memory of a dish” - three factors that underline the probability of a diner returning to the restaurant for a second meal, and thus acting as primary determinants of consumer loyalty).

<sup>14</sup> Cathay Y. N. Smith, *Food Art: Protecting Food Presentation Under U.S. Intellectual Property Law*, (2014) 14(1) J Marshall Rev Intell Prop L [i].

<sup>15</sup> Louise Bro Pedersen, *Creativity In Gastronomy - Exploring The Connection Between Art And Craft*, MSocSc thesis, Copenhagen Business School, Department of Management, Politics and Philosophy, (2012), available at [http://studenttheses.cbs.dk/bitstream/handle/10417/3198/louise\\_bro\\_pedersen.pdf?sequence=1](http://studenttheses.cbs.dk/bitstream/handle/10417/3198/louise_bro_pedersen.pdf?sequence=1) (Last visited on November 27, 2017). (“I have a clear idea of how the plates should look and taste. You have a starting point and then you develop it further and constantly optimize it; in terms of the visual presentation so you can reveal the secret of each ingredient in its purest form with excellent flavour and in harmony with the others.” – Rasmus Kofoed (The World’s Finest Chef 2011)); El Bulli’s former chef and revolutionary culinary artist, Ferran Adria, appears to accord immense importance to how his food looks on the diner’s plate - a fact truly reflected in his meticulously prepared notes on plating instructions; See Minneapolis Institute of Art, *Notes on Creativity*, available at <http://new.artsmia.org/ferran-adria-notes-on-creativity/exhibition-preview/> (Last visited on November 27, 2017) (The creative process behind Ferran Adria’s innovatively plated food at the Minneapolis

Yet, this element has been ignored by many writers in their academic exploration of the culinary arts. For example, Meiselman's work that desiccates the dimensions of food appears to altogether discount plating as a matter of relevance.<sup>16</sup> Similarly, Gustaffsson's five-factor meal model too fails to make a mention of it.<sup>17</sup>

Dishes inspired by molecular gastronomy might best represent this interplay between art and food.<sup>18</sup> Some restaurants are culinary laboratories in their own right, offering opportunities for exciting encounters with magnificently designed culinary creations that have the twofold effect of revivifying and surprising them by attacking all the three components of pleasure at once.<sup>19</sup> Data has shown that the dish's complexity tends to be construed by diners as being reflective of the value that the food palate before his is worthy of being accorded.<sup>20</sup> Dishes that carry resemblances to the abstractness oft associated with art, elicit appreciation from diners by virtue of being representative of the underlying human effort that goes into the dish's creation – something that diners themselves have been shown to appear willing to pay more for.<sup>21</sup> Restaurant owners may, be said to be rightly concerned about protecting their laboriously re-imagined culinary creations, from plagiarising chefs.

For every creator, there are probably a dozen or so imitators. One wonders then, whether recognizing food served at restaurants as products capable of being protected existing IP regimes would transform the way that people currently perceive the idea of extending IP protection to food, allowing chefs to restrict others from creating dishes with a similar appearance.

Beautifully sculpted food that transcends beyond mere hospitality undoubtedly influences consumer loyalty, by bringing to his palate, edible art, whose unmistakable appearance has the diner visually stupefied, leaving behind a lasting imprint in his mind

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Institute of Art's exhibit); *See also* Minnesota Public Radio, *Appetites: A Visual Masterclass from a Master Chef*, September 23, 2015, available at <https://www.mprnews.org/story/2015/09/23/appetites-visual-masterclass-from-a-master-chef> (Last visited on November 27, 2017).

<sup>16</sup> MEISELMAN HL, *DIMENSIONS OF THE MEAL: THE SCIENCE, CULTURE, BUSINESS, AND ART OF EATING*, (2000).

<sup>17</sup> Gustaffsson IB, *Culinary Arts and Meal Science - A New Scientific Research Discipline*, *Food Service Technology*, 4(1) (2004).

<sup>18</sup> *See* Jacquelyn Strycker, *From Palate To Palette: Can Food Be Art?*, January 7, 2013, available at <http://createquity.com/2013/01/from-palate-to-palette-can-food-be-art/> (Last visited on November 27, 2017) (Strycker describes her experience at Moto, a restaurant that specializes in molecular gastronomy – "...diners may be served a deconstructed/reconstructed avocado, be asked to put on a smoked glove to eat a chocolate dish, and finish their meal with a printed elderflower-marshmallow menu. The restaurant's kitchen includes a lab where chefs conduct technological experiments to create innovative dishes with flavors that often seem incongruous to their appearance, disrupting diners' notions of what food can be").

<sup>19</sup> KAHNEMAN D, DIENER E & SCHWARZ N, *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* (2003).

<sup>20</sup> A study had been conducted by Charles Michal, chef and researcher at the Crossmodal Laboratory at Oxford University, wherein he attempted to investigate the impact of artistic plating on diners' experiences by plating a salad in three ways and serving one plate each to 60 customers – the first had all the ingredients merely tossed together, the second was arranged to look like one of Kandinsky's paintings, and the third was arranged neatly, but non-artistically. He found that to his customers, the second art-inspired salad was "tastier" and they were willing to pay more for it, supporting the idea that food plated in a manner that is aesthetically pleasing enhances a diner's perception of its flavour rating. Charles Michel, *A taste of Kandinsky: Assessing the Influence of the Artistic Visual Presentation of Food on the Dining Experience*, *Flavour* 3(1) (2014); Another study by Henrik Hagtvædt and Vanessa M. Patrick on the phenomenon of "art infusion" revealed that products that are associated with art receive more favourable consumer perception, and are considered to be more 'luxurious' than non-artistic products, available at <https://flavourjournal.biomedcentral.com/articles/10.1186/2044-7248-3-7> (Last visited on November 27, 2017).

<sup>21</sup> *Id.*

which enables him to establish an association between the dish with the restaurant that it came from. Over time these intricately designed and innovatively conceptualised food arrangements come to be known as the chef's *signature* dishes that really set the restaurant apart from the countless other bistros that dabble in similar cuisines. What then, stops the dish from being deemed rightfully worthy of protection against copycat imitations?

### III. NORMS BASED VERSUS LAW-BASED IP SANCTIONING SYSTEMS

Before embarking upon an expedition of trade dress as a suitable form of intellectual property right to secure the protection of food plating, it is worthwhile to examine the need for a law-based IP system<sup>22</sup> to protect chefs' creative expression despite the existence of a norms-based IP system.<sup>23</sup> Claims have been made that existing forms of legal IP regimes have not been designed to protect edible creations, and that existing community norms that lay down ideal standards of behaviour to be followed by culinary professionals,<sup>24</sup> sufficiently fulfil this need, possibly doing away with the very need for protection within the law-based regime – a proposition that I entirely disagree with. If community norms by themselves sufficed, instances of blatant plating imitations would likely have been averted – in fact, instances such as the *Interlude* episode<sup>25</sup> merely highlight the glaring lacuna within community norms that a law-based sanctioning system seeks to fulfil. In their paper,<sup>26</sup> authors Emmanuelle Fauchart and Eric von Hippel explore the workings of a social norms-based IP system and pit it against the law-based IP system in an attempt to establish its significance as a system that can function as a complement to or substitute for, the latter. They, found that norms-based systems were plagued by a catastrophic downside – the system aid the control of behaviour only “when groups control stimuli that are valued (or disvalued) by the target person”,<sup>27</sup> and suggested that conformity was entirely subject to whether the individuals possessed a “personal need for a social reward controlled by the group”,<sup>28</sup> quite in contrast to legal systems that punish violators by imposing financial sanctions – a consequence of probable concern to all likely offenders.<sup>29</sup>

While perhaps globally renowned chefs, conscious of their public perception, might consider it worthwhile to strictly confine themselves to innovation *minus* imitation for the fear of negative public perception, those still looking to put their name on the culinary map might not care as much for ethical standards of behaviour among chefs if the act of imitation in return, has the potential to bring them considerable fame and recognition. The

<sup>22</sup> A system of protection of intellectual property rights founded in statutory or jurisprudential recognition.

<sup>23</sup> See Emmanuelle Fauchart, Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, MIT Sloan School of Management Working Paper 4576-06, 2006 (“Norms-based IP systems operate on social norms that are held in common by members of a given community and specify the nature and extent of rights that a group member can assert to intellectual property. They also include procedures of the claiming of intellectual property rights, and community-accepted types of sanctions for violators”).

<sup>24</sup> See The International Association of Culinary Professionals (IACP) Code of Professional Ethics, available at [http://www.iacp.com/join/more/iacp\\_code\\_of\\_ethics](http://www.iacp.com/join/more/iacp_code_of_ethics) (Last visited on November 27, 2017) (Despite the IACP, claims of plating imitations have continued to flow, proving the insufficiency of norms by themselves to push chefs to conform to a system of ethics based on mutual respect for others' creations).

<sup>25</sup> Chef Robin Wickens of the Melbourne-based *Interlude* restaurant has been hugely criticised by the culinary and the internet community for having blatantly copied the design and plating of dishes from restaurants *Alinea* and *WD-50*. See, The Guardian, *Can You Copyright a Dish*, March 24, 2006, available at <https://www.theguardian.com/lifeandstyle/2006/mar/24/foodanddrink.uk> (Last visited on November 27, 2017).

<sup>26</sup> Fauchart, *supra* note 23.

<sup>27</sup> *Id.*, at 5,6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 27.

need for a law-based system to protect chefs' intellectual property becomes immediately significant particularly in such a scenario, working as a mechanism to penalize unauthorised imitators for conveniently attempting to borrow another's creative expression and reaping the ensuing benefits.<sup>30</sup>

Fauchart and von Hippel discuss that in a questionnaire answered by chefs, one of the questions posed to them by the authors was to identify their motivations behind revealing the recipe of a dish at a public forum – which among others, included generating publicity for their restaurant and increasing their reputation, leading to the authors' conclusion that “free revealing is motivated by expectations of private benefit – benefit that is ensured because of the community norm that innovation authorship will be acknowledged by community members”.<sup>31</sup> To put it plainly, chefs that publicly discuss the constituents of their food hope that the attention that it garners will generate public revenue and goodwill for their restaurants, which will in turn dissuade others from imitating their creations for the fear of being denounced by their market. In a system based on social norms, they discuss, the consequence of unauthorized borrowing would be “bringing the matter to the attention of influential members of the community”,<sup>32</sup> whereby, if such members consider the case meritorious, “explanations may be requested of the apparent violator of the norm, and/or sanctions are applied very quickly – perhaps within days”.<sup>33</sup> Because ethical norms are not laws and do not in any measure amount to a parallel legal system on any account, it does the raise the issue of the unbiasedness of the “influential members” that Fauchart speaks of. Unlike courts of law that are required to abide by the letter of the law and commonly, also established legal precedent, the “judges” of a court of ethical norms have the freedom to base their decisions on wildly subjective interpretations and understandings of what does and does not amount to an imitation, and further, what does not possess the means to ‘enforce’ their decisions either. Finally, it is worthwhile to note that the sample group of chefs that the authors essentially surveyed comprised the relatively smaller community of Michelin-starred chefs within France, and noted that an IP system based on community norms “[may] apply to a more limited scope of actors than do law-based systems”<sup>34</sup> – further explaining why a norms based system cannot be applied on a wider scale, on account of the lack of incentive for individuals outside such communities to abide by such norms.

Thus, it becomes clear that by and large, the benefits that ensue from the adoption of an IP law-based sanctioning system, easily trump those from community norms based systems, and particularly so in relation to food plating. This in effect, brings us to the subject of Part IV of the paper, which tackles and explores the intellectual property right best suited to offer the subject matter of food plating, a sufficient degree of protection.

#### IV. EXTENDING “TRADE DRESS” PROTECTION TO FOOD PRESENTATION

The very proposition that intellectual property protection may be extended to food is in itself a controversial proposal, because to some, it may amount to trespassing a territory over which copyright and patent<sup>35</sup> law have thus far claimed dual monopoly over.

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<sup>30</sup> See *supra* note 3.

<sup>31</sup> *Id.*, 24-25.

<sup>32</sup> *Id.*, at 27.

<sup>33</sup> *Id.*, at 27.

<sup>34</sup> *Id.*, at 27.

<sup>35</sup> See WIPO, *WIPO Intellectual Property Handbook*, 17 (2004) (“A patent is a document, issued, upon application, by a government office (or a regional office acting for several countries), which describes an

Because customers generally do not have the opportunity to taste or examine their food before they order it, food plating has evolved as a “way of distinguishing restaurants”,<sup>36</sup> for the reason that “potential customer may evaluate the presentation of the dish through photographs on websites or in magazines before she makes a reservation and sits down at the restaurant”.<sup>37</sup> This acts not only as a “proxy for quality”,<sup>38</sup> but also increases the likelihood of the discovery of instances of imitation.<sup>39</sup> While most of the dialogue surrounding the question of according intellectual property protection to food has by and large involved the issue of the copyrightability or patentability of *recipes*, the discourse on IP protection to the artistic presentation of food, has been limited. Thus, at the outset, it is pertinent to define the contours of all three of the primary forms of IP protection, and their ability to protect food plating as intellectual property,

Under existing copyright<sup>40</sup> laws, food plating falls directly within the ambit of the “useful article” doctrine, and may be considered a sculptural work only if its sculptural features can be identified separately from, and are capable of existing independently of its inherent utilitarian aspects<sup>41</sup> – a test that, it becomes immediately clear, is difficult to say that food plating can pass. It is further debatable whether food plating is sufficiently “stable or permanent enough”<sup>42</sup> to be able to fulfil the threshold of being fixed in a tangible medium.

While it is true that design patents<sup>43</sup> have successfully been acquired for food plating arrangements<sup>44</sup>, the high costs associated with obtaining a patent and thereafter its enforcement and prosecution,<sup>45</sup> together with its limited term of protection<sup>46</sup> may far outweigh the benefits.

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invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent”).

<sup>36</sup> Naomi Straus, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. Rev. 182 (2012).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, at 206, 207.

<sup>40</sup> Copyright may be defined as ‘property rights that gives author and their publishers sufficient inducements to produce and disseminate’ original works, whilst also allowing ‘others to draw on these works in their own creative and educational endeavors. PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE*, Vol.1 4-9 (1989).

<sup>41</sup> 17 U.S. Code § 101 (“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work 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.”).

<sup>42</sup> 17 U.S. Code § 102 (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device...”)

<sup>43</sup> Design patents constitute one among three forms of IP protection – the others being copyright and trade dress – that offer protection to industrial designs. See Daniel H. Brean, *Enough is Enough: Time to Eliminate Design Patents and Rely on More Appropriate Copyright and Trademark Protection for Product Designs*, 16 Tex. Intell. Prop. L.J. 325, 328-332 (2008) (The author describes the nature of protection of designs under patents, trademark and copyright laws respectively).

<sup>44</sup> *E.g.*, Contessa Food Products owns a design patent on “Serving Tray with Shrimp” (Patent No. Des, 404, 612).

<sup>45</sup> For plating arrangements to be patentable as a design, two very high thresholds must be fulfilled – “new, original and ornamental” (35 U.S.C. § 171) and “non-obvious” standards” (35 U.S.C. § 103).



In direct contrast to the goals of both copyright and patent law, trademark law exists not to stimulate creativity or invention but to “enable the public to identify easily a particular product from a particular source”.<sup>47</sup> Under this head, there appears to exist a much greater probability of protection being granted to food presentation. The system as it currently stands, can provide ample protection to chefs’ culinary creations, and courts must be willing to fairly decide cases under the trademark regime involve the infringement of those food plating designs that truly act as source-identifiers for their inventor chefs.

The first legislation on trademarks in itself can be traced back to the UK’s Bakers Marking Law, 1266.<sup>48</sup> The UK being a common law country, has not enacted an unfair competition law, and offers protection to unregistered trademarks only under the common law tort of passing off.<sup>49</sup> India, also being a common law country, drafted its trademark statute to be in substantial consonance with its English counterpart<sup>50</sup> – therefore, it too has not brought into force any legislative enactment that explicitly protects unregistered trademarks. It is worthwhile to note that a successful prosecution under passing off requires the establishment of three factors – goodwill attached to the goods, misrepresentation and damage.<sup>51</sup> The limitations of passing off were brought to the forefront again in the case of *Moroccanoil Israel Ltd v. Aldi Stores Ltd*<sup>52</sup>, where the court held that “mere” confusion was insufficient in a case of passing off, and there must necessarily be deception.<sup>53</sup> Highlighting the difference between the two, the Court stated that while one is “an assumption on the part of the relevant public (misrepresentation)”, the other constitutes “mere wondering (confusion)”<sup>54</sup>

On the other hand, the USA’s Lanham Act explicitly protects unregistered trademarks under Section 43(a),<sup>55</sup> and was the first legislative enactment that offered protection to unregistered trade dress within its ambit. An unregistered trade dress under the Act, can be protected if it is distinctive, non-functional, and imitation results in the likelihood of confusion – suggesting almost instantaneously the lower standard of proof required under this provision, as against under tort of passing off. When a claim is made under Section 43(a) with regard to unregistered marks, although it is unaided by the presumptions of validity and ownership attached to registered marks<sup>56</sup> – both of which must be established by the plaintiff – “the claim is now frequently recognized, with respect to unregistered marks, as the equivalent of a claim for trademark infringement”.<sup>57</sup> This grants proprietors of unregistered trademarks

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<sup>46</sup> Design patents expire after a term of 14 years (35 U.S.C. 173), after which anybody is free to imitate or copy the design (in this case, the plating arrangement), without any legal consequences whatsoever.

<sup>47</sup> Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1695-96 (1999).

<sup>49</sup> LaFrance, Mary, *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law*, MICH. ST. L. REV. 1414 (2011) (“The concept of passing off lies at the heart of the system of trademark protection in the common law countries. It is rooted in the common law action for deceit”).

<sup>50</sup> Sravanan A, *First Amongst Equals: Review of the Historical Perspectives of the Trademark Legislation and Registration*, MIPR 2012 (1) 157.

<sup>51</sup> Reckitt & Coleman v. Borden, (1990) R.P.C. 341 at 406.

<sup>52</sup> (2014) EWHC 1686.

<sup>53</sup> *Id.*, at 8.

<sup>54</sup> *Id.*, at 11.

<sup>55</sup> The provision is now referred to as 15 U.S.C. §§ 1124–1125.

<sup>56</sup> Yarmuth-Dion, Inc. v. D’ion Furs, Inc., 835 F.2d 990 (2d Cir. 1987).

<sup>57</sup> Union Mfg. Co. v. Han Baek Trading Co., 763 F.2d 42 (2d Cir. 1985).

access to federal courts; and bestows simultaneously upon the courts, the ability to grant generous remedies.<sup>58</sup>

In the recent past, the US has been one of the few jurisdictions that has seen some rather stellar instances of food plating imitation.<sup>59</sup>

The Lanham Act was drafted with an inherent adaptability to changing times,<sup>60</sup> a deliberate effort by legislators that has over the years, permitted the ambit of the term to be considerably expanded<sup>61</sup> so as to include much more than what was originally intended.<sup>62</sup> Trade dress was first recognised as being protectable in the case of *Eastman Kodak Co. v. Royal-Pioneer Paper Box Manufacturing Co.*,<sup>63</sup> wherein the Court granted an injunction on the ground that “[d]efendant’s packages ... constitute an unfair use of [plaintiff’s] trade dress.”<sup>64</sup> In this background, together in light of the significant academic discourse on the subject in the jurisdiction,<sup>65</sup> when considering the issue of the trademark-ability of food plating, it would appear that the best regime under which to explore this issue would be in a country where the initial conversation has already begun, i.e., the USA.

#### A. TRADE DRESS - THE CONCEPT

Trade dress essentially offers protection to the image and appearance<sup>66</sup> or *get-up* of the product. A subset of trade mark, it includes within its protective sweep “a combination of any elements in which a product or service is presented to the buyer”,<sup>67</sup> encompassing “composite of features”<sup>68</sup> that make up the superficial elements of the product – size, shape,<sup>69</sup> colour,<sup>70</sup> commercial literature,<sup>71</sup> design of the wrapper,<sup>72</sup> label or container<sup>73</sup> in which the product itself was packaged. Although the concept of trade dress was traditionally restricted only to identifiable elements of a product’s outward appearance,<sup>74</sup> its purview had been broadened by judicial interpretation to include all factors that facilitate the

<sup>58</sup> MARGRETH BARRETT, *INTELLECTUAL PROPERTY*, 311 (2<sup>nd</sup> ed., 2008).

<sup>59</sup> *Supra* note 3.

<sup>60</sup> See Joseph D. Garon, *The Lanham Act: A Living Thing*, 7 *Fordham Intell. Prop. Media & Ent. L.J.* 56, 57 (1996).

<sup>61</sup> *Id.*

<sup>62</sup> Ethan Horwitz, Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, *Fordham Intell. Prop. Media & Ent. L.J.* 59 (1997).

<sup>63</sup> 197 F. Supp. 132 (E.D. Pa. 1961).

<sup>64</sup> *Id.*, at 133.

<sup>65</sup> As against other major jurisdictions such as the United Kingdom.

<sup>66</sup> *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

<sup>67</sup> THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, § 8:1, 8:3 (4th ed., 2014).

<sup>68</sup> *Hartford House Ltd. v. Hallmark Cards Inc.*, 846 F.2d 1268 (10th Cir. 1988).

<sup>69</sup> *Weber-Stephen Products Company v. Alrite Engineering*, (1992) RPC 549 (shape and external configuration of oven grill held protectable).

<sup>70</sup> *Hoffmann-La Roche & Co. v. DDSA Pharmaceuticals Limited*, 1972 RPC 1 (colour, having acquired secondary meaning as a component of a product’s get-up, is protectable – “Goods of a particular get-up just as much proclaim their origin as if they had a particular name attached to them, and it is well known that when goods are sold with a particular get-up for long enough to be recognized by the public as goods of a particular manufacturer it does not matter whether you know who the manufacturer is”).

<sup>71</sup> *Masson, Seeley & Co. Ltd. v. Embossotype Manufacturing Co.*, (1924) 41 R.P.C. 160.

<sup>72</sup> *Morison v. Salmond* (1841) 2 Man & G 385.

<sup>73</sup> *Reckitt & Coleman Properties Ltd. v. Borden Inc.*, [1990] RPC 341 [HL] (lemon shaped plastic containers for lime juice entitled to protection under trade dress).

<sup>74</sup> *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 31 (2d Cir. 1992) (“At one time, “trade dress” referred only to the manner in which a product was “dressed up” to go to market with a label, package, display card, and similar packaging elements. However, “trade dress” has taken on a more expansive meaning and includes the design and appearance of the product as well as that of the container and all elements making up the total visual image by which the product is presented to customer).

construction of an attractive visual image that enhances the product's saleability.<sup>75</sup> Although traditional distinctions between trademarks and trade dresses have largely disappeared, it is worth noting that the ambit of trade dress under the Act can be stretched to include variable elements of product design and packaging that the existing concept of trademark does not offer protection to.<sup>76</sup>

Section 43(a) lays down the basis for protection of an unregistered trade dress, which requires the party that alleges trade dress protection to prove that the trade dress is not functional. To be entitled to protection under this provision, the owner must be able to establish priority<sup>77</sup> as regards to the appearance or "get up" of the subject of issue, and that it fulfils the test laid down in *Gen. Motors Corp. v. Urban Gorilla, LLC*,<sup>78</sup> by showing that the get-up of the dish inherently distinctive or has acquired distinctiveness through secondary meaning, that there is a likelihood of confusion as to the originating source of competing products and that the trade dress is non-functional.<sup>79</sup>

## B. TRADE DRESS AND FOOD PLATING

To qualify for trade dress protection, every chef who desires to have legal recourse to an unauthorized imitation of their unique plated dish of food must necessarily be able to establish the same three factors discussed above, and show that such arrangement is i) distinctive, ii) not functional and iii) that the copying would result in a likelihood of confusion.

### 1. Distinctiveness

While initial trade dress infringement cases had courts insisting on the need to prove that the mark had acquired "secondary meaning", in order to show distinctiveness, even where such mark was not descriptive<sup>80</sup> – courts have repeatedly acknowledged the time honoured test originally devised by Justice Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc*<sup>81</sup> that a mark may be distinctive in one of two ways<sup>82</sup> – by establishing that the mark is inherently distinctive, or that it has come to acquire secondary meaning.<sup>83</sup> A mark is

<sup>75</sup> *Fuddrucker's, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 842 (9th Cir. 1987).

<sup>76</sup> In *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609 (9th Cir. 1989) the United States Court of Appeals for the Ninth Circuit noted that trade dress protection is broader in scope than trademark protection, both because it protects aspects of packaging and product design that cannot be registered for trademark protection and because evaluation of trade dress infringement claims requires the court to focus on the plaintiffs entire selling image, rather than the narrower single facet of trademark.

<sup>77</sup> *Tally-Ho Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1023 (11th Cir. 1989) ("the first to use a mark on a product or service in a particular geographic market...acquires rights in the mark in that market." The right to use a trade dress or a trademark is founded on the ability to establish priority).

<sup>78</sup> 500 F.3d 1222 (10th Cir. 2007).

<sup>79</sup> *Id.*, at 1227.

<sup>80</sup> *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299, 303-04 (2nd Cir. 1981).

<sup>81</sup> 537 F.2d 4, 10-11 (CA2 1976).

<sup>82</sup> *Chevron Chemical Co. v. Voluntary Purchasing, Inc.*, 659 F.2d 695 (5th Cir. 1981) (The Court categorically disagreed with the opinion in *Vibrant Sales* and held that it is not necessary to show secondary meaning in every trade dress infringement suit); *Blau Plumbing, Inc. v. S.O.S. Fix-it, Inc.*, 781 F.2d 604 (7th Cir. 1986) ("but these holdings may just reflect the fact that trade dress may be undistinctive without being descriptive; in such a case "secondary meaning" may be a synonym for "distinctive." If any of these cases stands for the broader proposition that secondary meaning must be shown even if the trade dress is a distinctive, identifying mark, then we think they are wrong, for the reasons explained by Judge Rubin for the Fifth Circuit in *Chevron*").

<sup>83</sup> In *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000) (The US Supreme Court held that marks that are inherently distinctive are those whose intrinsic nature serves to identify their particular source, while marks whose distinctiveness can be established only by secondary meaning whose primary significance, in the minds of the public, is to identify the product's source rather than the product itself).

said to have acquired secondary meaning when in the consumer's mind, there is an association between the mark and the source of the mark – whether such source is known or unknown.<sup>84</sup> Such association may result from extensive use by a single supplier, so that the public would recognize them as identifying the source of the product,<sup>85</sup> The distinctiveness thus acquired, by its long use and favourable acceptance,<sup>86</sup> must be such that it must bring to the consumer's mind, the plaintiff's trade dress to the exclusion of all others.

Until the US Supreme Court's momentous ruling in *Wal-Mart Stores Inc. v. Samara Bros. Inc.*,<sup>87</sup> the courts evaluating the distinctiveness of a trade dress only had to consider whether the trade dress that formed the subject of issue was inherently distinctive, or that it had acquired distinctiveness by secondary meaning in order to qualify for protection under Section 43(a) based on the SC's ruling in *Two Pesos v. Taco Cabana*.<sup>88</sup> This test was employed in the examination of the distinctiveness of all product features, irrespective of whether they comprised part of the product configuration or packaging.

In *Wal-Mart Stores Inc v. Samara Brothers*,<sup>89</sup> the issue before the Court pertained to the identification of the circumstances under which a product's design is distinctive, and therefore protectable, in an action for infringement of unregistered trade dress.<sup>90</sup> In answering this very question, the Court laid down a new rule of law that effectively established different standards for assessment of the distinctiveness of trade dresses, based on whether such trade dress could be classified as product design, product packaging or else some *tertium quid*<sup>91</sup> that is akin to product packaging.<sup>92</sup> Justice Scalia asserted that inherent distinctiveness could only be found where it may be reasonable to assume that the consumer is predisposed to taking packaging as an indication of source – but with product design, consumers are aware that the concerned feature is intended not to identify the source, but to render the product itself more useful or more appealing, and thus design cannot be distinctive except with a showing of secondary meaning.<sup>93</sup>

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<sup>84</sup> *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1536 n.14 (11th Cir. 1986).

<sup>85</sup> *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 702 (5th Cir.1981) (Citing from *Diamond, Untangling the Confusion in Trademark Terminology*, 78 Pat. & T.M.Rev. 195, 196 (1980)).

<sup>86</sup> *Vuitton et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769, 777 (9th Cir. 1981).

<sup>87</sup> 529 U.S. 205 (2000).

<sup>88</sup> 505 U.S. 763 (1992) (Taco Cabana operated a chain of Mexican style food restaurants, whose interiors it described as “a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals”. In 1985, Two Pesos opened a restaurant that had a trade dress similar to that in Taco Cabana's restaurants – Taco Cabana filed a suit for trade dress infringement. The district court found the trade dress to be inherently distinctive, and awarded damages to Taco Cabana. The ruling was affirmed by the court of appeals and the Supreme Court).

<sup>89</sup> 529 U.S. 205 (2000).

<sup>90</sup> §43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, as amended, 15 U. S. C. § 1125(a).

<sup>91</sup> The question of ‘tertium’ quid has been dealt under the broad ambit of product packaging because although it had been classified as a third category for the purpose of evaluating distinctiveness in trade dress infringement cases, it's nature has been equated with product packaging not only in *Wal-Mart*, but also in several other cases. For instance, both in *Best Cellars, Inc. v. Wine Made Simple, Inc* (320 F. Supp. 2d 60 (S.D.N.Y. 2003) and *John Allan Co. v. Craig Allen Co* (505 F. Supp.2d 986 (D. Kan. 2007)) although the interior décor at issue were each classified as “akin to product packaging”, they were both subjected to the product packaging standard analysis. Therefore, in granting a dish trade dress protection, that an aspect may comprise product packaging and not tertium quid akin to product packaging or vice-versa, would not affect the conclusions drawn as to their protectability under the ‘distinctiveness’ factor.

<sup>92</sup> *Wal-Mart*, 529 U.S. 205, 206 (2000).

<sup>93</sup> *Id.*, See *supra* note 60.

Therefore, the determination of whether the plating of a dish falls within the category of product design or product packaging<sup>94</sup> is crucial to the ascertainment of the test to be applied in determining distinctiveness of the presentation of the dish.

a) *'Inherent Distinctiveness' in Food Plating*

Where the plating may be classified as product packaging or *tertium quid*, it begs the application of a legal test to, at the first instance, ascertain whether inherent distinctiveness can be established.<sup>95</sup> Although this is a standard that might be difficult to apply in trade dress cases than trademark cases because of the need to consider the total appearance of the product, they have been successfully applied and found.<sup>96</sup> Referring to the restaurant décor that formed the subject matter of a trade dress dispute, the Court in *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*<sup>97</sup> held that the "total visual image" representing the overall impression of the décor may receive protection only if it is an arbitrary or uncommon trade dress.<sup>98</sup> Further, that the features of the trade dress are distinctive and memorable,<sup>99</sup> or are arbitrary in nature and do not serve to describe the product or assist in its effective packaging,<sup>100</sup> inherent distinctiveness must be established. The third consideration entails an examination of "whether it [the feature] is a common shape or design, whether it is unique or unusual in a particular field, and whether it is a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for that class of goods, or whether it was capable of creating a commercial impression distinct from the accompanying words."<sup>101</sup>

Chef Richard Ekkebus,<sup>102</sup> chef and culinary director at French restaurant *Amber*,<sup>103</sup> is known for his spectacularly innovative French dishes, of which the restaurant's signature dish, the Hokkaido sea urchin in a lobster jello with cauliflower, caviar and crispy seaweed waffles, is a visual wonder in its own right. The conventional white plate that chefs are most stereotypically known to use,<sup>104</sup> has been traded in for white Bernardaud china moulded to form a sea urchin shell<sup>105</sup> – a form of 'packaging' that has in effect become the dish's unique selling point,<sup>106</sup> whose unconventional use is likely to almost automatically

<sup>94</sup> *Supra* note 91.

<sup>95</sup> *See supra* note 59.

<sup>96</sup> *Blue Coral, Inc. v. Turtle Wax, Inc.*, 664 F. Supp. 1153, 1163 (N.D. Ill. 1987).

<sup>97</sup> *Fuddruckers Inc. v. Doc's B.R. Ors. Inc.*, 826 F.2d 837, 841 at 15 (9th Cir.1987).

<sup>98</sup> *Id.*, at 844.

<sup>99</sup> *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 618 F.2d 950, 952-54 (2<sup>nd</sup> Cir 1980).

<sup>100</sup> *Id.*, at 952-54.

<sup>101</sup> *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342 (Cust. & Pat.App.1977); *Robarb, Inc. v. Pool Builders Supply of the Carolinas, Inc.*, 696 F. Supp. 621, 624 (N.D. Ga. 1988).

<sup>102</sup> Ivan Brincat, *Richard Ekkebus (Amber, Hong Kong): Obsessed with Quality Ingredients*, September 15, 2014, available at <http://www.foodandwinegazette.com/?p=1772> (Last visited on November 27, 2017).

<sup>103</sup> Seyine Park, Hong Kong, *A Twist of Classic French in Hong Kong*, available at <http://theartofplating.com/gallery/a-twist-of-classic-french-in-hong-kong/> (Last visited on November 27, 2017) (Voted No. 6 in Asia's 50 Best Restaurants and the Best Restaurant in Hong Kong).

<sup>104</sup> TODAY, *How to Plate Your Food Like A Pro: Celebrity Chefs Reveal their Secrets*, October 2, 2014, available at <http://www.today.com/food/how-plate-your-food-pro-celebrity-chefs-reveal-their-secrets-2D80186757> (Last visited on November 27, 2017).

<sup>105</sup> Radka Beach, *Amber: Dutch Chef Reimagines Modern French Cuisine At Mandarin Oriental in Hong Kong*, December 30, 2014, available at <http://www.lamuseblue.com/2014/12/amber-dutch-chef-modern-french-cuisine-and-east-meets-west-michelin-awarded-dining-meet-at-mandarin-oriental-in-hong-kong/> (Last visited on November 27, 2017).

<sup>106</sup> *See* South China Morning Post, *Hong Kong's best signature dishes: sea urchin, wagyu ribs, flower crab and special strawberry dessert*, May 13, 2016, available at <http://www.scmp.com/lifestyle/food-drink/article/1943588/hong-kongs-best-signature-dishes-sea-urchin-wagyu-ribs-flower> (Last visited on November 27, 2017).

tells a customer that it comes from the *Amber's* kitchen. Both, the moulded bone china and the sea urchin held within the china may be considered for protection, but would, conceivably, each be subject to different tests in keeping with the *Wal-Mart*<sup>107</sup> ruling<sup>108</sup> – the sea urchin held within the china would comprise the product, whilst the china itself would comprise the ‘packaging’. The arrangement of the visible elements of the dish – that is, the delicate placement of caviar on the lobster jello, and the cauliflower bits encircling it – would comprise product design. Thus, while the distinctiveness through use of the bone china as product packaging may either be through establishment of inherent distinctiveness or through acquired secondary meaning, distinctiveness for the food arrangement as product design can only be proved through acquired secondary meaning– a factor that has been explored later in the paper.

In *re Mars Incorporated*,<sup>109</sup> the Trademark Trial and Appellate Board upheld the inherent distinctiveness of a “three dimensional configuration of packaging for pet food that consists of a round bowl-shaped, inverted and lacquered pet food container”, reversing the decision of the Examining Attorney refusing registration, stating that the Examining Attorney placed far too much focus on the “round” shape of the container to the exclusion of the other features of the mark.<sup>110</sup> Further, it is worthwhile to note that in order to be deemed inherently distinctive, the non-utilitarian attributes sought to be trademarked must be of such design “that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers”.<sup>111</sup> To be deemed arbitrary and fanciful and thereby capable of registration as an inherently distinctive trade dress, the product packaging “must be more than just the only one of its type; it must be original, distinctive and peculiar in appearance”.<sup>112</sup>

While not all the myriad forms of containers and dishes used to serve food in may be construed as being worthy of trade dress protection, it is worthwhile to mention a few particularly ingenious examples would certainly appear to meet the threshold for trade dress protection under the Act – Chef Grant Achatz’s Bacon hung in a steel bow<sup>113</sup> designed by Crucial Detail for the *Alinea* restaurant in Chicago<sup>114</sup> constitutes, among others, one of the few exceptions to the general rule. Transcending beyond mere superficial ornamentation, the unlikely packaging accords an arbitrary shape to the carrier of some already magnificent looking food, effectively acting as a source-identifier. The use of a stainless-steel construction to hold strips of bacon appears to primarily be geared towards carving a distinct identity for the dish, thereby subtly nudging consumers into drawing an exclusive association between the dish and the restaurant itself. Another interesting dish is the *Mussels en Escabeche*<sup>115</sup> served by Jose Andreas<sup>116</sup> at The Bazaar – marinated mussels served in a

<sup>107</sup> 529 U.S. 205 (2000).

<sup>108</sup> See *supra* note 58, 59, 60, 61.

<sup>109</sup> Serial No. 77727119 (May 16, 2011) [not precedential].

<sup>110</sup> *Id.*, at 11.

<sup>111</sup> *Tone Brothers, Inc. V. Sysco Corporation*, 28 F.3d 1192 69 (United States Court of Appeals, Federal Circuit 1994).

<sup>112</sup> *Re Compagnie Gervais Danone*, Serial No. 75/621,184 Trademark Trial and Appeal Board, United States Patent and Trademark Office.

<sup>113</sup> *Supra* note 9.

<sup>114</sup> *Id.*

<sup>115</sup> Food and Wine, *World's Most Beautiful Dishes*, available at <http://www.foodandwine.com/slideshows/worlds-most-beautiful-dishes/11> (Last visited on November 27, 2017).

<sup>116</sup> The Wall Street Journal, *Restaurant of the Future?*, December 10, 2009, available at <http://www.wsj.com/articles/SB10001424052748703558004574582381819140954> (Last visited on November 27, 2017).

seemingly unlikely replacement for a bowl, i.e. – a tin can. However, the fact that there currently are in existence a good number of restaurants that use tins as serving plates makes it, the commonality of its use reflect the high improbability of consumers associating the restaurant as being the place of origin for the use of tins as serving plates, thus putting into jeopardy the dish's possibility passing the threshold of distinctiveness whether inherent or acquired,<sup>117</sup> because where a mark is essentially in common to the trade, it fails to fulfil the very essence of the function of a trade mark – that is to act as a source identifier, and thus is not protectable.

b) *'Distinctiveness acquired by secondary meaning' in Food Plating*

Distinctiveness as acquired by secondary meaning must necessarily be proved where the product is identified as product design, and in the case of food characterised as product packaging or *tertium quid*, where inherent distinctiveness cannot be satisfactorily proved.

As far as the question of distinctiveness acquired by secondary meaning goes, in *Chevron*,<sup>118</sup> the Court lucidly stated that a demonstration of 'secondary meaning' under Trademark law is necessary only when the claimed trademark is not sufficiently distinctive of itself to identify the producer.<sup>119</sup> For secondary meaning to be proved, the plaintiff must not only show that the primary significance of the term in the minds of the consuming public is not the product but the producer,<sup>120</sup> but also that secondary meaning existed prior to the date on which the accused infringer commenced using a confusingly similar trade dress.<sup>121</sup> To establish secondary meaning, while it is not necessary for the public to know the name of the manufacturer that manufactures the product, it is sufficient if the public believes the product comes from a single, though anonymous source.<sup>122</sup> All product designs and some product packaging that do not possess inherent distinctiveness, may possess distinctiveness acquired by secondary meaning, where the manufacturer can show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.<sup>123</sup> The Supreme Court in *Two Pesos*<sup>124</sup> recognized that the rule requiring proof of secondary meaning only where the mark was descriptive, was not only restricted to trademark infringement, but is also applicable to trade dress infringement<sup>125</sup> – this mandatory requirement imposed on product designs to show secondary meaning in order to establish acquired distinctiveness makes it akin to descriptive marks, because as in the case of the latter, product designs are “not presumed to function as indications of origin

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<sup>117</sup> Food and Wine, *Taberna do Mercado*, available at <http://www.timeout.com/london/restaurants/taberna-domercado> (Last visited on November 27, 2017); Jose Pizarro's sardines cooked in oil and served in a tin represent another instance of the use of tins for plates (José Pizarro, FOOD AND WINE, available at <http://www.timeout.com/london/restaurants/jose-pizarro> (Last visited on November 27, 2017)); Interestingly, the We Want Plates Twitter feed is offers a rather amusing collection of unlikely plates by disgruntled plate-lovers, available at <https://twitter.com/wewantplates> (Last visited on November 27, 2017).

<sup>118</sup> *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695.

<sup>119</sup> *Id.*, at 702.

<sup>120</sup> *Vision Center v. Opticks, Inc.*, 596 F.2d 111, 118 (5th Cir. 1979) (Citing from *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118, 59 S. Ct. 109, 113, 83 L. Ed. 73 (1938)).

<sup>121</sup> *Tone Brothers, Inc V. Sysco Corporation* 28 F.3d 1192 (Cited from *Co-Rect Prods.*, 780 F.2d at 1330, 228 USPQ at 432).

<sup>122</sup> *Processed Plastic Co. v. Warner Comm., Inc.*, 675 F.2d 852, 856 (7th Cir. 1982); *See also* *French American Reeds Mfr. Co. v. Park Plastics Co., Inc.*, 20 N.J.Super. 325, 90 A.2d 50 (1952) (“The critical question of fact at the outset always is whether the public is moved in any degree to buy the article because of its source and what are the features by which it distinguishes that source”).

<sup>123</sup> *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

<sup>124</sup> *Id.*

<sup>125</sup> *Two Pesos*, 505 U.S. 763 (1992).

immediately upon first use”.<sup>126</sup> While there exist different yardsticks employed by the courts to assess whether the descriptive mark has assumed distinctiveness through secondary meaning, no one factor is determinative, and the factors taken into account differ from case to case<sup>127</sup> and circuit to circuit.<sup>128</sup>

Section 1212.06 of the Trademark Manual of Examining Procedure (TMEP)<sup>129</sup> discusses some of the more popular evidences used by parties to establish distinctiveness acquired by secondary meaning – long use of the mark, advertising expenditures, declarations and affidavits, surveys, which may individually or together be used by court to evaluate the distinctness of the mark. In *Harlequin Enterprises Limited v. Gulf & Western Corporation*,<sup>130</sup> Harlequin established the attachment of secondary meaning to its book cover by its readers by through its “extensive national advertising, it’s phenomenal sales success and the results of a consumer survey”.<sup>131</sup> However, the use of evidence associated with these factors are accompanied by riders. Consumer surveys, for instance, may be presented as evidence of distinctiveness by secondary meaning subject to its methodical, procedural and technical accuracy,<sup>132</sup> and the survey universe comprising a fair sample of those purchasers most likely to partake of the alleged infringer's goods or services.<sup>133</sup>

Michelin-starred Massimo Bottura’s signature psychedelic steak<sup>134</sup> has wowed both art and food connoisseurs all at once<sup>135</sup> – a survey of consumers likely to order the chef’s dish will likely throw up ample evidence of the enormous fame that the creation has garnered, seamlessly allowing to achieve the first threshold of ‘distinctiveness’. Similarly, establishing acquired distinctiveness for a magnificently presented dish like Hector Blumenthal’s Meat Fruit<sup>136</sup> creation, should, given its wide critical acclaim, not prove to be a

<sup>126</sup> *In Re DC Comics, Inc.*, 689 F.2d 1042, 1051 (C.C.P.A. 1982).

<sup>127</sup> *Yamaha Int’l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

<sup>128</sup> *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1536 (2d Cir. 1992) (citing *Thompson Medical*, 753 F.2d at 217; *Transgo, Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001, 1015 (9th Cir. 1985), cert. denied, 474 U.S. 1059 (1986)).

<sup>129</sup> See Trademark Manual Of Examining Procedure (TMEP), USPTO, April 2017, available at <https://tmep.uspto.gov/RDMS/TMEP/current> (Last visited on November 27, 2017) (The TMEP is a manual published by the United States Patent and Trademark Office “to provide trademark examining attorneys in the USPTO, trademark applicants, and attorneys and representatives for trademark applicants with a reference work on the practices and procedures relative to prosecution of applications to register marks in the USPTO. The Manual contains guidelines for Examining Attorneys and materials in the nature of information and interpretation, and outlines the procedures which Examining Attorneys are required or authorized to follow in the examination of trademark applications”).

<sup>130</sup> 644 F.2d 946.

<sup>131</sup> *Id.*, at 11.

<sup>132</sup> *In Re E.I. Kane, Inc.*, 221 USPQ 1203, 1206 (TTAB 1984); *Brooks Shoe Manufacturing Co. Inc. v. Suave Shoe Corporation*, 716 F.2d 854 (11th Cir. 1983).

<sup>133</sup> *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980); *American Basketball Association v. AMF Voit, Inc.*, 358 F. Supp. 981, 986 (S.D.N.Y.) (As cited in *Brooks Shoe Manufacturing Co., Inc. v. Suave Shoe Corporation*, 716 F.2d 854 (11th Cir. 1983)).

<sup>134</sup> The dish has been titled "Beautiful Psychedelic Veal, Not Flame-Grilled", and has been famously inspired by a Damien Hirst psychedelic spin painting, available at <http://torontolife.com/food/way-wagyu-michelin-starred-massimo-botturas-psychedelic-steak-bucas-one-kind-dinner/> (Last visited on November 27, 2017).

<sup>135</sup> Evelyn Chen, *Top chef Massimo Bottura blends art and food*, September 1, 2016, available at <http://www.scmp.com/magazines/style/travel-food/article/2008424/massimo-bottura-art-opens-chefs-eyes-remarkable-new> (Last visited on November 27, 2017).

<sup>136</sup> Hillary Dixler, *Meat Fruit at Dinner by Heston Blumenthal in London*, July 11, 2014, available at <http://www.eater.com/2014/7/11/6196141/meat-fruit-at-dinner-by-heston-blumenthal-in-london> (Last visited on November 27, 2017).



difficult feat in itself. Much has been written and said about his chicken liver and foie grass parfait with a mandarin orange jelly that has been made to look like a Mandarin orange.<sup>137</sup>

While it is not often that one might come across dish with a design distinct enough to be deemed to warrant trade dress protection, it is perhaps ever rarer to find a protection-worthy dish whose creator isn't world-renowned. Claire Anderson,<sup>138</sup> owner of Clairella Cakes', and recipient of the Cake International London 2014 award, is perhaps an exception. A picture of her rather exquisitely carved wedding cake that depicted a couple meeting, falling in love and getting married went viral on the internet – the courtesy of which, 'Clairella Cakes' cakes' came to be associated by a huge number of social media users with its novelty bakes.<sup>139</sup> Not long after its internet debut, a fascinated Reddit user constructed an inspired cake<sup>140</sup> that took the 'story' forward – perhaps if the user had made a business out of it and Clairella Cakes had instituted a suit for trade dress infringement, the user's imitation of the cake's unmistakably distinct, non-functional design would appear to point toward an almost likely victory. It is worthwhile to consider that even if Clairella Cakes chose not to adopt this as a signature 'theme' of sorts for all its cakes/baked goods, the design's use on a single cake has resulted in a significant portion of the market drawing a presumptuous connection between the creator of the cake and the cake itself – in a way no different from instances of hugely acclaimed restaurants' signature dishes' garnering widespread notability from their consumer base, for the creativity employed in the dishes' uncommon plating style.

## 2. Functionality

A product design or packaging's eligibility for protection is also heavily dependent on its non-functionality.<sup>141</sup> The product packaging/design under question may be said to be 'functional' if it is "essential to its use or purpose or affects its cost or quality",<sup>142</sup> or alternatively where the feature is a competitive necessity<sup>143</sup> – essentially defining two branches of the functionality principle.

While the law grants sellers the right to secure protection for their product design, whether such protection is actually granted, and if so, its nature and quantum, remains heavily dependent on the seller's ability to establish that the design or packaging as a whole is not functional.<sup>144</sup>

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<sup>137</sup> Herald Sun, *Heston Blumenthal's new Melbourne restaurant, Dinner, to feature famed Meat Fruit dish* October 10, 2015, available at <http://www.heraldsun.com.au/news/victoria/heston-blumenthals-new-melbourne-restaurant-dinner-to-feature-famed-meat-fruit-dish/news-story/ea505e556e1acc696efe4cdda937be51> (Last visited on November 27, 2017).

<sup>138</sup> Clairella Cakes, *About Us*, available at <https://clairellacakes.com/pages/about-us> (Last visited on November 27, 2017).

<sup>139</sup> Huffington Post, *The Internet Is Truly Baffled By This Wedding Cake*, April 16, 2014, available at [http://www.huffingtonpost.com/entry/wedding-cake-reddit\\_n\\_5148145.html?section=india](http://www.huffingtonpost.com/entry/wedding-cake-reddit_n_5148145.html?section=india) (Last visited on September 10, 2017).

<sup>140</sup> Huffington Post, *The Most Baffling Wedding Cake Ever Just Got A Beautiful Sequel*, May 3, 2014, available at [http://www.huffingtonpost.com/entry/wedding-cake\\_n\\_5255049.html?section=india](http://www.huffingtonpost.com/entry/wedding-cake_n_5255049.html?section=india) (Last visited on 12 September 2017).

<sup>141</sup> That 'non-functionality' is a distinct yardstick whose fulfillment is necessary for trade dress protection under § 43(a) of the Lanham Act has been upheld in number of cases – see *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992), *Inwood Laboratories* 456 U.S. 844 (1982).

<sup>142</sup> *Inwood Lab. Inc. v. Ives Lab. Inc.*, 456 U.S. 844, 850 n. 10, 102 S. Ct. 2182, 2187 n. 10, 72 L. Ed. 2d 606 (1982).

<sup>143</sup> *TraFFix*, 532 U.S. 23, 32 (2001).

<sup>144</sup> *American Greetings Corp. v. Dan-Dee Imports, Inc.*, 807 F.2d 1136, 1141 (3rd Cir. 1986).

The policy underlying the functionality doctrine are two-fold –to encourage fair competition and to exclude out of the realm of trademark protection, utilitarian aspects of products.<sup>145</sup> The functionality doctrine, by restraining one person or entity from singularly and exclusively utilizing, for the purpose of its own product design or packaging, a constitutive feature crucial to the functioning of the product itself, prevents trademark law from assuming an anti-competitive role. In the absence of this standard as an additional bar to securing trade dress protection, it would become close to impossible to have different brands manufacturing the same product<sup>146</sup> because of the monopolization of the product’s multiple functional features by a minority of market players – thus effectively resulting in the restraint of fair competition.<sup>147</sup>

In *Textron v. U.S.I.T.C.*,<sup>148</sup> the Court held that before a product configuration can be recognized as a trademark, the *entire* design, and not merely the product’s individual features, must be “arbitrary or non *de jure* functional”,<sup>149</sup> else the “the right to copy better working designs would, in due course, be stripped of all meaning if overall functional designs were accorded trademark protection because they included a few arbitrary and non-functional features”.<sup>150</sup> Trade dress is a complex composite of features, all of which must, under the law of unfair competition, be considered together, not separately.<sup>151</sup> Further, if the functional features of products were included within the ambit of trademark protection, this would result in a conflict between patent and trademark laws because “there exists a fundamental right to compete through imitation of a competitor’s product, which right can only be *temporarily* denied by the patent or copyright laws”..<sup>152</sup> Thus, if the utilitarian aspects of the product are its essence, only patent law can protect its configuration from use by competitors.<sup>153</sup>

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<sup>145</sup> *Qualitex v. Jacobson Products*, 514 U.S. 159 (1995) (“If a product’s functional features could be used as trademarks, however, a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever”).

<sup>146</sup> *W.T. Rogers Co. Inc. v. Keene*, 778 F.2d 334 (7th Cir. 1985) (“A firm that makes footballs could not use as its trademark the characteristic oval shape of the football, thereby forcing its rivals to find another shape for their footballs; since they wouldn’t be able to sell any round or oblong or hexagonal footballs, that firm would have, not an identifying mark, but a product monopoly, and a product monopoly not for a term of years as under the patent laws but forever”).

<sup>147</sup> Restatement (Third) Of Unfair Competition §1 cmt. e (1995) (“The rules governing the protection of trademarks must also be responsive to the public interest in fostering vigorous competition. In defining protectable subject matter and in delineating the scope of exclusive rights, the law cannot neglect the legitimate interests of other competitors. In some cases the recognition of exclusive rights in favor of a particular seller may undermine the ability of other sellers to communicate useful information to consumers or deprive competitors of access to product features necessary for effective competition”).

<sup>148</sup> 753 F.2d 1019 (Fed. Cir. 1985).

<sup>149</sup> See *In re Encco Display Systems, Inc* (“product configuration which is a superior design essential for competition is de jure functional and may be refused registration on that ground..... In contrast, a product configuration that is not a superior design essential for competition, but merely performs some function or utility, is only de facto functional. De facto functionality is not a ground for refusal under the statute”).

<sup>150</sup> *Textron*; See also *Fuddrucker*, 826 F.2d 837 (“We examine trade dress as a whole to determine its functionality...functional elements that are separately unprotectable can be protected together as part of a trade dress... In other words, our inquiry is not addressed to whether individual elements of the trade dress fall within the definition of functional, but to whether the whole collection of elements taken together are functional”).

<sup>151</sup> *American Greetings Corporation Corp*, 807 F.2d 1136, (3rd Cir. 1986), citing from *SK & F, Co. v. Premo Pharmaceutical Laboratories*, 481 F.Supp. 1184, 1187 (D.N.J.1979), *aff’d*, 625 F.2d 1055 (3d Cir.1980).

<sup>152</sup> *Morton-Norwich Prods.*, 671 F.2d 1332, 1336 (C.C.P.A. 1982); *Wal-Mart Stores, Inc. v. Samara Bros, Inc.*, 529 U.S. 205, 214 (2000) (“the producer can ordinarily obtain protection for a design that is inherently source identifying, but that does not yet have secondary meaning, by securing a design patent or a copyright for the design”).

<sup>153</sup> *Morton-Norwich*, 671 F.2d at 1338-40 (As cited in *Leatherman*, 199 F.3d at 1013).

There are two facets to the doctrine of functionality – the traditional or utilitarian form of functionality, and aesthetic functionality,<sup>154</sup> each with its own distinct tests.

a) *Utilitarian Functionality*

The utilitarian principle includes within its ambit all such features that are essential to the use or purpose of the device or affects the cost or quality of the device.<sup>155</sup> Perhaps one of the earliest instances where recognition was awarded to the doctrine on functionality, was by the US Supreme Court in *Kellogg Co. v. National Biscuit Co.*,<sup>156</sup> where it refused to award trade dress protection to the “pillow shaped”<sup>157</sup> shredded wheat biscuit because of its functional nature, on the ground that the substitution of the “pillow-shape” of the biscuit would spike costs and compromise quality.<sup>158</sup>

In *Sweet Street Desserts, Inc. v. Chudleigh’s Ltd.*<sup>159</sup> this very question formed the subject matter of consideration before the Court. The plaintiff, Sweet Street Desserts, Inc. (“Sweet Street”) manufactured and sold an apple pastry dessert at Applebee’s restaurants that the defendant Chudleigh’s Ltd. contended was an infringement of the registered product configuration for the design of its Apple Blossom pie. The plaintiff had filed a suit for cancellation of the defendant’s trademark registration, but the defendant vehemently attributed the blossom’s features to mere attempts at beautification, and asserted that they were not dictated by utilitarian concerns. The Court, based on certain observations,<sup>160</sup> concluded that Chudleigh’s Blossom Design trademark, comprising a round, “single-serving, fruit-filled pastry with six folds or petals of upturned dough” was functional in being “essential to the use or purpose of the article”, in purview of other shapes negatively affecting cost and qualitative considerations.<sup>161</sup>

One of Chef Grant Achatz’<sup>162</sup> most famous dishes at *Alinea*, is the Graffiti<sup>163</sup> – a black truffle ‘cement’ construction that hides a delectable mix of spring vegetables. This

<sup>154</sup> *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001).

<sup>155</sup> *Inwood Laboratories v. Ives Laboratories* 456 U.S. 844 (1982) (This statement was later upheld as the “traditional rule” of functionality in *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23,24 (2001), citing from *Qualitex*, 514 U.S. 159 (1995)); *See also* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, 376 U. S. 232 (1964); *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 112 (1938).

<sup>156</sup> *Kellogg Co.*, 305 U.S. 111 (1938).

<sup>157</sup> *Id.*, at 119.

<sup>158</sup> *Id.*, at 122.

<sup>159</sup> 69 F.Supp.3d 530 (2014).

<sup>160</sup> *Id.*, at 11 (The Court noted

- “The single-serving size was adopted to respond to the needs of the market, which was looking for a single-serving of pie... The Blossom was configured to avoid the need to cut slices from a larger pastry containing multiple servings...
- The round shape was chosen for practical reasons: a triangular shape required too much pastry to retain the apples and got soggy when microwaved, a square shape cost more and was harder for restaurants to work with, and a rectangular shapes was too weak and broke too easily... Chudleigh’s also selected a round shape because it “would mimic a round apple pie.” ... Furthermore, a circle is a basic design element over which courts should not grant a party exclusive use
- The opening at the top was essential to the Blossom’s function...because if there was more than one opening, the filling would spurt out when the product was heated and the microwave would get dirty...
- The six folds or petals of upturned, partially overlapping dough folded in a spiral pattern serve to hold the filling inside the pastry shell...”).

<sup>161</sup> *Traffix*, 532 U.S. 23 (2001).

<sup>162</sup> *Food and Wine Gazette, Grant Achatz (Alinea): A genius of molecular cuisine*, September 18, 2014, available at <http://www.foodandwinegazette.com/?p=1687> (Last visited on 12 September 2017).

<sup>163</sup> *Chicago Tribune, Graffiti Concrete Spring Vegetables*, available at <http://www.chicagotribune.com/chicagotribune-at-10-an-interview-with-grant-achat-002-photo.html> (Last visited on 10 August 2017).

dish, that finishes off with a rather dramatic flourish, has acquired such popularity and fame across the web that it is worthwhile to consider whether its design measures up to the high standards of non-functionality. Unlike in the case of Chudleigh's Apple Blossom design, it would seem rather unlikely that the clever disguise of porcini mushroom meringue as pieces of cement on a cement slab would in any way be functional to the working of the product itself – the black truffle itself could have been presented in a host of different ways, as there doesn't appear to exist any specific utilitarian advantage to the cement impersonation that would render it functional by virtue of its effect on the cost or quality of the product itself.

In molecular gastronomy, the method of plating and the arrangement of various components on the plate are deliberately designed to interact to create an optimum tasting experience, essentially implying that the arrangement of components on a plate impact can physically impact the resultant flavour upon being consumed together.<sup>164</sup> It was held in *In re Hershey Chocolate & Confectionary Corp*<sup>165</sup>, that to determine whether a particular plating arrangement, whether as part of product design or packaging, is de jure functional, the alleged functional elements must be balanced against any non-functional elements to determine whether the mark as a whole is essentially functional.<sup>166</sup> Even where the arrangement of food on a plate results in a qualitative improvement in the resulting flavours and is not merely restricted to the look of the dish, because the registration of configuration marks is not exclusively restricted to those designs that bear no connection with the function or purpose of the goods",<sup>167</sup> the dish may still be entitled to protection.

#### b) *Aesthetic Functionality*

The second form of functionality, 'aesthetic' functionality, is determined based on the competitive necessity test, which deems those design factors functional that are not considered so under the traditional utilitarian principle,<sup>168</sup> if giving the trademark holder the right to exclusively use it "would put competitors at a significant non-reputation-related disadvantage".<sup>169</sup> Thus, functionality might not always be the result of the 'utilitarian' nature of the product's appearance – a feature may be deemed functional even where such a factor is not essential or intrinsic to its use or purpose, but is merely an embellishment, and whose exclusive use would have the impact of putting competitors at a significant non-reputation-related disadvantage.<sup>170</sup> In *Pagliari v. Wallace China Co*,<sup>171</sup> the Ninth Circuit Court of Appeals ruled that where a design was merely ornamental,<sup>172</sup> and did not act only as an

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<sup>164</sup> You have to construct the dish so the client can instinctively know where to start. Michel Troisgros used to call it the tale. The dish must tell a tale. The dinner must know where to start and where to arrive in order to perceive all the right flavours. Just like when you read a canvas. – Florent Boivin, former sous-chef at the Troisgros restaurant. As cited by Deroy, Michel, Piqueras-Fiszman and Spence in 'The Plating Manifesto (I): from Decoration to Creation' through the author's personal communication.

<sup>165</sup> Serial No. 77809223, T.T.A.B., June 28, 2012, (non-precedential) (the TTAB reversed the examiner's refusal for registration of product configuration of a Hershey's 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.").

<sup>166</sup> *Id.*, at 9 (citing from *In Re Becton*, 102 USPQ2d at 1376).

<sup>167</sup> *Id.*, at 11.

<sup>168</sup> *Eppendorf - Netheler - Hinz GMBH v. Ritter GMBH*, 289 F.3d at 355 (Citing from J. Thomas McCarthy, *McCarthy On Trademarks and Unfair Competition*, §7:67 (4th ed., 2001) (discussing the "plethora of definitions" for functionality).

<sup>169</sup> *TrafFix*, 532 U.S. 23, 32 (2001).

<sup>170</sup> *See Inwood Laboratories*, 456 U.S. 844, 851 (1982).

<sup>171</sup> 198 F.2d 339 (9th Cir.1952).

<sup>172</sup> An ornamental feature is one that "do[es] not serve a purpose" in the design of the product (*TrafFix*, 532 U.S. 23, 35 (2001)).

indication of source, as in the case of the floral design on the plaintiff's china, it cannot be granted trade dress protection *because* the china's superficial attractiveness is one of its primary and intrinsic selling features, and its protection would result in the inhibition of competition, thereby rendering the design 'functional' – not because of its utilitarian nature, but because of its aesthetic appeal.<sup>173</sup> It was held that where the product's appearance significantly influences its saleability, such that it constitutes an "essential selling feature"<sup>174</sup> of the product that has at least in part, created a "demand"<sup>175</sup> for it, then even in the absence of utility, the courts will likely refuse to sanction its exclusive use through trademark protection unless the plaintiff can show that the feature is an arbitrary form of ornamentation, unrelated to basic consumer demands in connection with the product, and possesses secondary meaning as a source identifier.<sup>176</sup> Interestingly, had the Court here applied the standard for utilitarian functionality,<sup>177</sup> it would have found the design to be non-functional, because the "design was dictated by stylistic not anatomical considerations",<sup>178</sup> clearly demarcating the space that the principle of aesthetic functionality was introduced to fill, regardless of its actual legitimacy.

The application of the above Courts' interpretation of the aesthetic functionality to food arrangements could spell disaster for any possibility of protection for its innovative plating – creative arrangements are geared towards increasing consumer appeal by offering consumers a multiple-sensory dining experience, effectively acting as a game changer for players in the culinary industry. Both product design and product packaging have the ability to influence demand in the market for its dishes through better plating and edible embellishments and monumentally increase aesthetic attraction of the dish itself – thus possibly rendering it ineligible for trade dress protection under the competitive necessity test, in a grand disregard of a chef's natural inclination to deliberately pick product designs and packaging that generate consumer curiosity, in an attempt to set the dish apart from those of his competitors.

However, several conflicting judgements from other courts has resulted in uncertainty surrounding the standards for ascertaining aesthetic functionality, possibly signifying that all is not lost. Some courts have rejected the existence of a functionality standard that is based purely on ornamentation – for instance, in *In re Mogen David Wine Corp.*,<sup>179</sup> the Court refused to admit that the shape of a wine bottle is functional because of its appealing appearance, asserting that – "There is] an essential distinction between engineering function and ornamentation function... [E]ven if we assume some value behind the specific design in an aesthetic sense, it is not in the least essential to use it in order to have a fully

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<sup>173</sup> Pagliero, 198 F.2d 339 (9th Cir.1952); Restatement of Torts § 742, Comment a (1938) - When goods are bought largely for their aesthetic value, their features may be functional because they definitely contribute to that value and thus aid the performance of an object for which the goods are intended. Thus, the shape of a bottle or other container may be functional though a different bottle or container may hold the goods equally well. A candy box in the shape of a heart may be functional, because of its significance as a gift to a beloved one, while a box of a different shape or the form in which a ribbon is tied around the box may not be functional. Or a distinctive printing type face may be functional though the print from a different type may be read equally well. The determination of whether or not such features are functional depends upon the question of fact whether prohibition of imitation by others will deprive the others of something which will substantially hinder them in competition.

<sup>174</sup> Pagliero, 198 F.2d 339 (9th Cir.1952).

<sup>175</sup> *Id.*

<sup>176</sup> See *Wallace International Silversmiths, Inc. v. Godinger Silver Art Co.*, 916 F.2d 76 (2nd Cir. 1990).

<sup>177</sup> *Eppendorf*, 289 F.3d 351 (2002).

<sup>178</sup> *Famolare, Inc. v. Melville Corp.*, 472 F. Supp. 738 (D. Haw. 1979).

<sup>179</sup> 328 F.2d 925 (1964).

functioning bottle or an attractive bottle”. Even in *In re Penthouse International Ltd.*,<sup>180</sup> the Court of Customs and Patent Appeals ruled that an arbitrarily shaped key design for jewellery is arbitrary and nonessential to the piece itself regardless of its function of attracting purchasers and is therefore entitled to protection. Other courts have impliedly rejected the concept of aesthetic functionality by the traditional utilitarian functionality standard to ornamental features.<sup>181</sup>

In the recent case, *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*<sup>182</sup>, that debated the trademark-ability of single colour marks, the U.S. Court of Appeals for the Second Circuit outright rejected the ‘important ingredient’<sup>183</sup> test advocated by the Court in *Pagliero*<sup>184</sup> court, rightly asserting that it “inevitably penalized markholders for their success in promoting their product”.<sup>185</sup> Instead, it concluded that protection under the Lanham Act would not be granted only to *those* configurations of ornamental features which would “significantly limit the range of competitive designs available” and which are “necessary to compete in the [relevant] market”, but in line with the *Pagliero* decision, cautioned that an aesthetic feature may not necessarily be functional merely because it indicates the product’s source.

The cumulative implication of the decisions discussed above, while reflecting the uncertainty of the US courts, creates cause for further confusion<sup>186</sup> by rendering it difficult for chefs to anticipate the probability of their creation being accorded trade dress protection. However the Second Circuit’s decision in the *Louboutin*<sup>187</sup> case offers a silver lining by indicating that in cases where plating is classified as product design, it is likely not to fail the test under the ground of functionality, by reason of the design being an arbitrary inclusion, with its incorporation being inessential to the actual function of the product, and thereby, non-functional. This would seem to apply also in the case of product packaging – the use of innovative cutlery (like the sea urchin shell described earlier) to put the dishes a notch above the rest may thus not be barred from protection at least on the ground of aesthetic functionality.

It becomes clear that the ‘functionality’ factor does not necessarily pose a hurdle to the likelihood of the appearance of a dish being granted trade dress protection, and the utility of ‘food’ per se, does not impact the question of functionality of the appearance of

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<sup>180</sup> 565 F.2d 679 (C.C.P.A. 1977).

<sup>181</sup> *Rolls-Royce Motors Ltd. v. A & A Fiberglass, Inc.*, 428 F.Supp. 689, 692 (N.D.Ga.1976).

<sup>182</sup> 696 F.3d 206 (2d Cir. 2012).

<sup>183</sup> *Pagliero*, 198 F.2d 339, 343 (9th Cir.1952) (If the particular feature is an important ingredient in the commercial success of the product, the interest in free competition permits its imitation in the absence of a patent or copyright.<sup>5</sup> On the other hand, where the feature or, more aptly, design, is a mere arbitrary embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where the requisite showing of secondary meaning is made).

<sup>184</sup> 198 F.2d 339 (9th Cir.1952).

<sup>185</sup> *Wallace Int’l Silversmiths*, 916 F.2d, 80 (rejecting the assertion that “the commercial success of an aesthetic feature automatically destroys all of the originator’s trademark interest in it, notwithstanding the feature’s secondary meaning and the lack of any evidence that competitors cannot develop non-infringing, attractive patterns”).

<sup>186</sup> The doctrine has been heavily critiqued by a number of authors. See Deborah J. Kriege, *The Broad Sweep of Aesthetic Functionality: A Threat to Trademark Protection of Aesthetic Product Features*, 345 *Fordham L. Rev.* 51 (1982).

<sup>187</sup> 696 F.3d 206 (2d Cir. 2012).

the dish in itself, because as held in *Morton-Norwich*,<sup>188</sup> a discussion of "functionality" is *always* in reference to the *design* of the thing under consideration) and *not* the thing itself.<sup>189</sup>

After all, "a dish is a dish is a dish".<sup>190</sup>

### 3. Likelihood of Confusion

Because food is by nature functional, with its use even in the seemingly most myriad combinations often being fairly generic, consumer confusion is perhaps one of the hardest standards to establish of the three factors necessary to show trade dress infringement in food plating. It requires a showing by the plaintiff that "the defendant's use is likely to confuse an appreciable number of consumers into believing that the plaintiff is the source of the defendant's products, or sponsors or is somehow affiliated with the defendant or its products".<sup>191</sup>

A chef's work as a producer of culinary treats is one that is much like the role of a manufacturer. Just like the latter's line of concern must extend not only to the taste or design of the product, but also to its external packaging in order to distinguish the product from those of competitors, chefs too must divide their focus between ensuring that their creation is, both in taste and artistic construct, appealing to the consumer. However, because their dishes aren't packed and lined up in a supermarket beside other similar products, but made available only in the chef's own exclusive restaurant, the likelihood of consumer confusion is often discounted as an improbability.

The *Two Pesos*<sup>192</sup> infringement dispute makes it amply evident that the names of the restaurants by themselves may sometimes do little to sufficiently differentiate the establishments so as to preclude consumer confusion. Showing likelihood of confusion goes above and beyond a mere realization that a product is similar or identical to one that is produced elsewhere – it entails an actual mistaken belief concerning the source of the product so delivered. In an unlikely scenario, if a diner at a restaurant orders a main course that looks almost identical to any of the distinctive and non-functional dishes served at the restaurants discussed earlier, as long as he knows that the two restaurants – are independent (in the matter of source, association, affiliation or sponsorship) and that the chef at the better known restaurant had nothing to do with the meticulously created second-hand version of the dish, there exists no consumer confusion.

In *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*,<sup>193</sup> the plaintiff claimed that the defendant had copied its entire the design and concept of its chain of hamburger restaurants, the essence of which includes food preparation areas that are visible to its customers and the presentation of food items in glassed-in display cases. The Court in this case recognized that to constitute an infringement, the likelihood, however little, of consumers mistakenly assuming that the two restaurants belonged to the same parent company, is sufficient. It found that "Likelihood of confusion" exists when customers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark.". Nothing in the definition suggests that actionable likelihood of confusion should be limited to

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<sup>188</sup> 671 F.2d 1332 (1982).

<sup>189</sup> *Id.*, at 1338.

<sup>190</sup> *Id.*, (citing from *Hygienic Specialties Co. v. H. G. Salzman, Inc.*, 302 F.2d 614, 1962).

<sup>191</sup> Robert G. Bone, *Taking the Confusion out of Likelihood of Confusion*, 106 NW. U. L. REV. 1314 (2012).

<sup>192</sup> 505 U.S. 763, 15(1992).

<sup>193</sup> 826 F.2d 837.

consumer belief that the infringer is being operated by the original user. The potential for harm is equally great if the consumers believe that the infringer runs the original user. For example, if consumers believe that Doc's runs Fuddruckers, and they are disappointed with the quality of Doc's food or service, they may be deterred from patronizing Fuddruckers".<sup>194</sup>

The likelihood of a confusion factor is not ascertained by examining whether the defendant's trade dress is identical to that of the plaintiff's in each and every particular,<sup>195</sup> but entails an ascertainment merely of the similarity of the overall impression created.<sup>196</sup> However, the confusion need not necessarily relate only to the source of the product or service on offer – the Lanham Act also safeguards the consumer from other forms of actionable confusion regarding affiliation, sponsorship or of the product.<sup>197</sup> Confusion as to source or sponsorship of the product represents the ordinary form of confusion, where consumers mistakenly presume that the first user represents the source or sponsor of the goods emanating from the second user.<sup>198</sup> On the other hand, reverse confusion occurs when consumers are guided into thinking just the opposite – that the junior user is the source or sponsor of the senior user's goods.<sup>199</sup> The likelihood of confusion factor here thus transforms into a pendulum of impending doom that only swings in favour of the establishment with better reputation and goodwill.<sup>200</sup>

. A determination of the likelihood of confusion would necessitate the application of a test, the first of which was coined by the Second circuit in *Polaroid Corp. v. Polarad Electronics Corp.*,<sup>201</sup> comprising eight factors.<sup>202</sup> The factors commonly used as a yardstick in other circuits appear to vary, with no single factor being determinative,<sup>203</sup> albeit most seem to have been derived from two sources – the *Polaroid* case and Section 729 of the Restatement of Torts,<sup>204</sup> rendering it difficult to predict the outcome of cases depending on

<sup>194</sup> *Id.*, at 845.

<sup>195</sup> *Fremont Co. v. ITT Continental Baking Co., Inc.*, 199 U.S.P.Q. 415, 420 (S.D.N.Y. 1977).

<sup>196</sup> J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 8:2 (4th ed., 2000).

<sup>197</sup> *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir. 1979) (“A consumer need not believe that the owner of the mark actually produced the item and placed it on the market... The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement.”); *See also* Shashank Upadhye, *Trademark Surveys: Identifying The Relevant Universe of Confused Consumers*, 8 *Fordham Intell. Prop. Media & Ent. L.J.* 549 (1997) (“There are three types of actionable confusion (1) confusion as to the source, (2) confusion as to sponsorship or affiliation, and (3) reverse confusion”).

<sup>198</sup> *Victor Decosta v. Viacom International, Inc.*, 981 F.2d 602.

<sup>199</sup> J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, §23:10 (4th ed., 2009) (“Reverse confusion occurs when the junior user's advertising and promotion so swamps the senior user's reputation in the market that customers are likely to be confused into thinking that the senior user's goods are those of the junior user: the reverse of traditional confusion”); *See also* *Universal Money Ctrs., Inc. v. American Tel. & Tel. Co.*, 22 F.3d (10th Cir.1994) (considers reverse confusion).

<sup>200</sup> *See* *Big O Tires Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, (10th Cir. 1977).

<sup>201</sup> 287 F.2d 492 (2d Cir.1961).

<sup>202</sup> Since referred to as the ‘Polaroid’ factors, they are - (1) the strength of the mark; (2) the degree of similarity between the marks; (3) the proximity of the goods; (4) the likelihood that the prior owner will bridge the gap; (5) evidence of actual confusion; (6) defendant's good faith in adopting the mark; (7) the quality of the defendant's products; and (8) the sophistication of the buyers.

<sup>203</sup> *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3rd Cir. 1978) (advocating the use of a ten factor test); *Roto-Rooter Corp. v. O'Neal*, 513 F.2d 44, 45 (5th Cir. 1975) (seven factor test); *Landham v. Lewis Galoob Toys, Inc.* 227 F.3d 619 (6th Cir. 2000); *Sullivan v. CBS Corp.*, 385 F.3d 772, 778 (7th Cir. 2004).

<sup>204</sup> While the factors under this Section are not exactly identical to the Polaroid test, they appear to be similar - (a) the degree of similarity between the designation and the trade-mark or trade name in - (i) appearance; (ii) pronunciation of the words used; (iii) verbal translation of the pictures or designs involved; (iv) suggestion; (b) the intent of the actor in adopting the designation; (c) the relation in use and manner of marketing between the



where they are tried. The degree of similarity of the products, their proximity, evidence of actual confusion and the sophistication of the customers together with five other market factors identified in the *Polaroid* test cumulatively determine the fate of the mark.

*a) Extent of similarity*

In order to assess the degree of similarity between the plating of two dishes, it has been held that a comparison must be made in the light of what happens in the marketplace, and not merely by looking at the two side-by-side, as it is unlikely that the consuming public will ever be presented with the opportunity for such a comparison.<sup>205</sup> The similarity of two dishes, in an assessment of trade dress infringement, must be evaluated on the basis of its likely effect upon consumers who do not have the other dish before them, but who may have a vague recollection of the plating or food arrangement such as may result in a belief that there exists a relation between the two.<sup>206</sup> It thus becomes evident that in order for the consumers to become aware of a similarity, the first dish's presentation must possess distinctive and uncommon features in order to permit such a recollection by a consumer who has, in all likelihood, visited numerous restaurants over the course of his life and is unlikely to draw a distinction between two culinary creations whose external attributes are fairly generic.

*b) Market and Geographical Proximity of the respective dishes*

The proximity of the product factor entails the considerations of both market and geographic proximity.<sup>207</sup> While the former looks at whether the two products are in related areas of business, the latter considers the geographical separation of the products. In the case, an infringement suit had been filed by the owner of a restaurant alleging that another had been set up with an identical name. As far as food plating in the culinary industry is concerned, since both the restaurants are in the same business, the market proximity factor is duly satisfied. The issue that deserves further examination is that of geographic proximity. Here, the Court, while noting that in the absence of any evidence as to actual confusion, geographic separation is a reigning indicator of the unlikelihood of confusion as in the instant case, acceded to the possibility of confusion resulting from the overlapping clientele even in cases of restaurants that are separated by large distances, due to ease of travel.<sup>208</sup> The Court asserted that this must necessarily be substantiated by establishing that a significant number of consumers are likely to be confused as a result of and despite such large physical distances between the establishments.<sup>209</sup> The caveat that demands evidence of probable confusion seems reasonable, even in its application to trade dress infringement matters specifically relating to food plating, because it is often difficult to conceive a likelihood of confusion where the knockoff dish is being concocted and served thousands of miles away, unless the

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goods or services marketed by the actor and those marketed by the other; (d) the degree of care likely to be exercised by purchasers.

<sup>205</sup> James Burrough Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266.

<sup>206</sup> *Id.* at 40.

<sup>207</sup> Brennan's, Inc., V Brennan's Restaurant, 360 F.3d 125, 36.

<sup>208</sup> *Id.*, at 36.

<sup>209</sup> *Id.*, at 34, 36 (“To succeed on an infringement claim, plaintiff must show that it is probable, not just possible, that consumers will be confused...Courts have recognized that even businesses that are separated by large distances may attract overlapping clientele due to the ease of travel...We do not disagree with this possibility, but only note that, in the absence of actual confusion or bad faith, substantial geographic separation remains a significant indicator that the likelihood of confusion is slight...Geography alone is not decisive, but the plaintiff still has the burden to demonstrate that an appreciable number of relevant consumers are likely to be confused.”).

situation falls within the ambit of the factors discussed above. Proof showing real confusion amongst consumers through surveys, for instance, would help overcome this obstacle and permit a reasonable finding of confusion under this factor.

c) *Customer Sophistication*

While the general rule remains that the more sophisticated the customer, the less likely the possibility of consumer confusion,<sup>210</sup> exceptions to the rule provide for the existence of a contrary state where the more sophisticated the consumer, the higher the likelihood of confusion.<sup>211</sup> The Michelin-starred chef intensely innovative Davide Scabin<sup>212</sup> serves at his celebrated restaurant, Combal Zero, possibly one of the most curiously innovative dishes, the *cyber egg* – a peculiar twist on eggs and caviar, that’s crafted to replace the eggshell with plastic wrap, whereby the egg yolks and caviar are bound together in a plastic bubble.<sup>213</sup> Considering the immense popularity that follows both the dish and the restaurant, one would likely take for granted the unlikelihood of patrons of the restaurant becoming confused upon being served a similar version of the dish at another set-up, considering the well-known singularity of both Scabin and his *cyber egg* creation. However, despite this, patrons may find themselves wondering whether the restaurant serving the copycat version of the dish is connected to the first source, him and his bistro, effectively resulting in confusion by affiliation or sponsorship.<sup>214</sup> These persons are likely to be sophisticated customers who dine at high-end restaurants where chefs are more likely to invest their time towards creating distinctive looks for their dishes,<sup>215</sup> thereby being “more likely to identify a particular chef as the creator of the dish and thus upon seeing a knockoff might more likely be confused”.<sup>216</sup>

It would seem that in a case for trade dress infringement in relation to food plating, the Court may be even more likely to find in favour of this factor where the plaintiff can also establish an infringement of the restaurant’s trade dress or “look and feel” by the defendant or junior user, giving fodder to a likely state of confusion among customers by actively guiding them into misapprehension, such a state being worsened upon being served a dish plated similarly or identical to one served at the senior user’s restaurant.

In the absence of a finding of a trade dress infringement in the restaurant’s exteriors, a claim of infringement with regard to the plating of a chef’s culinary creations may not be worth pursuing unless the plaintiff himself is a celebrated figure in the culinary world.

## V. CONCLUSION

The modern day culinary industry is neck-deep in avant-garde innovation, constantly engaged in constructing staggeringly beautiful edible sculptures that challenge the existing notions of the functioning of the restaurant industry. Chefs strive and strive to create beautiful culinary dishes that render the product distinctive and different from competing products, and those that fulfil the necessary standards deserve the protection of the law to safeguard customers’ interests by ensuring that they get what they’ve asked for, and

<sup>210</sup> Bristol-Myers, 973 F.2d at 1046.

<sup>211</sup> Centaur Communications, 830 F.2d 1217, 1228 (2d Cir. 1987).

<sup>214</sup> Naomi Straus, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. Rev. 182 (2012), 244, 245.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

simultaneously prevent chefs' creations from being misappropriated by cheats. While the culinary industry is indeed one that thrives on inspiration, and survives on a co-dependent relationship to ensure the sustenance of an ever-blooming cycle of creativity, that does not justify condoning deliberate imitation of another's work, in a blatant show of indifference to community ethics and norms. You can always do more than just stand on the shoulders of that came people before – which is why, when acknowledgements as a show of professional courtesy do not follow culinary imitations, existing laws must adapt, expand and conform to offer a solution to this seemingly twisted conundrum.

I opine that although the inclusion of distinctive plating designs under the Lanham Act may not have been anticipated at the time that the statute was brought into force, the suitability of their possible formal inclusion within its ambit through judicial recognition has certainly been acknowledged by courts<sup>217</sup> – even relatively speaking, the Act certainly offers much more promising refuge to chefs' presentations of their culinary creations than other IP systems.

It has become clear that the primary fallout of the chefs' own self devised norms based system as it currently exists, is its miniscule relevance to chefs outside of a small elite community. This has brought to the forefront the need for courts to recognize and acknowledge that some forms of food presentations tick all the three boxes of what comprises legally protectable trade dress, and that such presentations are as worthy of the protection of the law as the distinctive features of other articles. If professional chefs' efforts towards reinventing food plating are to be taken seriously, it is pertinent that the law provide sanctuary to it, and the relative structural unsuitability of other IP systems would suggest that the Lanham Act might be the best place start.

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<sup>217</sup> See *New York Pizzeria, Inc. v. Ravinder Syal*, 3:13-CV-335 (The Plaintiff was a restaurant franchisor and filed a suit against a restaurateur for, among other things, trade dress infringement for copying NYPI's "distinctive visual presentation" which trade dress includes "but is not limited to, the presentation of baked ziti, eggplant parmesan, and chicken parmesan". In regard to this particular claim, although it later held against NYPI on account of lack of evidence to prove distinctiveness, it recognized "that there may be some rare circumstances in which the plating of food can be given trade dress protection. When plating is either inherently distinctive or has acquired a secondary meaning, when it serves no functional purpose, and when there is a likelihood of consumer confusion, it may be possible to prove an infringement claim. It is conceivable that certain well-known "signature dishes" could meet this very high standard.").