

The Mondrian Cake: may Intellectual Property protect signature food?

O bolo Mondrian: poderá a Propriedade Intelectual proteger a “cozinha de autor”?

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ABSTRACT (*L'amuse-bouche*): Taking the example of the Mondrian Cake, in this article we distinguish recipes from presentation of signature dishes, as well as cookbooks, menus and restaurants and aim to know what can be protected by Intellectual Property (e.g. copyright, patents, designs, trademarks, trade dress, trade secrets, general rules against unfair competition or even nondisclosure agreements and fiduciary duties). Regarding copyright, we emphasise the difference between USA and Continental Copyright approach. For situations where some kind of Intellectual Property protection is possible, we question enforcement and if all type of protection is desirable. What we conclude about food applies to beverages.

KEY WORDS: culinary creations; copyright; industrial property; trade secrets; unfair competition.

RESUMO (*L'amuse-bouche*): Tomando como exemplo o Mondrian Cake, neste artigo distinguimos receitas de apresentação de pratos de assinatura, assim como livros de cozinha, menus e restaurantes e procuramos saber o que pode ser protegido pela Propriedade Intelectual (ex. direitos de autor, patentes, modelos e desenhos, marcas, *trade dress*, segredos de negócios, regras gerais contra concorrência desleal ou até mesmo acordos de confidencialidade e deveres de sigilo). Em relação aos direitos de autor, destacamos a diferença entre o Direito de Autor Continental e o *Copyright* americano. Para situações em que algum tipo de proteção através da Propriedade Intelectual for possível, questionamos o seu *enforcement* e se todo o tipo de protecção é desejável. O que concluímos sobre comida aplica-se a bebidas.

PALAVRAS-CHAVE: criações culinárias; direito de autor; direitos privativos da propriedade industrial; segredos de negócios; concorrência desleal.

SUMMARY:

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1. Introduction (L' entrée)

The explosion of interest in culinary creations we witness today began by the mid-20th century. From time on, thousands of flashy cookery and recipe books became available¹. The introduction of TV cooks and TV cookery programs (e.g. Master Chef, Top Chef, Good Eats, Cake Boss, Chopped, Iron Chef, Ramsay's Kitchen Nightmares, Anthony Bourdain: No Reservations, Jamie at Home, Hell's Kitchen) brought the attention for recipes and for the culinary world to an unprecedented level. Today television networks fight for the most popular chefs and cooks, who have prime time shows where they perform cooking shows or reality shows. We are witnessing the phenomenon of the "superstar chef"². Along with this growing success of cookery programs, books, magazines, websites, cookery Blogs, Facebook pages and Instagram images relating food, many chefs and their reviewers, costumers and fans, look upon cooking as a form of art. There are museums dedicated to food (e.g Food Museum in Hangzhou, China, Museum of Food and Drink, in New York, Foodseum, in Chicago). Chefs are culinary artists. Their recipes and dishes are as pleasing to the palate as to the eye³. The same applies to drinks and barmen. Also, the question of protection of food by industrial property private rights, such as patents, utility models, design, trademarks and other distinctive signs, as well as rules against unfair competition, namely trade secrets, is subject to strong debate.

Let us deepen the question. The possibility of protection will differ, depending on the form of expression of the culinary creation. Like onions, these creations contain different layers. In fact, we can consider the recipe *per se*, the expression of the individual recipe in text or other form, for example, publication in a magazine, in a cooking book, on websites, public communication on radio or television, or before an audience. In a recipe, typically we have the name of the dish, a listing of the ingredients, along with quantities or proportions,

¹ The connection between kitchen, technology, culture and art go as far as the invention of fire. Cooking food was essential for the process of humanization, and eating a cooked meal together implied socialization and started to be a ritual in ancient Greece (e.g. banquets for the gods), were we find a strong connection between art and food. Ancient Rome and China were decisive for the appearance of food sellers and inns. In the Middle Ages monks played a decisive role in the appearance of dishes, namely sweets and several types of bread, and also developed wines and breads. The inns and taverns were the places where people could eat their meals out of home in the Middle Ages, but the dishes were simple and popular. The only exception regards London Taverns that, by the XIII century, were very well decorated and sometimes luxurious, with very elaborated dishes for the nobles and the high bourgeoisie. Restaurants with elaborate food appear after the French revolution, in the XVIII century, with the end of food corporations. In the XIX century we already find professional gastronomic critics See, in a detailed form, A. FRANCO, *De Caçador a Gourmet: uma história da Gastronomia*, Senac, São Paulo, 5^a ed., 2010; A. RIVAIL MEDRADO, *O Direito Adentra a Cozinha: Estudo sobre a proteção Autoral de Criações Culinárias*, Fundação Getulio Vargas, Escola de Direito de São Paulo, 2016, pp. 23-38.

² E. CEREA, A. RURALE, "Haute Cuisine system and its cultural dimension: when chefs are the new artists, available at www.ssrn.com October, 2010, 1 (last access on 04-10-2018); M-C JANSENS, "Copyright for Culinary Creations: a seven course tasting menu with accompanying wines", Centre for Intellectual Property Rights, University of Leuven, January, 2013; CUNNINGHAM, "Protecting Cuisine under the Rubric of Intellectual Property: Should the Law Play a Bigger Role in the Kitchen?", 9 *High Tech. L.*, 21, 2009, pp. 21-51.

³ See also, N. REED, "Eat Your Art Out: Intellectual Property Protection for Food", *Trademark and Copyright Law*, www.trademarkandcopyrightlawblog.com/2016/06/eat-your-art-out-intellectual-property.protection-for-food (last access on 27.09.2018).

instructions for preparing the recipe, the number of meals the recipe provides and/or equipment and environment needed to prepare the dish. We can have in mind a collection of recipes, in a cookbook, on a website, for example. We can address to the act of preparing the recipe, that is, the performing of the chef, in private, before a live audience, in a television show, or in an audio-visual work. We may also refer to the dish (or beverage) as the end product of the recipe, as it can be perceived by the human senses, namely, how it looks, smells, tastes. Also, we think of menus and its names. Inventions related to cooking must also be considered. In the case of the Mondrian Cake the visual aspect of the dish, that is similar to one of Mondrian famous paintings, as long as the name, are especially appealing.

2. Copyright for culinary creations (*Le plat*)

There is much debate going on about whether or not cooking is a form of art. In Continental Copyright we don't see any reason why not to include cooking art in copyright. What is necessary is to focus on the general requirements of protection of works. If they met, the culinary work is bound to be protected by copyright, as any kind of works, of the literary, artistic or scientific domain. Things are more complicated in Anglo-American copyright systems. Namely, in USA, if the work is utilitarian, it cannot be protected by copyright⁴.

It is a fact that in most cases the culinary creations do not qualify to be protected by copyright. Either because the subject matter is not protectable (for example, a common recipe has only ideas and methods) or because it lacks originality (most recipes are common sense) or because of both reasons.

There is also much confusion regarding the relation between the recipes and the final dishes. We consider that the dish is the end product of the recipe, like the house is the end product of the architecture project, or the sculpture is the end work of a project, thus we have a work that has a two-dimensional phase and a three-dimensional one. But some authors consider the dish a form of exploitation of the recipe, namely a communication to the

⁴ With more detail, see SU LI CHENG, "Copyright Protection of haute cuisine: Recipe for Disaster?", *EIPR*, 2008, (93), p. 97 ff.; CUNNINGHAM, "Protecting", *cit.*, pp. 26-28; M. GOLDMAN, "Cooking and Copyright: when chefs and restaurateurs should receive copying protection for recipes and aspects of their professional repertoires", *Journal of Sports and Entertainment Law*, 153, 2013, p. 157; M-C. JANSSENS, "Copyright", *cit.*, p. 2 ff.; A. MEDRADO, RIVAIL, *O direito adentra a cozinha*, *cit.*, pp. 39-79 and pp. 57-67; K. RAUSTIALA, C. SPRIGMAN, *The Knockoff economy, how imitation sparks innovation*, Oxford, University Press, New York, 2012, pp.57-95, particularly pp.63-69; K. RAUSTIALA, C. SPRIGMAN, "The piracy paradox: innovation and intellectual property fashion design", *Virginia Law Review*, Vol. 92, 8, 2006, available at ssrn.com/abstract=878401 (last access, 06.08.2018); C. M. REEBS, "Sweet or Sour: extending copyright protection to food art", *DePaul Journal of Art, Technology & Intellectual Property Law*, Vol. XXII, 41, 2011, p. 41. Regarding the requirements for protection a work see the following studies: M. VICTÓRIA ROCHA, "Contributos para a delimitação da originalidade como requisito de protecção da obra pelo Direito de Autor", *Estudos em Homenagem ao Prof. Doutor António Castanheira Neves*, Vol. II, Coimbra Editora, Coimbra, 2008, pp. 733-792; M. VICTÓRIA ROCHA, *Portugal*, nº 104, *International Encyclopaedia of Laws: Intellectual Property*, H. VANHEES (ed.), Kluwer Law International, Netherlands, 2017, pp. 6-49; C. SAIZ GARCÍA, *Objeto y Sujeto del Derecho de Autor*, Valencia, Tirant Lo Blanch, 2000.

public⁵. Other authors argue that what is copyrightable is the dish and not the recipe⁶. There are also authors that consider that protection ought not to be by copyright, but what should be protected are the performances of the chefs and that these ought to have a neighbouring right, like artists have⁷.

There is much confusion going on and we must clear what we are talking about when we talk about culinary art.

In what concerns recipes, if it is true that most of them do not qualify for protection, either because they lack originally, or because they are ideas or methods, which are excluded from protection, or because of both⁸. But that doesn't mean that recipes cannot be protected. If they meet the requirements of protection, that is, they are creations of the intellect, in some way exteriorized, independent creations of their author, which mean they are in some way creative, they can be protected as literary or artistic works, or both. Objective novelty is not a requirement for protection by copyright (this is our opinion and the opinion of the majority of scholars). We know that recipes exist for ages and, save some exceptional cases, the large majority of dishes are based in old recipes, that are, somehow altered, improved, presented in a different form. They came to existence by a process of "trial and error", borrowing or expanding already existing recipes. The culinary world is based on heritage and sharing of recipes by hundreds of generations. Most recipes that qualify for protection must be considered derivative works. In exceptional cases the recipes may be original, that is, not based in prior recipes, but only inspired by them.

Getting back to the question of whether recipes qualify for protection by copyright, it all depends on the recipe. The idea of the recipe (that is, the ingredients it contains) and the methods and processes that it describes to obtain the desired dish are unprotectable. But if there is creativity in the way the recipe is redacted, there may be a space for protection (e.g. the recipe appears in the context of a story, or in a poetic form, or there are comments connected to it, like telling the romantic environment in which the dish ought to be tasted and with which kind of wine, or connecting it to anecdotes, or if there are unusual suggestions on accompanying supplements, or with advises on way to arrange the plates, decorate the table, or if pictures are added to the recipe, or if it appears with an unusual layout and certain colours)⁹.

Regarding cookbooks, they may appear in many forms, going from basic cookbooks, to instructional cookbooks, professional cookbooks, single-subject cookbooks (how to cook rice, pasta, fish, meat, salads, chocolate cakes, and so on), cookbooks of a certain well known chef (in Portugal, Avillez, Maria de Lurdes Modesto, for example). The cookbook may appear in form of a text, or a text and pictures, or it may appear in a website. Anyway, because these books result from a choice of recipes, and the recipes appear in a certain order, or/and

⁵ MOUT-BOUWMAN, "De auteursrechtelijke bescherming van culinaire recepten", *AMI*, 1983, p. 53 ff.

⁶ With more detail, see M-C. JANSENS, "Copyright", *cit.*, p. 4.

⁷ PIREDDA, obs., *RIDA*, 1998, (177), p. 1121 ff.

⁸ E. CUNNINGHAM, "Protecting", *cit.*, pp. 27-28.

⁹ See, with details, M-C. JANSENS, "Copyright", *cit.*, pp. 7-13; E. CUNNINGHAM, "Protecting", *cit.*, p. 28.

related to certain subjects, they can be protected as derivative works, compilations, or databases. The traditional cookbooks are works of literature, but they may have also artistic aspects. If they appear in a digital environment, with interactivity, they may appear audio-visual works, namely multimedia works. Because data are collected, they also qualify for protection as databases¹⁰.

To the extent that these bases are creative, they can be protected, among us and in the EU, by copyright on the databases. In any case, regardless of this protection and even for non-creative databases, there is protection of the *sui generis* right of the database maker¹¹. The protection of the compilation doesn't mean that the recipes that are contained in it are protected. Individual recipes may or be not protected. That does not affect the protection of the compilation.

As to menus that describe the recipes and/or dishes, they may or may not be protected, including the title, depending if requirements of protection as work meet or not (and the menu may also be protected as a database). Most menus are straight forward, thus they don't meet the requirements for protection as works by copyright. What we find is a short title with elementary explanations regarding the ingredients (e.g. "macaroni with broccoli", "onion soup", "fillet mignon", "chocolate cake", "sliced manga"). Some chefs, or restaurant owners, though, use their opportunity to distinguish their cuisine from others, by turning their menus creative enough to qualify to be protected works. For example, using poetic language (*a foie gras parfait* presented as a perfect oblong on a blue plate; or, like in Porto Soundwisch Bar & Restaurant, the menus come written in a vinyl record, because all the idea is that jazz and blues create the ambience of the place, and each signature dish has a poetic name along the name of the chef). In this case the menus and the titles may be protected. We must remember that in the Infopaq decision the ECJ accepted the copyright protection for a text of eleven words¹². And three directives of the EU (software directive¹³, database directive¹⁴ and period of protection directive¹⁵) state that originality means that the work must be an independent creation of the author and no other requirements are necessary. The so called *Kleine Münze*, *small change*, also deserve protection^{16 17}.

¹⁰ Derivative works originate from a pre-existing work or data and recast, transform or adapt that work. If it incorporates protected works, there must be permission of the copyright owners and, as a rule, the payment of royalties. After that, the derivative work is an independent work.

¹¹ Cf. Decree-Law 122/2000 of 4 July, which transposed Directive 96/9 on the legal protection of databases. In detail, in the doctrine, we highlight M. A. BOUZA LOPEZ, *El Derecho Sui Generis del Fabricante de Base de Datos*, Madrid, REUS, 2001; P. D. VENÂNCIO, *O direito sui generis na protecção jurídica de bases de dados* (polycopied text), Porto, UCP, Escola de Direito do Porto, 2007.

¹² ECJ 16 July 2009, *Infopaq International A/S v. Danske DagbladesForening*, Case C-5/08, ECR, 2009, I, p. 6569 ff.

¹³ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) OJ L 111, 5.5.2009, p. 16–22.

¹⁴ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996, p. 20–28.

¹⁵ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12–18.

¹⁶ When the name of the chef or/and a picture of the face of the chef appears, we can rely in the additional legal system, allowing for the protection of her or his personality.

¹⁷ In detail see our study, M. V. ROCHA, "Contributos", cit., pp. 733-792, in particular pp. 763-767, and bibliography cited therein; M. V. ROCHA, "Obras de Arquitectura como obras protegidas pelo Direito de Autor", C. F. ALMEIDA / L. M. COUTO GONÇALVES / C. TRABUCO (Org.), *Contratos de Direito de Autor e de Direito Industrial*,

In the case of the Mondrian cake there can be protection by copyright in the EU and in USA because the inclusion of the visual aspects of the Mondrian painting do not have functional character, that is, don't affect the flavour of the cake. In our opinion, this is a derivative work. It is a transformation of the painting in a different kind of work, just like Yves Saint-Laurent did with his iconic dresses based on the Mondrian paintings. These cakes, as the dresses of Ives Saint-Lauren, are not just inspired by the Mondrian paintings, they transform the Mondrian paintings. Piet Mondrian died in 1 February, 1944, thus there is no necessity of permission because his works are in the public domain¹⁸.

3. Neighbouring rights protection of performances of chefs (*Le plat*)

The act of a chef cooking a recipe in a television show, for example, is at the same time the act of creating the three dimensional work, that is, the dish, based on a certain recipe or improvised, and a public performance. There may be overlapping of protections by copyright and by neighbouring rights. The chef is a performing artist, and may be protected by neighbouring rights, as all performers, if requirements meet. Cooking can be an artistic performance. And even if the dish is not protected as work, the performance may be protected by the neighbouring right of performers. There is here a strong analogy with what happens with theatre or movie actors or musicians when they interpret a certain work, protected or not. The same piece of music, e.g., may be interpreted many and many ways by the same or different performers, and nobody questions its intrinsic aesthetic value, just because of the possibility of infinite repetition. Each performance is unique. The same

Coimbra, Almedina, 2011, pp. 159-209, in particular pp. 159-169 and bibliography cited therein. M. V. ROCHA, *Portugal*, 104, F. HENDRICKX (ed.) *International Encyclopaedia of Laws*, cit., pp. 25-49, in particular p. 47; L. M. TELES DE MENEZES LEITÃO, *Direito de Autor*, Coimbra, Almedina, 2011, pp. 69-76; A. SÁ E MELLO, *Manual de Direito de Autor e Direitos Conexos*, 2^a ed. Actualizada e Ampliada, Coimbra, Almedina, 2016, pp. 99-112. A certain sector of German doctrine and jurisprudence has proved to be more demanding, requiring not only an independent intellectual activity removed from the banal, but imposing the requirement of a certain creative height (*Gestaltungshöhe*) for works in order to have originality and, therefore, possibility of protection. The individuality would be the reflection of the personality, however minimal, of the author in the work, so that it could be considered an independent creation. The creative height would be a concrete degree of creativity that the work had to achieve to deserve protection. Creative height would be the quantitative aspect of individuality. The requirement arose in German Copyright Law in the late 1950s precisely to determine the dividing line between Copyright protection of works of applied art and the protection of the then industrial design or model (an outdated designation that still remains in CDADC), but has spread to all types of works. Interestingly, with rare exceptions, the *Kleine Münze*, the minor works, continued to be protected. To a large extent, also thanks to developments at EU level, even German doctrine and jurisprudence have abandoned the requirement of creative height for works in general, requiring individuality only as a requirement of originality for most works. Also emphasizes C. SAIZ GARCIA, *Objeto y sujeto del derecho de autor*, cit., pp. 118-119, that there is a clear desire on the part of the Community legislature to take away the creative height (*Gestaltungshöhe*) so that works deserve protection. The assumption of originality should be considered fulfilled when the result is a product of the intellectual activity of its author, that is, when we are facing an independent creation. P. AKESTER, *Direito de Autor em Portugal, nos Palop, na União Europeia e nos Tratados Internacionais*, cit., also refers to these three Directives, concluding that from them emanates a notion of originality as "intellectual creation of the author" (p. 74). The TJCE also pronounced in the Premier League judgements C403/08 and C429/08 of 4 October 2011, 98 and in the Premier League judgment C604/10 of 1 March 2012, 38. In the same sense, the Infopac Judgement, the Judgment of the Court of Justice C5/08 of 16 July 2009, 45. About a TV CABO Guide, the National Court continued the protection of the *Kleine Münze*, Judgement of the Tribunal da Relação de Lisboa C-5670/2006 - 7 of January 16, 2007.

¹⁸ In Portuguese law moral rights last forever, under articles 9º, 56º, nº 2 and 57º CDADC. After work fall into public domain the Ministry of Culture may control if moral rights are offended. Both solutions seem to us highly bound to criticism.

happens with culinary creations, if a client in a restaurant orders the same dish several times, each time he will have the experience of tasting a different dish. Though based in the same recipe, there will be always small variations, or bigger ones, regarding the ingredients and the inspiration of the chef, and also regarding to the consumer state of spirit. The consumer who appreciates a culinary creation has an aesthetic spirit before the dish (vision, taste, smell, aesthetics). The dish gives us a very complex and complete sensorial experience. Thus, cooking a dish may imply copyright protection or protection by neighbouring rights, or by both¹⁹.

4. Patent protection in the culinary industry (*Le plat*)

Gastronomic technologies can be protected through patents²⁰. The modern convergence of cooking and science/technology contributes to some chefs' desires of increased intellectual protections, namely through patents. This seems conceivable regarding new styles, such as the so-called *molecular gastronomy*. It is now fashionable that nothing that appears on the dish is what it seems. We have fake caviar made from sodium alginate and calcium, burning sherbets, spaghetti made from vegetables, jelled sweet potato and bourbon, lamb with mastic-infused cream, dehydrated bacon threaded on a wire and decorated with ribbons of dehydrated apple puree, instant ice-cream, fast-frozen using liquid nitrogen. Molecular gastronomy is practiced by both scientists and food professionals who study the physical and chemical processes that happen while cooking²¹. These processes/techniques include using lasers, chemical powders, enzymes and flash freezing to make unique foods. But, more generally, patent can be used to protect new production methods, or machinery used in

¹⁹ In the same sense, see, A. RIVAIL MEDRADO, *O Direito adentra a cozinha*, cit., pp. 39-46. Regarding the aesthetic experience before a dish, see also, J. A. BRILLAT-SAVARIN, *A fisiologia do gosto*, São Paulo, Companhia das Letras, 1995; C. KORSMAYER, "Deleitável, Delicioso, Detestável", F. ALLHOFF, D. MONROE (org.), *Comida e Filosofia: coma, pense e seja feliz*, Rio de Janeiro, Tinta Negra, 2012, p. 181; D. MONROE, "Comida pode ser arte? O problema do consumo", F. ALLHOFF, D. MONROE (org.) *Comida e Filosofia: coma, pense e seja feliz*, Rio de Janeiro, Tinta Negra, 2012, p. 166, K. SWEENEY, "Uma sopa pode ser bela? A ascensão da gastronomia e a estética da comida", F. ALLHOFF, D. MONROE (org.) *Comida e Filosofia: coma, pense e seja feliz*, Rio de Janeiro, Tinta Negra, 2012, p. 164

²⁰ For the general rules about patents and utility models see L. M. COUTO GONÇALVES, *Manual de Direito Industrial, Propriedade Industrial e Concorrência Desleal*, 7^a ed., Revista e Actualizada, Coimbra, Almedina, 2017, pp. 37-131, pp. 359-366; M. VICTÓRIA ROCHA, *Portugal*, cit., pp. 111-160; P. SOUSA E SILVA, *Direito Industrial, Noções Fundamentais*, Coimbra, Coimbra Editora, 2011, pp. 41-96. For all aspects of Intellectual Property, W. CORNISH, D. LLEWELYN, T. APLIN, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights*, 8^a ed., London, Sweet & Maxwell, 2013.

²¹ For further details, see MORGAN P. ARONS, "A chef's guide protections available for cooking techniques and recipes in the era of postmodern cuisine and molecular Gastronomy, *Journal of Business and Technology Law*, Baltimore, Vol. 10, 137, 2015, p.147. E. Cunningham, "Protecting", footnote 2, pp. 25-26; M-C. JANSENS, "Copyright" quoted note 2, pp.17-18; T. HERVÉ, "Food for tomorrow? How the scientific discipline of molecular gastronomy could change the way we eat, *EMBO Reports* (European Molecular Biology Organization), 7 November 2006, p. 1062 ff, available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1679779/?tool=pmcentrez (last access on 07.10.2018); A. RIVAIL MEDRANO, *O Direito adentra a cozinha*, cit., pp. 100-103; N. STRAUSS, "Trade Dress Protection for Cuisine: monetizing creativity in a Low-IP Industry", 2012, pp. 182-260, in particular, p. 198.

gastronomic technology. For example, George Pralus and Joel Robuchon used patents to protect their inventions of “vacuum cooking” and “low temperature cooking”, respectively²².

Some chefs collect patent protections. This is the case of Homaro Cantu, executive chef and founder of Chicago’s Moto Restaurant, who thinks that royalties for licencing patents are far better than opening restaurants. He has about twelve patents in his name²³. However the narrow requirements of absolute novelty, inventive step and applicability to industry are very hard to meet in relation to individual culinary creations²⁴. Creating cuisine, even technologically advanced, is mostly a derivative process, and the possibility that recipes and food creations are in circulation before the chef’s work is high. Proving that there is no precedence in the marketplace for the food idea is very difficult. Patents are very expensive and there is a long administrative process to obtain one, it takes years. It is an expensive and hard task to police infringements and enforce the patent²⁵.

Chefs that want to keep their recipes secret from competition will not benefit from the patent system because patent applications are available to the public. Anyone can examine and copy a recipe, a process or a culinary creation disclosed application. Though this will not be legal, in case the patent is granted, it will be hard and expensive to enforce the patent right. These are worst when the patent is not granted. Once the secret is disclosed, it will spread without sanction²⁶. Even when patents are possible, the sharing norms in the culinary world dissuade many chefs from seeking such protection. The culinary culture relies on an open system²⁷. Even the most innovative technologically advanced chefs say it is rare someone “wakes up one day and has a completely novel idea about food” and all chefs are “standing on the shoulders of chefs who came before”²⁸. Chef CLAUDIO APRILE, who was trained by FERRARI ADRIA, known as the true innovator behind the current food-technology movement, thinks that if chefs assert that their cuisine is unequivocally theirs they do not realize the origins and derivative nature of what they are doing and adds that most avant-garde chefs owe their creative inspiration to ADRIA²⁹.

For all the reasons mentioned above, patents are clearly better for companies that are active in the food industry, with countless patents for food additives, micro & macro molecular food supplements, calorie intake, etc. But even companies tend to rely more on trade secrets rather than on patents. Getting a patent means to disclose the innovation to the public, plus,

²² Examples mentioned by M-C. JANSENS, “Copyright”, *cit.*, p. 17 and E. Cunningham, “Protecting”, *cit.*, pp. 25-26.

²³ See, J. KRAUSE, “When Can Chefs Sue Other Chefs? Defining legitimate legal claims in the restaurant world”, www.chow.com (last access on 07.10.2018).

²⁴ See, with more detail, E. CUNNINGHAM, “Protecting”, *cit.*, pp. 32-35, with several examples.

²⁵ See, with more detail, E. CUNNINGHAM, “Protecting”, *cit.*, pp. 47-49.

²⁶ *Idem*, p. 49

²⁷ With more details, J. KRAUSE, “When Can Chefs Sue Other Chefs? Defining legitimate legal claims in the restaurant world”, www.chow.com, *cit.* (last access on 07.10.2018); E. CUNNINGHAM, “Protecting”, *cit.*, pp. 46-47.

²⁸ Words of W. DUFRESNE, chef at wd~50 in New York, quoted by E. CUNNINGHAM, “Protecting”, *cit.*, p. 46.

²⁹ C. APRILE words are referred by quoted by E. CUNNINGHAM, “Protecting”, *cit.*, p. 46.

the protection takes time, is expensive and lasts only twenty years. A secret may be eternal (e.g., Coca-Cola formula³⁰, KFC).

Utility models do not apply to food, at least in Europe, because the European Patent Convention excludes from the subject of utility models pharmaceuticals, as well as inventions in the field of chemistry and biology. Nevertheless, there may have protection under utility models for machinery and utensils used in culinary world.

We don't think the Mondrian cake could be protected by patents, though we have no information about the novelty and inventive step of the cake. But the cake is not developed at an industrial level, which renders patent impossible.

5. Models and designs protection for culinary creations (*le plat*)

The visual appearance of the dish (food served on the plate) can be protected as model, if it is new, has singularity and applies to a product³¹. As we saw, copyright, as a rule, does not protect most recipes used to cook a meal or to bake a cake. Copyright doesn't protect the contents of the recipe. Such protection only extends to preventing the unauthorized use of the recipe as a literary or artistic work. Unlike some authors state, a dish does not constitute reproduction or communication to the public of the recipe³². This conception would lead to unbearable situations. Anytime one cooked protected recipes, one had to ask for permission and pay royalties to the author, and this would be for all period of life of the author plus 70 years after his death, counting from 1 January of the year next to the year of death. It is totally unbearable.

The only issue at stake here concerns the possibility of the copyright status of the dish itself, irrespective of its source. Dishes may be protected by copyright, if the protection requirements meet, and it will be protected as artistic work. There can be here a strong analogy with architectural works or sculptures. Anyway, even if the requirements to be protected as work don't meet, the visual presentation of the dish can be protected as a model. In the EU we have two types of model protection: as registered model — here the protection can go up to 25 years counting from da application for register (5 years renewable up to 25 years) —; as non registered model, the protection is of 3 years from the day the model is disclosed within the EU, the protection has no costs attached and we have a

³⁰ The original formula of Coca Cola was patented in 1893, but afterwards Coca Cola Company did not seek patent protection when the formula changed because the company knew that the public and competitors would have access to it. For further details see E. CUNNINGHAM, "Protecting", *cit.*, p. 49.

³¹ For the general requirements of protection by models or designs see L. M. COUTO GONÇALVES, *Manual*, *cit.*, pp. 134-164; OTERO LASTRES, "Rasgos conceptuales del diseño industrial", FERNANDÉZ-NÓVOA/OTERO LASTRES/BOTANA AGRA (org.), *Manual de la Propiedad Industrial*, 2^a ed., Madrid, Barcelona, Buenos Aires, São Paulo, Marcial Pons, 2013, pp. 361-384; M. VICTÓRIA ROCHA, *Portugal*, *cit.*, pp. 205-228; P. SOUSA E SILVA, *Direito Industrial*, *cit.*, pp.97-118. For all aspects of Intellectual Property, W. CORNISH, D. LLEWELYN, T. APLIN, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights*, 8^a ed., London, Sweet & Maxwell, 2013.

³² These authors consider that without the author's permission of the authors the recipe may not be used. For further details, see M-C. JANSENS, "Copyright", *cit.*, p. 21. For further details regarding model and design protection see A. RIVAIL MEDRANO, *O Direito Adentra a Cozinha*, *cit.*, pp. 96-100.

copyright approach, because the protection only prevents form copying. If the requirements of protection as work and as model meet, there can be overlapping of protections. There is much discussion about overlapping of protection, regarding the originality or creativity requirement. Scholars and Courts, in this case, tend to be more demanding regarding creativity³³. We think that protecting the design, the visual appearance of the dish as a model is better than protecting it by copyright, because there are no special creativity requirements and the period of protection is not excessive, unlike what happens with patrimonial copyrights. Nevertheless, because recipes come from generations, and are usually shared, perhaps the requirements of novelty and singularity will be difficult to fulfil.

In the case of the Mondrian Cake it may be difficult to protect it as a model or design because of the requirement of objective novelty. We look at the cake and immediately remember one of Mondrian well-known paintings.

6. Trademark protection for culinary creations (*le plat*)

Trademarks are signs, namely words, names, symbols, colours, slogans, shapes of a product or of its packaging, holograms, sounds, smells which manufacturers or sellers use to distinguish their products or services from identical or similar services of other manufacturers or sellers, thus avoiding confusion in the market regarding the source of the good or service³⁴. Trademarks have also other functions, besides indication of source, namely they are indicators of quality (see prestige trademarks) and reducing customers search time (advertising function). Chefs and restaurants may trademark their names or the name of the typical menu. They also have the possibility of registering as trademark shapes, as three-dimensional trademarks, leading to the protection of the visual appearance of food item or dishes. Nevertheless, regarding three-dimensional trademarks, the protection is not allowed in relation to signs consisting of a shape which gives substantial value to the goods. Registry of the smell or taste of dishes as trademark is even more problematic. Though possible under new EU Regulation³⁵, that abolished the necessity of graphic representation, still the strict interpretation by the ECJ Sieckmann case tends to prevail³⁶. Even in the USA, where USPTO seems to have a more liberal policy, functional scents and/or smells, inherent to the

³³ See, M. VICTÓRIA ROCHA, "Protecção cumulativa do design como obra e como desenho ou modelo quando o criador é um trabalhador dependente: o caso português", A. MARIA TÓBIO RIVAS / A. FERNANDEZ-ALBOR BALTAZAR / A. TATO PLAZA (Eds.), *Estudios de Derecho Mercantil, Libro de Homenaje al Prof. Dr.h.c.José Antonio Gómez Segade*, Madrid, Marcial Pons, 2013.

³⁴ For the general requirements of protection by trademarks see L. M. COUTO GONÇALVES, *Manual*, cit., pp. 166-356; M. VICTÓRIA ROCHA, *Portugal, supra*, footnote 7, pp. 161-188; P. SOUSA E SILVA, *Direito Industrial*, cit., pp. 121-242. For all aspects of Intellectual Property, W. CORNISH, D. LLEWELYN, T. APLIN, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights*, 8^a ed., London, Sweet & Maxwell, 2013.

³⁵ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, *OJ L* 154, 16.6.2017, pp. 1-99

³⁶ ECJ 12 December 2002, *Dr. Ralf Sieckmann v. Deutches Patent- und Markenamt*, case C-273/00. The case involved a "methyl cinnamate" scent, described by the applicant as "balsamically fruity with a slight hint of cinnamon". The ECJ ruled that (a) a chemical formula depicting this scent did not represent the odour of a substance, was not sufficiently intelligible, nor sufficiently clear and precise; (b) a written description was not sufficiently clear, precise and objective; (c) a physical deposit of a sample of the scent did not constitute a graphic representation, and was not sufficiently stable or durable.

product, are considered not to fulfil the essential trademark function of distinguishing such goods from similar goods of competitors and should, for that reason, be rejected³⁷.

Dishes are perceptible with, at least, three of the five senses. Besides sight, there is also taste and smell. Taste and smell are considered to be “chemical senses” while sight and hearing are called “mechanical senses”³⁸. Regarding smell, we could be led to make a comparison with fragrances. But there are strong differences. The olfactory perception, that is essential regarding fragrances, is of less significance regarding dishes, where the visual and gustatory perceptions are predominant. Plus, regarding smell, even if we assume that the same chef prepares the same dish on the basis of the same recipe, it is improbable that the dish will always have the same scent. Thus, perception varies and is not objective. Regarding taste the same arguments apply. Taste is neither objective nor stable. Plus if taste (or smell) is perceived by consumers as an inherent feature of a product, it will be functional, thus, not protectable by trademark (unless they acquire secondary meaning)³⁹.

Though the EC Regulation and EC Directive⁴⁰ opened the door to non-traditional trademarks, if EUIPO follows the requirements of the Sieckmann case (see Consideration 13 of the Directive) it will be difficult for this non-traditional trademarks, like smell and taste, as well as tactile signs, except for sound trademarks, to fulfil the requirements for protection.

In the case of the Mondrian Cake, apparently the name could be protected under a trademark because it is new (regarding the Nice classification and the principle of speciality of trademarks) and has distinctive character. Also, it doesn't offend Mondrian, it is a tribute to his paintings.

7. Other forms of protection of culinary creations by distinctive signs (*Le plat*)

There is also the possibility of protecting the trade dress of the culinary creations. Trade dress has a large tradition in the USA. In the landmark case *Two Pesos v. Taco Cabana* from 1992, which went to the Supreme Court, the plaintiff successfully claimed as a trade dress the concept of serving Mexican food in a festive atmosphere, consisting of stores built on two levels with a step between them and with pink, orange and yellow stripes painted around the

³⁷ M-C. JANSENS, “Copyright” quoted note 2, p. 19; A. RIVAIL MEDRADO, *O direito adentra a cozinha*, *cit.*, pp. 88-92.

³⁸ With much detail, M-C. JANSENS, “Copyright”, *cit.*, pp. 21-27. A. RIVAIL MEDRADO, *O direito adentra a cozinha*, *cit.*, pp. 88-92.

³⁹ The United States Trademark Trial and Appeal Board addressed the issue of a trademark flavour, in 2006, considering that an orange flavour for an anti-depressant pharmaceutical was not protectable as trademark because it was functional making the medication more palatable and appealing. The Board considered that the orange flavour was not source identifier, and consumers were not predisposed to associate the taste of the medication with the trademark or with the manufacture. See, describing this case, E. CUNNINGHAM, “Protecting”, *cit.*, p.32.

⁴⁰ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, *OJ L* 336, 23.12.2015, pp. 1-26

tops of the buildings⁴¹. This type of litigation is typically used to protect their restaurant concept⁴².

Traditionally, trade dress applies to the overall appearance of labels, wrapping or containers in which a producer packaged its product. That's the concept we have in Portugal, where trade dress is protected as unregistered trademark (see Article 240º of Portuguese Code of Industrial Property of 2003)⁴³. But in the USA there is a much more expansive definition of trade dress, encompassing a combination of any elements in which a product or a service presents itself to a consumer, which creates a visual effect to the consumer. Trade dress may include features such as size, shape, colour, textures, graphics, or even the design of the product. It does not protect the product (or the service) itself, but only the way in which the product or the service is presented to consumers⁴⁴. It can be also used to protect the whole visual aspects of a kitchen or restaurant. Trade dress has the same functions as trademarks and must be new, have distinctive character and non-functional in order to be protected. Trade dress is distinctive where by its intrinsic nature serves to identify a particular source. Though not being distinctive in the first place, as what happens with trademarks, it can become distinctive by acquiring secondary meaning, which is the association that consumers make with a product, service or business when they see a particular trade dress in commerce. Trade dress that is functional is not protected, regardless whether it is distinctive or not (unless it acquires secondary meaning)⁴⁵.

In the USA courts make a distinction between protecting product packaging and product design. Product design is intended to render the product more useful or aesthetically appealing and doesn't have to do with identifying the products source⁴⁶.

In contrast to product design, product packaging involves the deliberate attachment of a particular sign to the product or involves a distinctive packaging to identify the source.

⁴¹ 505 U.S. 763 (1992).

⁴² See also the case brought in 2007 by Rebecca Charles of Pearl Oyster Bar in New York against Ed McFarland of Ed's Lobster Bar for plagiarizing her restaurant concept. The lawsuit that included a claim for stealing her recipes (the use of English muffin Caesar Salad) was settled out in Court in 2008. For further details, P. WELLS, "Chef's Lawsuit Against a Former Assistant Is Settled Out in Court", *NYTimes*, 19 April 2008; E. CUNNINGHAM, "Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law play a bigger Role in the Kitchen?", 9 *J. High Tech. L.*, 21, 2009, pp. 21-22. This author also describes other well-known cases like the eGullet Society Culinary Arts & Letters case against Australian chef Robin Wickens of Alinea and wd~50, two high profile American restaurants in 2006. Wickens admittedly copied the cuisine and the unusual methods of preparation and presentation, rendering the original creations and the Interlude dishes indistinguishable. eGullet also exposed another chef of the Mandarin Oriental Hotel's Tapas Molecular Bar in Tokyo, who offered a tasting menu identical to that of Washington D.C.'s minibar, where he had previously worked. Cf. E. CUNNINGHAM, "Protecting", *cit.*, pp. 22-23. These are only three examples of copycat cuisine, which is a very frequent occurrence.

⁴³ For the disastrous way trade dress is protected in Portugal, see L. M. COUTO GONÇALVES, *Manual*, *cit.*, pp.270-271.

⁴⁴ With more detail, see E. CUNNINGHAM, "Protection", *cit.*, p. 29.

⁴⁵ "Functional features are those that are essential to an article's purpose or use, affect its cost or quality, or others must use them in order to effectively compete in the same line of business", as CUNNINGHAM states, "Protection", *cit.*, p. 31. About trade dress protection for culinary creations in detail, A. RIVAIL MEDRANO, *O direito adentra a cozinha*, *cit.*, pp. 92-96.

⁴⁶ See the *Wal-Mart Stores v. Samara Bros.* Case (529 U.S., 2010-11), referred to by E. CUNNINGHAM, "protecting", *cit.*, p. 31. In this case, a children's clothing designer sued Wal-Mart for selling knock-off copies of its clothing and claimed trade dress infringement. The court held that clothing and product designs are not inherent distinctive and can only receive protection if they acquire secondary meaning. Ordinary, commonplace designs that competitors share are generic, thus non protectable regardless of a claim of secondary meaning.

Although trademark and trade dress cannot reasonably protect cuisine itself, they might protect a unique style of presentation if it is non-functional, and if it is new and has distinctive character, or has acquired secondary meaning, and if there's likelihood of consumer confusion.

Logotypes, rewards, geographical indications (PI) and designations of origin (PDO), may also play an important role in protecting culinary creations by Industrial Property⁴⁷.

In the case of the Mondrian Cake, the title is new and distinctive, has no functional character and is related to the source of the Cake, thus, it could be registered as trademark cook of Caitlin Freeman. Also, it doesn't offend Mondrian's name, it is a tribute to the painter.

8. Trade secrets and other forms of protection for culinary creations (le plat)

Unfair competition comprises unlawful disclosure of trade secrets and other behaviours of companies that, in bad faith, deviate the clients from other companies to its own⁴⁸.

8.1. Trade secrets, nondisclosure agreements, fiduciary duties

⁴⁷ Other distinctive signs may also have a lot of interest. This is the case of logos (article 304-A ss CPI). The logo is the appropriate signal to identify any entity that provides services or markets products, distinguishing it from others. It may be used *inter alia* in establishments, advertisements, printed matter or correspondence. This is how the entity is known to the public. The logos composed exclusively or essentially of elements that describe the entity, or its characteristics, or elements that are usually used in the language of commerce, can not be registered for lack of distinctive capacity. A logo composed exclusively or essentially of these elements can only be registered if it has acquired, in commercial practice, secondary meaning. Where these elements are combined with distinctive elements (words or graphics), the logo may be registered. The descriptive, generic or usual elements are not the exclusive ownership of the respective holder. Logos may not be registered when they may cause a mistake by the consumer as to the nature or characteristics of the entity. Designations of origin and geographical indications may also be of great interest (see Article 305 ss of the CPI). When a geographical name (of a region, a place or a country), in addition to informing the consumer about the origin of a product, also ensures that the product meets certain characteristics and qualities, we may be before a designation of origin or a geographical indication. Designations of origin and geographical indications inspire consumer confidence because they play a quality role and can therefore be a very valuable tool for businesses by adding value to their brands. If designations of origin or geographical indications are registered, they become an industrial property right which gives the holders the possibility of reacting against misuse and abuse in products that discredit them. Designations of origin and geographical indications, besides conferring on the producer an exclusive right resulting from the achievement of a single place determined by the typicality and quality of the products and of giving an added value to the marks, are a privileged means at the disposal of their users/holders because they make it possible to reach the consumer through increasingly demanding criteria in terms of the quality and authenticity of the products they buy on the market. In order for a product to be protected as Denomination of Origin it is necessary to have a greater connection between the product and the region of origin, that is, its qualities and characteristics are due not only to human factors but also to natural conditions. There is interdependence between natural and human factors and the product. Geographical Indications have less demanding requirements. The connection of the product to its place of origin is much more tenuous, if the reputation or a certain quality (and not all qualities) or other characteristic (not all the characteristics) can be attributed to the geographical origin, without influence of the factors natural and human. With detail, see L. M. COUTO GONÇALVES, *Manual*, *cit.*, pp. 366-377; M. VICTÓRIA ROCHA, *Portugal*, *cit.*, pp. 199-203; P. SOUSA E SILVA, *Direito Industrial*, *cit.*, pp. 243-306.

⁴⁸ With detail, see L. M. COUTO GONÇALVES, *Manual*, *cit.*, pp. 381-408; M. VICTÓRIA ROCHA, *Portugal*, *cit.*, pp. 253-256; P. SOUSA E SILVA, *Direito Industrial*, *cit.*, pp. 315-342.

Chefs can freely decide to keep their recipes secret and rely on the trade secrets law⁴⁹. Recipes that are carefully developed and/or cooking procedures and dish concepts that are unique to a particular kind of restaurant or company may qualify as trade secrets. For many decades companies as Coca Cola and Kentucky Fried Chicken or MacDonald's Big Mac "Special Sauce" rely on this form of protection to protect the mystique and unique taste of their core products and/or processes. Pursuing this secrecy policy enable companies or restaurants the exclusive control over the content of the underlying recipe as well as over the taste and smell of the resulting dish/drink. While copyright does not protect ideas, processes, methods, trade secrets protect the author's ideas if they possess some novelty and are undisclosed or disclosed only on the basis of confidentiality and have economic value. Combined with contract law (e.g. non-disclosure agreements), trade secrets include a broad variety of items, such as ideas, procedures, methods and other subjects that copyright does not protect. Anyway, it will be difficult for chefs and restaurateurs to keep their unique recipes secret. The secret information can be revealed through inadvertence, independent discoveries, reverse engineering, amongst others⁵⁰. Nevertheless, because of the difficulties associated with using intellectual property rights, trade secret law, nondisclosure agreements and breach fiduciary duties provide additional viable means of protection for chef's ideas, recipes and cuisine. It is true that trade secrets offer little legal resource once the secret is disclosed, but we must not forget there is protection available if the secret gets out because of improper misappropriation. Nondisclosure agreements also provide enforceable legal protection and, when combined with trade secrets, they lessen the risk of others becoming aware of the trade secret recipe, for example. Many chefs mandate that employees sign nondisclosure agreements. CANTU, who defends strong intellectual property protection, namely by patents, also mandates his employees to sign nondisclosure agreements and goes further, requiring visitors to sign a similar agreement before entering motto's restaurant⁵¹. The guidelines of the International Association of Culinary Professional also state that restaurants and chefs should provide written contracts with the employees' responsibilities after they leave the business, especially with respect to the use of proprietary information⁵². The chef or restaurant owner can also sue for breach of fiduciary duty of their employees when they misappropriate information learned during the employment contract⁵³.

In the case of the Mondrian Cake, it is not protected by trade secrets, you may find sites of how to cook it in the internet, namely in a site of Caitlin Freeman, the author⁵⁴.

⁴⁹ For a definition of trade secret, see artº 39, 2 TRIPs: Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance) OJ L 157, 15.6.2016, pp. 1-18; M-C. JANSENS, "Copyright", *cit.*, pp.16-17; A. RIVAIL MEDRANO, *O direito adentra a cozinha*, *cit.*, pp, 104-106; SRAUSS, *cit.*, 2012, pp. 197-198; BABAK ZARIN, "Knead to Know: cracking recipes and trade secrets law", *Elon Law Review*, Vol. 8, 2016, goo.gl/L9oK1k (last access on 30.09.2018), p. 192.

⁵⁰ The original paper containing the recipe of Coca Cola is thought to lie deep within the Sun Trust Bank's main vault in Atlanta. The recipe of eleven herbs and spices of KFC is divided and kept secret in many places in the USA and the only complete handwritten copy is hidden in a vault in corporate headquarters Louisville, Kentucky. Information taken from M-C. JANSENS, "Copyright", *cit.*, p. 16, footnote 95.

⁵¹ E. CUNNINGHAM, "Protecting", *cit.*, p. 50

⁵² See this code at www.webcitation.org/5WIKb5OEZ (last access on 07.10.2018).

⁵³ In the same sense, E. CUNNINGHAM, "Protecting", *cit.*, p. 50.

⁵⁴ See <https://www.mindfood.com/recipe/mondrian-cake/> (last access 12.10.2018).

8.2. General rules against unfair competition

Either way, there are other types of unfair competition very common in the culinary industry, in addition to business secrets. The most commonly used forms of unfair competition are the use of distinctive signs of others (which also violates the law of trademarks and other distinctive signs), servile imitation and the creation of confusion by other means. The servile imitation exists when the competing company totally or partially copies the culinary creation in question. Other acts of confusion can be achieved when the attentive consumer, even knowing that it is an imitation, buys in order to induce others to think that it is an original, since the copy is so well done. If there is no protection by copyright or by models or designs, the look-alike or knockoff, if they are illegal copies, may be subsidiary protected by the norms against unfair competition. The look is the same but the price is much lower because of the lack of research, development and marketing costs. In the look-alike the trademark is not imitated, but may be undue from the part of the company that copies to enjoy the investment of the company whose products are copied, which spends on investment and development of the goods and in its advertising. The disloyalty is in the improper use of the investment and the notoriety and prestige of the culinary creations that are copied. In the look-alike or knockoff there can be an exploitation of the trust that, as a rule, the imitated brand product has, since it can communicate to its customers its qualitative differential with respect to similar products. The strength of the look-alike or knockoff is due to an association between the products, which may even be unconscious, and if it is, is subliminal and therefore even more dangerous. The imitator thus gets attention for his products which he otherwise would not have. It matters little that the imitated product has its own brand, distinct from the imitated product. It obtained an illicit and disloyal support⁵⁵.

Regarding the Mondrian Cake, it was created by pastry chef Caitlin Freeman, while owning Blue Bottle Coffee's at San Francisco Museum of Modern Art (SFOMA), from 2009 to 2013. In 2013 SFOMA closed its doors for a three-year expansion project. During that time Blue Bottle had no contact with the museum and when it reopened Caitlin Freeman was shocked to learn that Blue Bottle had been replaced by McCall Catering's Café that was apparently selling similar art inspired cakes⁵⁶.

⁵⁵ About unfair competition in general, read L. M. COUTO GONÇALVES, *Manual, cit.*, pp. 381-409. The author demonstrates the importance of distinguishing between the two existing models of competition, among us the professional model, which is more restrictive because it only protects the private interests of competitors, and the social model pioneered by Germany and has then extended to other regimes such as the Spanish, where unfair competition is no longer seen as an institute intended to resolve conflicts between competitors, to become an instrument of conduct in the market, while protecting the interests of consumers and at the same time the public interest in the proper functioning of the market.

⁵⁶ N. REED, "Eat Your Art Out", pp. 1-2.

9. Should Intellectual Property protect culinary creations? (Le dessert)

Culinary creations may be protected by copyright, neighbouring rights, industrial property rights, trade secrets and other rules against unfair competition. Are intellectual property rights good for the food industry? Granting such protection for culinary creations is the best way to generate incentives that encourage intellectual production in the culinary world? There are various opinions amongst scholars. Some argue that such protection, either by copyrights, either by industrial property rights is very important. Others think that such protection, especially regarding copyrights, is not good for innovation in this industry, because it would dissuade other chefs from experimenting for fear of running afoul of the law. Locking away recipes and dishes from the public domain during the lifetime of the chef plus seventy years after her/his death seems too much. At least industrial property rights, that are not trademarks or other distinctive signs, last less. Patents twenty years and models or designs 25 or 3 years, depending of whether they are registered or not.

In answering this complex question we must not forget that sharing recipes is common in the culinary world and that the recipes and dishes of today are the result of generations, are a cultural heritage. This industry is based upon a combination of heritage and innovation. Chefs seem to endorse the idea about sharing and hospitality which conflicts with the idea of exclusive ownership of recipes and dishes as long as they are given the credit and are acknowledged in some way.

Besides a law-based intellectual property protection, there are norms created by the culinary industry on which chefs rely⁵⁷. There are three main ideas regarding these informal norms. The first idea is that a chef must not copy other chefs' innovative recipes exactly. The second idea is that if a chef reveals a recipe related trade secret to a colleague, that chef must not pass the information to anybody else, mainly colleagues, except if authorized to do so. The third fundamental idea is that colleagues must give credits to developers of significant recipes and/or methods, and/or techniques as authors of that information. Chefs do respect these three general ideas, namely punishing violators by a refusal to provide further information and by lowered reputation in the community. It is not common for chefs to invoke copyright protection, except when cookbooks or audio-visual works are at stake. Trade secret plays also an important role in what regards protection of culinary creations. Reputed chefs, relying on gastronomic precedents belonging to the culinary public domain, tend to keep some ingredient or some combination of ingredients secret, to add their touch to the popular recipe. That way they are able to maintain a culinary edge over their competitors. It is also doubtful whether chefs rely on secrecy, in most known cases rather companies than individuals in the food industry apply to this type of protection. Authors like

⁵⁷ We refer to the International Association of Culinary Professional's ethical guidelines, available at <https://www.iACP.com/> (last access on 07.10.2018). This code is mentioned by several authors, namely M-C. JANSENS, "Copyright", referred *supra* footnote 2, p. 30; E. CUNNINGHAM, "Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?", 9 *J. High Tech. L.*, 21, 2009, p. 24.

Raustiala and Sprigman even consider knock-offs the fuel of innovation and creativity in food industry (as well as other industries)⁵⁸.

Even Caitilin Freeman has her Mondrian Cake in open source in her site, explaining how to make the cake⁵⁹.

10. Conclusions (*Le café*)

Although cuisine is frequently copied and imitated in the culinary industry, extending copyright, neighbouring rights, patents, trademark and other distinctive signs, as well as trade secrets and other rules of unfair competition may give a broad protection to chefs, restaurant owners and food industry companies. Nevertheless, excessive intellectual property protection is not the answer in most cases, given the history and traditions of food (and drink) industry. An excessive protection, given the history and tradition of this industry, may harm creativity and innovation, and ultimately competition. Most chefs continue to favour an open approach, believing that good cooking is something to share. But that doesn't mean that others have the opposite view and if they want, they may protect their culinary creations either by intellectual property rights, either by the general rules against unfair competition, trade secrets, nondisclosure agreements and fiduciary duties.

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⁵⁸ K. RAUSTIALA, C. SPRIGMAN, *The Knockoff economy, how imitation sparks innovation*, Oxford, University Press, New York, 2012, pp. 57-95, especially pp. 63-69; K. RAUSTIALA, C. SPRIGMAN, "The piracy paradox: innovation and intellectual property fashion design", *Virginia Law Review*, Vol. 92, 8, 2006, available at ssrn.com/abstract=878401 (last access, 06.08.2018).

⁵⁹ <https://www.mindfood.com/recipe/mondrian-cake/> (last access, 14.10.2018)

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