

# Food for thought

## Considering intellectual property protection for signature dishes and plating

By Regardt Willem van der Merwe

### ABSTRACT

*The purpose of the article is to assess which areas of IP law, if any, and under which criteria, offer legal protection for signature dishes and plating arrangements that are identified and commonly associated with a specific chef or restaurant. The two main concepts explored in the article are: (i) the question whether food can be considered as art for purposes of copyright; and (ii) whether the avenue of trade dress as suggested by scholars in the U.S. hold equal promise under EU trade mark and design law.*

*The outcomes within the respective spheres of copyright, trade mark and design law have proven in the affirmative; i.e. in principle protection is available for signature dishes and plating, subject to certain qualifications. However, it is found that potential IP right holders in the culinary industry elect not to acquire and/or enforce these rights. The question whether IP offers protection for signature dishes and plating remains answered from a theoretical point of view and legal certainty will only be achieved once the CJEU gives a decision on the matter – which in turn would only occur if the identified potential IP right holders start to litigate in an attempt to potentially enforce their rights.*

### 1. INTRODUCTION

The internationally acclaimed restaurant *Alinea* in Chicago, is renowned for its unique and technology forward ideas. One such unique creation is an edible toffee-like balloon (figure 1)<sup>1</sup> offered as a dessert option. The *balloon* is reported to be one of the most famous – and most Instagram posted – courses on the tasting menu.<sup>2</sup> The balloon was originally created by *Alinea*'s Mike Beagle, whom during an interview reportedly described the dish as “a step forward in cuisine; this is actually something that hasn't been done before”.<sup>3</sup>

However, in May 2017 it became apparent through media reports that a Toronto-based company started manufacturing machines that produce balloons which, allegedly, look uncannily like the toffee-based balloons that have been on *Alinea*'s menu since 2012.<sup>4</sup> In an interview with the publication *Eater*, *Alinea*'s managing partner Nick Kokonos responded to say: “We get a constant stream of copycats but this one seems unusually identical. I guess it's flattering”.<sup>5</sup>

The above referred incident has prompted the following question which forms the point of departure: does intellectual property (IP) law offer protection for signature dishes and novel plating? This article aims to address this question within the spheres of copyright, trade mark and design law.

\* Title: acknowledgment to author and philosopher Elizabeth Tefer's book *Food for Thought: Philosophy And Food* (Psychology Press 1996) 42-43.

<sup>1</sup> Image by Aliena, downloaded from [www.alinearestaurant.com/site/portfolio/balloon/](http://www.alinearestaurant.com/site/portfolio/balloon/) (accessed 28 April 2019).

<sup>2</sup> Daniella Galarzo, “*Alinea*'s signature edible balloons have been ripped off” (*Eater*, 25 May 2017) [www.eater.com/2017/5/25/15692720/alinea-balloon-rip-off-edible-balloons](http://www.eater.com/2017/5/25/15692720/alinea-balloon-rip-off-edible-balloons) (accessed 28 April 2019).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> The research is limited to the protectability of the aesthetic and technical aspects of signature dishes and plating. It does not refer to, or include, the taste (gustation) of the relevant cuisine.

<sup>7</sup> Oliver Thring, “The signals sent by signature dishes” (*The Guardian*, 19 March 2012) [www.theguardian.com/lifeandstyle/wordof-mouth/2012/mar/19/signals-sent-by-signature-dishes](http://www.theguardian.com/lifeandstyle/wordof-mouth/2012/mar/19/signals-sent-by-signature-dishes) (accessed 28 April 2019).

<sup>8</sup> Ibid.

<sup>9</sup> E.g. the Waldorf Salad created at New York's Waldorf-Astoria Hotel by the maître d'hôtel, Oscar Tschirky.

<sup>10</sup> Hosenally R, “In A Bid To Recover Its Lost Stars, Paris' Oldest Restaurant La Tour d'Argent Brings In A New Chef” (*Forbes*, 5 February 2017) <https://www.forbes.com/sites/rooksanahossenally/2017/02/05/in-a-bid-to-recover-its-lost-stars-paris-oldest-restaurant-la-tour-dargent-brings-in-a-new-chef/#4bde785e44b9> (accessed 23 May 2019).

<sup>11</sup> Ibid.

<sup>12</sup> Carlos Velasco, Charles Michel, Andy T.

Woods and Charles Spence, “Scientific paper on the importance of balance to aesthetic plating” *International Journal of Gastronomy and Food Science* 5-6 (2016) 10.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Kiran Mary George, “Trade dress law in the commercial kitchen: exploring the application of the Lanham Act to food plating in the culinary industry” *NUJS Law Review* 3 (2017) 3.

<sup>16</sup> Raustiala K & Sprigman C, “The Piracy Paradox Revisited” 61 *Stan. L. Rev.* 1201 (2008-2009) 1201.

<sup>17</sup> George op. cit. 3.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Rosenblatt, A Theory of IP's Negative Space, 34 *COLUM. J.L. & ARTS* 317, 326 (2011) 322; cited from George op. cit. 3.

### Signature dish

A "signature dish" is a dish that is closely identified with a chef or a restaurant and stands out as a prime example of that person's or establishment's cuisine.<sup>7</sup> A signature dish can be either an entirely new creation or an original interpretation of a classic.<sup>8</sup> It has become typical of many high-profile restaurants to have a signature dish which forms part of the establishment's allure. These signature dishes form a rhetoric amongst gastronomes and motivate most first visits. As such, they are a valuable tool in attracting customers. Even in restaurants that regularly change their offerings, a signature dish will remain on the menu year after year because it helps establish identity and continuity.<sup>9</sup> A good illustration hereof is the legendary Pressed Duck at La Tour d'Argent (Paris). The dish was first introduced by Frédéric Delaire at the end of the 19th century, during which time the restaurant had become internationally well-known.<sup>10</sup> Notwithstanding numerous changes of ownership and the passing of more than two centuries, the iconic Pressed Duck still today is celebrated and referred to as the restaurant's signature dish.<sup>11</sup>

### Plating

"Plating" refers to the visual composition of food on a plate.<sup>12</sup> Scholars in aesthetics and gastro-physics refer to the "art of plating".<sup>13</sup> In general, plating styles are guided by fashions and trends.<sup>14</sup> However, 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.<sup>15</sup>

### IP's negative space

Raustiala and Sprigman,<sup>16</sup> who coined the term IP's negative space, define the term as encompassing any "substantial area of creativity" which IP laws do not penetrate or provide only very limited propertization.<sup>17</sup> Put differently, the industries in IP's negative space exist in a "low-IP equilibrium" where IP protection is absent, or largely so, but creation continues.<sup>18</sup> The premise of IP's negative space is that the absence of strong IP protection not only fails to hinder low-IP industries, but actually helps them thrive.<sup>19</sup> Rosenblatt and George, amongst other scholars, provide that cuisine is such an industry.<sup>20</sup>



Figure 1. Image by Aliena, [www.alinearestaurant.com/site/portfolio/balloon](http://www.alinearestaurant.com/site/portfolio/balloon)

## 2 COPYRIGHT PROTECTION FOR SIGNATURE DISHES AND PLATING

The few copyright cases that do exist about food have focused on recipes rather than on restaurant dishes or chef's artistic works.<sup>21</sup> Recipes have generally proved ineligible for copyright protection, as they are considered ideas or methods of operation, or are just too standardized to leave room for own personal expressions that are required under copyright law.<sup>22</sup> Cookbooks, however, are copyrightable as compilations or combinations, i.e. as databases.<sup>23</sup> U.S. courts have also awarded copyright to individual recipes in cookbooks that incorporated elements of storytelling or historical and cultural descriptions.<sup>24</sup> The aim of this section is to investigate whether the phenomena of signature dishes and plating constitute subject matter susceptible to copyright protection.

As a starting block, Article 2(1) of the Berne Convention for the protection of literary and artistic works includes copyright protection for every production in the artistic domain *whatever may be the mode or form of its expression*. The first question to be addressed in this section is whether food can be considered as art? Thereafter, the originality criteria for copyright protection on the EU level is considered. On a national level, the established categories of artistic works under U.K. law are explored and met with examples of signature dishes and plating from practice. The role of a recipe per se is also briefly addressed. Finally, arguments against the provision of copyright to signature dishes and plating, and suggested solutions by scholars to these concerns, are identified.

### 2.1 Philosophical perspective

The question whether culinary art is indeed a recognized form of art, as meant under Article 2(1) Berne, is a subjective question and a matter of perception. Perhaps it was pronounced best in the 2008 Chancery Division judgment of *Lucasfilm Ltd v Ainsworth*<sup>25</sup> wherein it was stated that “*What is art?* is an unanswerable question.” Notwithstanding the aptly phrased dictum by Justice Mann, the social sciences also provide a number of theories advocating for and against the recognition of food as art (and consequently being protectable as such). Arguments from both sides are presented hereunder.

Food philosopher Elizabeth Teffler describes a piece of art as an object capable of eliciting a “disinterested” or “non-instrumental” reaction via the human senses.<sup>26</sup> These “aesthetic reactions” or “judgments” may be neutral, favorable, or unfavorable.<sup>27</sup> Teffler holds that food can elicit aesthetic reactions visually, in tastes and smells, and humans can distinguish enjoying visual composition, tastes or smells apart from approving of them instrumentally, on the grounds that the food is nourishing or calorie-filled.<sup>28</sup> Buccafusco adds to Teffler's theory that of all the “non-instrumental” aesthetic reactions to a dish, visual expressiveness is the strongest aesthetic reaction because vision is completely disassociated with the body's natural instrumental use of food (i.e. eating).<sup>29</sup> According to Teffler, food can be art when it is “intended or used wholly or largely for aesthetic consideration”.<sup>30</sup>

Aesthetics philosopher Carolyn Korsmeyer holds a different view. She argues to the contrary, that culinary dishes can only represent a “minor art”.<sup>31</sup> Korsmeyer holds that the kind of art that culinary dishes represent is simple compared to symphonies, buildings, poems, or paintings because, as an expressive medium, food has four limitations.<sup>32</sup> First, the formal arrangements and expressive range of food are more restricted than in fine art media.<sup>33</sup> Ostensibly, according to Korsmeyer, there are only four basic types of tastes—sweet, salty, bitter, and sour—that can be elicited, either alone or in combinations, to create flavors.<sup>34</sup> Second, food is a transient medium that either decomposes or is consumed. This temporal limitation eliminates, according to Korsmeyer, the possibility of studied appreciation over generations that could serve to elevate the culinary art.<sup>35</sup> Third, foods do not have meaning in that they have limited representational capacity to portray anything other than what they are, unlike literature, paintings, or sculptures.<sup>36</sup> Finally, Korsmeyer argues, “food cannot express emotion(s)” in that flavors, unlike sights and sounds, arguably have no expressive connections with emotions like love, hate, grief, joy, suffering, or yearning, for example.<sup>37</sup>

Considering the above philosophical views, it is proposed herein that Telfer's theory, that food can be art when it is “intended or used wholly or largely for aesthetic consideration” is a more accurate reflection of the *status quo* in the culinary industry in the context of the phenomena of signature dishes and plating. When chefs intend for their dishes be savored, appraised, thought about, and discussed—and not just to fill the stomachs of their patrons—dishes can be art if patrons actively contemplate them in the manner suggested by Telfer.<sup>38</sup> Therefore, a chef may create art when he designs a dish or a meal that presents patterns of harmonious or contrasting flavors, textures, colors, and plating arrangements that are intended to stimulate his or her patrons' aesthetic senses. Patrons may then also act as art critics when they contemplate these dishes and appreciate them as visual (and flavorful) expressions of art.<sup>39</sup> If one accepts that signature dishes and plating can be considered as art, the question arises whether it is susceptible to copyright protection, as such? This question is explored in the section hereafter.

### 2.2 Originality requirement

Originality is an indispensable condition for copyright protection. While the notion of originality is only harmonized partially by the legislature in Europe for certain categories of works, i.e. computer programs, databases and photographs,<sup>40</sup> the CJEU has begun a more thoroughgoing harmonization of originality through case law.<sup>41</sup> In the cases *Infopac*<sup>42</sup> (infringement) and *Bezpečnostní softwarová asociace*<sup>43</sup> (subsistence), the CJEU has held that the criterion for originality in the Directive on the Legal Protection of Databases (96/9EC) and also the Directive on the Legal Protection of Computer Programs (2009/24EEC), i.e. “author's own intellectual creation”<sup>44</sup> is applicable to all works of authorship.<sup>45</sup> In an attempt to establish the plausibility of a signature dish and plating fulfilling the criteria of “an author's own intellectual crea-

tion” decisions from the CJEU, interpreting this criteria, will be applied to an example from practice.

The Sound of the Sea (figure 2)<sup>46</sup> was created by Heston Blumenthal (The Fat Duck in London) more than a decade ago. It consists of a small portion of sashimi, garnished with hijiki, red tonka, ice plant, pickled seaweed, and a salad called oyster leaf which, reportedly, has the exact taste of an oyster.<sup>47</sup> The seafood slices are placed on a bed of “sand” made up of tapioca, miso oil, panko breadcrumbs, grape and cod liver oil.<sup>48</sup> The aforementioned is then served on a glass-covered box filled with white sand from Las Rocas beach, Venezuela.<sup>49</sup> Patrons are also given a sea shell in which an iPod (playing the sound of crashing waves) is hidden, allowing them to eat the dish while listening to the sounds of the sea on the headphones. In an interview with Harry Wallop (*The Telegraph UK*) Heston Blumenthal explained he not only wants customers to be in raptures about the flavors, he wants them to be transported back to a childhood day at the beach.<sup>51</sup> Some guests, during service of *Sound of the Sea*, are given postcards of their favorite childhood holiday beach. This tailored personal experience is achieved by allowing guests to fill in a questionnaire when making a reservation.<sup>52</sup>



Figure 2. Image from the Fat Duck.

<sup>21</sup> Naomi Strauss “Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry” UCLA L. Rev. 182 (2012) 194.

<sup>22</sup> Ibid; the U.S. Copyright Office, for example, issued a factsheet stating that “copyright law does not protect recipes that are mere listings of ingredients” this view is supported by the U.S. Court of Appeals for the Sixth Circuit in the non-precedential case *Tomaydo-Tomahhdo, LLC v. Vozary*, 629 F. App’x 658 (6th Cir. 2015) in which the court held that while there can be a copyright in the arrangement and creative expression contained in a recipe book, protection did not extend to the recipes themselves, a list of ingredients was “merely a factual statement, and not copyrightable”; Beck B and Von Werder K, “Your IP Valentine: Can Recipes Be Protected by Copyright?” (Mayer Brown, All About IP, 14 February 2017) [www.allaboutipblog.com/2017/02/your-ip-valentine-can-recipes-be-protected-by-copyright/](http://www.allaboutipblog.com/2017/02/your-ip-valentine-can-recipes-be-protected-by-copyright/) (accessed 28 April 2019).

<sup>23</sup> In Case No. 2-06 0 387/11 (28 March 2012) the Regional Court of Frankfurt, Germany, held that a selection of recipes suitable for certain pieces of cooking equipment was a “personal intellectual creation” within the meaning of section 2, para 2 of the German Copyright Act; the U.S. Copyright Office likewise stated that copyright protection could “extend to ... a combination of recipes, as in a cookbook”; Beck B and Von Werder K, “Your IP Valentine: Can Recipes Be Protected by Copyright?” (Mayer Brown, All About IP, 14 February 2017) [www.allaboutipblog.com/2017/02/your-ip-valentine-can-recipes-be-protected-by-copyright/](http://www.allaboutipblog.com/2017/02/your-ip-valentine-can-recipes-be-protected-by-copyright/) (accessed 28 April 2019).

<sup>24</sup> Strauss op. cit. 194 ad footnote 60, with

reference to *Barbour v Head* 178 F Supp. 2d at 764, in which the Court elaborated that recipes may warrant copyright protection in a variety of circumstances, such as where the recipe includes “suggestions for presentation, advice on wines to go with the meal, or hints on place settings with appropriate music,” or where the recipes are accompanied by “tales of their historical or ethnic origin” (*Barbour v Head* case text is available at <https://casetext.com/case/barbour-v-head-2> (accessed 28 April 2019)).

<sup>25</sup> *Lucasfilm and others v Andrew Ainsworth and another* [2008] EWHC 1878 (Ch) at para 119.

<sup>26</sup> Austin J. Broussard “An Intellectual Property Food Fight” *Vanderbilt Journal of Entertainment and Tech. Law* Vol.10:3:691 (2008) 718; Elizabeth Telfer, *Food For Thought: Philosophy And Food* (Psychology Press 1996) 42.

<sup>27</sup> Tefler op. cit. 42-43.

<sup>28</sup> Ibid. 44.

<sup>29</sup> Christopher Buccafusco, “On The Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?” 24 *CARDOZO ARTS & ENT. L.J.* (2007) 1121; Tefler op. cit. 42.

<sup>30</sup> Tefler op. cit. 46.

<sup>31</sup> Broussard op. cit. 108.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid. 718.

<sup>39</sup> Ibid.

<sup>40</sup> The circumscription of originality laid down in the Computer Program Directive, the Term

Directive (as regards photographs), and the Database Directive applies only to these specific categories of works; Walter makes the observation that the definition of originality laid down in these Directives, although limited to the categories of works, appears to indicate a uniform understanding of the meaning of originality, Michel Walter and Silke Von Lewinski, *EU Copyright Law: A Commentary* (Oxford University Press 2010) para 16.05, 1466.

<sup>41</sup> Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property Law* (5th edition, Oxford University Press 2018) 98.

<sup>42</sup> *Infopaq Int v Danske Dagblades Forening*, Case C-5/08, ECLI:EU:C:2009:465.

<sup>43</sup> *Bezpe nostní softwarová asociace-Svaz softwarové ochrany v Ministerstvo kultury*, Case C-393/09, ECLI:EU:C:2010:816.

<sup>44</sup> Software Directive Article 1(3); Database Directive Article 3(1).

<sup>45</sup> Bently op. cit. 98.

<sup>46</sup> Image from The Fat Duck, downloaded from <http://bearandmeblog.blogspot.com/2013/10/wacky-dishes-1-heston-blumenthal.html> (accessed 28 April 2019).

<sup>47</sup> Harry Wallop, “The Fat Duck: Tell me Heston – can any meal really be worth £255?” (*The Telegraph*, 4 March 2016) [www.telegraph.co.uk/food-and-drink/restaurants/the-fat-duck-tell-me-heston---can-any-meal-really-be-worth-255/](http://www.telegraph.co.uk/food-and-drink/restaurants/the-fat-duck-tell-me-heston---can-any-meal-really-be-worth-255/) (accessed 28 April 2019).

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.





Figure 3. Image from Yann Bernad Lejard's Instagram page, [www.instagram.com/p/BL5-RqRnSaJ/](https://www.instagram.com/p/BL5-RqRnSaJ/)



Figure 4. Alice. "5 Course Art" (WG, June 2018 issue, 77)

<sup>53</sup> Infopaq Int v Danske Dagblades Forening, Case C-5/08, ECLI:EU:C:2009:465, para 45.

<sup>54</sup> Ibid.

<sup>55</sup> Eva-Maria Painer v Standard Verlags GmbH, Case C-145/10, ECLI:EU:C:2011:798, paras 88-92: "As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices. As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. By making those various choices, the author of a portrait photograph can stamp the work created with his personal touch".

<sup>56</sup> Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, Case C-604/10, ECLI:EU:C:2012:115, para 38.

<sup>57</sup> Bezpečnostní softwarová asociace-Svaz softwarové ochrany v Ministerstvo kultury, Case C-393/09, ECLI:EU:C:2010:816; Bently op. cit. 100.

<sup>58</sup> Infopaq Int v Danske Dagblades Forening, Case C-5/08, ECLI:EU:C:2009:465, para 45.

<sup>59</sup> Football Dataco Ltd and Others v Yahoo! UK Ltd and Others Case, C-604/10, ECLI:EU:C:2012:115, para 38.

<sup>60</sup> Bezpečnostní softwarová asociace-Svaz softwarové ochrany v Ministerstvo kultury, Case C-393/09, ECLI:EU:C:2010:816; Bently op. cit. 100.

<sup>61</sup> Buccafusco op. cit. 1339.

<sup>62</sup> Under Swedish law, the preparatory works of 1956 hold that every original artistic or literary work that is created with an artistic ambition aiming at an artistic result could be protected under copyright law.

<sup>63</sup> Article 2(1) and (2) of the Berne Convention states: (1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. (2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

<sup>64</sup> Infopaq Int v Danske Dagblades Forening, Case C-5/08, ECLI:EU:C:2009:465, para 45; Football Dataco Ltd and Others v Yahoo! UK Ltd and Others Case, C-604/10, ECLI:EU:C:2012:115, para 38; Bezpečnostní softwarová asociace-Svaz softwarové ochrany v Ministerstvo kultury, Case C-393/09, ECLI:EU:C:2010:816.

<sup>65</sup> Bently op. cit. 60.

<sup>66</sup> The harmonizing copyright directives are as follows: Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable transmission; Directive 96/9/EC on the legal protection of databases; Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (Infosoc); Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art; Directive 2006/115/EC on rental right and

lending right and on certain rights related to copyright in the field of intellectual property; Directive 2006/116/EC on the term of protection of copyright and certain related rights; Directive 2009/24/EEC on the legal protection of computer programs; Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights; Directive 2012/28/EU on certain permitted uses of orphans work; Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

<sup>67</sup> Artistic works is the fourth category of works protected by copyright in the U.K; section 4(1) of the CDPA of 1988 provides: "artistic work" means (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, (b) a work of architecture being a building or a model for a building, or (c) a work of artistic craftsmanship."

<sup>68</sup> "Hotel overview" [The Ritz Carlton Bahrain, publish date unknown] [www.ritzcarlton.com/en/hotels/middle-east/bahrain/hotel-overview/press-releases/yann-bernard-lejard-executive-chef](http://www.ritzcarlton.com/en/hotels/middle-east/bahrain/hotel-overview/press-releases/yann-bernard-lejard-executive-chef) [accessed 28 April 2019].

<sup>69</sup> "5 Course Art" (WG, June 2018 issue, 77) [https://issuu.com/wogoa/docs/wg\\_june\\_2018\\_issue](https://issuu.com/wogoa/docs/wg_june_2018_issue) [accessed 28 April 2019].

<sup>70</sup> Ibid.

<sup>71</sup> Image from Yann Bernad Lejard's Instagram page, [www.instagram.com/p/BL5-RqRnSaJ/](https://www.instagram.com/p/BL5-RqRnSaJ/) [accessed 28 April 2019].

<sup>72</sup> "5 Course Art" (WG, June 2018 issue, 77) [https://issuu.com/wogoa/docs/wg\\_june\\_2018\\_issue](https://issuu.com/wogoa/docs/wg_june_2018_issue) [accessed 28 April 2019].

<sup>73</sup> Ibid.

<sup>74</sup> [1983] FSR 32; Bently op. cit. 73.

<sup>75</sup> Bently op. cit. 73.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> [1983] FSR 46; Bently op. cit. 73.

<sup>80</sup> Metix (UK) Limited and Another v G.H. Maughan (Plastics) Limited and Another (1997) F.S.R 718.

To establish whether this signature dish and plating is protected by copyright, the question is if it is an original work in the sense that it is the author's own intellectual creation? In an attempt to answer this question, it is necessary to determine the content given to the said concept by the CJEU. In *Infopaq*<sup>53</sup> the Court explained that: "Words... considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result, which is an intellectual creation."<sup>54</sup> Similar to the *Painer case*<sup>55</sup>, in *Football Dataco* the Court observed: "...the criterion of originality is satisfied when, through the selection or arrangement... the author expresses his creative ability in an original manner by making free and creative choices... and thus stamps his 'personal touch'."<sup>56</sup> In *Bezpečnostní softwarová asociace*, the Court has also indicated that originality will not be present where expression is dictated by function explaining that "the criterion of originality is not met since the different methods of implementing an idea are so limited that the idea and the expression become indissociable."<sup>57</sup>

When applying the above stated jurisprudence of the CJEU to *The Sound of the Sea* created by Heston Blumenthal, it can be convincingly argued that the dish and plating is original in the sense that it is the authors own intellectual creation. Considering the criteria in *Infopaq*<sup>58</sup> and *Football Dataco*<sup>59</sup> above, Heston Blumenthal clearly expressed his creativity by transporting the customer to his or her childhood, through his choice and combination of all the elements used in the dish and its plating. Furthermore, when considering the criteria in *Bezpečnostní softwarová asociace*<sup>60</sup> it can convincingly be argued that Heston's creative choices in the presentation of the dish are not dictated by the function of preparing the food, and as a result he achieved an individualized result which reflects his personal touch. Support for the latter reasoning is also found in literature, as Buccafusco suggests that for dishes, it is easy to conceptually separate the functional elements ("the basic need to provide calories") from the artistic ("the aesthetic merits").<sup>61</sup>

Changing view, one might argue that all that Heston Blumenthal did was to exert a considerable amount of pecuniary effort in the creation of his dish, and therefore, is not an intellectual creation. However, this argument is unconvincing, as one would have to disregard Heston's reason and purpose for creating the dish, i.e. his artistic ambition,<sup>62</sup> as well as his choices and combinations used in the presentation thereof reflecting his personality.

## 2.3 U.K. perspective

A definition or list of the different categories of protected works under the Berne Convention, is a matter for national legislation.<sup>63</sup> Following general principles of EU law (as seen above (Section 2.2) from the CJEU case law)<sup>64</sup> each Member State's copyright law should be read in a such a manner that anything which constitutes an "intellectual creation" should be protected.<sup>65</sup> Thus, if a work, e.g. signature dish or plating, does not fall within the definitions adopted by Member States, it does not automatically

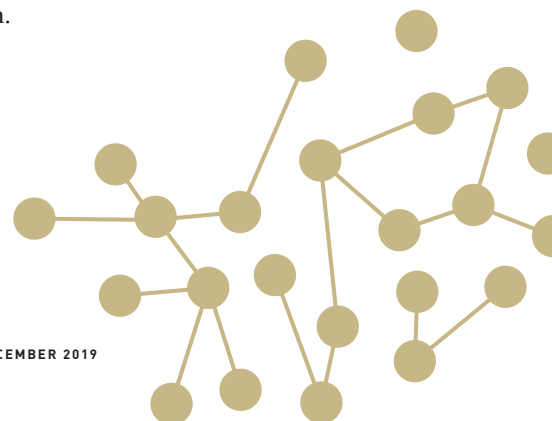
mean that such work is not protected, as the CJEU test is whether it is an intellectual creation.

Notwithstanding the aforementioned CJEU criteria for copyright protection, this section will proceed to consider copyright protection on national level to investigate how the subject matter of signature dishes and plating might fit into national copyright law. The U.K. is elected for this consideration being one of the jurisdictions that have implemented the 10 harmonizing copyright directives.<sup>66</sup> The following section will endeavour to investigate if signature dishes and plating as such would possibly qualify as artistic works<sup>67</sup>, and in certain instances dramatic works, under the U.K. Copyright, Designs and Patents Act c. 48 of 1988 (hereafter referred to as CDPA of 1988).

### 2.3.1 Paintings

Chef Yann Bernard Lejard (executive chef of the *Ritz-Carlton*, Bahrain) initially expressed himself "through street art, taking inspiration from the likes of modern art legend Jackson Pollock (1912-1956)" but eventually it was food he found to be a catalyst for his artistic expression.<sup>68</sup> Lejard is renowned for his signature style of drawing sauce on a plate.<sup>69</sup> Lejard is regarded as an "artist" in the culinary industry who is "leading the way in the visual presentation of food".<sup>70</sup> His early work, using a black background and a white plate (figure 3)<sup>71</sup> is frequently copied.<sup>72</sup> All of Lejard's dishes have a story. When he plates, he calls the plate by name and never uses the name of the item on the plate (e.g. *Alice*, figure 4).<sup>73</sup> But would Lejard's work qualify as a painting under section 4(1)(a) of the CDPA of 1988?

The answer to this question might be evident from the case *Merchandising Corp. v Harpbond*,<sup>74</sup> in which it was argued that the facial make-up of the pop star Adam Ant was protected by copyright.<sup>75</sup> The Court of Appeal rejected this submission, Lord Justice Lawton held that a painting required a surface and that Adam Ant's face did not qualify as such, stating that "a painting is not an idea: it is an object; and paint without a surface is not a painting".<sup>76</sup> Bently notes that the reasoning of Lawton LJ seems odd, for it is difficult to see why Adam Ant's face is less of a surface than a piece of canvas.<sup>77</sup> Bently provides that the decision could be justified on the ground that a painting must be intended to be permanent.<sup>78</sup> However, such a justification would only provide useful in jurisdictions where fixation is a requirement, such as the U.S. Alternatively, Bently states that the decision could be seen as a case of merger of idea and expression for which no protection is granted.<sup>79</sup> Thus, based on the decision in *Merchandising Corp. v Harpbond* it is doubtful that a plate painted by Lejard would qualify as a "painting". However, in terms of *Metix (UK) Ltd v GH Maughan (Plastics) Ltd*<sup>80</sup> the temporal nature of the work would not disqualify the work from copyright protection.



### 2.3.2 Drawings and diagrams

It has been reported that a number of decorated chefs begin their creations at the drawing board.<sup>81</sup> An example of such a sketch can be seen in figure,<sup>82</sup> showing a sketch by Chef Grant Achatz (*Alinea*) that gave rise to one of his famous dishes. The question however is, if such a sketch could be protected under section 4(1)(a) of the CDPA of 1988 as a drawing? Protection has been granted to architects plans distinct from the buildings themselves and also to sketches for dress designs.<sup>83</sup> Accordingly, no evident reason appears why protection would not be afforded to the drawing of a chef. If a chef should enjoy protection in this regard, it would help in preventing the copying of the dish and plating itself.<sup>84</sup>

### 2.3.3 Sculptures

This paragraph aims to investigate whether signature dishes and plating can qualify as sculptures. A practical example would be to ask whether the centerpiece with frozen eucalyptus and lime (figure 6)<sup>85</sup> previously served at *Alinea* would qualify as a sculpture. In an interview with *Saveur* magazine, chef Grant Achatz explained his creation as follows: "Last spring, we set out to create a new centerpiece to aesthetically imitate the seasonal change from winter

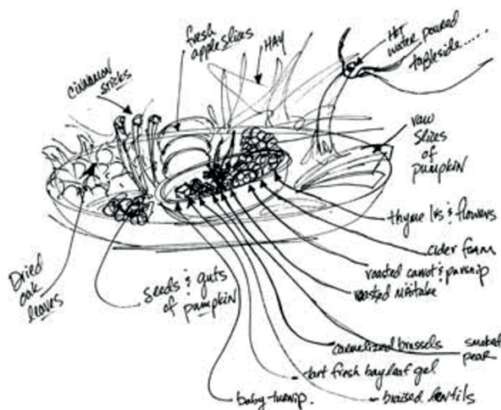


Figure 5. From Paper to Plate: Recipe Sketches from *Alinea* and Le Bernardin" (*Saveur*, 25 January 2011) [www.saveur.com/article/Kitchen/Recipe-Sketches-Alinea-Le-Bernardin](http://www.saveur.com/article/Kitchen/Recipe-Sketches-Alinea-Le-Bernardin)



Figure 6. Image from [www.pinterest.se/foodandhealth/alinea-desserts/?autologin=true](http://www.pinterest.se/foodandhealth/alinea-desserts/?autologin=true). ([www.bonappetit.com](http://www.bonappetit.com))

to spring. We are always interested in courses that transform in front of the guest, and after brainstorming we decided on the concept of the 'spring thaw.' A fresh eucalyptus branch arrives at the table, frosted with ice, suspended over a glass. As the meal progresses, the guest watches the ice melt and drip off the leaves. The melted liquid collects at the bottom of the glass, and mixes with a lime ice cube. Eventually, the service staff removes the branch. The guest is then presented the resulting lime-eucalyptus cocktail as a refreshing palate cleanser mid-meal."<sup>86</sup>

Considering appropriate tests from case law, it is evident that there are limits to what can be a sculpture. A distinction was made by Justice Mann in *Lucasfilm Ltd v Ainsworth*<sup>87</sup> between Carl Andre's bricks in the Tate Modern and an identical pile of bricks left at the end of a drive for a forthcoming building project.<sup>88</sup> The former was a sculpture because an artist made it for artistic purposes whilst the latter was not a sculpture because a builder made it for building purposes.<sup>89</sup> Mann J provided nine guiding factors (approved by the Court of Appeal in 2010, Ch 503, para 54) to assist in determining whether a particular object is a sculpture for purposes of the CDPA 1988.<sup>90</sup> For purposes of this discussion, factors (ii), (vi) and (vii) are of particular significance:

- (ii) "The concept (sculpture) can be applicable to things going beyond what one would normally expect to be art in the sense of the sort of things that one would expect to find in art galleries."
- (vi) "It is of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well. The purpose is that of the creator. This reflects the reference to "artist's hand" in the judgment of Laddie J in *Metix*, with which I respectfully agree. An artist (in the realm of the visual arts) creates something because it has visual appeal which he wishes to be enjoyed as such. He may fail, but that does not matter (no judgments are to be made about artistic merit). It is the underlying purpose that is important"; and
- (vii) "The fact that the object has some other use does not necessarily disqualify it from being a sculpture, but it still has to have the intrinsic quality of being intended to be enjoyed as a visual thing."

A further decision that is of value in this discussion is the case of *Metix (UK) Ltd v GH Maughan (Plastics) Ltd*,<sup>91</sup> which held that "something which has a transient existence may nevertheless be a work of sculpture". In *Metix*, Laddie J approved of the example that an ice sculpture is no less a sculpture because it will melt, assuming that the chef is an artist.<sup>92</sup> Therefore, as with all artistic or literary works, it is not a requirement that a creation be permanent to qualify as a sculpture.

In applying the above principles from case law to the question whether a signature dish and plating, such as *Alinea*'s centerpiece with frozen eucalyptus and lime can qualify as a sculpture, the result seems to be in the affirmative:



- The creation in served at *Alinea* goes “beyond what one would normally expect to be art in the sense of the sort of things that one would expect to find in art galleries” and as such not disqualified as being regarded as a sculpture;<sup>93</sup>
- Chef Grant Achatz said that it was their aim “to create a new centerpiece to aesthetically imitate the seasonal change from winter to spring” and that the guests watch how the white frost melts away to reveal the green eucalyptus branch. Thus, it is clear that chef Grant Achatz intended to create something that has visual appeal and that it should be enjoyed *inter alia* for that purpose;<sup>94</sup>
- The fact that the creation has another purpose, i.e. use as a palette cleanser between meals, does not disqualify it from being a sculpture because it holds the “intrinsic quality of being intended to be enjoyed as a visual thing”<sup>95</sup> and
- Finally, the fact that the creation is intended to diffuse and be consumed, i.e. not being permanent, does not disqualify it from being a sculpture.<sup>96</sup>

### 2.3.4 Artistic craftsmanship

In order for a work to fall within this category, it is necessary to show that the work is “artistic” and that it is a work of “craftmanship”.<sup>97</sup> Bently states that this approach is unusual to copyright law because it requires the courts to consider whether the work satisfies the qualitative threshold of being artistic.<sup>98</sup>

#### 2.3.4.1 Artistic

The question of what is meant by a work of artistic craftsmanship was discussed by the House of Lords in *Hensher v Restawhile*,<sup>99</sup> in which case all their Lordships agreed that the subject matter was not artistic but differed in

their reasoning.<sup>100</sup> In subsequent case law there has been little consistency as to the approach to be taken when assessing artistry.<sup>101</sup> For purposes of considering whether signature dishes and plating can possibly qualify as “artistic” the different tests provided in *Hensher* (as opposed to later case law) will be employed, for the reason that the diverging tests in *Hensher* provide the opportunity to assess the “artistic” criteria at a larger view:

- Lord Reid said that the test to decide whether a work was artistic is whether “any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual from looking at” and that the author’s intention that the resulting product is artistic is neither necessary nor conclusive.<sup>102</sup>
- Lord Morris said that a court should look to see if there is a general consensus of opinion “among those whose views command respect” thus the court would be guided by evidence given by specialists.<sup>103</sup>
- Lord Kilbrandon said expert evidence was irrelevant and instead it is for the judge to determine whether the author had the “desire to produce a thing of beauty which would have an artistic justification for its own existence”.<sup>104</sup>
- Viscount Dilhorne said that a work would not be artistic merely because there was originality of design, but that it could be artistic even if it were functional. Viscount Dilhorne said that expert evidence and public opinion would be relevant but in the end it is the judges own intuition as to what is a “work of art”.<sup>105</sup>
- Lord Simon emphasized that it was the craftsmanship rather than the work that must be artistic, and included hand-painters of tiles as an example of artistic craftsmen.

<sup>81</sup> “From Paper to Plate: Recipe Sketches from Alinea and Le Bernardin” (Saveur, 25 January 2011) [www.saveur.com/article/Kitchen/Recipe-Sketches-Alinea-Le-Bernardin](http://www.saveur.com/article/Kitchen/Recipe-Sketches-Alinea-Le-Bernardin) (accessed 28 April 2019).

<sup>82</sup> Figure 5: a sketch of a dish of roasted maitake mushrooms with chestnuts, roasted vegetables and autumnal aromas; in an interview with Saveur magazine, Achatz stated the following regarding this sketch: “During a brain-storming meeting we started asking ourselves the touchstones of the upcoming fall season. Halloween, Thanksgiving, and hayrides were common answers, followed by the inevitable question: ‘what does a hayride smell like?’ For me, the combination of hay, apples, cinnamon, freshly-cut pumpkins and dried leaves, evoke vivid memories. As kids, we used ride in the back of a tractor pulled wagon and eat cinnamon doughnuts with apple cider in the crisp autumn air. In order to recreate the hayride, we had to carefully balance each of the elements. Too much cinnamon or apple yield a result like apple pie. Too much hay or leaf material overpowers the pumpkin and apple aromas”; *ibid.*

<sup>83</sup> *Bernstein v Murray* [1981] RPC 303; Bently *op. cit.* 74.

<sup>84</sup> Bently *op. cit.* 74.

<sup>85</sup> Image downloaded from [www.pinterest.se/foodandhealth/alinea-desserts/?autologin=true](http://www.pinterest.se/foodandhealth/alinea-desserts/?autologin=true) ([www.bonappetit.com](http://www.bonappetit.com))

<sup>86</sup> “From Paper to Plate: Recipe Sketches from Alinea and Le Bernardin” (Saveur, 25 January 2011) [www.saveur.com/article/Kitchen/Recipe-Sketches-Alinea-Le-Bernardin](http://www.saveur.com/article/Kitchen/Recipe-Sketches-Alinea-Le-Bernardin) (accessed 28 April 2019).

<sup>87</sup> *Lucasfilm and others v Andrew Ainsworth and another* [2008] EWHC 1878 (Ch) para 118.

<sup>88</sup> David Bainbridge, *Intellectual Property* (9th edition, Pearson 2012) 63, with reference to *Lucasfilm and others v Andrew Ainsworth and another* [2008] EWHC 1878 (Ch) para 118.

<sup>89</sup> Bainbridge *op. cit.* 63.

<sup>90</sup> *Lucasfilm and others v Andrew Ainsworth and another* [2008] EWHC 1878 (Ch) para 118.

<sup>91</sup> *Metix (UK) Limited and Another v G.H. Maughan (Plastics) Limited and Another* [1997] F.S.R. 718.

<sup>92</sup> *Ibid.*

<sup>93</sup> Para 118 (iii).

<sup>94</sup> Para 118 (vi).

<sup>95</sup> Para 118 (vii).

<sup>96</sup> *Metix (UK) Limited and Another v G.H.*

*Maughan (Plastics) Limited and Another* [1997] F.S.R. 718.

<sup>97</sup> Section 4(1)(c) CDPA 1988; Bently *op. cit.* 79.

<sup>98</sup> Bently *op. cit.* 80.

<sup>99</sup> *George Hensher v Restawhile Upholstery (Lancs)* [1976] AC 64; Bently *op. cit.* 80.

<sup>100</sup> Bently *op. cit.* 80.

<sup>101</sup> In *Merlet v Mothercare* [1986] RPC 115 Walton J concluded that in the first instance the question is whether the artistic-craftsmen intended to create a work of art, if the intention was present and the creator had not “manifestly failed” in this regard, then the work was a work of art; in *Vermaat v Boncrest* [2001] FST [5] 49 a different test was adopted, requiring not merely intention but actual evidence of creativity, in the sense of being produced by someone with creative ability and having aesthetic appeal. In *Guild v Eskandar* [2001] FSR [38] 645 the court considered whether the garment can fairly be regarded as satisfying the aesthetic emotions of a substantial section of the public.

<sup>102</sup> 78G; Bently *op. cit.* 80.

<sup>103</sup> 81D; *ibid.*

<sup>104</sup> 98C; *ibid.*

<sup>105</sup> 87 E-F.



If one would apply the above tests to signature dishes and plating, a cumulative criteria, (formulated herein to find the strictest criteria for the investigated subject matter) could be phrased as follows:

- The particular dish and / plating should be admired by the public for its appearance;
- Experts in the culinary field should regard it as “artistic”;
- The chef must have held the desire to produce a thing of beauty when creating it;
- It must be a “work of art” according to the Judge’s intuition;
- Culinary artists would have to be regarded as artistic craftsmen.

#### 2.3.4.2 Craftmanship

In addition to proving that the work is artistic, it is also required to show that it is a work of craftsmanship.<sup>106</sup> In *Hensher v Restawhile*<sup>107</sup> Lord Simon defined a work of craftsmanship as presupposing “special training, skill and knowledge” for its production and that it implied “a manifestation of pride in sound workmanship”.<sup>108</sup> A different approach was given by Lord Reid, in the same case, who defined a work of craftsmanship as a “durable, useful handmade object”.<sup>109</sup>

Considering the criteria of *artistic craftsmanship* under section 4(i)(c) of the CDPA 1988, and the meaning thereof as provided in the above case law, it is submitted that a signature dish and plating would most likely have the ability to satisfy the *artistic* criteria. However, although it could be convincingly argued that gastronomy presupposes “special training, skill and knowledge” and that a signature dish and plating is “a manifestation of pride in sound workmanship”, the requirement of being *durable* seems to be detrimental to satisfying the craftsmanship criteria in this regard. Thus, it is doubtful whether a signature dish and plating would qualify as a work of artistic craftsmanship under U.K. law.

#### 2.3.5 Dramatic works

In her research on the sociology of food and cuisine, Ferguson noted, “cuisine belongs with the performative arts,

and as for other such arts, the social survival of the culinary performance depends on words.”<sup>110</sup> At Alinea in Chicago, chef Achatz is reputed for creating dessert at the table, or rather, on the table. In short, Achatz (and his colleagues) start by placing what appears to be a chocolate ball in the centre of the table, followed by a sequence of synchronized painting of chocolate and other elements of the dessert on the table surface. Finally, Achatz picks up the chocolate ball that forms the centre piece and abruptly throws it breaking on the table, before walking away.<sup>111</sup> This paragraph will analyse the plausibility of certain signature dishes and plating, such as Achatz’s dessert, of being protected as dramatic works under section 3(1) CDPA of 1988.

For a creation to qualify as a “dramatic work” it must be a “work of action” that is “capable of being performed”.<sup>112</sup> Considering the first requirement, that it must be a “work of action” it is accepted that it does not include static objects, sets scenery, or costumes.<sup>113</sup> Applying this requirement to Achatz’s dessert the outcome seems to be twofold in consequence: Achatz’s actions (his movements) clearly satisfy the first requirement, although the items compromising the dessert are static and as such will not form part of the dramatic work (however, these might be protected as artistic works).

The second requirement, that the work must be “capable of being performed” have been held to mean that the dramatic work must have significant unity for it to be capable of being performed.<sup>114</sup> Considering that Achatz himself, and also other colleagues, are able to re-enact the dessert presentation numerous times, in an identical manner, suggests that the second criteria would be satisfied.

#### 2.4 A recipe’s role

Accepting that a recipe, in general, is not susceptible to copyright, does not mean a recipe per se is totally irrelevant for purposes of copyright in the present study. In jurisdictions where the national law might prescribe some form of material fixation, as the U.S. and Canada, *Buccafusco* suggests that the recipe for the signature dish would be the means of fixation whilst the dish itself as an expressive medium would be the work.<sup>115</sup> The means of fixation of signature dishes and plating would not have to be limited

<sup>106</sup> Bently op. cit. 82.

<sup>107</sup> *George Hensher v Restawhile Upholstery* [Lancs] [1976] AC 64; Bently op. cit. 82.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ferguson P, *Accounting for Taste: The Triumph of French Cuisine* (University of Chicago Press 2004) 20.

<sup>111</sup> Hilaoj “Final Dessert of 20 Course Meal at Alinea” (YouTube, 13 December 2010); [www.youtube.com/watch?v=qofsdSMuGbg](http://www.youtube.com/watch?v=qofsdSMuGbg); G Shindo “Alinea Dessert Plating” (YouTube, 27 May 2013) [www.youtube.com/watch?v=xhm-kotwDpTg](http://www.youtube.com/watch?v=xhm-kotwDpTg) (accessed 28 April 2019).

<sup>112</sup> *Norowzian v Arks* [No 2] [2000] EMLR 67 (CA) 73; Bently op. cit. 68.

<sup>113</sup> Bently op. cit. 70.

<sup>114</sup> *Green v Broadcasting Corp of New Zealand* [1989] RPC 469 (CANZ), 477; *Court a qua in Norowzian v Arks* [No 2] [2000] EMLR 67 (CA).

<sup>115</sup> *Buccafusco* op. cit. 1123.

<sup>116</sup> Rochelle C Dreyfuss and Justine Pila, *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018) 5.

<sup>117</sup> *Strauss* op. cit. 214; in a legal context, a chilling effect is defined as the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction (Your Dictionary, search term “chilling effect”) <http://law.yourdictionary.com/chilling-effect> (accessed 28 April 2019).

<sup>118</sup> In the U.S. fair use is a statutory carveout that declares that use of copyrighted material “for

purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright” *Strauss* op. cit. 214.

<sup>119</sup> Berne Convention art 9-12.

<sup>120</sup> *Strauss* op. cit. 213.

<sup>121</sup> Ibid.

<sup>122</sup> *Buccafusco* op. cit. 1121.

<sup>123</sup> Ibid.

<sup>124</sup> *Strauss* op. cit. 214; *Buccafusco* op. cit. 1122.

<sup>125</sup> *Strauss* op. cit. 214.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> *Lucasfilm and others v Andrew Ainsworth and another* [2008] EWHC 1878 (Ch) para 119.

to recipes. It could also be in the form of inter alia a photograph or diagram (being works of authorship in their own right). The fixation of signature dishes and plating, and specifically its transient nature, is well illustrated when considered in analogue to the following textbook example: A photograph of an ice sculpture (work of authorship in its own right) may fix the ice sculpture, thus preserving the record of the work after the original has melted, but the two works are as distinct as if the photograph had depicted a previously fixed sculpture, such as a statue in bronze.<sup>116</sup> Although fixation is not required in the EU, this logic of reasoning helps to create a clear understanding of what role a recipe plays in the copyright protection of signature dishes, as the protection of recipes per se is not to be confused with the copyright protection of signature dishes and plating.

## 2.5 Fears of a chilling effect

Strauss provides that the most common arguments against extending copyright protection to dishes are that such protection would stifle creativity and grant certain chefs monopolies over dishes that belong to the community as a whole – resulting in a so called chilling effect.<sup>117</sup> Broussard and Buccafusco each propose a different solution to this possible problem, both views are summarized hereunder with the addition of commentary by Strauss.

Broussard suggests that the fair use doctrine under U.S. law<sup>118</sup> (in EU context, national exceptions in the similar vein)<sup>119</sup> would adequately prevent the chilling effects of possible copyright infringement litigation.<sup>120</sup> However, Strauss provides that it is difficult to determine ex ante whether a particular use will be considered fair or not (or within the scope of a national exception in a Member State), consequently many people will choose not to offer dishes that are very similar to those of others to avoid claims of infringement.<sup>121</sup> A further issue pointed out by Strauss in this regard is that the culinary industry is known for development of skills through apprenticeships, consequently it might be difficult to distinguish between recreating another chef's signature dish or plating for educational or commercial purposes, the latter requiring a license whilst the first mentioned would fall within one of the exceptions.<sup>122</sup>

Buccafusco provides that the “culinary public domain” would provide a solution to the fears of a chilling effect.<sup>123</sup> According to Buccafusco, the suggested culinary public domain would include those “recipes (that) have been produced for years, if not for generations, and (whose) original creators are unknown.”<sup>124</sup> Copyright protection would not be afforded to restatements of these dishes because they would not satisfy the originality requirement.<sup>125</sup> Buccafusco suggests that recognizing a culinary public domain would serve the important purpose of keeping available to all cooks and restaurants the right to keep preparing classic dishes.<sup>126</sup> Innovative signature dishes and plating that have no gastronomic precedent, would fall outside the culinary public domain and enjoy copyright protection.<sup>127</sup> Furthermore, signature dishes that are a chef's personal take on one of the classics, but still creative enough that they are not simply re-creations of the clas-



sics and thereby satisfying the originality requirement, would also enjoy protection.<sup>128</sup> However, when assessing Buccafusco's proposition, it is to be noted that the granting of copyright under these special rules, would by implication weaken the area and thereby the acceptance of copyright protection.

## 2.6 Conclusion

The point of departure in this chapter was the question whether food can be considered as art? This has been found to be a subjective question with no apparent strict answer. As Mann J stated in the *Lucasfilm* case: “*What is art?* is an unanswerable question.”<sup>129</sup> In support of an answer in the affirmative whether signature dishes and plating can be considered as art, Tefler's theory is of note. She argues that food can elicit aesthetic reactions visually, in tastes and smells, and humans can distinguish enjoying visual composition, tastes or smells apart from approving of them instrumentally, on the grounds that the food is nourishing.

Departing from the above philosophical hypothesis that signature dishes and plating can be considered as art per se, the succeeding question, whether it is susceptible to copyright protection also proved to be in the affirmative. An analysis of the established categories of artistic works under U.K. copyright law and the respective criteria for each category, illustrates that signature dishes and plating could qualify as either paintings or sculptures but likely not works of artistic craftsmanship under section 4(1)(a) and (c) CDPA 1988, depending on the circumstances. The analysis of U.K. copyright law further proves that diagrams or drawings created by a chef during the creation process would also be possibly subject to copyright protection under the same section. The copyright in these drawings would extend protection for the author against the copying of the signature dish and or plating arrangement itself, by another chef. It is also found that under certain circumstances, a signature dish and plating could also be protected as a dramatic work under section 3(1) CDPA 1988.

Notwithstanding the illustrative and practical use of the aforementioned exercise analyzing signature dishes and plating as subject matter of artistic works under U.K. copyright law, the final deductions and conclusions on the matter at hand is to made in accordance with the harmonized system of EU copyright law. To establish whether a signature dish and or plating arrangement is protected by copyright under the EU standard, the only question is if it is an original work in the sense that it is the author's own *intellectual creation*? The concept of intellectual creation is explained in the cases of *Infopaq*,<sup>130</sup> *Painer*,<sup>131</sup> *Football Dataco*<sup>132</sup> and *Bezpečnostní softwarová asociace*.<sup>133</sup> In short the intellectual creation criteria requires that the author expresses his or her creative ability in an original manner by making free and choices (not dictated by function or rules) resulting in a work that reflects his or her personal touch.<sup>134</sup> Thus, if a signature dish and or plating arrangement meets this criteria, it would be subject to copyright protection under EU law, without having any regard to its aesthetic merits. It can therefore be said that, not only is *what is art* an unanswerable question as previously held, but also an irrelevant question when considering copyright protection of signature dishes and plating.

### 3. TRADE MARK AND DESIGN PROTECTION FOR SIGNATURE DISHES AND PLATING

Signature dishes and plating styles stand at the forefront in representing a chef or establishment's style, ethos, background and goals.<sup>135</sup> In summary, it encompasses the identity of the establishment or chef.<sup>136</sup> Signature dishes and plating arrangements have the ability to generate vast media attention, both in the editorial- and social media sphere. In an era where consumers, more than ever before due to the advent of social media, are motivated by the association or identity of a brand, signature dishes and

plating take prominence in distinguishing one competitor from another and inducing consumers. As an example, when one considers the phenomena of social media *influencers*,<sup>137</sup> it has become the norm when posting a photo in a restaurant setting to tag the name of the establishment and signature dish in a similar vein to tagging the designers of the featured influencers apparel and other accessories. Furthermore, consumers can also evaluate the signature dishes and plating of the dish through published photographs before making a reservation at the particular establishment. Thus, the dish's appearance serves as a proxy for its culinary quality—the more aesthetically pleasing the plating, the higher the presumed quality of the restaurant.<sup>138</sup> Beyond serving as a proxy for quality, Strauss provides that attractive plating also contributes value to the dining experience, just as a pleasant ambiance increases the value of a restaurant meal.<sup>139</sup>

In considering viable avenues for protection of signature dishes and plating within the scope of IP law, a number of scholars from the U.S. argue that trade dress provides the most suitable protection in this regard.<sup>140</sup> In this line of reasoning, it is argued that a signature dish and plating can potentially constitute an indelible mark of association in the consumer's mind between the dish and its source restaurant.<sup>141</sup> Therefore the foods' trade dress possess tremendous exploitability and constitutes a valuable asset for the establishment and or chef.<sup>142</sup>

In an attempt to establish whether this argument has potentially equal merit and applicability under Community law, this chapter aims to first establish how "trade dress" is protected in the EU, with specific focus on the question of trade dress protection for signature dishes and plating.

#### 3.1 Trade dress under European law

Trade dress is a judicially-made notion originally stemming from the U.S. jurisdiction and refers to the overall

<sup>130</sup> *Infopaq Int v Danske Dagblades Forening*, Case C-5/08, ECLI:EU:C:2009:465, para 45.

<sup>131</sup> *Eva-Maria Painer v Standard Verlags GmbH*, Case C-145/10, ECLI:EU:C:2011:798, para 88-92: "as stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices. As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. By making those various choices, the author of a portrait photograph can

stamp the work created with his personal touch".

<sup>132</sup> *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others* Case, C-604/10, ECLI:EU:C:2012:115, para 38.

<sup>133</sup> *Bezpečnostní softwarová asociace v Ministerstvo kultury*, Case C-393/09, ECLI:EU:C:2010:816; Bently op. cit. 100.

<sup>134</sup> *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others* Case, C-604/10, ECLI:EU:C:2012:115, para 38.

<sup>135</sup> Strauss op. cit. 204.

<sup>136</sup> *Ibid.*

<sup>137</sup> Defined as someone who affects or changes the way that other people behave, through their use of social media (Cambridge Dictionary, search term "influencer") <https://dictionary.cambridge.org/dictionary/english/influencer> [accessed 28 April 2019].

<sup>138</sup> Strauss op. cit. 204.

<sup>139</sup> *Ibid.* 206.

<sup>140</sup> George op. cit. 11.

<sup>141</sup> Mary Grace Hyland, "A Taste of the Current Protection Offered by Intellectual Property

Law to Molecular Gastronomy" *Cybaris*: Vol. 8: Iss. 1 [2017] 178.

<sup>142</sup> George op. cit. 3.

<sup>143</sup> Duygu Campinari, "Expansion in the Subject-Matter of Trademark: Have the Law of Passing-Off and the Law of Designs Become Redundant regarding the Protection of Trade Dress?" (IPR Gezgini, 8 June 2016) <https://iprgezgini.org/2016/06/08/expansion-in-the-subject-matter-of-trade-mark-have-the-law-of-passing-off-and-the-law-of-designs-become-redundant-regarding-the-protection-of-trade-dress/> [accessed 28 April 2019].

<sup>144</sup> *Ibid.*

<sup>145</sup> "Trade Dress Protection in Europe Report" prepared by the Europe Subcommittee of the Trade Dress Committee 2004-2005 and by the Europe Subcommittee of the Non-Traditional Marks Committee 2006-2007 (September 2007). The report provides an overview of the current legal framework of Trade Dress in the EU, EU Member States, and elsewhere in Europe. Trade Dress is regarded as product design and packaging

image of a product or service as source indicator.<sup>143</sup> In Europe, the term trade dress is not used explicitly, instead, the term “get-up” is used to identify the total look and feel of the product.<sup>144</sup> *The Trade Dress Protection in Europe Report* prepared by the Europe Subcommittee of the Trade Dress Committee and by the Europe Subcommittee of the Non-Traditional Marks Committee (hereafter INTA report)<sup>145</sup> articulates the concept of trade dress as follows:

*“Trade dress” refers to the features of the visual appearance of a product or its packaging. It is generally accepted both within the EU and outside the EU that trade dress can be divided into different categories of features of the visual appearance of a product, for instance the shape of a product, the shape of a packaging of a product, the colour of a product and even the visual appearance of a shop front or the decor of a restaurant.*<sup>146</sup>

The INTA report provides that the rationale behind the protection of trade dress depends on the legal basis under which protection is sought, and that trade dress protection is available both under trade mark and design law in Europe. Under trade mark law theories, trade dress having secondary meaning is protected against confusion, because the public identifies in the trade dress the source of the product rather than the product itself.<sup>147</sup> Under design law theories, trade dress which is new and has individual character is protected against copying and imitation because it promotes the contribution of individual designers to the sum of Community excellence in the field, and encourages innovation and development of new products and investment in their production.<sup>148</sup> Trade dress protection for signature dishes and plating under trade mark and design law will be considered in turn.

### 3.2. European trade mark law

In the context of trade mark law and the culinary industry, it is evident that the names of restaurants, the names of individual dishes, and catchphrases may well serve as trade marks.<sup>149</sup> Chefs may also trademark their own names, which they can then license to their own restaurant business entity, other restaurants, or diffusion lines of packaged food, cookware, or other forms of merchandise.<sup>150</sup> Similarly, Strauss argues (from a U.S. perspective) that signature dishes and plating best qualifies in IP law as trade dress under trade mark law.<sup>151</sup> This section aims to examine this argument in the context of EU trade mark law, with the focus on the shape of goods or of their packaging, as the proposed trade mark of signature dishes or plating.

Pursuant to Article 4 of the Council Regulation (EU) 2017/1001 on the European Union trade mark (the EUTMR) shapes of goods or of their packaging are registrable as Community trade marks as long as they are capable of distinguishing the goods to which they apply from those of other undertakings and capable of being represented on the Register.<sup>152</sup> The signs to be registered may be either inherently distinctive pursuant to Article 7(1)(b)<sup>153</sup> or have acquired distinctiveness through use pursuant to Article 7(3)<sup>154</sup> EUTMR. Furthermore, as three-dimensional trademarks are of a type that might conflict with public interest,<sup>155</sup> protection of three-dimensional shapes as trademarks under EU trademark law is subject to special provisions i.e. it must not amount to one of the absolute grounds for refusal listed in Article 7(1)(e) EUTMR.

Within the context of signature dishes and plating as the proposed subject matter for trade mark protection, the following subsection will consider the distinctiveness criteria for shapes under Article 7(1)(b) EUTMR and the absolute grounds for refusal listed in Article 7(1)(e) EUTMR.

together with product configuration and shape. As a rule, relevant legislation does not provide a statutory definition of Trade Dress, and although definitions arise from case law these definitions vary from jurisdiction to jurisdiction. Another factor leading to dissimilar definitions is the applicability of various relevant laws such as Trademark Law, Unfair Competition Law, Copyright Law and Design Law. An essential question deriving from that is whether Trade Dress should be, or is sufficiently, protected under Trademark Law and whether additional explicit rules on Trade Dress protection should be introduced especially with regard to the possibility of harmonization on the European level.

<sup>146</sup> INTA Report op. cit. 6.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> For example, a trade mark search of the EU register shows 41 entries for JAMIE OLIVER, ranging from cookware to restaurant names (Trade Mark View, date of search 16 February 2019)

www.tmdn.org/tmview; Strauss op. cit. 195.

<sup>150</sup> Strauss op. cit. 195.

<sup>151</sup> Ibid.

<sup>152</sup> INTA Report refers to Article 4 of the Council Regulation (EC) No. 40/94 on the Community trademark (the Regulation); Article 2 of the Council Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks (EUTMD) contains a similar provision to Article 4 EUTMR.

<sup>153</sup> Article 3(1)(b) EUTMD.

<sup>154</sup> Article 3(3) of EUTMD.

<sup>155</sup> Since the decision in *Windsurfing Chiemsee Produktions v. Boots- und Segelzubehör Walter Huber & Franz Attenberger*, Cases C 108/97 and C 109/97 (ECJ, May 4, 1999) it has been clear that statutory provisions relating to absolute grounds of refusal must be interpreted in the context of the public interest and, in the context of shape marks, bearing in mind specifically that the exclusive and permanent right that a trade mark confers on the proprietor should not act as an enabler to effectively extend the life of, or protect subject matter that is normally

intended by the legislature to be protected by other types of intellectual property rights, notably design protection. Another, often cited public policy consideration for limiting monopolies on shapes and other characteristics of goods is to avoid making it unjustifiably difficult for competitors to give their goods a shape which would be suited for the normal commercial use for which those goods are intended, or that has a primarily decorative function, Oliver Lombardo, “Explaining the (in-)explainable addition of the words ‘Another Characteristic’ in the EU trademark law” (Denmeyer IP Blog, 2 June 2017) <http://blog.dennemeyer.com/explaining-the-in-explainable-addition-of-the-words-another-characteristic-in-the-new-eu-trademark-law> [accessed 28 April 2019].



### 3.2.1 Distinctiveness

Article 7(1)(b) EUTMR does not distinguish between different categories of trade marks in determining whether a trade mark is capable of distinguishing the goods or services of one undertaking from those of other undertakings.<sup>156</sup> Accordingly, there is not a stricter criteria for signs consisting of the shape of the goods themselves, however, it may be more difficult to come to a finding of distinctiveness, as such marks are not necessarily perceived by the relevant public in the same way as a word or figurative mark.<sup>157</sup>

Shape marks are grouped into three categories: (i) shapes unrelated to the goods and services themselves; (ii) shapes that consist of the shape of the goods themselves or part of the goods; and (iii) the shape of packaging or containers.<sup>158</sup> The basic test for distinctiveness of the shape itself is whether the shape is so materially different from basic, common or expected shapes that it enables a consumer to identify the goods just by their shape and to buy the same item again if he or she has had positive experiences with the goods.<sup>159</sup> Frozen vegetables in the form of a crocodile are a good example of this.<sup>160</sup> For purposes of this study, the distinctiveness criteria of the latter two categories are addressed hereunder.

#### 3.2.1.1 Shape of the goods themselves or shapes related to the goods or services

For trade marks consisting exclusively of the shape of the goods or services<sup>161</sup> themselves, the criteria for distinctiveness found in the EUIPO Guidelines can be summarized as follows:

- A shape is non-distinctive if it is a basic shape<sup>162</sup> or a combination of basic shapes;<sup>163</sup>
- The shape must depart significantly from the shape that is expected by the consumer, and it must depart significantly from the norm or customs of the sector;<sup>164</sup>
- It is not enough for the shape to be just a variant of a common shape or a variant of a number of shapes in an area where there is a huge diversity of designs;<sup>165</sup>
- Functional shapes or features of a shape mark will be perceived by the consumer as such.<sup>166</sup>

In the context of food shapes, two examples identified from the EUIPO Guidelines provide practical guidance. First, the mouse-shape of the German chocolate bar *Milchmäuse* (figure 7)<sup>167</sup> was refused registration. The CJEU confirmed the refusal on the basis that the shape is not sufficiently different from the shapes and colors of those commonly used in the sweet and chocolate sectors.<sup>168</sup> On the other end of the scale, as a second example but of a shape that was found distinctive and consequently accepted, is that of an ice cream (figure 8) which shape can be described as orbital or atom-like spheres.<sup>169</sup>

Considering whether a signature dish could qualify as a shape mark based on the distinctiveness criteria, it is useful to analyse an example from practice. Heston Blumenthal (The Fat Duck, London) serves canapés in the shape of ice lollies (figure 9).<sup>170</sup>

The first lolly is made up of layers of apple, celery and walnut; the second is a cylinder of salmon wrapped in avocado mousse; the third is chicken liver pate dipped in fig



Figure 7. Refused (EUIPO Guidelines)



Figure 8. Accepted (EUIPO Guidelines)

and red wine compote.<sup>171</sup> In analogy to the CJEU reasoning in the *Milchmäuse* case,<sup>172</sup> the shape(s) of this signature dish, unlike the mouse in the referred case, is arguably sufficiently different from the shape(s) usually used for savoury canapés and as such the shape departs significantly from the shape that is expected by the consumer and the norm or customs of the sector.<sup>173</sup>

#### 3.2.1.2 Shape of the packaging

The EUIPO Guidelines provide that the same criteria (para 3.2.1.1 above) apply for the “shape of bottles or containers” for the goods.<sup>174</sup> Accordingly, the shape applied for must be materially different from a combination of basic or common elements and must be striking.<sup>175</sup> Illustrative of the application of this criteria is the wrapping of the *Lindt & Sprüngli* chocolate bunny, commonly associated with German and/or Austrian tradition (Figure 10).<sup>176</sup> The bunny-shaped chocolate with gold wrapping was found to be a common phenomenon on the market corresponding to the industry concerned.<sup>177</sup> An analysis of the individual elements, that is, the shape of a rabbit, the gold foil wrapping and the red ribbon with a bell, were held both individually and cumulatively devoid of distinctive character and consequently refused as a shape mark.<sup>178</sup>

In the context of the present study, the question arises whether plating could constitute as packaging? Strauss argues in the affirmative stating that when a restaurant serves a dish, the food would be considered the product,

while its presentation and plating—on specific plates and with precise arrangements—constitute the packaging.<sup>179</sup> Consequently the packaging could then be protected as inherently distinctive trade dress.<sup>180</sup> In support of this argument, Strauss emphasizes that plating is not merely the arrangement of the elements of a dish but also includes literally the choice of the plate on which the food will be served.<sup>181</sup> Following this logic, an example of signature plating is considered to determine protectability as packaging.

Heston Blumenthal's (The Fat Duck, London) signature dessert "Counting Sheep" (figure 11)<sup>182</sup> consists of two small perfectly formed meringues made from coconut ice cream with a steamed sponge and panna cotta – constituting the product.<sup>183</sup> The dessert is served on a pillow that is seemingly floating and spinning in mid-air (magnets are employed to achieve the levitating effect) – arguably constituting the packaging.<sup>184</sup> Reportedly, this unique plating took 15 years to create.<sup>185</sup> Mindful of the distinctiveness criteria, the said example convincingly appears to "depart significantly from the shape that is expected by the consumer and the norm or customs of the sector"<sup>186</sup> and thus could prove its plating as being distinctive packaging and consequently susceptible to trade mark protection as such.<sup>187</sup>



Figure 9. (bloomberg.com)



Figure 10. Accepted (EUIPO Guidelines)

<sup>156</sup> EUIPO Guidelines for Examination of European Union Trade Marks, Part B Examination, Section 4 Absolute Grounds For Refusal, Chapter 3 (Article 7(1)(b) EUTMR) 18.

<sup>157</sup> Mag Instrument Inc. v OHIM, Case C-136/02 P, ECLI:EU:C:2004:592 para 30; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 18.

<sup>158</sup> Ibid.

<sup>159</sup> EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.

<sup>160</sup> Ibid.

<sup>161</sup> The criteria for goods applies mutatis mutandis to shapes related to services, for example the device of a washing machine for laundry services; *ibid.* 24.

<sup>162</sup> Judgment of 19 September 2001, T-30/00, Red-white squared washing tablet, EU:T:2001:223; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.

<sup>163</sup> Decision of 13 April 2000, R 263/1999-3; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.

<sup>164</sup> The more closely the shape resembles the shape that is most likely to be taken by the product in question, the greater the likelihood that it is not distinctive, Mag Instrument Inc. v OHIM, Case C-136/02 P, ECLI:EU:C:2004:592 para 31; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.

<sup>165</sup> Ibid.

<sup>166</sup> For example, for washing tablets, bevelled edges avoid damage to laundry, and layers of different colours represent the presence of

different active ingredients; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.

<sup>167</sup> EUIPO Guidelines for Examination, Part B, Section 4, Chapter 3, 23.

<sup>168</sup> August Storck KG v OHIM, C-96/11 P, ECLI:EU:C:2012:537; EUIPO Guidelines for Examination, Part B, Section 4, Chapter 3 (Article 7(1)(b) EUTMR) 24.

<sup>169</sup> EUTM No 10 350 593; EUIPO Guidelines (Article 7(1)(b) EUTMR) 23.

<sup>170</sup> Image downloaded from [www.bloomberg.com/news/articles/2015-02-13/london-chef-heston-blumenthal-re-creates-his-fat-duck-down-under-review](http://www.bloomberg.com/news/articles/2015-02-13/london-chef-heston-blumenthal-re-creates-his-fat-duck-down-under-review) (accessed 28 April 2019).

<sup>171</sup> Richard Vines, "London Chef Heston Blumenthal Re-Creates His Fat Duck Down Under: Review" (Bloomberg, 13 February 2015) [www.bloomberg.com/news/articles/2015-02-13/london-chef-heston-blumenthal-re-creates-his-fat-duck-down-under-review](http://www.bloomberg.com/news/articles/2015-02-13/london-chef-heston-blumenthal-re-creates-his-fat-duck-down-under-review) (accessed 28 April 2019).

<sup>172</sup> August Storck KG v OHIM, C-96/11 P, ECLI:EU:C:2012:537; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 23.

<sup>173</sup> The more closely the shape resembles the shape that is most likely to be taken by the product in question, the greater the likelihood that it is not distinctive, Mag Instrument Inc. v OHIM, Case C-136/02 P, ECLI:EU:C:2004:592 para 31; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.

<sup>174</sup> EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 23

<sup>175</sup> Ibid.

<sup>176</sup> Image downloaded from <https://www.chocolate.lindt.com/shop/lindt-goldebunny-milk> (accessed 28 April 2019).

<sup>177</sup> Chocoladefabriken Lindt & Sprüngli AG v OHIM, Case C-98/11 P, ECLI:EU:C:2012:307, paras 44–47; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 25.

<sup>178</sup> Ibid.

<sup>179</sup> Strauss op. cit. 226.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Image downloaded from [www.thetimes.co.uk/article/the-top-100-southeast-w6c52s22n](http://www.thetimes.co.uk/article/the-top-100-southeast-w6c52s22n) (accessed 28 April 2019).

<sup>183</sup> Caleb Taylor, "So that's how it works! The secret behind Heston Blumenthal's floating pillow dessert is revealed" (Mail Online, 31 July 2018) [www.dailymail.co.uk/tvshowbiz/article-6011117/Masterchefs-floating-pillow-divides-Twitter-shows-grand-finale-does-work.html](http://www.dailymail.co.uk/tvshowbiz/article-6011117/Masterchefs-floating-pillow-divides-Twitter-shows-grand-finale-does-work.html) (accessed 28 April 2019).

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Mag Instrument Inc. v OHIM, Case C-136/02 P, ECLI:EU:C:2004:592, para 31.

<sup>187</sup> The more closely the shape resembles the shape that is most likely to be taken by the product in question, the greater the likelihood that it is not distinctive, Mag Instrument Inc. v OHIM, Case C-136/02 P, ECLI:EU:C:2004:592 para 31; EUIPO Guidelines (Article 7(1)(b) EUTMR) op. cit. 20.



Figure 11. (www.thetimes.co.uk)

### 3.2.2 Absolute exclusions: Article 7(1)(e) EUTMR

Article 7(1)(e) EUTMR excludes from registration signs that consist exclusively<sup>188</sup> of (i) the shape or another characteristic that results from the nature of the goods themselves; (ii) the shape or another characteristic of goods that is necessary to obtain a technical result; or (iii) the shape or another characteristic of the goods that gives substantial value to the goods.<sup>189</sup> The wording of this provision implies, in principle, that it does not apply to signs for which registration is sought in respect of services. The aforementioned exclusions are considered respectively hereunder.

#### (i) Shape or other characteristics resulting from the nature of the goods

Under Article 7(1)(e)(i) EUTMR, signs that consist exclusively of the shape or another characteristic that results from the nature of the goods themselves cannot be registered. In the case of *Hauck GmbH v Stokke*<sup>190</sup> the CJEU has clarified that this exclusion applies in three situations: *natural products* that have no substitute;<sup>191</sup> *regulated products* i.e. of which

the shape or another characteristic is prescribed by legal standards;<sup>192</sup> and shapes that are *inherent to the generic function(s)*<sup>193</sup> of such goods. As regards the third category, the Court in *Hauck GmbH v Stokke* endorsed the Advocate General's reasoning by stating "reserving such characteristics to a single economic operator would make it difficult for competing undertakings to give their goods a shape which would be suited to the use for which those goods are intended. Moreover, it is clear that those are essential characteristics which consumers will be looking for in the products of competitors, given that they are intended to perform an identical or similar function".<sup>194</sup>

#### (ii) Shape or other characteristics of goods necessary to obtain a technical result

Article 7(1)(e)(ii) EUTMR excludes from registration signs that consist exclusively of the shape or another characteristic of goods that is necessary to obtain a technical result. In *Lego Juris* the Court held that a sign consists "exclusively" of the shape of goods that is necessary to obtain a technical result, when all the essential characteristics of a shape perform a technical function, and the presence of non-essential characteristics with no technical function are irrelevant.<sup>195</sup> The Court in *in Lego Juris* similar to case C-299/99 Philips further held that the fact that there may be alternative shapes, with other dimensions or another design, capable of achieving the same technical result, does not in itself preclude the application of this provision.<sup>196</sup> Following *Lego Juris*, the EUIPO Board of Appeal in *L&D v Julius Shämann*<sup>197</sup> also provided "the test is whether if the respective element was absent, the technical result would not be obtained, and if the respective element was altered substantially, the technical result would also alter substantially." In *Nestlé v. Cadbury*<sup>198</sup> the question was whether "tech-

<sup>188</sup> A sign consists "exclusively" of the shape of goods or other characteristics when all its essential characteristics – that is to say, its most important elements – result from the nature of the goods [Article 7(1)(e)(i) EUTMR], perform a technical function [Article 7(1)(e)(ii) EUTMR] or give substantial value to the goods [Article 7(1)(e)(iii) EUTMR]. The presence of one or more minor arbitrary elements, therefore, will not alter the conclusion; *Hauck GmbH & Co. KG v Stokke*, Case C-205/13, ECLI:EU:C:2014:2233, *Lego Juris A/S v OHIM*, Case C-48/09, ECLI:EU:C:2010:516, paras 21-22; 51-52.

<sup>189</sup> Article 7(1)(e) EUTMD; EUIPO Guidelines, Part B, Examination: Absolute Grounds for Refusal – Shapes or Other Characteristics with an Essentially Technical Function, Substantial Value or Resulting from the Nature of the Goods, 3; The EUIPO Guidelines provides that the objective

pursued by Article 7(1)(e) EUTMR is the same for all of its three grounds, namely to prevent the exclusive and permanent rights that a trade mark confers from serving to extend the life of other IP rights indefinitely, such as patents or designs, which the EU legislature has sought to make subject to limited periods, EUIPO Guidelines for Examination of European Union Trade Marks, Part B Examination, Section 4 Absolute Grounds For Refusal, Chapter 6 [Article 7(1)(e) EUTMR] 3.

<sup>190</sup> *Hauck GmbH & Co. KG v Stokke A/S*, Case C-205/13 ECLI:EU:C:2014:2233, paras 24-25.

<sup>191</sup> For example, the realistic representation below of a banana for bananas, EUIPO Guidelines [Article 7(1)(e) EUTMR] op. cit. 5.

<sup>192</sup> *Ibid*; for example, a rugby ball.

<sup>193</sup> The examples given by the Advocate General include: legs with a horizontal level for a table; an orthopaedic-shaped sole with a V-shaped strap for flip-flops [opinion in

*Hauck GmbH & Co. KG v Stokke*, Case C-205/13, ECLI:EU:C:2014:322, para 59].

<sup>194</sup> *Hauck GmbH & Co. KG v Stokke A/S*, Case C-205/13 ECLI:EU:C:2014:2233, para 26; an example of the third category under Article 7(1)(e)(ii) can be found with reference to Case T-63/01, *Procter & Gamble v OHIM*, where it was held that the concave shape of a soap bar was only a minor variation by comparison with typical shapes of soaps and, second, that if the characteristics of the shape in issue were noticed by the relevant public, those characteristics would be primarily perceived as having a utilitarian function intended to enable the soap to be gripped easily, consequently that shape was held not capable of directly indicating a particular trade source to the relevant public [para 51].

<sup>195</sup> *Lego Juris A/S v OHIM*, Case C-48/09 P, ECLI:EU:C:2010:516 para 51; EUIPO Guidelines [Article 7(1)(e) EUTMR] op. cit. 5.

nical result” is broad enough to include how the goods are manufactured, instead of how they are to be used. The case concerned the shape of the KIT KAT wafer bar of which the grooves between each chocolate finger allowed consumers to easily separate them, while the angles of the sides and the grooves were determined by a specific chocolate moulding process. The CJEU found that the technical result exclusion: “...must be interpreted as referring only to the manner in which the goods at issue function and it does not apply to the manner in which the goods are manufactured”.<sup>199</sup>

### (iii) Shape or other characteristics giving substantial value to the goods

Under Article 7(1)(e)(iii) EUTMR, signs that consist exclusively of the shape or another characteristic that gives substantial value to the goods cannot be registered, or if registered they are liable to be declared invalid.<sup>200</sup> This exclusion covers shapes of which the aesthetic value, in its own right, determine to a large extent the commercial value of the product and a consumer’s decision to purchase it.<sup>201</sup> When other characteristics may give the product significant value in addition to this aesthetic value, such as functional value (for instance safety, comfort and reliability), Article 7(1)(e)(iii) EUTMR is not ruled out automatically.<sup>202</sup> Consequently, for the exclusion to apply, aesthetic appeal is a necessary requirement but need not be the only or primary basis for the product’s appeal to consumers, so long as it is a significant factor.<sup>203</sup>

#### 3.2.2.1 Relevance of the absolute exclusions for signature dishes

The application of the above exclusions would have to be determined on a case-by-case basis. However, a signature dish (figure 12)<sup>204</sup> by chef Jan-Hendrik van der Westhuizen (JAN, Nice) illustrates the possible application of Article 7(1)(e). This particular signature dish consists of mosbol-



Figure 11. (www.thetimes.co.uk)

letjie bread served with an edible candle made with kaiings, pork lard and pepper.<sup>205</sup> The candle is lit and as the wax melts, one is supposed to smear the wax on the bread. Although the shape of the smear in the form of a candle is arguably distinctive, it would however most likely not qualify as a shape under Article 7(1)(e)(ii) EUTMR on the basis that the burning candle is necessary to obtain a technical result.

### 3.3 European Design law

The second avenue for trade dress protection in Europe is through design law.<sup>206</sup> To qualify for protection as a registered or unregistered design under the Regulation, a design must meet a set of basic requirements: (i) it must be new (i.e. novel); (ii) it must have individual character; (iii) it must not be functional; and (iv) certain designs must also be visible when in normal use.<sup>207</sup> These requirements are briefly examined below in a search to identify how signature dishes and plating can be (or is) protected under design law.

<sup>196</sup> Lego Juris A/S v OHIM, Case C-48/09 P, ECLI:EU:C:2010:516 para 53-58; see also Koninklijke Philips Electronics NV v Remington Consumer Products Ltd, Case C-299/99, ECLI:EU:C:2002 para 80; Bently op. cit. 967.

<sup>197</sup> R 1283/2013-4 [OHIM, Fourth BoA], 36; Bently op. cit. 968.

<sup>198</sup> Société des Produits Nestlé SA v Cadbury UK Ltd, Case C-215/14, EU:C:2015:395.

<sup>199</sup> Société des Produits Nestlé SA v Cadbury UK Ltd, Case C-215/14, EU:C:2015:395, paras 52-57.

<sup>200</sup> EUIPO Guidelines [Article 7(1)(e) EUTMR] op. cit. 8.

<sup>201</sup> In terms of the factors to be considered when assessing this, the Court in Hauck GmbH & Co. KG v Stokke, Case C-205/13 para 34-35 clarified that (i) alongside the relevant consuming public’s perception of the shape of the product, additional criteria would include (ii) the nature of the category of goods [is visual appeal usually important for

that category?], (iii) the artistic value of the shape in question, (iv) its dissimilarity from other shapes in common use on the market concerned, (v) a substantial price difference in relation to similar products, and (vi) the development of a promotion strategy which focuses on accentuating the aesthetic characteristics of the product in question; Bently op. cit. 969.

<sup>202</sup> Hauck GmbH & Co. KG v Stokke, Case C-205/13, ECLI:EU:C:2014:2233 paras 29-32; EUIPO Guidelines [Article 7(1)(e) EUTMR] op. cit. 8-9.

<sup>203</sup> Bang & Olufsen v OHIM, Case T-508/08, ECLI:EU:T:2011:575, para 73-77; Bently op. cit. 969.

<sup>204</sup> Image downloaded from [www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/](http://www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/) [accessed 28 April 2019].

<sup>205</sup> Image downloaded from [www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/](http://www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/) [accessed 28 April 2019].

[com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/](http://www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/) [accessed 28 April 2019].

<sup>206</sup> Through the Community Design, introduced by the Regulation 6/2002 of 12 December 2001 or at national level, where individual legislations are harmonized as a result of the Directive 98/71 of 13 October 1998, trade dress protection can be achieved by acquiring design rights over the trade dress, INTA Report op. cit. 6.

<sup>207</sup> Meaning that the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public; article 6 CDR.





**(i) it must be new (i.e. novel)**

A design will qualify as new if no design that is “identical”<sup>208</sup> (or different only in “immaterial details”)<sup>209</sup> has been made available to the public (in the case of unregistered designs, before the designer’s first public use of the design, or in the case of registered designs, before the filing date of the application for registration or before the priority date if the designer is claiming a priority date based on an application filed in another Paris Convention or WTO country).<sup>210</sup>

The Design Regulation establishes that novelty will not be extinguished by uses that “could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, within the Community.”<sup>211</sup> Accordingly, geographically or historically remote uses within the EU will not affect novelty.<sup>212</sup> However, Dreyfuss provides that recent case law has persuasively challenged the logic of this provision with respect to uses in other sectors.<sup>213</sup> The Court of Appeal of England and Wales in *In Green Lane Products v PMS International Group*, held that because exclusive rights in a community design extend to all goods, even those outside of the sector in which the design is used or in connection with which it is registered, “prior art available for attacking novelty should also extend to all kinds of goods.”<sup>214</sup> Furthermore, courts have held that disclosures occurring outside of the EU may destroy novelty if they would be known in the normal course of business to the relevant specialized firms in the sector within the EU.<sup>215</sup>

**(ii) it must have individual character**

In terms of Article 6(1) CDR, a design will qualify as having “individual character” if the “overall impression it produces on the informed user”<sup>216</sup> differs from the overall impression produced on that user by any other design made available to the public before the same dates used to assess the novelty of the design.<sup>217</sup> The Regulation further provides that in assessing individual character, courts must take into consideration the “degree of freedom of the design-

ner”<sup>218</sup> in light of such constraints as the functional requirements of the product or a crowded prior art.<sup>219</sup> The informed user is understood to recognize that where such constraints significantly limit the designer’s freedom, minor differences between the design and the prior art may enhance the difference of the overall impression of the design as against the prior art.<sup>220</sup>

**(iii) it must not be functional**

According to Article 8(1) CDR, a Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function. Bogatz provides that “the rationale for this exclusion is that solely technical features should rightly be protected by patents or (where available) utility models, rather than design law. However, in the past, there have been different approaches taken by the various national courts and EUIPO as to how to determine whether a feature is *solely dictated by its technical function*.”<sup>221</sup>

Bogatz further explains that the “predominant approach in Germany and various other EU member states (e.g. Spain) was the “multiplicity of forms” approach, which holds that if there is a design alternative possible that fulfils the same function, the design cannot solely be dictated by its technical function.”<sup>222</sup> With reference to the *Lindner*<sup>223</sup> case, Bogatz further states that “the main argument against this approach is that it would lead to exclusion of protection in only a very few cases. After all, there will almost always be the option to slightly change the appearance of the product, so that almost no product design would be considered to be solely dictated by its technical function on this test.”

Bogatz explains that the alternative approach (followed by the EUIPO, the U.K. and French courts amongst others) is the “no-aesthetic-consideration-test”.<sup>224</sup> Here the question is whether there were only technical considerations contributing to the design of the product?<sup>225</sup> In other words, were there any aesthetic considerations that contributed to the design as well? If there were, then the features were not solely dictated by technical function.<sup>226</sup> However, Bogatz provides that “it is questionable from whose perspective this question should be answered: the subjective view of the designer or, say, the objective view of a reasonable observer, and that it has been argued that this test leads to uncertainty and also that it contradicts Recital 10 of the CDR which does not require a design to have aesthetic quality.”<sup>227</sup>

However, in *DOCERAM v CeramTec*<sup>228</sup> the CJEU now decided in favor of the “no-aesthetic-consideration-test” and, in doing so, forced the German courts to change their approach. Bogatz summarises the CJEU’s main argument as follows: “In light of Recital 10 of the Regulation, Article 8(1) CDR is intended to prevent technological innovation from being hampered by granting design protection to features dictated solely by a technical function of a product. If the existence of alternative designs fulfil-

ling the same function (as that of the product concerned) was sufficient in itself to exclude the application of Article 8(1) CDR and to deny that features of a product's appearance were solely dictated by its technical function, a single person would be able to obtain several registrations as a Community design of different possible forms of a product incorporating exclusively technical features of a product's appearance. That way, this person would benefit from exclusive protection for a product without fulfilling the (much stricter) conditions of patent or utility model protection".<sup>229</sup>

Therefore, in order to determine whether the features of appearance of a product are solely dictated by its technical function, it must be established that the technical function is the only factor which determined the design of those features (with the existence of alternative designs not being decisive).

Following the logic of the "no-aesthetic-consideration-test", this requirement evidently would not prove difficulty for plating as trade dress under design law, because although the plating is functional, if aesthetic considerations were taken into account (which in theory is the predominant and definitive aim of plating in the context of this study) it would not be disqualified as on this basis.

#### (iv) Visibility of the design

Apart from the above three requirements, a further point of relevance, specifically for signature dishes, is the question whether a design has to be visible at the time of purchase or if it is acceptable that hidden features are revealed during normal use of the product? To exemplify this point, Bently poses the question what would for instance be the case if a design for the inside of a chocolate were visible only when it is eaten?

To answer this question, Bently states that while there is arguably nothing in the Regulation that restricts designs to those aspects of appearance that are visible at the time of purchase, the Courts have held otherwise.<sup>230</sup> In *Przedsiębiorstwo Produkcji Lodow v Patent Office* the Polish supreme Administrative Court held that an application to register a design of an ice cream which consisted of a solid ball-shape and contained filling of contrasting colors that was not visible until the ice cream was eaten, was not registrable as a design.<sup>231</sup> This was because "all features of the product appearance or its parts that give it a certain image of the design had to be present at the time" that the product was purchased.<sup>232</sup>

<sup>208</sup> Article 5(2) CDR.

<sup>209</sup> Ibid; see also Dreyfuss and Pila op. cit. 14.

<sup>210</sup> Articles 5 and 41 CDR; art 7(2) CDR establishes that, for registered designs, the designer's own use of its design during the 12-month period preceding its date of application (or its priority date) will not destroy the novelty of the design. The applicant for registration thus has a 12-month grace period (during which it will enjoy unregistered design protection).

<sup>211</sup> Article 7(1) CDR.

<sup>212</sup> Dreyfuss and Pila op. cit. 14.

<sup>213</sup> Ibid.

<sup>214</sup> *Green Lane Products v PMS International Group* [2008] EWCA Civ 358, 79.

<sup>215</sup> Dreyfuss and Pila op. cit. 14 with reference to *Holey Soles Holdings Ltd* [2008] 8 ECDR 100 [OHIM Invalidity Decision]; *Kirschenhofer GmbH v WS Teleshop International Handels GmbH* [OHIM Third Board of Appeal, 11 July 2007].

<sup>216</sup> In *PepsiCo Inc v Grupo Promer Mon Graphic SA*, Case C-281/10 P, ECLI:EU:C:2011:679 the CJEU identified informed user in between the trademark concept of "average consumer" and the "sectoral expert" to mean that "not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question" (para 35); in this respect, although it is difficult to distinguish them from each other, it is reasonable to assert that informed user can be deemed one step ahead of

average consumer as the former is aware of existing designs.

<sup>217</sup> In the case of unregistered designs, before the designer's first public use of the design, or in the case of unregistered designs, before the filing date of the application for registration or before the priority date; article 6(1) CDR.

<sup>218</sup> Ibid.

<sup>219</sup> Dreyfuss and Pila op. cit. 14.

<sup>220</sup> Ibid; *PepsiCo Inc v Grupo Promer Mon Graphic SA*, Case C-281/10 P, ECLI:EU:C:2011:302, para 29 (Advocate General).

<sup>221</sup> "The CJEU DOCERAM case: when is a product feature solely dictated by its technical functionality such that it cannot be protected as a Community Design?" [Bird & Bird, March 2018] [www.twobirds.com/en/news/articles/2018/uk/cjeu-doceram-case](http://www.twobirds.com/en/news/articles/2018/uk/cjeu-doceram-case) (accessed 28 April 2019).

<sup>222</sup> Ibid.

<sup>223</sup> *Lindner Recyclingtech GmbH v Franssons Verkstäder AB* [2010] ECDR 1 [OHIM 3rd Board of Appeal 2009] rejected this approach on the ground that it will find functionality only in "highly exceptional circumstances" and, in any case, one firm could itself individually register each alternative design and thereby establish an indirect monopoly over the technical function at issue. For Lindner, even in a design process that might have focused largely on functional considerations, if any aesthetic considerations were taken into account, then the design is not functional

<sup>224</sup> The Lindner approach assesses, from the standpoint of the reasonable observer (rather than from the subjective standpoint of the particular designer responsible for the design), whether only purely functional considerations could have been relevant when the design was chosen and aesthetic considerations were "completely irrelevant" in which case the design was "solely dictated by its technical function." If, by contrast, aesthetic considerations would also have been taken into account, then the design will not be excluded from protection on functionality grounds, *ibid.* paras 35-36.

<sup>225</sup> "The CJEU DOCERAM case: when is a product feature solely dictated by its technical functionality such that it cannot be protected as a Community Design?" [Bird & Bird] op. cit.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> *DOCERAM GmbH v CeramTec GmbH*, Case C-395/16, EU:C:2018:172.

<sup>229</sup> "The CJEU DOCERAM case: when is a product feature solely dictated by its technical functionality such that it cannot be protected as a Community Design?" [Bird & Bird] op. cit.

<sup>230</sup> Bently op. cit. 743, with reference to *Przedsiębiorstwo Produkcji Lodow v Patent Office* [20 March 2007].

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.



Figure 13.

In *Biscuits Poult v Banketbakerij Merva*<sup>233</sup> the General Court held that the layer of filling inside a biscuit (figure 13)<sup>234</sup> that was only visible after the biscuit was broken open could not be taken into consideration for the purpose of determining the individual character.<sup>235</sup>

### 3.4 Conclusion

The INTA Report provides that “at the EU level, double protection is currently available for trade dress under trademark and design law. However, each one has its advantages, limits and problems when considering the protectability of signature dishes and plating. In order to achieve trademark protection the trade dress must be distinctive enough to pass the quite elevated standards set by the CJEU.”<sup>236</sup> Also, if such a mark were to be applied for as a service mark, it would evidently spring free the exclusions under Article 7(1)(e) EUTMR. Design rights, on the other hand, does not require distinctiveness, but in turn requires novelty. Obtaining an unregistered design is affordable and suitable to establishments where signature dishes and plating styles are cyclically reimagined. However, in certain instances, where the development phase of a dish has been reported to exceed 15 years, unregistered designs would not suffice in equal measure, and as such diminishes the identified ostensible advantage of affordability.

In summary, it is evident from the findings in this chapter that when an establishment or chef seeks to gain protection under trade dress, the key question in determining whether it would be most susceptible to protection under trademark law or design is to ask whether the signature dish is distinctive although not new (i.e. a possible trademark) or whether it is new and has an individual character (i.e. a possible design).

## 4 CONCLUSION

The purpose and aim of the research were to assess which areas of IP law, if any, and under which criteria, offer legal protection for signature dishes and plating arrangements that are identified and commonly associated with a specific chef or restaurant. The research outcomes within the respective IP spheres of copyright, trademark, design and patent law have proven in the affirmative, subject to certain qualifications set out hereafter.

To establish whether a certain signature dish and or plating arrangement is protected by copyright under the EU standard, the only question is if it is an original work in the sense that it is the author’s own intellectual creation. Thus, if a signature dish and or plating arrangement meets this criterium, it would be subject to copyright protection under EU law, without having any regard to its aesthetic merits.

The possibility for a chef or establishment to obtain a word mark for their name is well established. However, in order for a signature dish or plating itself to achieve trademark protection for its shape, it must be distinctive enough to pass the quite elevated standards set by the CJEU in this regard. However, if such a mark were to be applied for as a service mark (which a restaurant arguably can qualify for), it would evidently spring free the exclusions under Article 7(1)(e) EUTMR.

To qualify as a design, on the other hand, the signature dish or plating does not require distinctiveness, but in turn requires novelty. Obtaining an unregistered design is affordable and suitable to establishments where signature dishes and plating styles are cyclically reimagined. However, in certain instances, where the development phase of a dish has been reported to exceed 3 years, unregistered designs would not suffice in equal measure, and as such disregards the identified affordability advantage.

Thus, it is found that in theory IP offers protection for signature dishes and plating. The relevant domain of IP protection (i.e. copyright, trademark, design or patent) would depend on the particular dish and plating lending itself more toward the intrinsic requirements and away from the exclusions under each of the said fields of IP.

Finding that IP protection in principle is available for signature dishes in conjunction with the initial premise that there exists a problem in the unauthorized copying of signature dishes and plating, the logical deduction would be the apparent presence of a problem and a solution.

However, the research outcome suggests contrary to this logical deduction. Based on the scarcity of CJEU case law, trademark, and design applications within the culinary scope, potential IP right owners probably elect not to

<sup>233</sup> *Biscuits Poult SAS v OHIM*, Case T-494/12, ECLI:EU:T:2014:757, paras 24-26.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid*; Bently op. cit. 744.

<sup>236</sup> *Ibid.*

pursue IP protection but instead see it as a compliment and/or motivation to come up with an even more creative signature dish or plating, or even to continue serving their original offering assured in the knowing the quality offered by them is unsurpassed, even though a copy of the dish may be offered at another establishment.

This finding strengthens the point of view of Raustiala and Sprigman (advanced by inter alia Rosenblatt) that the culinary industry exists in IP's negative space: a "low-IP equilibrium" where IP protection is absent, or largely so, but creation continues. The premise of IP's negative space, coined by Raustiala and Sprigman, is that the absence of strong IP protection not only fails to hinder low-IP industries, but actually helps them thrive – this premise proves to hold water in the present study where it is found that chefs are motivated to continuously innovate as a counter measure to copycat chefs, rather than to pursue IP protection.

As far as the future is concerned, it is to be noted that the research finds that IP, in its various spheres, theoretically offer sufficient protection for signature dishes and plating. However, development and legal certainty will only be accomplished when the creators of these signature dishes and plating decide to formally acquire and enforce their rights. Until such time, signature dishes and plating remain in IP's negative space – seemingly by choice of the potential right holders.

**Table of reference for figures used in text:**

Figure 1:	<a href="http://www.alinearestaurant.com/site/portfolio/balloon/">www.alinearestaurant.com/site/portfolio/balloon/</a>
Figure 2:	<a href="http://bearandmeblog.blogspot.com/2013/10/wacky-dishes-1-heston-blumenthal.html">http://bearandmeblog.blogspot.com/2013/10/wacky-dishes-1-heston-blumenthal.html</a>
Figure 3:	<a href="https://www.instagram.com/p/BL5-RqRnSaJ/">https://www.instagram.com/p/BL5-RqRnSaJ/</a>
Figure 4:	<a href="https://issuu.com/wogoa/docs/wg_june_2018_issue">https://issuu.com/wogoa/docs/wg_june_2018_issue</a>
Figure 5:	<a href="https://issuu.com/wogoa/docs/wg_june_2018_issue">https://issuu.com/wogoa/docs/wg_june_2018_issue</a>
Figure 6:	<a href="https://www.pinterest.se/foodandhealth/ali-neia-desserts/?autologin=true">https://www.pinterest.se/foodandhealth/ali-neia-desserts/?autologin=true</a>
Figure 7:	EUIPO Guidelines for Examination of European Union Trade Marks, Part B Examination, Section 4 Absolute Grounds For Refusal, Chapter 3 (Article 7(1)(b) EUTMR) 23
Figure 8:	EUIPO Guidelines for Examination of European Union Trade Marks, Part B Examination, Section 4 Absolute Grounds For Refusal, Chapter 3 (Article 7(1)(b) EUTMR) 24
Figure 9:	<a href="http://www.bloomberg.com/news/articles/2015-02-13/london-chef-heston-blumenthal-re-creates-his-fat-duck-down-under-review">www.bloomberg.com/news/articles/2015-02-13/london-chef-heston-blumenthal-re-creates-his-fat-duck-down-under-review</a>
Figure 10:	<a href="https://www.chocolate.lindt.com/shop/lindt-goldbunny-milk">https://www.chocolate.lindt.com/shop/lindt-goldbunny-milk</a>
Figure 11:	<a href="http://www.thetimes.co.uk/article/the-top-100-southeast-w6c52s22n">www.thetimes.co.uk/article/the-top-100-southeast-w6c52s22n</a>
Figure 12:	<a href="http://www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/">www.jacarandafm.com/shows/scenic-drive-rian/how-michelin-star-chef-serves-pork-crackling/</a>
Figure 13:	Biscuits Poult SAS v OHIM, Case T-494/12, ECLI:EU:T:2014:757



#### **Regardt Willem van der Merwe**

Admitted as an attorney of the High Court in South Africa (2015). Currently practicing as an attorney at Riëtte Oosthuizen Attorneys, Pretoria, South Africa. Commencing traineeship at IP specialist firm Von Seidels in Cape Town South Africa, January 2020. Holds a LL.B (2014) and LL.M in Public International Law (2017) from the University of Pretoria (South Africa) and a LL.M in European Intellectual Property Law from Stockholm University (2019).

