

HD	First world fine food frenzy - IP tricks and traps
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TAKE AWAY TIPS

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Following on from the celebritization of chefs, the success of reality TV cooking competitions and the general preoccupation with what we privileged first world citizens are prepared to put in our mouths, high end food has become a modern obsession.

Fine food is not a fad, not a flash in the pan, but a lasting frenzy in the first world.

High end food experiences fit in nicely with goals of status and refinement, but also tick the "experiential" box that has become such an important factor to so many of us in exercising our discretion about our spending.

There are those who can even convince themselves that it is a good idea to pay €1,000 a couple to eat in some European establishments. Clearly there is big money in fine dining. There are also big risks facing food entrepreneurs, and plenty of them have fallen by the wayside.

This article suggests that the traditional professional norms encouraging correct and ethical behaviour in this industry, if they ever did truly exist, are long gone, and seeks to examine what the creators in the gourmet food industry can do to better protect their products using existing legal rights and protections.

The types of restaurateur chefs who reach for the stars (Michelin, that is) put in huge amounts of creativity and time into their endeavours. It is asking too much of them to take copying as a compliment, particularly when it dilutes their profit. Things get complicated when these chefs also publish recipe books.

High end food producers, manufacturers and importers are another **group** that will be focused on taking steps to protect their intellectual property in their products.

Finally, the perpetuation of the first world fine food frenzy depends on the future production of more TV shows involving food, whether in reality TV "contest" format, or as infotainment or documentaries. Creators of these concepts will be, as ever, keen to see that their contributions are duly rewarded.

RESTAURATEUR CELEBRITY CHEFS

In this case, there are three major elements to the reputation of the restaurant - the look and feel of the establishment, the taste experience (driven by produce and recipes) and the look of the dishes themselves (the plating). Of course service is important too, but so it is to all high end customer experiences.

It is the above three elements that have resulted in the original reputation of the chef, which he or she may have built on by the type of mass publicity, and indeed celebrity, which results from appearances in mass media, usually television, whether in infotainment, documentary or reality formats, and in other personal appearances that are reported on as news. Many famous chefs of course also take their kitchen on the road and present it as a stage show.

Recipe books and blogs and copyright

Publication of recipe books and/or blogging of recipes by the chef sometimes precedes and often succeeds the "celebritization" phase of the chef's career. Where this occurs, clearly the intention is to share the recipes with the public at large, as copyright will of course only protect the literary work that is the recipe itself, not the idea behind it.

While recreating recipes and plating by a competitor may well be considered unethical plagiarism amongst the profession, the only actionable type of infringement as far as a breach of copyright is concerned is likely to be where a rival cookbook author or publisher reproduces the recipes in his own cookbook or compilation of recipes without the original author's permission.¹

Recreating the beautiful plating shown in the photographs illustrating the cookbook will likewise not be actionable by the chef, even if it is done by a competitor and **sold**, as the plating simply does not amount to either an artistic work (a sculpture) or as a work of artistic craftsmanship, as those terms are used in the Copyright Act 1968 (Cth). The ephemeral nature of the product - the fact that it is after all, food, and primarily created in order to be consumed by, and to nourish the diner, means the product itself can never satisfy these definitions which are used in reference to something intended as a more permanent item. This is despite the fact that in a line of somewhat controversial New Zealand decisions the definition of "sculpture" has been extended to things such as the moulds used to produce crocodile shaped jubes, (but note, not to the jubes themselves).²

Artists who are using food in their artworks are a different case and would not face the same problems with copyright subsistence.

Trade secrets

If the recipes being used in the restaurant are really that valuable then the tried and true approach is to treat them as trade secrets. Doing this properly would entail having the restaurant's employees and contractors enter into written confidentiality/non-disclosure agreements, or clauses in their contracts. Recipes for salads have been held to constitute trade secrets, at least at the interlocutory stage of proceedings. 3

The circumstances involving Melbourne chef, Robin Wickens, and Alinea restaurant may have been avoided, had a confidentiality agreement been entered into.

In this case, Wickens, began serving food at his Melbourne's Interlude restaurant (now closed) that replicated dishes from Alinea restaurant (amongst others), including the way that they looked, down to its highly unusual service ware. Wickens admitted he had returned from the United States, where he spent five days working under Alinea chef, Grant Achatz.

Wickens has since written to Achatz to apologise. He has stated that he had made a mistake he regretted but had never intended to pass off the replica dishes as his own.

Figure 1 shows the comparison between the dishes served at Interlude with the ones served at Alinea and WD-50.

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Trademarking

One of the authors has written previously on the subject of trademarking the look and feel of a fitout of retail premises 5 , which of course a restaurant is. However, somehow that seems to us more appropriate to eating establishments that are more lowbrow, such as pizza chains and the like. The high end restaurant experience is often as much about the exclusivity and refinement of the surroundings as it is about the food. It is not the same experience as that of entering an Apple store, (as pleasant as that may be).

The lack of trademarking of the fitout of a restaurant has not stopped action being taken for alleged copying of the distinctive look and feel of the restaurant.

In an aggressive lawsuit in the United States, Rebecca Charles, the owner-chef of Pearl Oyster Bar in West Village NYC claimed her former sous chef, Ed McFarland, had copied "each and every element" of Pearl Oyster Bar in his new restaurant called Ed's Lobster Bar nearby in Soho. Charles sought financial damages from McFarland and claimed he copied from Pearl Oyster Bar, amongst other things, the white marble bar, the chairs and bar stools with their wheat-straw backs, and the packets of oyster crackers placed at each table setting. The restaurant had been designed as a New York take on traditional Maine seafood restaurants.

The court did not make a ruling on these circumstances as the parties settled the matter out of court.

Trademarking the trading name, however, and/or logo or combination thereof, is altogether advisable and may

even be possible where it includes the name of the chef. Such marks are valuable in an industry where so much of the value of the **brand** is attached to the individual, as is the case with designers and fashion brands ⁶ . Consideration should also be given to filing in other jurisdictions in certain cases where the globalisation of the empire is a real possibility.

Three-Michelin Star chef, Heston Blumenthal, of "The Fat Duck" fame in Bray England, has learnt the importance of protecting his **brand** from international use and infringement.

In September 2011, a restaurant called "Fat Duck", specialising in French cuisine, opened in the Darling Quarter of Sydney. Shortly after the restaurant's opening, Blumenthal's **company** SL6 Limited filed an application for trademark protection of "The Fat Duck" in Australia. ⁷ Then, in November 2011, SL6 Limited filed a claim in the Federal Court of Australia against the owners of the Fat Duck. ⁸

The Court made orders by consent, where the owners of the Sydney restaurant would be restrained from using the words or marks "Fat Duck", "Fat Duck Rotisserie Kitchen", "Fat Duck Catering" or any other words or marks which were substantially identical or deceptively similar to them.

Australian restaurateurs need to ensure that their **brand** is protected abroad by applying for international protection of their Australian trademarks. The most cost-effective and flexible method to do this in most, but not all cases, is by filing an international trademark application under the Madrid Protocol.

The merchandising of both food and food related products that may well be part of the celebrity chef's overall **business** plan will of course rely heavily, if not exclusively, on trademarking.

Designs

If bespoke and innovative cutlery or **china** designs were created for the chef's restaurant empire, these items could have potential for design registration.

Copyright

Two dimensional patterns designed especially for, and appearing on the **china** or napery would be protected by copyright. If the designer is other than the chef the restaurant would need to obtain the appropriate assignment from the artist.

As discussed above, (with reference to the publication of recipes by chefs), however unlikely it is that there is copyright protection in the plating of food, that has not stopped chefs like David Chang (of Momofuku Seiobo in Sydney) from prohibiting food photography at their restaurants.

Gilles Goujon from the three Michelin-starred L'Auberge du Vieux Puits in the south of France has stated he believes that when his dishes appear online, it takes away "a little bit of my intellectual property". ⁹

However, Justin Llewellyn, head chef at award-winning Laguna Kitchen & Bar at Park Plaza Cardiff, believes social media has in fact boosted the dining experience. He claims that, "social networks are the new word of mouth. It's the new advertising. You have to move with the times." 10

In any event, contrary to the belief of chef Goujon, and as discussed above with reference to the publication of recipes, the copyright in a photo of food belongs to the person who took the photo, rather than the chef or the restaurant owner. That is, until it is posted onto social media, where the intellectual property rights in the photo are all but assigned to the likes of Facebook or Instagram. 11

To date, no claims have been raised by restaurants who believe their offerings have been devalued by exposure on social media. In terms of intellectual property protection, prohibiting photography may make it more difficult for infringers to reverse engineer the plating, but doesn't really offer any other advantage.

Figure 2 is a photograph from a food blog of one of the stunning desserts that has been on the menu in the past at WD-50 in New York City, which is known for its presentation.

Fig 212

GOURMET FOOD PRODUCERS, MANUFACTURERS AND IMPORTERS

These players often supply to the businesses above and/or to selected retailers or sell to consumers through their own outlets and through websites.

Trademarking

Trademarking in all three cases, both of product names and logos and often the packaging itself (and sometimes the shape of the goods) 13 will be just as important to these businesses as it is to the FMCG sector 15 . In some cases it will be important to source unique packaging materials and the like as part of the overall marketing strategy. Figure 3 illustrates the beautiful packaging and trade dress of Pepe Saya® handcrafted **butter**.

Fig 315

As illustrated by the case of "The Fat Duck", it is important for Australian businesses to ensure that their **brand** is protected abroad by applying for international protection of their Australian trademarks.

This is particularly the case where your supplier is in an overseas **company**. Registering your trademark in the jurisdiction where your supplier operates will assist in preventing your supplier from becoming your competitor, which is a very real risk. In "first to file" jurisdictions like **China**, failure to register may actually result in another person registering your trade mark there, and having your export goods held up at the port for infringement of their registration!

Exclusive supply agreements

Exclusive supply agreements for packaging, the ingredients and perhaps the finished product itself if it is being imported from abroad may well be crucial in these businesses and may be legitimate depending on the structure of the market for the particular goods concerned.

Trade secrets

Manufacturers like chefs will be concerned to keep their recipes and methods secret. Again this will require discipline and proper processes in place to ensure employees and contractors are bound to contractual obligations of confidence.

Designs

There are many examples of food design registrations, such as the Viennetta ice cream confection ¹⁶, and of course many chocolate confections. ¹⁷ In general it will be difficult to obtain registration as shape trade marks for goods which are **sold** packaged, leaving aside the issues of inherent or acquired distinctiveness necessary for registration, but design registration for novel and attractively shaped goods may be available where it is not possible to show that the shape is necessarily distinctive as a badge of origin. ¹⁸

Patents

Large corporate chocolatiers are well known for patenting their manufacturing processes, one of the only examples of patenting in the food industry. This will not be advisable for most smaller operators.

CREATORS AND PRODUCERS OF TV SHOWS ABOUT FOOD

Copyright

There is a strong appetite for reality, infotainment and documentary style programs about food amongst television audiences. Creators and producers will be looking to document their ideas in a detailed treatment which will attract copyright protection as a literary work.

Trademarking

They will simultaneously be trying to come up with and trade mark a distinctive name for the show and a great logo, such as the flaming red **"M"** of Masterchef.

Trade secrets

Use of confidentiality/non-disclosure agreements will be essential during the pre-production and production phases.

Of course depending on the circumstances there may be a case for passing off or misleading and deceptive conduct in any of the above industries, but Australian courts have been prepared in recent years to accord a degree of sophistication to Australian consumers when presented with a cheap alternative product seeking to piggyback on the reputation of an established **brand** ¹⁹ We sophisticated Australian consumers can, in most cases it seems, tell the difference between the original

and a copycat product, so these types of actions are not likely to be as successful as perhaps they once were.

Footnotes

1 Granger v Murdoch Books Pty Limited 2012 FCA 909; BC201206194

2 Beckman v Mayceys Confectionery Ltd (1995) 33 IPR 543

3 Chenel Pty Ltd v Rayner (1994) 28 IPR 638, BC9406183

4

<http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html> This image has been labelled for reuse on Google Images

5 See Logan C, "Protecting the architecture of happiness (with apologies to Alain de Botton)" (2013) 26(3) Australian Intellectual Property Law Bulletin 63

6 See Logan C, "Fair trading in fashionable names: What to do if your name is famous but you are not (yet)" (2009) 22(6) Australian Intellectual Property Law Bulletin 114

7 Trademark no 1450496.

8 SL6 Limited v Fat Duck Pty Ltd [2012] FCA 71.

9

http://www.francetvinfo.fr/culture/gastronomie/deux-chefs-francais-exasperes-par-les-clients-qui-photographient-leurs-plats_529087.html

10

<http://www.insidecounsel.com/2014/03/06/chefs-claim-intellectual-property-damages-for-unat>

11 A "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license" is granted in relation to all IP rights in photos posted to Facebook and Instagram. For Facebook, see <https://www.facebook.com/legal/terms>. For Instagram see <http://instagram.com/legal/terms/#>.

12 <http://www.goodiesfirst.com/2013/02/wd-50.html> This image has been labelled for reuse on Google Images

13 For example Kit Kat chocolate bars bearing the imprint "Kit Kat", Australian trade mark registration number 849096, cf Vienetta ice cream confection, which is registered as a design

14 Mars Australia Pty Ltd v Sweet Rewards Pty Ltd (2009) 81 IPR 354, and see also C Logan "Mars Fail to get up in get up case: Maltesers rolled down the aisle and out of court" (2009) 22(3) Australian Intellectual Property Law Bulletin 46 and C Logan "Maltesers rolled again on appeal" (2010) 22(7) Australian Intellectual Property Law Bulletin 140

15 <http://www.pepesaya.com.au>

This image has been used with the permission of Pepe Saya

16 Australian design registration number 127649s, (no longer in force)

17 For example Australian design registration 322766s, which is a current registered design for the shape of block chocolate, owned by Societe des Produits Nestle S.A.

18 Nestle SA v Unilever Plc [2002] EWHC 2709 (Ch) (18 December 2002)

19 As above note 14

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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