
Protection Of Food Art Under the Copyright Regime in India

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Abstract

Dining out in contemporary times has increased to become a routine activity and for an elemental experience. Restaurant owners and chefs in the culinary business are taking initiatives to improve the consumer's entire dining experience. Chefs are sometimes called culinary artists who prepare food with a formidable presentation appealing to the eye of the diner. The presentation or arrangement of the food by the chefs involves human intellect, which includes colour combinations, placing of food, and layering by working several hours. These food creations involve creative works resulting out of the labour or skill and hence need legal protection. This research paper will take a step forward by attempting to examine whether a chef or restaurant can protect their food creations as food art under the present Indian copyright law regime.

Keywords: Food Art, Culinary Creations, Artistic Works, Copyright Protection.

Introduction

In the culinary world, people relish the food first with the appearance of the dish, then with the smell of the food and then finally they eat their food. To make it visually appealing chefs make great efforts in enhancing the overall experience of a consumer. Chefs are sometimes called culinary artists who prepare food with a formidable presentation appealing to the eye of the diner. In such a scenario a need for uniqueness in the culinary setting has great importance in a competitive consumer-centric market. Chefs undergo rigorous training and they put in a lot of effort, labour and skill to create such culinary creations. These culinary creations are also termed as food art (Reebs, 2011). The presentation or arrangement of the food by the chefs involves human intellect, which includes colour combinations, placing of food, and layering by working several hours. Such creations in the form of food art involve creative works and they need legal protection because of rampant and unauthorised use of food pictures and videos on online mediums including social media and food blogging sites. Such use of unauthorised food pictures and videos including food blogging can result in the stealing of style of presentations of the food creatively done by the chefs. Under the Indian Copyright Act, 1957 protection is given to the authors of original works originating from hard work of author, it shouldn't someone else's work and there should be in a physical format. Food art can be taken as artistic work just like any sculpture or drawing made of items is given protection under the copyright law.

Plating of a dish comes with a lot of precision where the chef places the right colours to give the dish an aesthetic value. A considerable amount of creativity and culinary skills are required to put together the items on a plate. The presentation of a dish can be regarded as no less than a painting or a piece of artwork and can be considered as any additional artistic creations (Kenny, 1984) under "Section 2(c) (iii) of the Copyright Act (The Copyright Act, 1957 (14 of 1957))."

The Copyright Act i.e. the Indian Copyright Act hold no proper definition of the term "Fixation" but in the case of *R.G. Anand v. Delux Film Industries* (1978), it was held in this case that the manner, arrangement, and expression of an idea may be covered by copyright protection. Mostly civil law countries seek the idea-expression dichotomy giving literal meaning to the term "expression" and doing away with the fixation requirement (Brown, 2014). Restricting copyright protection only to fixed objects would prevent multiple works from seeking copyright protection that may involve make-up styles, hairstyles, sand sculptures, etc.

Food art in the form of a unique presentation of food items and food plating can be considered as an expression of the chef's own idea and must be recognised and given copyright protection under the Section 2(c) (iii) any additional artistic creations (The Copyright Act, 1957 (14 of 1957)).

This research paper examines whether a chef or restaurant can protect their culinary art in the form of food art under the current Indian copyright law regime and whether plating of dish can be regarded as original work of authorship.

Defining Food Art

Food art is that food preparation which is created very intricately and designed with so much perfection on a plate before being actually served to the people dining in a restaurant to enjoy the deliciousness and also make it appealing for them. It is made possible by the chefs through colour combinations used along with the layering of food and placement in such a way that it can be considered no less than a piece of art. (Adria, 2006).

According to Broussard, *“A chef is someone who creates art when he or she designs any meal or dish in such an aesthetic way that it actually presents an amazing arrangement of colours and textures being incorporated in way of plating arrangements to stimulate the diner’s aesthetic sense and may be acting as critics when they have a first view of the same and give appreciation to the plating as visual and flavourful expressions of art”* (Broussard, 2008).

Such dish presentation is considered as "food art," and it also serves the practical purpose of influencing the dish's taste, creating a unique dining experience for consumers, and ensuring or enhancing a restaurant's quality and reputation.

Need For the Protection of Food Art Under the Copyright Law

Food art in the form of a unique presentation of food items and food plating can be considered as an expression of the chef's own idea and can be given copyright protection. Copyright protection is given to original works of art created by artist and generally meets the tangibility requirement. Any artist is a creator which as a result of his intellectual efforts creates anything original that appeals to the eye and also to the mind of the consumers (Duboff and King, 2006). Chefs can be regarded as no less than any artist that can be given copyright protection for their creations in the form of presentation of dishes they make. Such creations by the chefs require the same amount of effort and expertise as the other forms of artistic creations and so they needed to get the same level of copyright protection as the other art forms are accorded such protection.

Plating of a dish comes with a lot of precision where the chef places the right colours to give the dish an aesthetic value. A considerable amount of creativity and culinary skills are required to put together the items on a plate. The presentation of a dish can be regarded as no less than a painting or a piece of artwork and can be considered as “any other work of artistic craftsmanship” under Section 2(c) (iii) of The Copyright Act (The Copyright Act, 1957 (14 of 1957)).

Legal Analysis of Originality and Respective Economic Rights That Can Be Vested with The Chefs Under the Indian Copyright Regime

Since the definition of “food art” is already explained under the heading I, stated previously, it says that it will come under the purview of artistic works. As a consequence, it is apparent that copyright can and must subsist in such artistic works, and that they are subject to copyright protection (Broussard, 2008).

Food art can be regarded as an artwork under Section 2 (c) that defines artistic work as any painting, sculpture, a drawing, etc. and can be considered as any additional artistic creations under Section 2(c) (iii) of the Copyright Act, 1957 Act (The Copyright Act, 1957 (14 of 1957)). In order to satisfy the criteria for copyright protection, the work must satisfy three requirements that are needed to be given copyright protection that are-

- i. original work of authorship;
- ii. must be original in nature and
- iii. must be fixed in a tangible form.

Though the Indian Copyright Act does not specify the exact meaning of originality but it can be interpreted with the help of precedents set by the courts. However, post *Eastern Book Company & Ors. v. D.B. Modak & Anr.* (Appeal (civil) 6472 of 2004) case, originality was to be determined with the help of two tests i.e. the “Sweat of the Brow” test and “Creativity” test. The author must have put his or her own mind, skill, labour and judgment to create the work. If the work is a derivative work, then the arrangement of such work should be different from the original work.

In the case of *Macmillan & Co. Ltd. v. K&J Cooper* ((1924) 26 BOMLR 292), it was decided that sufficient labour, skill and capital that have been put to the product possess quality or character that the original raw material didn't possess. The work is original only if the author has applied some labour or skill.

In order to attain copyright for work, it is necessary that the work must be fixed in a tangible medium because copyright protection is not given to a mere idea but an expression of ideas. The Indian Copyright Act holds no proper definition of fixation. In the United States the copyright law there expressly states that the work has to be in a fixed in a tangible form (*Kelley v. Chicago Park District*, 635 F.3d 290, 303 (7th Cir. 2011)). Food is expected

to be eaten just after it is prepared, which means it is perishable and its presentation cannot be preserved for a long period of time. Also, in this case, simply clicking a photograph of the dish to get copyright protection cannot guarantee effective copyright protection unless the chef or the restaurant itself takes the photo. Further if a consumer or any other professional photographer clicks the photo then such photographer can later reproduce 3D versions of the work as per Section 14(c) of the Act (The Copyright Act, 1957 (14 of 1957)).

Mostly civil law countries seek the idea-expression dichotomy giving literal meaning to the term “expression” and doing away with the fixation requirement. Restricting copyright protection only to fixed objects would prevent multiple works from seeking copyright protection that may involve make-up styles, hairstyles, sand sculptures, etc.

In the case of *Donoghue v. Allied Newspaper Ltd. (1937)*, it was held in this case that the ideas per se cannot be protected. It is in actual form the expression of ideas that is protected in a material medium that is the subject matter of copyright protection. In another case of *R.G. Anand v. Delux Film Industries (1978)*, it was decided that copyright protection could cover how an idea is organised and expressed.

It is important to note that the creative works must be copyright protected so as to ensure safeguards over the author’s creations, protecting and rewarding their creativity. It also enables the copyright owner to sue persons infringing their works by way of copying and making commercial gain out of the same. The owner has the ability to invoke on a legal basis either to sue the guilty party or compensate for the financial loss. If your work is being used without your knowledge, then you have an absolute right to stop them using your work and compensate for the earnings made. Section 51 of the Act clearly states that reproduction any of any artistic work without the permission of the owner shall be regarded as an unauthorised copy.

The author of an artistic work is granted certain economic rights under Section 14 of the Act, including the right to reproduce, adapt, and communicate the work, among others. The first owner of the copyright will really be named under Section 17 of the Act. Copyright over any work that is created in a tangible medium is granted as soon as the work is actually produced. The general rule under section 17 of the Act is that copyright vests with the original author of the work, making that person the first owner of any work.

If there is no written agreement, the owner of the magazine or newspaper is presumed to be the first owner of any artistic work created by an author while employed by the publisher under a contract of service because the copyright pertains to the publication of the work in the newspaper or magazine or the reproduction of the work for the purpose of its publication. According to section 17(a) of the Act, the person who freely makes their own artistic work in other contexts beyond the scope of employment will be the initial owner of the copyright to such work.

In the case of *Indian Performing Rights Society (IPRS) v. Eastern Indian Motion Pictures Ltd. (1977)*, a dispute broke out over the matter concerning rights over literary and musical works under the Copyright Act, 1957. Parties were the IPRS and the Cinematographer’s Association of India. IPRS is the authority for the purpose of granting a license to all the present and future musical or literary works to be performed in public. IPRS claimed royalty in case of works being used in public as they claimed to be assignees of the work and laid down a tariff. The association of cinematographers opposed that the IPRS had absolutely no rights over these works and the production house will be the real owner. It was held that the producer of the cinematograph film will be the first owner of the copyright. Section 17(c) (The Copyright Act, 1957 (14 of 1957)) clearly points out that the producer will be the first owner of the copyright and the authority cannot be questioned for this.

Another set of rights that remain with the copyright owner even after the copyright period has passed are known as Moral Rights. These are eternally reserved rights for the author. Even after the copyright has been wholly or partially assigned to the author, Section 57 of the Act mentions the author's special right vested in the owner of copyright and states that the author has the right to claim authorship of the work and to prevent or claim damages in the event of any distortion, mutilation, modification, or other act that would be prejudicial to his honour or reputation.

International Conventions in Relation to Food Art Under Copyright Protection

In *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey & Ors.*, Justice Chinnappa Reddy made the following statement.

"An artistic, literary, or musical work is the brainchild of the author, fruit of his labour and skill is considered to be his or her own property."

Therefore, it is strongly advised that all civilised nations consider such works deserving of protection by domestic legislation and international treaties.

There are a few Conventions and Treaties discussed here under which specifically deals with copyright and related rights.

A. The Berne Convention for the Protection of Literary and Artistic Works (1886)

The Berne Convention was adopted in 1886 that was constituted for the protection of works and rights of the authors in their literary and artistic works. The authors of the work have the ability to control how and by whom their works are being used. The Berne Convention is founded on three principles; national treatment, automatic

protection, and the Principle of Independence of Protection. It comprises provisions that deal with the minimum standard of protection that must be provided, as well as exceptional measures for members who are signatories to the convention and prefer to exceed the minimum standard of protection (Burger, 1988).

The Convention also provides for moral rights (Article *6bis*) that involves the author retains the right to claim authorship and object to any mutilation or modification of the work that would harm the author's honour and reputation, even after the works have been licenced or assigned to anyone else. Enforcement under the Berne Convention is left to the member countries who are signatory to the convention unlike to anybody or tribunal which can actually hamper the rights enforcement in the case of food art where the signatories can only enforce such rights rather any neutral body. Also, enforcement will likely be ineffective or difficult because of the numerous rights given under the convention to the owner of the copyrighted work.

Built cuisine and other culinary innovations would likely be included in the term "any creation" used in Article 2(1) of this Convention, and the phrase "whatever may be the form of expression" further supports this perspective. The Convention appears to offer artists the broadest range of protection available, regardless of the media employed, notwithstanding the absence of case law or interpretive work on the topic. In accordance with the stated requirements of the Convention, chefs, food artists, and molecular gastronomists would all be adequately protected in the United States. To obtain the desirable moral rights outlined by the Convention, food artists would need to take other actions. (Reebs, 2011).

This is due to the Berne Union's absence of a defined system for "determining whether the laws of a nation filing an instrument of admission comply with the Berne Convention's provisions." Generally, the courts of the country where the rights are asserted are in charge of enforcing the Convention. Because of its broad list of rights, the Berne Convention's ineffectiveness is a loss for culinary artists. Extending these rights to food artists would have substantial economic and cultural benefits. Food artists would be able to avoid unfettered duplication of their creations by claiming ownership of works drawn from a certain chef's recipe. Though several of the Berne Convention's specific moral rights provisions have not been adopted statutorily, it is likely that chefs' creations will be protected in the future if the moral rights coverage is increased.

B. WIPO Copyright Treaty (WCT) (1996)

WCT is a special agreement which deals with the protection of rights and works of the authors on a digital platform under the Berne Convention. The rights granted under this treaty are in addition to what is recognized by the Berne Convention already discussed under previous heading. The additional rights granted include certain economic rights.

This treaty generally adds two subject matters that are computer programs; and compilation of data or other material i.e. databases that can be protected as literary works in any form and the contents should be intellectual creations because if it doesn't contain such creation then it will be considered as outside the scope of this treaty. Apart from the rights granted by the Berne Convention to the authors, the treaty grants right of distribution; right of rental; and right to communication to the public. Article 10 of the WCT recommends the three-step test to determine the limitations and exceptions. The contracting states may devise new exceptions and limitations that will be considered appropriate to the digital environment and can only be created if they meet the three step test. The treaty will benefit the chefs and the restaurant owners who have stored their photos or videos that they must have shot by themselves for their own advertising or marketing that will definitely involves intellectual creations because if they have created food art which is unique and original then they can protect it through storage of photos and videos and with the application of this treaty on a digital platform if anyone tries to infringe their rights they can claim remedies in accordance with the WIPO Copyright treaty and national provisions in their respective countries which implement such a treaty.

C. Agreement on Trade Related Aspects of Intellectual Property Rights (1995)

The WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1995) is a multilateral agreement on intellectual property. The agreement provides recognised the linkages between intellectual property and trade to provide a uniform international platform for the protection of intellectual property between countries. The basic principle of the TRIPS agreement is to give promotion for effective and adequate amount of protection in relation to intellectual property rights so as to reduce any distortions to international trade. The member of the TRIPS agreement must implement the minimum standards of protection that are provided by the agreement. The TRIPS has presented the most powerful enforcement mechanisms that have helped the states in order to maintain discipline in case of enforcement as well as dispute settlement. The agreement has been in effect for many years now and provides effective enforcement as well protection mechanism across states for enhanced intellectual property protection.

The only problem that such extensive protection across countries to food art can pose is that of its intangibility because some countries may require tangibility and some may not to grant automatic copyright protection on creative works created which can have no permanence until and unless they are captured on any tangible medium

like make-up that is washed off after sometime and food itself that is eaten. Requirement is to provide effective protection in case of any medium when it is especially original, creative and made with a lot of hard-work and skill.

Conclusion

Copyright is a form of intellectual property right that deals with copyright protection on works that are original and tangible in form governed by the Indian Copyright Act, 1957. It includes work in which copyright subsists that includes original "*literary, dramatic, musical and artistic works*". Such food art will fall under artistic works and recipes posted on websites will fall under literary works.

In case of recipes when it is published in a cookbook along with other menus and recipes then copyright exists in the book on the original manner and expression of the book. Similarly, food art that involves unique style and expression and pictures or videos of the same are posted on the website then copyright exists on them too as it is the original works of the chef. Dishes created by chefs in the form of food art are perishable in nature i.e. there are meant to be eaten by the customer and so copyright protection becomes difficult for such food art as it is not fixed in a tangible form as the law currently requires and which the researcher suggests that this legal position needs to be reformed. If chefs or restaurants become aware in India or elsewhere that food art can be granted copyright protection when fixed in a medium through pictures and videos posted on their official websites, then they can prevent others from copyright infringement as observed through the analysis of the websites. The chefs and restaurants can put a proper mechanism in place through a well-designed website for their recipes and dishes. One of the main aims of copyright law is to provide incentives to creators who can benefit from their creative works. Food art in the form of culinary creations certainly meets all the requirements that are needed that to be given copyright protection under the ambit of the Indian copyright regime. Making revisions broadly in civil law countries can be considered to meet the modern requirement of such evolving industries in contemporary times like the culinary industry that has a huge consumer base and increasing day-by-day. The constant development of the culinary industry evolved a need in exploring these facets of the protection under the Copyright Law.

Thought it may be tougher to get intellectual property protection on food art although it is possible to get such protection on such art as it involves creative works. The food art can be given protection that has a unique plating style and reveals the personality of the author as well. As rightly pointed out by Austin Broussard the food art can be given protection as original works of authorship. The only thing that needs to be kept in mind is that while giving and extending copyright protection to food art there should be a balance of interest as well for the chefs who are creating such authentic dishes and public interest who have access to such content. There needs to be a balance maintained between public domain and also copying without gaining permission. The purpose here is to protect such creators who create unique dishes that are exclusive in nature and also public to have access to such content.

While some of the authors believed that gaining copyright protection over food art would undermine the culture of the culinary industry with regard to openness and sharing of knowledge. There were authors that believed that giving protection will lead to more innovation in the industry that will lead to creating of new type of dishes with different kind of presentations as well. With the consistent expansion it had even become more important to expand intellectual property protection for such food creations and this will be more possible when more judicial interpretations are extended on this subject matter especially in India.

Copyright protection is not granted to ideas but to the expression of ideas. Food presentations are not an idea but an expression of ideas and so every effort must be made to grant copyright protection to such food art in the culinary industry. Though the food art can be given protection according to the norms mentioned under the copyright regime but still it is not been given adequate protection (Buccafusco, 2006). Therefore, it is very important to grant adequate copyright protection to such creations in the culinary industry to chefs and restaurants mainly because of the economic aspects.

Suggestions

This study attempts to find out possible solutions and alternatives that can be implemented to give protection both at the domestic and international level. Expanding copyright protection is one thing that can be done to gather a stringent protection for food art. There is certainly room for improvement in this case as chefs who are the actual creators are not able to benefit which they should and so there needs to be some sort of protection for such food artists to reward their creativity and intellectual efforts. Following are the possible solutions for better protection of food art: -

1. The possible solution can be to expand the current copyright regime to include such food art within its ambit. It will have to exclude the fixation requirement that is an essential in case copyright protection is to be sought automatically. In India any original and creative work can sought automatic copyright

protection when fixed in a medium. Works like these involving food art, make-up or hairstyles cannot be fixed in a tangible medium and cannot be given automatic protection.

2. A restaurant pays some royalty to the producer of any song when it plays that song in the restaurant involving commercial purpose and so like these paying royalties even to chefs can be an alternative solution under the copyright regime.
3. An amendment in the Copyright Act, 1957 of India must be provided for providing for rights that can be given to the chefs or artists for a limited period of time than the term given i.e. lifetime of the author plus 60 years after the death of the author under the Indian Copyright Act 140 for any creative work.
4. The moral rights that are bestowed upon any creator under the act will also act as the saviour for many creators in the culinary industry as it remains even after the copyright protection term is over.
5. A copyright society can be established for the culinary industry in particular so as to enable greater protection and recognition of the rights of the creators.

An effort in this regard can be initiated with respect to the culinary industry so that rights can be protected of the chefs and restaurants for their culinary creations for which they make so much effort.

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