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SPECIAL SECTION: FOOD & BEVERAGE

Infringing Lasagna? 3-D Printing Risks

Innovative restaurants already use the technology – but is it all protected IP?

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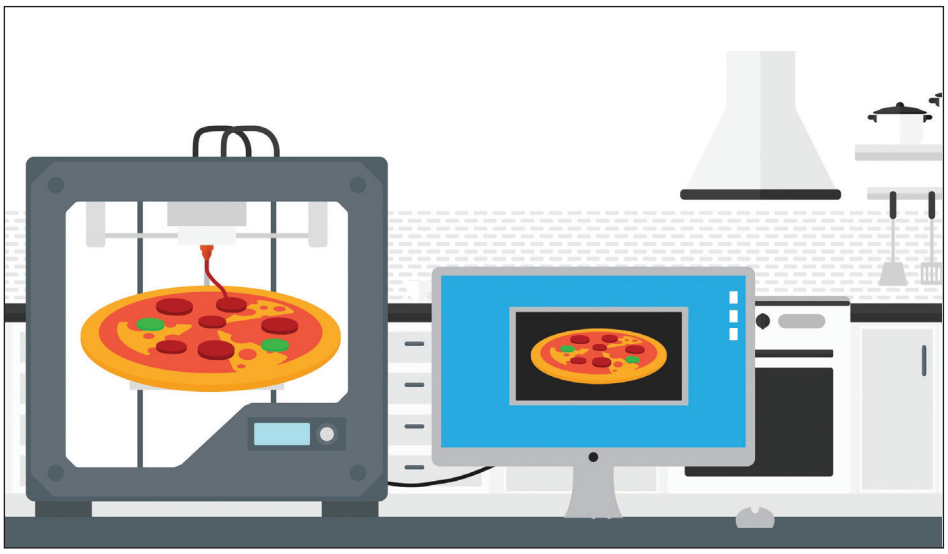
There are lots of risks in the restaurant business: bad food, unruly patrons, defective furniture. Fortunately, copying a recipe claimed by someone else is not one of them. Judges regularly close the courthouse doors on such claims, which, as a result, are few and far between. Until, that is, 3-D printing came along. Now, as surely as "au chocolat" follows "éclair," a 3-D printed confection is going to attract some unwanted attention, including, perhaps, a copyright infringement claim. Let us explain.

First, there is the little matter of copyright of recipes. One might think that the recipes for Colonel Sanders' Kentucky Fried Chicken and Coca-Cola must have copyright protection. One would be wrong. The Colonel's family recipe is protected, but by trademark – not copyright. You can batter and season your chicken exactly as the Colonel does but you can't call your chicken "Kentucky Fried Chicken" or "Old Kentucky Home Fried Chicken" or anything similar. And Coke demonstrated its disdain for copyright (but not trademark) law by keeping the recipe safely stashed in the gray matter of two individuals who – like mothers and fathers, and the president and vice president – fly on different planes (but see snopes.com/cokelore/formula.asp). Coke's recipe is even available online, if you have the time to mix oils of orange, lemon, nutmeg, cinnamon, coriander and neroli. But we digress.



Recipes are not subject to copyright protection because Congress says they are not. That is an oversimplification but not by much. The Constitution established that "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

At various times before today's seemingly endless congressional gridlock, Congress passed laws implementing the constitutional writ, most recently the Copyright Act of 1976, which provides that the subject matter of

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copyright is an original work of authorship that is fixed in a tangible medium of expression (codified in section 102 of Title 17). However, certain subjects are excluded from protection:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.

Thus, lists of ingredients lack the originality necessary to be copyrighted. And the process of combining such ingredients falls afoul of the prohibition of copyright for procedure or process. You don't have to take our word for it. The Seventh Circuit, in *Publications Int'l Ltd. v. Meredith Corp.,* 88 F.3d 473 (7th Cir. 1996), has written all this down with appropriate citations to the Constitution, statutory authority and relevant precedent.

Software code, however, is something different. While it may not read like Shakespeare or Dr. Seuss or sound like Beethoven or Adele, software is a "literary work." The Third Circuit figured this out in a case from the dawn of the microcomputer era, *Apple Computer, Inc. v. Franklin Computer Corp.,* 714 F.2d 1240 (3d Cir. 1983). After a review of the Copyright Act, a recent amendment to that act and relevant case law, the court ruled: "[A] computer program, whether in object code or source code, is a 'literary work' and is protected from unauthorized copying." This idea was immediately attacked to the extent that it purported to protect code that instructed a computer how to run the operating system (a procedure or process) as opposed to code that creates the output of the computer (the application). The Ninth Circuit, in *Apple Computer, Inc. v. Formula Int'l Inc.*, 725 F.2d 521 (9th Cir. 1984), just as quickly put the kibosh on that argument: "[Defendant-Appellant's] position, however, is contrary to the language of the Copyright Act, the legislative history of the Act, and the existing case law concerning the copyrightability of computer programs."

And so the table is set: What happens if a non-copyrightable recipe is written down in copyrightable software? So far as we can tell, this question has not yet been answered, but we predict it will be shortly. The reason: 3-D printing.

The 3-D Effect

Three-dimensional printing is taking off. A key patent expired in 2009, and by one estimate the market will be $20 billion by 2025. Food is a small corner of that market. There are at least three levels to the application. First, there are the applications that are fairly similar to conventional two-dimensional printing. Think cookies and frostings extruded in ultra-precise shapes and colors. Copyright and trademark issues here will be conventional. Is a Darth Vader image appropriately licensed? Can one get away with "Just Do It" carefully inscribed in the signature marzipan?

The two sides of 3-D food: those who figured it out and those who want to copy it.

Next, there are creations more along the lines of mainstream 3-D printing; that is, food items crafted in three-dimensional shapes. A recent article in "The Los Angeles Times" described culinary works of art created by local chefs, such as "a French onion soup featuring a 3-D printed onion powder cube in a bowl that dissolved as hot oxtail broth was poured over" and "a passion fruit curd dessert garnished with a 3-D printed sugar passion fruit flower." This approach would seem still to contain a relatively bright line between the software code describing the precise approach to making a 3-D printed cube or flower and the recipe for how to make the oxtail broth and combine it with the cube, or to prepare the curd dessert and garnish it with the flower.

The third approach we see is where the code actually combines the steps of the recipe. A NASA contractor has created a 3-D printed pizza for a mission to Mars. As described, "the printer would be able to lay out all the starches, proteins, fats, texture and structure, spraying on flavor, smell and micronutrients at the end." A European consortium, considering how to address the nutritional needs of elderly persons suffering from difficulties chewing and swallowing, has used 3-D printing to create meals of pureed and strained food in their original shapes and textures, including personalized nutritional additives. A concept from a group of Indian design students, called the Sky Kitchen, envisions 3-D printed foods for air travelers (as in freshly made rather than precooked). In other words, a designer plate of lasagna may not be far off.

There will be two sides of the table for that lasagna: the one who figured out how to serve award-winning lasagna from a 3-D printer and the rest of the world that wants to copy it. If it is only a recipe, the copiers can proceed with impunity; if it is software, the innovator may protect his or her intellectual property. And we don't know how these conflicts will come out.

As a result, there will likely be cease-and-desist letters in the copiers' futures. And if lasagna is lucrative enough, a lawsuit. If you extend this scenario to award-winning 3-D printed soufflés, corn breads, paellas, jambalayas, mousses or whatever other foodstuffs an innovator/artist/artisan/chef sets his or her mark on, this could be something of a headache.

Infringement Insurance

Can you insure against this sort of thing? As a theoretical matter, of course you can. But as in most things insurance, the details matter. Your typical general liability insurance provides copyright infringement protection in connection with your advertisements. This means that if you get sued, your insurance company will defend you, and if you improperly infringed, it will pay the damage award. The significant detail is that you will have to show that the infringing lasagna is part of your advertisement, which we suspect may be difficult.

The easy answer to this is to procure a media liability policy, which contains a much broader span of copyright infringement coverage. However, it may be difficult to convince the boss that a restaurant needs a media policy for its lasagna. But the boss did approve the 3-D printing venture, so maybe it is not impossible.

The larger picture is that innovation comes with some great rewards but also with risks that may not squarely fall where you have addressed risks in the past. Food contamination risk is a present restaurant risk, and it will continue with any adoption of 3-D printing. Copyright infringement risk in your food is something you probably never even conceived, much less worried about. But that does not mean you should steer away from 3-D printing. To the contrary, it means a robust discussion with your broker, your insurer and your counsel is required so that you can go on doing what you do – with no unpleasant surprises. Enjoy the lasagna!

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