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Turkan Bayandik Karimova
Baku State University
Intellectual Property Law,
Master degree
turkankerimova19@gmail.com

THE PROTECTION OF FOOD RECIPES IN THE CONTEXT OF TRADE SECRET

Abstract

The article examines the protection of recipes with intellectual property rights in the context of trade secrets, as well as the legislation and judicial practice of foreign countries, in addition to national legislation. In connection with the topic, in the judicial practice of foreign countries, in addition to the requirement of confidentiality in the treatment of recipes, it was determined to take into account the requirement of innovation, and commented on this approach. The article also examines the right of consumers to information in terms of trade secrets and cases of obtaining trade secrets by legal means.

Key words: *food, recipe, trade secret, intellectual property rights, secrecy*

Kərimova Türkan Bəyəndik qızı

QIDA RESEPTLƏRİNİN KOMMERSİYA SİRRİ KONTEKSTİNDƏ MÜHAFİZƏSİ

Xülasə

Məqalədə yemək reseptlərinin əqli mülkiyyət hüquqları ilə mühafizəsi kommersiya sirri kontekstində tədqiq edilmiş, milli qanunvericiliklə yanaşı, xarici dövlətlərin qanunvericilik və məhkəmə təcrübəsi də araşdırılmışdır. Mövzu ilə əlaqədar xarici dövlətlərin məhkəmə təcrübəsində yemək reseptlərinə münasibətdə gizlilik tələbi ilə yanaşı, yenilik tələbinin də nəzərə alınması müəyyən edilmiş və bu yanaşmaya münasibət bildirilmişdir. Həmçinin məqalədə kommersiya sirri aspektində istehlakçıların məlumat almaq hüququ və kommersiya sirlininin qanuni vasitələrlə əldə etmə halları da araşdırılmışdır.

Açar sözlər: *qida, resept, kommersiya sirri, əqli mülkiyyət hüquqları, gizlilik*

Introduction. Today, the growing network of large restaurants leads to a wider range of their services. Most of the services provided by restaurants depend on the recipes they have. Culinary products, especially recipes, have become a business tool with significant economic value for large restaurant chains [C.Bailey King&Bridget V.Warren, 2019, p.59]. This raises the legal protection of prescriptions in the food industry, especially in terms of intellectual property rights.

Recipe is understood as a set of instructions for making something from various ingredients and formula or procedure for doing or attaining something [22]. Sometimes the recipe is accepted as technical information [M.Schultz & P.Passman, p.5].

Searching for intellectual property rights in recipes is more difficult than protecting them [C.Bailey King & Bridget V.Warren, 2019, p.60]. For that reason, the approaches regarding the protection of recipes are divided into two parts:

1. The recipes are devoid of any legal protection. This comes from practical necessity
2. The recipes have expressive elaboration and deserve protection [Zarin B, 2016, p.187]

Copyright, patents, and trademark are not powerful tools for legal protection of food recipes [C.Bailey King&Bridget V.Warren, 2019, p.63], processes and recipes are not suitable for granting patent [Bocchinuso D. Courage N., 2020, p.1]. Thus, some authors believe that there are “low IP” rights in this area [B.Zarin, 2016, p.185]. From the point of view of intellectual property rights, the kitchen is an “open source” model because the application of intellectual property rights here in the interests of society can hinder development. For that reason, trade secret is usually chosen as a more effective legal tool [Bailey C., Bridget K. Warren V. 2019, p.63] and the strongest IP asset for the protection of food recipes.

Requirements for trade secret protection

The trade secret is information related to production, technological, management, financial and other activities of legal entities and individuals, disclosure without the consent of the owner, which may harm their legitimate interests [4, art. 2.0.1]. TRIPS Agreement defines the trade secret as *undisclosed information*. The requirements for undisclosed information are the following:

1. Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
2. Has commercial value because it is secret;
3. Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret [6, art.39.2].

According to the IPR literature in order for information to be classified as a trade secret, the information must have three characteristics. Firstly, the information must not be generally known to the public. Secondly, the owner of the trade secret must take reasonable precautions to avoiding the disclosure of the trade secret [Mark.A.L., 2008, p.8]. Thirdly, the information has to possess “independent economic value” [Camilla A. HrdyM. , Lemley A., 2021, p.5]. This can be actual or potential [Bailey C., Bridget K., Warren V., 2019, p.62]

Similar requirements have been expressed in the relevant law. The criteria for classifying information as a trade secret are as follows: [4, 3]

1. Has a commercial value (important because it is not known to other persons in terms of gaining an advantage in the field of activity and making a profit, can be sold to other persons in whole or in parts, forgiven, contracted or inherited, etc.);
2. Implementation of legal, organizational, technical and other measures by the owner in order to protect the confidentiality of information;
3. Restricting the free access to this information on legal grounds.

In our opinion, most recipes are of public importance, that is, they directly serve to meet people's food needs. For this reason, protecting every recipe with a trade secret, while a successful tool for companies, is dangerous to the public interest. For instance, RecipeLion.com does not claim any copyright ownership or trademark [Secret Restaurant Copycat Recipes, p.2].

II. Disputes related to misappropriation of food recipes

One of the key points in litigation is the definition of additional criteria for trade secrets. Thus, although one of the main criteria for a trade secret having secrecy, in some cases it's required novelty from information. In *Buffets, Inc. v. Klinke* case court decided that trade secret “protects the author's very ideas if they possess some novelty and are undisclosed or disclosed only on the basis of confidentiality.” [Bailey C. King & Bridget V. Warren, 2019, p.62].

In this case, the question automatically arises: does the requirement of novelty, which is the main criterion in patent law, also apply to trade secrets? We must keep in mind that a trade secret, as its name implies, is a secret, that is, undisclosed information. If the information is not disclosed, it gives the owner an advantage. But can every undisclosed information be considered new? Should the court expect innovation from trade secrets when considering a dispute? We believe that the demand for innovation means unknown, undisclosed. That is, the information constituting a trade secret is disclosed, but this information is known to a limited circle of persons. Information that is a trade secret may also be protected by a patent. For this reason, it is advisable to consider the demand for innovation in trade secrets.

However, some authors believe that it is a trade secret that is an effective means of protection for recipes, because it is easier for chefs to prove that a recipe is secret than to prove that it is new and quite distinctive [Zarin Z., 2016, p.196]. Novelty is not the main requirement and there is no need to prove that trade secret is new [Susanna H.S. Leong, 2013, p.9].

As mentioned above, the main purpose of protecting recipes as a trade secret is to prevent their disclosure to competitors. For this reason, special attention is paid to the protection of recipes by special means. But is the recipe for choosing strong preservatives a trade secret? Also, if a prescription is

developed on the basis of a prescription that is considered public property and is not supposed to belong to any person, will it be considered a trade secret? It isn't feasible to give an unequivocal answer to the question. However, in one of the cases, we can find a partial answer to both questions with the conclusion of the court.

There are three stages of conflict when determining whether a recipe is a trade secret:

1. Creativity v. instruction - Creativity is the latest version of the dish. Instruction is the method used by the cook in the preparation of food [Zarin B., 2016, p.197].

2. Skillset v. artistry - During the preparation of food, the chef demonstrates his skills in the usual work process, that is, he is an instructor [Zarin Z. 2016, p.198]

3. Secrecy v. openness - According to the dominant position in the literature, the food industry-kitchen is a shared economy, because involuntarily chefs participate in training and demonstrate their skills in cooking, and this should be the case [Zarin B., 2016, p.200].

Another issue is the development of food-based on other recipes. Can any trade recipe developed on the basis of traditional and national recipes form a trade secret? For example, can a person who created a new version of pilaf claim that it is a trade secret? In court practice, the attitude to the issue is noteworthy. *Hui Kun Li v. Schuman* The recipe must be distinguished from traditional dishes, otherwise, it is considered well-known [Gregory R.Farkas, 2020, p.18]. In *Cf. Buffets Inc. v. Klinke* case court made a decision the recipe cannot be considered a trade secret unless a new product is created and designed [Gregory R., Farkas, 2020, p.18].

III.Famous trade secret recipes. Exceptions to trade secret and the right to information and

Another important issue is what the recipe protects as a trade secret. According to the above definitions, the recipe includes the ingredients used in the preparation of the dish and the methods of preparation. For this reason, in most cases, there are prescription methods of preparation. However, they are protected ingredients from popular recipes, such as KFC's recipe. Thus, 11 species of plants and spices are protected as trade secrets [18].

McDonald's is one of the fast food giants that successfully uses recipes. So, the special sauce for BigMac burger and Krispy Kreme Doughnut recipe is a trade secret [18].

Coca-Cola's recipe is also among the best preserved recipes. The recipe for the company's diet Coke, caffeine- free diet Coke, TAB, caffeine- free TAB and caffeine- free Coca- Cola have not yet been disclosed [16, p.6]. The ingredients that give the drink its natural taste are a trade secret, but other ingredients used in the preparation of the drink are reflected on the bottle [20].

Another product is Campari. A mixture of natural ingredients, mainly herbs, spices, peels, fruits and fruit peels. It was noted that only one person knew the whole formula [20].

Large corporations take certain measures to protect food recipes. Non-disclosure agreements are made to ensure security [R.Stim, p.3]. It is also possible to disclose food recipes to certain individuals through franchising agreements [Siregar İ.Y. 2018, p.86]. Does this violate the requirement of confidentiality of trade secrets? The answer to the question is that the disclosure of recipes in business activities to a limited circle of people outside the owner [7, p.130] such as partners, distributors, does not make the recipe accessible to everyone. The requirement of confidentiality means that the recipe is not known to everyone and is not available to the general public.

However, this protection does not mean that recipes are kept secret forever. Thus, the cases where a trade secret is not considered a violation of the law are as follows:

- ❖ Independent creation;
- ❖ Reverse engineering;
- ❖ Reading public documents [7].

In general, the legal and fair means of obtaining a trade secret are not limited to the above. In such cases, the disclosed trade secret will no longer be considered confidential as it has lost its confidentiality.

Maintaining a balance between the protection of trade secrets and the protection of consumer rights is also important. Due to the confidentiality of information constituting a trade secret, the consumer can not obtain information about the composition of the food. This right stems from the right to information provided for in Article 50 of the Constitution of The Republic of Azerbaijan. According to Article 13.1

of the Law of The Republic of Azerbaijan "About protection of the rights of consumers", the seller (executor) provide the consumer with necessary and accurate information on the conditions of acquisition, warranty obligations and claims, methods and rules of use, storage and safe use of goods. However, another normative legal act stipulates that this right will be restricted. According to Article 2.4-1 of the Law of The Republic of Azerbaijan on access to information, access to information is allowed provided that it protects the interests of the Republic of Azerbaijan in the fields of political, economic, military, financial-credit and monetary policy, protection of public order, health and morality, protection of rights and freedoms, *commercial and other economic interests* not to contradict the purpose of ensuring the reputation and impartiality of the court, the normal course of the criminal investigation.

Similar regulations are applied in the USA and Sweden. Although The Freedom of Information Act establishes the right of citizens to free access to information, it also sets limits. One of these exceptions is a trade secret. The government does not disclose this information except to ensure public health [Dessemontet, p.17-18].

Conclusion. The expansion of the large restaurant chain is affecting the competitive environment between them. Since one of the main criteria for ensuring this competition is recipes, it is more convenient to protect them with trade secrets. However, this does not mean that all recipes can be kept a trade secret. For this reason, the ingredients of recipes that are a trade secret in litigation must meet the requirement of confidentiality. The methods of cooking can additionally meet the demand for innovation. The expectation of a novelty requirement for the methods is due to the owner's desire not to disclose them, even if they meet the patent legal requirements. At the same time the owner of the trade secret must take reasonable step to prevent disclosure.

Although the relevant legislation defines the consumer's right to information, this right is not absolute. However, if a person discloses a trade secret by legal means, it will not be considered a violation of commercial law.

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