



**G. ELIAS**

## **Beyond the Plate:**

The Importance of Intellectual Property Protection in Driving Innovation and Competition in the Food Manufacturing Industry

## Introduction

The food manufacturing industry (the “**Industry**”) is one of the fastest growing because of its immense importance to man. The Industry encompasses all the steps for creating food, from manufacturing which is the formulation of the recipes to labeling, marketing, and branding of the final product.<sup>1</sup> On the basis of trade and profit making, the food industry thrives on branding, and it is on this basis that Intellectual Property protection is necessary. With the growth of the Industry and competition in the market, the need to protect and enforce the rights that accrue to the Intellectual Property Right (“**IPR**”) owners to avoid unfair exploitation by other market competitors becomes a thing of concern.

Intellectual Property (“**IP**”) has been defined as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.<sup>2</sup> The protection of intellectual property is aimed at striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.<sup>3</sup>

The various IPRs that protect IP owners in the Industry are copyright, trademark, patents, industrial design, geographical indications, plant and animal varieties and trade secrets. The Industry also faces several unique issues related to the protection of IP, which make it difficult for food companies and enterprises to protect their innovations, brand reputation, and market position. This article gives an overview of the significance of IPRs in the Industry and considers the issues relating to the protection of IP in the Industry.

## Intellectual Property Rights in the Food Manufacturing Industry

### Copyright in the Food Manufacturing Industry

Copyright as a branch of Intellectual Property rights protects literary, dramatic, musical, and artistic works.<sup>4</sup> Copyrights can only protect the IP owner when such ideas or works are expressed literally.<sup>5</sup> Recipes, cookbooks (whether Physical or audio visual), and its contents can be regarded as the intellectual property of the author.

It is important to note that copyright laws do not protect the mere listing of ingredients without more. The mere listing of ingredients can be likened to ideas which are not recognizable under copyright laws.<sup>6</sup> A simple set of directions has also been said to be uncopyrightable as such recipes are factual and merely contain procedures which do not entitle them to copyright protection. This is the position in the United States.<sup>7</sup> It is however important to note that there are circumstances where recipes can be copyrighted. That is where such recipe includes any written, pictorial, or video content accompanying the list, stipulating an original way of combining the listed ingredients to create a unique meal.<sup>8</sup>

In Nigeria, there are no specific requirements with respect to recipes and food related works. However, copyright protection is available to IP owners for literary, artistic, and scientific works, including recipes and food related works, if they meet the trio requirement of originality, sufficiency

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<sup>1</sup> Kashish world, “Intellectual Property Rights in the Food Industry” Retrieved from <https://www.kashishworld.com/blog/intellectual-property-rights-in-the-food-industry/#:~:text=Intellectual%20Property%20Protection%20can%20safeguard,protect%20his%20or%20her%20idea.>

<sup>2</sup> WIPO, “What is Intellectual Property” Retrieved from <https://www.wipo.int/about-ip/en/>

<sup>3</sup> Ibid

<sup>4</sup> See section 1 of the Copyright Act, Cap C28, Laws of the Federal Republic of Nigeria, 2004

<sup>5</sup> Ibid

<sup>6</sup> See *Tomaydo-Tomahdo, LCC v Vozary*, 629 F. Appx. 658, 661 (6th Cir. 2015)

<sup>7</sup> United States Copyright Office. (2021). Circular 33: Works Not Protected by Copyright. Retrieved from <https://www.copyright.gov/circs/circ33.pdf>

<sup>8</sup> Ibid.

of effort and fixation.<sup>9</sup> This availability of copyright protection also covers website contents, blog updates and marketing contents as it relates to food and food manufacturing.

### Trademark in the Food Manufacturing Industry

Trademarks refers to recognizable symbols, signs, words or marks (“**Brands**”) used by manufacturers to identify their products. Trademarks are very essential because they are a means through which a manufacturer distinguishes his products from competitive ones in the marketplace.<sup>10</sup> In today’s world, consumers are faced with choosing their preferred product from a well of the same products with the determining factor for making their choices being the “brand”. This is the point trademark comes in as by registering one’s trademark, the trademark owner can differentiate its brand from others, it protects the brand against infringement, protects the brand from defamation and builds trust around quality standards.<sup>11</sup> This is why protecting a brand or goodwill is given utmost priority.

Registering a trademark for a food brand will give the IPR owner exclusive rights to exploit the brand and entitle it to initiate legal proceedings for protection of its trademark against infringers. Trademarks can also be used to afford protection to food or food product as a 3-dimensional shape. Shape marks are often described as non-conventional trademarks. Non-conventional trademarks also include, sound marks, smell marks etc. An example of this is the Toblerone trademark which protects its mark made up of a series of joined triangles and the contour shape of the Coca-Cola bottle<sup>12</sup>. Trademarks also provide “trade-dress” protection, which is a subset of trademark law that protects the design, shape, color, packaging, or appearance of a product so long as these characteristics work as an identifier for the consumer.<sup>13</sup>

### Patents and the Food Manufacturing Industry

Patents are applicable to inventions that satisfies the requirement of newness, result from inventive activity and are capable of industrial application.<sup>14</sup> Food, food product and food manufacturing methods can be patented.<sup>15</sup> However, such food product must be novel, useful and not intended to be kept a secret. Patent protection is also relevant in the food industry as it relates to many other processes or procedures surrounding food manufacturing. It is possible to acquire patent protection for machines, packaging, preservation methods and innovative processes used in the food manufacturing industry.

### Industrial Design in the Food Manufacturing Industry

Industrial design protects the exterior appearance of a product or parts of it thus granting the holder the right to make, sell, and use it.<sup>16</sup> Industrial designs protect lines, colours, and dimensions. This helps

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<sup>9</sup> Section 1(2) of the Copyrights Act, Cap C28, Laws of the Federal Republic of Nigeria, 2004.

<sup>10</sup> Folarin Shyllon, “Intellectual Property Law in Nigeria”, Vol.21. 2003.

<sup>11</sup> Dinesh Parmar, “4 Reasons why Trademark registration is important for food industries” Retrieved from <https://www.parkerip.com/blog/4-reasons-why-trademark-registration-is-important-for-food-industries/>

<sup>12</sup> “Shape and 3-Dimensional Trademarks”, Received from <https://www.onlinepatentfiling.com/blogs/shape-and-3-dimensional-trademarks.html>

<sup>13</sup> Thomson Reuters. (n.d.). “Design rights in food and drink.” Practical Law UK. Retrieved from [https://uk.practicallaw.thomsonreuters.com/2-502-0450?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/2-502-0450?transitionType=Default&contextData=(sc.Default))

<sup>14</sup> Section 1(1) Patent and Design Act 1970.

<sup>15</sup> Flora IP, “Food and Intellectual Property: Protecting Cookbooks, Chocolates, Peppers and Pies”. 2020

<sup>16</sup> Section 12 of the Patent and Designs Act, 1970 defines industrial design as “any combination of lines or colours or both, and any three-dimensional form, whether it is associated with colours or not, intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain technical result.”

food manufacturing industries to distinctively package their food products.<sup>17</sup> By so doing, there will be protection for the distinctively packaged products against counterfeiting and other infringing acts by competitors and other counterfeiting agents.

The registration of a design ensures that other businesses do not make use of the same packaging, or even similar containers as that of the product of the IPR owner. It is not enough to merely make minor changes to a protected design, if the overall look of the products is similar, such a competitor can still be prevented from using such design as that would infringe on the rights of the registered design owner.

### Trade Secrets in the Food Manufacturing Industry

Trade secret is a very relevant IPR to the food industry. Most enterprises have winning secrets which gives them an advantage and keeps them above others in the market.<sup>18</sup> The World Intellectual Property Organisation (WIPO) defines trade secret as any confidential business information which provides an enterprise a competitive edge which could be commercial assets, manufacturing or industrial secrets which protects against unfair competition depending on the jurisdiction the product is.

As it relates to the Food Industry, most restaurants, chefs, bakers and food manufacturers have trade secrets, such as secret recipes or manufacturing processes, which distinguishes their products from others in the market. These secrets are very essential to the growth and brand of their business hence the recognition to afford them protection.

Trade secrets as an Intellectual Property Right generally do not require any form of registration. In Nigeria particularly, there is no governing law with respect to trade secrets. However, the TRIPS Agreement to which Nigeria is a party has provided a general standard for the protection of trade secrets. Section 39 of the TRIPS provides that for an information to be protected as a trade secret, the following requirements must be met:

- The information must be secret (that is it is not generally known among, or readily accessible to, circles that normally deal with the kind of information in question);
- It must have commercial value because it is a secret; and
- It must have been subject to reasonable steps by the rightful holder of the information to keep it secret (e.g., through confidentiality agreements).<sup>19</sup>

Most developed countries like the United States for instance have trade secret laws in place protecting businesses with such trade secret against unauthorized exploitation by competitors or unauthorized persons. In Nigeria on the other hand, in the absence of laws governing trade secrets, most businesses with information to protect has in its place adopted the practice of drafting Non-Disclosure Agreements to be signed by all its employees as a measure to protect their trade information.<sup>20</sup>

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<sup>17</sup> Infusion Lawyers, "Intellectual Property and Brand Protection in the Food and Spice Industry", Retrieved from <https://infusionlawyers.com/intellectual-property-and-brand-protection-in-the-food-and-spice-industry/#:~:text=In%20the%20food%20sector%2C%20patents,methods%2C%20and%20other%20novel%20elements>

<sup>18</sup> Infusion Lawyers, "Intellectual Property and Brand Protection in the Food and Spice Industry", Retrieved from <https://infusionlawyers.com/intellectual-property-and-brand-protection-in-the-food-and-spice-industry/#:~:text=In%20the%20food%20sector%2C%20patents,methods%2C%20and%20other%20novel%20elements>

<sup>19</sup> World Trade Organization. (1994). Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)

<sup>20</sup> Ibid

Some of the world best kept trade secrets are those of the Coca-Cola formula and KFC recipes for their coke and chicken respectively. A major benefit to registering one's trade secrets is that it gives it long term usage and as such there is a possibility for that trade information to be kept a secret in perpetuity.

### Geographical Indications in the Food Manufacturing Industry

A geographical indication (GI) is a sign appertained to products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. Geographical indications identify products with specific geographic origin or with unique characteristics linked to a particular place of origin.<sup>21</sup> Examples of internationally recognized geographical indications are Champagne from France, Tequila from Mexico, Swiss made (in respect of watches) from Switzerland, Penja Pepper from Cameroon among others.<sup>22</sup> In the food industry, both cooked food and the ingredients used in recipes can be registered as Geographical indications.

This branch of Intellectual property is also very relevant because of the economic implications it has for the locality. The protection of geographical indications can lead to a growth in the economic prosperity of the manufacturers and producers in that locality. In furtherance to this, the promotion of these products in its area of origin enhances economic activities automatically boosting the economic development of that area.

In Nigeria there is currently no sui generis law on Geographical Indications, however, origin-based products can be protected pursuant to section 43 of the Trademarks Act as a certification mark.<sup>23</sup> There is also currently no Nigerian food products protected by geographical indications. There are however several Nigerian food products which may qualify for protection by geographical indications such as Ijebu-garri from Ijebuland, Okpa Nsukka and Ofada rice from western Nigeria.

### Plant and Animal Varieties in the Food Manufacturing Industry

A plant variety represents a more precisely defined group of plants, selected from within a species, with a common set of characteristics.<sup>24</sup> Plant breeding is a means of creating new improved plant varieties by combining different plants and doing so is an important and sustainable means of achieving food security.<sup>25</sup> This makes it an important IPR for the food manufacturing industry. Successful plant breeding requires great skill and knowledge in a process that can take up to 15 years to introduce a new plant variety to the market.<sup>26</sup> As a result, it has been globally recognized as a protected IPR.

Originally plant and animal variety protection was submerged into patentable rights under the TRIPS Agreement with the Agreement mandating member states to provide a patent for the protection of these varieties while also giving these states the liberty to exclude biological processes for the production of plants or animals.<sup>27</sup> On the basis of this, some countries like Nigeria excluded plant and animal varieties from patent protection.

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<sup>21</sup> WIPO, "Geographical Indications. What is a Geographical Indication?" Available at [https://www.wipo.int/geo\\_indications/en/](https://www.wipo.int/geo_indications/en/)

<sup>22</sup> Tolu Olaloye, "Economic Benefits of Establishing Law for the Protection of Geographical Indications (GIs) in Nigeria" 2022. Retrieved from <https://jee.africa/economic-benefits-of-establishing-law-for-the-protection-of-geographical-indications-gis-in-nigeria/>

<sup>23</sup> The Journal of World Intellectual Property, "Rethinking Nigeria Geographical Indications Law". 2022. Retrieved from <https://doi.org/10.1111/jwip.12248>

<sup>24</sup> "What is a Plant Variety" Retrieved from <https://www.upov.int/overview/en/variety.html>

<sup>25</sup> WIPO, "Achieving sustainability with Plant Variety Protection". Retrieved from <https://www.wipo.int/ip-outreach/en/ipday/2022/toptips/upov.html>

<sup>26</sup> Ibid

<sup>27</sup> "Plant Breeder's Rights Under Nigeria's Plant Variety Protection Act 2021". Retrieved from <https://jee.africa/plant-breeders-rights-under-nigerias-plant-variety-protection-act-2021/>

Subsequently, the International Convention for the Protection of New Varieties of Plants (UPOV Convention) established the International Union for the Protection of New Varieties of Plants (UPOV) whose mission is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.<sup>28</sup> Under the UPOV, there are stipulated conditions to be fulfilled before the grant of breeder's right. These conditions are Novelty (the plant variety must be new);<sup>29</sup> Distinctiveness (that is the variety must be distinguishable from any other existing variety);<sup>30</sup> Uniformity<sup>31</sup> and Stability.<sup>32</sup>

Like plant variety, animal variety entails animal breeding where various species of animals are cross bred to create a new specie.

In Nigeria, the Plant Variety Protection Act 2021 is the foremost regulatory framework regulating plant variety in Nigeria as Nigeria is not a signatory to the UPOV convention. The Act was enacted to promote increased staple crop productivity for small holder farmers in Nigeria and encourage investment in plant breeding and crop variety as well as protect new varieties of plants.<sup>33</sup> A plant variety right affords protection to a specific variety as it protects the breeder of a new plant against other breeders producing, conditioning, selling or marketing a similar variety.<sup>34</sup>

The benefit of plant and animal variety protection to the breeders (IPR owners), the Industry and the Nigerian economy cannot be overemphasized hence the need for IP protection. Protection of plant and animal variety IPR allows for increased investments in plant and animal breeding, protects biodiversity, promotes food security and serves as an incentive for plant and animal breeders to encourage them engage in breeding new varieties knowing that they will be conferred with the rights in those varieties.<sup>35</sup>

### Issues with the protection of IPRs in the Food manufacturing Industry

The food industry faces several unique challenges related to the protection of IPRs. One of the major issues to intellectual property protection in the industry is the underutilization of these rights. According to Eben Freeman, the creator of the smoked-Coca-Cola cocktail, *"In no other creative business can you so easily identify money attached to your creative property...Yet, we have less protection than anyone else."*<sup>36</sup>

The underutilization of intellectual property rights in the food industry can be attributed to several reasons, some of which are:

- **Stringent registration requirements:** the strictness of the law governing certain intellectual property rights is one of the reasons the industry has failed to properly utilize them. According to the U.S. Supreme Court, to claim protection in food products, "an applicant must establish a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function." As a result, new recipes or formulas for cooking food or manufacturing food products, which involve the addition or elimination of common ingredients, or for treating them in

<sup>28</sup> UPOV website. Retrieved from <https://www.upov.int/portal/index.html.en>

<sup>29</sup> 1991 UPOV Convention, Article 6

<sup>30</sup> 1991 UPOV Convention, Article 7

<sup>31</sup> 1991 UPOV Convention, Article 8

<sup>32</sup> 1991 UPOV Convention, Article 9

<sup>33</sup> Ifeanyi Okonkwo, Blessing Udo & Kayode Ikumelo, "Overview of Nigeria's Plant Variety Protection Act 2021 and the Impact of Section 43(2) on Plant Breeders". Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3928965](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928965)

<sup>34</sup> Nicholas Jones and Rachel Wallis, "How to get IP protection for new varieties of plants and animals" 2010. Retrieved from <https://sciencebusiness.net/news/67925/How-to-get-IP-protection-for-new-varieties-of-plants-and-animals>

<sup>35</sup> Ifeanyi Okonkwo, Blessing Udo & Kayode Ikumelo, "Overview of Nigeria's Plant Variety Protection Act 2021 and the Impact of Section 43(2) on Plant Breeders". Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3928965](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928965)

<sup>36</sup> Beatrice Martinet Esq, "Intellectual property protection in the food industry". <https://www.food-safety.com/articles/6872-intellectual-property-protection-in-the-food-industry>.

ways which differ from the former practice, do not amount to invention merely because no one else ever did [it]."<sup>37</sup>This strict position has discouraged many in the industry from applying for patent protection.

- **Brand adoption difficulties:** As it relates to trademark, there is equally the challenge of establishing the distinctiveness requirement in the industry. Now with the growth the industry experiences, it has become so competitive that manufacturers must find names that are expressive enough to strike a chord in the mind of consumers making them remember such product when faced with a lot of choices. Thus, food businesses tend to adopt trademarks that are very suggestive, often bordering on descriptive. As a result, several marks get rejected based on their lack of distinctiveness.
- **Enforcement difficulties:** There is also the problem of difficulty in enforcement. This is particularly the case with trade secrets. The protection afforded by trade secrets is fragile as disclosure of the secret ends the coveted monopoly which is the basis for the economic benefits of it. As a result, enforcing trade secrets is very important but this can become difficult, time-consuming, and costly to the owner.
- **Reverse engineering:** The nature of the food industry makes it relatively easy for competitors to reverse engineer products and create replicas, making it challenging to protect trade secrets.<sup>38</sup>
- **Geographic indications:** The application of geographic indications (GIs) to protect the origin and quality of food products can be contentious, particularly in cases where multiple regions claim the same product name. For example, the use of the name "feta" has been a contentious issue between Greece and other countries.<sup>39</sup>
- **Traditional knowledge and cultural heritage:** Many food products and processes are based on traditional knowledge and cultural heritage, making it difficult to determine who has the rights to the IP associated with these products and processes.<sup>40</sup>
- **Lack of Awareness:** Many people are not aware of other forms of protection available to IPR owners besides the conventional Copyrights, Trademarks and Patents. Farmers, for example, who have been engaged in breeding new plant and animal species are not aware of the IP framework available for the protection of their respective IPRs. In this regard they are unable to exploit their IPRs and may lose out on investments, support and recognition for their efforts in ensuring food security.

## Conclusion

Despite the attendant issues with intellectual property in the industry, one cannot deny its value and as such food businesses are encouraged to still take intellectual property protection seriously to enable them to unlock the economic advantage it brings. IPR owners in the Industry are advised to adopt a multifaceted approach to intellectual property protection. That is, have a combination of these rights and with such in place, the brand is guaranteed adequate protection.

It is also important for the food industry to work collaboratively with legal and regulatory bodies to develop strategies that protect IPR while balancing the need for innovation, fair competition, and consumer protection. By doing so, the food industry can continue to grow and thrive in a highly competitive global marketplace.

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<sup>37</sup> See re Levin, 84 U.S.P.Q. 232 (1949).

<sup>38</sup> Sophie Peresson, "IP and food technology: how to protect innovation in the food industry," World Intellectual Property Organization, 12 September 2019, Retrieved from [https://www.wipo.int/wipo\\_magazine/en/2019/05/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2019/05/article_0003.html)

<sup>39</sup> European Commission, "Geographical Indications (GI)," Retrieved from [https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications\\_en](https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications_en)

<sup>40</sup> Food and Agriculture Organization of the United Nations, "The Role of Intellectual Property Rights in the Agricultural and Food Sector," Retrieved from <http://www.fao.org/3/x6635e/x6635e01.htm>

## Authors



**Chioma Egboh** • Associate

[chioma.egboh@gelias.com](mailto:chioma.egboh@gelias.com)



**Somtochukwu Anekwe** • Associate

[somtochukwu.anekwe@gelias.com](mailto:somtochukwu.anekwe@gelias.com)

## LOCATIONS

### LAGOS OFFICE

6 Broad Street  
Lagos, Nigeria

### ABUJA OFFICE

2nd Floor, Abia  
House,  
Plot 979, First  
Avenue,  
Central Business  
District  
F.C.T, Abuja.

T: +234 (1) 460 7890

E: [gelias@gelias.com](mailto:gelias@gelias.com)

T: +234 (1) 888 8881

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