

Can Recipes Be Patented?

You've heard it before: "We make the best!" Be it barbecue sauce or brownies, it seems like everyone claims to have a unique and special food recipe. But can the culinary geniuses who came up with those recipes obtain a patent and exclude others from making, using, or selling their delectable creations? One of the most common questions the Office of Innovation Development receives is whether or not food recipes can be patented. Here's what you need to know.

First, remember that patents may be granted for any "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" according to Title 35 of the United States Code, Section 101 (35 U.S.C. 101). A food product or recipe typically has three components: a list of ingredients, instructions on how to combine and cook them, and the final product resulting from the first two components. In terms of patentable subject matter, a list of ingredients can fall under the headings of a composition of matter and/or manufacture, and the way the food product is produced can fall under a process. So the short answer is yes, recipes are eligible for patent protection because they potentially contain patentable subject matter.

But hold on. To be patentable, an invention must also be "novel" and "nonobvious," as determined by 35 U.S.C. 102 and 35 U.S.C. 103, respectively. That means a patentable invention can neither have existed before, nor be an obvious improvement or alteration of a previously known invention, which could be determined by someone with reasonable skill in the art encompassed by the invention. This is where patenting a recipe gets a lot trickier.

Consider that people have been mixing together ingredients to produce different food products since the dawn of humanity—in fact, some of the earliest known examples of written language are food recipes. These days, most "new" recipes are merely combinations of known ingredients in varying amounts, separate discoveries of preexisting recipes, or variations on known recipes. Even if a previous version of a recipe cannot be found, a "new" recipe could still be considered obvious.

A final food product typically is nothing more than the expected sum total of individual components. For example, the more sugar one adds to a cake batter, the sweeter the finished cake is expected to be. Similarly, adding tarragon to a dish that doesn't usually include tarragon may result in an unexpected taste for that particular dish, but not an unexpected result. When considering processes for food preparation, the ways different materials behave are well-understood, and making changes to the order or method of adding ingredients often results in something you've expected. For example, if a pancake recipe calls for adding an egg while the pancake is cooking on the griddle, while that may differ from what is commonly thought of as a pancake, it will produce a result that can be considered obvious to a person having ordinary skill in the culinary arts.

There are exceptions in which the combination of ingredients used, or the way they are processed, results in a food product totally unexpected. That's something that may be patentable. Numerous patents on food products are issued each year. However, if you take a look at most of these patents, you'll find that the recipe was more likely to have been created in a laboratory than on a kitchen counter.

A patent isn't the only way to acquire intellectual property protection for food products. Trade secrets are often used by companies to protect their recipes and processes, but they differ considerably from patent protection in a number of ways. With a trade secret, inventors do not disclose the inner workings or formula of the invention, and employees or collaborators usually sign non-disclosure agreements that prevent them from sharing the recipe. Many food companies and restaurants choose to use trade secrets to protect their recipes and methods because it allows them to use the secretive nature as a marketing tool. The recipes for Coca-Cola, Dr. Pepper, Bush's Baked Beans, and KFC fried chicken are all trade secrets, and each company has, at some point, used that secret as a part of their advertising campaigns.

It's important for inventors to understand that a trade secret is not the same thing as a patent. Trade secrets do not prevent others from independently discovering or reverse engineering a recipe or invention. Also, in the United States, trade secrets are enforced differently from state to state. Anyone considering protecting his or her intellectual property with a trade secret should be diligent about learning the scope of trade secret protection and how it is enforced.

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