

THE POWER OF FOOD PATENTS

YOLANDA MORENO
VALIENTE

Certified Translator, Lawyer-Linguist,
Intellectual Property, Mova Legal English &
Translations | Máster en Propiedad
Intelectual y Derecho de las Nuevas
Tecnologías · Universidad Internacional de
la Rioja

The interest in food is permeating our culture in a circular manner[1], we can see how the popularity of haute cuisine and creative cooking are influencing the food industry, while the latter tries to provide solutions to restaurants and consumers. This has created a productive breeding ground where food patents have proliferated offering new alternatives which keep up with a society in constant evolution.

While the protection of food creations under copyright is being debated[2], it cannot be contested that they can be protected under the patent system. We can see that food patents offer technical solutions to technical problems in the culinary field, in this sense, we encounter answers to technical problems connected with basic needs related to nutritional needs and conservation of food, and on the other hand, new challenges arise due to our increased sophistication as consumers (we demand better flavor, meatless choices that look and taste like meat, gluten-free, lactose-free, and sugar-free products, etc.) Moreover, the Covid-19 pandemic has increased our awareness about the proactive role of nutrition in protecting our health, therefore, patents of products which provide added nutritional value are subject of great interest in the food industry.

The Spanish Patent Law of March 20, 2015 (*Ley 24/2015*) sets out the logical process to follow when analyzing the patentability of a culinary creation. First, we must ensure that said creation is not included in the list provided for under article 4.4 of the Patent Law, excluding for instance, discoveries and scientific theories. For instance, we could not obtain a patent for a mushroom that we have discovered, but it might be possible to get patent protection for a novel sauce which uses said mushroom as an ingredient. Furthermore, we could not patent scientific theories behind innovative cooking techniques forming the basis of the so-called molecular gastronomy, such as spherification, jellification and emulsification[3], but we could obtain patent protection for culinary creations which apply said theories.

Among the exclusions listed under article 4.4 of the Spanish Patent Law are business and commercial activities, raising some interesting issues. In this regard, the Spanish Patents and Trademarks Office (OEPM) has clearly established that methods for doing business cannot be patented[4]. However, this is in contrast with other jurisdictions, such as the US, where methods for planning and organizing the business activities of restaurants and companies in the food industry are thriving and provide a competitive edge and a source of income through licensing agreements. These types of patents are so numerous that the US Patent and Trademark Office (USPTO) has a specific unit dedicated to this type of patents [5].

The next step should be determining whether the culinary creation is novel, comprises an inventive step and has industrial application (articles 6-9 of the

Spanish Patent Law).

We can see the application of said requirements in **Patent ES2872649A1** – Procedure for curing ham and product obtained. It is novel because this procedure for curing ham, (removing the hip bone and femur but keeping all the muscles except for the upper half of the dough before the salting and curing process takes place), is not included in the existing state of the art, meaning that it is not described in any procedure or product previously patented, used or disclosed to the public in Spain or abroad, in an express or implied manner.

Secondly, it involves an inventive step, given that this procedure for curing ham is not obvious for an expert in the field. The key is not determining how difficult or strenuous it was for the inventor to come up with this alternative to cure ham, but if the solution claimed was obvious for an average expert with average knowledge concerning curing ham. Lastly, this procedure must be subject to industrial application, so it must be described sufficiently to allow its execution and by others, which does not necessarily require production at a large scale.

Special attention deserves the analysis of utility models, and the fact that the period of protection afforded by the patent is 20 years, the utility model protects an invention for 10 years, which could often be more suitable in an industry which changes rapidly. Utility models are regulated in articles 137-140 of the Spanish Patent Law. Unlike patents, which offer technical solutions to technical problems, utility models bring an improvement to something which existed before, and which results in some type of advantage concerning the use or fabrication. Furthermore, the requirement of inventive step is less strict, being only required that the invention claimed was not very obvious for an expert in the field. An example is **Utility Model ES1294340U** – Low Sodium Olives, which covers olives which can be consumed by people affected with conditions requiring lower sodium intake.

Based on the foregoing, we have ascertained that food creations can be patented. Moreover, if we consider that the food and beverages industry is an extremely competitive field, we can say that food patents may foster technological innovation, something that benefits society as a whole, while providing companies in the





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food industry a competitive edge[6]. Although detractors of the patent system claim otherwise, the fact that the content of the invention protected by a patent must be disclosed contributes to technological advances in the food industry. We cannot copy patents, but we can use the knowledge contained in previous patents to make new inventions.

Lastly, having concluded that we can patent culinary creations, we would need to decide the territorial scope of protection we wish to obtain. In addition to the Spanish patent, other options are the European patent (EPC) and the international (PCT) Patent, as well as the Unitary Patent.

What follows are some examples of food patents granted in Spain which provide technical solutions to the needs described above:

-**ES2918330A1** – Low glycemic pectin gel for coating food. This invention consists of a gel which facilitates **food preservation, while limiting the amount of sugar** commonly present in these types of products.

-**ES291278A1** – Method for preparation of a dough with flavor and smell of coffee, product obtained and use of said dough. In this case, the invention covers a pleasant coffee flavor **avoiding the bitter taste present in previous products**.

-**ES2920302A1** – Dough with marine plankton. This preparation may be used in conjunction with different types of flour, adding to the previous state of the art **the nutritional richness of plankton** (vitamins, minerals and more than 100 nutrients to similar products comprising the state of the art).

-**ES2913875A1** – Procedure for obtaining **ecological carpaccio and product obtained**. This patent offers a healthier alternative to preexisting meat products.

References:

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[2]ROBERT GUILLÉN, S., Haute Cuisine and Copyright | Alta Cocina y Derecho de Autor), Editorial Reus, Madrid, 2017.

[3]YEK, G.S., STRUWE, K., «Deconstructing Molecular Gastronomy. Food Technology Magazine», June 1, 2008, in: <https://www.ift.org/news-and-publications/food-technology-magazine/issues/2008/june/features/deconstructing-molecular-gastronomy>.

[4]«Can business ideas be patented?» | «Se pueden proteger como patentes las ideas de negocios?», in: https://www.oepm.es/es/propiedad_industrial/preguntas_frecuentes/FaqCuestiones06.html?modalidadFaq=noSel.

[5]USPTO – Business Methods, in: <https://www.uspto.gov/patents/basics/types-patent-applications/utility-patent/patent-business>.

[6]ALFRANCA, O., RAMA, R., VON TUNZELMAN, N., «A patent analysis of global food and beverage firms: the persistence of innovation», Agribusiness, Vol. 18 (3) Wiley InterScience, 2002, pp. 349-368.