



November 2018



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The November 2018 issue of Sterne Kessler's MarkIt to Market® newsletter discusses IP protection for food products, the now-scheduled changes to Canadian trademark laws, and the new gTLD Sunrise Periods.

Sterne Kessler's [Trademark & Brand Protection practice](#) is designed to help meet the intellectual property needs of companies interested in developing and maintaining strong brands around the world. For more information, please contact [Monica Riva Talley](#) or [Tracy-Gene G. Durkin](#).

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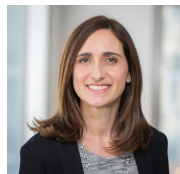
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## Food for Thought

By: [Ivy Estoesta](#)

Earlier this month, the Court of Justice of the European Union held that the [taste of a food product cannot be classified as a work protectable by copyright](#).

This decision appears to be in line with [U.S. Copyright law](#), which does not include the taste of a food product among one of the eight types of copyrightable works. U.S. Copyright law also does not protect recipes that are mere listings of ingredients, no matter how original or delicious the resulting food product. However, the U.S. Copyright Office will register a copyright in a compilation of recipes, such as in a cookbook.

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## Now Coming in June 2019 – Changes to Canadian Trademark Law, Eh? (Part II)

By: [Dana Justus](#) and [Monica Riva Talley](#)

The wait is over! The Canadian Privy Council Office recently announced that the long-anticipated changes to Canada's trademark laws will officially go into effect **June 17, 2019**.

As detailed in our article "[Changes to Canadian Trademark Law, Eh?](#)", the new *Trademarks Act* includes numerous significant revisions to the country's trademark system. Highlights include the following:

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## gTLD Sunrise Periods Now Open

By: [Monica Riva Talley](#)

As first reported in our December 2013 newsletter, the first new generic top-level domains (gTLDs, the group of letters after the "dot" in a domain name) have launched their "Sunrise" registration periods. Please contact us or see our December 2013 [newsletter](#) for information as to what the Sunrise Period is, and how to become eligible to register a domain name under one of the new gTLDs during this period.

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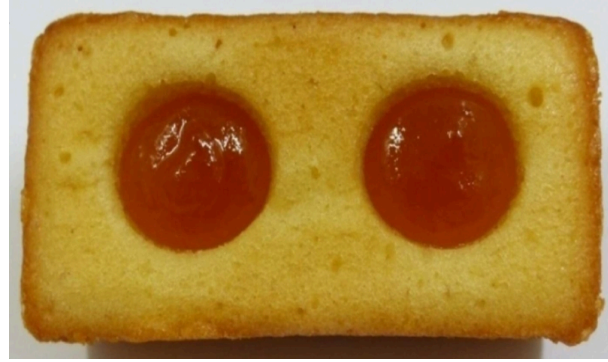
When it comes to protecting food itself, U.S. entities usually start by closely guarding recipes that provide a unique flavor profile – i.e., trade secret. The recipes for Bush's baked beans, KFC fried chicken, and Dr. Pepper soda are a few examples of food products protected by trade secrets. But trade secret rights are not always easy to enforce, and do not preclude others from reverse-engineering a secret recipe. Nor does it preclude the permanent loss of trade secret status after a secret recipe is disclosed, even if inadvertently.

Given the challenges to protecting the taste of a food, food brands often turn to protecting another important aspect: the food's appearance. After all, the way a food product looks often drives the purchasing decision, suggesting that the appearance is an equally—if not more—important aspect worth protecting.

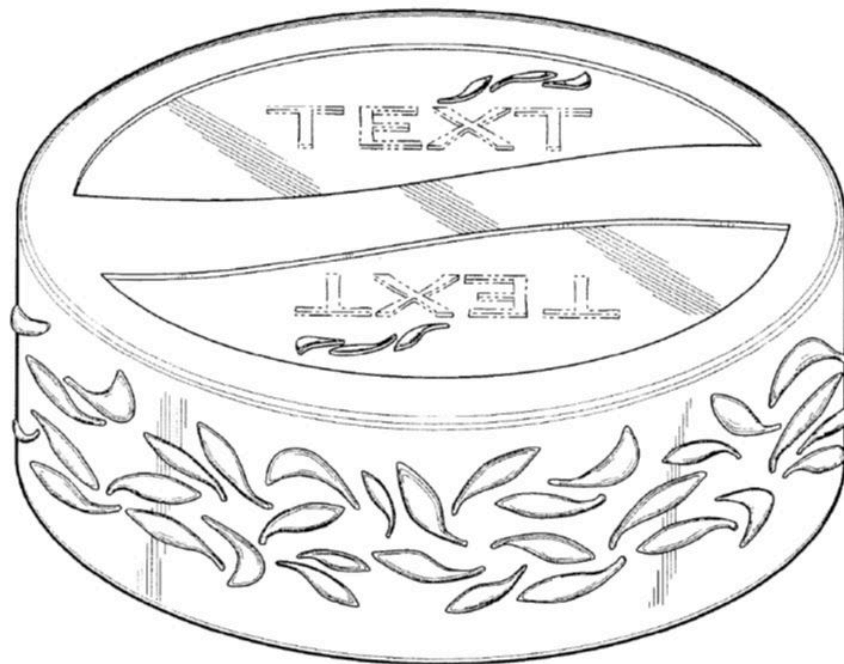
Culinary innovators wishing to protect the appearance of their food creations may consider using design patents or trade dress. To qualify for design patent protection, the visual aspects of a food product must be novel and non-obvious. Alternatively or in addition, they may be protectable by trade dress if distinctive and nonfunctional.

Protectable visual aspects can include, for example, a food product's exterior shape, color,

texture, or a combination thereof, as shown by the following patented or registered trade dress designs for food products:



**U.S. Design Patent No. D806,350 - Pastry**



**U.S. Design Patent No. D588,328 – Cheese Wheel**



**U.S. Trademark Reg. No. 2142003 – Cookie configured in the shape of an unshelled peanut**

Protectable visual aspects of a food need not be limited to their exterior, as shown by the registered trade dress for the layered arrangement of the filling of SNICKERS candy bars:



**U.S. Reg. No. 5047574**

Those interested in maximizing and protecting the value of their culinary creations should take a holistic approach to evaluating what aspects of their food products may qualify for intellectual property protection and which IP rights constitute the “cream of the crop” for the particular food. With the proper IP rights, it may be possible to have your cake and eat it too!

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As detailed in our article "[Changes to Canadian Trademark Law, Eh?](#)", the new *Trademarks Act* includes numerous significant revisions to the country's trademark system. Highlights include the following:

- Canada will (finally!) become a party to the Madrid Protocol international filing system;
- Declarations of Use and registration fees will be eliminated;
- The Nice Classification system for goods and services will be implemented;
- Non-traditional marks (e.g., colors, three-dimensional shapes, sounds, scents, and textures) are now protectable;
- Applications may now be divisible during prosecution; and
- The registration term will be decreased from 15 years to 10.

These changes will provide enhanced protection to trademarks in Canada and more closely align Canada with other jurisdictions, enabling streamlined trademark filing and prosecution strategies on a global basis.



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As of November 28, 2018, ICANN lists new Sunrise periods as open for the following new gTLDs that may be of interest to our clients. A full list can be viewed at: <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>.

.sport	.fan
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ICANN maintains an up-to-date list of all open Sunrise periods [here](#). This list also provides the closing date of the Sunrise period. We will endeavor to provide information regarding new gTLD launches via this monthly newsletter, but please refer to the list on ICANN's website for the most up-to-date information – as the list of approved/launched domains can change daily.

Because new gTLD options will be coming on the market over the next year, brand owners should review the list of new gTLDs (a full list can be found [here](#)) to identify those that are of interest.

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