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Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age

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Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age

ABSTRACT

Sharing recipes through food blogs is an increasingly popular activity. Bloggers publish their own recipes, claiming copyright protection, but they also publish others' recipes. Food publishers who distribute recipes online may be harmed when bloggers include the entire text of the food publisher's recipe on a blog without the publisher's knowledge or permission. The blogger's inclusion of an entire recipe often reduces site traffic to the food publisher's website, thereby damaging advertising revenues. Copyright law, as courts interpret it today, does not provide these publishers with recourse against bloggers who publish their recipes without permission.

This Note analyzes the various issues related to the copyrightability of recipes, beginning with the current rule on copyright protection for recipes. The current rule should be changed due to the prevalence of recipe sharing through food blogs. Any such change must comply with the constitutional requirements for copyright law as applied to recipes. In order to demonstrate successful enforcement of recipe copyright, this Note looks to examples of copyright licensing organizations such as the Internet licensing organization, Creative Commons, and the American Society of Composers, Artists and Publishers (ASCAP). Ultimately, this Note proposes that the challenges arising from recipe use on the Internet require a new approach to copyrighting published recipes that includes copyright protection combined with an establishment of an industry licensing the enforcement organization.

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In October 2009, after sixty-eight years of continuous distribution, *Gourmet Magazine* ceased printing.¹ *Gourmet* had occupied a preeminent position in food literature since it began publication in 1941.² Recognized by many as an American cultural icon, *Gourmet* delighted readers with its “sumptuous photography, test kitchens and exotic travel pieces, resulting in a beautifully produced magazine that lived, and sold, the high life.”³ Food critics, famous chefs, and restaurateurs throughout the country bemoaned *Gourmet’s* demise.⁴ Despite its popularity and loyal readers, the worldwide publishing company, Condé Nast, decided to stop printing *Gourmet* along with three other magazines.⁵ Condé Nast based this decision on the fact that its advertiser supply had dropped by 43 percent from a comparative time period in 2008, a much steeper drop than peer magazines had experienced.⁶ Furthermore, *Gourmet’s*

1. Stephanie Clifford, *Condé Nast Closes Gourmet and 3 Other Magazines*, N.Y. TIMES, Oct. 5, 2009, <http://www.nytimes.com/2009/10/06/business/media/06gourmet.html>. *Gourmet* still maintains a website that primarily contains archives of past recipes. See GOURMET MAGAZINE, <http://www.gourmet.com> (last visited Sept. 18, 2011).

2. See Clifford, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.* Condé Nast also shut down *Cookie* a parenting magazine, as well as *Elegant Bride* and *Modern Bride*. See Clifford, *supra* note 1.

6. Greg Bensinger, *Condé Nast Shuts Gourmet, Cooking Mainstay Since World War II*, BLOOMBERG (Oct. 6, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aRzYK_Gptlww; Clifford, supra note 1.

readership had dwindled.⁷ Although its circulation had decreased by only 1 percent, its single-purchase newsstand distribution fell by 25 percent during that time.⁸

As a practical matter, *Gourmet's* decline in ad sales and readership must be attributed, in part, to the economic recession, which adversely impacted many magazines.⁹ However, *Gourmet's* woes seem somewhat surprising when contrasted with the increasing "foodie culture"¹⁰ in this country and the related interest in cooking and food. In the past two decades, food and cooking have taken on a remarkable role in American culture.¹¹ The restaurant industry is projected to bring in \$604 billion in sales in 2011.¹² The strength of the food industry has also increased due to the rise in celebrity chefs who have created empires of restaurants, cooking shows, and cookbooks.¹³ In general, such chefs enjoy the freedom of sharing their recipes in order to build upon each other's common knowledge.¹⁴ This trend is also reflected in the recent explosion of food blogs on the Internet and in the growing trend among food bloggers to share how they use or adapt recipes from cookbooks or food magazines.¹⁵ Such

7. Bensinger, *supra* note 6.

8. Bensinger, *supra* note 6. Circulation generally includes "subscriptions and single-copy sales of print and electronic editions ordered and paid for by individual consumers." *Individually Paid Circulation*, AUDIT BUREAU OF CIRCULATIONS, <http://www.accessabc.com/resources/intheknow2.htm> (last visited Oct. 11, 2011). Though they constitute a small part of a magazine's total circulation, newsstand sales are often a highly profitable part of a magazine's revenues. Stephanie Clifford, *Magazines' Newsstand Sales Fall 9.1 Percent*, N.Y. TIMES, Feb. 8, 2010, <http://mediadecoder.blogs.nytimes.com/2010/02/08/magazines-newsstand-sales-fall-91-percent>. Newsstand sales are closely tied to the economy and can measure a magazine's health better than subscription numbers, which are deeply discounted. *Id.*

9. See Clifford, *supra* note 1.

10. See *America's Best Cities for Foodies*, SPERLING'S BEST PLACES, http://www.bestplaces.net/docs/studies/americas_top_foodie_cities.aspx (last visited Feb. 11, 2011). Paul Levy and Ann Barr are credited with having coined the word "foodie" in 1981, which they later used as the title of their book, *The Official Foodie Handbook*. "Foodie" is a "person having an avid interest in the latest food fads." *Foodie*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/foodie> (last visited Oct. 11, 2011).

11. This is evident, for example, by the growth in culinary literature, television, and blogs. See also J. Austin Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691, 698-704 (2008) (describing the growth in popularity of The Food Network, celebrity chefs, and competitive cooking television shows).

12. *Facts at a Glance*, NAT'L REST. ASS'N, <http://www.restaurant.org/research/facts> (last visited Feb. 17, 2011).

13. Broussard, *supra* note 11, at 698-702.

14. See Adam Conner-Simons, *Culinary Copyright: A Recipe for Disaster?*, GELF MAGAZINE (Aug. 6, 2008), http://www.gelfmagazine.com/archives/culinary_copyright_a_recipe_for_disaster.php.

15. See, e.g., *About*, MOMOFUKU FOR 2, <http://momofukufor2.com/about> (last updated Sept. 2010); Lori Lange, *Ina Garten's Italian Wedding Soup*, RECIPE GIRL (Jan. 24, 2011),

blogs often acknowledge the recipe's source, and some even provide the reader with a link to that source.¹⁶ However, such blogs also commonly reproduce the entire text of the recipe, giving the reader no reason to leave the blog.¹⁷

Commentators have expressed concern that sharing recipes through food blogs could lead to the demise of other food publications like *Gourmet*.¹⁸ Food publishers often make their recipes available to the public through the Internet, whether from their own websites or through authorized partner websites.¹⁹ In such situations, the food publisher may benefit financially from its decision to share free-of-charge with the public through advertisers on the website.²⁰ In contrast, a food publisher may not profit from a blog publishing its recipe's entire text. If that blog does not induce the reader to access the food publisher's website, it reduces its site traffic and damages advertising revenue. Furthermore, when the recipe is from a cookbook and not normally provided free-of-charge through the Internet, the online reader has no motivation to purchase the cookbook if the recipe is available to the reader through the blog at no cost.

When a blogger publishes a recipe without attribution, the food publisher has little legal recourse. Because recipes have not received the same copyright protection as other literary works,²¹ food publishers are unable to protect their rights under copyright law or to profit from sharing their recipes.²² Under the 1976 Copyright Act, copyright protection may be obtained for "original works of authorship fixed in any tangible medium of expression, now known or later

<http://www.recipegirl.com/2011/01/24/ina-gartens-italian-wedding-soup>; Mardi Michels, EAT. LIVE. TRAVEL. WRITE., <http://www.eatlivetravelwrite.com> (last visited Feb. 24, 2011).

16. See, e.g., Lange, *supra* note 15 (providing a link where readers can buy the book, *The Barefoot Contessa Back to Basics*, from which the blogger adapted the recipe).

17. See, e.g., *Cranberry Orange Scones—Barefoot Bloggers*, NUMMY KITCHEN (June 18, 2009), <http://nummykitchen.blogspot.com/2009/06/cranberry-orange-scones-barefoot.html> (noting not only the entire recipe but also step-by-step instructions with pictures).

18. See Jennifer Guevin, *Pirates in the Kitchen: Recipe Copying 'Rampant' Online*, APPLIANCES & KITCHEN GADGETS BLOG (Oct. 15, 2007, 12:10 PM), http://www.cnet.com/8301-13553_1-9797476-32.html.

19. See, e.g., BON APPÉTIT MAGAZINE, <http://www.bonappetit.com> (last visited Nov. 6, 2010); EPICURIUS.COM, <http://www.epicurious.com> (last visited Nov. 7, 2010); FOOD NETWORK, <http://www.foodnetwork.com> (last visited Nov. 7, 2010); SELF MAGAZINE, <http://www.self.com> (last visited Nov. 7, 2010).

20. See Guevin, *supra* note 18.

21. See *What Does Copyright Protect?*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-protect.html> (last updated Sept. 13, 2010).

22. See Broussard, *supra* note 11, at 703-08; Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1127-29 (2007).

developed,” including “literary works.”²³ Although recipes might be considered “literary works,” they have generally been classified instead within the category of creative works that are nonetheless exempt from copyright protection:²⁴ “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”²⁵ The rationale for this interpretation of the copyright statute is the underlying principle of copyright law that one cannot copyright an idea or a process because it lacks originality, which is the fundamental requirement for copyright protection.²⁶ This rule, known as the “idea/expression dichotomy,” enables authors to protect “their original expression but encourages others to build freely upon the ideas and information conveyed by a work.”²⁷ Regarding recipes, the US Copyright Office explained:

A mere listing of ingredients is not protected under copyright law. However, where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a collection of recipes as in a cookbook, there may be a basis for copyright protection.²⁸

Furthermore, the US Supreme Court has not ruled on this issue, and the most authoritative positions on the matter have been taken by the US Courts of Appeal for the Sixth and Seventh Circuits.²⁹ Even though both circuits agree that recipes are not copyrightable, the US Supreme Court should hear a case and create a new rule for copyrighting recipes.

This Note will examine the copyrightability of recipes, exploring a solution that will both protect the economic investment of those who develop and publish recipes and enable the online community to continue using published recipes. It will debate whether traditional copyright protection will achieve these goals. Because the purpose of food publishing and blogging is to share, interact, and develop new recipes, copyright protection must enable

23. 17 U.S.C. § 102(a) (2006).

24. See *What Does Copyright Protect?*, *supra* note 21.

25. 17 U.S.C. § 102(b).

26. *Publ'ns Int'l, Ltd., v. Meredith Corp.*, 88 F.3d 473, 479 (7th Cir. 1996).

27. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); see 17 U.S.C. § 102.

28. *What Does Copyright Protect?*, *supra* note 21.

29. See *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 U.S. App. LEXIS 1983, at *3 (6th Cir. Feb. 6, 1998) (holding that recipes are not copyrightable because they merely contain the ingredients necessary for the preparation of food, and thus constitute only a statement of facts); *Publ'ns Int'l*, 88 F.3d at 481-82 (holding that defendant's copyright did not extend to the recipes contained in a cookbook protected by a registered compilation copyright, but only covered the manner and order in which the recipes were presented).

individuals to use and share recipes while still complying with copyright law's permission and licensing requirements.

Part I of this Note will discuss the current rule on copyright protection afforded to cookbooks and recipes, the recent debate over recipe copyright, and the rise in popularity of food blogging and recipe sharing. Part II will address the potential problems of full copyright protection, including the issues of recipes in the public domain, the discouragement of innovation, and enforcement problems. This section will also introduce the new Internet licensing organization, Creative Commons, which seeks to provide the average Internet user with a form of copyright protection. This section will further provide a survey of sharing norms within the culinary industry and within food blogging associations. Part III will propose a solution: copyright protection for recipes. This section will draw upon the examples of professional licensing organizations and the variety of licenses used by Creative Commons. Part IV will conclude by arguing that the challenges arising from recipe use on the Internet necessitate a new approach to copyrighting published recipes, and contending that this solution would promote the spirit of collaboration and fraternity valued by the cooking community as well as protect the economic interests of those who invest in creating recipes.

I. RECIPE COPYRIGHT IN PERSPECTIVE

Although often perceived to be a settled issue, recipe copyrightability has received differing treatment from the few courts to address the question.³⁰ The Supreme Court has not directly addressed recipe copyrightability.³¹ The few lower courts that have addressed recipe copyrightability reasoned that recipes lack the requisite originality for copyright protection.³² Multiple well-publicized squabbles over recipe ownership and copyright highlight

30. *Belford v. Scribner*, 144 U.S. 488, 508 (1892) (finding copyright infringement when defendants published without permission a book containing recipes); *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 U.S. App. LEXIS 1983, at *3 (6th Cir. Feb. 6, 1998) (relying on a Seventh Circuit opinion to conclude that recipes are per se copyrightable); *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) (holding that the recipes in that case were uncopyrightable, but expressly declining to adopt a per se rule against recipe copyrightability); *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 828 (8th Cir. 1924) (concluding that a bottle label including a recipe was copyrightable); *Barbour v. Head*, 178 F. Supp. 2d 758, 764 (S.D. Tex. 2001) (holding that the recipes at issue were sufficiently expressive to meet copyright law's originality requirement).

31. *See Lambing*, 1998 U.S. App. LEXIS 1983, cert. denied, 524 U.S. 954 (1998).

32. *Lambing*, 1998 U.S. App. LEXIS 1983, at *3; *Publ'ns Int'l*, 88 F.3d at 480.

the need for reexamining this issue.³³ Furthermore, the recent rise in popularity of food blogging and other recipe sharing online underscores the necessity for corrective action.

A. The Current Rule on Copyright Protection Afforded (or Denied) to Cookbooks and Recipes

Today, most people take it for granted that recipes are per se not copyrightable under the US Copyright Act.³⁴ However, prior to *Publications International v. Meredith Corporation*,³⁵ caselaw held the opposite.³⁶ In 1892, the US Supreme Court in *Belford v. Scribner* held that the defendant publishers and printers had committed copyright infringement by publishing an identical version of a book for which the plaintiffs held a copyright.³⁷ The court described the book at issue as containing:

Receipts for cooking foods and fruits, preserving meats, vegetables, and fruits, and preparing drinks, and many other receipts for the sick-room and the nursery . . . that all such receipts, information, instruction and material were selected and arranged with great care and labor, and embodied and written in the style, words, and language of said lady, and she was the original inventor and author of most of the written matter contained in said work, and with great labor and care had selected and compiled the remainder thereof, and was the original compiler and author of all of said work and of the arrangement of the topics and index thereof . . .³⁸

Despite the defendants' many challenges to plaintiff's ownership of the book's copyright, neither party questioned the validity of copyright in recipes.³⁹

Later, in 1924, the Eighth Circuit dealt with a direct recipe copyright infringement claim in *Fargo Mercantile*.⁴⁰ The plaintiffs claimed to have a copyright in a label attached to bottles and cartons of fruit juice.⁴¹ The labels contained recipes, which the court described as "original compositions" that "serve a useful purpose," namely "to

33. See *infra* notes 98-116 and accompanying text (discussing various disputes involving claims of stealing cookbook and restaurant concepts).

34. See, e.g., Conner-Simons, *supra* note 14; Pete Wells, *Chef's Lawsuit Against a Former Assistant is Settled Out of Court*, N.Y. TIMES, Apr. 19, 2008, <http://www.nytimes.com/2008/04/19/nyregion/19suit.htm>.

35. See *infra* notes 70-76 and accompanying text.

36. See generally *Belford*, 144 U.S. 488; *Fargo Mercantile Co.*, 295 F. 823.

37. *Belford*, 144 U.S. at 508.

38. *Id.* at 490.

39. See *id.* at 488-508.

40. *Fargo Mercantile Co.*, 295 F. at 824.

41. *Id.*

advance the culinary art.”⁴² The court reasoned that because the recipes could “undoubtedly be copyrighted” if printed in a book or even on a single sheet of paper, the presence of the recipes on the label necessitated copyright protection for the entire label.⁴³

Despite these historical interpretations of recipe copyrightability, current understandings of the intellectual property rights afforded to recipes are far different, based largely on later interpretations of constitutional requirements.⁴⁴ The source of law for that allows the federal government to police and provide copyright protection stems from the US Constitution:⁴⁵ “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁶ The Supreme Court has interpreted the Copyright Clause as limiting protection to “Authors and Inventors” for their “Writings and Discoveries,” to hold that “[t]he *sine qua non* of copyright is originality.”⁴⁷

The 1976 Copyright Act makes copyright protection available for “original works of authorship fixed in any tangible medium of expression, now known or later developed.”⁴⁸ Such works include “(1) *literary works*; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”⁴⁹ However, the Act specifically declines to extend copyright protection to works that merely constitute ideas, procedures, processes, methods of operations, or discoveries.⁵⁰ Further, the Register of Copyrights provides a list of works that may *not* be subject to copyright protection, among which includes “mere listing of ingredients or contents.”⁵¹

The originality requirement for US copyright protection mandates that “copyrightable works possess some minimum indicia of creativity, “that they be ‘original intellectual conceptions of the

42. *Id.* at 828.

43. *Id.*

44. *See infra* notes 52-67 and accompanying text.

45. *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996).

46. U.S. CONST. art. I, § 8, cl. 8.

47. *Publ'ns Int'l*, 88 F.3d at 479 (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

48. 17 U.S.C. § 102(a) (2006).

49. *Id.* (emphasis added).

50. *Id.* § 102(b).

51. 37 C.F.R. § 202.1(a) (2011).

author.”⁵² The threshold for originality is low, and requires only that the author create the work independently (thus not copied from others), and that it possess a minimum level of creativity.⁵³ The Supreme Court has ruled that facts are not original.⁵⁴ Thus, copyright law defines originality by drawing a line between creation and discovery as such: The first person to “find” a fact has not created that fact, rather she has merely discovered the fact’s existence.⁵⁵ Both the copyright statute and the Supreme Court recognize a concession for a *compilation* of facts, which is eligible for copyright protection as long as the selection and arrangement of facts demonstrates an element of creativity and originality.⁵⁶ However, since the facts themselves are not copyrightable, a compilation copyright covers only the work’s original elements.⁵⁷ Thus, if the compiler expresses the facts in her own words, the copyright would protect only that manner of expression or exact phrasing.⁵⁸ Even though copyright protection would not prevent others from lifting and using the facts in their own writing, they could not use the compiler’s original form of expression.⁵⁹ If, however, the compiler does not *express* the facts in an original way, then the original element of the work is only the *manner* in which the compiler selected and arranged the facts, such as the specific choices of which facts to include and in what order to organize them.⁶⁰ As such, the selection and arrangement would be the sole part that could receive copyright protection.⁶¹

For example, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, the Supreme Court addressed the extent of copyright protection available to telephone directory white pages.⁶² Rural Telephone Service Company was a certified public utility that published a telephone directory of its subscribers, as required by state

52. *Publ’ns Int’l*, 88 F.3d at 479 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

53. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

54. *Id.* at 347.

55. *Id.*

56. See 17 U.S.C. § 103(b) (2006) (providing that copyright in derivative works and compilations “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in that work”); *Feist Publ’ns*, 499 U.S. at 348 (explaining that independent choices made by a compiler regarding selection and arrangement may contain the minimal degree of creativity necessary to satisfy copyright’s originality requirement).

57. *Feist Publ’ns*, 499 U.S. at 348.

58. *Id.*

59. *Id.*

60. *Id.* at 349.

61. *Id.*

62. *Id.* at 342.

regulation.⁶³ Rural sued Feist Publications for copyright infringement, citing Feist's compilation of names, towns, and telephone numbers from Rural's directories into an area-wide directory.⁶⁴ The Court held that though Rural had collected the names, towns, and telephone numbers of its subscribers, this information constituted "uncopyrightable facts."⁶⁵ Rural nonetheless could have had a compilation copyright if these uncopyrightable facts had been selected or arranged in an original way.⁶⁶ However, Rural's alphabetical listing by surname of its subscribers lacked sufficient creativity to make it original.⁶⁷

One of the main barriers to affording copyright protection to recipes is the debatable understanding of a recipe as a collection of facts. In order to accommodate First Amendment concerns, copyright law distinguishes between expression and ideas or facts.⁶⁸ As the Supreme Court has explained, "This 'idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."⁶⁹ The Supreme Court has not issued a decisive ruling regarding recipe copyrightability, and the caselaw in this area is very limited. Thus, in its seminal case on recipe copyright, the Seventh Circuit based its decision largely on the concept that a list of ingredients contains facts.⁷⁰ In *Publications International, Limited v. Meredith Corporation*, Meredith Corporation asserted a counterclaim alleging that Publications International had infringed Meredith Corporation's copyright in its cookbook *Discover Dannon—50 Fabulous Recipes with Yogurt*.⁷¹ The court held that the defendant's compilation copyright did not apply to the individual recipes contained within the cookbook, but applied only to the manner

63. *Id.*

64. *Id.* at 344.

65. *Id.* at 361.

66. *Id.* at 348, 362; *see supra* text accompanying notes 56-61 (describing the rule that when a compilation does not express facts in an original way, the originality may be found in the manner in which the compiler selected and arranged the facts); *see also* 17 U.S.C. § 103(b) (2006).

67. *Feist Publ'ns*, 499 U.S. at 362 ("Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is 'selection' of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression.").

68. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

69. *Id.* (quoting *Harper & Row v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

70. *See Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996).

71. *Id.* at 475.

and order in which the recipes were presented.⁷² The court based this conclusion on its finding that “[t]he identification of ingredients necessary for the preparation of each dish is a statement of facts. There is no expressive element in each listing.”⁷³ Thus, “the functional listing of ingredients [was not] original within the meaning of the Copyright Act.”⁷⁴ Despite ruling against copyright protection in this particular case, the court acknowledged that it was not issuing a per se rule against allowing copyright protection for recipes.⁷⁵ In dicta, the court stated:

[N]othing in our decision today runs counter to the proposition that certain recipes may be copyrightable. There are cookbooks in which the authors lace their directions for producing dishes with musings about the spiritual nature of cooking or reminiscences they associate with the wafting odors of certain dishes in various stages of preparation. Cooking experts may include in a recipe suggestions for presentation, advice on wines to go with the meal, or hints on place settings and appropriate music. In other cases, recipes may be accompanied by tales of their historical or ethnic origin.⁷⁶

The Sixth Circuit is the only other Court of Appeals to reach the issue of whether recipes may be copyrighted.⁷⁷ In *Lambing v. Godiva Chocolatier*, Lambing claimed that Godiva had misappropriated her recipe and truffle design.⁷⁸ The court flatly dismissed the plaintiff’s claim, relying on *Publications International* to hold that recipes are not copyrightable.⁷⁹ Yet the court did not engage in any further analysis.⁸⁰ Therefore, although the Sixth Circuit found the issue of recipe copyright to be a decided rule, precedent shows that, under certain circumstances, a recipe may qualify for copyright protection.⁸¹

Nimmer on Copyright, the definitive treatise on copyright law, also handles recipe copyrightability as a decided issue.⁸² Although

72. *Id.* at 482.

73. *Id.* at 480; *see also* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45 (1991) (“The most fundamental axiom of copyright law is that ‘no author may copyright his ideas or the facts that he narrates.’” (quoting *Harper & Row*, 471 U.S. at 556)).

74. *Publ’ns Int’l*, 88 F.3d 1t 480.

75. *Id.*

76. *Id.* at 481.

77. *See* *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 U.S. App. LEXIS 1983, at *2 (6th Cir. Feb. 6, 1998).

78. *Id.*

79. *Id.* at *3.

80. *See id.*

81. *Compare id.* (relying solely on *Publications International* to hold that recipes are not copyrightable), *with* *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480-82 (7th Cir. 1996) (declining to find all recipes uncopyrightable).

82. *See* 1-2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.18(I) (2011).

Nimmer acknowledges that a recipe's copyright could prevent others from reproducing the recipe word-for-word, he identifies two barriers to extending copyright protection to the entire recipe: (1) lack of originality, and (2) the understanding of recipes as a procedure, process, or discovery.⁸³ His arguments touch upon one of the main rationales for denying copyright protection to recipes: A recipe's contents are dictated by functional considerations, and thus a recipe lacks the requisite originality for copyright protection.⁸⁴ For example, although there are endless ways to make a chocolate chip cookie, the recipe must also include chocolate chips and involve specified ratios of baking soda, flour, eggs, etc. Nimmer notes that even if copyright protection were available to prevent word-for-word recipe reproduction, it would not prevent others from creating the dish that the recipe describes.⁸⁵

Ultimately, Nimmer acknowledges that the original locutions contained within a recipe do warrant copyright protection.⁸⁶ A district court in the Fifth Circuit applied this reasoning in *Barbour v. Head*.⁸⁷ There, the court declined to directly follow *Publications International* and deny the recipe at issue copyrightability, pointing out that the court in that case had acknowledged that "certain recipes may be copyrightable."⁸⁸ The cookbook at issue in *Barbour*, entitled *Cowboy Chow*, contained recipes, suggestions for entertaining, and historical information about cowboys.⁸⁹ The defendant, an Internet magazine publisher, had printed almost exact copies of *Cowboy Chow's* recipes without the author's consent, instead crediting the recipes to the defendant.⁹⁰ Since the recipes contained in *Cowboy Chow* provided helpful commentary, anecdotal language, and suggestions for food presentation, the court found that the recipes contained "more than mechanical listings of ingredients and cooking directions" and thus might be "sufficiently expressive to exceed the boundaries of mere fact."⁹¹ Thus, the court declined to grant the defendant's motion for

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See Barbour v. Head*, 178 F. Supp. 2d 758, 763 (S.D. Tex. 2001).

88. *Id.* at 764 (quoting *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996)).

89. *Id.* at 759.

90. *Id.* at 760.

91. *Id.* at 764.

summary judgment, which had largely centered on the claim that recipes were not copyrightable.⁹²

From these cases emerges a murky picture of caselaw on recipe copyrightability. While *Publications International* held the recipe at issue not copyrightable,⁹³ other courts, such as the one in *Lambing*, interpreted this decision as a per se rule proscribing copyrightability for any recipe.⁹⁴ In contrast, the court in *Barbour* relied on *Publications International* to conclude that certain recipes may be sufficiently expressive to be copyrightable.⁹⁵ At base, courts seem to be struggling to define the extent of a recipe's originality, especially since recipes range from listing ingredients to providing helpful commentary and backstories.

B. The Recent Debate Over the Status of Copyright Protection for Recipes

The issue of recipe copyrightability recently arose when cookbook author Missy Chase Lapine sued Jessica Seinfeld and Jerry Seinfeld for copyright infringement.⁹⁶ Lapine's cookbook *The Sneaky Chef*, published in April 2007, contained recipes designed to teach parents how to hide vegetables in their children's food.⁹⁷ Just months later, Jessica Seinfeld published her own book, *Deceptively Delicious: Simple Secrets to Getting Your Kids Eating Good Food*.⁹⁸ Lapine promptly filed suit, claiming that Seinfeld and her publisher had stolen her idea and committed copyright infringement.⁹⁹ The Second Circuit disagreed, holding that "[s]tockpiling vegetable purees for covert use in children's food is an idea that cannot be copyrighted."¹⁰⁰ While Lapine's argument seemed attenuated given the particular facts

92. *Id.*

93. *See supra* notes 70-76 and accompanying text.

94. *See supra* notes 77-81 and accompanying text.

95. *See supra* notes 87-92 and accompanying text.

96. *Lapine v. Seinfeld*, No. 08 Civ. 128 (LTS) (RLE), 2009 U.S. Dist. LEXIS 82304, at *1-2 (S.D.N.Y. Sept. 10, 2009), *aff'd*, 375 F. App'x 81 (2d Cir. 2010).

97. Steven A. Shaw, *Not That There's Anything Wrong With That*, SLATE (Jan. 8, 2008, 5:47 PM), <http://www.slate.com/id/2181684>.

98. *Id.*

99. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *1-2; Shaw, *supra* note 97.

100. *Lapine v. Seinfeld*, 375 F. App'x 81, 83 (2d Cir. 2010); *see also Lapine*, 375 F. App'x at 83 (quoting 17 U.S.C. § 102(b) (2006) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.")).

of the case,¹⁰¹ *Lapine v. Seinfeld* underscores the growing desire of some chefs to find a way to protect their work.

Rebecca Charles, chef and owner of Pearl Oyster bar, made another well-publicized attempt to protect culinary creativity.¹⁰² Charles accused her former sous-chef, Ed McFarland, of stealing her restaurant's concept and most of her menu when he opened Ed's Lobster Bar only a mile away.¹⁰³ Charles claimed that she was not attempting to copyright the food she served at her restaurant, acknowledging correctly that she cannot lay claim to the idea for the lobster roll—a timeless New England staple.¹⁰⁴ However, Charles did object to McFarland's inclusion of "Ed's Caesar" on his menu, a dish Charles claimed as her own.¹⁰⁵ Charles stated, "This is about identity theft: Someone took everything that made my restaurant unique and duplicated it across town."¹⁰⁶ The case concluded when McFarland and Charles reached a confidential out-of-court settlement.¹⁰⁷ Ed's Lobster Bar changed a few elements in its décor and menu, but "Ed's Caesar," one of the main recipes to which Charles objected, remained on the menu.¹⁰⁸ Post-settlement, Charles still expressed her desire to address the issue raised by the case—the culinary industry needs to enable chefs to protect their recipes.¹⁰⁹

Robin Wickens garnered much attention for an even more blatant incident of culinary theft.¹¹⁰ Wickens had been a rising star and highly praised chef at Interlude, a restaurant in Melbourne, Australia.¹¹¹ He then became infamous among the foodie community for including on Interlude's menu exact replicas of dozens of dishes

101. Lapine's book was published in April 2007; Seinfeld's book was published in October 2007. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *6-7; Shaw, *supra* note 97. Given that cookbooks take more than one year to produce and that Seinfeld's agent indicated the book was being bound in April 2007, it is unlikely that an opportunity for plagiarism even existed. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *6-7; Shaw, *supra* note 97.

102. Wells, *Chefs Lawsuit*, *supra* note 34.

103. Jason Krause, *When Can Chefs Sue Other Chefs?*, CHOW (Sept. 4, 2007), <http://www.chow.com/food-news/54101/when-can-chefs-sue-other-chefs>; Ed Levine, *Is Imitation Always the Sincerest Form of Flattery?*, SERIOUS EATS (June 4, 2007, 2:00 PM), <http://www.seriousseats.com/2007/06/sometimes-imitation-is-not-fla.html>.

104. Krause, *supra* note 103.

105. Wells, *Chefs Lawsuit*, *supra* note 34. Charles claimed her mother as the source of the Caesar salad recipe, which is made with English-muffin croutons and a coddled egg. *Id.*

106. Krause, *supra* note 103.

107. Wells, *Chefs Lawsuit*, *supra* note 34.

108. *Id.*

109. *Id.*

110. See Pete Wells, *New Era of the Recipe Burglar*, FOOD & WINE (Nov. 2006) [hereinafter Wells, *Recipe Burglar*], <http://www.foodandwine.com/articles/new-era-of-the-recipe-burglar>.

111. *Id.*

from famous American chefs and restaurants, including Wylie Dufresne of WD-50 in New York City and Grant Achatz of Alinea in Chicago.¹¹² Wickens' dishes not only imitated the ingredients and process of making the dishes, but also went so far as to use identical presentation and serviceware.¹¹³ The online food forum, eGullet, first discovered Wickens' actions and then became a medium for heated debate over culinary intellectual property rights.¹¹⁴ Steven Shaw, a former lawyer and eGullet's founder, initially argued that recipe theft should be dealt with through industry norms and public shaming.¹¹⁵ However, Shaw quickly changed his mind, questioning the "assumption . . . that a list of ingredients is like a formula, as opposed to literature or art or craft."¹¹⁶ Shaw wanted to convene a summit of food industry members with the goal of developing a working model for copyrighting food.¹¹⁷ He envisioned a licensing and enforcement mechanism like that of the American Society of Composers, Authors, and Publishers (ASCAP), which licenses and collects royalties for public performance of its members' copyrighted musical compositions.¹¹⁸ Recognizing that many recipes, such as French onion soup, exist in the public domain due to lack of a known author or length of time since creation, Shaw nonetheless urges that copyright protection should be available for original ideas.¹¹⁹ He argues that allowing chefs to profit through licensing systems would spur creativity and innovation.¹²⁰

Chef Homaru Cantu also sought legal protection for his culinary endeavors, albeit through patent protection.¹²¹ Cantu's restaurant, Moto, features many avant-garde creations.¹²² To seek protection for his many innovations, including edible sheets of paper that taste like cotton candy and a fork that adds flavor to food, Cantu has filed numerous patent applications and intends to file more.¹²³

112. Paul Lewis, *Can You Copyright a Dish?*, THE GUARDIAN, (Mar. 23, 2006), <http://www.guardian.co.uk/lifeandstyle/2006/mar/24/foodanddrink.uk>; Wells, *Recipe Burglar*, *supra* note 110.

113. Wells, *Recipe Burglar*, *supra* note 110.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Wells, *Recipe Burglar*, *supra* note 110; *see also* About ASCAP, ASCAP, <http://www.ascap.com/about> (last visited Jan. 21, 2011).

119. Wells, *Recipe Burglar*, *supra* note 110.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

Despite the high cost of filing for patent protection, Cantu believes that he will reap profits by licensing his ideas to major food companies.¹²⁴

Although Cantu's wild culinary inventions might warrant patent protection, patents are not a practical solution for most chefs, whose culinary creations rarely include such technological innovation.¹²⁵ Further, patent protection does not solve the problem of chefs who desire to share recipes through cookbooks or culinary websites, yet do not want others to publish their recipes for profit. Each of these recent disputes concerning chefs and restaurants attempting to protect their recipes has resolved itself using a different strategy. This highlights the need for a uniform system that protects recipes, but has enough flexibility to maintain the camaraderie in the cooking industry.

C. *The Rise in Popularity of Food Blogging and Recipe Sharing*

The recent growth in food blogging has led to increased publication of others' recipes without attribution. This practice can undermine the recipe authors' ability to capture financial return for their efforts in creating the recipe. The popular recipe website Epicurious.com possesses the right to provide viewers access to recipes from the archives of *Gourmet*, *Bon Appétit*, *Self* magazine, and various Random House publications.¹²⁶ While sites like Epicurious, which functions as a partner of various food publishers, are extremely popular, home cooks also can search for recipes on their favorite blogs.¹²⁷ Food blogs, with their stylized formats and elegant photographs of both the cooking process and the final dish, are an increasingly popular recipe source for home chefs.¹²⁸ Other websites, such as the popular Tastespotting.com, assemble daily compilations of photographs of food and URL links to hundreds of food blogs.¹²⁹ These compilation websites provide viewers with an easy way to browse and share different food blogs.¹³⁰ By clicking on a picture of a dish,

124. *Id.*

125. *Id.*

126. See EPICURIUS.COM, <http://www.epicurious.com> (last visited Nov. 7, 2010).

127. Cf. Guevin, *supra* note 18 (describing a study tracking the frequency with which the recipes of food publishers are copied on blogs or other websites).

128. Emily Shardlow, *Dubai-Based Food Blogger on How to Make One and Why They are Popular*, THE NATIONAL (July 24, 2011), <http://www.thenational.ae/lifestyle/food/dubai-based-food-blogger-on-how-to-make-one-and-why-they-are-popular>.

129. See TASTESPOTTING, <http://www.tastespotting.com> (last visited Nov. 7, 2010).

130. See generally *id.*

Tastepotting redirects the viewer to the associated blog.¹³¹ The reader may then browse the blog, which typically contains photographs of the cooking process as well as the final dish, personal commentary regarding the dish, and a copy of the recipe used.¹³² If the recipe is not the author's original creation, the author often gives recognition to the recipe's source either by mentioning the source by name, or providing a link to the recipe's source.¹³³ However, even when a blogger provides a link to the recipe's original source, there is little motivation for the reader to access that recipe through the original website, especially when the complete recipe, along with pictures, tips, and modifications, is already available to the reader.

Food blogs' rising popularity as a recipe source is concerning because visits to these websites take away traffic, and thus advertising revenue, from the websites that created the recipe. Attributor, an online content-tracking company, recently completed a study to determine how often recipes that are published online get reposted on other sites.¹³⁴ To conduct this study, Attributor compiled original recipes from Allrecipes.com, Epicurious.com, and RachelRayMag.com and searched for matches on the Internet.¹³⁵ The results demonstrated "rampant" online copying of recipes.¹³⁶ In fact, Attributor identified 10,000 incidents of recipes copied from the three websites.¹³⁷ For more than 60 percent of those incidents, the copying websites made no attribution to the recipe's original source.¹³⁸ This study identified an alarming problem—in many searches for the original title of a recipe, the copy of the recipe appeared higher in the search results than did the original.¹³⁹ When the copy appears higher than the original, the reader will more likely choose to view the copy, leading to traffic and advertising revenue loss to the original website. Consequently, Attributor estimated that the copycat websites deprive Allrecipes and Epicurious of 800,000 and 400,000 monthly site visits

131. *See id.*

132. *See sources cited supra* note 15.

133. *See, e.g.,* Mardi Michels, *French Fridays with Dorie: Green Beans with Pancetta*, EAT. LIVE. TRAVEL. WRITE. (Feb. 18, 2011), <http://www.eatlivetravelwrite.com/2011/02/french-fridays-with-dorie-green-beans-with-pancetta>; *Momofuku Milk Bar Crack Pie Recipe*, MOMOFUKU FOR 2 (Feb. 27, 2010), <http://momofukufor2.com/2010/02/momofuku-milk-bar-crack-pie-recipe>.

134. Guevin, *supra* note 18.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

respectively.¹⁴⁰ Translated to monetary figures, the lost site traffic equates to a \$3.1 million annual loss for Allrecipes and a \$1.6 million annual loss for Epicurious.¹⁴¹

In light of this evidence of widespread online copying of recipes, it is important to find a way to protect the monetary investment made in developing and publishing recipes. Although chefs and the culinary community typically operate on an “open source model” that encourages sharing, borrowing, and working off of each other’s recipes,¹⁴² financial concerns require the development of a new system. Many food publishers, such as Cook’s Illustrated, produce a printed magazine.¹⁴³ Unlike most food publishers, however, Cook’s Illustrated charges a monthly membership fee in order to access its online database of recipes.¹⁴⁴ Cook’s Illustrated is published by America’s Test Kitchen, a small company consisting of chefs and products testers whose goal is “to develop the absolute best recipe for all of your favorite foods.”¹⁴⁵ Therefore, the company tests each individual recipe between thirty and seventy times in order to discover the ideal method, ingredients, and equipment for that recipe.¹⁴⁶ Katherine Bell, the online managing editor for America’s Test Kitchen, stated: “We have more to lose (than other recipe sites) if people are posting our recipes online because we have fewer recipes, we’ve invested a lot in every single one, and there would be no reason for people to pay a subscription if they can get our recipes for free.”¹⁴⁷ For chefs and companies like America’s Test Kitchen that rely on recipe sales as their chief source of revenue, the free distribution of their recipes could cause substantial damage to their company.

Like Epicurious and Allrecipes, many food bloggers and other recipe websites sell advertisements and thus earn profits from their online viewership.¹⁴⁸ Despite the tradition of sharing recipes, red flags arise when a blog or other website lifts a recipe from a publisher that has invested time and money in developing it. Most food bloggers include copyright symbols and warnings throughout their postings,

140. *Id.*

141. *Id.*

142. Wells, *Recipe Burglar*, *supra* note 110.

143. See COOK’S ILLUSTRATED, <http://www.cooksillustrated.com> (last visited Jan. 21, 2011).

144. See *id.* But see EPICURIUS.COM, <http://www.epicurious.com> (last visited Nov. 7, 2010) (allowing visitors to view and download recipes without charge).

145. *About America’s Test Kitchen*, COOK’S ILLUSTRATED, <http://www.cooksillustrated.com/aboutus> (last visited Jan. 21, 2011).

146. *Id.*

147. Guevin, *supra* note 18.

148. See *id.*

recipes, and photographs, which highlights the need for further recipe copyright discussion.¹⁴⁹ Copyright protection exists from the moment the work is created in a fixed and tangible form,¹⁵⁰ such as posting on a blog; thus, copyright symbol use in this way is unnecessary because the symbols do not create copyright protection. However, the use of these symbols show the blogger's attempts to warn the viewer that all the information on the website is protected by copyright and the viewer is not allowed to replicate any information. It is ironic that some bloggers are concerned about protecting their intellectual property from misappropriation, while others are freely posting recipes that are not their own.

Several courts and other authorities have expressed the belief that recipes are not copyrightable.¹⁵¹ Despite these rulings, recent lawsuits and squabbles over recipe ownership demonstrate that there is a growing desire and need for copyright protection of recipes.¹⁵² Increased copying of recipes through food blogs has exacerbated this issue and highlights the need for reexamination of recipe copyright.¹⁵³

II. IDENTIFYING POSSIBLE SOLUTIONS

Commentators argue that current sharing norms within the culinary industry render copyright protection unnecessary.¹⁵⁴ However, chefs do object to certain uses others may make of their recipes.¹⁵⁵ Furthermore, an examination of both the sharing norms and copyright protection understandings in the food blogging sphere demonstrates the need for a comprehensive response to recipe copyrightability issue.¹⁵⁶ Because the US Constitution is the source of

149. See, e.g., *About*, MÉLANGER, <http://melangerbaking.com/about-m> (last visited Feb. 24, 2011); Wil Mowrey, WIL MOWREY AT HOME, <http://wilmowrey.blogspot.com> (last visited Feb. 24, 2011).

150. U.S. COPYRIGHT OFFICE, CIRCULAR NO. 1, COPYRIGHT BASICS 2 (last updated Aug. 2011), available at <http://www.copyright.gov/circs/circ01.pdf>; see also 17 U.S.C. § 101 (2006).

151. See *supra* notes 70-87 and accompanying text (discussing two US circuit court cases and Nimmer's copyright treatise).

152. *Supra* notes 98-122 (discussing several well-publicized disputes over recipes, cookbooks, and restaurant concepts).

153. See *supra* notes 134-41 (describing Attributor's online study demonstrating a high number of recipe copying incidents).

154. See, e.g., Buccafusco, *supra* note 22, at 1151-56 (citing the opinions of many chefs and arguing that the current informal professional norms sufficiently protect recipes).

155. See *infra* notes 216-218 and accompanying text (discussing the objections of some chefs to copying without attribution).

156. See *infra* notes 187-203 and accompanying text (describing the common sharing norms within the food blogging community).

federal copyright law,¹⁵⁷ any extension of copyright protection to recipes must fit within the constitutional framework.

A. Norms and Sharing Standards within the Culinary Community

Some scholars have suggested that the established norms within the culinary community are sufficient to deal with recipe copying.¹⁵⁸ Many chefs, in fact, object to a copyright system for recipes.¹⁵⁹ Grant Achatz, renowned chef at Alinea, claims: “Chefs won’t use it. Can you imagine Thomas Keller calling me and saying, ‘Grant, I need to license your Black Truffle Explosion so I can put it on my menu?’”¹⁶⁰ Some chefs claim that copyright protection would be futile since stealing and borrowing occur all the time in the culinary world.¹⁶¹ In fact, they often occur unintentionally.¹⁶² As Sara Moulton, former executive chef at *Gourmet Magazine* points out, “You look at a lot of recipes to get ideas. And before you know it—whoops!—you don’t even remember that you saw it somewhere else.”¹⁶³ Even Wylie Dufresne,¹⁶⁴ chef and owner of the famous New York restaurant WD-50, is hesitant to pursue intellectual property rights for food. Regarding the Robin Wickens incident,¹⁶⁵ he lauds the sharing and collaboration within the culinary community.¹⁶⁶

There is nothing wrong with [Wickens] taking those techniques and making them his own. That’s the best thing I can do is come up with a technique and have somebody else use it. That means I’ve contributed somehow. It means I’ve done something. That’s all we can hope for is to make a difference. By people taking a concept that me and my team developed and then using it is some way of ensuring some sort of legacy. It’s a documented form of contribution I’ve made. It feels good.¹⁶⁷

Commenting on Homaru Cantu’s patent pursuit,¹⁶⁸ Dufresne said, “I understand that he wants to protect his intellectual property, but it

157. See U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

158. Buccafusco, *supra* note 22, at 1153-55.

159. *Id.* at 1151-55; Wells, *Recipe Burglar*, *supra* note 110.

160. Wells, *Recipe Burglar*, *supra* note 110.

161. See Conner-Simons, *supra* note 14.

162. *Id.*

163. See Conner-Simons, *supra* note 14.

164. See *supra* notes 110-113 and accompanying text.

165. See *supra* notes 110-113 and accompanying text.

166. Buccafusco, *supra* note 22, at 1153.

167. *Id.* at 1153.

168. See *supra* notes 121-124 and accompanying text.

gets to be a little too McDonalds-y for me. It takes away from the spirit of the craft.”¹⁶⁹

Although some chefs are hesitant to assign intellectual property rights to recipes, a recent incident on Bravo TV’s cooking competition franchise, *Top Chef*, demonstrates a different point of view.¹⁷⁰ *Top Chef* contestants Richard Blais and Mike Isabella quarreled over the ownership of a chicken “oyster” dish.¹⁷¹ Blais, who had previously shown Isabella a sketch of his idea to serve a chicken “oyster” in an oyster shell, was unpleasantly surprised when Isabella made the dish later and presented it to the show’s judges.¹⁷² When Blais confronted him, Isabella responded, “It’s not your dish. It’s my dish, because I won”¹⁷³ Upon discovering what had happened, other chefs commented that Isabella’s behavior was “bad chef etiquette.”¹⁷⁴ One contestant, Carla Hall, stated, “There is man law, and there is chef law. You don’t take another chef’s idea.”¹⁷⁵ The incident prompted celebrity chef and *Top Chef* judge Tom Colicchio to respond on Bravo’s website, disagreeing with Hall’s view on “chef laws.”¹⁷⁶ He informed the show’s fans that intellectual property laws do not protect dishes.¹⁷⁷

The level of tolerance for recipe copying seems to be limited to the restaurant setting. In his response to the “chef law” incident, Colicchio remarked that a chef need only change a single ingredient in order to reprint the recipe of another.¹⁷⁸ Rowley Leigh, food writer and founder of London’s Kensington Place and Le Café Anglais, suggests that cooks should be flattered when other chefs use their ideas.¹⁷⁹ But he draws the line at having his recipes published verbatim in a rival’s cookbook without receiving acknowledgment as the recipe’s original author.¹⁸⁰ Other chefs do not object to the use of

169. Conner-Simons, *supra* note 14.

170. *Top Chef: For the Gulf* (BravoTV television broadcast Feb. 23, 2011).

171. *Id.*; John Horn, “*Top Chef: Mike Thinks Cook and Crook are the Same Thing*, L.A. TIMES SHOW TRACKER BLOG (Feb. 24, 2011, 6:30 AM), <http://latimesblogs.latimes.com/showtracker/2011/02/top-chef-mike-thinks-cook-and-crook-are-the-same-thing.html>; *Bios—Top Chef Season 8*, BRAVO TV, <http://www.bravotv.com/top-chef/season-8/bios> (last visited Oct. 23, 2011).

172. *Top Chef*, *supra* note 170; Horn, *supra* note 171.

173. *Id.*

174. *Id.*

175. *Id.*

176. Tom Colicchio, *On Protecting Recipes and Wildlife*, BRAVO TV BLOGS (Feb. 24, 2011), <http://www.bravotv.com/top-chef/season-8/blogs/tom-colicchio/on-protecting-recipes-and-wildlife>.

177. *Id.*

178. *Id.*

179. Lewis, *supra* note 112.

180. *Id.*

their recipes as long as they receive attribution.¹⁸¹ This desire for acknowledgment resounds with the European recognition of the “moral rights” of copyright holders.¹⁸² The moral rights system entitles copyright holders to certain rights, including attribution, in addition to the traditional economic rights recognized under US statutes.¹⁸³

Sharing with attribution is also promoted within professional culinary organizations.¹⁸⁴ The International Association of Culinary Professionals (IACP) is a non-profit professional organization comprised of members from all parts of the culinary field, from chefs and restaurateurs to nutritionists and food writers.¹⁸⁵ IACP members pledge to “support the growth of knowledge and the free interchange of ideas within the profession,” as well as to “respect the intellectual property rights of others and not knowingly use or appropriate to [their] own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition.”¹⁸⁶

Outside the realm of professional organizations, many cooks also adhere to an informal system of norms.¹⁸⁷ Intellectual property professors Emmanuelle Fauchart and Eric von Hippel completed an extensive study to determine how French chefs protect the new food recipes that they create.¹⁸⁸ Through this study, Fauchart and von Hippel found that accomplished French chefs operate under a social norms system in order to protect their recipes, which they consider to

181. For example, Chef Van Aken has said:

I write cookbooks and teach classes so folks will use my recipes. I am quite happy when a layperson uses my recipes and I would also be just as happy, maybe more so, if a professional were to, provided that they gave me credit in some way shape or form.

Buccafusco, *supra* note 22, at 1152-53 (2007). Similarly, Charlie Trotter opined, “I honestly don’t really care [if other chefs create or publish my recipes]. It doesn’t bother me because we did it first and it’s our point of view, and I think people know what’s up.” Buccafusco, *supra* note 22, at 1153.

182. See 3-8D MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 (2011).

183. *Id.* US recognition of moral rights is limited to the visual arts. *Id.* § 8D.02.

184. See generally INT’L ASS’N CULINARY PROF’LS, <http://www.iacp.com> (last visited Jan. 23, 2011).

185. *Who We Are*, INT’L ASS’N CULINARY PROF’LS, <http://www.iacp.com/displaycommon.cfm?an=3> (last visited Jan. 23, 2011).

186. INT’L ASS’N CULINARY PROF’LS, No. IA-3679, CCP INFORMATION PACKAGE 6, <http://www.iacp.com/associations/7870/files/CCP%20Application.pdf> (last visited Jan. 23, 2011).

187. See Emmanuelle Fauchart & Eric A. von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* 3 (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06), available at <http://web.mit.edu/evhippel/www/papers/vonhippelfauchart2006.pdf>.

188. *Id.*

be a valuable form of intellectual property.¹⁸⁹ This finding is not surprising considering France's strong emphasis on the moral rights of authors.¹⁹⁰ Through their research, these professors identified three norms to which all chefs who were interviewed obeyed.¹⁹¹ First, a chef must not copy another chef's recipe innovation exactly.¹⁹² Second, if a chef reveals a secret recipe to a colleague, that colleague must not reveal that information to others without permission.¹⁹³ Third, chefs must credit the developer of a recipe or technique as the author of that creation.¹⁹⁴ Von Hippel and Fauchart found that chefs were far more likely to hire and share information with other chefs who they believed would adhere to these three norms.¹⁹⁵ Those chefs who violate these norms could suffer a harmed reputation or even be shunned from the culinary community.¹⁹⁶ One chef explained, "[i]f another chef copies a recipe exactly we are very furious; we will not talk to this chef anymore, and we won't communicate information to him in the future."¹⁹⁷

Furthermore, chefs expressed the importance attached to protecting their recipes¹⁹⁸ because of the potential to profit from this intellectual property.¹⁹⁹ First, famous chefs often own or work for haute cuisine restaurants, which benefit largely from having unique, original recipes on their menus.²⁰⁰ The ability to profit from such original dishes is greater if fellow chefs and competitors follow the three social norms described above.²⁰¹ Next, chefs can profit through the exchange of their recipes with other chefs.²⁰² Such an exchange is beneficial to the chef only if she can trust that the other chef will not reveal the information without the original chef's permission.²⁰³ Finally, chefs stand to profit by sharing their recipes in a cookbook, magazine, or on a television show.²⁰⁴ The ability to profit from openly

189. *Id.*

190. *See* 3-8D NIMMER & NIMMER, *supra* note 182.

191. Fauchart & von Hippel, *supra* note 187, at 3.

192. *Id.* at 3-4.

193. *Id.* at 4.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 4.

198. *See* Fauchart & von Hippel, *supra* note 187, at 20.

199. *Id.* at 18.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 18-19.

204. *Id.* at 18.

sharing a recipe with the public hinges upon the acknowledgment of the chef's authorship.²⁰⁵ Such sharing increases the chef's reputation, which could result in higher cookbook sales or restaurant patronage.²⁰⁶ Because a chef's ability to profit from a recipe innovation depends largely on proper attribution, it is not surprising that Fauchart and von Hippel found that the chefs in their study believed that creating and promoting novel recipes were important to their professional success.

Fauchart's and von Hippel's study of French chefs demonstrates the importance of maintaining a clear claim to one's original recipes. Because of this issue, many chefs abide by an informal norm system, and chef associations have established ethical sharing norms for their members.²⁰⁷ While these conventions may be sufficient to prohibit rampant recipe theft among an organization's members, their efficacy does not necessarily extend to those who are not bound by organizational and industry norms.²⁰⁸ Furthermore, while informal systems of norms may be self-regulating among chefs and the restaurant world, they do nothing to prevent recipe misappropriation on the Internet.

B. Norms and Sharing Standards within the Food Blogosphere

Adopting standardized sharing norms within the food blogging community might also protect recipes. However, because the food blogging community is an amorphous entity, it can be difficult to identify clear standards and norms that govern it. The consensus among many food-blogging individuals and associations is that basic recipe instructions are not covered by copyright because they are merely methods or procedures.²⁰⁹ Yet these communities still object to outright copying without attribution of another's recipe.²¹⁰ Food Blog Alliance, an association for food bloggers, advises members to get permission from the original author or publisher when in doubt of how to properly recognize a recipe's source, especially if reproducing a

205. *Id.* at 18.

206. *Id.* at 18.

207. *Id.* at 3-4.

208. *See, e.g., Top Secret Recipe: KFC* (Country Music Television broadcast Oct. 7, 2011) (promoting a "food hacker" who travels the country to uncover the most secret recipes such as KFC's original fried chicken recipe, and then attempts to fool a panel of expert judges with his own version).

209. *See* Elise Bauer, *How to Deal with Copyright Theft*, FOOD BLOG ALLIANCE (Aug. 27, 2008), <http://foodblogalliance.com/2008/08/how-to-deal-with-copyright-theft.php>.

210. David Lebovitz, *Recipe Attribution*, FOOD BLOG ALLIANCE, (Apr. 1, 2009), <http://foodblogalliance.com/2009/04/recipe-attribution.php>.

word-for-word version of the recipe.²¹¹ Alliance also sets forth the following rules of thumb for proper recipe attribution:

- (1) If you're modifying someone else's recipe, it should be called '*adapted from*[']
- (2) If you change a recipe substantially, you may be able to call it your own. But if it's somewhat similar to a publisher recipe, you should say it's '*inspired by*[' which means that you used [someone] else's recipe for inspiration, but changed it substantially.
- (3) If you change three ingredients, you can in most instances call the recipe *yours*.²¹²

Alliance offers further advice regarding the attribution method. For example, if the blogger has adapted the recipe from a website, Alliance advocates including a link to the original recipe.²¹³ Or, if the recipe comes from a cookbook, Alliance suggests including a link to purchase the cookbook itself on Amazon.com, the publisher's website, or on the author's website.²¹⁴

A recent uproar created by *Cooks Source*, a food magazine based in Massachusetts, demonstrates that great confusion remains among amateur food publishers and bloggers.²¹⁵ In 2005, Monica Gaudio, a food blogger, wrote an article for *Gode Cookery* entitled "A Tale of Two Tarts" that described the history of two English apple pies and provided their recipes.²¹⁶ Five years later, a friend congratulated Gaudio for having her article and recipes published in *Cooks Source*.²¹⁷ *Cooks Source* had never obtained Gaudio's permission to publish her article, so Gaudio initially assumed a mistake had been made as her name was still attached to the article.²¹⁸ Thus, she contacted the magazine to correct the misunderstanding and requested an apology and a nominal fee as compensation—a \$130 donation to the Columbia School of Journalism.²¹⁹ Instead, she received a hostile email from

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. See generally *Cooks Source, Copyright and Public Domain*, NPR (Nov. 8, 2010), <http://www.npr.org/templates/story/story.php?storyId=131168884> (describing *Cooks Source*'s republication of a food blogger's article without attribution).

216. Monica Gaudio, *A Tale of Two Tarts*, GODE COOKERY, <http://godecookery.com/twotarts/twotarts.html> (last visited Feb. 17, 2011); Tanzina Vega, *A Social Media Firestorm About Apple Pies*, N.Y. TIMES MEDIA DECODER (Nov. 4, 2010, 6:13 PM), <http://mediadecoder.blogs.nytimes.com/2010/11/04/a-social-media-firestorm-about-apple-pies>.

217. Dugald Baird, *Cooks Source: US Copyright Complaint Sparks Twitter and Facebook Storm*, THE GUARDIAN PDA: THE DIGITAL CONTENT BLOG (Nov. 4, 2010), <http://www.guardian.co.uk/media/pda/2010/nov/04/cooks-source-copyright-complaint>.

218. Jane Smith, *Copyright Infringement and a Medieval Apple Pie*, HOW PUBL'G REALLY WORKS (Nov. 4, 2010), <http://howpublishingreallyworks.com/?p=3450>.

219. Baird, *supra* note 217.

Judith Griggs, the publication's managing editor.²²⁰ After blaming long hours and forgetfulness, Griggs wrote, "But honestly Monica, the [W]eb is considered 'public domain' and you should be happy we just didn't 'lift' your whole article and put someone else's name on it! It happens a lot, clearly more than you are aware of, especially on college campuses and the workplace."²²¹ Griggs later went so far as to suggest that Gaudio should instead pay *Cooks Source* for taking the time to edit the article.²²² Further investigation revealed that *Cooks Source* regularly lifted recipes from other sources without permission.²²³

While the *Cooks Source* controversy generated an outcry on various social media sites,²²⁴ Griggs' suggestion that all information on the Internet is in the public domain highlights the general lack of understanding that pervades recipe use and attribution. Because of the varied nature of the blogging community, this widespread confusion would be difficult to dispel, and any attempt to police recipe use within the community would have no teeth.

C. A System of Copyright Protection that Fits within the Constitutional Framework for Copyright Law

The US Constitution grants Congress the power to enact copyright laws.²²⁵ Under the Constitution, copyright law must meet three requirements: "(1) the promotion of learning ('the Progress of Science'); (2) securing of the author's right to profit from a work ('exclusive Right'); and (3) enhancing the public domain ('limited Times')."²²⁶ Therefore, in order to determine whether copyright protection should extend to recipes, it must first be determined whether such protection would fit within the constitutional framework.

220. *Id.* at 217; Rene Lynch, *Cooks Source Magazine vs. the Web*, L.A. TIMES DAILY DISH BLOG (Nov. 4, 2010, 1:26 PM), <http://latimesblogs.latimes.com/dailydish/2010/11/cooks-source-magazine-vs-the-web.html>.

221. Baird, *supra* note 217.

222. *Id.*

223. Edward Champion, *The Cooks Source Scandal: How a Magazine Profits on Theft*, RELUCTANT HABITS (Nov. 4, 2010), <http://www.edrants.com/the-cooks-source-scandal-how-a-magazine-profits-on-theft> (documenting at least six incidents of recipe publication without attribution).

224. Lynch, *supra* note 220.

225. U.S. CONST. art. 1, § 8, cl. 8.

226. Buccafusco, *supra* note 22, at 1149; see also L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 783-84 (1989).

1. The Promotion of Learning

In mandating that copyright law promote learning, the Constitution provides justification for copyright law creation.²²⁷ As the Supreme Court has explained, “The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”²²⁸ Chefs and food bloggers publish recipes in order to share their ideas with others.²²⁹ In this way, other chefs can use the recipes to create their own dishes, expand upon the original ideas, and then pass along either the original or modified recipe to others for the same treatment. If copyrighting a recipe would require a license in order to use the information and create the dish that the recipe described, then copyright protection would constrain the entire purpose of publishing the recipe—sharing it with others so they might use it. This purpose fits squarely within the idea/expression dichotomy, according to which the Court has held that “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.”²³⁰ However, food bloggers do not use the recipe to recreate the dish described by the recipe.²³¹ Instead, the blogger often takes her use of the recipe one step further by reproducing for other readers a word-for-word copy of the recipe.²³² While this action functions to further share the recipe’s information with the world, it does so unnecessarily since the recipe is already published and accessible in its original form should others want to locate it.²³³

227. See Buccafusco, *supra* note 22, at 1124-25; Patterson & Joyce, *supra* note 226.

228. Baker v. Selden, 101 U.S. 99, 103 (1879).

229. See, e.g., Jennifer Bartoli, *About Us*, CHOCOLATESHAVINGS.CA, <http://chocolateshavings.ca> (follow “About Us” hyperlink) (last visited Feb. 24, 2011); *About*, MÉLANGER, <http://melangerbaking.com/about-m> (last visited Feb. 24, 2011).

230. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

231. See, e.g., *Lemon Mousse*, INDIAN SIMMER (Aug. 8, 2010), <http://www.indiansimmer.com/2010/08/lemon-mousse.html>; *Quick Rosemary, Fig, and Goat Cheese Tarts*, WILLOW BIRD BAKING (Feb. 23, 2011, 2:54 AM), <http://willowbirdbaking.wordpress.com/2011/02/23/quick-rosemary-fig-and-goat-cheese-tarts>; *Recipe: Coconut Raspberry Cake*, BIG APPLE NOSH (Jan. 4, 2011), <http://www.bigapplenosh.com/2011/01/recipe-coconut-raspberry-cake>.

232. See, e.g., *Recipe: Coconut Raspberry Cake*, BIG APPLE NOSH (Jan. 4, 2011), <http://www.bigapplenosh.com/2011/01/recipe-coconut-raspberry-cake>; *Rosemary Apricot Bars*, GASTRONOMY BLOG (Sept. 10, 2009), <http://gastronomyblog.com/2009/09/10/rosemary-apricot-bars>.

233. This situation is similar to someone copying the entire text of a novel and posting it on the Internet. Such an action would inhibit the author’s ability to profit from her work and would constitute copyright infringement. See 17 U.S.C. § 106 (2006).

In order for recipe copyright to achieve the constitutional goal to promote learning, a different understanding of “license” is necessary. When an individual purchases a cookbook, that sale implicitly includes a “license” to use and make the recipes in the book. Further, by accessing recipes on a food publisher’s website, the viewer implicitly agrees to the website’s terms of use, which in turn gives the viewer an implied license to produce the dishes the website describes. In contrast, neither of these implied licenses gives the purchaser or viewer the ability to republish such a recipe, either word-for-word or even generally, on their personal website. In such a way, this concept of copyright license would permit others to benefit from the content of the recipe, without forcing the creator to make that content available for anyone to freely reproduce. Furthermore, allowing an individual to obtain a license if she desired to reproduce the recipe, either on the Internet or through another publication, would facilitate further circulation of the recipe to the public through legitimate means.

2. Securing the Author’s Right to Profit from Work

By extending copyright protection to recipes in this way, without copyrighting or directly protecting the ability to make the dish,²³⁴ chef-authors may be better equipped to profit from the time and money investments made in creating the recipes. As demonstrated in Attributor’s study of the revenue lost by recipe-publishing websites or blogs, individuals are already harnessing the ability to profit from recipe publication on the Internet.²³⁵ Under the above-described concept of recipe copyright license, in order for an individual to reproduce a copyrighted recipe, she would need to request permission and even pay a licensing fee to the original author. Many commentators object to the enforcement of such a licensing scheme.²³⁶ Some argue that this scheme would require individual cookbook authors and even online recipe publishers to expend much more time and money than would be worthwhile in order to post a recipe.²³⁷

234. Traditional copyright protection grants an exclusive public performance right to the copyright holder of “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.” *Id.* § 106(4).

235. See *supra* notes 134-141 and accompanying text.

236. See Buccafusco, *supra* note 22, at 1151-52 (“[M]any chefs would be unlikely to enforce their IP rights against pirates, both because it would often be too costly and time-consuming and also because of a certain ‘culture of hospitality’ that chefs seem to share.”).

237. See Buccafusco, *supra* note 22, at 1151-52.

However, the existence of an industry licensing organization could provide a workable solution to the enforcement problem. Attributor's recipe republication study has already demonstrated one method of identifying infringing parties.²³⁸ Further, as discussed by eGullet founder Steven Shaw,²³⁹ ASCAP, one type of copyright-licensing clearinghouse, already exists.²⁴⁰ ASCAP, one of three performance-rights organizations in the United States,²⁴¹ is a member-owned organization that licenses the works of its members, collects fees for the licenses, and distributes royalties to its members.²⁴² In 2009, ASCAP collected over \$990 million in licensing fees and distributed more than \$860 million in royalties to its members.²⁴³ ASCAP functions to protect the intellectual property rights of its members collectively in ways that its members could not do alone.

Creative Commons operates in a different, though successful way as a monitoring program like ASCAP.²⁴⁴ It does not maintain a registry of its members or licenses, monitor those who use its licenses, or track the purposes for use of its which its licenses are used.²⁴⁵ Founded in 2001 with support from the Center for the Public Domain,²⁴⁶ the purpose of this non-profit organization is to address many of the copyright problems created by the Internet.²⁴⁷ In particular, Creative Commons seeks to enable Internet users who wish to "copy, paste, edit source, and post to the Web" to comply with the requirements for obtaining advance permission from the source's author under copyright law.²⁴⁸ To accomplish this, the organization

238. See *supra* notes 134-141 and accompanying text (describing Attributor's method of compiling lists of various food publishers' recipes and searching the internet for copies).

239. See *supra* notes 115-120 and accompanying text.

240. Wells, *Recipe Burglar*, *supra* note 110; see also *About ASCAP*, ASCAP, <http://www.ascap.com/about> (last visited Jan. 21, 2011).

241. The other two performance-rights organizations operating within the United States are Broadcast Music Incorporated (<http://www.bmi.com>) and Society of European Stage Authors and Composers (<http://www.sesac.com>).

242. *About ASCAP*, ASCAP, <http://www.ascap.com/about> (last visited Jan. 21, 2011).

243. ASCAP, 2010 ANNUAL REPORT 15 [hereinafter ASCAP 2010 ANNUAL REPORT], available at http://www.ascap.com/about/annualReport/annual_2010.pdf (last visited Jan. 22, 2011).

244. See *infra* text accompanying note 245.

245. *Frequently Asked Questions*, CREATIVE COMMONS, http://wiki.creativecommons.org/Frequently_Asked_Questions (last visited Jan. 22, 2011).

246. *History*, CREATIVE COMMONS, <http://creativecommons.org/about/history> (last visited Jan. 22, 2011).

247. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Jan. 22, 2011).

248. *Id.*

has developed an infrastructure through which members register their copyrighted material and give notice of which licenses and rights attach to their material.²⁴⁹ Creative Commons allows individual authors or creators, which it calls “licensors,” to choose from six different types of licenses, each of which designates what rights, available uses, and manners of attribution the licensor wishes to bestow upon other users.²⁵⁰ For example, the organization’s most accommodating license, the “Attribution” license, “lets others distribute, remix, tweak, and build upon [the licensor’s] work, even commercially, as long as they credit [the licensor] for the original creation.”²⁵¹ Alternatively, the most stringent license option, the “Attribution-NonCommercial-No Derivatives” license, allows others to “download [the licensor’s] works and share them with others as long as they credit [the licensor], but they can’t change them in any way or use them commercially.”²⁵² The organization also enables licensors to mark certain content as belonging in the public domain, thus notifying potential users that the licensor holds no exclusive right to that material.²⁵³

Either of these two copyright licensing models offers a possible solution to the enforceability and profitability questions raised by recipe copyright. The ASCAP model provides both an enforcement mechanism and the ability to harness potential profit. Furthermore, because ASCAP is a membership organization, those in the culinary world who do not wish to copyright or profit from publication of their recipes could abstain from joining. However, publishing chefs or commercial recipe publishers such as America’s Test Kitchens or the Food Network could protect and profit from their time and financial investment in recipe creation and development. The different types of licenses offered by Creative Commons demonstrate a model that could preserve the open source spirit of the culinary community.²⁵⁴ Those chefs who wish to grant full access to their recipes can do so. Other chefs who wish for more protection can modify the rights offered to others by choosing the type of license that meets their particular needs. As to food bloggers, such a system has the potential to create more sharing and collaboration than ever before. Because many bloggers already profit from their blogs through advertisements or

249. *Id.*

250. *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses> (last visited Jan. 22, 2011).

251. *Id.*

252. *Id.*

253. *Id.*

254. *See supra* notes 173-177 and accompanying text.

sponsors, they might be willing to pay a small fee to use recipes created by others for their blog.

Recipe copyright critics contend that its financial benefits would run to lawyers and cookbook publishers instead of chefs, and that the cost of enforcing one's intellectual property would get passed on to diners or secondary recipe users.²⁵⁵ However, ASCAP tells the opposite story. Based on its collection and distribution numbers, the organization boasts a 14.3 percent operating expense-collection ratio.²⁵⁶

3. Enhancing the Public Domain

There remains the question of whether this concept of recipe copyright and license would enhance the public domain. Already, the reality that a large number of recipes in circulation belong in the public domain stands as a barrier to the extension of copyright protection to recipes.²⁵⁷ However, just as in the realm of literature, extending copyright protection to recipes would by no means encompass those works clearly in the public domain such as apple pie, French onion soup, and mashed potatoes.²⁵⁸ In order to obtain a copyright for a recipe, the recipe would require enough creativity to be considered original;²⁵⁹ adding a copyright symbol will not achieve copyright protection. Establishing copyright protection would thus contribute to the public domain by clearly defining what recipes are available for use by all.²⁶⁰

While some scholars point to the lack of copyright protection in the fashion industry as support for not extending copyright protection to recipes, this argument is unconvincing.²⁶¹ In their study of fashion

255. Buccafusco, *supra* note 22, at 1150-51; Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 J. HIGH TECH. L. 21, 39-40 (2009).

256. ASCAP 2010 ANNUAL REPORT, *supra* note 243. The operating expense ratio reflects the percentage of income used for operating expenses out of the total income collected by the organization. *Supra* note 243.

257. See Conner-Simons, *supra* note 14; Lewis, *supra* note 112; Wells, *Chef's Lawsuit*, *supra* note 34.

258. See generally Broussard, *supra* note 11, at 724 (expressing concern that extending copyright protection to recipes would remove dishes from the public domain); Buccafusco, *supra* note 22, at 1130 (noting that recipes which have been produced for years and have no known author belong in the "Culinary Public Domain" and thus do not require copyright protection); Wells, *Recipe Burglar*, *supra* note 110 (noting that any extension of copyright protection to recipes would mean many traditional recipes would be placed in the public domain).

259. Wells, *Recipe Burglar*, *supra* note 110.

260. See *infra* Part III.B.

261. See Broussard, *supra* note 11, at 712-13; Buccafusco, *supra* note 22, at 1150.

design and intellectual property, professors Karl Raustiala and Christopher Sprigman suggest that the lack of intellectual property protection, instead of stifling creativity, in fact leads to more innovation—a phenomenon they dubbed the “piracy paradox.”²⁶² They contend that because individuals may freely copy the fashion designs of others, this copying encourages designers to be more innovative and creative in order to keep ahead of copycats.²⁶³ While acknowledging that fashion is not a perfect analogy to food, commentators still argue that, like high fashion, food created in the realm of haute cuisine, haute couture’s culinary equivalent, functions as a status symbol.²⁶⁴ Thus, imitations or reproductions of dishes and recipes created by critically acclaimed chefs serve to popularize the original recipe and increase its sales.²⁶⁵ The analogy to high-end fashion is more appropriate at the level of celebrity chefs and restaurants. After such chefs popularize a new culinary technique or dish, the widespread use encourages them to create new and different methods in order to keep ahead of imitators.²⁶⁶ However, when a person reproduces the entire recipe and does not give attribution to the author, the analogy is insufficient. In that scenario, anyone who views or uses the reproduced recipe will have no incentive to locate more recipes created by the original chef because she does not know the chef’s identity.

Thus, although the extension of copyright protection to recipes may face some constitutional challenges along the way, with a little creativity, these problems are not insurmountable. Copyright protection for recipes would promote learning by encouraging chefs and food publishers to continue sharing recipes with the public, knowing that this act would not enable others to reproduce the recipe’s text. In this way, food publishers and chefs would be able to secure the right to profit from sharing a recipe by requiring licenses if someone wants to reproduce the recipe’s text. Finally, extending copyright protection to recipes would enhance the public domain by clearly defining what recipes belong there.

III. WHY COPYRIGHT LAW OUGHT TO EXTEND TO RECIPES

Based on the preceding discussion, this Note concludes that copyright statutory law ought to be amended to extend explicitly to

262. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1717-18 (2006).

263. *Id.* at 1726.

264. *See, e.g.*, Broussard, *supra* note 11, at 712-13.

265. *Id.* at 706, 712-13.

266. *See Id.* at 701-02, 712-13; Buccafusco, *supra* note 22, at 1150.

original recipes. This extension would comply with constitutionally mandated requirements²⁶⁷ and would eliminate the confusion over how another's recipe may be used. Furthermore, due to the obvious confusion among the general public over how another's recipe may be used, the uniformity and clarity that a copyright licensing organization could provide would be highly desirable. A system providing various forms of licenses would continue to promote the open source spirit of the culinary community,²⁶⁸ while legalizing the informal norms for recipe sharing that already exist within the culinary community.²⁶⁹

Commentators have offered several arguments in support of adopting traditional copyright protection for recipes. Opponents of copyright protection for recipes claim that extension of such rights would be too difficult to enforce and would restrict the free exchange of ideas valued by the culinary community.²⁷⁰ Supporters argue that extending copyright protection to recipes would ease confusion over how another's recipe may or may not be used and would fulfill the three constitutionally mandated requirements for copyright protection.²⁷¹

A. *The Merits of Extending Copyright Protection to Recipes*

Similar to traditional forms of intellectual property that receive copyright protection,²⁷² creating an original recipe requires time and money. Also, a chef's ability to profit from her original recipe depends largely on her ability to identify the recipe as her own and utilize it in a restaurant or through publication.²⁷³ For these reasons, the US

267. Copyright law must meet the following requirements: "1) the promotion of learning ('the Progress of Science'); 2) securing of the author's right to profit from a work ('exclusive Right'); and 3) enhancing the public domain ('limited Times')." Buccafusco, *supra* note 22, at 1149 (discussing arguments for and against, but ultimately concluding against extending copyright law to recipes); see also *supra* notes 225-266 and accompanying text (analyzing how extension of copyright to recipes can comply with constitutional requirements).

268. See *supra* notes 244-254 and accompanying text (explaining that the Creative Commons system utilizes various licenses, a model which could be used in a recipe copyright system).

269. See *supra* notes 187-206 and accompanying text (detailing the use of informal social norms accepted by the French culinary community).

270. Buccafusco, *supra* note 22, at 1150-52; Wells, *Recipe Burglar*, *supra* note 110; see *supra* Part II.B.

271. *Id.* at 1149-51 (analyzing the ability of recipe copyright to fit within the constitutional framework, but ultimately concluding that current industry norms are sufficient to deal with this issue).

272. See 17 U.S.C. § 102(a) (2006).

273. See Fauchart & von Hippel, *supra* note 187, at 18-19.

Copyright Office acknowledges that recipes should be copyrightable to some extent.²⁷⁴

Although recent caselaw assumes the non-copyrightability of recipes, it is possible to extend copyright protection to recipes in a way that complies with constitutional requirements.²⁷⁵ Extending copyright protection to recipes would contribute to the promotion of learning by permitting others to benefit from the knowledge contained in an original recipe, while preventing others from reproducing that knowledge without permission. Further, copyright protection for recipes would secure the author's right to profit from work by enabling the creator of an original recipe to license the right to reproduce written copies of her recipe on the Internet or other food publication. In order to ensure the enforcement and collection of royalties for such licenses, an industry licensing organization should be created. Such an organization could also offer a series of modified licenses, much as the Creative Commons does, which would enable creators of a recipe to choose what rights attach to the license.²⁷⁶ Such a licensing scheme would also promote learning because it would enable individuals to obtain licensing rights more easily and thus share the recipe with the public. Then, food publishers such as *Cook's Illustrated*, which depend on sales of publications consisting of original recipes, would be able to protect their initial investment by harnessing licensing fees. Finally, affording copyright protection to recipes would help the public differentiate between recipes meant for sharing in the public domain, and those that would require licensing.

Furthermore, the extension of copyright protection to recipes would not only remedy the intentional misappropriation of another's original recipes, but would also eliminate much of the confusion about recipe use by providing clear guidelines about how a recipe may be used and shared. The implementation of a private copyright licensing system like ASCAP that provides a variety of licensing options, such as Creative Commons, would clarify which uses are permissible for a particular recipe, while also providing a way to grant and monitor licenses for recipe use.

B. Addressing the Concerns of Opponents to Recipe Copyright

A major argument against extending copyright protection to recipes is confusion over when a recipe could qualify for copyright

274. *What Does Copyright Protect?*, *supra* note 21.

275. *See supra* Part II.A.

276. *See supra* Part II.A.2.

protection.²⁷⁷ Copyright protection extends only to “original works of authorship.”²⁷⁸ Accordingly, the initial challenge of enforcing recipe copyright is how to determine when a chef’s recipe constitutes an original dish.²⁷⁹ Due to the nature of cooking, as well as the open source sharing norms within the culinary community, an infinite number of dishes already exist in the public domain.²⁸⁰ Opponents to recipe copyright protection protest the issue of originality because many recipes’ ingredients and procedures are dictated by functional rather than expressive considerations, and as such, these elements are not protectable under copyright law.²⁸¹ However, the threshold for originality is low, requiring only a minimal amount of creativity.²⁸² As the court found in *Barbour v. Head*, certain recipes can be sufficiently expressive to meet this requirement.²⁸³

Another prominent argument asserted against copyright protection for recipes is the difficulty of enforcing such a copyright.²⁸⁴ Chefs in particular question the practicality of enforcing a recipe copyright against others in the “performance” of a recipe through a dish.²⁸⁵ This objection is based on an understanding that a recipe copyright would restrict the exclusive right to perform the dish to the recipe’s copyright holder and to those who hold a license to perform the recipe.²⁸⁶ The concern is that innovation would be stifled as chefs would be hesitant to experiment with another chef’s copyrighted recipe out of fear of violating copyright law.²⁸⁷ However, under current copyright statutes, the exclusive public performance right only extends to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.”²⁸⁸ This Note proposes that the nature of copyright protection afforded to

277. Cunningham, *supra* note 255, at 38.

278. 17 U.S.C. § 102 (2006).

279. Cunningham, *supra* note 255, at 38.

280. *Id.* at 37-38.

281. Buccafusco, *supra* note 22, at 1127 (discussing Nimmer’s position on recipe copyrightability); Cunningham, *supra* note 255, at 37-38; *What Does Copyright Protect?*, *supra* note 21.

282. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

283. See *Barbour v. Head*, 178 F. Supp. 2d 758, 764 (S.D. Tex. 2001) (finding the recipes at issue to be sufficiently expressive to go beyond mere facts); see also *Publ’ns Int’l, Ltd., v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) (stating that certain recipes may contain sufficient expressiveness to be copyrightable).

284. See *infra* note 285.

285. See Buccafusco, *supra* note 22, at 1152; *supra* Part II.B.

286. *Id.* at 1150.

287. Buccafusco, *supra* note 22, at 1150.

288. 17 U.S.C. § 106(4) (2006).

recipes focuses only on the *publication* aspect of recipes, rather than the use or “performance” of recipes.²⁸⁹ This concern is irrelevant.

Further, opponents argue that the high cost of participation in a licensing-enforcement organization and even higher costs of litigation would frustrate any ability to earn profits from licensing one’s recipe for use by others.²⁹⁰ However, ASCAP, a licensing and royalty distribution organization, has demonstrated the ability to profit from licensing one’s intellectual property despite heavy enforcement barriers. ASCAP has maintained an operating expense to member-distribution ratio of between 11.5 percent and 14.3 percent between 2008 and 2010.²⁹¹ Thus, if a similar organization controlled recipe licensing, there would be no danger of high costs of participation or litigation.

Many prominent chefs oppose a copyright and licensing system for recipes.²⁹² This opposition is rooted in the belief that any copyright and licensing would be in direct conflict with the open source spirit of the culinary community.²⁹³ In fact, some commentators suggest that the informal social norms already in place within the culinary community are sufficient to protect chefs’ intellectual property.²⁹⁴ These norms serve only to police those who are already part of the professional culinary community and would be affected by the culinary community’s decision to “punish” an offender through damaging the individual’s reputation or excluding the individual from the community.²⁹⁵ Thus, the informal social norms within the culinary community have no effect on the actions of bloggers or other food publishers who appropriate a chef’s original recipe, publish it without attribution or permission, and sometimes even profit from it.

IV. CONCLUSION

While caselaw seems to dictate a per se denial of copyright protection to recipes, that was not always the case.²⁹⁶ The current absence of copyright protection is becoming increasingly difficult to

289. *Supra* Part II.C.1.

290. Cunningham, *supra* note 255, at 39-40.

291. ASCAP 2010 ANNUAL REPORT, *supra* note 243; *About ASCAP*, ASCAP, <http://www.ascap.com/about/> (last visited Jan. 21, 2011).

292. Cunningham, *supra* note 255, at 40; Wells, *Recipe Burglar*, *supra* note 110; see *supra* Part II.B.

293. *Id.* at 40; see *supra* Part II.B.

294. Buccafusco, *supra* note 22, at 1156; Cunningham, *supra* note 255, at 49-50.

295. Fauchart & von Hippel, *supra* note 187, at 3-4.

296. See *supra* Part I.A.

justify given the rise in recipe appropriation without attribution and the growing trend of Internet recipe sharing.²⁹⁷ Extending copyright protection to recipes is the most effective way to adapt this aspect of copyright law to increased use of Internet recipe sharing, and to enable chefs and food publishers to better protect their financial investments in recipe creation. Although enforcement difficulties exist, particularly in defining an original recipe,²⁹⁸ these barriers are not as insurmountable as some may suggest. An industry licensing organization would be able to overcome these barriers.²⁹⁹ By offering a series of modified licenses, the organization would provide clear notice to the public of permissible types of use for each recipe.³⁰⁰ Furthermore, the organization would have the power to collect royalties and police recipe publication on the Internet.³⁰¹ Finally, extension of copyright protection to recipes would comply with constitutional requirements and strengthen the current sharing norms within the culinary industry.³⁰²

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297. Guevin, *supra* note 18.

298. See *supra* notes 48-75 and accompanying text (discussing the copyright's originality requirement).

299. See *supra* notes 234-256 and accompanying text (describing the success of other industry licensing organizations and the transferability of such a system to recipe copyright licensing).

300. *Supra* notes 249-254 and accompanying text (describing the various licensing schemes of the Internet organization Creative Commons and the transferability of such a system to recipe copyright).

301. *Supra* notes 255-56 (describing the enforcement mechanisms and distribution ratios of current licensing organizations).

302. *Supra* Parts II.C and III.A.

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