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## An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation

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# An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation

## ABSTRACT

*In the United States, dining has become an increasingly popular form of leisure and entertainment, generating an estimated \$537 billion in 2007. However, dining represents only one aspect of the modern food economy; cooking and dining are regularly featured in newspapers and magazines, while celebrity chefs tout their own brands on television. Eating has been transformed from a mere perfunctory activity into big business.*

*Increasing competition for the attention and money of restaurant patrons has prompted chefs of grande cuisine to differentiate their menus by creating unique dishes. The time and labor that chefs sink into this form of innovation represents a substantial investment, and some have turned to the law to protect their original dishes from competing chefs. Yet, copyright law fails to protect chefs' recipes from copyists. Historically, the law has viewed recipes as uncopyrightable subject matter because of their "functional" and "utilitarian" nature.*

*This note illustrates why, in today's food culture, copyright law should embrace chefs' innovative dishes as original works of authorship, amenable to copyright protection. First, the author describes the transformation of eating from a perfunctory activity into one done for entertainment and explains how this phenomenon created competition among chefs. Second, the author traces the current law on the copyrightability of culinary dishes and recipes. Next, the author discusses the legal, doctrinal, and sociological reasons why the law has not protected recipes as works of authorship in the past. Finally, the author argues that chefs' original menu items, as expressed in recipes, should be considered copyrightable subject matter as works of applied art.*

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Food is fuel. You get picky about what you put in the tank, your engine is gonna die. Now shut up and eat your garbage.

- Django the Rat, *Ratatouille*<sup>1</sup>

Expression is all of [recipe creation]. It's all emotion; it's all soul. It's spiritual.

- Chef Rick Tramonto, Executive Chef, TRU Restaurant, Chicago<sup>2</sup>

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1. RATATOUILLE (Disney/Pixar 2007).  
 2. 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, 1133-34 (2006) (citing Interview with Rick Tramonto, Chef-Owner, TRU (Mar. 2, 2006)).

On June 26, 2007, Rebecca Charles, the owner and executive chef of the critically celebrated Pearl Oyster Bar (Pearl) in lower Manhattan, filed a complaint in federal court against her former sous chef, Edward McFarland.<sup>3</sup> She alleged that McFarland “pirated Pearl’s entire menu” and “copied all aspects of Pearl’s presentation of its dishes” when he opened Ed’s Lobster Bar only weeks after quitting his position at Pearl.<sup>4</sup> The Charles–McFarland case has garnered much attention in the media, as well as in food and dining blogs across the Internet.<sup>5</sup> Many who have posted online comments on these “foodie blogs” have sympathized with the frustration of Charles, but they remain skeptical that intellectual property concepts can or should be invoked to protect menu items featured by restaurants.<sup>6</sup>

Interestingly, Charles did not assert copyright infringement by McFarland in her complaint. Instead, she relied on a “trade dress” claim under 15 U.S.C. § 1125 in an attempt to protect the “recipes, arrangements, and presentations” of Pearl’s menu items.<sup>7</sup> Because copyright law has traditionally shunned claims that recipes should be protected as intellectual property,<sup>8</sup> Charles presumably asserted the trade dress claim as an alternative litigation strategy. Yet, should

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3. Complaint at 1-3, *Powerful Katinka, Inc. v. Edward McFarland*, No. 07 Civ. 6036 (S.D.N.Y. filed June 26, 2007).

4. *Id.* at 1-2.

5. See, e.g., Ed Levine, *Is Imitation Always the Sincerest Form of Flattery?*, SERIOUS EATS, June 4, 2007, [http://www.serious eats.com/required\\_eating/2007/06/sometimes-imitation-is-not-fla.html](http://www.serious eats.com/required_eating/2007/06/sometimes-imitation-is-not-fla.html) (criticizing McFarland and noting that, while “there’s nothing illegal about [what he did] . . . that doesn’t make it right”); Pete Wells, *Chef Sues Over Intellectual Property (the Menu)*, N.Y. TIMES, June 27, 2007, at A1 (discussing and debating the merits of Charles’s lawsuit against McFarland); Keep Recipes Free, <http://www.megnut.com/2006/10/keep-recipes-free> (Oct. 10, 2006) (“The culinary world at its best is a world of craft and art. A fine meal is a performance, not a soulless assemblage of ingredients. I feel good when I eat Grant Achatz’s ‘Hot Potato’ at Alinea. I don’t want to eat ‘Hot Potato™’ by Grant Achatz’ rotely [sic] created at some food counter in the airport.”); Posting of Mike Madison to madisonian.net, <http://madisonian.net/archives/2007/06/27/all-the-ip-you-can-eat/> (June 27, 2007) (arguing that, rather than suing former employees, “[i]t would be a better strategy . . . for Pearl to really cook up something new”); Restaurant Concept Lawsuits Run Amok, <http://www.megnut.com/2007/06/restaurant-concept-lawsuits-run-amok> (June 27, 2007) (criticizing Charles’s litigious attitude, while noting that the “real problem[] here [is] a lack of originality being demonstrated by Ms. Charles’ former employees”).

6. See, e.g., Posting of twhid to Megnut.com, <http://www.megnut.com/2007/06/restaurant-concept-lawsuits-run-amok> (June 27, 2007, 14:55) (expressing that an expansion of “IP concepts” to encompass menu items would create a “lose-lose” situation for both customers and restaurateurs).

7. Complaint, *supra* note 3, at 15-21.

8. See, e.g., *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) (holding that certain yogurt-based recipes, as lists of ingredients, did not represent copyrightable subject matter due to their lack of originality).

Charles have to resort to a trade dress claim in order to protect her dishes? Would a copyright infringement claim, rather than a trade dress claim, be more appropriate with respect to the legal interests that she is trying to protect?<sup>9</sup> Should copyright law provide legal protection for chefs' original dishes?

In the United States, restaurant dining has become a popular form of leisure and entertainment, generating an estimated \$537 billion in 2007, up from \$42 billion in 1970.<sup>10</sup> Thus, the stakes are as high as ever for emerging and growing restaurants, with hearty industry competition for patronage, beefy start-up costs, and opportunities for franchising, cookbook publishing, and television appearances boiling over.<sup>11</sup> Indeed, even when Americans are not spending their leisure time eating, they may still be entertained by food. The emergence of cooking literature, television cooking, celebrity chefs, and competitive cooking programs have permeated American popular culture like never before. Today, food is truly a super-sized business opportunity.

In many cases, a restaurant's success is determined by the level of creativity in its menu.<sup>12</sup> Patrons saturated by the same offerings actively seek out new gastronomic experiences, ready to spend top dollar on dishes that will not only fill their stomachs but also delight their senses.<sup>13</sup> As competing chefs fight for their menu items to be noticed by food critics and the public at large, some attempt to invoke intellectual property concepts to protect their culinary creations, as did Rebecca Charles.<sup>14</sup> As the restaurant business grows, litigation between restaurateurs should be expected to increase, although intellectual property law remains seemingly

9. This note is concerned only with the question of copyright protection of food dishes. Therefore, other intellectual property rights that a chef might have, like patent or trade secret, lie outside the scope and will not be discussed.

10. National Restaurant Association, *Industry at a Glance*, [http://www.restaurant.org/research/ind\\_glance.cfm](http://www.restaurant.org/research/ind_glance.cfm) (last visited Feb. 15, 2008).

11. *See id.* (indicating that more than seven out of ten eating places are single-unit or independent operations and that four out of five consumers agree that going out to a restaurant is a better way to spend leisure time than cooking).

12. This assertion is supported by the general observation that the most financially and popularly successful restaurants feature highly creative menu offerings. *See, e.g.*, Charlie Trotter's Grand Menu, <http://www.charlietrotters.com/restaurant/cuisine/menu.asp?menuID=13> (last visited Feb. 15, 2008).

13. *See* ELIZABETH TELFER, *FOOD FOR THOUGHT: PHILOSOPHY AND FOOD* 24-40 (1996) (examining philosophically the pleasures of food enjoyed by twentieth-century Westerners who "devote more time, money, and attention to food than is needed to stay alive, or even to stay healthy and active").

14. *See generally* Complaint, *supra* note 3 (asserting a trade dress claim against an alleged copyist of recipes and menu items).

unsure about whether to sink its teeth into the now prominently asserted interests in original culinary creations.

The purpose of this note is to explore the emergence of intellectual property “food fights,” asking whether copyright protection should be available to chefs whose original menu items become pirated by competing restaurateurs. It appears that a chef in the restaurant industry will need more than just sharp cutlery to be successful; sharp legal intellect might also be required.

Part I of this note will describe the historical and philosophical development of eating from a perfunctory activity to one done also for entertainment and leisure, and the transformation of cooking and dining into a competitive, large-revenue, multimedia consumer industry. Part II will address the current law on the copyrightability of food creations and recipes, and will discuss the doctrinal and sociological reasons why copyright law has not traditionally protected recipes as works of authorship. Part III will contend that chefs’ original menu items, as expressed in recipes, should be considered copyrightable subject matter for both legal and philosophical reasons. Finally, Part IV will end the note by concluding that chefs and society would benefit from the extension of copyright protection to original dishes in the contemporary world of culinary competition.

## I. A SUPER-SIZED BUSINESS: FOOD AS ENTERTAINMENT

### A. *The Origins of Leisurely Dining and Culinary Competition*

Historically, the emergence of the modern upscale restaurant has its origins in the French Revolution.<sup>15</sup> Social and economic upheaval in France acted as “a culinary landmark” in the “transformation [of] . . . the cooking profession and its theater of operations.”<sup>16</sup> Food historian Stephen Mennell argues that “the age of the great French restaurants is usually reckoned to date from the Revolution, and their emergence proved an immense stimulus to still more rapid development of elaborate, refined and luxurious food,” thereby widening the “prestige gap” between professional and

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15. See STEPHEN MENNELL, *ALL MANNERS OF FOOD* 134-65 (2d ed. Univ. of Ill. Press 1996) (1985) (exploring the developments during and after the Revolution that aided the development of fine Parisian dining).

16. *Id.* at 134.

domestic cookery.<sup>17</sup> French *grande cuisine* in turn spread over the rest of Europe and to North America during the mid-nineteenth century.<sup>18</sup>

Precursors to the modern restaurant existed in pre-revolutionary Paris primarily as cookshops and *traiteurs*.<sup>19</sup> However, neither of these institutions “matched the [modern] restaurant’s particular combination of style and type of food, social milieu and social function.”<sup>20</sup> The cookshop was a place where people could send meats to be cooked or could purchase simple pre-cooked dishes.<sup>21</sup> “*Traiteur*[s did] not sell individual helpings of cooked dishes, though they did act as caterers, selling whole meal[s] for a dinner party in the purchaser’s own home.”<sup>22</sup>

It was not until the French Revolution that the supply and demand for restaurants, as a higher form of eating, materialized.<sup>23</sup> On the supply side, cooks formerly employed in aristocratic kitchens found themselves seeking alternative means of employment.<sup>24</sup> Demand for dining out increased with the growth of bourgeois society.<sup>25</sup> Moreover, more restaurants were needed to serve the increasing numbers of revolutionary deputies from conquered provinces who lodged in boarding houses in Paris.<sup>26</sup> As Mennell observed: “There was now an alternative route to the top of the culinary profession; rather than integrating themselves with one of a small number of rich employers, ambitious cooks could proudly compete with each other for the custom of a much larger body of diners-out.”<sup>27</sup>

This transformation of the culinary profession paralleled “changes in the social roles of writers, musicians, and artists during [the post-revolutionary] period.”<sup>28</sup> Chefs became exposed to the world of public opinion, as did their creative counterparts who worked with other media.<sup>29</sup> Thus, the development of *grande cuisine* during the late-eighteenth and early-nineteenth centuries can be understood as

17. *Id.*
18. *Id.*
19. *Id.* at 136-38.
20. *Id.* at 136.
21. *Id.*
22. *Id.* at 138.
23. *Id.* at 139.
24. *Id.* at 141.
25. *Id.* at 140-41.
26. *Id.* at 139.
27. *Id.* at 142.
28. *Id.*
29. *Id.* at 142-43.

competition between restaurateurs for clientele. In a more competitive marketplace, the incentives to innovate became greater, and the pace of culinary development consequently quickened.<sup>30</sup> Restaurants were therefore “a crucial development essential to the rising status of star cooks and rapid innovation in *grande cuisine*.”<sup>31</sup> Mennell wrote that, before restaurants, “there [were] few if any instances of the origins of a particular dish being known . . . [and] about such questions as who made the first mayonnaise or béchamel. The very idea of originality in a recipe is itself almost an invention of the bourgeois age.”<sup>32</sup> Chefs like Antonin Carême and Georges Auguste Escoffier, who uniquely transformed the profession in the early- and late-nineteenth century, respectively, by establishing their own particular artistic styles or schools of cooking, received public recognition for the originality in their recipes and methods.<sup>33</sup> In fact, “Escoffier [lamented] that while artists, writers, musicians and inventors were protected by law, the chef had absolutely no redress for [the plagiarism] of his work.”<sup>34</sup>

The emerging French bourgeois society, and later the American upper-class, demanded originality in its menu choices when dining out because the experience was increasingly considered not simply one to satiate bodily needs, but also one to satisfy aesthetic tastes.<sup>35</sup> In this way, the modern act of “dining out” is not simply a perfunctory exercise of necessity, but is also a source of pleasure, entertainment, and leisure.<sup>36</sup>

While food philosopher Elizabeth Telfer admits that humans usually eat due to bodily necessity, she argues that, to some extent, we alter these attitudes in certain situations, savoring and cherishing the novelties of our food, exercising judgment and taste as if we were cooks and not merely consumers.<sup>37</sup> Thus, normal attitudes toward food and eating may change while dining at a restaurant.<sup>38</sup> As patrons of eating establishments, we become free to pursue leisure by exercising our individuality, for example, in choosing a restaurant or

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30. *Id.* at 143.

31. *Id.* at 144.

32. *Id.* at 143.

33. *Id.* at 144-49, 157-63.

34. *Id.* at 162.

35. *See id.* at 142-43 (discussing the origins of public opinion in matters of culinary taste and the emergence of original dishes in the newly competitive post-Revolutionary restaurant industry).

36. *See TELFER, supra* note 13, at 1-3 (discussing how eating and drinking are not only necessities, but that they function as a leisure activity as well).

37. *Id.* at 2.

38. *See id.*

entree.<sup>39</sup> In this way, eating becomes *dining*, an assertion of individuality and an aesthetic experience unassociated with the body's need to consume calories.<sup>40</sup>

### B. Cooking on Television

The identity of food as a source of pleasure, entertainment, and leisure extends to times unassociated with eating. Because of the emergence of culinary literature and television programming, it is possible to be entertained by the joys of dining and food making before and after mealtimes. Gastronomic literature has existed since the origin of the restaurant and *grande cuisine*, and traditionally described the proper composition of menus, sequence of courses, and technique of service.<sup>41</sup> Restaurant guides originated in the early-twentieth century.<sup>42</sup> The *Michelin Guide* of France, first published in 1900, and the *Zagat Survey* of the United States, first published in 1979, are two of the most popularly consulted restaurant guides today.<sup>43</sup> Nationally and locally circulated newspapers regularly feature articles on dining out as well as reviews of restaurants.<sup>44</sup> *Food and Wine* and *Bon Appétit* magazines represent another popular medium devoted to a discussion of cooking, restaurants, and the enjoyment of eating.<sup>45</sup> However, it was not until the early-1990s that the entertainment value of food and dining was harnessed by the television industry in the form of an entire channel devoted to the subject—the Food Network.

The Television Food Network was founded on November 23, 1993, by Joe Langhan, who developed the concept while working for the Providence Journal Company.<sup>46</sup> In 1997, the current owner of the channel, the E.W. Scripps Company (Scripps), acquired the Food

39. *Id.*

40. *See id.*

41. *See* MENNELL, *supra* note 15, at 270 (discussing Grimod de La Reynière's *Manuel des Amphitryons*, the "archetype" of gastronomic literature that addresses "such questions as the composition of menus, sequences of courses, and techniques of service").

42. *Id.* at 281.

43. Welcome to the Michelin Guide, <http://www.michelinguide.com/> (last visited Feb. 15, 2008); Zagat Survey, <http://www.zagat.com/> (last visited Feb. 15, 2008).

44. Washingtonpost.com, Food & Dining, <http://www.washingtonpost.com/wp-dyn/content/artsandliving/foodanddining/> (last visited Feb. 15, 2008).

45. *See* Bon Appétit, <http://www.epicurious.com/bonappetit> (last visited Feb. 15, 2008); Food & Wine, This Month's Issue—Recipes and Articles, <http://www.foodandwine.com/monthly> (last visited Feb. 15, 2008).

46. The Wine Network.tv, <http://www.winetv.tv/f2.htm> (last visited Feb. 15, 2008).

Network in order to bolster its holdings of “lifestyle media.”<sup>47</sup> Scripps’s Web site describes the Food Network as a “unique lifestyle network . . . that strives to surprise and engage its viewers with likable hosts, personalities and the variety of things they do with food.”<sup>48</sup> Scripps also comments that “[t]he network is committed to exploring new, different and interesting ways to approach food—through pop culture, adventure and travel—while also expanding its repertoire of technique-based information.”<sup>49</sup>

The Food Network reaches more than 90 million American households and 191 territories on seven continents.<sup>50</sup> The channel features seventy-one different regularly produced programs<sup>51</sup> across two genres—“Food Network in the Kitchen,” and “Food Network Nighttime.”<sup>52</sup> The former genre is dedicated to instructional cooking programs, while the latter features travel programming, cooking competitions, and other food entertainment programs.<sup>53</sup> Some of the most popular programs on the network feature chefs who have become famous not only for their original cuisine and culinary styles, but also for their humor and likeable personalities.<sup>54</sup> The idea of the celebrity chef has its origins in the birth and development of television cooking, resulting from the medium’s unique potential to expose the art of cooking and gastronomy to the mass public for the first time in history.<sup>55</sup>

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47. See Scripps Networks, <http://scrippsnetworks.com/about.aspx> (last visited Feb. 15, 2008).

48. ScrippsNetworks.com, Food Network, <http://scrippsnetworks.com/newsitem.aspx?id=91> (last visited Feb. 15, 2008).

49. *Id.*

50. *Id.*

51. See Food Network, <http://www.foodnetwork.com> (last visited Feb. 15, 2008); Food Network TV Show List A to Z, [http://www.foodnetwork.com/food/shows\\_a\\_to\\_z](http://www.foodnetwork.com/food/shows_a_to_z) (last visited Feb. 15, 2008).

52. Food Network, [http://en.wikipedia.org/wiki/Food\\_Network](http://en.wikipedia.org/wiki/Food_Network) (last visited Feb. 15, 2008); see In the Kitchen Schedule, [http://www.foodnetwork.com/food/cooking/text/0,,FOOD\\_9819\\_8897,00.html](http://www.foodnetwork.com/food/cooking/text/0,,FOOD_9819_8897,00.html) (last visited Feb. 15, 2008).

53. Food Network, *supra* note 52.

54. For a list of the Food Network’s chefs, see FoodNetwork.com, Hosts & Celebrity Chefs, [http://www.foodnetwork.com/food/hosts\\_celebrity\\_chefs](http://www.foodnetwork.com/food/hosts_celebrity_chefs) (last visited Feb. 15, 2008).

55. See Sylvia Lindman, *Julia Child: Bon Appétit*, MSNBC.COM, Aug. 13, 2004, <http://www.msnbc.msn.com/id/3694953> (discussing how Julia Child became a celebrity by changing the American public’s perception of French cooking and cuisine through her television programs: “[Julia Child] changed not only home entertaining but [also] restaurant dining, brought cooking to prime-time television, and was the first big celebrity chef”).

### C. *The Celebrity Chef*

A “celebrity chef” is a chef who has become popularly known for his or her cuisine or cooking techniques.<sup>56</sup> The goal of achieving the status of celebrity chef—that is, of achieving the recognition and remuneration attendant to that status—has been an inspiration for creativity and innovation in the culinary arts since the times of Antonin Carême and Georges Escoffier.<sup>57</sup> Thus, there have always been social and financial rewards lauded upon excellent chefs. However, considering the modern business practices of multimedia advertising, cross-promotional marketing, and branding, the commercial possibilities available to the contemporary celebrity chef are almost without limit. This increasing potential for fame and financial reward for modern chefs not only acts as an impetus for innovation in the culinary arts, but also stimulates the increasing invocation of intellectual property rights in food dishes, since more money is at stake than ever before.<sup>58</sup>

Television embraced Julia Child as its first highly visible celebrity chef in the 1960s.<sup>59</sup> She introduced America to French cuisine and cooking techniques in her program *The French Chef*, which was first broadcast in 1963 on what is now the Public Broadcasting System (PBS).<sup>60</sup> Child’s appearances on television spanned four decades and, in 2001, she donated her kitchen to the Smithsonian National Museum of American History.<sup>61</sup>

Three contemporary chefs who have gained modern celebrity status and commercial success are Bobby Flay, Mario Batali, and

56. See Posting of Michael Ruhlman to Megnut.com, <http://www.megnut.com/2006/07/the-meaning-of-celebrity> (July 19, 2006) (contemplating the true meaning of the term “celebrity chef”).

57. See MENNELL, *supra* note 15, at 144-49, 157-63 (discussing the respective “ages” of Carême and Escoffier).

58. See Anne E. McBride, *Interview with Chef Thomas Keller*, [http://www.trainatice.com/news/articles/article\\_38.shtml](http://www.trainatice.com/news/articles/article_38.shtml) (acknowledging that, although many well-received contemporary chefs, like himself, are rewarded with fame and financial success, Thomas Keller personally does not indulge in an “extravagant” lifestyle); Posting of Michael Ruhlman, *supra* note 56 (“My favorite ‘celebrity chef’ is Cat Cora who, when I was interviewing her for an article on chef branding told me point blank, and with refreshing candor, ‘It’s something I’ve wanted all my life. To have the fame. Without beating around the bush, that’s the bottom line.’”); see Complaint, *supra* note 3.

59. See Starchefs.com, *Chef Julia Child’s Biography*, <http://www.starchefs.com/JChild/html/biography.shtml> (last visited Feb. 15, 2008) (noting that Julia Child was America’s “first celebrity chef”).

60. *Id.*

61. Julia Child’s Kitchen at the Smithsonian, <http://americanhistory.si.edu/juliachild/jck/html/textonly/default.asp> (last visited Feb. 15, 2008).

Emeril Lagasse.<sup>62</sup> Bobby Flay has hosted six programs on the Food Network, has published numerous cookbooks, and currently owns six restaurants, including New York City's well reviewed Mesa Grill, Bolo, and Bar Americain.<sup>63</sup> He is also an "Iron Chef" on the Food Network's *Iron Chef America*.<sup>64</sup> Each of Flay's restaurants showcases his original Southwest-American style of cooking and grilling.<sup>65</sup> Like Flay, Mario Batali is regularly featured on *Iron Chef America*.<sup>66</sup> Batali's accolades include authorship of five cookbooks and ownership of fourteen restaurants, including New York City's Babbo, Del Posto, and Esca.<sup>67</sup> Batali cooks with an original style that fuses "Old World Italian" cuisine with that of modern America.<sup>68</sup> Finally, Emeril Lagasse might be considered the epitome of the celebrity chef. His cooking techniques and television antics have been well known to the American public since his program *Emeril Live* appeared on the Food Network in 1997.<sup>69</sup> Emeril's unique style of Cajun and Creole cooking, upbeat personality, and catchphrases like "BAM!" and "Let's kick it up a notch!" made him a popular feature on the Food Network.<sup>70</sup> NOLA, Emeril's, and Emeril's Tchoup Chop are three of Emeril's eleven restaurants located across the United States.<sup>71</sup> Emeril's Web site proudly features his own self-styled brands of cookware, cutlery, cookbooks, tableware, apparel, kitchen textiles, mustards, spices, sauces, dressings, salsas, and even cooking sprays.<sup>72</sup>

The commercial success of these three chefs is illustrative of the possibility for celebrity status in the world of cooking. In the

62. See FoodNetwork.com, Hosts & Celebrity Chefs, *supra* note 54.

63. See Bobby Flay: Chef, <http://www.bobbyflay.com> (place pointer over "Bobby"; then follow "Bio" hyperlink) (last visited Feb. 15, 2008).

64. FoodNetwork.com, Iron Chef America: Meet the Iron Chefs, [http://www.foodnetwork.com/food/show\\_ia\\_the\\_series](http://www.foodnetwork.com/food/show_ia_the_series) (follow "Who's Who" hyperlink) (last visited Feb. 15, 2008).

65. See Bobby Flay: Chef, *supra* note 63.

66. See FoodNetwork.com, Iron Chef America: Meet the Iron Chefs, *supra* note 64 (follow "Iron Chef Mario Batali" hyperlink).

67. MarioBatali.com, About Mario, [http://www.mariobatali.com/about\\_biography.cfm](http://www.mariobatali.com/about_biography.cfm) (last visited Feb. 15, 2008); MarioBatali.com, Restaurants, <http://www.mariobatali.com/restaurants.cfm> (last visited Feb. 15, 2008).

68. See MarioBatali.com, About Mario, *supra* note 67.

69. Emeril Live ceased production on December 11, 2007, but the Food Network still airs re-run episodes of the program. See Associated Press, *Food Network Pulling Plug on Emeril Live*, CNN.COM, Nov. 27, 2007, <http://edition.cnn.com/2007/SHOWBIZ/TV/11/27/people.emerillagasse.ap/index.html>.

70. Emeril Lagasse Biography, biography.com, <http://www.biography.com/search/article.do?id=9542380>.

71. See Emerils.com, Restaurants, <http://www.emerils.com/restaurants/> (last visited Feb. 15, 2008).

72. See Shop Emerils.com, <http://www.emerilstore.com/> (last visited Feb. 15, 2008).

competitive business of owning and operating restaurants, the selling power of celebrity can mean the difference between financial triumph and bankruptcy.<sup>73</sup> The allure of commercial success is likely what inspires young chefs to innovate new dishes and culinary styles, in an effort to arrest the attention of the media and general public. This constant competition between chefs for originality and recognition will likely lead more chefs, like Rebecca Charles, to assert intellectual property rights in their dishes.

#### D. Competitive Cooking

In addition to its other programming, the Food Network features reality programming that showcases culinary competition between celebrity chefs and chef hopefuls.<sup>74</sup> The general recipe for these programs seems to incorporate equal parts cooking and sport. Competitive cooking shows usually feature two or more chefs who are required to cook within a limited time frame and with a fixed budget or set of ingredients, and whose dishes are evaluated by a panel of judges for taste, presentation, and originality.<sup>75</sup>

The popularity of competitive cooking is so ubiquitous that even non-cooking themed networks have aired these types of shows. For example, the Bravo network's *Top Chef*, now in its fourth season, pits fifteen upstart young chefs against one another for \$100,000 and a feature article in *Food and Wine* magazine, among other prizes.<sup>76</sup> Similarly, Fox Broadcasting Company's *Hell's Kitchen* showcases the cooking of a number of young chefs competing for the praise of English chef Gordon Ramsay, who works alongside them and also serves as

73. See Posting of Frank Bruni to New York Times Diner's Journal Blog, <http://dinersjournal.blogs.nytimes.com/2006/03/01/a-taste-of-celebrity> (March 1, 2006, 10:13) (recounting how successful restaurants strategically market and display their famous executive chefs, like Bobby Flay and Mario Batali, to excite and attract patrons).

74. See FoodNetwork.com, The Next Iron Chef, [http://www.foodnetwork.com/food/show\\_io/text/0,3180,FOOD\\_30216\\_64345,00.html](http://www.foodnetwork.com/food/show_io/text/0,3180,FOOD_30216_64345,00.html) (last visited Feb. 15, 2008); FoodNetwork.com, The Next Food Network Star: Season 3, [http://www.foodnetwork.com/food/show\\_nf\\_vote/text/0,2495,FOOD\\_20356\\_63749,00.html](http://www.foodnetwork.com/food/show_nf_vote/text/0,2495,FOOD_20356_63749,00.html) (last visited Feb. 15, 2008).

75. See, e.g., FoodNetwork.com, Iron Chef America: Meet the Iron Chefs, *supra* note 64 (featuring *Iron Chef America*, an original Food Network series that showcases the cuisines of an "Iron Chef" and a "challenger" chef who compete in an hour-long cooking match to create five dishes that are judged for taste, plating, and originality); Food Network TV Show List A to Z, *supra* note 51 (featuring links for The Next Iron Chef and The Next Food Network Star, both of which provided opportunities for lesser-known chefs and cooks to gain culinary stardom).

76. See BravoTV.com, Top Chef: Season 4, [http://www.bravotv.com/Top\\_Chef/season/4/about/index.php](http://www.bravotv.com/Top_Chef/season/4/about/index.php) (last visited Feb. 15, 2008).

their judge.<sup>77</sup> In *Hell's Kitchen's* third season, the winner was offered the position of head chef at the Green Valley Ranch Resort and Spa in Las Vegas.<sup>78</sup>

The modern cultural phenomenon of televised competitive cooking illustrates food's value not only as caloric nourishment for the body, but also as a popular consumer good in an entertainment economy. The growth of the food and dining industry has likely been due in part to the popularity of food on television, thereby creating more financial opportunities for the innovative and entrepreneurial chef.<sup>79</sup> These opportunities represent yet another reason why chefs might desire copyright protection for their original dishes in this new food economy.

## II. THE COPYRIGHTABILITY OF FOOD CREATIONS: WHY THE LAW HAS NOT ALLOWED COPYRIGHT FOR CULINARY INNOVATION

Despite the primacy of food and dining in the entertainment industry, popular culture, and the economy, food exists in one of copyright's "negative spaces"—a medium of creative expression not covered by law.<sup>80</sup> The courts, Congress, and Melville Nimmer, a preeminent copyright law scholar, have all displayed unease with the proposition that a chef should be able to have a copyright in his food creations.<sup>81</sup> Part of this unease likely has to do with lawmakers' and scholars' faulty assumption that the recipe for a dish, rather than the dish itself, is the proper subject matter of copyright protection.<sup>82</sup>

### A. *The Copyright Act of 1976*

The Copyright Act of 1976 (Copyright Act, or the Act) protects original literary, musical, dramatic, choreographic, pictorial, graphic,

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77. FOX Broadcasting Company: *Hell's Kitchen*, <http://www.fox.com/hellskitchen/showinfo/> (last visited Feb. 15, 2008).

78. *Id.*

79. See National Restaurant Association, *Industry at a Glance*, *supra* note 10 (detailing growth in the industry).

80. Buccafusco, *supra* note 2, at 1122 (citing Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA L. REV. 1687, 1768 (2006)). Although today food exists in copyright's negative space, the first recorded evidence of a formal intellectual property system comes from Athenaeus, a third-century A.D. Greek author. Raustiala & Sprigman, *supra*, at 1768. He reported that in the sixth century B.C., the citizens of Sybaris, a Greek city-state, enforced short-term exclusivity in recipes. *Id.*

81. Buccafusco, *supra* note 2, at 1122.

82. See *id.* at 1131-32 (discussing the recipe's function as a means for "fixing a work").

sculptural, audiovisual, and architectural works of authorship.<sup>83</sup> Food dishes and recipes are notably absent from this list of protected subject matter. The Act expressly excludes copyright protection for “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.”<sup>84</sup> Copyright law has not traditionally protected recipes because they have not been considered to fall within the scope of subject matter contemplated by the Copyright Act.<sup>85</sup> Subject matter amenable to protection under the Act must meet three general requirements: (1) existence as a work of authorship (rather than an idea or procedure); (2) fixation in a tangible medium; and (3) a degree of originality.<sup>86</sup>

The Code of Federal Regulations elucidates the Copyright Act’s subject matter limitations and provides examples of material not subject to copyright, including the “mere listing of ingredients or contents.”<sup>87</sup> The U.S. Copyright Office’s fact sheet on recipes indicates that “[m]ere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection.”<sup>88</sup> It also adds a qualifying statement: “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 combination of recipes, as in a cookbook, there may be a basis for copyright protection.”<sup>89</sup> Thus, while the copyrightability of cookbooks is generally accepted under current law, the copyrightability of individual recipes is less clear.<sup>90</sup>

83. 17 U.S.C. § 102(a) (2000).

84. *Id.* § 102(b).

85. See *infra* note 81 and accompanying text.

86. 17 U.S.C. § 102.

87. 37 C.F.R. § 202.1(a) (2007).

88. U.S. Copyright Office—Recipes, <http://www.copyright.gov/fls/fl122.html> (last visited Feb. 15, 2008).

89. *Id.*

90. This statement is not to assert that cases of cookbook copyright infringement are easily decided or uncontroversial. In a recent and much publicized controversy, Missy Chase Lapine (author of *The Sneaky Chef: Simple Strategies for Hiding Healthy Foods in Kids’ Favorite Meals*) publicly accused Jessica Seinfeld (wife of comedian Jerry Seinfeld and author of *Deceptively Delicious: Simple Secrets To Get Your Kids Eating Good Food*) of copying the technique of hiding vegetables in kid-friendly foods and plagiarizing certain recipes from her cookbook. No lawsuit has been filed, however. See Associated Press, *Seinfeld: Wife Not Guilty of Vegetable Plagiarism*, CNN.COM, Oct. 31, 2007, <http://www.cnn.com/2007/SHOWBIZ/books/10/31/people.jessicaseinfeld.ap/index.html?iref=mpstoryview> (last visited Feb. 15, 2008); Deirdre Donahue, *Cookbook Author Says Seinfeld Book ‘Deceptively’ Similar*, USA TODAY, Oct. 22, 2007, at 3D.

*B. The Current Case Law on the Copyrightability of Recipes:  
Publications International v. Meredith Corp.*

In the most recent and comprehensive discussion of the copyrightability of recipes, *Publications International v. Meredith Corp.*, the Seventh Circuit concluded that, while recipes are not per se excluded from copyright protection, the recipes in question in the case constituted “mere listings of ingredients,” thus falling within the specific subject matter excepted from copyright protection by 37 C.F.R. § 202.1.<sup>91</sup> The underlying factual dispute in *Meredith* concerned whether the Meredith Corporation possessed copyrights in its recipes for dishes containing a particular brand of yogurt, and could therefore prevent Publications International from printing substantially similar recipes.<sup>92</sup> In dicta, the *Meredith* court suggested that copyright protection for recipes may be appropriate where “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.”<sup>93</sup> The court also noted that “[c]ooking 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.”<sup>94</sup>

Although the *Meredith* court did not grant copyright protection to recipes, it recognized a common law loophole through which especially literary chefs could achieve copyright protection for their recipes.<sup>95</sup> But why should chefs have to blend literary “musings” with their ingredients and procedural steps to achieve copyright protection for their recipes? Essentially, what *Meredith* indicates is that for a recipe to be copyrightable, it should look more like a vignette or novella rather than a simple list of perhaps original or creatively combined ingredients.<sup>96</sup>

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91. *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996); 37 C.F.R. § 202.1(a).

92. *Meredith Corp.*, 88 F.3d at 475-76.

93. *Id.* at 481.

94. *Id.*

95. *Id.*

96. It is important to note here that even if a chef could secure a copyright for his literary recipe under *Meredith*, another chef could recreate the underlying dish that the recipe described without infringing upon the copyright; the copyright would only protect the recipe, as a writing, from being copied. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[I] (2007) [hereinafter 1 NIMMER ON COPYRIGHT].

### C. Recipes As Unoriginal

In *Meredith*, the Seventh Circuit cited *Feist Publications v. Rural Telephone Service Co.* for the proposition that facts are not copyrightable because “the *sine qua non* of copyright is originality.”<sup>97</sup> In *Feist*, the U.S. Supreme Court stated that originality in a work is a constitutional requirement for copyright protection.<sup>98</sup> Therefore, a telephone white pages directory, a statement of facts—as an alphabetical listing of telephone numbers—lacked the originality necessary to qualify for copyright protection.<sup>99</sup> In its decision, the Court indicated that the originality requirement contemplates that a work be “independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>100</sup>

The law has traditionally treated recipes as mere statements of facts, dictated solely by functional considerations.<sup>101</sup> Nimmer opines that the extension of copyright protection to recipes “seems doubtful because the content of recipes are clearly dictated by functional considerations, and therefore may be said to lack the required element of originality, even though the combination of ingredients . . . may be original in a noncopyright sense.”<sup>102</sup> Under this view, a recipe for “macaroni and cheese” is not copyrightable because it describes a dish that must necessarily contain both macaroni and cheese, and the dish’s composition did not originate with the author of the recipe. The recipe is therefore not “secondarily expressive” because it does not express an original idea in addition to expressing fact; instead, the recipe only articulates bare facts in order to achieve a result: the creation of the dish.

Only where facts are compiled in a unique way, as an original expression, may copyright protection be appropriate for such a work, such as a compilation of recipes in a cookbook.<sup>103</sup> However, even in a factual compilation, the constitutive facts of the work may not be considered original and, therefore, may not be copyrightable.<sup>104</sup> This is because “the primary objective of copyright is not to reward the

97. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), quoted in *Meredith Corp.*, 88 F.3d at 479.

98. *Id.* at 345-46.

99. *Id.* at 362-64.

100. *Id.* at 345.

101. 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.18[1].

102. *Id.*

103. *See id.*

104. *See id.*

labor of [compilation] authors, but ‘to promote the Progress of Science and useful Arts.’”<sup>105</sup> Thus, both *Meredith* and *Nimmer* come to a common conclusion: a non-literary recipe is not copyrightable because it is a functional statement of unoriginal facts that do not owe their creation to the author claiming the copyright.<sup>106</sup>

#### D. Recipes As Utilitarian

The second hurdle to achieving copyrightability for recipes is their status as “works of utility.”<sup>107</sup> Because recipes are traditionally reproduced to be used for cooking rather than for their literary or artistic value, they are not considered susceptible to copyright protection, as articulated by the U.S. Supreme Court in *Baker v. Selden*.<sup>108</sup> The *Baker* Court held that if the enforcement of a copyright results in a monopoly not only of the copyrighted work itself but also of the system, function, or process of art upon which the work is based, then the copyright should not be enforced.<sup>109</sup> In *Baker*, the plaintiff sought copyright protection for his books that explained a new system of ledgers and bookkeeping.<sup>110</sup> Included as a supplement were lined forms designed to be used in connection with the bookkeeping system explained in the book.<sup>111</sup> The defendant published a book with similar but distinct forms designed to promote the same method of bookkeeping.<sup>112</sup> The plaintiff argued for copyright protection not only for his book, but also for the method described in his book.<sup>113</sup>

The U.S. Supreme Court rejected the plaintiff’s argument, however, reasoning that “where the art [that a copyrighted material]

105. *Feist Publ’ns, Inc.*, 499 U.S. at 349 (quoting U.S. CONST. art. I, § 8, cl. 8).

106. *See Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996) (finding that recipes describing a procedure by which the reader may produce many dishes featuring Dannon yogurt are excluded from copyright protection as a procedure, process, or system); 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.18[I] (stating that, because recipes are dictated by functional considerations, they therefore lack the originality required for copyright protection); Buccafusco, *supra* note 2, at 1129 (“*Meredith* and *Nimmer* . . . stand for the proposition that the recipes for dishes are merely statements of preexisting facts that do not owe their creation to the author claiming copyright.”).

107. *See* 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.18[A] (describing the “[p]roblem of [u]se” whereby a copyright does not foreclose the repeated use of that information once placed into the public domain—i.e., the actual making of the dish found in a recipe book).

108. 101 U.S. 99 (1880).

109. 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.18[B][2].

110. *Baker*, 101 U.S. at 100.

111. *Id.*

112. *Id.*

113. *Id.* at 100-01.

teaches cannot be used without employing the methods . . . used to illustrate the book . . . [the methods] are to be considered as necessary incidents to the art, and given therewith to the public.”<sup>114</sup> To grant a monopoly in the underlying method itself “would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.”<sup>115</sup> Simply stated, *Baker* held that copying is permissible if the use of a method which a copyrighted work explains requires a copying of the work itself.<sup>116</sup> In the wake of *Baker*, courts would likely be reluctant to enforce copyrights of recipes because of their utilitarian nature as sets of instructions that have little, if any, intrinsic literary or artistic value, having only instrumental value in their explanation of an underlying method to cook a particular dish.

### *E. The Culinary Industry’s Self-Regulation*

The legal designation of recipes as both “unoriginal” under *Meredith* and “utilitarian” under *Baker* represent the legal-doctrinal reasons why copyright law has not yet embraced culinary innovation. However, there are other historical and sociological reasons why copyright law has not imposed itself on the industry and why chefs have not overwhelmingly invited it to do so.

#### 1. Culinary Professionals’ Codes of Ethics

One reason for copyright law’s absence from the culinary industry may be attributed to the industry’s success in formal self-regulation. Culinary professionalism emphasizes not only the maintenance of a culture of respect for the dining public, but also for fellow chefs.<sup>117</sup> Many culinary and food service organizations publish

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114. *Id.* at 103.

115. *Id.* at 102.

116. 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.18[B][2].

117. See, e.g., International Association of Culinary Professionals: Code of Ethics, <http://www.iacp.com/displaycommon.cfm?an=1&subarticlenbr=9> (last visited Feb. 15, 2008) (“As a member of the International Association of Culinary Professionals, I pledge myself to . . . [s]upport the growth of knowledge and the free interchange of ideas within the profession, and respect the views and opinions of my colleagues and honor their right to express them.”); United States Personal Chef Association—Code of Ethics, <http://www.uspca.com/codeofethics.html> (last visited Feb. 15, 2008) (“As a USPCA personal chef and in the interest of conducting myself in the most professional manner, I promise . . . [t]o treat my clients, my peers and the USPCA staff with courtesy and respect at all times.”).

codes of ethics instructing member chefs to adhere to the highest level of culinary professionalism.<sup>118</sup>

For example, the International Association of Culinary Professionals, a 4,000 member, non-profit organization of individuals “engaged in the areas of culinary education, communication, or in the preparation of food and drink,” expects its members to “[r]espect the intellectual property rights of others and not knowingly use or appropriate to [one’s] own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition.”<sup>119</sup> Likewise, the United States Personal Chef Association instructs its members, who prepare in-home meals for clients, “[t]o respect the intellectual property of [one’s] peers by not copying, reproducing or in any other way utilizing their written or published materials as [one’s] own, *even when this work has not been explicitly protected by copyright, patent, etc.*”<sup>120</sup>

Chefs’ adherence to these types of professional ethical codes is likely strong because adherence to an organization’s code is generally required to maintain membership in that organization.<sup>121</sup> Because certain benefits accrue to organizational members, chefs likely desire to maintain their memberships, thereby making the ethical codes effective regulations on the conduct of the members of organizations that espouse them.<sup>122</sup>

## 2. Norms-Based Intellectual Property Systems

In addition to conforming to formal, published codes of culinary ethics, chefs also adhere to an informal and tacit professional consensus regarding the inviolability of culinary intellectual property. In a seminal study, Emmanuelle Fauchart and Eric von Hippel empirically determined that many accomplished French chefs rely on strong social norms related to the protection of recipe intellectual

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118. See, e.g., International Association of Culinary Professionals: Code of Ethics, *supra* note 117; United States Personal Chef Association—Code of Ethics, *supra* note 117.

119. International Association of Culinary Professionals, About IACP, <http://www.iacp.com/displaycommon.cfm?an=3> (last visited Feb. 15, 2008); International Association of Culinary Professionals: Code of Ethics, *supra* note 117.

120. United States Personal Chef Association—Code of Ethics, *supra* note 117 (emphasis added).

121. See, e.g., International Association of Culinary Professionals: Code of Ethics, *supra* note 117 (“Adherence to these standards is required for membership in the Association, and serves to assure public confidence in the integrity and service of Culinary Professionals.”).

122. See, e.g., International Association of Culinary Professionals: Membership—Member Benefits & Dues, <http://www.iacp.com/displaycommon.cfm?an=1&subarticlenbr=47> (last visited Feb. 15, 2008).

property to enhance economic returns on their original dishes.<sup>123</sup> Although Fauchart and von Hippel's study included only a number of French *chefs de cuisine*, their findings can be reasonably extrapolated to predict information-sharing behavior among elite American chefs.<sup>124</sup>

Fauchart and von Hippel identified three social norms that chefs relied upon to protect their intellectual property: (1) "a chef must not copy another chef's recipe innovation exactly"; (2) "if a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission"; and (3) "[chefs] must credit developers of significant recipes (or techniques) [that they use] as the authors of that information."<sup>125</sup>

The behaviors of "recipe sharing" and "authorship crediting" described above exemplify the "tension that has existed throughout the history of the culinary profession between, on the one hand, originality and creativity, and on the other hand, tradition and authenticity."<sup>126</sup> Although patrons might encourage chefs to invent new dishes, they never tire of traditional favorites. Many of today's cutting-edge chefs, like Mario Batali, practice "fusion cuisine," in which traditional old world styles and flavors are combined with modern preparation techniques and new ingredients.<sup>127</sup> Therefore, while creativity and innovation are certainly goals of cooking, idea borrowing from tried-and-true recipes must be tolerated to a certain extent for styles of cuisine to retain a distinct identity.<sup>128</sup> As one copyright scholar noted: "[T]he regularity of large-scale borrowing throughout the history of cooking suggests that the development of

123. See Emmanuelle Fauchart & Eric A. von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* 3-4, 22-25, (MIT Sloan School of Management, Working Paper 4576-06, 2006), available at <http://ssrn.com/abstract=881781> (discussing the operation of three social norms on prominent French chefs: (1) "a chef must not copy another chef's recipe innovation exactly"; (2) "if a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission"; and (3) "colleagues must credit developers of significant recipes (or techniques) as the authors of that information").

124. This is because the authors' study contemplates the information-sharing chef chiefly as a rational economic actor seeking to maximize returns on his culinary investment (i.e., his cost of innovating a new dish) by creating greater name recognition for himself and his restaurant. This rational economic behavior should therefore be reasonably expected of all elite chefs, no matter their country of residence.

125. Fauchart & von Hippel, *supra* note 123, at 3-4.

126. Buccafusco, *supra* note 2, at 1147.

127. See MarioBatali.com, About Mario, *supra* note 67 ("Mario Batali breathes the spirit of the Old World into modern day America and shows us how to revel in the inherent joys of daily life.").

128. See Fauchart & von Hippel, *supra* note 123, at 3-4 (discussing the parameters within which recipe sharing does occur in the culinary community).

norms about authorship and originality may have been different for the culinary arts than, say, for literature.”<sup>129</sup>

Even so, Fauchart and von Hippel’s results demonstrate that this form of “serial collaboration” in recipe development likely would not have occurred but for the existence of a norms-based intellectual property system in the culinary industry.<sup>130</sup> In their study, the authors discovered that most of the chefs they interviewed have shared recipes with one another and were significantly more likely to give information to chefs they believed would (1) credit them as author of the recipe, (2) ask for permission before passing on the recipe to another colleague, and (3) not copy the recipe exactly.<sup>131</sup>

Informal norms-based intellectual property systems have a limited effect in controlling the behaviors of only values-sharing members of small communities.<sup>132</sup> Thus, norms-based systems are socially important complements to law-based intellectual property systems, yet they are not complete substitutes for law-based systems, as Rebecca Charles’s lawsuit evinces.<sup>133</sup> Norms-based systems fail when the social enforcement mechanisms underlying the systems go stale.<sup>134</sup> The stability of a social norm is only maintained when those violating the norm suffer retaliation for its contravention or are ostracized by the community imposing the norm.<sup>135</sup> Therefore, when other chefs still agreed to work for Ed McFarland and the public still chose to patronize Ed’s Lobster Bar despite its identity as a rip-off of Pearl Oyster Bar, Rebecca Charles became compelled to petition the law-based intellectual property system for legal redress.

### F. The Piracy Paradox

A final reason why copyright law and law-based intellectual property systems have not embraced culinary innovation is the phenomenon of the culinary piracy paradox. The term “piracy paradox” describes industries in which unchecked copying does not have the negative systemic effect of stifling innovation or creativity in

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129. Buccafusco, *supra* note 2, at 1147-48

130. *See id.* at 1148; Fauchart & von Hippel, *supra* note 123, at 3-4.

131. Fauchart & von Hippel, *supra* note 123, at 20-22 (discussing quantitative findings from surveys done with chefs).

132. *See id.* at 5-6.

133. *See id.* at 3 (“Legal protections are potentially available via trade secrecy laws but, as we will see, chefs very seldom use them.”); *see also* Complaint, *supra* note 3.

134. Fauchart & von Hippel, *supra* note 123, at 6.

135. *Id.*

the industry.<sup>136</sup> Intellectual property rights are justified by the utilitarian premise that innovation is stifled when copyists may freely appropriate the products of innovators' work as their own.<sup>137</sup> In industries where products are difficult to create but easy to copy, intellectual property rights are necessary to protect innovation and prevent free-riding by copyists.<sup>138</sup> Thus, it should be true that in industries where copying is rampant, innovation and originality should be wanting because creators would refuse to invest in new inventions, believing that their investments would not become profitable in a market over-saturated by unauthorized copies of their works.<sup>139</sup> However, this is not always the case.

A commonly cited example of the piracy paradox is the constant innovation associated with the fashion design industry.<sup>140</sup> Intellectual property law professors Kal Raustiala and Christopher Sprigman have offered several explanations for why fashion piracy, though rampant, does not harm the industry.<sup>141</sup> They argue that copying may actually serve to induce, rather than stifle, creativity in the industry because of three factors: (1) fashion design's naturally swift cycle of seasonal innovation or "induced obsolescence"; (2) fashion items' quality as status-based goods; and (3) theme "anchoring."<sup>142</sup>

First, copying likely does not harm the industry because consumers nevertheless seasonally demand innovation and copyists are therefore de facto at a competitive disadvantage by not being the "first-mover."<sup>143</sup> Additionally, there seems to be little incentive for fashion designers to endure the legal transaction costs to enforce their copyrights on out-of-style and last-season's fashions. Second, copying may actually stimulate designers' creativity.<sup>144</sup> Once high-end fashion designs are copied and become widespread, the big-spending consumers of high fashion simply demand the creation of a new product that nobody else is wearing, since the old style has lost its status-marking function.<sup>145</sup> Thus, the appeal of fashion lies not only

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136. See Raustiala & Sprigman, *supra* note 80, at 1691; James Surowiecki, *The Piracy Paradox*, NEW YORKER, Sept. 24, 2007, at 90.

137. Raustiala & Sprigman, *supra* note 80, at 1688.

138. *Id.*

139. *See id.*

140. *Id.* at 1689.

141. *Id.*

142. *See id.* at 1692.

143. *See id.* at 1722.

144. *Id.*

145. *Id.* at 1719-21.

in its look, but also in its exclusivity.<sup>146</sup> This demand for exclusivity arguably spurs new creations. Third, copying serves to reinforce or “anchor” a theme or trend of the season announced by fashion designers in their new styles.<sup>147</sup> In this way, copies actually serve to popularize original designs, and might serve to increase sales of the original as well as the copy.

The industry of *grande cuisine* shares some of the characteristics of the fashion design industry, but the analogy is not perfect.<sup>148</sup> “Induced obsolescence” (i.e., intentional style cycling by an industry) is not a likely explanation, since cooking does rely heavily on old tradition and authenticity, as previously discussed. Likewise, theme “anchoring” is not a good explanation for the piracy paradox, since culinary seasonal trends are not announced in the same high-profile way as are fashions.

The most comparable explanation for the culinary piracy paradox is likely the nature of *grande cuisine* dishes as status-based or positional goods. *Grande cuisine* is certainly a status-based good, as is high fashion.<sup>149</sup> The idea of *grande cuisine* dining as a status-marking experience has grown out of the aforementioned history of aristocratic eating in Paris before the Revolution.<sup>150</sup> Patrons of the most critically acclaimed restaurants in the United States should expect to spend a small fortune on an evening’s gastronomic experience. For example, the *prix fixe* tasting menu at Thomas Keller’s The French Laundry starts at \$240 per person, and the “tour” menu at Grant Achatz’s Alinea runs \$195 per person.<sup>151</sup> Moreover, reservations at these exclusive and elite restaurants can be difficult to come by. The French Laundry recommends reserving a table two months in advance, since the restaurant can only accommodate sixty-two patrons at a time.<sup>152</sup> Alinea can seat sixty-four and offers only two

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146. *Id.*

147. *Id.* at 1728-29.

148. *See id.* at 1765-68 (addressing creative cuisine’s existence in the negative space of copyright law).

149. *See id.* at 1718-19 (describing a status-based good as one that confers social prestige upon “early adopters” of the good, but that sees such prestige diminish as more people own the good).

150. *See* MENNELL, *supra* note 15, at 135-39 (discussing the rise of French *grande cuisine* in the years before the French Revolution).

151. Alinea, [http://www.alinea-restaurant.com/pages/menus\\_top.html](http://www.alinea-restaurant.com/pages/menus_top.html) (last visited Feb. 15, 2008); The French Laundry, <http://www.frenchlaundry.com> (follow “Reservations” hyperlink; then follow “Reservations Info” hyperlink) (last visited Feb. 15, 2008).

152. The French Laundry, *supra* note 151 (follow “Reservations” hyperlink). For a popular blog that demonstrates how individuals can recreate some of Thomas Keller’s most well-known recipes at home, since many foodies are unlikely to get a chance to set foot in

seating times an evening.<sup>153</sup> Cuisine offered by restaurants of this caliber are available only to those who can afford to pay the price to eat the newest, most innovative food in the world, like Keller's "Oysters and Pearls" or Achatz's "Hot Potato Cold Potato."<sup>154</sup>

Thus, there are a variety of legal-doctrinal, historical, and sociological reasons why food creations have not been protected by copyright law. The Copyright Act, as interpreted by the courts, has shunned recipes as unoriginal and utilitarian, and therefore, not amenable for protection.<sup>155</sup> Culinary codes of ethics formally discourage chefs from pirating others' menu items, and informal understandings among chefs dictate proper information-sharing practices in the industry.<sup>156</sup> The identity of *grande cuisine* as a status-based good likely perpetuates a culinary piracy paradox, which still allows for innovation in an industry inhabited by copyists.<sup>157</sup>

### III. WHY CHEFS' ORIGINAL DISHES AND MENU ITEMS SHOULD BE COPYRIGHTABLE

Despite the various aforementioned reasons why food creations and menu items have not traditionally been protected by copyright law, this note argues that chefs' unique culinary dishes and menu items, as original works of authorship, should be copyrightable.

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the restaurant, see French Laundry at Home, <http://carolcookskeller.blogspot.com> (last visited Feb. 15, 2008).

153. Grant Achatz, [http://en.wikipedia.org/wiki/Grant\\_Achatz](http://en.wikipedia.org/wiki/Grant_Achatz) (last visited Feb. 15, 2008); Laurie Werner, *The Toughest Tables in the U.S.*, July 14, 2007, <http://www.forbestraveler.com/food-drink/toughest-tables-story.html> (follow "Launch Slideshow" hyperlink; then proceed to Slide three).

154. Alinea, *supra* note 151; The French Laundry, *supra* note 151; see Werner, *supra* note 153 (highlighting tactics one can employ to get a "tough table," including soliciting the services of professional reservation-making companies for an annual flat fee—for example, PrimeTime Tables, <http://primetimetables.com/> (last visited Feb. 15, 2008), charges \$500 annually plus \$45 per reservation for its "on-demand dining club that offers . . . reservations . . . to the hottest tables in town"). Achatz's "Hot Potato" dish is presented in "a custom-made paraffin wax bowl [that] is pierced with a pin on which a truffle-topped potato and parmesan cheese hover over the hot potato soup. To eat, one pulls the pin through the wax [bowl] releasing the truffle, potato, and cheese into the hot soup, thereby completing the creation and perfectly intertwining the hot soup and cold portions." Project Foodie, <http://www.projectfoodie.com/spotlights/restaurants/alinea-hot-potato-cold-potato.html> (last visited Feb. 15, 2008). Keller's "Oysters and Pearls" dish is described in footnote 170, *infra*, and in the accompanying text.

155. See *supra* Part II.A-D.

156. See *supra* Part II.E.

157. See *supra* Part II.F.

### A. Culinary Dishes As Original Works of Authorship

As mentioned in Part II, non-literary recipes have not traditionally been considered copyrightable; however, this conclusion is based upon the faulty assumption that the recipe for a dish, rather than the dish itself, is the proper subject matter of copyright protection.<sup>158</sup> The courts have unfortunately “confuse[d] the [copyrightable] work of authorship with the instructions about how to perform it.”<sup>159</sup> A recipe acts simply as a means of “fixing” a dish, as an ephemeral subject, in a writing that provides a convenient and lasting form of expression, as is required by the Copyright Act.<sup>160</sup> Just like other performance arts, such as dance and music, the culinary arts depend on descriptive writings for social survival.<sup>161</sup> “To the extent that cuisine depends on oral transmission, its general cultural status remains precarious. Writing stabilizes [the culinary] experience by giving it a form amenable to commentary and criticism.”<sup>162</sup> Recipes should therefore be regarded as the fixed copies of their underlying works of authorship (the dishes themselves) just as schematics of dance steps and sheet music are considered written copies of their underlying works (dance performances and symphonies).<sup>163</sup>

Under the Copyright Act, fixation of a work is sufficient if the work “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>164</sup> The broad language of the fixation requirement “is intended to avoid the artificial and largely unjustifiable distinctions . . . under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.”<sup>165</sup> A work is considered fixed if its “embodiment in a copy or phonorecord . . . is

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158. Buccafusco, *supra* note 2, at 1131-32; *see supra* Part II.A-E.

159. Buccafusco, *supra* note 2, at 1131.

160. *See id.* at 1131-32 (discussing how recipes, drawings, or musical notations are used to make otherwise “ephemeral items,” like a dish, dance, or symphony, tangible). The fixation requirement for copyright protection is described in § 102(a): “Copyright protection subsists, in accordance with this title, *in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*” 17 U.S.C. § 102(a) (2000) (emphasis added). The dish is described here as “ephemeral” since it is edible, existing only until it is consumed by a hungry restaurant patron.

161. Buccafusco, *supra* note 2, at 1131-32.

162. *Id.* at 1145 (quoting PRISCILLA PARKHURST FERGUSON, ACCOUNTING FOR TASTE: THE TRIUMPH OF FRENCH CUISINE 92 (2004)).

163. *Id.* at 1131-32.

164. 17 U.S.C. § 102(a).

165. H.R. REP. NO. 94-1476, at 52 (1976).

sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*.”<sup>166</sup> Conceptually and legally, the dish itself should be considered the “work of authorship” under § 102(a), with the recipe for the dish existing only to satisfy the statutory requirement of fixation. Thus, a recipe merely represents a dish’s fixation in a copy that endures for a period of more than transitory duration (i.e., even after the dish has been eaten).<sup>167</sup> Viewed in this way, a recipe ceases to be impermissibly functional or utilitarian under the doctrines of *Meredith* and *Baker* because the recipe exists not merely as an instruction for the creation of the dish, but as the necessary legal expression of the dish in a copy fixed in a tangible and lasting medium of expression.

Copyright authorities have also conceptually erred in concluding that recipes lack the required element of originality that is the sine qua non of copyright-protected works.<sup>168</sup> By focusing on recipes that are admittedly in the “culinary public domain,” such as macaroni and cheese and apple pie, rather than considering recipes of modern, experimental *grande cuisine*, Nimmer and the *Meredith* court neglected to consider genuinely the possibility of originality in the culinary arts. “It is no more true that the ingredients and directions for making [Thomas Keller’s] ‘Oysters and Pearls’ is a statement of fact than it is to say that the arrangement of words in [James] Joyce’s *Ulysses* is a statement of fact.”<sup>169</sup> Keller’s “Oysters and Pearls” is a “sabayon” (an Italian-style light, whipped custard) of pearl tapioca blended with Beau Soleil oysters and white sturgeon caviar.<sup>170</sup> While some traditionally prepared dishes like tapioca pudding may not be copyrightable because of their unoriginal nature, an innovative dish like “Oysters and Pearls,” for example, should qualify for protection because the dish “owes its origin” to Keller, its author and creator.<sup>171</sup> Certainly, professional chefs have developed and will continue to

166. 17 U.S.C. § 101 (2000) (emphasis added).

167. See Buccafusco, *supra* note 2, at 1131-32.

168. See *id.* at 1130-31.

169. *Id.* at 1131.

170. See Bruce Cormicle, *Oysters and Pearls*, ONEFORTHE TABLE.COM, <http://www.oneforthetable.com/oftt/stories/oysters-and-pearls.html> (describing the experience eating one of Chef Keller’s variations of the dish, featuring Island Creek oysters).

171. See *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884)) (explaining that “originality” in reference to a copyrighted work means that the particular work “owes its origin” to an “author” and is not a requirement of a “large measure of novelty”).

invent many unique dishes like Keller's that exhibit the more than de minimis originality required by the Copyright Act as articulated in the U.S. Supreme Court's opinion in *Feist*.<sup>172</sup>

### *B. Food As an Aesthetic and Expressive Medium*

Considering a dish, rather than its recipe, to be a work of authorship worthy of copyright protection presents certain conceptual challenges. Both philosophical and legal questions arise when a culinary dish is regarded as the subject matter of legal protection. The philosophical difficulty involves the question of whether dishes can properly be considered "works of art." The primary legal question that arises is how culinary dishes should be categorized for inclusion under the Copyright Act.

#### 1. The Philosophy of Food As Art

Historically, copyright law has protected "works of art" from being pirated by copyists.<sup>173</sup> Novels, symphonic arrangements, ballet choreographs, theater productions, paintings, sculptures, recordings, movies, and architectural plans are examples of subjects that are considered "works of art" and that may be copyrighted.<sup>174</sup> The philosophical inquiry presented by this observation is whether food, cooked and plated by a chef who seeks to express himself in his creation, can be considered a work of art that is morally worthy of

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172. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("To be sure, the requisite level of creativity is extremely low [to satisfy the Act's originality requirement]; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.").

173. See *infra* text accompanying note 174 for examples of copyrightable subject matter under § 102(a).

174. 17 U.S.C. § 102(a) indicates the classifications of subject matter amenable to copyright protection:

Works of authorship include the following categories:

- (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.

17 U.S.C. § 102(a) (2000).

copyright protection. A vast literature on the philosophy of food exists, discussing whether the culinary art is indeed an “art.”<sup>175</sup>

Food philosopher Elizabeth Telfer describes a piece of art as an object capable of eliciting a “disinterested” or “non-instrumental” reaction via the human senses.<sup>176</sup> These “aesthetic reactions” or “judgments” may be neutral, favorable, or unfavorable.<sup>177</sup> Food can elicit aesthetic reactions in tastes and smells, and humans can distinguish enjoying tastes or smells apart from approving of them instrumentally, on the grounds that the food is nourishing or calorie-filled.<sup>178</sup> Food can be art when it is “intended or used wholly or largely for aesthetic consideration.”<sup>179</sup> This is admittedly not true of the food that most of us eat daily.<sup>180</sup> Yet when chefs intend that their dishes be savored, appraised, thought about, and discussed—and not just to fill the stomachs of their patrons—dishes can be art if eaters actively contemplate them in the manner suggested by Telfer.<sup>181</sup> Therefore, a chef may create art when he designs a dish or a meal that presents patterns of harmonious or contrasting flavors, textures, colors, and plating arrangements that are intended to stimulate his patrons’ aesthetic sense, and patrons may act as art critics when they contemplate their dishes and appreciate them as visual and flavorful expressions of art.

Aesthetics philosopher Carolyn Korsmeyer argues to the contrary that cooking and culinary dishes can only represent a “minor art.”<sup>182</sup> Admittedly, “[t]he kind of art that [culinary dishes] represent] . . . is simple compared to symphonies, buildings, poems, or paintings” because, as an expressive medium, food has four limitations.<sup>183</sup> First,

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175. At least one author has philosophically examined whether cooking might constitute an art, a craft, or possibly a combination of the two as a “thoughtful practice.” See generally Lisa M. Heldke, *Foodmaking as a Thoughtful Practice*, in *COOKING, EATING, THINKING: TRANSFORMATIVE PHILOSOPHIES OF FOOD* 203 (Deane W. Curtin & Lisa M. Heldke eds., 1992).

176. TELFER, *supra* note 13, at 41-42 (explaining that an object of art elicits aesthetic reactions, which are reactions unassociated with the instrumental use of the object, and only with that object’s value in and of itself).

177. *Id.* at 42-43.

178. *Id.* at 44. Another possible “non-instrumental” aesthetic reaction to a dish is its consideration solely for its visual expressiveness. This is probably the strongest aesthetic reaction to food, since vision is completely dissociated with the body’s natural instrumental use of food (i.e., eating).

179. *Id.* at 46.

180. *Id.*

181. See *id.* at 46-47.

182. CAROLYN KORSMEYER, *MAKING SENSE OF TASTE: FOOD AND PHILOSOPHY* 109 (1999).

183. *Id.* at 108.

“the formal arrangements and expressive range” of food are more restricted than in fine art media.<sup>184</sup> Ostensibly, there are only four basic types of tastes—sweet, salty, bitter, and sour—that can be elicited, either alone or in combinations, to create flavors.<sup>185</sup> Second, food is a transient medium that either decomposes or is consumed.<sup>186</sup> This temporal limitation eliminates, according to Korsmeyer, the possibility of studied appreciation over generations that could serve to elevate the culinary art.<sup>187</sup> Third, foods do not have meaning in that they have limited representational capacity to portray anything other than what they are, unlike literature, painting, or sculpture.<sup>188</sup> Finally, Korsmeyer argues, “food cannot express emotion[s].”<sup>189</sup> Flavors, unlike sights and sounds, arguably have no expressive connections with emotions like love, hate, grief, joy, suffering, or yearning, for example.<sup>190</sup>

However, food’s expressive limitation and its philosophical status as an arguably “minor art” should not exempt certain dishes from legal protection under copyright law. Culinary dishes, expressively cooked and plated, have the practical potential to communicate just as much information to an attentive eater as does music to a close listener.<sup>191</sup> The aesthetic expressiveness of a particular culinary dish is in many ways no less communicative than a Miles Davis jazz piece or the vibrant colors of a Mark Rothko painting, even if the description of the dish cannot be easily couched in traditional emotional idiom. Dishes are often described with a wide variety of adjectives: light, heavy, bright, dark, avant-garde, whimsical, serious, masculine, feminine, ethnic, fusion, and traditional.<sup>192</sup> Indeed, dishes may even express meanings incident to

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184. *Id.*

185. There are other basic tastes that are less known, such as “astringency,” “umami,” and “neutral.” See Gary Dank, *Umami: The Fifth Element*, ART CULINAIRE, Summer 2003, available at [http://findarticles.com/p/articles/mi\\_m0JAW/is\\_69/ai\\_105735781/](http://findarticles.com/p/articles/mi_m0JAW/is_69/ai_105735781/) (describing observations of tastes historically to include Aristotle’s spicy, astringent, and sandy, as well as the Japanese taste *umami*).

186. KORSMEYER, *supra* note 182, at 108.

187. *Id.*

188. *Id.* For example, in the art of sculpture, one might shape marble to portray a human form. An artist would likely have a more difficult time using foods as a medium to depict a human form.

189. *Id.* at 109.

190. *Id.*

191. See Buccafusco, *supra* note 2, at 1133-34 (analogizing food to music in their expressive capacities).

192. These adjectives are representative but not exhaustive of the gamut of descriptors used in various restaurant reviews. See, e.g., Dining & Wine—New York Times, <http://www.nytimes.com/pages/dining/> (last visited Feb. 15, 2008).

their territorial or temporal origins.<sup>193</sup> For example, a chef might utilize local produce to capture the sensation of a region in a dish, or use the flavors of pumpkin and cinnamon to express the idea of “autumn.”<sup>194</sup> Culinary dishes should therefore not be dismissed as only “minor” works of art unworthy of copyright protection because they do possess the expressive potential to convey meaning like other traditionally protected works of art.

Although the meanings of some dishes may be difficult to describe, the expressive contents of the traditionally copyrightable works of art may be equally challenging to articulate at times. Culturally and historically, however, music and paintings have been regarded as possessing innate and unquestionable expressive features.<sup>195</sup> Why this is not also true for food could possibly have its origins in the ancient philosophical belief in a “hierarchy of the senses.”<sup>196</sup> The idea of a hierarchy of human senses extends back in time to the writings of Plato and Aristotle.<sup>197</sup> Since the times of ancient Greek philosophy, Western civilization has ordered the five senses—vision, hearing, touch, smell, and taste—according to their epistemological importance.<sup>198</sup> Because vision and hearing provided the most objective information about the outside world and thereby contributed most to the creation of knowledge, they were the senses most revered by the Greeks.<sup>199</sup> The senses of sight and hearing also allowed an individual to perceive from a distance.<sup>200</sup> Touch, smell, and taste, however, required proximity to the perceived object to be of any use, thereby impeding the transcendence of the body’s corporeality and the possibility of objective philosophical inquiry.<sup>201</sup> These senses were thus denigrated as incapable of aesthetic perception, with the

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193. See Buccafusco, *supra* note 2, at 1135 (quoting Chef Norman Van Aken’s description of his culinary inspiration in the climate and environment surrounding his Miami restaurant).

194. See *id.* at 1134-35 (discussing how some prominent chefs use their preparation of food as a means of expression).

195. *Id.* at 1133.

196. See KORSMEYER, *supra* note 182, at 11 (noting that taste is quickly marginalized as a perceptual means of reaching knowledge).

197. See *id.* at 12-37 (acknowledging that pre-Socratic philosophy embraced theories of the senses, but examining Plato’s metaphysical elaborations on those philosophies).

198. Buccafusco, *supra* note 2, at 1140-41.

199. See *id.* at 1141 (summarizing Korsmeyer’s discussion of the Greek hierarchy of human senses).

200. See *id.*

201. *Id.*

consequence that food, as an object perceived chiefly by taste, was not considered capable of eliciting aesthetic reactions as a form of art.<sup>202</sup>

Another reason for taste's low ranking in the hierarchy of the senses was eating's natural relation to survival.<sup>203</sup> Because eating reminds man that he is like other animals—dependant on nourishing his body with food to remain alive—the sense of taste was believed to operate not at an intellectual level, but instead at a primal and instinctual level of human existence.<sup>204</sup> Taste was also viewed as susceptible to the moral danger of gluttony, a risk not posed by vision or hearing as “higher,” more morally agreeable senses.<sup>205</sup> These beliefs about the carnality and moral danger of taste furthered the belief that taste could not act as a source of aesthetic perception.

Even though taste has been disparaged as a lesser aesthetic sense and cooking as a minor art form, food's alleged limitations as an artistic medium should not exempt it from legal protection under copyright law. Contemporary diners likely do not regard the sense of taste as aesthetically impotent as did the ancient Greeks who presumably ate from less diverse “menus.” Food should be considered art when it is intended to be considered aesthetically, and a chef may create works of art worthy of copyright protection when he designs expressive dishes.

## 2. Culinary Dishes As “Applied Art” Under the Copyright Act

The foremost legal question is how culinary dishes should be categorized for protection under the Copyright Act. This note concludes that dishes would be most appropriately regarded as “works of applied art” or “works of artistic craftsmanship,” which are treated equivalently by the Copyright Act.

“Included within the section 102(a)(5) category of pictorial, graphic, and sculptural [subject matter] are ‘works of art in the traditional sense . . . works of graphic art, and illustration, art reproductions . . . and works of applied art.’”<sup>206</sup> “Works of applied art encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless

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202. *Id.* at 1141-42.

203. See KORSMEYER, *supra* note 182, at 14-15 (noting taste's role in appetite and its tendency toward gluttony, which is the enemy of philosophy).

204. See *id.* (describing how the need for food to survive places man on par with the “wild animal” that also needs food).

205. Buccafusco, *supra* note 2, at 1141.

206. 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.08[B] (quoting H.R. REP. NO. 94-1476, at 54 (1976)); see 17 U.S.C. § 102(a) (2000).

of factors such as mass production, commercial exploitation, and the potential availability of design patent protection.”<sup>207</sup> Essentially, works of applied art are those pieces of art that perform a dual function: both expressing aestheticism as well as functioning as utilitarian objects to be used for some purpose.<sup>208</sup>

Works of artistic craftsmanship are also embraced by § 102(a)(5)’s subject matter category:

[I]nsofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a *useful article* . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.<sup>209</sup>

“A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>210</sup> This language indicates that only the aesthetic features of a useful article (or work of applied art or work of artistic craftsmanship) are copyrightable under the Act, while the utilitarian features of that same article are not.

The statutory language embodying the useful articles doctrine has a common law origin in *Mazer v. Stein*, decided by the U.S. Supreme Court in 1954.<sup>211</sup> In *Mazer*, the Court upheld the copyright in a statuette used as a lamp base and ratified the then-existing Copyright Office Regulation allowing for protection of “works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries.”<sup>212</sup> The *Mazer* opinion has been interpreted to mean that any useful article is subject to copyright protection, with respect to its form, if it is aesthetically pleasing in appearance.<sup>213</sup>

The 1976 Copyright Act’s language in § 101 (excerpted above) places a limitation on the *Mazer* decision, requiring that an object’s copyrightable aesthetic form be “separately identifiable” or “separately existing” from its utilitarian aspect.<sup>214</sup> Despite conflicting case law, Nimmer interprets this language as requiring *conceptual* rather than *physical* separability of the form and utilitarian features of the

207. H.R. REP. NO. 94-1476, at 54.

208. *See id.*

209. 17 U.S.C. § 101 (2000) (emphasis added).

210. *Id.*

211. 347 U.S. 201 (1954).

212. *Id.* at 202-03, 212-14 (internal citation omitted).

213. 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.08[B][3].

214. 17 U.S.C. § 101.

copyrighted object.<sup>215</sup> The House Report accompanying the 1976 Act indicates:

[The test for separability] does not depend upon the nature of the design—that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.<sup>216</sup>

This language indicates that even if an object's appearance is dictated by aesthetic rather than by functional reasons, it is not copyrightable if there are not other design elements that can be separately identified from the useful article itself. It also indicates that copyright protection extends only to those expressive elements of a useful article, not to the entire object.

Chefs' dishes fall within the "useful articles doctrine" of copyright law because they are objects that have an obvious and intrinsic utilitarian function that is not to portray appearance; a culinary dish is edible and its inherent function is to provide nourishment to anyone who consumes it. The expressive features of an original dish should therefore qualify for protection under the doctrine if the dish's design or composition incorporates expressions that can be conceptually identified as separate from the dish's basic utilitarian identity as a repository of calories. As argued above, a culinary dish can have aesthetic and expressive features that communicate ideas independently from its identity as a source of bodily nourishment.<sup>217</sup> This is the expressiveness that should be protected by copyright.

A problem remains, however. Within the current conceptual framework of the Copyright Act, culinary dishes would be considered only for their visual expressiveness and not their gustatory (taste) or olfactory (smell) expressiveness.<sup>218</sup> Again, § 102(a)(5) embraces the subject matter of "pictorial, graphic, and sculptural" works, including

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215. 1 NIMMER ON COPYRIGHT, *supra* note 96, § 2.08[B][3]. Compare *Esquire, Inc. v. Ringer*, 591 F.2d 796, 803-04, 806 (D.C. Cir. 1978) (holding that the overall design of outdoor lighting fixtures is not eligible for copyright protection as a "work of art"), with *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980) (holding that decorative belt buckles could be copyrighted because the primary ornamental aspect of buckles could be conceptually separated from their subsidiary utilitarian function).

216. H.R. REP. NO. 94-1476, at 55 (1976).

217. See *supra* Part III.B.1.

218. See 17 U.S.C. § 102(a)(5) (2000).

the “applied arts” in which dishes should arguably be included.<sup>219</sup> The difficulty with the framework of § 102 is that cooking and food making represent more than just visual or decorative arts. Culinary art stimulates the senses of taste and smell, as well as that of vision. The vision-centric language of the Copyright Act makes evident, once again, the bias of philosophy and law against the “lower” senses. To have copyright protect more than just the appearance of original dishes, extending protection to their more important qualities like flavor and texture, copyright law should be expanded to include consideration of all forms of sensual perception when determining the “aesthetic expressiveness” of a work of applied art.

### *C. Prevention of Chilling Effects with the Fair Use Defense*

A potentially devastating downside to the expansion of copyright protection to culinary dishes would be the removal of an indefinite number of dishes from the public domain.<sup>220</sup> Without a sufficiently robust culinary public domain, innovative expression in cooking might be chilled since new chefs would have fewer sources to imitate or from which to prepare derivative dishes. The copyrightability of dishes could potentially have a negative effect on the culinary art by preventing its students from learning new dishes (that have been copyrighted) or by limiting the menus of restaurants (for fear of an infringement suit by a copyright holder), for example. Additionally, individuals might not be able to prepare dinner for their families without infringing on an existing culinary copyright. Thus, even though one copyright scholar believes that original dishes are conceptually worthy of copyright protection, he does not advocate for such protection under the law.<sup>221</sup> He argues that granting intellectual property rights to chefs in their culinary creations would only *possibly* encourage the growth of the public domain.<sup>222</sup> The domain would only be meaningfully enlarged if those chefs who would otherwise keep the methods of their dishes’ preparation a secret would consent to publishing them in return for copyright protection.<sup>223</sup>

Admittedly, just as innovation in an industry may be stifled by the presence of free-riding copyists, it may also be subdued when the public domain is sharply contracted by a lack of an open exchange of

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219. See H.R. REP. NO. 94-1476, at 54.

220. See Buccafusco, *supra* note 2, at 1149-51.

221. See *id.*

222. *Id.* at 1149-50.

223. *Id.*

ideas between competitors, resulting in a “tragedy of the anticommons.”<sup>224</sup> The “tragedy” describes a situation where rational individuals, acting separately, collectively waste a given resource by under-utilizing it. This occurs when so many individuals have rights of exclusion, such as property rights, in a resource that the transaction costs of coordinating those rights overwhelm any benefit that would come from using that resource.<sup>225</sup>

The balance that must be struck between granting too many intellectual property rights and too few is, undoubtedly, a dilemma that Congress has considered, as evidenced by the Copyright Act itself.<sup>226</sup> In § 107 of the Copyright Act, Congress created a “fair use” limitation on the exclusive rights given to copyright holders.<sup>227</sup> This statutory exception embraces the idea that copyright holders should not be able to prevent the reproduction of their work if that reproduction is done in a way that represents a desirable social benefit.<sup>228</sup> A fair use defense would be sufficient to prevent a tragedy of the anticommons in the culinary industry if dishes became copyrightable works under the Act.

The fair use doctrine can be read to encompass three distinct common law concepts: productive, necessary, and equitable fair use.<sup>229</sup> Productive fair use of a copyrighted work is allowed when its reproduction is “transformative,” thereby altering the original work or

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224. See Michael Heller, *Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998) (defining the “tragedy of the anticommons” as the situation where too many owners hold exclusive rights to scarce resources, resulting in underuse).

225. See *id.* at 640 (detailing how the market solution to the anticommons problem will not work if transaction costs exceed the benefits).

226. See 17 U.S.C. § 107 (2000).

227. According to § 107:

[T]he fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*

228. See *id.*

229. See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 85 (2004).

offering it for a new purpose.<sup>230</sup> This exception would possibly allow chefs to improve upon copyrighted dishes by changing their ingredients, flavors, textures, or arrangements in a significant way as to create a new dish. Necessary fair use of a work is allowed, for instance, when a reproduction is used to benefit public purposes, such as research, teaching, or non-profit purposes.<sup>231</sup> This exception would possibly allow culinary arts schools to instruct students on how to create previously copyrighted dishes, and should allow for any use that “increase[s] the diversity of viewpoints [to make a] robust dialogue essential to [a democratic culinary art].”<sup>232</sup> Equitable fair use of a work is allowed when a copyright holder has gained protection of his work by fraud, abused his market power, or improperly delayed in enforcing his copyright.<sup>233</sup> This limitation would require chefs to assert their copyrights in accordance with equity and accepted social practices.

Contrary to the concern that allowing chefs copyright interests in their original dishes would result in a dearth of innovation and information sharing, the fair use limitations of § 107 would most likely achieve a balance between protection and innovation in the culinary arts, as Congress intended. The informal intellectual property systems that exist among chefs, identified by Fauchart and von Hippel, would probably still act as effective mechanisms of information sharing and dispute resolution that would precede a chef’s formal petition to the law-based intellectual property system.<sup>234</sup> This is because chefs would likely continue to share their recipes reciprocally, to censure informally any chefs who choose to violate the longstanding norms that regulate this practice, and, only after continued abuse, to bring a fellow chef to court for infringement.<sup>235</sup> A copyright infringement action would likely occur between chefs only as a last resort for the protection of an original dish, due to the high costs of litigation and the ready availability of the “no cost” informal censuring social mechanisms that already exist within the culinary community.

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230. *Id.* at 86.

231. *Id.* at 90.

232. *Id.* at 97.

233. *Id.* at 92-95.

234. Fauchart & von Hippel, *supra* note 123, at 18

235. *See id.* (describing the informal censuring social mechanisms of *grande cuisine* chefs as making “negative gossip” about the violating chef within the professional community, the “lowering of the violator’s reputation,” and a “low[ering of the] likelihood that additional requests for information [by the violator] will be answered by community members”).

## IV. CONCLUSION

Some form of copyright protection should be available to chefs so that they may protect their original dishes from copyists. In the struggle for the palates of discerning patrons, critical acclaim, commercial success, and even success on a competitive cooking television program, competition among chefs is as intense as it has ever been. Accordingly, chefs should have intellectual property interests in their gastronomic creations as a legal response to the development of two modern phenomena: (1) the growth of dining as a popular and revenue-generating form of leisure and entertainment; and (2) the existential dependence of *grande cuisine* restaurants on the originality and innovation embodied in their menu items.<sup>236</sup>

The legal doctrines developed from *Meredith*, *Feist*, and *Baker* have denigrated recipes as impermissibly unoriginal and utilitarian to be protected by copyright.<sup>237</sup> Moreover, codes of culinary ethics and tacit intellectual property agreements among chefs seem to prevent rampant copying in the industry adequately.<sup>238</sup> Although these legal-doctrinal and sociological factors have contributed to food's relegation to the negative space of intellectual property law, allowing chefs like Rebecca Charles to obtain copyright interests in their original dishes would help them better protect the fruits of their innovation and labor.

Copyright protection for original culinary dishes, rather than for their recipes, is supported by the philosophical proposition that dishes can be considered morally worthy "works of art," as well as by the legal argument that dishes are works of applied art that have separately identifiable expressive features apart from their utilitarian function as bodily nourishment.<sup>239</sup> Finally, limitations on copyright created by the fair use doctrine, as well as those formally and informally self-imposed on the culinary industry, would likely be sufficient to maintain a balance of innovation and idea protection, thereby preventing the potential chilling effects on culinary innovation that might result from copyrighting original dishes.<sup>240</sup>

Under a copyright regime that protected original culinary dishes, entrepreneurial chefs like Pearl's Rebecca Charles could achieve true ownership of their creative artistic expressions and prevent opportunistic copying by competing chefs. After all, food is

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236. See TELFER, *supra* note 13, at 24; National Restaurant Association, Industry at a Glance, *supra* note 10; Posting of Frank Bruni, *supra* note 73.

237. See *supra* Part II.B-D.

238. See *supra* Part II.E.

239. See *supra* Part III.A-B.

240. See *supra* Parts II.E, III.C.

more than just fuel for the body; to many chefs and their patrons, food is an intimate medium for emotional and artistic expression of the soul.<sup>241</sup>

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241. See *supra* notes 1-2 and accompanying text.

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