

## On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be *Per Se* Copyrightable?<sup>1</sup>

Christopher J. Buccafusco\*

*Cooking is the oldest of all arts... Cooking is also of all the arts the one which has done most to advance our civilization, for the needs of the kitchen were what first taught us to use fire, and it is by fire that man has tamed Nature herself. -- J.A. Brillat-Savarin<sup>2</sup>*

### Abstract:

This article is the first devoted to copyright protection for one of the restaurant industry's most valuable assets – original recipes. The two most recent appellate courts to consider the issue have been hostile to the notion that recipes are copyrightable, but given the enormous amount of money at stake, litigation in this area is likely about to expand. The article begins by critiquing the courts' conclusions. Following an analogy to musical composition, I argue that recipes are simply the means of fixation for culinary works of authorship, i.e, dishes. Next, based on interviews with some of America's leading chefs, including Thomas Keller, Charlie Trotter, Rick Tramonto, and Wylie Dufresne, I suggest that chefs use recipes to express a variety of ideas and emotions. This section ends by concluding that there are no doctrinal limitations to recipes' copyrightability. In Part II, I suggest reasons why recipes may have lagged behind other media in recognition by copyright law. I explore the marginalized status of the sense of taste in Western philosophy, and I propose that chefs adopted the norms of Romantic authorship and originality at a slower pace than poets, painters, and musicians. Part III argues that, while recipes may be formally amenable copyright, they should not currently receive monopolistic protection, because granting copyright to recipes would not promote any of the law's stated goals. Moreover, I suggest that formal legal protection is not necessary, because a vibrant system of social norms exists to sanction plagiarism, assign credit, and promote innovation.

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<sup>1</sup> The first half of the title is derived from Launcelot Sturgeon's chapter "On the Physical and Political Consequences of Sauces," in his *ESSAYS MORAL, PHILOSOPHICAL AND STOMACHICAL, ON THE IMPORTANT SCIENCE OF GOOD LIVING* (London, G. and W.B. Whittaker, 1823). The last half of the title is a bad joke.

\* I am delighted to thank all of the chefs who agreed to talk to me about this article: Charlie Trotter, Thomas Keller, Mathias Merges, Rick Tramonto, Wylie Dufresne, Homaro Cantu, Norman van Aken, Greg Fatigati, and Eve Felder. For invaluable comments, suggestions, and encouragement, I thank Douglas Baird, Stephanie Harris, Matthew Harris, Robin Paul Malloy, Jonathan Masur, David Nimmer, Kal Raustiala, James Smith, Chris Sprigman, Charlie Voelker, Eric von Hippel, Peter Yu, and the attendees of the 2006 conference of the Association for the Study of Law Culture and Humanities.

<sup>2</sup> JEAN ANTHELME BRILLAT-SAVARIN, *THE PHYSIOLOGY OF TASTE* (M.F.K. Fisher, trans., 1971).

On March 14, 2006, pastry chef and molecular gastronomist Sam Mason posted a link on an Internet gourmet forum called egullet.org drawing attention to some striking similarities between dishes served at Interlude restaurant in Australia and those available at the American restaurants minibar and WD-50, Chef Mason's employer.<sup>3</sup> The egullet staff followed up by posting a series of photographs comparing dishes on Interlude's menu with similar dishes at WD-50 and Alinea, a Chicago restaurant where Interlude's chef Robin Wickens had just *staged*.<sup>4</sup> The maelstrom that ensued filled more than fifteen webpages and included chefs, restaurateurs, and gourmards from around the globe debating copyrights, plagiarism, attribution, and culinary norms.<sup>5</sup>

Recipes have recently been described as existing in one of copyright's "negative spaces," i.e., a realm of creativity not covered by copyright law.<sup>6</sup> But the high-stakes culinary world of television chefs, flashy cookbooks and product lines, and world-wide gourmet restaurant chains has encouraged those with an interest in the industry to consider enforcing their potential intellectual property rights in their recipes. Perhaps surprisingly, however, the two most recent Federal Circuit Courts to rule on the copyrightability of recipes and copyright law's primary authority, *Nimmer*, have proved hostile to notion that creators of recipes may obtain monopolies

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<sup>3</sup> [#entry1149563](http://forums.egullet.org/index.php?showtopic=84505&st=0&p=1149563).

<sup>4</sup> <http://forums.egullet.org/index.php?showtopic=84800&hl=>. To *stage* (pronounced "stahjz") at a restaurant is to serve as an unpaid intern in the hope of learning from the restaurant's chef. It is a common practice in restaurants throughout the world.

<sup>5</sup> This author's contributions can be found under the handle Gastro Nomos. For an account of the controversy see Katy McLaughlin, '*That Melon Tenderloin Looks Awfully Familiar...*,' WALL ST. J., June 24, 2006.

<sup>6</sup> Kal Raustiala & Chris Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 73, draft on file with author.

over their works.<sup>7</sup> Given the size of the food and beverage industry and the amount of money potentially at stake,<sup>8</sup> litigation in this area is likely about to spike.

This article will take up the issue of recipes' copyrightability in earnest.<sup>9</sup> If successful it will accomplish three goals: 1) critique and correct the current analysis of recipes' copyrightability by courts and commentators; 2) use the history of recipes, cooks, and cooking to illuminate some of copyright law's hidden preferences and inconsistencies; and 3) explore the power of social norms to regulate conduct that is not governed by the law. Part I will analyze the current state of copyright law in the U.S. It will show that, contrary to the arguments of the authorities mentioned above, there are no doctrinal reasons why the inventors of original recipes should not be granted copyrights. This part will proceed by correcting two conceptual mistakes about recipes made by both Nimmer and the courts, and it will introduce an analogy between recipe creation and musical composition through interviews with some of America's leading chefs, including Thomas Keller (The French Laundry, Per Se, Bouchon), Charlie Trotter (Charlie Trotter's), Rick Tramonto (Tru), Homaro Cantu (Moto), Norman van Aken (Norman's), and Wylie Dufresne (WD-50). Backing away from purely doctrinal considerations, Part II will attempt to describe why, at the beginning of the 21<sup>st</sup> century, when copyrights are being granted

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<sup>7</sup> See *Lambing v. Godiva Chocolatier*, 142 F.3d 434 (6<sup>th</sup> Cir. 1998); *Publications Int., Ltd. v. Meredith Corp.*, 88 F.3d 473 (7<sup>th</sup> Cir. 1996); NIMMER ON COPYRIGHT, § 2.18[I] (2005).

<sup>8</sup> Restaurant industry sales for 2006 are projected at over \$511 billion, representing 4% of the U.S. gross domestic product. See Nat. Restaurant Assoc. 2006 Restaurant Ind. Fact Sheet, available at [http://www.restaurant.org/research/ind\\_glance.cfm](http://www.restaurant.org/research/ind_glance.cfm).

<sup>9</sup> It will not be concerned either with other intellectual property rights in recipes, including patent, trade secret, and unfair competition law or with the copyrightability of cookbooks, a subject that, while unresearched, needs little comment. Clearly, cookbooks, if arranged in a suitably original fashion are copyrightable as compilations. See 17 U.S.C. §103. As yet, work on the copyrightability of recipes is incredibly sparse. The subject is mentioned briefly in Raustiala & Sprigman, *supra* note 6, at 74-77 and in Jessica Litman, *The Exclusive Right to Read*, 13 CARD. ARTS & ENT. L. J. 29, 45 (1994). The only article-length treatment is Malla Pollock, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARD. L. REV. 1477 (1991).

to all sorts of products and media, recipes have still not been recognized as copyrightable subject matter. Here, I will explore attitudes toward taste and food in Western aesthetic philosophy and culture as well as the cultural history of cooks and cooking.<sup>10</sup> Finally, Part III will return to the legal realm to argue that an expansion of the copyright monopoly to recipes, while doctrinally feasible, is neither necessary nor appropriate to the Constitution's goal of "promot[ing] the progress of science."<sup>11</sup> This argument will be based on analysis of the economic impact of such a change, the opinions of chefs about their culture of sharing, and on the force of involuntary norms about copying, plagiarism, and attribution.

## **I. The Copyrightability of Recipes in American Law**

When writing about copyright law, as with cooking, one must begin with the foundations. In cooking, this means the basic stocks and sauces, i.e. *béchamel*, *espagnole*, *fond de veau*, etc., and in copyright law it means Article I, section 8, clause 8 of the U.S. Constitution and the 1976 Copyright Act, found in Chapter 17 of the United States Code. The Constitution itself adds little to the question of whether recipes should be copyrightable other than the distinction it draws between copyrightable subject matter (those that promote science) and patentable subject matter

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<sup>10</sup> In addition to providing doctrinal analysis of the subject, this article also stands at that beginning of a larger project devoted to theorizing about the place(s) of food in the law and about the cultural norms that legitimate the law's treatment of food. Scholars from a number of disciplines, including anthropology, literature, history, and cultural studies, have begun to focus academic attention on the previously overlooked realm of cuisine, its products, and its producers. *See e.g.* CLAUDE LEVI-STRAUSS, *THE RAW AND THE COOKED* (1964) (anthropology); JACK GOODY, *COOKING, CUISINE, AND CLASS* (1982) (anthropology, cultural studies); *THE RECIPE READER: NARRATIVES, CONTEXTS, TRADITIONS* (Janet Floyd & Laurel Forster, eds., 2003) (literature, women's studies); BARBARA KETCHAM WHEATON, *SAVORING THE PAST : THE FRENCH KITCHEN AND TABLE FROM 1300 TO 1789* (1983) (history). My argument will be among the first to apply some of these insights to the law. For earlier work on law and food, *see* ALAN HUNT, *GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW* (1996).

<sup>11</sup> U.S. CONST., Art. I, § 8, cl. 8.

(those that promote the useful arts).<sup>12</sup> The Copyright Act, however, provides more guidance. It states, “Copyright protection subsists...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.”<sup>13</sup> The Act then enumerates a list of copyrightable works of authorship, including “(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.”<sup>14</sup> Recipes are clearly not included in the list. Part (b) of §102 follows up with the limitation that “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work,”<sup>15</sup> and the Code of Federal Regulations clarifies, “The following are examples of works not subject to copyright... (a)...mere listing of ingredients or contents.”<sup>16</sup> The Copyright Office of the U.S. government has added its own limitations, noting, “Mere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection. 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>17</sup> None of these statements fully

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<sup>12</sup> This topic will be explored later at, *infra* 13-14.

<sup>13</sup> 17 U.S.C. § 102 (a).

<sup>14</sup> *Id.*

<sup>15</sup> 17 U.S.C. §102(b). This section is the codification of both the Idea/Expression dichotomy and the *Baker v. Selden* doctrine. On the latter as it relates to recipes, see *infra* at 13-14.

<sup>16</sup> 37 C.F.R. § 202.1.

<sup>17</sup> Available at <http://www.copyright.gov/fls/fl122.html>.

explains the issue of whether recipes should receive copyright protection. The comment of the Copyright Office clarifies that recipes are not a “mere listing of ingredients” as on a food label; they also have directions for preparation.<sup>18</sup> Although the statutory law seems to leave room for copyrighting recipes, as we shall see, recent courts and commentators have taken the position that these statements drastically curtail the possibility of copyright protection for recipes. But it wasn’t always this way.

### **A. Early Cases on the Copyrightability of Recipes**

The status of recipes vis-à-vis copyright law has not been litigated often in American legal history, but the issue has occasionally come up. In 1884, Charles Scribner’s publishing house brought a suit for copyright infringement claiming that more than “170 receipts” (an older word for recipes) had been copied “*verbatim et literatim*” from Marion Harland’s “Common Sense in the Household; A Manual of Practical Housewifery.”<sup>19</sup> The special master assigned to the case found that the defendants’ works were “largely compilations of the recipes of the complainant; and that the matter and language of said books is the same as the complainant’s in every substantial sense.”<sup>20</sup> The finding of copyright infringement was not overturned by either

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<sup>18</sup> To qualify as a recipe, there must be, at minimum, a list of the necessary ingredients for the dish and the steps for combining and cooking them. This may be done, as it was in the past, in a fluid, narrative style, e.g., Antonin Careme’s recipes for “Riz a la piemontaise:” “Wash in warm water a pound and a half of Carolina rice several times; after blanching it a few seconds, drain it and simmer three-quarters of an hour in a pan...”, or in the modern version of listing quantities of ingredients follows by steps for preparation. See ANNE WILLAN, GREAT COOKS AND THEIR RECIPES: FROM TAILLEVENT TO ESCOFFIER, 154 (1992). Both are “recipes” as the term is used throughout this article.

<sup>19</sup> Belford, Clarke, & Co. v. Scribner, 144 U.S. 488 (1892). The plaintiff described the book as “composed of receipts for cooking foods and fruits, preserving meats, vegetables, and fruits, and preparing drinks...” *Id.* at 489-490. For some of the history of cookbooks such as this one, see *infra* at 24-25.

<sup>20</sup> *Id.* at 493.

the District Court judge or the U.S. Supreme Court. The parties and the judges raised a number of issues,<sup>21</sup> but none of them questioned the notion that the individual recipes were copyrightable.

In 1924, the Court of Appeals for the Eighth Circuit heard the case of *Fargo Mercantile Co. v. Brechet & Richter, Co.*, involving a claim of copyright infringement of a bottle label “embodying as the principal and distinguishing features thereof a series of new and original recipes.”<sup>22</sup> The defendant argued that the labels were “designed to be used for...articles of manufacture,” and thus were the subject of patent or trademark law and not copyright law.<sup>23</sup> Judge Booth, however, was willing to separate the label into distinct parts, the first containing the “fanciful emblem and printed matter” and the second containing recipes.<sup>24</sup> He admitted that the emblem was uncopyrightable as a “mere advertisement,” but the recipes, he concluded, are “of a different character.”<sup>25</sup> According to the judge, “They are not a mere advertisement; they are original compositions, and serve a useful purpose, apart from the mere advertisement of the article itself. They serve to advance the culinary art.”<sup>26</sup> He continued, “If printed on a single sheet, or as a booklet, these recipes could undoubtedly be copyrighted, and we see no reason why this protection should be denied, simply because they are printed and used as a label.”<sup>27</sup> To the court, the recipes displayed the necessary artistic originality to qualify for copyright protection.<sup>28</sup>

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<sup>21</sup> Litigated issues include the proper ownership of the copyright, valid proof of copyright, and the amount of damages to be paid for infringing part of an entire work. *Id.* at 501-502.

<sup>22</sup> 295 F. 823, 824 (8<sup>th</sup> Cir. 1924).

<sup>23</sup> *Id.* at 825.

<sup>24</sup> *Id.* at 828.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> This case does not stand for the proposition that recipes are only copyrightable in original compilations as the Seventh Circuit reads it in *Meredith*. See 88 F.3d at 482. Judge Booth never mentions the originality of the compilation or anything about the organization of the recipes. For

## B. Nimmer, *Meredith*, and *Godiva*: Too Many Cooks Ruin the Soup

But this liberal attitude towards recipe copyrights did not last. Melville Nimmer's treatise, it seems, put a lid on the issue even before a court had done so.<sup>29</sup> According to Nimmer, the notion that recipes can be copyrighted "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 contained in the recipes may be original in a noncopyright sense."<sup>30</sup> Relying on §102(b) of the Copyright Act, which prohibits copyrights of a "procedure, process, or discovery," he goes on to note that even if published recipes could not be reprinted in other cookbooks, nothing would stop chefs from performing those culinary "dishes."<sup>31</sup> According to Nimmer, no chef should be able to secure a copyright for a recipe for apple pie, for example, because the idea of apple pie is not original to the author (copyright law's standard for originality).<sup>32</sup> The recipe for apple pie is a fact that does not owe its origin to any particular person, and thus any individual recipe lacks originality because it must conform to the necessities of apple pie making.<sup>33</sup>

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him, the recipes are copyrightable in their own right as "original compositions." *Fargo Merchantile*, 295 F. at 828.

<sup>29</sup> The section existed in the original 1963 edition at § 37.9. All citations will be to the current edition.

<sup>30</sup> NIMMER, *supra* note 7, at § 2.18[I].

<sup>31</sup> *Id.*

<sup>32</sup> *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (stating, "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

<sup>33</sup> On the uncopyrightability of facts, *see id.*, at 347. Quoting Nimmer, the *Feist* court explains, "No one may claim originality as to facts.' ... This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find

In the most extensive discussion of the copyrightability of recipes by any court, the Seventh Circuit relied on *Nimmer* in vacating a district court’s finding of infringement of the plaintiff’s *Discover Dannon* cookbook.<sup>34</sup> Although the court withheld judgment on whether recipes are “*per se* amenable to copyright protection,”<sup>35</sup> it concluded that “[t]he recipes involved in this case comprise lists of required ingredients and the directions for combining them to achieve the final products. The recipes contain no expressive elaboration upon either of these functional components, as opposed to recipes that might spice up functional directives by weaving in creative narrative.”<sup>36</sup> To the court, dishes like “Curried Turkey and Peanut Salad” and “Swiss ‘n’ Cheddar Cheeseballs” did not manifest “even a bare modicum of the creative expression—i.e., the originality—that is the ‘*sine qua non* of copyright”<sup>37</sup> As they were for *Nimmer*, recipes were either statements of preexisting facts, i.e., “the ingredients necessary for the preparation of a particular dish,”<sup>38</sup> or they were procedures or processes, excluded from copyright protection by § 102(b) of the Act.<sup>39</sup> To some extent, the *Meredith* court did soften its ruling of uncopyrightability by conceding that some portions of recipes may be copyrightable to the extent that their “authors lace their directions for producing dishes with musings about the

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and report a particular fact has not created the fact; he or she has merely discovered its existence.” *Id.* (citation omitted).

<sup>34</sup> *Meredith*, 88 F.3d at 481.

<sup>35</sup> *Id.* at 480. The judge explained, “We do not express any opinion whether recipes are or are not *per se* amenable to copyright protection, for it would be inappropriate to do so. The prerequisites for copyright protection necessitate case-specific inquiries, and the doctrine is not suited to broadly generalized prescriptive rules.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 482, quoting *Feist*, 499 U.S. at 345.

<sup>38</sup> *Id.* at 480.

<sup>39</sup> *Id.* at 480-481. The court takes the odd course of splitting the recipes up and analyzing the list of ingredients separately from the directions for their preparation. This allows it to hold that the former are uncopyrightable as a “mere list of ingredients” while the latter are uncopyrightable as a “procedure, process, [or] system.” *Id.* By failing to appreciate the status of the recipe as a whole, the court’s analysis ignores the appropriate questions.

spiritual nature of cooking or reminiscences they associate with the wafting odors of certain dishes in various stages of preparation.”<sup>40</sup> While correct, this statement is distracting and adds little to the question of the *per se* copyrightability of recipes.<sup>41</sup>

The Sixth Circuit’s 1998 opinion in *Lambing v. Godiva Chocolatier* is the most recent statement by an appellate court on the subject.<sup>42</sup> Lambing sued Godiva for copyright infringement for copying the recipe and design of her chocolate truffle known as “David’s Trinidad” and described in one of her unpublished books.<sup>43</sup> The court was brief in its rejection of her claim. Citing *Meredith*, the court held that recipes are not copyrightable, stating, “The identification of ingredients necessary for the preparation of food is a statement of facts. There is no expressive element deserving copyright protection in each listing. Thus, recipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C. § 102(b).”<sup>44</sup>

The recent authorities on the copyrightability of recipes make two points about recipes that prohibit recipes from earning legal protection. First, *Nimmer*, *Meredith*, and *Godiva* all stand for the proposition that the recipes for dishes are merely statements of preexisting facts that

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<sup>40</sup> *Id.* at 481.

<sup>41</sup> Judge Kent of the Southern District of Texas recently allowed a case of recipe copyright infringement to proceed beyond summary judgment. *See Barbour v. Head*, 178 F.Supp.2d 758 (S.D. Tex. 2001). Although he rejects *Meredith* as controlling authority, Judge Kent finds in favor of the plaintiff because, “Unlike its counterparts in [*Meredith*], the recipes in [plaintiff’s cookbook] *Cowboy Chow* are infused with light-hearted or helpful commentary, some of which also appears verbatim in [defendant’s] *License to Cook Texas Style*.” *Id.* at 764. In an opinion larded with awful culinary puns, (e.g., “No matter what else you herd...”) the judge implies that recipes without clever commentary such as “Great with meats!” would “represent mere unprotected facts.” *Id.* Thus, although the plaintiff wins, the analysis remains the same.

<sup>42</sup> 142 F.3d at 434.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

do not owe their creation to the author claiming the copyright.<sup>45</sup> According to this view, the contents of recipes are dictated by functional necessities such as the requirements that apple pie must contain apples and a crust and that it must be baked. It follows, then, that as unoriginal statements of fact, recipes lack an expressive component required by copyright jurisprudence. Second, each of these authorities views recipes as functional processes or directions for creating a known product.<sup>46</sup> As such, they are not subject to copyright protection and may be protected only if they meet the more stringent requirements of patent law.

### C. Critiquing the Authorities

The two points made by the authorities discussed above are based on two conceptual mistakes that mar their analysis from the beginning.<sup>47</sup> This section will describe the two mistakes, and then, with the aid of an analogy and the statements of some of America's best chefs, show why, at least doctrinally, recipes could be granted copyright protection.

The first conceptual mistake the authorities make is to focus their attention on recipes for dishes already in existence rather than on novel creations. It makes sense for Nimmer to

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<sup>45</sup> NIMMER, *supra* note 7, at § 2.18[I] (“...the content of recipes are clearly dictated by functional considerations, and therefore may be said to lack the required element of originality.”); *Meredith*, 88 F.3d at 480 (“The identification of ingredients necessary for the preparation of each dish is a statement of facts.”); *Godiva*, 142 F.3d at 434 (“The identification of ingredients necessary for the preparation of food is a statement of facts.”).

<sup>46</sup> NIMMER, *supra* note 7, at §2.18[I]; *Meredith*, 88 F.3d at 481 (“The recipes at issue here describe a procedure by which the reader may produce many dishes featuring Dannon yogurt. As such, they are excluded from copyright protection as either a ‘procedure, process, [or] system’”); *Godiva*, 142 F.3d at 434 (“...recipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C. § 102(b).”).

<sup>47</sup> It should be noted that I am not claiming that the courts were necessarily wrong about the copyrightability of the recipes at issue in those cases. I have not been able to locate the texts but it certainly seems that the Dannon recipes were mostly yogurt-based variants on public domain dishes like “Waldorf Salad” and “Chocolate Torte.” See *Meredith*, 88 F.3d at 475. Instead, I am arguing that the analytical approach to recipes chosen by the courts and by Nimmer is fundamentally flawed.

conclude that recipes are “dictated by functional considerations” and that they “lack the required element of originality” if he only considers recipes for well-established dishes like apple pie or *coq au vin*.<sup>48</sup> The *Meredith* court makes the same mistake when it notes that the recipes “were at some time original.”<sup>49</sup> The appropriate subject matter for considering whether recipes are original creations or merely functional statements of preexisting facts are dishes like Thomas Keller’s “Oysters and Pearls,” a combination of tapioca pudding, Malpeque oysters, and caviar,<sup>50</sup> or “Peches Melba” at the time that it was created by Auguste Escoffier in 1892 or 1893.<sup>51</sup> Most dishes at most restaurants are based on recipes in what we may call the Culinary Public Domain, i.e., they have been produced for years, if not for generations, and their original creators are unknown. Clearly restatements of recipes for these dishes do not deserve copyright protection. But when the focus is on dishes like “Oysters and Pearls” that have no gastronomic precedent, it makes no sense to suggest that they lack originality because they are merely statements of facts. It is no more true that the ingredients and directions for making “Oysters and Pearls” is a statement of fact than it is to say that the arrangement of words in Joyce’s *Ulysses* is a statement of fact.<sup>52</sup> As the Supreme Court explains in *Feist*, “The distinction [between works of authorship and facts] is one between creation and discovery: The first person to find and report a particular

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<sup>48</sup> NIMMER, *supra* note 7, at §2.18[I].

<sup>49</sup> 88 F.3d at 481.

<sup>50</sup> See THOMAS KELLER, *THE FRENCH LAUNDRY COOKBOOK*, 23 (1999).

<sup>51</sup> See WILLAN, *supra* note 18, at 200, 210. The dish is made with fresh peaches, raspberry puree, and vanilla ice cream. *Id.*

<sup>52</sup> One could certainly list all of the words in *Ulysses* in the order they appear and claim that it was a statement of that fact, but copyright law would quickly recognize that it was merely a copy of the work of authorship.

fact has not created the fact; he or she has merely discovered its existence.”<sup>53</sup> Chef Keller, on the other hand, did not “discover” “Oysters and Pearls;” he created it.<sup>54</sup>

The second conceptual mistake made by Nimmer and the circuit courts is to confuse the work of authorship for the instructions about how to perform it. To say that a recipe is an uncopyrightable procedure or process is the same as saying that a schematic rendering of dance steps is a procedure or, most clearly, that the required instruments and notes for a symphony is a process. In truth, though, the recipe, the drawing, and the musical notation are simply means for fixing a work (the dish, the dance, or the symphony) in a tangible medium of expression. In the words of the Copyright Act, they allow these otherwise ephemeral media to be “perceived, reproduced, or otherwise communicated.”<sup>55</sup> As Priscilla Parkhurst Ferguson notes, “cuisine belongs with the performative arts, and as for other such arts, the social survival of the culinary performance depends on words.”<sup>56</sup> If we were to be clear, then, the copyright would exist in the work of authorship that is the particular “dish” with the recipe serving merely to fulfill the statutory requirement of fixation.<sup>57</sup>

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<sup>53</sup> *Feist*, 499 U.S. at 347.

<sup>54</sup> Over the past decade and a half, scholars have focused considerable attention on the historically contingent nature of copyright law’s notions of “authorship” and “originality.” See THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi, eds. 1994); SUSAN SCAFIDI, WHO OWNS CULTURE: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005). These critiques will feature prominently in Part II of this article. For the time being, terms like “author,” “create,” “originality,” and “expressiveness” will be used uncritically to show that even according to the established meanings of these words in copyright jurisprudence, recipes could be deemed copyrightable. It is hoped that by doing so, the critique in Part II will be made all the stronger.

<sup>55</sup> 17 U.S.C. § 102(a).

<sup>56</sup> PRICILLA PARKHURST FERGUSON, ACCOUNTING FOR TASTE: THE TRIUMPH OF FRENCH CUISINE, 20 (2004).

<sup>57</sup> As Chef Norman van Aken told me, “The recipe is a map. The dish is the real place of arrival.” Email from Norman van Aken, Executive Chef-Owner, Norman’s, to Christopher J. Buccafusco (Aug. 3, 2006) (on file with author).

Certainly procedures and processes are used in cooking, and, according to the doctrine of *Baker v. Selden*<sup>58</sup> codified in § 102(b), these are uncopyrightable.<sup>59</sup> These culinary procedures, however, are the basic techniques of cooking – ingredient preparation, grilling, baking, *sous vide*,<sup>60</sup> etc. – and not the individual recipes that make use of the techniques. As the *Baker* court explained, “A treatise on...the mode of drawing lines to produce the effect of perspective...would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art...described therein.”<sup>61</sup> The author of the treatise could not receive an exclusive right to practice perspective drawing, but that does not mean that works of art created with the techniques of perspective are not copyrightable.<sup>62</sup> Similarly, culinary dishes are not the proscribed “descriptions of an art,” but instead particular creative expressions “addressed to the taste” and produced using the techniques of the art of cooking.<sup>63</sup> No one may receive a monopoly on a particular method of cooking, unless they secure a patent on the method as Homaro Cantu has done,<sup>64</sup> but nothing in this part of the *Baker* doctrine prevents anyone from securing a copyright in a dish made with particular techniques, so

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<sup>58</sup> 101 U.S. 99 (1879).

<sup>59</sup> 17 U.S.C. § 102(b).

<sup>60</sup> *Sous vide* (“under vacuum”) cooking utilizes vacuum-sealed plastic bags submerged in temperature-controlled water baths. The food placed in the bag can be cooked to the perfect degree of doneness without loss of nutrients or flavor. See “Sous vide,” WIKIPEDIA, available at [http://en.wikipedia.org/wiki/Sous\\_vide](http://en.wikipedia.org/wiki/Sous_vide).

<sup>61</sup> 101 U.S. at 102. The Court also mentions treatises on the composition and use of medicines, the construction and use of ploughs, or watches, or churns, and the mixture and application of colors for painting. *Id.*

<sup>62</sup> On perspective and the law, see Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Digital Evidence in Perspective*, 58 UNIV. OF MIAMI L. REV. 609 (2004).

<sup>63</sup> *Baker*, 101 U.S. at 103.

<sup>64</sup> See [www.cantudesigns.com](http://www.cantudesigns.com). Perhaps Chef Cantu’s most famous culinary invention are natural chemical inks that when printed on edible paper taste like food. He can, for example, print an image of a pizza on a piece of paper that, when eaten, tastes like pizza. Interview with Homaro Cantu, Chef-Owner, Moto, in Chicago, IL (Mar. 8, 2006) (hereinafter Cantu Int.).

long as it meets the other statutory requirements.<sup>65</sup> Thus, there is no problem by way of either the prohibitions against copyrighting statements of facts or procedures and processes that prevents dishes from being copyrighted.

It remains to determine whether individual recipes are in fact like musical compositions and other such works to the extent that they are actually a means of expression. I must admit at the outset that it can be incredibly difficult to talk about how, if at all, recipe creation expresses anything.<sup>66</sup> Writing about cuisine, as about music, is as hard as “dancing about architecture.”<sup>67</sup>

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<sup>65</sup> A second objection flowing from the *Baker v. Selden* doctrine is that dishes should not be copyrightable because they are “useful articles” whose expressive elements are inseparable from the dishes’ utilitarian function of providing nourishment. See 37 C.F.R. § 202.10(c). Section 101 of the Copyright Statute defines a “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Courts determine copyrightability according to a variety of tests of the “separability” of the works expressive content from its “utilitarian function. See *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7<sup>th</sup> Cir. 2004); *Kisselstain-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F.Supp. 625 (S.D.N.Y. 1959). Although a case by case inquiry would be required, it is possible that all or most recipes that otherwise qualify for copyright protection due to the expressive content would pass the tests of separability, because the aesthetic content of most of these dishes would be far removed from their nutritional functions. People rarely go to The French Laundry because they’re hungry and want to be nourished. The creators of these dishes, moreover, may be only marginally influenced by the nutritive components of their works. As the *Baker* Court writes, ““their form is their essence, and their object, the production of pleasure in their contemplation.” 101 U.S. at 103-104. Additionally, as Raustiala and Sprigman note in their work on fashion design, the useful articles limitation “is not somehow entailed in copyright doctrine, but is a policy choice.” Raustiala & Sprigman, *supra* note 6, at 61. Congress could simply do away with the limitation for recipes as it has for architecture. *Id.* at 62-63.

<sup>66</sup> As Carolyn Korsmeyer suggests, “Objects of vision are easily assessed for their formal properties, as are objects of the sense of hearing. Indeed, composition, balance, harmony are all aesthetic qualities that make up standard critical vocabularies of the arts. By comparison, taste sensations are relatively unstructured. As a rule tastes and smells tend to blend and lose their discrete components in the experience of a meal.” CAROLYN KORSMEYER, *MAKING SENSE OF TASTE: FOOD & PHILOSOPHY*, 60 (1999). Susan Scafidi notes that “it is far easier to consume cultural products than to analyze them.” SUSAN SCAFIDI, *supra* note 54, at x.

<sup>67</sup> The quote “Talking about music is like dancing about architecture,” has been attributed to a number of sources, including Elvis Costello and Frank Zappa. For analysis, see Alan P. Scott, *Talking About Music is like Dancing About Architecture*, at <http://home.pacifier.com/~ascott/they/tamildaa.htm>.

But again the analogy to music helps. Although people may doubt that dishes are capable of emotional expression, neither courts of law or average citizens would ever doubt that a piece of music expresses something, even though many would be hard-pressed to articulate what that something is. On the one hand, our culture presumes that a given series of musical notes is expressive, and I have found no case in which it was even claimed that a particular piece of music lacked expressive content. On the other hand, people are less certain about expression through food, and the courts have consistently rejected the possibility.<sup>68</sup>

To determine whether chefs do in fact use recipes as an expressive medium I asked chefs their opinions.<sup>69</sup> According to Chef Rick Tramonto at TRU in Chicago, “Expression is all of [recipe creation]. It’s all emotion; it’s all soul. It’s spiritual.”<sup>70</sup> For Chef Charlie Trotter of the eponymous Chicago restaurant, “Cooking is a form of expression that combines ideas about cooking and eating in a way that a lot of people, from the home cook to professional chefs, can understand.”<sup>71</sup> Both chefs compare culinary expressiveness to musical expressiveness, although Chef Trotter prefers a comparison to jazz while Chef Tramonto prefers one to classic rock.<sup>72</sup>

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<sup>68</sup> See *Meredith*, 88 F.3d at 480 (“The recipes contain no expressive elaboration...”); *Godiva*, 142 F.3d at 434 (“There is no expressive element deserving copyright protection in each listing.”).

<sup>69</sup> This is a more or less random sampling of chefs’ opinions, and they must be taken for whatever they are worth. Nonetheless, these chefs represent the elite of the profession, and their ideas are supported by the opinions of others outside of the profession, including both academics and mere gastronomes. In any event, this sort of qualitative social science research is becoming increasingly popular among legal academics. See Howard S. Erlanger, et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005).

<sup>70</sup> Interview with Rick Tramonto, Chef-Owner, TRU (Mar. 2, 2006) (hereinafter *Tramonto Int.*).

<sup>71</sup> CHARLIE TROTTER, *THE KITCHEN SESSIONS WITH CHARLIE TROTTER*, 12 (1999).

<sup>72</sup> Chef Trotter explained, “It’s like music. You can play a trumpet and be decent at it, or you can be inspired in it and be an artist. The same may exist in the world of cooking.” Interview with Charlie Trotter, Chef-Owner, Charlie Trotter’s Restaurant, in Chicago, IL (Jan. 25, 2006) (hereinafter *Trotter Int.*). According to Chef Tramonto, “When you put on a Miles Davis piece or a Santana piece, you’re just listening to this guy riff on this guitar or riff on this horn, you kind of get the goose bumps. You can feel the emotions. It’s just like when you get a great dish in

For the expression to be meaningful, however, it is important that people other than the chef can understand what is being expressed. As with music, it can be difficult for people to articulate what is being expressed in dishes, but the chefs I interviewed believed that they could do so by tasting a dish in a restaurant, preparing it themselves, or even simply reading a recipe. As Chef Tramonto explains, ““When I pick up old cookbooks like [Auguste] Escoffier and *Larousse [Gastronomique]*, or even when I pick up old school New American cookbooks like Alice Waters, James Beard, and Julia Child, I’m just in awe. They were fearless. They had convictions. They understood.”<sup>73</sup> In short, just by reading the recipes, the chef could appreciate their meanings, whether about relationships to technique and style or to nature and the seasons.<sup>74</sup> Chef Thomas Keller of The French Laundry and Bouchon in Napa Valley and Per Se in Manhattan says that he tastes the various combinations in a recipe in his mind, and from this he can determine if they “work,” i.e., if they make sense together and express what he intends.<sup>75</sup> Chef Trotter recalls his days as a young culinarian reading old cookbooks, “preparing the dishes

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front of you eating in some restaurant. You put a piece of foie gras in front of some people and they’re like, it’s just food, what’s the big deal, but you put them in front of a great symphony and they’re on the edge of their seats while other people are falling asleep.” Tramonto Int., *supra* note 70. Chicago gastronomes will undoubtedly be aware that while Chefs Trotter and Tramonto agree about the expressive component of cuisine, they do not see eye to eye on the appropriateness of serving foie gras. See Mark Caro, *Liver and Let Eat*, CHICAGO TRIBUNE, Mar. 29, 2005, at 1.

<sup>73</sup> Tramonto Int., *supra* note 70.

<sup>74</sup> *Id.*

<sup>75</sup> He explains, “I had never tasted the oysters and pearls dish, for example, but I had enough experience with oysters, caviar, and tapioca pudding that I knew what each of their flavor profiles were and even more so what the textures were, so I could taste the components together in my mind so I knew that it would work.” Interview with Thomas Keller, Chef-Owner, The French Laundry, Per Se, and Bouchon (Mar. 20, 2006) (hereinafter *Keller Int.*).

in [his] mind,” and understanding what the chefs were trying to do.<sup>76</sup> Chef van Aken also reads others’ recipes in this fashion.<sup>77</sup>

The dishes that chefs create express various ideas and emotions taken from both the purely culinary world and the chefs’ wider experiences. As Chef Keller explains, much culinary expression is about experimenting with established “flavor profiles,” i.e., traditional harmonies of components, flavors, and textures. He cited his famous “Salmon Cornets”<sup>78</sup> *amuse bouche*:

Look at the cornets for example, which is something that I’ve been doing for fifteen years. Where did it really come from? ... When you think about what the cornet is, it’s a cracker. Okay it’s shaped differently. It has a little crème fraîche in it. Okay, sour cream, crème fraîche, salmon and onions. We’ve all had some kind of cracker with sour cream, salmon, and onions. It’s a very very recognizable flavor profile, but just treated in a different way.<sup>79</sup>

Similarly, WD-50 chef Wylie Dufresne enjoys presenting familiar tastes and combinations in an unfamiliar way, as in his pickled beef tongue sandwich with deep-fried mayonnaise and molasses ketchup.<sup>80</sup> Chef van Aken uses traditional recipes and sauces as “major chords... in a dish that I would be making into a whole song.”<sup>81</sup> For many chefs today, dishes are about expressing relationships with the environment by highlighting seasonal products and thus

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<sup>76</sup> Trotter Int. *supra* note 72.

<sup>77</sup> He explains, “To read them is to see if they make sense or interest me. I can usually ‘taste the dish in my mind’ if I give it enough time so that helps me understand what a chef might be trying to do. I usually find that most of the so-called ‘new recipes’ are quiet affected and unnecessary. But I try to keep an open mind!” Email from van Aken, *supra* note 57.

<sup>78</sup> See KELLER, *supra* note 50, at 6-7.

<sup>79</sup> Keller Int. *supra* note 75.

<sup>80</sup> Interview with Wylie Dufresne, Chef, WD-50 (Aug. 8, 2006) (hereinafter *Dufresne Int.*). Chef Dufresne explains, “Yes, certainly what we do taps into nostalgia, humor. Those are things we work with a lot. The familiar in an unfamiliar way.” *Id.*

<sup>81</sup> Email from van Aken, *supra* note 57.

exploring the boundaries imposed by Mother Nature.<sup>82</sup> Chef van Aken, for example, is inspired by the climate and environment around his restaurant in Miami, “Since so much of my life has been cooking in Key West and South Florida I try to express my sense of place on this earth. I like my dish to express the ‘terroir’ of this place even if I am investing it with some imaginary or unlikely couplings in the task.”<sup>83</sup>

The chefs I spoke with also took their inspiration from outside the kitchen. Chef Homaro Cantu of Moto in Chicago prepares so-called “post-modern” cuisine that is inspired by technology and a sense of whimsy.<sup>84</sup> He explains, “It starts out just having fun. That’s really what you’ve got to do. When you get a lot of people in a room and you say, ‘We want to make this wheatgrass here taste like cotton candy,’ that’s fun.”<sup>85</sup> Chef Tramonto describes his dishes as “fine dining with a sense of humor,” Chef van Aken is inspired by the wider culture and history of his restaurant’s locale.<sup>86</sup> Chefs also make considerable use of both literary and verbal puns, as in Chef Keller’s “Oysters and Pearls:” “Where did that come from? The tapioca – pearls. Pearls come from oysters. You see the word ‘pearls’ and what comes to your mind? What comes to my mind is oysters.”<sup>87</sup>

Philosopher Carolyn Korsmeyer studies the ways in which foods create meaning. She notes, “. . . tastes convey meaning and hence have a cognitive dimension that is often overlooked.

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<sup>82</sup> Tramonto Int. *supra* note 70.

<sup>83</sup> Email from van Aken, *supra* note 57.

<sup>84</sup> The Moto press release says of Chef Cantu’s postmodern cuisine, “Cantu manipulates the finest local and global ingredients with not-so-obvious kitchen tools such as liquid nitrogen, helium, and organic food-based inks to create dishes that are not only delicious by practically unimaginable. With courses such as the sushi cartoon, lobster with freshly braised pizza and garlic, freeze dried pina colada and doughnut soup, Cantu delivers a play on words and a dining adventure from the very first bite – which is often the edible menu.” Moto Press Release, on file with author.

<sup>85</sup> Cantu Int., *supra* note 64.

<sup>86</sup> Email from Chef van Aken, *supra* note 57.

<sup>87</sup> Keller Int. *supra* note 75.

Foods are employed in symbolic systems that extend from the ritual ceremonies of religion to the everyday choice of breakfast. Perhaps most obviously, eating is an activity with intense social meaning for communities large and small.”<sup>88</sup> The most obvious way that foods express meaning is through what Korsmeyer calls “representational food” – those dishes, like croissants, pretzels, and the Eucharistic bread and wine that are crafted to look like and remind the diner of something else.<sup>89</sup> Beyond simple representation, Korsmeyer explains that dishes can be expressive in less obvious and more culturally-specific ways. She writes, “Independent of tradition and context, tastes are not by themselves the bearers of meaning any more than are the colors of paints straight out of the tube.”<sup>90</sup> Particular tastes and the dishes they contribute to take on meaning by being with associated various events, whether daily, weekly, or yearly. In the contemporary United States, turkey, stuffing, and pumpkin pie are associated with Thanksgiving, and a chef can use these ingredients outside of the holiday season to conjure some of the typical associations that diners have with these tastes.<sup>91</sup>

Although many meals may be made without any particular expressive content and although many people may have difficulty articulating the kinds of things dishes express and the

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<sup>88</sup> KORSMEYER, *supra* note 66, at 4.

<sup>89</sup> *Id.* at 118-120. The croissant was created in honor of the successful defense of Vienna in 1683 against the Ottoman Turks and was intended to symbolize devouring the enemy. *Id.* at 119. Pretzels was designed to look like the folded arms of a person in prayer and were originally given out to monks who recited the catechism correctly. *Id.* The symbolism of the Eucharist is widely known.

<sup>90</sup> *Id.* at 136.

<sup>91</sup> For the emotive connotations of various foods, see ANDREW DORNENBERG & KAREN PAGE, CULINARY ARTISTRY, 32-33 (1996). The authors propose:

Animalistic/Primal : grilled steak

Aphrodisiac : caviar, champagne, cinnamon, cloves,...oysters, pepper,...truffles...

Comfort : creamy mashed potatoes

Earthy : grilled mushrooms

Feminine : fruit, tiramisu

Masculine : thick-cut steak or chops...

*Id.*

ways in which they do it, the foregoing has shown that an outright denial of expressivity would be inappropriate, especially when expressivity is presumed for such similarly situated media as music, dance, and architecture. Accordingly, if courts were to realize that 1) the proper area for analysis is new culinary creations and not articulations of those already in the culinary public domain; 2) that the work of authorship is the dish and that the recipe serves only as the means of fixation and communication; and 3) that dishes are capable of being imbued with layers of meaning and expression, nothing in copyright jurisprudence stands in the way of granting chefs copyrights in their gastronomic works.<sup>92</sup>

## **II. A Brief Foray into the Cultural History of Taste, Cooks, and Cooking**

If, as I have argued, there are no doctrinal impediments to recognizing dishes and recipes as copyrightable subject matter, why have they never been included within the group of recognized works of authorship? A number of possible reasons present themselves, including various socio-economic factors that might apply to a group of non-copyrightable media,<sup>93</sup> but in this section I will focus on explanations based on the cultural history taste, cooks, and cooking. By suggesting reasons why dishes have not been granted copyright protection, this section will

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<sup>92</sup> In any case, courts will have to analyze particular recipes to ensure that they meet the necessary requirements of copyright law, but this is no different than it would or should be for literary or musical works. Just as some series of musical notes may lack expressive content, e.g. notes used to operate various electronic devices, some recipes will lack expressive content, and the strength of the presumption of expressiveness may be different for different media. Further, courts would have to ensure that chefs are not claiming copyright in recipes that are already in the public domain. In the short term, courts could recognize recipes as “literary works,” under 17 U.S.C. § 102(a)(1), but to be intellectually honest, Congress would have to create a new form of protection for “Culinary works.” Of course, if my recommendations in Part III are followed, none of this will be necessary.

<sup>93</sup> See Raustiala & Sprigman, *supra* note 6.

elucidate some of the hidden preferences at the foundation of American copyright law.<sup>94</sup> Cuisine is unique among media in its orientation to the gustatory sense of taste, a sense that has been generally denigrated in Western culture for a variety of reasons. In addition, cuisine, unlike most legally recognized media, is necessary for survival, and thus, it contains a functional component that, especially in Anglo-American culture, detracts from its aesthetic and expressive characteristics. Finally, dishes are produced by an unusual and diverse class of artisans, professionals, and laity, and the final part of this section will examine the social status and attitudes of and about cooks to see what may be gleaned from their history.

#### **A. Taste in Western Philosophy and Culture**

Since ancient Greece, Westerners have enumerated five external senses - vision, hearing, touch, smell, and taste – and they have ranked them according to their perceived epistemological importance.<sup>95</sup> Vision and hearing seem to provide the most and best information about the outside world. Moreover, for philosophers going back to Plato, vision and hearing have the added benefit of operating at a distance from the sources of light or sound thereby protecting the perceiver and allowing for a greater measure of objective appreciation.<sup>96</sup> As Carolyn Korsmeyer notes in her pioneering study of the sense of taste in Western philosophy, “Vision and hearing are senses that are less involved with the experience of pleasure and pain in their exercise and thus appear comparatively detached from experiences that are phenomenally subjective—that is,

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<sup>94</sup> For other such work, see SCAFIDI, *supra* note 54, at 1; and THE CONSTRUCTION OF AUTHORSHIP, *supra* note 54.

<sup>95</sup> See KORSMEYER, *supra* note 66, at 2.

<sup>96</sup> Summarizing the beliefs of Plato and Aristotle, Korsmeyer writes, “sight and hearing are sources for ‘objective’ information; that is to say, what is learned concerns the world external to the body of the percipient. . . . The information delivered by sight and hearing, especially sight, lends itself to reflection and to abstraction that yields knowledge of universals.” *Id.* at 25.

that are felt as sensations in the body.”<sup>97</sup> Touch, smell, and taste, however, require contact with, or at least close proximity to, the object in question. For Plato, as for those who followed him, this proximity generated not just physical but moral danger. In his view, philosophy requires transcendence of the body’s corporeality, but the haptic senses (touch, smell, and taste) continually remind philosophers of their bodies and distract them from more important matters. What is worse, because of their relationship to nourishment and survival, smell and, especially, taste are susceptible to overindulgence and gluttony, a risk rarely associated with vision and hearing. Korsmeyer explains, “So closely are taste and eating tied to the necessities of existence that taste is frequently cataloged as one of the lower functions of sense perception, operating on a primitive, near instinctual level. Taste is associated with appetite, a basic drive that propels us to eat and drink. Its role in sheer animal existence is one of the factors that has contributed to its standard neglect as a subject of philosophical inquiry.”<sup>98</sup>

While the literal sense of gustatory taste is relegated to the bottom of the hierarchy of the senses, the metaphoric sense of taste – the use of the word “taste” to mean discrimination and a sense of the beautiful – is enormously important for Western aesthetic discourse. This is not the place for an history of the development of this metaphorical usage,<sup>99</sup> but it is worth noting that despite the adoption of the gustatory metaphor, objects of literal taste have been generally excluded from discussions of aesthetics.<sup>100</sup> With the notable exception of some 18<sup>th</sup>- and 19<sup>th</sup>-

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<sup>97</sup> *Id.* at 3.

<sup>98</sup> *Id.* at 1. This attitude toward the sense of taste continues throughout Western philosophy. Interested readers should consult Korsmeyer, who follows the trend from Plato and Aristotle, through Hume and Kant to Freud and Bourdieu. *Id.* at chs. 1 and 2.

<sup>99</sup> *See id.*, at 38ff.

<sup>100</sup> Korsmeyer explains, “The use of the term ‘taste’ to refer to an ability to discern beauty and other aesthetic qualities is intriguing and paradoxical, for literal, gustatory taste is by and large excluded from among the chief subjects of the theories of taste that become prominent in Enlightenment European philosophy. The sense of taste provides the language, indeed the

century gastronomes such as Jean Anthelme Brillat-Savarin, Grimod de la Reynière, and Launcelot Sturgeon, most writers on beauty have focused exclusively on those media that present themselves to the eyes and ears. The stomachical arts, to borrow Sturgeon's phrase, pertain only to nourishment and do not merit philosophical reflection.<sup>101</sup>

As just noted, much of the denigration of gustatory taste is associated with its perceived liability to overindulgence. In the Western religious tradition, the fear of overindulgence has been codified as the sin of gluttony – one of the deadly seven<sup>102</sup> -- and, indeed, some cultural historians have ascribed the lowly status of cuisine among the arts to puritanical religious attitudes towards food.<sup>103</sup> Historian Stephen Mennell explains, “food, like sex, is something necessary, but definitely not to be enjoyed by the virtuous...”<sup>104</sup> Accordingly, to many people, especially in the Anglo-American world, food should be nourishing to the body and capable of sustaining the diner through a day of toil, but it should be devoid of frills and should not pander

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conceptual framework, that fosters theoretical understanding of aesthetic appreciation of works of art. That sense itself, however, is eclipsed as the concept of the aesthetic develops philosophical rigor and depth.” *Id.* at 38.

<sup>101</sup> *Id.*

<sup>102</sup> MICHAEL SYMONS, *A HISTORY OF COOKS AND COOKING*, 100 (2000). Symons notes, “The idea of seven deadly sins preoccupied some of the mightiest medieval minds, and the first among the seven was *gula*, gluttony. The dire and deadly sin to which a host of theologians ascribed Adam's loss of Eden was not to pride but gluttony.” *Id.*

<sup>103</sup> See STEPHEN MENNELL, *ALL MANNERS OF FOOD*, 104-108 (1996). “Puritan” is used here in the lower case to indicate that it refers not to a specific group of 17<sup>th</sup>- and 18<sup>th</sup>-century religious groups but to a more pervasive attitude about life and religion. *Id.* at 106.

<sup>104</sup> *Id.*

to base human desires.<sup>105</sup> This belief appears in much of the puritanical writing on food and cooking that deplored the cook's use of fancy sauces to encourage diners to eat beyond satiety.<sup>106</sup>

These attitudes towards food show themselves in a particular genre of cookbook that emerged in 16<sup>th</sup>-century England and remained popular into the 20<sup>th</sup> century. These cookbooks are devoted to the “practical skills” necessary for “housewives.” Addressed not to courtly nobility but to modest gentlewomen, texts like Thomas Dawson's *The Good Huswives Jewell* (1585) and Gervase Markham's *The English Hus-Wife* (1615) were unique for the time.<sup>107</sup> Instead of offering recipes for elaborate *pièce montées* and suggestions for dinner parties, these books and their considerable progeny dictated a diet “wholesome and cleanly prepared at due hours, and cooked with care and diligence;...rather to satisfy nature than our affections, and apter to kill hunger than revive new appetites.”<sup>108</sup> In addition to recipes, these manuals, like the 19<sup>th</sup>-century one at issue in the *Scribner* case, also included medical remedies and advice for maintaining a proper home, further divorcing them from the realm of art.

In Western and, especially, Anglo-American culture gustatory pleasures have been consistently marginalized from aesthetic discourse and practice. The sense of taste, even as it was becoming the metaphor for refinement, was being relegated, at best, to the sphere of practical nourishment. At worst, the “pleasures of the table” were vilified as corrupting, and

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<sup>105</sup> Launcelot Sturgeon rejects such beliefs as ill-conceived if not downright treasonous, “Physicians indeed tell us, that sauces should be avoided—“because they induce us too eat to repletion!”—not perceiving that the objection constitutes the fines eulogium that could be passed on them. Were we guided by such reasoning as this, it would undermine the constitution and destroy the whole system of modern cookery.” STURGEON, *supra* note 1, at 81.

<sup>106</sup> SYMONS, *supra* note 102, at 101. Symons quotes the Chevalier Louis de Jaucourt: “it is impossible to reduce to a fixed order all the tricks for disguising natural foodstuffs that have been pursued, invented and imagined by man's self-indulgence and unrestrained taste.” *Id.* at 100. But the great English chef Alexis Soyer stood up for cooks: “mankind has thrown on cooks all the faults of which they ought to accuse their own intemperance.” *Id.* at 101.

<sup>107</sup> See MENNELL, *supra* note 103, at 84.

<sup>108</sup> *Id.*

their producers were blamed for society's ills. Since, as Korsmeyer writes, "only vision and hearing are traditionally considered genuine aesthetic senses,"<sup>109</sup> it is not surprising that only those objects that present themselves to the eyes and ears are considered "works of art."<sup>110</sup> And although artistic merit is not a necessity for copyright protection, one can see how historical ideas related to taste and food could have hindered the law's recognition of cuisine as an expressive work of authorship.<sup>111</sup>

### **B. The Status and Attitudes of Cooks**

The products of cuisine have often been held in low aesthetic regard in Anglo-American culture, and, likewise, the chefs who labored over them have received plenty of scorn and little praise. As the 19<sup>th</sup>-century English gourmand Launcelot Sturgeon describes, "Whatever may be the praises bestowed on a dinner, the host never thinks of declaring the name of the artist who produced it; and while half the great men in London owe their estimation in society solely to the excellence of their tables, the cooks on whose talents they have risen languish 'unknown to fame' in those subterranean dungeons of the metropolis termed kitchens."<sup>112</sup> While many painters and poets had established themselves as individual artists during the Renaissance, with

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<sup>109</sup> KORSMEYER, *supra* note 66, at 3.

<sup>110</sup> *Id.*

<sup>111</sup> One senses the disdain with which the *Meredith* court treats recipes as works of authorship in its description of the cookbook's contents:

This publication announces that 'creamy Dannon yogurt' owes its popularity not only to its flavor, but to its versatility as well. To back up this claim, *Discover Dannon* offers a cornucopia of culinary delights featuring—you guessed it—Dannon yogurt. From 'Simple Snacks' to 'Dazzling Desserts,' 'Super Salads' to "Exciting Entrées,' the array of offerings is enough to send anyone rushing to the fridge. Some highlights are 'Chucky Chili Dip,' 'Crunchy Tuna Waldorf Salad,' 'Spicy Bean Tostitas,' and for dessert, 'Chocolate Fruit Torte.' As inspiration, *Meredith* offers pictorial representations of the final products upon which the yogurt devotee may longingly fixate.

*Meredith*, 88 F.3d, at 475.

<sup>112</sup> Quoted in MENNELL, *supra* note 103, at 144.

musical composers soon to follow,<sup>113</sup> cooks, as Sturgeon's quote makes plain, remained faceless servants in dark, dirty kitchens. Throughout the 18<sup>th</sup> century, cooks were mostly anonymous practitioners of low status, who, if they were lucky, might see their names attached to dishes and occasionally be praised as artisans. Not until the 19<sup>th</sup> century, with famous French chefs like Antonin Careme and Auguste Escoffier, do we see the broad recognition of individual culinary creativity.<sup>114</sup>

Michael Carroll, in his work on the history of music copyright, has articulated a number of reasons why composers lagged behind painters, poets, and the like in individual recognition. Two of these reasons – the difficulty of oral communication of ephemeral events and the composer's primary role as performer – offer parallels with the developments of professional cooks. Carroll suggests that prior to the establishment of a widely accepted form of musical notation, composers had great trouble conveying their ideas to others. But, he notes, "As musical texts became more readily available and more authoritative, composers began to make claims that their names be associated with the text and the music reflected in the text. Composers increasingly became self-aware subjects."<sup>115</sup> The same is true for chefs and cuisine. Frances Ferguson explains, "'To the extent that cuisine depends on oral transmission, its general cultural status remains precarious. Writing stabilizes experience by giving it a form amenable to commentary and criticism. Language allows sharing what is at once the most assertively individual and yet, arguably, the most dramatically social of our acts: eating."<sup>116</sup> Early

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<sup>113</sup> On the development of musicians as artists see, Michael W. Carroll, *Whose Music is it Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405 (2004) (hereinafter *WMA*); Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005) (hereinafter *SMC*).

<sup>114</sup> See MENNELL, *supra* note 103, at 68.

<sup>115</sup> Carroll, *WMA*, *supra* note 113, at 1477.

<sup>116</sup> FERGUSON, *supra* note 56, at 92.

manuscript cookbooks were written in the vulgar languages rather than in Latin, and they did not circulate far beyond individual kitchens.<sup>117</sup> With the dispersion of printed cookbooks and the increasing quantitative precision of recipe writers, recipes became more prescriptive and authoritative and cooks experienced “increasing technical cohesion and social prestige,”<sup>118</sup> some eventually gaining the status of Careme and Escoffier.<sup>119</sup> Carroll also notes of musicians that they were generally musical performers first and composers second, if at all.<sup>120</sup> He adds that “for many composers, publication of their compositions functioned as a means for increasing demand for their public performances.”<sup>121</sup> Cooks too have been almost exclusively performers whose first requirement was to have meals ready and whose spare time could be spent inventing new dishes to glorify their patrons. Although it may come as a surprise to modern readers, until the rise of “celebrity chefs,” cooks spent the majority of their time at the stove.

While the private chefs for wealthy patrons struggled for individual recognition, lagging far behind their colleagues in the other arts, the lowly status of cuisine was cemented by the fact that most cooking in most households was performed by women, either housewives or domestic servants.<sup>122</sup> As we have seen, the most popular cookbooks in 19<sup>th</sup>-century England and America were those intended for housewives and devoted to “practical cookery” and “domestic

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<sup>117</sup> MENNELL, *supra* note 103, at 65. Describing the use of early cookbooks, he writes, “One clue is that most of even the earliest sources of actual recipes – both the late medieval manuscripts and then printed books – are written in the vulgar languages rather than in Latin. That is a strong hint that they were written by practitioners for practitioners.” *Id.*

<sup>118</sup> *Id.* at 67. As Mennell explains, “writing down a recipe tends to enhance its prescriptive character; the imperative tone of early recipes is very striking – indeed the word ‘recipe’ itself, as well as some other extinct or equivalent words such as ‘nym’ in the north of England, means ‘take’, typically the first command in the instructions for each dish.” *Id.*

<sup>119</sup> See WILLAN, *supra* note 18, at 143, 199.

<sup>120</sup> Carroll, *WMA*, *supra* note 113, 1410.

<sup>121</sup> Carroll, *SMC*, *supra* note 113, at 927.

<sup>122</sup> MENNELL, *supra* note 103, at 201.

economy.”<sup>123</sup> Accordingly, it would have been asking quite a lot of Victorians – or even of 21<sup>st</sup>-century copyright law, mired as it is in Romantic notions of originality, creation, and authorship<sup>124</sup> – to recognize the expressive potential of such a dismal affair as food preparation.<sup>125</sup>

Perhaps the most interesting aspect of culinary history that may relate to the status of recipes in copyright law is the peculiar tension between originality, borrowing, and plagiarism in the publication of cookbooks. From the earliest cookery manuscripts of the 13<sup>th</sup> century to flashy cookbooks of today, two rules have governed cookbook authors: 1) use your preface to vigorously assert your own originality and creativity; and 2) steal like mad from your predecessors! Mennell notes that the oldest late medieval Italian manuscripts all come from a single source text, and the earliest French cookbooks are all copied from the Italian sources.<sup>126</sup> Even the great 14<sup>th</sup>-century chef Guillaume Tirel, better known as Taillevent, whose efforts are said to mark “the beginning of cooking as we know it,”<sup>127</sup> was a pirate.<sup>128</sup> Things became particularly heated in the late 17<sup>th</sup> century as a series of famous chefs – La Varenne, Nicholas de Bonnefons, Pierre de Lune, Jean Ribou, L.S.R., and Massialot – successively touted their own originality, denounced the efforts of their predecessors, and then copied mercilessly from them. In 1733, Vincent La Chapelle opened his significantly titled *The Modern Cook* with this:

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<sup>123</sup> WILLAN, *supra* note 18, at 103.

<sup>124</sup> See CONSTRUCTION OF AUTHORSHIP, *supra* note 54.

<sup>125</sup> Dr. Johnson was willing to grant women a certain technical ability, but he did not believe they could create innovative recipes: “women can spin very well, but they cannot make a good book of cookery.” *Quoted in* WILLAN, *supra* note 18, at 99.

<sup>126</sup> MENNELL, *supra* note 103, at 49.

<sup>127</sup> WILLAN, *supra* note 18, at 9

<sup>128</sup> Mennell says of his famous cookbook, “Yet the celebrated *Viandier* was by no means a collection of original dishes invented by Taillevent; it is rather a compilation of dishes gathered from earlier sources.” MENNELL, *supra* note 103, at 50.

A cook of genius will invent new delicacies to please the palates of those for whom he is to labor, his art, like all others, being subject to change... The treatise of cookery [by Massialot] having been written so many years since, is not proper for present practice. ... [W]ho will take the trouble to compare that piece with mine will find them entirely different. I may be so bold as to assert that I have not borrowed a single circumstance in the ensuing treatise from any author, the whole being the results of my own practice and experience.<sup>129</sup>

This statement encouraged scholars Philip and Mary Hyman to actually compare the two treatises. While they do detect some significant advances in La Chapelle's work, they also discovered that 480 of the 1476 recipes in his book were plagiarized directly from Massialot.<sup>130</sup> Such tactics are not the preserve of the French, and they do not belong exclusively to the distant past. The first American cookbook, Amelia Simmons's *American Cookery* was copied and reprinted numerous times under different covers for decades.<sup>131</sup> The *Scribner* case suggests that the practice had not stopped by the late 19<sup>th</sup> century.<sup>132</sup>

This behavior suggests a serious 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>133</sup> Although chefs' patrons encouraged them to invent fabulous dishes

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<sup>129</sup> Quoted in *id.* at 76-77.

<sup>130</sup> *Id.* at 77.

<sup>131</sup> See WILLAN, *supra* note 18, at 133.

<sup>132</sup> Although all arts experience a certain degree of piracy, it would be difficult to imagine a book of poems or songs where a third of them were direct copies from the artist's teacher.

<sup>133</sup> The tension is particularly apparent in the dishes of chefs like Mario Batali of, *inter alia*, Babbo, Lupa, and Del Posto in New York, who pride themselves on preparing "authentic" regional dishes the way "grandma" would while also serving highly inventive dishes that "grandma" might not recognize, never mind eat. For example, Batali's website proclaims, "People should think there are grandmothers in the back preparing their dinner," and then asserts that Babbo "redefines and reinvents the principles of Italian cuisine for 21st century America."

to impress their guests, they, like all of us, favored certain dishes that they never tired of. And it would be just as impossible for a cookbook on the cuisine of southwestern France to leave out recipes for duck *confit* and *cassoulet* as it would be for each cookbook author to invent a new version of those dishes. Thus, while creativity was the stated goal, a considerable degree of borrowing has had to be tolerated.<sup>134</sup> Furthermore, there is reason to believe that culinary success was measured differently than success in literature, painting, and music. Although the culinary texts often include fierce denunciations of borrowers as plagiarists,<sup>135</sup> the regularity of large-scale borrowing throughout the history of cooking suggests that the development of norms about authorship and originality may have been different for the culinary arts than, say, for literature.<sup>136</sup> While literary authors had solidified a norm (if not a practice) of individual creative composition by the late 18<sup>th</sup> - and early 19<sup>th</sup> centuries,<sup>137</sup> cuisine seems to have held on to a

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New dishes seem to arrive daily.” Mario Batali Restaurants, available at <http://www.mariobatali.com/restaurants.htm>.

<sup>134</sup> For an excellent discussion of the value of authenticity in American law and culture, see SCAFIDI, *supra* note 54, at 54-66. She writes, “The rhetoric of authenticity performs much the same social function as property ownership, placing the claimant group in a position superior to all others with respect to the item in question.” *Id.* at 54.

<sup>135</sup> Willan quotes a poem at the beginning of Ann Cook’s 1760 *Professed Cookery* accusing rival Hannah Glasse of plagiarism:

She steals from ev’ry Author to her Book,  
Infamously branding the pillag’d Cook,  
With Trick, Booby, Juggler, Legerdemain

WILLAN, *supra* note 18, at 99.

<sup>136</sup> As Woodmansee argues, the conception of the solitary literary genius introducing “a new element into the intellectual universe” is both of fairly late vintage and never entirely descriptive of literary practices. Martha Woodmansee, *On the Author Effect: Recovering Collectivity, in THE CONSTRUCTION OF AUTHORSHIP*, 50 (Martha Woodmansee & Peter Jaszi, eds. 1994). The quote is from Wordsworth.

<sup>137</sup> Woodmansee writes, “The notion that the writer is a special participant in the [book] production process—the only one worthy of attention—is of recent provenience. It is a by-product of the Romantic notion that significant writers break altogether with tradition to create something utterly new, unique—in a word, ‘original.’” *Id.*

process of “serial collaboration”<sup>138</sup> based on minor modifications to canonical recipes into the 20<sup>th</sup> century and perhaps up to the development of French *Nouvelle Cuisine* in the 1970s.<sup>139</sup>

In summary, a number of factors have contributed to cuisine’s delayed recognition as an original and expressive enterprise and thus to its current status in copyright law. The sense of taste has been consistently denigrated by philosophers for the low quality of information it provides and for its threatening relationship to sensuous bodily delights. Anglo-American culture has been particularly hostile to the pleasures of table, associating them with gluttonous over-consumption and trying to limit cuisine to its fundamentally nutritive components. Cooks have not fared better than their products. Until the 19<sup>th</sup> century, cooks were anonymous servants toiling in unhealthy conditions or, perhaps worse for cuisine’s status as an art, women. And with their apparently rampant plagiarism, chefs have done little historically to help their cause. When copying is the rule rather than the exception, a Romantic copyright law would be understandably reluctant to get involved.<sup>140</sup>

### III. Sharing Food, Sharing Culture: What to do About Copyrighting Recipes

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<sup>138</sup> The phrase is Peter Jaszi’s. See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP*, 50 (Martha Woodmansee & Peter Jaszi, eds. 1994).

<sup>139</sup> Throughout at least the era of Careme and Escoffier, chefs seem to have received as much praise for their ability to recreate the dishes in the culinary canon as for adding to it. Subsequent historical research should be able to illuminate the precise timing of the rise of Romantic conceptions of authorship in cuisine. As yet, however, much writing on the history of cooking is patently historicist, only devoted to showing which chefs made substantial improvements over their predecessors. See e.g. JEAN FRANCOIS REVEL, *CUISINE AND CULTURE* (Helen R. Lane, trans., 1982).

<sup>140</sup> As Jaszi writes, “At base...the law is not so much systematically hostile to works that do not fit the individualistic model of Romantic ‘authorship’ as it is uncomprehending of them. Such works are marginalized or become literally invisible within the prevailing ideological framework of discourse in copyright...” Jaszi, *supra* note 138, at 38.

In an article such as this, after analyzing the case law and exploring the history behind it, it remains to the author to suggest the appropriate way forward for courts and legislatures.

### **A. The Goals of Copyright Law**

Copyright law is grounded on three constitutional imperatives: 1) the promotion of learning (“the progress of science”); 2) securing the author’s right to profit from a work (“exclusive right”); and 3) enhancing the public domain (“limited times”).<sup>141</sup> These goals are met, at least in theory, by granting the author a monopoly on publishing (and sometimes performing) the work for a limited time in exchange for allowing the work to enter the public domain at the end of the statutory period.<sup>142</sup> According to what Kal Raustiala and Chris Sprigman term the “orthodox justification,” copyright law encourages innovation by protecting the intellectual investments of authors against the stifling effects of free-riding copiers.<sup>143</sup> In deciding whether to extend copyright protection to recipes, then, we should consider whether these goals would be met.

Granting monopolies to chefs in their culinary creations could encourage the growth of the public domain, but it is impossible to tell by how much. Although some chefs would keep their recipes secret, as the folks at Coca-Cola and Kentucky Fried Chicken do,<sup>144</sup> many chefs

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<sup>141</sup> See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 783 (1989).

<sup>142</sup> This exchange is known as copyright’s “bargain.” See *id.* at 790.

<sup>143</sup> Raustiala & Sprigman, *supra* note 6, at 2.

<sup>144</sup> These companies, and many other members of the food and beverage industry, rely on the protections of trade secret law to prevent copiers. The Uniform Trade Secrets Act defines a trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique, or process that; (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the

would publish their recipes and eventually see them enter the public domain at the termination of the statutory period. Of course, in the current state of non-protection, all recipes are available for use by anyone who pleases, so the public domain would only be meaningfully enlarged if some chefs who would otherwise keep their recipes secret would consent to publishing them in return for copyright protection.

Determining whether expanding copyright protection to cover recipes would promote learning and secure benefits to authors is even less clear. In their work on intellectual property in fashion design, Raustiala and Sprigman note that the fashion industry remains innovative and economically healthy despite a lack of IP protection and a high incidence of piracy.<sup>145</sup> They call this situation a “low-IP equilibrium.”<sup>146</sup> Beyond this equilibrium, they even suggest that the *lack* of IP protection may be responsible for the high degree of innovation in fashion design – the so-called “piracy paradox” of their title. It is difficult to say whether the specific reasons they describe for fashion’s stability<sup>147</sup> are applicable to the culinary world, but modern cuisine seems both highly innovative (see the creations of the so-called “molecular gastronomists” like Homaro Cantu (Moto – Chicago), Grant Achatz (Alinea – Chicago), Heston Blumenthal (The Fat Duck – London), and Ferran Adria (El Bulli – Spain)) and well-capitalized.<sup>148</sup> Accordingly, it is difficult to see how copyrighting recipes would prove a boon for either culinary innovation or the

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subject of efforts that are reasonable under the circumstances to maintain its secrecy.  
UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 438 (1990).

<sup>145</sup> Raustiala & Sprigman, *supra* note 6, at 12.

<sup>146</sup> *Id.*

<sup>147</sup> These reasons include “induced obsolescence” and “anchoring.” *Id.* at 34-51.

<sup>148</sup> According to the National Restaurant Association, “Restaurant-industry sales are forecast to advance 5.1% in 2006 and equal 4% of the U.S. gross domestic product.” Nat. Restaurant Assoc. 2006 Restaurant Fact Sheet, available at [http://www.restaurant.org/research/ind\\_glance.cfm](http://www.restaurant.org/research/ind_glance.cfm). Annual food and drink sales at restaurants in 2006 are projected at \$511.1 billion – more than \$200 billion over 1996 figures. *Id.*

restaurant industry's economic success.<sup>149</sup> In fact, it is possible that innovation would actually decrease if copyrights in recipes extended beyond just publishing the recipes to actually performing the dishes. Following the analogy to music, it would seem that any copyright in a dish would have to entail an exclusive right to perform the dish publicly,<sup>150</sup> thereby dissuading other chefs from experimenting with the dish for fear of running foul of the law.

It also seems unlikely that individual chefs will be much improved were they to receive copyrights in their recipes. As I will explore shortly, most chefs would not prosecute their rights if they had them, if for no other reason than that the time and money would distract from their work. To the extent that suits were filed for copyright infringement of recipes, they would likely be similar to the ones at issue in *Scribner*, *Fargo Merchantile*, and *Meredith*, i.e., on behalf of large publishing houses who own the rights to the recipes contained in cookbooks. Moreover, chefs could find themselves in trouble with their own publishers and restaurant owners if they sell the rights to the recipes to them. As Chef Keller asks, "If I've written a new cookbook, of course, the books are owned by the publishers who have copywritten [sic] them. ... So how do I use the recipe in another way, because the book is copywritten? Do I have to call up my publisher to get permission to use a recipe that I told them to put in the cookbook?"<sup>151</sup> Licensing schemes could be developed to bypass some of these fairly uncomplicated issues, but chefs could find themselves in a awkward position with any variety of third parties whom they may have

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<sup>149</sup> History has shown that our culture values the culinary arts enough to support them even without intellectual property protection.

<sup>150</sup> Section 106 of the Copyright Act grants the owners of copyrights "the exclusive rights to...in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. §106(4). It seems plausible that if copyright protection were extended to recipes, chefs would have both the exclusive right to publish those recipes in cookbooks and the exclusive right to perform them publicly. Home cooks would not be prohibited from using the recipes, but fellow professionals would not be able to do so.

<sup>151</sup> Keller Int. *supra* note 75.

dealt with in the past and since had a falling out. From the foregoing, it seems that the only parties likely to benefit from copyright protection for recipes are cookbook publishers, a group not mentioned in copyright law's bargain between authors and the public.<sup>152</sup>

## **B. A Culture of Sharing and Non-Legal Norms**

Beyond these economic and public policy arguments against extending copyright protection to cuisine, a number of cultural factors unique to the culinary world augur against monopolies in food. As mentioned above, many chefs would be unlikely to enforce their IP rights against pirates both because it would often be too costly and time-consuming and also because of a certain "culture of hospitality" that chefs seem to share.<sup>153</sup> In my interviews with chefs, they each expressed an idea about sharing and hospitality that was in conflict with the ownership of dishes. As Chef Keller said, "We're in the hospitality industry. We're innately hospitable, so why wouldn't you want to share? I share my restaurant and my food."<sup>154</sup> He continued, "There's a hospitality gene that we have as chefs that makes us want to share what we do."<sup>155</sup> Chef Van Aken notes that "Most chefs are sharing and caring individuals that tolerate quite a bit,"<sup>156</sup> and Chef Trotter locates the feeling more broadly: "[Cooking] is about caring for and loving the foodstuffs you're working with and caring for and loving the people you are

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<sup>152</sup> Jaszi notes that the Romantic concept of authorship has historically served the interests of book publishers rather well despite their absence from constitutional consideration. Jaszi, *supra* note 138, at 34. According to the American Booksellers Association, book sales on "Cooking/Crafts" books increased over 22% between 1991 and 1998. *See* Am. Booksellers Assoc., Category Share of Consumer Purchases of Adult Books: The U.S., Calendar 1991-1998, available at <http://www.bookweb.org/research/stats/387.html>.

<sup>153</sup> Historian of cooks Michael Symons notes that "So many of the most basic culinary actions, such as slicing, stirring, and spooning out, are plainly distributive." SYMONS, *supra* note 102, at 121. He concludes that a cook's "central task is sharing." *Id.* at 128.

<sup>154</sup> Keller *Int.*, *supra* note 75.

<sup>155</sup> *Id.*

<sup>156</sup> Van Aken email, *supra* note 57.

cooking for. Preparing great-tasting, nutritious food merely stems from the desire that is present in each of us to do something truly special for family, friends, and even those we may not yet be acquainted with.”<sup>157</sup> The “hospitality gene” stems partly from the nature of the work these chefs do and partly from the nature of the practical education they received,<sup>158</sup> and it makes it difficult for these chefs to exclude others from using their creations. Chef Keller seemed the most uncomfortable with the concept of “owning” his recipes:

Look at the [salmon] cornets for example, which is something that I’ve been doing for fifteen years. Where did it really come from? Did I really invent it? Did I create it? Or was it an inspiration from an ice cream cone that I just looked at differently? ... Do I have the right to say that this is mine and nobody else’s? I don’t know. ... What happens to my salmon cornet if they copyright it? Does somebody have to get my permission to use it? Does somebody have to pay me royalties? ... I kind of have a problem with that. I really do.<sup>159</sup>

The other chefs seemed fine with the idea of other chefs using their recipes as long as they were acknowledged. Chef Van Aken claims, “I write cookbooks and teach classes so folks *will* use my recipes. I am quite happy when a layperson uses my recipes and I would also be just as happy, maybe more so, if a professional were to PROVIDED that they gave credit in some way

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<sup>157</sup> TROTTER, *supra* note 71, at 12-15.

<sup>158</sup> Chef Keller says, “I share my restaurant and my food. Even transmitting that to my staff. It’s as important or more important to give them the philosophies and culture as it is the repertoire, the techniques, the knowledge to go out and do a better job than me. Progress is being able to give somebody something that allows them to continue in their career and reach even higher goals. From my point of view that’s one of the definitions of success – having a legacy that helps people reach their goals and, at the same time, give people memories that are coming to your restaurant.” Keller Int., *supra* note 75.

<sup>159</sup> *Id.*

shape or form.”<sup>160</sup> Chef Trotter seemed pleased as long as his priority was acknowledged: “I honestly don’t really care [if other chefs create or publish my recipes]. We did it first. It’s our point of view. I think people know what’s up. ... I wish I had a nickel for every time somebody cooked one of these recipes, but you can’t do it that way. ... I can’t get caught up about who might copy what we do. We’re already on to the next thing.” Chef Cantu was content to see other chefs use his recipes as long as they did not employ his patented gastronomic technologies without a license.<sup>161</sup>

Chef Dufresne, one of the chefs whose dishes were copied in the incident recounted at the beginning of this article, enjoys the open collaboration he has with other chefs, and he is pleased to see his culinary ideas gaining circulation, as long as others do not merely copy him. He explains:

There is nothing wrong with him taking those techniques and making them his own. That’s the best thing I can do is come up with a technique and have somebody else use it. That means I’ve contributed somehow. It means I’ve done something. That’s all we can hope for is to make a difference. By people taking a concept that me and my team developed and then using it is some way of ensuring some sort of legacy. It’s a documented form of contribution I’ve made. It feels good.<sup>162</sup>

Interestingly, he detects an increased secrecy among chefs eyeing their intellectual property rights, and he is saddened by the threat to the open exchange of ideas.<sup>163</sup>

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<sup>160</sup> Van Aken email, *supra* note 57 (emphasis in original).

<sup>161</sup> Cantu Int., *supra* note 64.

<sup>162</sup> Dufresne Int., *supra* note 80.

<sup>163</sup> *Id.* He told me, “It ultimately makes me sad the way things are going. I’m saddened by it. I like the exchange of ideas and the back and forth. But what’s happening is that people are becoming more reticent to talk and share, and I don’t think that’s good for the movement.” *Id.* He continued:

More than just a certain feeling about sharing and hospitality these responses point to another reason why copyrighting recipes would be inappropriate because unnecessary, i.e., the considerable power of non-legal norms to assign credit to innovators and blame to plagiarists.<sup>164</sup> Culinary history has long had a custom of attributing a new recipe to the chef who created it, and this practice remains in force today. Aspiring chefs are taught to respect the rights of other chefs when using their recipes,<sup>165</sup> and the International Association of Culinary Professionals publishes a “Code of Ethics” that requires members to “pledge to... [r]espect the intellectual property rights of others and not knowingly use or appropriate to [their] own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition.”<sup>166</sup>

In a study similar to my own, Emmanuelle Fauchart and Eric von Hippel interviewed accomplished French chefs to ascertain whether a norm-based IP system exists in the lacuna left

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I don't espouse the point of view of some of my fellow chefs of non-disclosure, signing documents, and not sharing ideas and not disclosing what you're doing. Maybe they're going to get patents and make a lot of money and retire wealthy beyond their imagination and I'm just going to be a fool. Because for me it's much more interesting to share ideas and move along collectively than to try to each do it all on our own.

*Id.*

<sup>164</sup> On law and social norms, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); and Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

<sup>165</sup> I interviewed two Associate Deans of Culinary Arts at the prestigious Culinary Institute of America (CIA) in Hyde Park, NY, and they both suggested that they teach students the values of honoring mentors and attributing assistance. The CIA, like most academic institutions, also has a formal policy outlining the rules about plagiarism, attribution, and original work. Interview with Eve Felder, Assoc. Dean for Culinary Arts, CIA (Aug. 7, 2006); Interview with Greg Fatigati, Assoc. Dean for Culinary Arts, CIA (Aug. 7, 2006).

<sup>166</sup> International Association of Culinary Professionals, IACP Code of Professional Ethics, available at <http://www.iacp.com/displaycommon.cfm?an=1&subarticlenbr=4>.

by positive law.<sup>167</sup> Their research indicates the existence of at least three social norms that protect chefs' IP interests: 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."<sup>168</sup> Norms against plagiarism and in favor of attribution seem to function vibrantly in the closely-knit culinary realm where the esteem of one's peers and the opinions of diners work to both dissuade rampant copying and promote true innovation.<sup>169</sup> Fauchert and von Hippel note that because of their speed and reduced cost, norms-based systems may be more efficient than law-based approaches to culinary intellectual property.<sup>170</sup> The community of chefs, media, and gourmards establish the

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<sup>167</sup> Emmanuelle Fauchert & Eric von Hippel, *Norms-Based Intellectual Property Systems: the case of French chefs*, MIT Sloan School of Management Working Paper No. 4576-06 (Jan. 2006).

<sup>168</sup> *Id.* at 3-4. The authors also found that chefs rarely attempted to secure what little legal protection might be available for their work. *Id.* at 15. This supports my suggestion that a broader norm of sharing and hospitality may inform chefs' ideas about ownership of recipes generally.

<sup>169</sup> On plagiarism and the "norm of attribution," see Stuart Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L. J. 167 (2002). Green notes, "The concept of plagiarism is embedded within the context of a complex set of social norms. . . . The desire for esteem produces a norm that I shall refer to as the 'norm of attribution.' According to this norm, words and ideas may be copied if and only if the copier attributes them to their originator or author." *Id.* at 174. He continues:

Those who violate . . . the norm of attribution by committing plagiarism risk, in the first instance, the disesteem of their peers. A poet, scholar, historian, novelist, or filmmaker who is exposed as a plagiarist will suffer the disapprobation of precisely those colleagues whose opinion he must value. Such a sanction is particularly appropriate because the plagiarist is denied exactly the social good that his unattributed copying is intended to elicit—namely, the esteem of his peers and the benefits that flow from such esteem, such as academic credit, prestige, and financial reward.

*Id.* at 196.

<sup>170</sup> See Fauchert & von Hippel, *supra* note 167, at 25-27. Of course, norms-based systems do have limits that law-based systems do not, including the ability to demand monetary payment from violators. *Id.* at 27.

limits of appropriate behavior, and because most chefs covet this community's approval, sanctions are highly effective.<sup>171</sup> As in fashion, some plagiarists may get away with passing off a stolen dish to unknowledgeable buyers usually at the low end of the quality spectrum, but the circle of gastronomic cognoscenti know to whom credit for the dish should go. Especially in the Internet age, pirates are unlikely to last long before being "outed" and discredited by the innumerable culinary blogs and forums that grace the web. The story that opened this article supports this belief.<sup>172</sup>

#### **IV. Conclusion**

The cases and commentary reviewed in Part I come to the conclusion that recipes are not copyrightable, and by the end of Part III, I have reached the same conclusion. We have reached this conclusion, however, in very distinct ways. According to the Nimmer and the appellate courts, recipes are uncopyrightable because they lack the required original expression. They reach this conclusion by isolating the list of ingredients at the beginning of modern recipes from the directions for combining ingredients that follow. The former they call uncopyrightable "statements of fact" and the latter merely processes or procedures. In doing so, they make two conceptual mistakes. First, they focus on recipes that are already within the culinary public domain, and second, they mistake the recipe for the work of authorship itself, i.e., the dish. If courts shifted their focus to original dishes like "Oysters and Pearls," and if they understood the

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<sup>171</sup> If any of the above reasons for not extending the copyright monopoly to recipes were to change, i.e., if the economic health of the industry diminished, if chefs would be more likely to use their rights, or if the strength of social norms could not prevent copying, my conclusions will have to be revised. As yet, however, no substantial reason exists for amending the law.

<sup>172</sup> As a matter of historical and theoretical interest, further research should consider whether these norms developed by necessity to compensate for a lack of IP protection or whether they pre-date the lack of protection and can explain why greater protection has rarely been sought. Presumably, it is a combination of the two.

appropriate relationship between the dish (work of authorship), the recipe (means of fixation), and the cooking technique (process or procedure), cuisine would begin to look a lot more like other copyrightable subject matter. To be copyrightable, however, the dishes must be sufficiently expressive and not merely functional combinations of tastes. Each of the chefs interviewed believed that cuisine is capable of expression about both various culinary relationships of balance, harmony, and texture and also about wider social and cultural phenomena like place, history, and the emotions. Accordingly, nothing in the doctrine of copyright law would bar the recognition of dishes as protectable works of authorship.

Having reached this *legal* conclusion, I stepped back from doctrinal considerations to suggest possible reasons why recipes had not previously been accepted as copyrightable subject matter. Part II included a brief tour through the place of “taste” in the history of aesthetics and a discussion of the role of puritanism in shaping cultural ideas about food and food production. It continued with an examination of the social status of cooks, distinguishing them from other producers who gained prestige earlier.

Finally, Part III returned to the legal realm to consider whether granting copyright protection to chefs would further the goals of copyright law. It seems that creating monopolies in dishes would not substantially reward innovators, promote knowledge, or enlarge the public domain, and that doing so might, in fact, have the opposite effect. Lastly, I turned to the opinions of chefs about the “culture of hospitality” that shapes the culinary profession. Notions of sharing among chefs indicate that they do not treat recipes as their own “intellectual property” and that they are happy to share them with others if appropriate norms of attribution are followed. Accordingly, the goals of copyright law will be best achieved through the system of

informal professional norms already in place and not through an extension of the copyright statute.