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On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?

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ON THE LEGAL CONSEQUENCES OF SAUCES: SHOULD
THOMAS KELLER'S RECIPES BE *PER SE* COPYRIGHTABLE?¹

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-Savarin²

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¹ As noted below, the appropriate subject of copyright analysis is the dish and not the recipe. The recipe describes the manner of reproducing the dish and thus serves as a method of “fixing” the dish. The authorities, however, all speak of the copyrightability of recipes, so this terminology is used in the Introduction. Dishes and recipes will be distinguished throughout the remainder of the article.

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* (1822). The last half of the title is a bad joke.

² JEAN ANTHELME BRILLAT-SAVARIN, *THE PHYSIOLOGY OF TASTE* 279 (M.F.K. Fisher

INTRODUCTION

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.³ The *egullet.org* 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*.⁴ The maelstrom that ensued filled more than fifteen web pages and included chefs, restaurateurs, and gourmards from around the globe debating copyrights, plagiarism, attribution, and culinary norms.⁵

Food has recently been described as existing in one of copyright's "negative spaces," i.e., a realm of creativity not covered by copyright law.⁶ 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. The two most recent Federal Circuit decisions on the copyrightability of recipes, as well as copyright law's primary authority, *Nimmer*, have proven hostile to the notion that creators of recipes may obtain monopolies over their works.⁷ Given the size of the food and beverage industry and the amount of money potentially at stake,⁸ litigation in this area is likely about to spike.

This article will take up the issue of the copyrightability of

trans., 1971).

³ Posting of Sam Mason ("WillieLee") to eG Forums, <http://forums.egullet.org/index.php?showtopic=84505&st=0&p=1149563&#entry1149563> (Mar. 14, 2006, 13:23). See also posting of the *Daily Gullet* staff to eG Forums, <http://forums.egullet.org/index.php?showtopic=84800&hl=> (Mar. 20, 2006, 00:44).

⁴ Posting of the *Daily Gullet* staff to eG Forums, <http://forums.egullet.org/index.php?showtopic=84800&hl=> (Mar. 20, 2006, 00:44). 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.

⁵ This author's contributions can be found under the screen name "Gastro Nomos." For an account of the controversy, see Katy McLaughlin, *That Melon Tenderloin Looks Awfully Familiar . . .*, WALL ST. J., June 24, 2006, at P1.

⁶ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, VA. L. REV. (forthcoming).

⁷ See *Lambing v. Godiva Chocolatier*, 142 F.3d 434 (6th Cir. 1998); *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.18[I] (2005).

⁸ Restaurant industry sales for 2006 are projected at over \$511 billion, representing four percent of the U.S. gross domestic product. See National Restaurant Association, 2006 Restaurant Industry Fact Sheet, http://www.restaurant.org/research/ind_glance.cfm (last visited Oct. 9, 2006).

dishes, by way of their fixation in recipes, in earnest.⁹ If successful, this article will accomplish three goals: 1) it will critique and correct the current analysis of recipes' copyrightability by courts and commentators; 2) it will use the history of recipes, cooks, and cooking to illuminate some of copyright law's hidden preferences and inconsistencies; and 3) it will explore the power of social norms to regulate conduct that is not governed by the law and thus obviate the need for legal intervention.

Part I of this article will analyze the current state of copyright law in the United States. It will show that, contrary to the arguments of the authorities mentioned above, there are no doctrinal reasons why the creators of original dishes 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 dish creation and musical composition through interviews with some of America's leading chefs, including Thomas Keller (chef and owner of The French Laundry, Per Se, and Bouchon), Charlie Trotter (chef and owner of Charlie Trotter's), Rick Tramonto (Executive Chef at Tru), Homaro Cantu (Executive Chef at Moto), Norman Van Aken (Norman's), and Wylie Dufresne (chef and part owner of WD-50). If we recognize the dish as an expressive medium and the recipe as its means of fixation, there would be little or no doctrinal limit on extending copyright to dishes. Backing away from purely doctrinal considerations, Part II of this article will attempt to describe why, at the beginning of the twenty-first century, when copyrights are being granted to all sorts of products and media, dishes 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

⁹ This article is not concerned 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 (2006); see also Matthew J. Harris, Note, *Julia Child's Excellent Adventure: A Metaphysical Journey into the Copyrightability of Recipes* (unpublished note, on file with author). As yet, work on the copyrightability of recipes is incredibly sparse. The subject is mentioned briefly in Raustiala & Sprigman, *supra* note 6, and in Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 45 (1994). The only article-length treatment of food and copyright law is Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991). This Note, dating from before the recent appellate court opinions on the subject, claims that "[e]dible art forms' should be protected intellectual property." *Id.* at 1523. In email correspondence, the author has suggested that the Note was meant to be ironic. The first footnote, however, states that "[t]his Note is not a spoof. . . . The author respectfully suggests that . . . this proposal and its justification are both logical and beneficial. . . ." *Id.* at n.a1. Individual readers will have to judge.

cultural history of cooks and cooking.¹⁰ Finally, Part III will return to the legal realm to argue that an expansion of copyright protection to dishes, while doctrinally feasible, is neither necessary nor appropriate to the Constitution's goal of "promot[ing] the Progress of Science."¹¹ 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 the force of involuntary norms about copying, plagiarism, and attribution. Thus, the answer to the question posed in the article's title must be "No," but not for the reasons suggested by the authorities.

II. 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 United States 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 original works that promote Science) and patentable subject matter (those that promote the useful arts).¹²

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."¹³ 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

¹⁰ In addition to providing doctrinal analysis of the subject, this article also stands at the 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).

¹¹ U.S. CONST. art. I, § 8, cl. 8.

¹² This topic will be explored *infra* Part II.B.

¹³ 17 U.S.C. § 102(a).

sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”¹⁴ Recipes are not included in the list. Section 102(b) follows up this list of copyrightable works of authorship with the limitation that “[i]n 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.”¹⁵ The Code of Federal Regulations clarifies this limitation, noting that among the “examples of works not subject to copyright” is a “(a) . . . mere listing of ingredients or contents.”¹⁶ The United States Copyright Office has added its own limitations on copyrightable works of authorship, 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.¹⁷

None of these statements fully explains 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.¹⁸ Although the statutory law seems to leave room for copyrighting recipes, recent court decisions and commentators have taken the position that the statements of the authorities cited above drastically curtail the possibility of copyright protection for recipes.¹⁹ But it wasn’t always this way.

¹⁴ *Id.*

¹⁵ *Id.* § 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* Part II.B.

¹⁶ 37 C.F.R. § 202.1 (2006).

¹⁷ U.S. Copyright Office, Recipes, <http://www.copyright.gov/fls/fl122.html> (last visited Oct. 11, 2006).

¹⁸ 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 (see, e.g., Antonin Carême’s recipe 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 manner of listing quantities of ingredients followed 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.

¹⁹ As we will see, recipes are not entirely without protection under current copyright law. The Seventh Circuit has held that recipes that incorporate *literary* expressiveness in their list of directions may be amenable to copyright protection. *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 473 (7th Cir. 1996). This article, however, is concerned with whether *culinary* expressiveness, as embodied in barebones recipes, should be subject to copyright protection.

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."²⁰ 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."²¹ Neither the district court nor the United States Supreme Court overturned the finding of copyright infringement. The parties and the judges raised a number of issues,²² but none questioned the notion that the individual recipes were rightly 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."²³ 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.²⁴ In its decision, the court was willing to separate the label into distinct parts, the first containing the "fanciful emblem and printed matter" and the second containing recipes.²⁵ The court held that while the emblem was uncopyrightable as a "mere advertisement," the recipes were "of a different character."²⁶ The court further held that the recipes on the bottle label "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."²⁷ The court continued, "If printed on a single sheet, or as a booklet, these recipes could undoubtedly be copyrighted, and we see no reason

²⁰ *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 489-90. For some of the history of cookbooks, such as this one, see *infra* Part III.A.

²¹ *Belford*, 144 U.S. at 493.

²² 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 501-02.

²³ *Fargo Mercantile Co. v. Brechet & Richter, Co.*, 295 F. 823, 824 (8th Cir. 1924).

²⁴ *Id.* at 825.

²⁵ *Id.* at 828.

²⁶ *Id.*

²⁷ *Id.*

why this protection should be denied, simply because they are printed and used as a label.”²⁸ To the court, the recipes displayed the necessary artistic originality to qualify for copyright protection.²⁹

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

This liberal attitude towards recipe copyrights did not last. Melville Nimmer’s treatise on copyright law seems to have put a lid on the issue of the copyrightability of recipes even before a court had done so.³⁰ 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.”³¹ Relying on section 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.”³² Following Nimmer’s view, 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).³³ Under this reasoning, 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 piemaking.³⁴

In the most extensive discussion of the copyrightability of recipes by any court, the Seventh Circuit relied on Nimmer in

²⁸ *Id.*

²⁹ 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 *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 482 (7th Cir. 1996). Judge Booth never mentions the originality of the compilation or anything about the organization of the recipes. For him, the recipes are copyrightable in their own right as “original compositions.” *Fargo Mercantile*, 295 F. at 828.

³⁰ The section existed in the original 1963 edition of *Nimmer on Copyright* at section 37.9. All citations will be to the current edition.

³¹ 1 NIMMER, *supra* note 7, § 2.18[I].

³² *Id.*

³³ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“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.”).

³⁴ On the uncopyrightability of facts, see *id.* at 347. 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 and report a particular fact has not created the fact; he or she has merely discovered its existence.

Id. (quoting 1 NIMMER, *supra* note 7, § 2.11[A]).

vacating a district court's finding of infringement of the plaintiff's *Discover Dannon* cookbook.³⁵ Although the court withheld judgment on whether recipes are “*per se* amenable to copyright protection,”³⁶ it concluded:

The recipes involved in this case comprise the 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.³⁷

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.’”³⁸ Agreeing with Nimmer, the Seventh Circuit held that the recipes were either statements of preexisting facts, i.e., “the ingredients necessary to the preparation of a particular dish,”³⁹ or they were procedures or processes, excluded from copyright protection by section 102(b) of the Copyright Act.⁴⁰ To some extent, the *Meredith* court did soften its ruling that recipes are not copyrightable 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 spiritual nature of cooking or reminiscences they associate with the wafting odors of certain dishes in various stages

³⁵ *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996).

³⁶ *Id.* at 480 (“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.”).

³⁷ *Id.*

³⁸ *Id.* at 482 (quoting *Feist*, 499 U.S. at 345).

³⁹ *Id.* at 480.

⁴⁰ *Id.* at 480-81. The court takes the odd course of splitting up the recipes and analyzing the lists of ingredients separately from the directions for their preparation. This allows it to hold that the former are uncopyrightable as “mere listings of ingredients” while the latter are uncopyrightable as a “procedure, process, [or] system.” *Id.* (quoting 37 C.F.R. § 202.1 (2006); 17 U.S.C. § 102(b) (2006)). By failing to appreciate the status of the recipe as a whole, the court's analysis ignores the appropriate questions. The important question is whether a dish, as embodied in a recipe, constitutes a protectable work of authorship. Instead of analyzing the dish for its expressiveness, the court analyzes the directions for its creation, i.e., its method of fixation. *See infra* Part II.C. If applied to the copyrightability of music, the court's analysis would find that the list of instruments in a musical score amounts to a “statement of facts” and that the directions for playing those instruments are merely a procedure or process. *Meredith*, 88 F.3d at 480. In determining expressiveness, the court must consider the work—the dish or the piece of music—and not its method of fixation (which will inevitably be a statement of the facts that make up the work). In determining the copyrightability of a particular dish or piece of music, it may be necessary to isolate its individual components to determine if they are sufficiently original, but when analyzing a category of works (like music or recipes) the court must consider these works as a whole.

of preparation.”⁴¹ While correct, this statement is distracting and adds nothing to the question of the *per se* copyrightability of recipes.⁴²

The Sixth Circuit’s 1998 opinion in *Lambing v. Godiva Chocolatier* is the most recent statement by an appellate court on the subject.⁴³ Lambing sued Godiva Chocolatier 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.⁴⁴ The court was brief in its rejection of her claim. Citing *Meredith*, the court held that recipes are not copyrightable, and stated, “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).”⁴⁵

The recent authorities on the copyrightability of recipes make two points about recipes that limit the extent of available legal protection. First, *Godiva*, *Meredith*, and *Nimmer* all stand for the proposition that the recipes for dishes are merely statements of preexisting facts that do not owe their creation to the author claiming the copyright.⁴⁶ According to this view, the contents of recipes are dictated by functional necessities, such as the requirements that an 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

⁴¹ *Meredith*, 88 F.3d at 481.

⁴² Of course, an author who added original literary expression to a recipe would receive a copyright in that literary expression, just as an author of a telephone book who included artistic drawings in the margins could receive a copyright in the drawings. The court’s statement tells us nothing, however, of whether a recipe, standing alone, would be subject to copyright. A recent district court opinion suggests how distracting a comment it was. Judge Kent of the Southern District of Texas allowed a case of recipe copyright infringement to proceed beyond summary judgment. *Barbour v. Head*, 178 F. Supp. 2d 758 (S.D. Tex. 2001). Although Judge Kent rejects *Meredith* as controlling authority, he finds in favor of the plaintiff because, “[u]nlike 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.” *Id.* at 762), the judge implies that recipes without clever commentary such as “Great with all your meats!” would “represent mere unprotected facts.” *Id.* at 764. Thus, although the plaintiff wins, the analysis remains the same.

⁴³ *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 U.S. App. LEXIS 1983 (6th Cir. Feb. 6, 1998).

⁴⁴ *Id.* at *2.

⁴⁵ *Id.* at *3.

⁴⁶ *Id.* (“The identification of ingredients necessary for the preparation of food is a statement of facts.”); *Meredith*, 88 F.3d at 480 (“The identification of ingredients necessary for the preparation of each dish is a statement of facts.”); 1 NIMMER, *supra* note 7, § 2.18[I] (“[T]he content of recipes are clearly dictated by functional considerations, and therefore may be said to lack the required element of originality . . .”).

by copyright jurisprudence. Second, each of these authorities views recipes as functional processes or directions for creating a known product.⁴⁷ 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.⁴⁸ This Part will describe these 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 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*.⁴⁹ The *Meredith* court makes the same mistake when it notes that the recipes "were at some time original."⁵⁰ The appropriate subject matter for considering whether recipes are expressive works of authorship 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,⁵¹ or "*Pêches Melba*" at the time that it was created by Auguste Escoffier in the early 1890's.⁵² Most dishes at most restaurants are based on recipes in what one may call the Culinary Public Domain; in other words, these recipes have been produced for years, if not for generations, and their original creators are unknown. Restatements of recipes for these dishes do not deserve copyright protection. When the

⁴⁷ *Godiva*, 1998 U.S. App. LEXIS 1983, at *3 ("[R]ecipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C. § 102(b)"); *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'"); 1 NIMMER, *supra* note 7, § 2.18[I] (quoting 17 U.S.C. § 102(b) (2006)).

⁴⁸ 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.

⁴⁹ 1 NIMMER, *supra* note 7, § 2.18[I].

⁵⁰ *Meredith*, 88 F.3d at 481.

⁵¹ See THOMAS KELLER, *THE FRENCH LAUNDRY COOKBOOK* 23 (1999).

⁵² See WILLAN, *supra* note 18, at 200, 210. The dish is made with fresh peaches, raspberry puree, and vanilla ice cream. *Id.*

focus shifts from standard dishes to the more obviously innovative dishes like “Oysters and Pearls” that have no gastronomic precedent, it makes no sense to suggest that these innovations 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.⁵³ As the Supreme Court explains in *Feist Publications Inc. v. Rural Telephone Service Co.*, “The distinction [between works of authorship and facts] is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”⁵⁴ Chef Keller, on the other hand, did not “discover” “Oysters and Pearls”; he created it.⁵⁵

The second conceptual mistake made by Nimmer and the circuit courts is to confuse the work of authorship with 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, more clearly, that the required instruments and notes for a symphony constitute a process.⁵⁶ In truth, 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, the recipe, the drawing and the musical notation allow otherwise ephemeral media to be “perceived, reproduced, or otherwise communicated.”⁵⁷ 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.”⁵⁸ To be clear, then, the copyright would exist in the work of authorship that is the

⁵³ 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.

⁵⁴ *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

⁵⁵ 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.

⁵⁶ See Pollack, *supra* note 9, at 1499. Pollack notes that the copyright of a cake “is directly parallel to the current status of music under the Act.” *Id.*

⁵⁷ 17 U.S.C. § 102(a) (2006).

⁵⁸ PRICILLA PARKHURST FERGUSON, ACCOUNTING FOR TASTE: THE TRIUMPH OF FRENCH CUISINE 20 (2004).

particular “dish” with the recipe serving merely to fulfill the statutory requirement of fixation.⁵⁹

Certainly procedures and processes are used in cooking, and, according to the doctrine of *Baker v. Selden*,⁶⁰ codified in section 102(b), these procedures and processes are uncopyrightable.⁶¹ Culinary procedures, however, are the basic techniques of cooking—ingredient preparation, grilling, baking, *sous vide*,⁶² etc.—and not the individual dishes 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.”⁶³ 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.⁶⁴ Similarly, culinary dishes are not proscribed “descriptions of an art” but instead are particular creative expressions “addressed to the taste” and produced using the techniques of the art of cooking.⁶⁵ No one may receive a monopoly on a particular method of cooking—unless he or she secures a patent on the method as Homaro Cantu has done⁶⁶—but nothing in this part of the *Baker* doctrine prevents anyone from securing a copyright in a dish made with particular techniques, so long as it meets the other statutory requirements.⁶⁷ Thus, there is

⁵⁹ As Chef Norman Van Aken remarks: “A recipe is a map. The dish is the real place of arrival.” E-mail from Norman Van Aken, Executive Chef-Owner, Norman’s, to Christopher J. Buccafusco (Aug. 3, 2006) (on file with author). See Pollack, *supra* note 9, at 1505. Pollack suggests that a dish “exists for more than a ‘transitory duration,’” but she also notes that the recipe serves to “fix” the dish in the same way that a musical score serves to fix a concerto. *Id.*

⁶⁰ *Baker v. Selden*, 101 U.S. 99 (1879).

⁶¹ 17 U.S.C. § 102(b).

⁶² *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 Wikipedia, *Sous-vide*, http://en.wikipedia.org/wiki/Sous_vide (last visited Oct. 15, 2006).

⁶³ *Baker*, 101 U.S. at 102. The Court also mentions treatises on the composition and use of medicines, the construction and use of ploughs, watches, churns, and the mixture and application of colors for painting. *Id.*

⁶⁴ 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).

⁶⁵ *Baker*, 101 U.S. at 105.

⁶⁶ See Cantu Designs, <http://www.cantudesigns.com> (last visited Oct. 9 2006). Perhaps Chef Cantu’s most famous culinary inventions are natural chemical inks that taste like food when printed on edible paper. 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, Ill. (Mar. 8, 2006).

⁶⁷ 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. This objection is dealt with *infra* notes 98-109 and accompanying text.

no problem by way of the prohibitions against copyrighting either statements of facts or procedures and processes that prevents dishes from being copyrighted.

It remains to be determined whether individual dishes 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, dish creation expresses anything.⁶⁸ While writing about cuisine, as about music, is as hard as “dancing about architecture,”⁶⁹ an analogy to music will help to clarify. Although people may doubt that dishes are capable of emotional expression, neither courts of law nor 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.⁷⁰ On the other hand, people are less certain about expression through food, and the courts have been hostile to the possibility.⁷¹

To determine whether chefs do in fact use dishes as an expressive medium, I asked chefs their opinions on the matter.⁷² 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

⁶⁸ 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.” SCAFIDI, *supra* note 55, at x.

⁶⁹ 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*, <http://home.pacifier.com/~ascott/they/tamildaa.htm> (last visited Oct. 15, 2006).

⁷⁰ Perhaps the best example of a piece of “music,” or at least a series of coordinated tones, lacking expressive content would be a police siren, where the choice of the tones is dictated by purely functional considerations about which sounds are most likely to cause alarm.

⁷¹ See *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (“The recipes contain no expressive elaboration . . .”); *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 U.S. App. LEXIS 1983, at *3 (6th Cir. Feb. 6, 1998) (“There is no expressive element deserving copyright protection in each listing.”).

⁷² This is more or less a random sampling of chefs’ opinions, and they must be taken for whatever they are worth. Nonetheless, these chefs represent the elite of their profession, and their ideas are supported by the opinions of others outside 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, 339 (2005).

spiritual.”⁷³ 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.”⁷⁴ Both Chef Tramonto and Chef Trotter compare culinary expressiveness to musical expressiveness, although Chef Trotter prefers a comparison to jazz while Chef Tramonto prefers one to classic rock.⁷⁵

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 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 school books like [Auguste] Escoffier and Larousse [Gastronomique] or even old school New American stuff like Alice Waters, James Beard, and Julia Child, [I’m] just in awe. They were fearless. They had convictions. They understood.”⁷⁶ 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.⁷⁷ Chef Thomas Keller of The French Laundry and Bouchon in Napa Valley, and Per Se in Manhattan, says that he tastes the various combinations of 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.⁷⁸ Chef Trotter recalls his

⁷³ Telephone Interview with Rick Tramonto, Chef-Owner, TRU (Mar. 2, 2006).

⁷⁴ CHARLIE TROTTER, THE KITCHEN SESSIONS WITH CHARLIE TROTTER 12 (1999).

⁷⁵ Chef Trotter explained: “It’s like music. You can play the trumpet and . . . be decent at it, or you could somehow be inspired . . . and you might become an artist. The same may exist in the world of cooking.” Interview with Charlie Trotter, Chef-Owner, Charlie Trotter’s Restaurant, in Chicago, Ill. (Jan. 25, 2006). According to Chef Tramonto:

When you put on a Miles Davis piece or a Santana piece, and you’re just listening to this guy riff on this guitar or riff on this horn . . . it gives you goose bumps. You’re feeling the emotions through that spirit of music. It’s just like when you get a great dish in front of you if you’re eating in some restaurant. . . . If I put a piece of foie gras in front of somebody, it’s like, “Okay, it’s food. What’s the big deal?” but you sit them in [the] front row of an incredible symphony concert, [and] some people are falling asleep and some people are on the edge of their seats.

Telephone Interview with Rick Tramonto, *supra* note 73. 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*, CHI. TRIB., Mar. 29, 2005, at 1.

⁷⁶ Telephone Interview with Rick Tramonto, *supra* note 73.

⁷⁷ *Id.*

⁷⁸ Keller 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

days as a young culinarian reading old cookbooks. He “prepared [the dishes] in [his] mind” in order to gain an understanding of what the chefs were trying to do.⁷⁹ Chef Van Aken also reads others’ recipes in this fashion.⁸⁰

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,” that is, traditional harmonies of components, flavors, and textures. He offers his famous “Salmon Cornets”⁸¹ *amuse bouche* as an example:

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.⁸²

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.⁸³ Chef Van Aken uses traditional recipes and sauces as “major chords . . . in a dish that I would be making into a whole song.”⁸⁴ For many chefs today, dishes are about expressing relationships with the environment by highlighting seasonal products and thus exploring the boundaries imposed by Mother Nature.⁸⁵ 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

taste the components together in my mind so I knew that it would work.
Telephone Interview with Thomas Keller, Chef-Owner, The French Laundry, Per Se, and Bouchon (Mar. 20, 2006).

⁷⁹ Interview with Charlie Trotter, *supra* note 75.

⁸⁰ Van Aken 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!

E-mail from Norman Van Aken, *supra* note 59.

⁸¹ See KELLER, *supra* note 50, at 6-7.

⁸² Telephone Interview with Thomas Keller, *supra* note 78.

⁸³ Interview with Wylie Dufresne, Chef, WD-50 (Aug. 8, 2006). 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.*

⁸⁴ E-mail from Norman Van Aken, *supra* note 59.

⁸⁵ Telephone Interview with Rick Tramonto, *supra* note 73.

investing it with some imaginary or unlikely couplings in the task.⁸⁶

The various chefs interviewed for this article also take 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.⁸⁷ He explains: “It starts out just having fun. That’s really what you’ve got to do. If you get all these people in a room and you say, ‘We want to make this wheatgrass here taste like cotton candy,’ that’s fun.”⁸⁸ Chef Tramonto describes his dishes as “fine dining with a sense of humor.”⁸⁹ Chef Van Aken is inspired by the wider culture and history of his restaurant’s locale.⁹⁰ Chefs also make considerable use of both literary and verbal puns, as in Chef Keller’s “Oysters and Pearls.” When asked where the dish’s name came from, Chef Keller replied: “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.”⁹¹

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. 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.”⁹² 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.⁹³ Beyond simple

⁸⁶ E-mail from Norman Van Aken, *supra* note 59.

⁸⁷ 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 but practically unimaginable. With courses such as the sushi cartoon, lobster with freshly squeezed orange soda, beef with 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.

Press Release, Moto Restaurant, http://motorestaurant.com/press/MOTOPressKit12_05.pdf (last visited Oct. 29, 2006).

⁸⁸ Interview with Homaro Cantu, *supra* note 66.

⁸⁹ Telephone Interview with Rick Tramonto, *supra* note 73.

⁹⁰ E-mail from Norman Van Aken, *supra* note 59.

⁹¹ Telephone Interview with Thomas Keller, *supra* note 78.

⁹² KORSMEYER, *supra* note 68, at 4.

⁹³ *Id.* at 118-20. 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 were 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.

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.”⁹⁴ 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.⁹⁵

Chefs use dishes to express a wide variety of sensations, emotions, and ideas, but copyright law will only provide protection if what they are trying to express is “separable” from the dishes’ functional attributes. In an attempt to distinguish those creative works that rightly fall under the purview of copyright law from those within the province of design patents, courts and Congress have developed the “useful articles” doctrine.⁹⁶ Following Congress’s requirement that otherwise useful articles can only obtain copyright protection if they incorporate “features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article,”⁹⁷ federal courts have developed a number of tests for whether a useful article’s aesthetic features are “physically” or “conceptually” separable from its function. To the extent that food provides diners with nutrients, dishes are useful articles subject to the requirements of the separability doctrine.

A battery of tests exists for determining “conceptual separability,”⁹⁸ each with its own adherents and detractors.⁹⁹

⁹⁴ *Id.* at 136. Pollack also notes the symbolic function of certain food items. Pollack, *supra* note 9, at 1494.

⁹⁵ KORSMEYER, *supra* note 68, at 137. 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. at 33.

⁹⁶ For a history of the useful articles doctrine, see *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 919-31 (7th Cir. 2004); John B. Fowles, *The Utility of a Bright-Line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in Leicester v. Warner Bros.*, 12 *UCLA ENT. L. REV.* 301 (2005).

⁹⁷ 17 U.S.C. § 101 (2006).

⁹⁸ As noted, to pass the useful articles test, aesthetic features must be either physically separable or conceptually separable. See *Pivot Point Int’l*, 372 F.3d at 922 n.8. Because

Under any of the tests, however, one can imagine dishes whose aesthetic features are separable from their nutritive components. In upholding copyrights of ornamental belt buckles, the Second Circuit in *Kieselstein-Cord v. Accessories by Pearl, Inc.* noted that the buckles were primarily ornamental and only secondarily functional.¹⁰⁰ Similarly, in many dishes, the caloric content of the food is secondary to the chef's creative expression. The primary purpose of the chef creating the dish or the diner consuming it may have very little to do with filling the belly. In the case of *Carol Barnhart v. Economy Cover Corp.*, the Second Circuit distinguished the ornamental buckles from artistic models of human torsos used to display clothes.¹⁰¹ According to the court:

What distinguishes those buckles from the Barnhart forms is that the ornamented surfaces of the buckles were not in any respect required by their utilitarian functions; the artistic and aesthetic features could thus be conceived of as having been added to, or superimposed upon, an otherwise utilitarian article. The unique artistic design was wholly unnecessary to performance of the utilitarian function.¹⁰²

Certain dishes are more like the buckles than the models of torsos in that the addition of the chef's creative expression to the dish, like the ornamentation added to a bare-bones belt buckle, is not necessary to serve the food's nutritive function. In order to function as clothes models, the court notes, the torsos must resemble human torsos, but in order to provide proteins, fats, and carbohydrates, dishes need not assume any particular forms.¹⁰³ Dissenting in *Barnhart*, Judge Jon Newman proposed his own more liberal test of conceptual separability, which would ask whether the article "stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function."¹⁰⁴ Many dishes would pass this test, as consumers are readily able to consider a dish's taste and expressiveness separately from any nutrition that they may derive from it.¹⁰⁵

Other tests to discern copyright separability have been

there are few if any dishes whose aesthetic components are physically separable from the food that makes them up, I will only focus on the tests for conceptual separability.

⁹⁹ In his article, Fowles lists each of the tests and the arguments for and against them. Fowles, *supra* note 96, at 312-29.

¹⁰⁰ *Kieselstein Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

¹⁰¹ *Carol Barnhart v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985).

¹⁰² *Id.* at 419.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 422 (Newman, J., dissenting). Judge Newman continues, "I think the requisite 'separateness' exists whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously." *Id.*

¹⁰⁵ *Id.*

advanced by copyright scholars,¹⁰⁶ and some of them have been adopted by courts.¹⁰⁷ Most recently, the Seventh Circuit has adopted a “process-oriented approach” that asks whether the design elements reflect the author’s “artistic judgment exercised independently of functional influences.”¹⁰⁸ Like the facial features of the mannequin involved in that case, the recipes for many dishes are determined by creative expressions independent of most functional influences. A chef might, for example, decide to pair collard greens with *sous vide* chicken to suggest a relationship between traditional and modern ways of eating without ever considering the dish’s nutritional value. While a number of dishes might fail any one of these tests, other dishes are imaginable whose aesthetic merits are separable from the basic need to provide calories. A case by case analysis would, of course, be necessary, but none of the tests for conceptual separability would serve as a *per se* bar to copyrighting dishes.¹⁰⁹

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 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.¹¹⁰ Accordingly, if courts were to realize that 1) the proper area for analysis of the copyrightability of dishes is new culinary creations and not articulations of those dishes already in the culinary public domain; 2) the work of authorship is the dish and that the recipe serves only as the means of fixation and communication; and 3) dishes are capable of being imbued

¹⁰⁶ See Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741, 746-47 (1983) (proposing a sliding scale based on whether the work was influenced by utilitarian considerations); Shira Perlmutter, *Conceptual Separability and Copyright in the Design of Useful Articles*, 37 J. COPYRIGHT SOC’Y OF THE U.S.A. 339, 377 (1990) (adapting Denicola’s test into a two-pronged test which allows copyrightability if an observer can detect both aesthetic and utilitarian functions).

¹⁰⁷ See, e.g., *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (suggesting Denicola’s test).

¹⁰⁸ *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 931 (quoting *Brandir*, 834 F.2d at 1145).

¹⁰⁹ 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. Congress could simply modify or do away with the limitation for recipes as it has for architecture. *Id.*

¹¹⁰ Because I argue in Part III that extending copyright protection is not warranted, I have skipped over mechanical issues that would emerge if dishes were to receive copyright protection, such as determining which dishes are in the public domain, whether there is substantial similarity between two dishes, and whether individual dishes are or are not expressive. The burden of having to answer these questions alone might give any judge pause before holding a dish copyrightable.

with layers of meaning and expression, nothing in copyright jurisprudence stands in the way of granting chefs copyrights in their gastronomic works.¹¹¹

III. A BRIEF FORAY INTO THE CULTURAL HISTORY OF TASTE, COOKS, AND COOKING

If, as this article has argued, there are no doctrinal impediments to recognizing dishes 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,¹¹² but this Part will focus on explanations based on the cultural history of taste, cooks, and cooking. By suggesting reasons why dishes have not been granted copyright protection, this Part will elucidate some of the hidden preferences at the foundation of American copyright law.¹¹³

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, because an unusual and diverse class of artisans, professionals, and laity produce dishes, the last section of this Part 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

¹¹¹ 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. sirens or 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.” 17 U.S.C. § 102 (2006). Of course, if my recommendations in Part III are followed, none of this will be necessary.

¹¹² See Raustiala & Sprigman, *supra* note 6.

¹¹³ For other such work, see SCAFIDI, *supra* note 55, at 1; THE CONSTRUCTION OF AUTHORSHIP, *supra* note 55.

importance.¹¹⁴ Vision and hearing seem to provide the most and best information about the outside world. Moreover, for philosophers dating 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.¹¹⁵ 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, that are felt as sensations in the body.”¹¹⁶

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 hepatic senses (touch, smell, and taste) continually remind philosophers of their bodies and distract them from more important matters. What is worse is that, 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.¹¹⁷

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 a history of the

¹¹⁴ See KORSMEYER, *supra* note 68, at 2. For an excellent discussion of food in modern philosophy, see Pollack, *supra* note 9, at 1494-97.

¹¹⁵ 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.” KORSMEYER, *supra* note 68, at 25.

¹¹⁶ *Id.* at 3.

¹¹⁷ *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. 1-2.

development of this metaphorical usage,¹¹⁸ but it is worth noting that, despite the adoption of the gustatory metaphor, objects of literal taste generally have been excluded from discussions of aesthetics.¹¹⁹ With the notable exception of some eighteenth and nineteenth 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.¹²⁰

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 seven¹²¹—and, indeed, some cultural historians have ascribed the lowly status of cuisine among the arts, to the puritanical religious attitudes towards food.¹²² Historian Stephen Mennell explains, “food, like sex, is something necessary, but definitely not to be enjoyed by the virtuous”¹²³ 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 to base human desires.¹²⁴ This belief appears in much of the puritanical writing on food and cooking that deplores the cook’s use of fancy sauces

¹¹⁸ See *id.* at 38-45.

¹¹⁹ 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 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.

¹²⁰ *Id.*

¹²¹ 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 pride but gluttony” *Id.*

¹²² See STEPHEN MENNELL, ALL MANNERS OF FOOD 104-08 (1996). “Puritan” is used here in the lower case to indicate that it refers not to a specific group of seventeenth and eighteenth century religious groups but to a more pervasive attitude about life and religion. *Id.* at 106.

¹²³ *Id.*

¹²⁴ 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 to 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.

to encourage diners to eat beyond satiety.¹²⁵

These attitudes towards food show themselves in a particular genre of cookbook that emerged in sixteenth century England and remained popular into the twentieth 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 Huswifes Jewell* (1585) and Gervase Markham’s *The English Hus-Wife* (1615) were unique for the time.¹²⁶ 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.”¹²⁷ In addition to recipes, these manuals, like the nineteenth 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 their producers were blamed for society’s ills. Since, as Korsmeyer writes, “only vision and hearing are traditionally considered genuine aesthetic senses,”¹²⁸ it is not surprising that only those objects that present themselves to the eyes and ears are considered “works of art.”¹²⁹ 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.¹³⁰

¹²⁵ SYMONS, *supra* note 121, 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.

¹²⁶ See MENNELL, *supra* note 122, at 84.

¹²⁷ *Id.*

¹²⁸ KORSMEYER, *supra* note 68, at 3.

¹²⁹ *Id.*

¹³⁰ 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 Entrees,” the array of offerings is enough to send

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 nineteenth century English gourmand Launcelot Sturgeon described:

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.¹³¹

While many painters and poets had established themselves as individual artists during the Renaissance, with musical composers soon to follow,¹³² cooks, as Sturgeon’s quote makes plain, remained faceless servants in dark, dirty kitchens. Throughout the eighteenth century, cooks were mostly anonymous practitioners of low status who, if they were lucky, would occasionally see their names attached to dishes or be praised as artisans. Not until the nineteenth century, with the rise to fame of French chefs like Antonin Carême and Auguste Escoffier, did recognition of individual culinary creativity begin to broaden.¹³³

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

anyone rushing to the fridge. Some highlights are “Chucky Chili Dip,” “Crunchy Tuna Waldorf Salad,” “Spicy Bean Tostadas,” and for dessert, “Chocolate Fruit Torte.” As inspiration, Meredith offers pictorial representations of the final products upon which the yogurt devotee may longingly fixate.

Publ’ns Int’l, Ltd. v. Meredith Corp., 88 F.3d 473, 475 (7th Cir. 1996).

¹³¹ MENNELL, *supra* note 122, at 144 (quoting STURGEON, *supra* note 1, at 192).

¹³² 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); Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005).

¹³³ See MENNELL, *supra* note 122, at 68.

text. Composers increasingly became self-aware subjects.”¹³⁴ The same is true for chefs and cuisine. 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.¹³⁵

Early manuscript cookbooks were written in the vulgar languages rather than in Latin, and they did not circulate far beyond individual kitchens.¹³⁶ 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,”¹³⁷ some eventually gaining the status of Carême and Escoffier.¹³⁸ Carroll also notes that musicians were generally musical performers first and composers second, if at all.¹³⁹ He adds that “for many composers, publication of their compositions functioned as a means for increasing demand for their public performances.”¹⁴⁰ 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 further cemented by the fact that women, either in their capacity as housewives or as domestic servants, performed the cooking in most households.¹⁴¹ As we have seen, the most popular cookbooks in nineteenth

¹³⁴ Carroll, *Whose Music Is It Anyway?*, *supra* note 132, at 1477.

¹³⁵ FERGUSON, *supra* note 58, at 92.

¹³⁶ MENNELL, *supra* note 122, 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.*

¹³⁷ *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.

¹³⁸ See WILLAN, *supra* note 18, at 143, 199.

¹³⁹ Carroll, *Whose Music Is It Anyway?*, *supra* note 132, at 1410.

¹⁴⁰ Carroll, *The Struggle for Music Copyright*, *supra* note 132, at 927.

¹⁴¹ MENNELL, *supra* note 122, at 201.

century England and America were those intended for housewives and devoted to practical cookery and “domestic economy.”¹⁴² Accordingly, it would have been asking quite a lot of Victorians—or even of twenty-first century copyright law, mired as it is in Romantic notions of originality, creation, and authorship¹⁴³—to recognize the expressive potential of such a dismal affair as food preparation.¹⁴⁴

Perhaps the most interesting aspect of culinary history that may relate to the status of dishes in copyright law is the peculiar tension between originality, borrowing, and plagiarism in the publication of cookbooks. From the earliest cookery manuscripts of the thirteenth century to the 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.¹⁴⁵ Even the great fourteenth century chef Guillaume Tirel, better known as Taillevent, whose efforts are said to mark “the beginning of cooking as we know it . . . ,”¹⁴⁶ was a pirate.¹⁴⁷ Things became particularly heated in the late seventeenth 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 statement:

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

¹⁴² WILLAN, *supra* note 18, at 103.

¹⁴³ See THE CONSTRUCTION OF AUTHORSHIP, *supra* note 55.

¹⁴⁴ Dr. Johnson was willing to grant women a certain technical ability, but he did not believe they could create innovative recipes. “[W]omen can spin very well, but they cannot make a good book of cookery.” SAMUEL JOHNSON, JAMES BOSWELL, & CHRISTOPHER HIBBERT, *THE LIFE OF SAMUEL JOHNSON* 246 (Penguin Books 1979) (1791).

¹⁴⁵ MENNELL, *supra* note 122, at 49.

¹⁴⁶ WILLAN, *supra* note 18, at 9.

¹⁴⁷ 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 122, at 50.

whole being the results of my own practice and experience.¹⁴⁸

This statement encouraged scholars Philip and Mary Hyman to actually compare the treatises of La Chapelle and Massialot. While some significant advances in La Chapelle's work can be detected, it appears that 480 of the 1476 recipes in his book were plagiarized directly from Massialot.¹⁴⁹ 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.¹⁵⁰ The *Scribner* case suggests that the practice had not stopped by the late nineteenth century.¹⁵¹

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.¹⁵² Although the chefs' patrons encouraged those chefs to invent fabulous dishes to impress their guests, the patrons, like all of us, favored certain dishes of which they never tired. 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 of cooking, a considerable degree of borrowing had to be tolerated.¹⁵³ 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,¹⁵⁴ the regularity of large-scale borrowing throughout

¹⁴⁸ *Id.* at 76-77 (quoting VINCENT LA CHAPELLE, *THE MODERN COOK* (1733)).

¹⁴⁹ *Id.* at 77.

¹⁵⁰ See WILLAN, *supra* note 18, at 133.

¹⁵¹ 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.

¹⁵² 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. New dishes seem to arrive daily." Mario Batali Restaurants, <http://www.mariobatali.com/restaurants.htm> (last visited Oct. 15, 2006).

¹⁵³ For an excellent discussion of the value of authenticity in American law and culture, see SCAFIDI, *supra* note 55, 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.

¹⁵⁴ 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 . . .*

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.¹⁵⁵ While literary authors had solidified a norm (if not a practice) of individual creative composition by the late eighteenth and early nineteenth centuries,¹⁵⁶ cuisine seems to have held on to a process of “serial collaboration”¹⁵⁷ based on minor modifications to canonical recipes into the twentieth century and perhaps up to the development of French *Nouvelle Cuisine* in the 1970s.¹⁵⁸

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, as well as for its threatening relationship to sensuous bodily delights. Anglo-American culture has been particularly hostile to the pleasures of the 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 nineteenth century, cooks were either 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.¹⁵⁹

WILLAN, *supra* note 18, at 99.

¹⁵⁵ 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, *supra* note 55, at 16 (quoting William Wordsworth, *Essay, Supplementary to the Preface* (1815)).

¹⁵⁶ 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.*

¹⁵⁷ The phrase is Peter Jaszi’s. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 55, at 50.

¹⁵⁸ Throughout at least the era of Carême 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, *CULTURE AND CUISINE: A JOURNEY THROUGH THE HISTORY OF FOOD* (Helen R. Lane trans., 1982).

¹⁵⁹ 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 157, at 38.

IV. SHARING FOOD, SHARING CULTURE: WHAT TO DO ABOUT COPYRIGHTING DISHES

In an article such as this, after analyzing the case law and exploring the history behind it, it remains for 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”).¹⁶⁰ 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.¹⁶¹ 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.¹⁶² In deciding whether to extend copyright protection to dishes, then, we should consider whether these goals would be met.

Granting intellectual property rights 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 companies such as Coca-Cola and Kentucky Fried Chicken do,¹⁶³ many chefs 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 dishes 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

¹⁶⁰ U.S. CONST. art. I, § 8, cl. 8; see also L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 783 (1989).

¹⁶¹ This exchange is known as copyright’s “bargain.” Patterson & Joyce, *supra* note 160, at 790 n.236.

¹⁶² Raustiala & Sprigman, *supra* note 6.

¹⁶³ 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: (i) 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 (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Unif. Trade Secrets Act § 1, 14 U.L.A. 438 (1985).

secret would consent to publishing them in return for copyright protection.

Determining whether expanding copyright protection to cover dishes would promote learning and secure benefits to the recipe 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.¹⁶⁴ They call this a “low-IP equilibrium” situation.¹⁶⁵ 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 stability¹⁶⁶ 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.¹⁶⁷ Accordingly, it is difficult to see how copyrighting dishes would prove a boon for either culinary innovation or the restaurant industry’s economic success.¹⁶⁸ In fact, it is possible that innovation would actually decrease if copyrights in dishes 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,¹⁶⁹ thereby dissuading other chefs from experimenting with the dish for fear of running foul of the law.

It also seems unlikely that the status of individual chefs would be much improved were they to receive copyrights in their

¹⁶⁴ Raustiala & Sprigman, *supra* note 6.

¹⁶⁵ *Id.*

¹⁶⁶ These reasons include “induced obsolescence” and “anchoring.” *Id.*

¹⁶⁷ According to a recent report of 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.” National Restaurant Association, 2006 Restaurant Industry Fact Sheet, <http://www.restaurant.org/pdfs/research/2006factsheet.pdf> (last visited Oct. 15, 2006). Annual food and drink sales at restaurants in 2006 are projected at \$511.1 billion—more than \$200 billion over 1996 figures. *Id.*

¹⁶⁸ History has shown that our culture values the culinary arts enough to support them even without intellectual property protection.

¹⁶⁹ Section 106 of the Copyright Act grants the owners of copyrights “the exclusive right[. . .] 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 (2006). 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.

culinary creations. As this article 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 required to pursue these prosecutions would distract the chefs from their work. To the extent that suits were to be filed for copyright infringement of dishes, they would likely be similar to the ones at issue in *Scribner*, *Fargo Merchantile*, and *Meredith*, where suits were brought by large publishing houses that 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 sold the rights to the recipes to them. As Chef Keller asks:

I've written two cookbooks. Of course, the books are owned by the publishers who have copywritten [sic] them. . . . So how do I then 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?¹⁷⁰

Licensing schemes could be developed to bypass some of these fairly uncomplicated issues, but chefs could find themselves in an awkward position with any variety of third parties with whom they may have dealt in the past and, since then, have had a falling out. From the foregoing, it seems that the only parties likely to benefit from copyright protection for dishes are cookbook publishers, a group not mentioned in copyright law's bargain between authors and the public.¹⁷¹

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 argue 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.¹⁷² In my interviews with chefs, they each expressed an idea about sharing

¹⁷⁰ Telephone Interview with Thomas Keller, *supra* note 78.

¹⁷¹ 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 157, at 34. According to the American Booksellers Association, sales of "Cooking/Crafts" books increased over twenty-two percent between 1991 and 1998. American Booksellers Association, BookWeb: Statistics: Category Share of Consumer Purchases of Adult Books: The U.S. Calendar 1991-1998, <http://www.bookweb.org/research/stats/387.html> (last visited Oct. 15, 2006).

¹⁷² Historian of cooks Michael Symons notes that "[s]o many of the most basic culinary actions, such as slicing, stirring and spooning out, are plainly distributive." SYMONS, *supra* note 121, at 121. He concludes that a cook's "central task is sharing." *Id.* at 128.

and hospitality that was in conflict with the idea of exclusive 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.”¹⁷³ He continued, “There’s a hospitality gene that we have as chefs that makes us want to share what we do.”¹⁷⁴ Chef Van Aken notes that “[m]ost chefs are sharing and caring individuals that tolerate quite a bit,”¹⁷⁵ 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 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.¹⁷⁶

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,¹⁷⁷ 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. 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.¹⁷⁸

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 shape or

¹⁷³ Telephone Interview with Thomas Keller, *supra* note 78.

¹⁷⁴ *Id.*

¹⁷⁵ E-mail from Norman Van Aken, *supra* note 59.

¹⁷⁶ TROTTER, *supra* note 74, at 12-15.

¹⁷⁷ Chef Keller says:

I share my restaurant [and] my food . . . even [with] my staff. It’s almost as important, sometimes more important, to be able to give them the philosophies and culture, the repertoire, the techniques, the knowledge for them to go out and do a better job than me. . . . True 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 true legacy that helps people reach their goals and, at the same time, gives people memories that are coming to your restaurant.

Telephone Interview with Thomas Keller, *supra* note 78.

¹⁷⁸ *Id.*

form.”¹⁷⁹ 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]. It doesn't bother me because we did it first and it's our point of view, and I think people know what's up. . . . I wish I had a nickel for every time somebody cooked one of these recipes at home, [but] you can't do it that way. . . . I can't get caught up about who might copy what we do because we're already on to the next thing.¹⁸⁰

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.¹⁸¹

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.¹⁸²

Interestingly, Chef Dufresne detects an increased secrecy among chefs eyeing their intellectual property rights, and he is saddened by the threat to the open exchange of ideas.¹⁸³

More than just a certain feeling about sharing and hospitality, these responses point to another reason why copyrighting dishes would be inappropriate and unnecessary—the availability and considerable power of non-legal norms to assign credit to

¹⁷⁹ E-mail from Norman Van Aken, *supra* note 59.

¹⁸⁰ Interview with Charlie Trotter, *supra* note 75.

¹⁸¹ Interview with Homaro Cantu, *supra* note 66.

¹⁸² Interview with Wylie Dufresne, *supra* note 83.

¹⁸³ *Id.* Chef Dufresne mourned:

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. . . . 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.

innovators and blame to plagiarists.¹⁸⁴ Culinary history has long had a custom of attributing a new dish 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.¹⁸⁵ 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.”¹⁸⁶

In a study similar to that of this article, Emmanuelle Fauchart and Eric von Hippel interviewed accomplished French chefs to ascertain whether a norm-based IP system exists in the lacuna left by positive law.¹⁸⁷ Fauchart and von Hippel’s 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.”¹⁸⁸ 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.¹⁸⁹ Fauchart and von Hippel note that because of

¹⁸⁴ For a discussion of law and social norms, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000). See also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

¹⁸⁵ 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. Telephone Interview with Eve Felder, Assoc. Dean for Culinary Arts, CIA, in Hyde Park, NY (Aug. 7, 2006); Telephone Interview with Greg Fatigati, Assoc. Dean for Culinary Arts, CIA, in Hyde Park, NY (Aug. 7, 2006).

¹⁸⁶ International Association of Culinary Professionals, IACP Code of Professional Ethics, <http://www.iacp.com/displaycommon.cfm?an=1&subarticlenbr=4> (last visited Oct. 15, 2006).

¹⁸⁷ Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* (MIT Sloan School of Management, Working Paper No. 4576-06), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781.

¹⁸⁸ *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.

¹⁸⁹ For a discussion of 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

their speed and reduced cost, norms-based systems may be more efficient than law-based approaches to culinary intellectual property.¹⁹⁰ The community of chefs, media, and gourmands establishes the limits of appropriate behavior, and, because most chefs covet this community's approval, sanctions are highly effective.¹⁹¹ 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.¹⁹² The story that opened this article supports this belief.¹⁹³

CONCLUSION

The cases and commentary reviewed in Part I come to the conclusion that recipes should not be copyrightable, and, by the end of Part III, I have reached a similar conclusion. We have reached this conclusion, however, in very distinct ways. According to 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,

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. Green 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 most values. 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.

¹⁹⁰ See Fauchart & von Hippel, *supra* note 187, at 25-27. Of course, law-based systems do have processes that norms-based systems do not, including the ability to demand monetary payment from violators. *Id.* at 27.

¹⁹¹ 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.

¹⁹² This is perhaps one of the rare instances where the Internet inhibits copying rather than promoting it.

¹⁹³ 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.

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—the dish. If courts shifted their focus to original dishes like “Oysters and Pearls,” and if they understood the appropriate relationship between the dish (the work of authorship), the recipe (the means of fixation), and the cooking technique (the 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 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 dishes 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.