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**PROTECTING CUISINE UNDER THE RUBRIC OF  
INTELLECTUAL PROPERTY LAW:  
SHOULD THE LAW PLAY A BIGGER ROLE IN THE KITCHEN?**

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I. Introduction

In June 2007, Rebecca Charles, chef-owner of Pearl Oyster Bar (“Pearl”) in New York City’s Greenwich Village, sued her former sous chef, Ed McFarland, now chef and part owner of Ed’s Lobster Bar in New York’s SoHo neighborhood.<sup>1</sup> In her complaint, Charles alleged that McFarland had pirated Pearl’s menu, recipes, dish presentations, décor, “look and feel,” all of which Charles believed amounted to a flagrant misappropriation of both her and Pearl’s intellectual property.<sup>2</sup> The detail that reportedly irritated Charles most was a dish on McFarland’s menu called “Ed’s Caesar.”<sup>3</sup> According to Charles, McFarland had copied her own Caesar salad recipe, made with English muffin croutons and a coddled egg dressing, which Charles maintained was a signature dish at Pearl.<sup>4</sup>

The culinary and restaurant industries billed Charles’s suit, which settled out of court on undisclosed terms in April 2008,<sup>5</sup> as among the first of its kind.<sup>6</sup> In the past, chefs and restaurateurs had invoked intellectual property concepts to defend particular aspects of their restaurants, but most had stopped short of filing suits, and few had attempted to argue intellectual property theft in such totality.<sup>7</sup> While Charles maintained that her case was about protecting her restaurant as a whole and not about laying claim to a type of food, her lawsuit

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1. See Complaint at 1:3, *Powerful Katinka, Inc. v. McFarland*, 2007 WL 2064059 (S.D.N.Y. 2007) (No. 07 CV 6036).

2. *Id.*

3. Pete Wells, *Chef Sues Over Intellectual Property (the Menu)*, N.Y. TIMES, June 27, 2007, at A1.

4. *Id.*

5. Pete Wells, *Chef’s Lawsuit Against a Former Assistant is Settled Out of Court*, N.Y. TIMES, Apr. 19, 2008, at B2.

6. Eater.com, *Pearl Oyster Bar v. Ed’s Lobster Bar: Day 2*, archived at <http://www.webcitation.org/5WIBtVS5n>.

7. See Wells, *supra* note 3.

sparked fierce debate in the culinary world, particularly with regard to intellectual property rights and cuisine itself.<sup>8</sup>

This Note explores intellectual property laws in the culinary arena and examines whether imitation of a chef's cuisine constitutes intellectual property theft. This Note will establish that intellectual property protections such as copyright, trademark and trade dress, do not encompass recipes and culinary creations, nor should they. Utilizing copyright and trademark laws to protect cuisine will hinder competition among chefs and restaurants, discourage creativity and innovation, and undermine the culinary industry's norm of sharing. An increase in such protections also will fail to enhance chefs' profits, enforcement will be difficult, and litigation will be costly. The Note will demonstrate that while patent law can protect highly innovative recipes and methods of food preparation, most chefs probably will not utilize the patent system because of its high costs and stringent patentability standards. In addition to well-established norms in the culinary community, existing legal protections such as trade secret law, private contracting and the imposition of fiduciary duties provide adequate safeguards for a chef's proprietary information.

Part I of this Note presents background information related to the issues discussed above, addressing the traditional culture of the culinary industry, the significance of the convergence of technology and cooking, and the growing interest in legal protection for culinary creations. Part II sets forth statutory and case law standards pertinent to the issue, discussing principles of copyright, trademark, trade dress, patent, and trade secret law. Part III of the Note analyzes the issues in light of the legal standards, traditions, culture and goals of the culinary industry. Ultimately, this Note explores the ramifications of extending intellectual property laws too far into the culinary world.

## II. Background

### A. Copycat Cuisine: A Frequent Occurrence?

Rebecca Charles is not the first chef-owner to have her culinary ideas allegedly ripped off.<sup>9</sup> In 2006, the eGullet Society for Culinary Arts & Letters ousted Australian chef Robin Wickens of Melbourne's Interlude for copying unique dishes from the menus of Alinea and wd~50, two high profile American restaurants.<sup>10</sup> Wickens admittedly copied the cuisine and the unusual methods

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8. See, e.g., Jason Krause, *When Can Chefs Sue Other Chefs? Defining legitimate legal claims in the restaurant world*, CHOW.COM, Sept. 4, 2007, archived at <http://www.webcitation.org/5W1CxyGMO>.

9. See, e.g., Pete Wells, *New Era of the Recipe Burglar*, FOOD & WINE, Nov. 2006 (discussing recent occurrences of "copycat" cuisine).

10. Daily Gullet Staff, *Sincerest Form, Interludes after midnight*, eGullet Society for Culinary Arts &

of preparation and presentation, rendering the original creations and the Interlude dishes indistinguishable.<sup>11</sup> eGullet also exposed another chef—one at the Mandarin Oriental Hotel’s Tapas Molecular Bar in Tokyo—who offered a tasting menu that was identical to that of Washington D.C.’s minibar, where he had previously worked.<sup>12</sup>

Incidents like these disconcert many chef-owners, who work in an intensely competitive business and want to protect their investments.<sup>13</sup> Chefs are not the only ones who want protection; their investors do too.<sup>14</sup> Many high profile chefs are now household names, and there is significant value in what they produce, so investors might be wise to demand intellectual property protections.<sup>15</sup> Some also fear a growing trend in which corporations copy the inventive techniques and culinary creations of local establishments and use them in franchising chains.<sup>16</sup> Homaru Cantu, chef and founder of Chicago’s moto restaurant, asserts that “food producers have always copied products from cutting edge restaurants. Why should we leave that money on the table for them?”<sup>17</sup> As competition and the cost of opening a restaurant continue to skyrocket, legal experts predict an increase in lawsuits similar to Charles’s as

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Letters (Mar. 20, 2006), archived at <http://www.webcitation.org/5WoICNQHh>; see also Rachel Gibson, *Is copying a fancy dish flattery?*, THE AGE, (MELBOURNE) April 1, 2006, archived at <http://www.webcitation.org/5WIKJ55gO>. Wickens, while visiting the United States, worked at Alinea for a week as a stagiere (unpaid intern) and dined at wd~50. Katy McLaughlin, *That Melon Tenderloin Looks Awfully Familiar...*, WALL ST. J., June 24, 2006, at P1. Note that chef-owners of Alinea (Grant Achatz) and wd~50 (Wylie Dufresne) did not sue Wickens, and Dufresne has been reluctant to criticize Wickens for copying the cuisine. Paul Lewis, *Can you copyright this?: That's the question raging in the food world this week after a chef in Australia was accused of copying the signature dish of a New York restaurant*, GUARDIAN (LONDON), Mar. 24, 2006, at 20.

11. See Wells, *supra* note 9; Lewis, *supra* note 10. Some of the dishes that Wickens copied were: sliced poached squab served in a beaker with two burning cinnamon sticks; smoked yogurt that tasted like bacon; and pureed prawns bound with transglutaminase pushed through a die to make noodles. *Id.* Wickens also copied unique presentation pieces such as glass votive candle holders and test tube beakers. See Daily Gullet Staff, *supra* note 10; Lewis, *supra* note 10; Gibson, *supra* note 10.

12. Steven A. Shaw, *The merit of preservation, further tales of culinary plagiarism*, eGullet Society for Culinary Arts & Letters (Apr. 6, 2006), archived at <http://www.webcitation.org/5WrJ1F2u4>; see also Wells, *supra* note 9. José Andrés, chef-owner of minibar, reportedly wanted the Mandarin Oriental to either pay him a licensing fee to serve the dishes or to change its menu. McLaughlin, *supra* note 10.

13. Wells, *supra* note 9. Today, because “one hit restaurant can mean multiple locations, television appearances and a line of cookware,” chefs are looking at their menus and restaurant concepts as intellectual property. McLaughlin, *supra* note 10.

14. Nichole Aksamit, *Chefs Guard Secret Ingredients of Success*, OMAHA WORLD HERALD, Sept. 19, 2007, at D1. (quoting Chicago patent attorney Charles Valauskas). Dufresne of wd~50 says he is “torn” because he “like[s] to share ideas but [is] being warned not to by patent attorneys and potential investors.” McLaughlin, *supra* note 10.

15. Aksamit, *supra* note 14.

16. Martha Neil, *Mixing IP With MMM*, 6 No. 19 ABA J. E-REPORT 3 (May 11, 2007); see also, e.g., Posting of Inventolux to eGullet Society for Culinary Arts & Letters (Mar. 20, 2006), *supra* note 10 (writing that “‘Molecular cuisine’ is breaking new ground. Every day there are new discoveries that major companies have not considered. Therefore those techniques are the ones that should be protected”).

17. Krause, *supra* note 8; see also Neil, *supra* note 16 (writing that the possibility of corporations capitalizing on Cantu’s culinary inventions has Cantu worried).

chef-owners begin to think more like chief executive officers.<sup>18</sup>

### B. Traditional Industry Culture and the Derivation of Dishes

The culinary industry generally views cooking as a derivative art.<sup>19</sup> Chefs work in an open-source model, drawing inspiration from a multitude of places, borrowing and expanding on fellow chefs' ideas and deriving new dishes from them.<sup>20</sup> Many chefs freely admit that they base their dishes on versions that they have previously seen or eaten.<sup>21</sup> In an open letter to London's *Guardian* newspaper, four renowned chefs wrote that "culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks."<sup>22</sup> Chef Nora Pouillon<sup>23</sup> echoes this sentiment, saying that she is flattered when someone passes along one of her recipes, and although it is nice to get credit, a recipe ultimately is something to share.<sup>24</sup> By nature, food people are generous and believe that much of the fun in food is in sharing it.<sup>25</sup> The International Association of Culinary Professionals' ethical guidelines require members to pledge that they will not knowingly use any recipe or intellectual property belonging to another for their own financial or professional advantage, but they also provide for use with proper recognition, further reflecting the industry's norm of sharing.<sup>26</sup>

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18. Neil, *supra* note 16.

19. See Gibson, *supra* note 10.

20. See Wells, *supra* note 9; Gibson, *supra* note 10; Mike Masnick, *Recipes: Shared and Improved on For Years...Now Targeted by Copyright Cops?*, TECHDIRT.COM, Oct. 19, 2007, archived at <http://www.webcitation.org/5WIDM2gfo> (discussing how individuals historically have been content, eager and willing to share recipes).

21. See, e.g., Joyce Gemperlein, *Can a Recipe Be Stolen?*, WASHINGTON POST, Jan. 4, 2006, at F1 (writing that one high profile chef freely admits she based her cherry clafoutis recipe on versions that she saw and ate as a child in Austria).

22. Ferran Adrià et al, *Statement on the "new cookery"*, GUARDIAN UNLIMITED, Dec. 10, 2006, archived at <http://www.webcitation.org/5WIDRSr3Z>; see also Gibson, *supra* note 10 (noting that Australian chef Guy Grossi acknowledges that derivation is a common theme among chefs).

23. Pouillon is a cookbook author and chef-owner of two Washington, D.C. restaurants, Nora and Asia Nora. StarChefs.com, Nora Pouillon, archived at <http://www.webcitation.org/5WIDVuwG9>.

24. Gemperlein, *supra* note 21.

25. Posting of Lydia to *Keep Recipes Free*, Megnut.com, (Oct. 10, 2006), archived at <http://www.webcitation.org/5WIENLXPk>.

26. International Association of Culinary Professionals, IACP Code of Professional Ethics, archived at <http://www.webcitation.org/5WIKb5OEZ>. The Association states that: (1) Where one obtains a recipe from another source and makes minor changes, but the recipe remains fairly intact, one should credit the source; (2) where one has made changes to a recipe, but the original essence still remains, one should indicate that the recipe is "adapted from" or "based on" another; and (3) where one has changed a recipe considerably, but still wants to indicate derivation from the original, one should indicate it as "loosely adapted from" or "inspired by" another recipe. *Id.* See also U.S. Personal Chef Association, Code of Ethics Part II, archived at <http://www.webcitation.org/5Ws1CTDv0> (stating in part, "I promise [...] to respect the intellectual property of my peers by not copying, reproducing, or in any other way utilizing their written or published materials as my own even when this work has not been explicitly protected by copyright, patent, etc.").

The role of apprenticeships and stagieres<sup>27</sup> in the industry also supports the idea that cooking is a shared art and one that is best handed down from one cook to another.<sup>28</sup> Professional cooking is viewed as a mentoring process whereby executive chefs teach their cooks everything they know—recipes and techniques—hoping that the cooks will successfully recreate the cuisine in order to keep a restaurant operating consistently.<sup>29</sup> The American Culinary Federation describes the goals of apprenticeship as gaining knowledge of the history, evolution and diversity of the culinary arts, practicing basic and advanced food preparation skills, and developing knowledge about food composition.<sup>30</sup> Apprentices are allowed and encouraged to carry their learned tools of the trade from job to job.<sup>31</sup> Essentially, they are taught to “pay it forward [and] spread the word.”<sup>32</sup>

### C. The Fusion of Cooking and Mad Science

The modern convergence of cooking and technology contributes to some chefs’ desires for increased intellectual property protections.<sup>33</sup> Today, a group of avant-garde chefs is creating novel cuisine using equipment, ingredients and processes traditionally reserved for science.<sup>34</sup> Sometimes termed “molecular gastronomy” (although many chefs do not favor this nomenclature), this increasingly popular style of cooking involves applying scientific techniques to the creation of food.<sup>35</sup> The techniques include using lasers, chemical powders, enzymes, and flash freezing to make unique foods such as jelled sweet potato

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27. Stagiare is a traditional industry practice in which chefs briefly visit other restaurants (as unpaid interns essentially), learn techniques, then leave and apply the techniques to their own restaurants and style of cuisine. Posting of nick.kokonas to eGullet Society for Culinary Arts & Letters (Mar. 20 2006), *supra* note 10. “The idea is to freely share information with others to promote the art and craft of cooking -- and move cuisine forward.” *Id.*

28. Chris Sherman, Hey! That Seafood Joint was my Idea, *St. Petersburg Times*, July 11, 2007 at 5E.

29. Posting of Bourdain to *Keep Recipes Free*, Megnut.com, (Oct. 11, 2006), *archived at* <http://www.webcitation.org/5WIENLXPk>.

30. American Culinary Federation, Education, Apprenticeships, *archived at* <http://www.webcitation.org/5WIPZ0HBr>.

31. Aksamit, *supra* note 14.

32. Amy Rosen, *Isn't that my tofu pillow of ham?*, MACLEANS.CA, June 19, 2006, *archived at* <http://webcitation.org/5WIEyMjNz>.

33. See Krause, *supra* note 8; Corby Kummer, *Part I: The Alchemist: A chef in Chicago wants to blow your mind*, 110 MIT TECH. REV. 62, Jan. 1, 2007.

34. Kummer, *supra* note 33. See also Wells, *supra* note 9; Sara Dickerman, *Make it New: How the pursuit of novelty has caused haute cuisine to go mass market*, SLATE, Jan. 28, 2004, *archived at* <http://www.webcitation.org/5WIKw0l5Q>. Included in the group of so-called “molecular gastronomists” are: Grant Achatz (Alinea; Chicago), Ferran Adrià (El Bulli; Girona, Spain), Homaro Cantu (moto; Chicago), Wylie Dufresne (wd~50; New York), and Heston Blumenthal (The Fat Duck; Bray, England). Lessley Anderson, *You're Mispronouncing "Achatz": CHOW'S molecular gastronomy cheat sheet*, CHOW.COM, Sept. 4, 2007, *archived at* <http://www.webcitation.org/5WIFClid9>.

35. Anderson, *supra* note 34; see also Adrià, *supra* note 22 (discussing four chefs’ view that the term “molecular gastronomy” does not accurately describe their approach to cooking).

and bourbon, lamb with mastic-infused cream, and dehydrated bacon threaded on a wire and decorated with ribbons of dehydrated apple puree.<sup>36</sup> The result is cuisine that is highly imaginative and arguably, non-derivative.<sup>37</sup>

According to some, this marriage of food, chemistry and technology reflects an important turning point in the history of cooking.<sup>38</sup> Cantu, a practitioner of molecular gastronomy, is a pioneer in the movement to expand intellectual property laws to certain culinary related creations.<sup>39</sup> Currently, he is seeking legal protection for his edible, cotton candy flavored paper—a concoction of soybean and cornstarch—and a fork that holds herbs, adding an aromatic element to each bite of food.<sup>40</sup> Cantu believes creative chefs ought to have the same rights and protections as the rest of the food industry.<sup>41</sup> While he does not advocate patenting food on a broad scale, Cantu believes patenting some of his intellectual property in order to get licensing fees from chefs, restaurants and businesses might be the most efficient way to tap revenue in the restaurant industry.<sup>42</sup>

### III. Identifying Relevant Legal Standards

#### A. Copyrightability of the Recipe that Makes the Dish

The purpose of U.S. copyright law is “to promote the Progress of [...] useful Arts, by securing for limited times to Authors [...] the exclusive Right to their respective Writings and Discoveries.”<sup>43</sup> An erroneous belief persists that the goal of copyright is to protect copyright holders from parties who would steal their work and the fruits of their creative labor.<sup>44</sup> While the Supreme Court recognizes that an effect of copyright law is to secure a fair return for the creative labor of an author, the ultimate goal of copyright is “to stimulate artistic creativity for the general public good.”<sup>45</sup>

The scope of the law is set forth in section 102 of the Copyright Act of 1976 and extends to literary, musical, dramatic, choreographic, pictorial, graphic,

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36. Kummer, *supra* note 33. Mastic is a licorice flavored Greek resin that is used to thicken ice cream. *Id.*

37. See Kummer, *supra* note 33.

38. Michael Ruhlman, *The New New Cuisine*, RESTAURANT HOSPITALITY, May 1, 2007, archived at <http://www.webcitation.org/5aLXIIzvQ>.

39. Neil, *supra* note 16.

40. Neil, *supra* note 16.

41. Krause, *supra* note 8 (quoting Homaru Cantu).

42. See Wells, *supra* note 9.

43. U.S. CONST., art. I, § 8, cl. 8.

44. Lydia Pallas Loren, *The Purpose of Copyright*, OPEN SPACES QUARTERLY, Feb. 7, 2000, archived at <http://www.webcitation.org/5WIFKNaZF>.

45. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

architectural and sculptural works as well as sound recordings, pantomimes and motion pictures.<sup>46</sup> Copyright only protects original works of authorship that are fixed in a tangible medium of expression.<sup>47</sup> Protection does not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in such works.<sup>48</sup>

Derivative works, which originate from a preexisting work and recast, transform or adapt that work, require additional considerations for copyrightability.<sup>49</sup> A derivative work that is primarily a new work but incorporates previously registered material is copyrightable.<sup>50</sup> Copyright holders, however, have the exclusive right to prepare derivative works based on their original copyrighted works.<sup>51</sup> Factors a court examines when considering whether to grant copyright protection for derivative works include whether the underlying work is in the public domain and whether the changes or additions made are merely trivial variations on the underlying work.<sup>52</sup>

Copyright laws traditionally have not protected individual recipes.<sup>53</sup> The U.S. Register of Copyrights notes that “mere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection [unless] [they are] 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.”<sup>54</sup> The rationale for this is that an individual recipe is a process of creating something, rather than a creative literary expression.<sup>55</sup> Chefs and restaurateurs, unless they have published their recipes in compilations, have little redress under current copyright law.<sup>56</sup>

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46. 17 U.S.C. § 102(a)(1) – (7) (2006) (putting forth the subject matter eligible for copyright).

47. 17 U.S.C. § 102(a).

48. 17 U.S.C. § 102(b). Prohibiting copyright protection for ideas encourages individuals to freely build upon the ideas and information that a work conveys, thereby enhancing the progress of science and art. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57 (1985).

49. John W. Hazard, Jr., *Copyright Law in Business & Practice* § 2:9 (rev. ed., West 1999).

50. *See* U.S. Copyright Office, Copyright Registration for Derivative Works (Circular 14), *archived at* <http://www.webcitation.org/5WIFOb9fa>.

51. 17 U.S.C. § 103 (2006) (stating that “protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully”); *see also, e.g., Pickett v. Prince*, 207 F.3d 402, 405-06 (7th Cir. 2000).

52. Hazard, *supra* note 49; *see also* U.S. Copyright Office, *supra* note 50 (explaining that a derivative work must be different enough from the original that it may be regarded as a new work). Minor changes and insubstantial additions will not render the work a new, copyrightable version. *Id.*

53. FindLaw For Small Business, Copyrighting Recipes, *archived at* <http://www.webcitation.org/5WIFnEswo>.

54. U.S. Copyright Office, Recipes, *archived at* <http://www.webcitation.org/5WILIW8EC>.

55. *See* FindLaw For Small Business, *supra* note 53.

56. Janet K. Keeler, *What do you mean it's 'your' recipe?*, ST. PETERSBURG TIMES, Feb. 5, 2003, at 1D (statement of Jennifer Griffin, editor at Workman Publishing, New York, NY) (“You really have no claim over one recipe [...] It’s the mode of expression that can be copyrighted, not the recipe”). *Cf.* Wells, *supra* note 9 (noting that the idea of copyrighting a recipe is “the most radical idea to hit the food world since the invention of the menu”).

This interpretation is supported by case law.<sup>57</sup> Litigation addressing the copyrightability of recipes is relatively sparse, but existing decisions do not favor individual recipe holders.<sup>58</sup> According to the Seventh Circuit, a chef who writes down ingredients and directions for making “Curried Turkey and Peanut Salad” creates a statement of facts, not a literal expression reflecting his or her individual creativity or creative labors.<sup>59</sup> Courts have noted that the inclusion of anecdotes, narratives, pairing suggestions, history, or unique cooking tips within a recipe may elevate it to copyrightable status.<sup>60</sup> However, courts have been reticent to grant protection for an individual recipe (versus a compilation) on this basis.<sup>61</sup>

In order to succeed on an infringement claim, a plaintiff must show that the alleged infringer has copied the plaintiff’s work to such an extent that there is a substantial similarity between the plaintiff and infringer’s works.<sup>62</sup> An alleged infringer may defend his or her actions under the doctrine of fair use<sup>63</sup> or argue that the purportedly copied material is in the public domain.<sup>64</sup>

## B. Trademark or Trade Dress Protection for Dishes

### 1. Basic Principles

Trademarks are any word, name, symbol, device, or combination thereof, which a producer uses to distinguish its goods from those of other manufacturers or sellers and to indicate the source of those goods.<sup>65</sup> A

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57. Wells, *supra* note 9.

58. See generally William F. Patry, *Patry on Copyright* § 4:23 (West 2007).

59. Publ’ns Int’l, Ltd. v. Meredith Corp., 88 F.3d 473, 480 (7th Cir. 1996). See also *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 U.S. App. LEXIS 1983 (6th Cir. 1998) (holding that a recipe for chocolate truffles constituted an identification of ingredients and a statement of facts and lacked the expressive element deserving copyright protection); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (holding that copyright does not protect underlying facts, and that the originality requirement contemplates that a work be independently created by the author, and that it possesses some minimal degree of creativity).

60. Publ’ns Int’l, 88 F.3d at 481; see also *Barbour v. Head*, 178 F. Supp. 2d 758, 764 (S.D. Tex. 2001) (holding that recipes are not *per se* uncopyrightable).

61. Publ’ns Int’l, 88 F.3d at 481 (noting that cases presented neither directly support nor refute the argument that a recipe is copyrightable).

62. *Barbour*, 178 F. Supp. 2d at 762; Hazard, *supra* note 49, § 7:15.

63. Fair use of a copyrighted work includes using a work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, and does not constitute copyright infringement. 17 U.S.C. § 107 (2006).

64. 17 U.S.C. § 107 (2006); see also U.S. Copyright Office, Certain Unpublished, Unregistered Works Enter Public Domain, Jan. 13, 2003, archived at <http://www.webcitation.org/5WIFvg2in>. The fact that material is in the public domain does not render it *per se* uncopyrightable. *Id.* If the author has transformed the material in such a way that it becomes original, it may obtain copyrightable status. 18 AM. JUR. 2d *Copyright and Literary Property* § 18 (2008) (citing *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059 (9th Cir. 1981)).

65. 74 AM. JUR. 2d *Trademarks and Tradenames* § 1 (2d ed. 2007) (quoting *HBP, Inc. v. Am. Marine Holdings, Inc.*, 290 F. Supp. 2d 1320 (M.D. Fla. 2003)). Words, names, symbols, combinations of words and



producer generally must use the trademark somewhere on the product or goods.<sup>66</sup> Trade dress, under the Lanham Trademark Act (“Lanham Act”), constitutes a “symbol” or “device.”<sup>67</sup> It is a form of trademark to which the standard principles of trademark law apply.<sup>68</sup>

Traditionally, trade dress applied to the overall appearance of labels, wrapping or containers in which a producer packaged its product.<sup>69</sup> Today the definition is more expansive, encompassing a combination of any elements in which a product or service presents itself to a consumer, which creates a visual image for the consumer.<sup>70</sup> Trade dress can include features such as size, shape, color, textures, or graphics.<sup>71</sup> It can also include the design of a product.<sup>72</sup> Neither trade dress nor trademark laws protect an underlying product or substance of a product, only the *way* in which the product or service is presented to consumers.<sup>73</sup>

A subset of the law of unfair competition, the general purpose of trademark and trade dress law is to encourage fair competition and prevent parties from passing off their goods or services as those of another.<sup>74</sup> The laws protect a specific embodiment of a concept or idea, which serves to distinguish the source or brand behind it.<sup>75</sup> Important economic functions of trademark and trade dress law include reducing customer search time and incentivizing markholders to maintain good reputations for a predictable quality of goods.<sup>76</sup> Unlike copyright and patent law, trademark law does not exist to reward innovation or creativity, and the law will not rationalize protection on this basis.<sup>77</sup>

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designs, trade dress sounds, scents and colors can generally serve as trademarks. Sheldon H. Klein, *Understanding Trademark Law*, PRACTICING LAW INST. (2007).

66. Klein, *supra* note 65.

67. Klein, *supra* note 65; *see also* 15 U.S.C. § 1125(a) (2006).

68. 74 AM. JUR. 2d, *supra* note 65, § 38.

69. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 8.1 (4th ed. 2007).

70. *See* *Fuddrucker, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 842 (9th Cir. 1987) (expanding boundaries of trade dress infringement claims from copying a product's packaging and display to copying a combination of elements employed in the marketing of a restaurant).

71. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992) (citing *John H. Harland Co. v. Clarke Checks, Inc.*, 771 F.2d 966, 980 (11th Cir. 1983)).

72. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000).

73. 87 C.J.S. *Trade-Marks Etc.* § 59 (2007).

74. 74 AM. JUR. 2d, *supra* note 65, § 82; McCarthy, *supra* note 69, § 2.1

75. *Sports Traveler, Inc. v. Advance Magazine Publishers, Inc.*, 25 F. Supp. 2d 154, 163 (S.D.N.Y. 1998) (holding that a unique concept or idea itself, such as a women's sports magazine, is not protectable trade dress; only the specific embodiment that idea is protectable); *see also* McCarthy, *supra* note 69, § 7:1 (noting that concept of informal country dining at “down home country cooking” restaurant is not protectable).

76. McCarthy, *supra* note 69, §§ 2.3-2.4; *see also* Jerre B. Swann, *The Configuration quagmire: Is Protection Anticompetitive or Beneficial to Consumers, and the need to Synthesize Extremes*, 87 TRADEMARK REP. 253, 253-54 (1997) (noting that without symbols to evoke associations with quality, variety, and price expectations, competition would be limited to price, resulting in “a race to produce inferior goods”).

77. *See* *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34 (2001) (noting that the Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device, which is the purpose

## 2. Producer's Right to Protect Its Trade Dress

The Lanham Act codifies a producer's right to protect its trade dress.<sup>78</sup> Legal protection is available regardless of whether or not the trade dress is registered.<sup>79</sup> In order to succeed on a claim of infringement, a producer must show it has legally protectable trade dress, and the alleged infringer's actions are likely to cause consumer confusion.<sup>80</sup> Confusion exists where those observing the trade dress presume that the product or service it represents comes from or is associated with a different source that uses a similar dress.<sup>81</sup> A claim of infringement will be unsuccessful if there is no likelihood of consumer confusion.<sup>82</sup>

In addition to consumer confusion, a producer claiming infringement must also show that the trade dress is distinctive and non-functional.<sup>83</sup> Trade dress can be either inherently distinctive or distinctive by acquired secondary meaning.<sup>84</sup> Trade dress is inherently distinctive where by its intrinsic nature it serves to identify a particular source.<sup>85</sup> Trade dress that is not inherently distinctive can become distinctive by acquiring secondary meaning, which is

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of patent law); McCarthy, *supra* note 69, § 8:1.

78. 15 U.S.C. § 1125(a) (2006). The Lanham Act provides that:

"any person who, in connection with any goods or services [...] uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person [...] shall be liable in civil action by any person who believes that he or she is or is likely to be damaged by such act."

*Id.*

79. 74 AM. JUR. 2d, *supra* note 65, § 82.

80. 74 AM. JUR. 2d, *supra* note 65, § 85.

81. 74 AM. JUR. 2d, *supra* note 65, § 85. Factors that are relevant to the analysis of consumer confusion are: the degree of similarity between the two marks or dress, the intent of the alleged infringer in adopting the mark or dress, evidence of actual confusion, and the functionality or commonplaceness of the mark or dress. *Id.* § 86. See also McCarthy, *supra* note 69, § 8:15.

82. See *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 845 (9th Cir. 1987).

83. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000); *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1120 (5th Cir. 1991). Individual functional elements are not protectable trade dress because of the public interest in preserving and enhancing competition. See also 15 U.S.C. § 1125(a)(3) (2006).

84. *Wal-Mart*, 529 U.S. at 210-11.

85. *Wal-Mart*, 529 U.S. at 210; see also *Two Pesos*, 505 U.S. at 775 (1992) (reasoning that "inherent distinctiveness" presumes a connection between source and trade dress, thereby rendering secondary meaning superfluous and unnecessary to prove). There are three categories of inherent distinctiveness: (1) Arbitrary (having no relation to the product other than identifying the company that produces it, e.g. Camel-cigarettes); (2) Fanciful (a made-up word, e.g. Kodak); and, (3) Suggestive (providing a link between the characteristics of a product and its producer, e.g. Tide-detergent). Felicia J. Boyd, *Supreme Court Narrows Trade Dress Protections*, FAEGRE & BENSON LLP, Spring 2000, archived at <http://www.webcitation.org/5WIG4aUDp>.

the association a consumer makes with a product, service, or business when he or she sees a particular trade dress in commerce.<sup>86</sup>

Trade dress that is “functional” is not protectable regardless of whether or not it is distinctive.<sup>87</sup> Functional features are those that are essential to an article’s use or purpose, affect its cost or quality, or others must use them in order to effectively compete in a line of business.<sup>88</sup> If an article, device, or symbol’s configuration gives it a functional advantage or results from functional considerations, the configuration is not protectable.<sup>89</sup> Extending protection to functional features would inhibit legitimate competition by allowing a producer to control a useful product feature.<sup>90</sup> The existence of some functional elements, however, does not render the trade dress, as a whole, unprotectable.<sup>91</sup>

### 3. Trade Dress: The Distinction between Design and Packaging

Courts make a distinction between protecting product packaging and product design as trade dress.<sup>92</sup> In *Wal-Mart Stores v. Samara Bros.*, a children’s clothing designer sued Wal-Mart for selling “knock-off” copies of its clothing and claimed trade dress infringement.<sup>93</sup> The court held that clothing and product designs are not inherently distinctive and can only receive protection if they acquire secondary meaning.<sup>94</sup> Product design is intended to render the product more useful or aesthetically appealing, not to identify the product’s source.<sup>95</sup> Ordinary or commonplace designs that many competitors share are generic and not protectable regardless of a claim of secondary meaning.<sup>96</sup>

In contrast to product design, product packaging involves the deliberate attachment of a particular word, logo or phrase to the product, or encasing it in a distinctive package in order to identify the source.<sup>97</sup> In *Taco Cabana Int’l*,

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86. See *Wal-Mart*, 529 U.S. at 210-11; *Two Pesos*, 505 U.S. at 769; Christine LaFave, *Bobby Ghajar*, 117 RESTAURANTS & INST. 15 (Oct. 1, 2007) (interviewing intellectual property attorney Bobby Ghajar).

87. *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 159 (1995).

88. *Taco Cabana*, 932 F.2d at 1119.

89. 87 C.J.S., *supra* note 73, § 59.

90. 87 C.J.S., *supra* note 73, § 158; see also *Qualitex*, 514 U.S. at 159.

91. See, e.g., *Taco Cabana*, 932 F.2d at 1120 (noting that the whole, in trademark law, is often “greater than the sum of its parts”).

92. Compare *Wal-Mart*, 529 U.S. at 215 (involving product design) with *Taco Cabana*, 932 F.2d at 1120 (involving product packaging or some “tertium quid” form of trade dress).

93. *Wal-Mart*, 529 U.S. at 208-09.

94. *Id.* at 212.

95. *Id.* at 206.

96. McCarthy, *supra* note 69, § 7.1 (discussing trade dress protection for building exterior and interiors); see also *HI Ltd. P’ship v. Winghouse of Florida, Inc.*, 347 F. Supp. 2d 1256, 1259 (M.D. Fla. 2004) (holding that Hooter’s alleged trade dress, which included American bar fare, scantily clad waitresses and wooden décor, was commonly found in sports bars, grills, beach-themed restaurants and raw bars and was “far too typical.”).

97. *Wal-Mart*, 529 U.S. at 206.

*Inc. v. Two Pesos, Inc.*, the Fifth Circuit held that a restaurant's "festive eating atmosphere," including its physical layout, decorations, colors, and menu was akin to product packaging, which was inherently distinctive trade dress requiring no proof of secondary meaning.<sup>98</sup>

#### 4. Can Taste and Flavor be a Trademark?

In a recent case of first impression, the United States Trademark Trial and Appeal Board addressed the issue of a trademark flavor, holding that an orange flavor for an anti-depressant pharmaceutical was not a protectable trademark because it was functional.<sup>99</sup> The Board found that the orange flavor was not a source identifier, and consumers were not predisposed to associate the taste of the medication with the brand or manufacturer.<sup>100</sup> While the Board did not rule that flavor is *never* protectable as a trademark or trade dress, it found that consumers generally do not perceive flavor as such, considering it instead "an inherent feature of a product that renders [the product] more appealing."<sup>101</sup> Consequently, flavor and taste will likely have to acquire secondary meaning in order to gain legal protection.<sup>102</sup>

#### C. Patent Possibilities

Unlike trademark and trade dress law, patent law protection extends to an underlying article or substance of a product.<sup>103</sup> There are two broad justifications for patenting.<sup>104</sup> The first is the natural right of the inventor to control, and the second is that patenting benefits the public.<sup>105</sup> The purpose of patent law is to encourage creativity, inventiveness and societal contribution by granting inventors legal rights, which allow them to protect their inventions.<sup>106</sup> Absent patents, imitators would have a significant advantage over innovators because they could afford to sell the article at a lower price having avoided the time, capital and research needed to develop the invention.<sup>107</sup> Of the three

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98. See *Taco Cabana*, 932 F.2d at 1117.

99. In re N.V. Organon, 79 U.S.P.Q.2d 1639, 1648 (T.T.A.B. 2006) (finding the orange flavor to be functional because it made the medication more palatable and appealing to those taking it).

100. *Id.* at 1650-51.

101. *Id.* at 1649.

102. See *id.* at 1639.

103. See 35 U.S.C. § 101 (2006); *contra* 87 C.J.S., *supra* note 73, § 59.

104. R. Carl Moy, *Moy's Walker on Patents* § 1:26. (West Oct. 2007).

105. *Id.*

106. See John Gladstone Mills III, Donald C. Reiley III & Robert C. Highley, *Patent Law Fundamentals*, § 1:24 (2nd Ed. Rev. West 2008); Aaron Larson, Patent Law, Expertlaw.com (Sept. 2003), *archived at* <http://www.webcitation.org/5WIMDXHiq>.

107. Mills, *supra* note 106, § 1:24.

primary types of patents—utility, design and plant—utility is the relevant option for the culinary industry.<sup>108</sup> Utility patents protect processes, machines, articles of manufacture, or compositions of matter.<sup>109</sup> In order to patent an invention, an applicant must meet the patentability requirements, which are utility,<sup>110</sup> novelty,<sup>111</sup> and non-obviousness.<sup>112</sup>

Meeting the patentability requirements poses a hurdle for culinary creations.<sup>113</sup> While recipes are compositions of matter, the U.S. Patent Office does not often grant utility patents for recipes, reasoning that recipes generally lack invention.<sup>114</sup> The critical inquiry with respect to edible creations is whether the recipe or food product is new and non-obvious in light of other recipes, and in many instances the answer will likely be no.<sup>115</sup> In 1989, Procter & Gamble (“P&G”) sued Keebler, Nabisco and Frito Lay, alleging that Chewy Chips Ahoy, Soft Batch and Grandma’s Rich & Chewy cookie brands were infringing on a patent P&G held for a recipe and process of making a dual textured cookie that was “crispy on the outside and chewy on the inside.”<sup>116</sup>

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108. Larson, *supra* note 106.

109. Larson, *supra* note 106. Recipes, similar to chemical compounds, are considered compositions of matter because they are methods of combining specific ingredients to make something new. Mark Levy, Can I Patent A Food Recipe?, Inventorprise.com (Aug. 1, 2004), *archived at* <http://www.webcitation.org/5WpeAZMOP>.

110. 35 U.S.C. § 101 (2006). “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.” *Id.* The subject matter of the invention must be either implicitly or explicitly “useful” for some purpose. Gene Quinn, Patentability Requirements, IPWatchdog.com, *archived at* <http://www.webcitation.org/5WIHG5IqI>.

111. 35 U.S.C. § 102 (2006). A person shall be entitled to a patent unless “(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent [...]” *Id.* § 102(a). The subject matter of the invention must be “new” and may not infringe a patent that has already been issued. Gene Quinn, Law of Recipes, IPWatchdog.com, *archived at* <http://www.webcitation.org/5WINHkVf3>.

112. 35 U.S.C. § 103 (2006).

“A patent may not be obtained [...] if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”

*Id.* § 103(a). “For a patent to be non-obvious it must display “ingenuity beyond the compass” of a person of ordinary skill in the art.” Quinn, *supra* note 110.

113. Quinn, *supra* note 111.

114. Mills, *supra* note 106, § 7:11.

115. Quinn, *supra* note 111.

116. Procter & Gamble Co. v. Nabisco Brands, 711 F. Supp. 759, 760 (D. Del. 1989). As part of their patent application, Procter & Gamble, claimed as novel:

“a method for making a laminated dough structure comprising: preparing a first cookie dough from cookie ingredients comprising a crystallization resistant sugar component comprising a mono- or di-saccharide or mixture thereof that crystallizes substantially more slowly than sucrose at the water content and water activity conditions encountered in semi-moist cookies of the home-baked type; and flour and shortening; preparing a second cookie dough comprising a readily crystallizable sugar component comprising a mono- or di-saccharide or moisture thereof which readily and spontaneously crystallizes, at the water

The defendants argued, in part, that P&G's patent was invalid as anticipated by a recipe published in a 1968 cookbook.<sup>117</sup> Although the parties settled, the District Court held on a pre-trial, partial summary judgment motion that P&G's novelty claim regarding the recipe and method of preparing the cookie dough was invalid due to the publication of the 1968 recipe.<sup>118</sup>

Failure to prove non-obviousness is also grounds for refusing to issue a patent for a recipe and related food product.<sup>119</sup> In 1999, two inventors patented a crustless, peanut butter and jelly sandwich, which J.M. Smucker Company ("Smuckers") received by assignment and marketed under the "Un crustables" brand name.<sup>120</sup> When Smuckers tried to enforce and expand the patent, litigation and reexamination of the patent ensued.<sup>121</sup> The Board of Patent Appeals and Interferences eventually held that Smucker's patent was invalid partially due to obviousness because those of ordinary skill in the art knew to put peanut butter on both sides of the bread to prevent both jelly from leaking out and sogginess.<sup>122</sup> Although non-obviousness hinders patenting culinary creations, some producers have been successful.<sup>123</sup> Examples of patented culinary inventions include the process of making a "fruit ganache"<sup>124</sup>, yogurt cream cheese<sup>125</sup>, microwaveable sponge cake<sup>126</sup>, and sugarless baked goods<sup>127</sup>.

Unlike trade secrets, the content of patented articles, inventions and designs is not confidential information.<sup>128</sup> Copies of patent applications and issuances

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content and water activity encountered in semi-moist cookies of the home-baked type; and flour and shortening and applying a layer of said second dough to said first dough, thereby forming a laminated dough structure."

U.S. Patent No. 4,455,333 (filed Mar. 3, 1981) (issued June 19, 1984).

117. *Id.*

118. *Procter & Gamble*, 711 F. Supp. at 773.

119. Levy, *supra* note 109 (stating that the most common problem with patent applications for recipes and food products is that the requisite non-obviousness is missing).

120. U.S. Patent No. 6,004,596 (filed Dec. 8 1997) (issued Dec. 21, 1999). The patent claimed that crimping the bread's edges to seal it and placing peanut butter on both sides of the bread with the jelly in between constituted a sealed crustless sandwich that overcame shortcomings, such as sogginess, of the prior art. *Id.*

121. See, e.g., *Albie's Foods v. Menusaver, Inc.*, 170 F. Supp. 2d 736 (E.D. Mich. 2001). Albie's was a Michigan grocer that sold crustless, sealed, peanut butter and jelly sandwiches. *Id.* Menusaver, owned by Smuckers, sent a cease and desist order to Albie's. *Id.* Albie's subsequently sought a declaratory judgment as to the invalidity of the patent. *Id.* See also *Ex Parte Kretchman*, 2001 Pat. App. LEXIS 81, 17-19 (B.P.A.I. 2003) *aff'd*, 125 Fed. Appx. 1012 (Fed. Cir. 2005).

122. *Ex Parte Kretchman*, 2001 Pat. App. LEXIS 81, 17-19 (B.P.A.I. 2003).

123. Levy, *supra* note 109.

124. U.S. Patent No. 5,958,503 (filed Feb. 21, 1997) (issued Sept. 28, 1999).

125. U.S. Patent No. 7,258,886 (filed Mar. 18, 2005) (issued Aug. 21, 2007).

126. U.S. Patent No. 6,410,074 (filed Feb. 9, 2001) (issued June 25, 2002).

127. U.S. Patent No. 5,804,242 (filed Nov. 5, 1997) (issued Sept. 8, 1998).

128. See U.S. Patent and Trademark Office, Frequently Asked Questions about Patents, *archived at* <http://www.webcitation.org/5WIHgmPZp>.

are public records that are freely available to anyone.<sup>129</sup> Also, a patent term generally expires after twenty years, at which point the invention enters the public domain, and imitators are free to copy it.<sup>130</sup>

#### D. Trade Secret Protection for Recipes and Dishes

Restaurateurs and chefs have successfully protected cuisine and the underlying recipes through trade secret law.<sup>131</sup> A “trade secret” is “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.”<sup>132</sup>

A recipe must have limited availability, economic value and relative secrecy to be a trade secret.<sup>133</sup> General knowledge in the industry and the effort and cost of obtaining the information from available sources are considered with respect to limited availability.<sup>134</sup> The Ninth Circuit, for example, held that trade secret law does not protect dishes offered at an all-you-can-eat Old Country Buffet restaurant because cuisine such as barbecue chicken and macaroni and cheese are American staples, which restaurants across the country serve.<sup>135</sup>

### IV. Analysis

#### A. Should Copyright Law Protect Culinary Creations?

Although copyright law currently does not protect recipes and cuisine,

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129. *Id.*

130. See 35 U.S.C. § 154 (2006). The term of copyrights, in contrast, is seventy years. 17 U.S.C. § 302 (2006).

131. See, e.g., *Magistro v. Lou, Inc.*, 703 N.W.2d 887 (Neb. 2005) (holding that a pizza restaurant’s recipes were trade secrets because the recipes derived independent economic value from not being known to others, and the restaurant took reasonable steps to maintain the recipes’ secrecy).

132. UNIFORM TRADE SECRETS ACT (Nat’l Conf. of Commr’s on Uniform State Laws, Proposed Official Draft 1985) archived at <http://www.webcitation.org/5bRpOJ20V>; see also Gene Quinn, Trade Secrets, IPWatchdog.com, archived at <http://www.webcitation.org/5WIMRLYFr> (discussing the meaning and application of the Uniform Trade Secrets Act).

133. Jay Dratler, Jr. & Stephen M. McJohn, *Intellectual Property Law: Commercial, Creative and Industrial Property*, ALM PROPS., INC., LAW JOURNAL PRESS, § 4.03 (2006).

134. *Id.*

135. *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996).

expanding the law will do little to further the primary goal of copyright, which is to encourage the creation of content.<sup>136</sup> Former lawyer and eGullet.com co-founder, Steven Shaw, argues that if a chef comes up with a new soup, copyrights it, and demands a licensing fee from anyone who serves it, it will spur creativity.<sup>137</sup> According to Shaw, if there is money to be made from new kinds of soup, more chefs will make soup.<sup>138</sup> While Shaw's rationale may be sound, there is no evidence that creativity in the culinary world *needs* spurring. In fact, creativity in the kitchen is alive and well.<sup>139</sup> Chefs are increasingly using new techniques and appliances to create imaginative dishes such as lamb loin with pretzel consommé<sup>140</sup> and sea bream with haddock air.<sup>141</sup> A food blogger and diner observes that, today, more and more chefs are known for their creativity, and diners return to a restaurant not merely to taste their favorite dish but also to see what the chef is currently doing.<sup>142</sup> Some argue that the innovations currently rolling through the culinary world are so revolutionary that they are akin to those that occurred in the nineteen seventies when *nouvelle cuisine*<sup>143</sup> swept France, the United States and eventually the world.<sup>144</sup> Revolution, particularly among the avant-garde chefs, is the norm, and according to the epicurean society eGullet, "the atmosphere of culinary invention has permeated the professional kitchen."<sup>145</sup>

Even without copyright laws, significant incentives exist for chefs to create

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136. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress power to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Masnick, *supra* note 20.

137. Wells, *supra* note 9.

138. Wells, *supra* note 9. See also Meg Hourihan, *Keep Recipes Free*, MEGNUT.COM, (Oct. 10, 2006), archived at <http://www.webcitation.org/5WIENLXPk>; Pallas Loren, *supra* note 44 (writing—but then refuting—"the argument goes like this: the greater monopoly you permit, the greater the financial rewards and therefore the greater the incentive to create").

139. Chefs Ferran Adrià, Heston Blumenthal, Thomas Keller & Harold McGee stated in their open letter to the GUARDIAN "we embrace innovation—new ingredients, techniques, appliances, information and ideas [...]." Adrià, *supra* note 22.

140. wd~50, Menu, archived at <http://www.webcitation.org/5WIMmZ7bl>.

141. Interlude, Menu, archived at <http://www.webcitation.org/5WIN8mVkW>.

142. Posting of Bux to *Keep Recipes Free*, Megnut.com, (Oct. 11, 2006), archived at <http://www.webcitation.org/5WIENLXPk>.

143. ENCYCLOPEDIA BRITANNICA ONLINE, *Nouvelle Cuisine*, archived at <http://www.webcitation.org/5WII7iyy4>. *Nouvelle cuisine* refers to a French culinary movement founded by Henry Gault and Christian Millau. *Id.* The movement was in reaction to rich, classic, French haute cuisine and stressed freshness and lighter foods. *Id.* Basic characteristics of nouvelle cuisine are using sauces thickened by vegetable or fruit purees, not by roux, and serving novel combinations of foods in small quantities, artistically arranged on white plates. *Id.*

144. See Ruhlman, *supra* note 38.

145. Daily Gullet Staff, *supra* note 10; see also McLaughlin, *supra* note 10 (writing that "When French cuisine and traditions ruled, chefs [...] were encouraged to mimic their mentors' methods [...]. But the past decade has seen the focus [in the culinary industry] shift to innovation").



new and interesting cuisine.<sup>146</sup> These include the omnipresence of food critics and a desire for professional rewards.<sup>147</sup> Competition, the desire to satisfy customers, and the potential for public criticism propel a chef to make his or her restaurant different from the rest.<sup>148</sup> Industry norms, which make copying a recipe without deviation a culinary faux pas, and the possibility of public humiliation like that which Robin Wickens experienced, provide incentives for creativity as well.<sup>149</sup> Further, while diners favor creativity, some do not want recipes to be so creative or original that they are outrageous.<sup>150</sup> When one high profile chef created a shrimp cocktail essence that waiters sprayed into diners' mouths, there was a public outcry.<sup>151</sup> Most do not want their grilled cheese sandwich, for example, fried in cod liver oil, just for it to be different.<sup>152</sup> There are diners who believe it is enough to see individual takes on the same cuisine or variations on the classics.<sup>153</sup>

Copyright only protects "original works of authorship," so the idea of copyrighting recipes assumes that a chef can create an original dish.<sup>154</sup> The bar for originality under copyright law is low, requiring mere independent creation and some minimal degree of creativity.<sup>155</sup> However, because of the sharing norms that pervade the culinary industry, an infinite number of dishes (and their widely known variations) are in the public domain and therefore belong to everyone.<sup>156</sup> Rebecca Charles, for instance, admits that even her "unique," signature, Caesar recipe came from her mother, who got it from a chef at a Los Angeles restaurant.<sup>157</sup> Like Charles, other chefs have made English muffin

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146. Masnick, *supra* note 20.

147. See, e.g., Dickerman, *supra* note 34. Sara Dickerman is food and dining editor at Seattle Magazine. *Id.* See also, e.g., Michelin Guide, archived at <http://www.webcitation.org/5WqEnVKHL>. Michelin Star awards are highly coveted in the restaurant industry, and "receiving one or more Michelin stars can create a legend; losing one can result in significant heartbreak." Diner's Digest, the Michelin Guide: Stars, archived at <http://www.webcitation.org/5WqFF7TLI>.

148. See, e.g., Eater.com, *supra* note 6 (statement of Jason Kottke, criticizing Ed McFarland). "The key question [...] is: does the person exercise creativity [...] Clam shacks are everywhere in New England but an upscale seafood establishment with a premium lobster roll [Pearl] is a unique creative twist on that concept [...] an upscale clam shack blocks away from a nearly identical restaurant at which the owner [McFarland] used to work for six years, that seems a bit lame to me, not the work of a creative restaurateur."

149. See Lewis, *supra* note 10.

150. Keeler, *supra* note 56 (quoting Jennifer Griffin).

151. Kummer, *supra* note 33; see also Rosen, *supra* note 32 (writing that "not everyone in town appreciated the innovation" when dinner at Sen5es included "hot and cold foie gras, a 'pod' of sunchoke water, crème fraiche and pink peppercorns held together with calcium chloride and sodium alginate.")

152. Keeler, *supra* note 56 (quoting Jennifer Griffin).

153. Posting of SLS to *Keep Recipes Free*, Megnut.com, (Oct. 10, 2006), archived at <http://www.webcitation.org/5auHMPJmd>.

154. See 17 U.S.C. § 102(a) (2006); Keeler, *supra* note 56 (writing that "the truth is, an original recipe is rare. The best we can do is [to] add a twist to a classic one to make it our own"); Hourihan, *supra* note 138 (arguing that all recipes are derivative works).

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

156. See Wells, *supra* note 9.

157. Wells, *supra* note 3.

croutons, and coddled eggs have been an ingredient in Caesar dressing for decades.<sup>158</sup> Further, functional considerations, rather than expressive ones, often dictate methods of preparing and combining ingredients for many recipes, and such elements are not protectable under copyright law.<sup>159</sup>

Although copyright protection is available for derivative works that contain more than minor changes to or trivial variations on an underlying work (even those in the public domain), the question arises whether one additional step would render a new recipe original and worthy of protection.<sup>160</sup> In cooking, adding one ingredient or step can make the end result far better or wildly different.<sup>161</sup> Is a new dish that differs from its underlying recipe because of the mere addition or substitution of *one* ingredient copyrightable?<sup>162</sup> Likewise, would such a recipe be substantially similar enough to constitute infringement?<sup>163</sup> Further, the copyright holder has the exclusive right to control derivative works.<sup>164</sup> Chefs endeavoring to create improved versions of copyrighted recipes will have to expend time and resources researching whether a copyright and the potential for infringement exists.<sup>165</sup> Subsequently, they will need to obtain licenses, which copyright holders may withhold, and for which chefs may not want to pay, all of which impede the creation of new cuisine.<sup>166</sup>

Consequently, a copyright scheme may engender a chilling effect on creativity.<sup>167</sup> Fearing litigation, some chefs will stick to “tried and true” formulas, rather than feeling free to be inventive and create new content.<sup>168</sup> Forcing chefs who are adapting copyrighted recipes to discern between expressive (protectable) and functional (unprotectable) elements of an underlying recipe will deter adaptation.<sup>169</sup> If chefs have to distinguish whether

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158. WEBSTER'S II NEW COLLEGE DICTIONARY 159 (3rd ed. 2005) (defining “Caesar salad” as “a tossed green salad with anchovies, croutons, and grated cheese and a dressing of olive oil, lemon juice, and a raw or coddled egg”). See, e.g., Rachel Ray, Clam Bake Stoup with Muffin Croutons (Oct. 18, 2007), archived at <http://www.webcitation.org/5cVFYevCL>.

159. Publ'ns Int'l., Ltd. v. Meredith Corp., 88 F.3d 473, 481 (7th Cir. 1996) (citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.18[I] (2005)).

160. See U.S. Copyright Office, *supra* note 50 (noting that a derivative work is copyrightable if it is different enough from underlying work to render it “new”).

161. Posting of SLS, *supra* note 153.

162. See, e.g., Posting of Saltshaker to eGullet Society for Culinary Arts & Letters, *supra* note 10 (questioning whether using a different herb in foam makes it fundamentally different).

163. *Barbour v. Head*, 178 F. Supp. 2d 758, 762 (S.D. Tex., 2001).

164. See 17 U.S.C. § 103 (2006).

165. See, e.g., Pallas Loren, *supra* note 44 (discussing how copyright can sometimes hamper creation of content).

166. *Id.*

167. Wells, *supra* note 9; see also Pallas Loren, *supra* note 44 (noting that “increases in monopoly rights of copyright owners empirically have not been shown to increase the production of new works”).

168. Wells, *supra* note 9.

169. See Adam Conner-Simons, Culinary Copyright: A Recipe for Disaster?, *Golf Magazine* (Aug. 6,

sautéing garlic for ten minutes versus three, or using poultry versus pork, is an expressive or functional element of a recipe, they will be discouraged from making second generation, improved versions.<sup>170</sup> Monopolistic stagnation, which can occur when the scope of a copyright monopoly becomes so pervasive that it hinders the creation of new works, poses a threat, particularly if large franchises copyright a significant number of recipes.<sup>171</sup> Creators of new works generally build upon past works in some way, and if they cannot do so because of a broad copyright monopoly, creativity will diminish along with the value of the copyright to society.<sup>172</sup>

The significance of execution in cooking also renders a copyright system unnecessary.<sup>173</sup> Because the final product depends heavily on execution, the circulation of a recipe does little to diminish a creative chef's competitive advantage.<sup>174</sup> Unlike an MP3 file, which generally is a perfect and exact substitute for a compact disc track, a copy of a recipe is not an exact substitute for the final dish.<sup>175</sup> "A truly magnificent dish," says chef Alexis Gauthier, "can never be stolen by a rival chef [...] if there's something that cannot be replicated it is the ability of a chef to know when the jus is reduced enough, when the fish is cooked to perfection. You can taste the difference between chefs."<sup>176</sup> Some think a recipe alone is sufficient for a skilled cook to prepare almost any dish.<sup>177</sup> However, experience, technique, equipment, and ingredients can make one chef's cooking vastly different from his or her colleague's.<sup>178</sup> A chef relies on intuition in executing a dish, which cannot be reduced to writing.<sup>179</sup>

Expanding copyright protection to recipes will not necessarily enhance the profits of chefs, thereby eliminating a desirable by product of copyright.<sup>180</sup> It is

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2008), archived at <http://www.webcitation.org/5cVE2AEv2> (wondering whether chefs can reasonably expected to police themselves so stringently).

170. See generally Conner-Simons, *supra* note 169 (discussing the complexities for chefs in distinguishing similarity, uniqueness, ownership, and which additions are sufficient to make a recipe their own).

171. Pallas Loren, *supra* note 44; see also *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 23 U.S.P.Q.2d 1241, 1244 (2nd Cir. 1992) (noting that "copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation").

172. Pallas Loren, *supra* note 44.

173. Posting of Tyler Cowen to *Why no patent or copyright for new food recipes?*, MarginalRevolution.com, (Oct. 14, 2006), archived at <http://www.webcitation.org/5WlIRjc7N>.

174. *Id.*

175. *Id.*

176. See Lewis, *supra* note 10; Keeler *supra* note 56 (writing that "a person who makes a dish does little things [...] that [he or she] [cannot] put down in writing (because [they are] intuitive)").

177. See FindLaw For Small Business, *supra* note 53; Posting of Cowen, *supra* note 173 (writing "try buying a fancy cookbook from a celebrity chef and see how well the food turns out").

178. See Keeler, *supra* note 56.

179. Keeler, *supra* note 56.

180. See Posting of Bux, *supra* note 142 (writing "I don't see the introduction of lawyers into the process as anything but an additional burden likely to leave less profit in the hands of successful chefs and drive new

not certain that the chef who creates the recipe will get the benefit of the copyright and related licensing fees.<sup>181</sup> In the journalism profession, stories written on the job belong to the publication that publishes them, not the authoring journalist.<sup>182</sup> In the food industry, the notion that “the dish stays with the house” is common.<sup>183</sup> Restaurant owners feasibly will lay claim to dishes invented in their kitchens, franchises may hoard copyrights, and non chef-owners may not receive the benefits of their own innovative cuisine.<sup>184</sup> Participating in a copyright system will also entail added costs for chefs, such as licensing and attorneys’ fees, registration fees paid to the U.S. Copyright Office, and costs associated with litigating infringement.<sup>185</sup> Such costs will surely be passed onto diners in the form of higher prices, nullifying copyright’s role as “for the public good.”<sup>186</sup>

Many chefs do not favor a copyright system for recipes and would not use it because of the “open source” model and the industry’s prevailing tradition of sharing.<sup>187</sup> Similar to choreographers, who historically have not utilized available copyright protections, preferring to rely on dance community norms, chefs may not register their recipes even if the law permits it.<sup>188</sup> Many chefs subscribe to this open source approach to cooking.<sup>189</sup> For example, Grant Achatz, despite Robin Wickes’s alleged copying of his dishes, is not in favor of

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restaurants to close faster as a result of additional legal expenses”); Wells, *supra* note 9. *But see* Twentieth Century Music Corp., 422 U.S. 151, 156 (1975) (describing enhanced profits for authors as a beneficial effect of copyright).

181. Wells, *supra* note 9.

182. Wells, *supra* note 9.

183. Jennifer Leuzzi, *What’s Mine is Yours*, Snack.com (Sept. 12, 2006), *archived at* <http://www.webcitation.org/5bJ3tahYW>. Leuzzi describes a scenario in which sous chef, Chef B, creates an entrée recipe for Chef A’s restaurant, which becomes a signature of the house. *Id.* When Chef B leaves to open his own restaurant, he will never be able to “own” that particular dish because critics and consumers generally will think that he is copying Chef A (despite the reality that Chef B invented the dish). *Id.*

184. Wells, *supra* note 9.

185. *See* U.S. Copyright Office, Current Fees (Circular 4), *archived at* <http://www.webcitation.org/5WINKQSIJ>; 17 U.S.C. § 504(b)-(c)(2) (2006) (stating damages for copyright infringement may be up to \$30,000.00, and if willful infringement, up to \$150,000.00).

186. Twentieth Century Music Corp., 422 U.S. at 156 (noting copyright’s goal as serving “the public good”); *see also* Pallas Loren, *supra* note 44 (stating the importance of considering whether the high cost to the public of an increased copyright monopoly will be outweighed by additional works that will be created due to incentives provided by the copyright increase).

187. Wells, *supra* note 9.

188. *See* William Patry, *The Patry Copyright Blog: Choreography and Alternatives to Copyright Law*, williampatry.com (Aug. 18, 2005), *archived at* <http://www.webcitation.org/5WIIXKIUV>. Copyright has protected choreography since 1978, but statistically most choreographers do not register copyrights, preferring instead to rely on dance community norms. *Id.* In 2004, of the 661,469 copyrights registered, only 1,115 were works registered under the drama, choreography and pantomime category. *Id.*

189. *See, e.g.*, Adrià, *supra* note 22; Posting of nick.kokonas, *supra* note 27 (discussing the “open-source” nature of the industry); Gemperlein, *supra* note 21 (quoting chef Nora Pouillon about her belief in sharing recipes).

a copyright system for food.<sup>190</sup> According to him, “Chefs won’t use it. Can you imagine Thomas Keller calling me and saying, ‘Grant, I need you to license your Black Truffle Explosion so I can put that on my menu?’”<sup>191</sup> Even in instances in which professional cooks publish recipes that are blatant copies of their colleagues’ work and fail to provide attribution, lawsuits are rare.<sup>192</sup> Richard Corrigan, chef-owner of two distinguished London restaurants, says, “everyone has been robbed in the middle of London, [it is] normal. But it doesn’t bother me; I’m sometimes tickled.”<sup>193</sup>

#### B. Viability of Trademark or Trade Dress Protection for Cuisine: Can a Restaurant have a “Trademark Dish”?

Generally, a producer must use its mark on the product or article itself or present it to the observer in some fashion, so the application of trademark law to food is not intuitive.<sup>194</sup> However, courts have authorized untraditional marks such as the sound of the NBC chimes and scent of sewing thread.<sup>195</sup> While a chef can put forth a trade dress-style claim arguing that his or her cuisine constitutes a “symbol” under the Lanham Act, which represents his or her particular restaurant’s “brand,” it is a novel argument that probably will be unsuccessful.<sup>196</sup> Using trademark or trade dress law to protect cuisine is problematic, in part, because it constitutes an attempt to protect the article, product, or substance of the product itself, which falls under the jurisdiction of copyright or patent law.<sup>197</sup> Although trade dress can protect the “total package” or image of a restaurant, comprised of distinct elements that include cuisine, trade dress should not be construed to protect the cuisine itself.<sup>198</sup>

A major problem with protecting edible creations under the umbrella of

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190. Wells, *supra* note 9.

191. Wells, *supra* note 9 (quoting Grant Achatz); *see also* Pickett v. Prince, 207 F.3d 402, 405 (7th Cir. 2000) (holding that copyright owner’s permission required before use or creation of derivative works based on copyrighted work).

192. Gemperlein, *supra* note 21.

193. *See* Lewis, *supra* note 10; Gibson, *supra* note 10 (citing Chef Greg Malouf of Melbourne’s Momo restaurant as saying that chefs can be “a little too precious” about their work, and he “would be honored” if one of his dishes turned up on a colleague’s menu. “I don’t think I’d be angry,” Malouf stated, “I think I’d be flattered”).

194. *See* Klein, *supra* note 65. *See also* *Taco Cabana*, 932 F.2d at 1117.

195. *Qualitex*, 514 U.S. at 162.

196. *See* 15 U.S.C. § 1125(a) (2006). The Lanham Act states that trademarks include “any word, name symbol or device.” *Id.* Since individuals might use as a ‘symbol’ or ‘device’ “almost anything at all that is capable of carrying meaning, this language, read literally is not restrictive.” *Qualitex*, 514 U.S. at 162.

197. 87 C.J.S., *supra* note 73, § 59.

198. *See* LaFave, *supra* note 86 (interviewing Attorney Bobby Gajar). Gajar discusses trade dress protection for the overall, memorable package of a restaurant but notes that protection applies only to an alleged infringer’s use of elements that substantially overlap with the plaintiffs. *Id.* If a restaurant’s trade dress has ten elements and the infringer uses only one or two of them [e.g. copies the cuisine style], it is not sufficient overlap. *Id.*

trade dress law is that food is functional, often generic or commonplace and proving consumer confusion will be very difficult for a plaintiff.<sup>199</sup> Cuisine is ultimately a functional feature of a chef's restaurant because he or she creates food to satisfy and appeal to consumers, not primarily to serve as a "symbol" or to signify his or her restaurant's brand.<sup>200</sup> The type of cuisine offered and ingredients used affect the cost and quality of the menu items, and chefs decide menus with functional considerations in mind, such as whether the food is easy to eat, nutritious, satisfactory to the targeted market, or pairs well with other menu offerings.<sup>201</sup> Also, restaurants and chefs must use particular dishes in order to effectively compete in their line of business.<sup>202</sup> Many steakhouses, for example, serve steak au poivre, and just as many seafood restaurants offer lobster rolls.<sup>203</sup> While *Taco Cabana* indicates that trade dress can protect functional elements as part of a restaurant's overall trade dress (*e.g.* menu, décor and atmosphere), the case adds little to the question of whether individual culinary creations are protectable under trade dress law.<sup>204</sup> The *Taco Cabana* court never addressed the restaurant's cuisine, and the menu was merely one element of the "total image of the business."<sup>205</sup> Further, the court found a likelihood of consumer confusion because Two Pesos had copied the entire "look and feel" of Taco Cabana, not simply because they had served the same tacos or fajitas.<sup>206</sup>

In addition to the functionality hurdle, proving consumer confusion with respect to cuisine is difficult because most food is neither inherently distinctive

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199. See *Qualitex*, 514 U.S. at 159 (noting the requirements of trademark/dress protection); 74 AM. JUR. 2d., *supra* note 65, § 85.

200. Michael Atkins, *Can a Restaurant Protect Its Décor? Its Recipe? Bob Cumbow Tells All*, Seattletrademarklawyer.com, archived at <http://www.webcitation.org/5WlIbWlVF>. Cumbow states that recipes and menus probably cannot be included as part of a restaurant's overall trade dress because they are almost certainly functional. *Id.* See also *Qualitex*, 514 U.S. at 163-64 (explaining that source-distinguishing ability of a mark or dress is foundation of trademark law); McCarthy, *supra* note 69, § 8.6 (noting that trademark and trade dress law only protect specific embodiments that serve to identify sources or brands).

201. See *Taco Cabana*, 932 F.2d at 1119 (describing functional features as those that are essential to article's use or purpose or affect its cost or quality); About.com, *Restauranting: How to Price Your Restaurant Menu*, archived at <http://www.webcitation.org/5WlIenTek>.

202. See *Taco Cabana*, 932 F.2d at 1119; *Qualitex*, 514 U.S. at 166 (noting that functional features are those that if exclusively used by one producer would put competitors at a "significant, non-reputation-related disadvantage"); Atkins, *supra* note 200.

203. See, *e.g.*, Capital Grille, Dinner Menu, archived at <http://www.webcitation.org/5WlJGaAte>; Smith and Wollensky, Dinner Menu, archived at <http://www.webcitation.org/5WlJJQLVk>; Legal Seafoods, Dinner Menu, archived at <http://www.webcitation.org/5WlIQ3Me59>; Jasper White's Summer Shack, Menu, archived at <http://www.webcitation.org/5WlJVNXkI>.

204. See *Taco Cabana*, 932 F.2d at 1118.

205. *Taco Cabana*, 932 F.2d at 1118 (instructing jury that trade dress is total image of Taco Cabana's business, which may include: shape and general appearance of the exterior restaurant, identifying sign, interior kitchen floor plan, décor, menu, equipment used to serve food, servers' uniforms and other features reflecting restaurant's total image).

206. *Taco Cabana*, 932 F.2d at 1122.

nor will it acquire secondary meaning.<sup>207</sup> While courts have not found that taste can never be inherently distinctive, existing case law indicates that a consumer's association of the taste with the brand is necessary.<sup>208</sup> Two dishes that taste similarly will fail to indicate the requisite level of consumer confusion if diners are aware of the source behind the food.<sup>209</sup> For instance, a diner said of Ed Lobster Bar's alleged trade dress infringement of Pearl that "Ed's Caesar" and Charles' Caesar were virtually indistinguishable in taste.<sup>210</sup> Others noted that the lobster rolls were "almost identical."<sup>211</sup> However, the diners, in order to reflect the requisite likelihood of consumer confusion, must have believed or assumed that Ed's Caesar either came from Charles or identified her Pearl brand.<sup>212</sup> It is insufficient where a diner knows the source and merely thinks that the dishes taste similarly. Also, many ingredients and flavors, such as those in a Caesar salad or a lobster roll, are generic, and a majority of chefs use them, which further undermines a likelihood of consumer confusion.<sup>213</sup>

Although trademark and trade dress laws cannot reasonably protect cuisine itself, they might protect a unique style of presentation if it is non-functional, has acquired secondary meaning, and there is a likelihood of consumer confusion.<sup>214</sup> Charles, for example, claimed McFarland illegally copied her food presentations, which were part of Pearl's trade dress.<sup>215</sup> Under *Wal-Mart*, courts would likely construe presentation as product design.<sup>216</sup> Consequently, a plaintiff would have to show acquired secondary meaning, which is challenging

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207. See 74 AM. JUR. 2d, *supra* note 65, § 85 (discussing consumer confusion as a requisite element in trade dress infringement cases); see also *Wal-Mart*, 529 U.S. at 205 (noting that trade dress can be either inherently distinctive or acquire distinctiveness by secondary meaning).

208. In re N.V. Organon, 79 U.S.P.Q.2d 1639, 1648 (T.T.A.B. 2006). *Organon* was a case of first impression regarding taste as a trademark. *Id.*

209. *Powerful Katinka, Inc. v. McFarland*, 8:54, 2007 WL 2064059 (S.D.N.Y. 2007). Charles' trade dress argument is only loosely based on the cuisine at Pearl Oyster Bar and focuses instead on the total image, look and feel of her restaurant, of which the menu offering are only one aspect. *Id.*

210. Harry Bruinius, *A bitter recipe for lobster tales*, CHRISTIAN SCIENCE MONITOR, Aug. 3, 2007, at 20.

211. Complaint, *Powerful Katinka*, *supra* note 1, at 8:54.

212. See *Organon*, 79 U.S.P.Q.2d at 164. The court held that the orange flavor was not a source-identifier because consumers were not predisposed to associate the taste of the medication with the manufacturer. *Id.* See also, e.g., *McCarthy*, *supra* note 69, § 8:15.

213. *McCarthy*, *supra* note 69, § 8:15 (noting that commonplace designs and motifs are factors that oppose a likelihood of consumer confusion). *Id.*

214. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 214 (2000) (holding that product design is protectable only upon showing of secondary meaning).

215. Complaint, *Powerful Katinka*, *supra* note 1, at 12:u; see also Posting of Tom415 to *Is Imitation Always the Sincerest Form of Flattery*, SERIOUSEATS.COM, (June 29, 2007), archived at <http://www.webcitation.org/5WrRTAtdp> (noting that the presentation of the dishes at Ed's Lobster Bar and Pearl Oyster Bar are identical).

216. See *Wal-Mart*, 529 U.S. at 206. Food presentation is not akin to product packaging because it generally renders food more appealing to diners. *Id.* at 206, 212 (noting that with product design, such as a penguin shaped cocktail shaker, a consumer is not predisposed to automatically identify that object with a source).

with respect to cuisine.<sup>217</sup> A high profile chef like Grant Achatz may create a unique presentation for poached squab by serving it in a glass beaker with burning cinnamon sticks, but this presentation probably will not acquire secondary meaning.<sup>218</sup> Average diners are probably unaware of Achatz or his restaurant, Alinea, and are not predisposed to associate the food's presentation with the Alinea "brand."<sup>219</sup>

Trademark and trade dress laws seemingly do little to protect culinary creations, but courts and legislatures should not reinterpret or expand the laws because doing so will undermine the primary goal of trademark law, which is to encourage fair competition.<sup>220</sup> The traditional rationale for refusing to protect functional features or items, such as food, is that protection will hurt competition, potentially result in monopolies, and negatively impact the public.<sup>221</sup> If a restaurant can have its "trademark dish," and serve it to the exclusion of others, the market price for diners who want that particular dish will be significantly higher.<sup>222</sup> The exclusivity that food monopolies will engender also will undermine the industry's tradition of openness and sharing.<sup>223</sup> Dining options will become more limited.<sup>224</sup>

Further, applying principles of trademark and trade dress to prevent copy-cat cuisine fails to address the underlying problem, which is more analogous to plagiarism than it is to a "palming off" or confusingly similar use of a mark or dress.<sup>225</sup> Brand names, trademarks and trade dress become associated with consumer expectations of quality.<sup>226</sup> Trademark and trade dress laws exist to prevent individuals and businesses from passing off *their* goods as *those of another*, to the confusion of the consumer.<sup>227</sup> However, the opposite is

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217. *Id.* at 206.

218. *See* Wells, *supra* note 9 (indicating that one of the most elaborate dishes Robin Wickens allegedly copied from Grant Achatz was poached squab, accompanied by glass test tubes containing burning cinnamon sticks).

219. Please note that Grant Achatz is merely used as an example. To the author's knowledge, he has not argued that trade dress or trademark laws ought to protect his presentation ideas.

220. *See* 74 AM. JUR. 2d, *supra* note 65, § 1 (stating the goal of trademark law as promoting fair competition).

221. *See* 87 C.J.S., *supra* note 73, § 59.

222. *See* BLACK'S LAW DICTIONARY, (8th ed. 2004) (defining "monopoly" and discussing the effect that monopolies have on market prices).

223. *See* Wells, *supra* note 9 (discussing the culture of suspicion that may arise in the industry if chefs begin to derive significant amounts of their income from their intellectual property).

224. BLACK'S LAW DICTIONARY, *supra* note 222 (discussing the limited availability of a product or service that occurs as a result of a monopoly).

225. Daily Gullet Staff, *supra* note 10 (discussing the food emulation and "plagiarism" in the industry). "Palming off" is an attempt to make a purchaser believe the product is that of a better known competitor and is one way of causing consumer confusion. McCarthy, *supra* note 69, § 8:19.

226. McCarthy, *supra* note 69, § 2:5.

227. *See* McCarthy *supra* note 69, § 8:19 (discussing that often the issue in trade dress simulation cases is defendant's "passing off" or "palming off" its product as that of plaintiff); 74 AM. JUR. 2d, *supra* note 65, § 82.



occurring in the culinary industry—certain chefs and restaurants are passing off *another* chef or restaurant’s work as *their own* creative work.<sup>228</sup> Consumer expectations of quality are not implicated because diners are not going to restaurants thinking that they are buying one thing while receiving something that is perhaps inferior in quality.<sup>229</sup> “Idea-lifting” and a failure to attribute credit are occurring in the culinary arena, not a “palming off.”<sup>230</sup> Trademark and trade dress laws do not exist to remedy these problems.<sup>231</sup>

### C. The Potential and Pitfalls of Patenting

There is a meritorious argument for patenting highly innovative and truly new cuisine if it meets certain standards.<sup>232</sup> Unlike copyright law’s well settled exclusion of recipes and methods of preparing food, patent law has no definitive exclusions.<sup>233</sup> Industrial food companies and restaurant chains commonly and successfully use patents to protect their edible creations, but a majority of chefs ignore the system.<sup>234</sup> Homaru Cantu’s edible, cotton-candy flavored paper (on which he prints his restaurant’s menu) is a prime example of a potentially patentable food.<sup>235</sup> Cantu may successfully obtain a utility patent<sup>236</sup> if he can convince the U.S. Patent Office that his creation is novel,

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The fashion is exemplary of an industry that has struggled to gain trademark and trade dress protection to prevent designer knock-offs. Posting of Elsa to MarginalRevolution.com (Oct. 16, 2006), *supra* note 173 (writing that the rampant copying occurring in the fashion industry is that of low end brands copying designer lines).

228. See Wells, *supra* note 9 (noting that writers on eGullet.com discussion boards characterize instances of copy-cat cuisine as food “plagiarism” and “presenting someone else’s ideas as your own”).

229. For example, during the period in which Wickens offered dishes almost identical to those at wd~50 and Alinea, diners probably did not go to Interlude thinking that they were buying wd~50’s or Alinea’s cuisine but bought Wickens because it was confusingly similar.

230. See McLaughlin, *supra* note 10. See generally Daily Gullet Staff, *supra* note 10.

231. 74 AM. JUR. 2d, *supra* note 65, § 1 (stating that the purpose of trademark law is “to protect the public from confusion regarding the sources of goods or services and to protect business from the diversion of trade through the misrepresentation or appropriation of another’s goodwill”). See also McCarthy, *supra* note 69, § 2:5 (quoting Judge Posner, “the fundamental purpose of trademark law is to reduce customer search costs by providing a concise and unequivocal identifier of the particular source of particular goods”); *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34 (2001) (noting that trademark law does not exist to reward innovative ideas).

232. Wells, *supra* note 9.

233. See Rosen, *supra* note 32.

234. Krause, *supra* note 8. See also Emmanuelle Fauchert & Erich Von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, MIT Sloan School of Management Working Paper 4576-06 at 15, Jan. 2006, archived at <http://www.webcitation.org/5aw4nnNTX> (writing that in a survey of 104 chefs, the respondents indicated that they and their colleagues seldom attempted to gain legal protection for recipes); McLaughlin, *supra* note 10 (noting that intellectual property attorney Charles Valouskas had no chef clients until three or four years ago).

235. See System and methods for preparing substitute food items, U.S. Patent Application Publication No. 20060081619 (App. filed September 29, 2005) (published April 20, 2006); Martha Neil, *supra* note 16.

236. A utility patent is the proper vehicle for patenting a recipe or method of creating food, such as Cantu’s edible paper, because utility patents extend to “processes” and “compositions of matter.” See 35 U.S.C. § 101

non-obvious and has certain advantages over ordinary food (*i.e.*, has utility).<sup>237</sup> However, the protection that a patent will afford Cantu may be narrow, depending on how he states his claims.<sup>238</sup> If a chef fails to think of or include equivalent substitute ingredients in his or her patent application, the patent will only protect the narrow ingredients listed.<sup>239</sup> A patented recipe containing sugar and pecans may not be enforceable against a copy-cat recipe that utilizes honey or molasses, or walnuts or almonds instead.<sup>240</sup>

Although Cantu's recipe and method of creating edible paper may meet the requirements for a utility patent, many recipes and dishes will lack the requisite novelty for a utility patent.<sup>241</sup> Even the work of today's most innovative, technologically advanced chefs may not constitute an "inventive step."<sup>242</sup> Wylie Dufresne, chef at wd-50 in New York (and a practitioner of the so-called "molecular gastronomy"), believes it is rare that someone "wakes up one day and has a completely novel idea about food."<sup>243</sup> He finds it difficult to consider patenting food because "we are all standing on the shoulders of chefs who came before us."<sup>244</sup> In *Procter & Gamble*, P&G's failure to realize that a recipe and method for making its patented cookies was in circulation, which predated their patent, severely undercut their novelty claim.<sup>245</sup> Chef Claudio Aprile thinks that if chefs assert that their cuisine is unequivocally theirs, they do not realize the origins and derivative nature of what they are doing.<sup>246</sup> Aprile trained under Ferran Adrià (rumored to be the true innovator behind the current food-technology movement<sup>247</sup>), and says most avant-garde chefs owe their creative inspiration to Adrià.<sup>248</sup> Creating cuisine, even technologically advanced cuisine, is, in many aspects, a derivative process, and the possibility that recipes and food creations are in circulation, which predate or anticipate a chef's work, is high.<sup>249</sup> Proving that there is no precedence in the marketplace

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(2006).

237. 35 U.S.C. §§ 101-103 (2006). Cantu's patent application indicates that his edible paper has utility because it is advantageous for a consumer who wants to ingest a food item, but does not have the requisite food components, time, means or skill to apply the necessary techniques to prepare the food. U.S. Patent Application Publication No. 20060081619, *supra* note 235.

238. See Quinn, *supra* note 111 (stating that patent protection for recipes is narrow).

239. Levy, *supra* note 109 (explaining that one of the most common errors in submitting patent applications for recipes or food is that the inventor fails to list equivalent substitutes, rendering the patent protection extremely narrow).

240. Levy, *supra* note 109.

241. See Krause, *supra* note 8; Wells, *supra* note 9.

242. *Id.*

243. Krause, *supra* note 8.

244. *Id.*

245. See *Procter & Gamble Co. v. Nabisco Brands, Inc.*, 711 F. Supp 759, 773 (D. Del. 1989).

246. Rosen, *supra* note 32.

247. Dickerman, *supra* note 34.

248. Rosen, *supra* note 32.

249. See Masnick, *supra* note 20 (discussing the traditions of "sharing" and "improving" that pervade the

for a food idea will be difficult.<sup>250</sup>

The requisite non-obviousness is problematic as well, and many patent applications for recipes and cuisine will fail on this ground.<sup>251</sup> The restaurant business is highly competitive, so many chefs are extremely skilled, which means the bar for non-obviousness is high.<sup>252</sup> Chefs will probably have a better chance of obtaining a patent if their inventions contain new preparation or cooking methods as opposed to mere combinations of ingredients.<sup>253</sup>

While a patent may be possible, the sharing norms in the culinary industry will dissuade many chefs from seeking the benefit of the system.<sup>254</sup> Even many of those engaged in the innovative, food-technology movement seem disinclined to patenting their creations.<sup>255</sup> Some diners disfavor the idea as well.<sup>256</sup> In the seventeenth century, *crème brulée*, which represents a convergence of cooking and technology similar to that occurring today, was a novel dessert that a creative cook developed by blow torching sugar topped custard.<sup>257</sup> Today it is widely popular, and “no one is ‘in a snit’ about the millions of *crème brulees* being served in restaurants.”<sup>258</sup> The popularity that *crème brulee* enjoys is reflective of a centuries-old culinary tradition, which seems to value the circulation of good food more than the protection of a recipe, method or process associated with creating it.<sup>259</sup>

Opportunistic patentees and the effect of hostile patent litigation also pose a risk to the industry’s culture of openness.<sup>260</sup> In other industries, such as the

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culinary industry); Krause, *supra* note 8.

250. Krause, *supra* note 8.

251. See 35 U.S.C. § 103 (2006) (requiring non-obviousness to obtain a patent); Quinn, *supra* note 111 (noting the difficulty of proving non-obviousness for recipes).

252. The standard of non-obviousness requires showing that the invention would not have been obvious to others of ordinary skill in the art. 35 U.S.C. § 103 (2006).

253. Posting of Jeff to *Patent for a Recipe*, INTELPROPLAW.COM, (Sept. 16, 2004), archived at <http://www.webcitation.org/5WrgPUFPE>.

254. See, e.g., Adrià, *supra* note 22 (noting that one of the three basic principles that guides their cooking is “openness”). A risk of utilizing expensive legal protections such as patents is that kitchens will have to adopt an air of suspicion. Wells, *supra* note 9. “When you rely on intellectual property for income, you suddenly become Bill Gates, building walls around your inventions to keep thieves away.” *Id.* Some chefs have already taken steps in this direction—Cantu does not allow stagiaires in his kitchen and Andrès of minibar has created a test kitchen to “come up with new ideas away from prying eyes.” McLaughlin, *supra* note 10. Achatz, in contrast, invites top chefs into his kitchen to “see what he is up to.” Rosen, *supra* note 32.

255. See, e.g., Adrià, *supra* note 22; Lewis, *supra* note 10 (noting Dufresne’s apparent lack of interest in seeking legal protections for his inventive food). *But see* McLaughlin, *supra* note 10 (writing that Dufresne spoke to an attorney about patenting his recipe for turning shrimp into noodles).

256. Wells, *supra* note 9 (writing that some moto diners have suggested that they feel like “guinea pigs” for Cantu’s “patent creating factory”); see also Hourihan, *supra* note 138 (writing that she enjoys having Achatz’s “Hot Potato” at Alinea and does not want to eat “Hot Potato by Grant Achatz” rotely created at an airport food counter).

257. Rosen, *supra* note 32.

258. *Id.*

259. See *id.*

260. Krause, *supra* note 8.

technology industry, patent trolls abound, filing patents, seeking a profit without contributing to or expanding on research and development, and suing others for infringing upon their broad claims.<sup>261</sup> Chefs may expose themselves to similar legal woes if patenting becomes the norm.<sup>262</sup>

The costs associated with patenting are significant and are a deterrent to seeking patent protection for culinary creations.<sup>263</sup> Obtaining a single patent is expensive and can take years.<sup>264</sup> Royalty fees, exposure to infringement suits and enforcement costs likely contribute to some chefs' lack of support for the patent system.<sup>265</sup> Because patents grant inventors the "right" to protect their inventions, patent holders themselves must police and enforce against infringers, which is expensive.<sup>266</sup> A patent holder who fails to detect or enforce against an infringer's use, will probably experience profit loss.<sup>267</sup> The potential payoff for a novel idea arguably can be huge, and some believe it may balance

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261. Krause, *supra* note 8; *see also* CBS News, *Patent Trolls Feed on Technology*, CBSNEWS.COM, Feb. 24, 2006, *archived at* <http://www.webcitation.org/5WrDhsLsL>. Patent trolls do not invent or develop ideas, but rather are speculators who patent ideas (technology, generally) and "wait for the moment to pounce when big companies like Microsoft and Yahoo start using that idea -- or anything close." *Id.*

262. Krause, *supra* note 8.

263. Wells, *supra* note 9.

264. *See* U.S. Patent and Trademark Office, FY 2008 Fee Schedule, *archived at* <http://www.webcitation.org/5WoO2Ed9E>. The schedule outlines costs such as the application filing (\$310.00), performing required searches (\$510.00), examining the application (\$210.00), issuing the patent (\$1,440.00), maintaining the patent for the term (\$7,200.00), and other costs. *Id.* *See also* U.S. Patent and Trademark Office, Kids' Frequently Asked Questions, *archived at* <http://www.webcitation.org/5WoQmLplA> (noting costs can be "very high," and parties will pay \$4,000 minimum to the U.S. Patent and Trademark Office). The Office also notes that on average, it takes twenty-two months for patent issuance. *Id.* *See also* Wells, *supra* note 9; McLaughlin, *supra* note 10 (describing high attorneys fees associated with patenting); Gene Quinn, *Patents*, IPWATCHDOG.COM, *archived at* <http://www.webcitation.org/5WoNhc2Y> (writing patent seekers should seriously consider whether the costs outweigh the benefits given the "state of the prior art").

265. *See* Gene Quinn, *Drafting a Licensing Agreement*, IPWATCHDOG.COM, *archived at* <http://www.webcitation.org/5Wrf73ilT> (discussing that the patent holder has discretion to fix royalty fees, which can be paid on profits or net proceeds); Adam B. Jaffe & Josh Lerner, *Patent Prescription, a radical cure for the ailing U.S. patent system*, IEEE SPECTRUM ONLINE, 2004, *archived at* <http://www.webcitation.org/5WpjsHCka> (stating that in 2004, according to a survey, the median cost of litigating a major patent case was four million dollars).

266. 35 U.S.C. § 154 (2006) ("every patent shall [...] grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States [...]"). *See also* Posting of Participating Member to eGullet Society for Culinary Arts & Letters, *supra* note 10 (writing that one of the reasons why patents are an "extremely expensive proposition" for chefs is that they, not the government, must "police" their own patents); Quinn, *supra* note 111 (writing enforcement can be expensive). *But see* McLaughlin, *supra* note 10 (noting that because the culinary world is now more globally interconnected—restaurant reviews are available online, foodies post images of dishes, and food blogs are widespread—it is easier for chefs to "police suspected copycats").

267. *See* Gil Zvulony, *Understanding Intellectual Property Rights through Coca Cola*, ZVULONY.COM, Mar. 2005, *archived at* <http://www.webcitation.org/5WJciIIN> (explaining that had Coca-Cola patented its recipe, it would have become known to others, rendering the formula virtually useless to the company). The implication is that competitors would copy the formula, regardless of the patent.

the costs.<sup>268</sup> Cantu, for instance, is hoping that major food companies will be willing to pay him licensing fees for some of his ideas.<sup>269</sup> The average kitchen, however, is not making giant technological leaps forward like those occurring in Cantu's kitchen at moto.<sup>270</sup> The "techno-cooking" is too laborious, sophisticated and expensive for a majority of chefs to technically undertake.<sup>271</sup> Instead, most chefs use traditional equipment to prepare their food and probably will not have the opportunity or resources to patent their cuisine.<sup>272</sup>

Chefs who want to keep their recipes a secret from competitors will not benefit from a patenting system, either.<sup>273</sup> Because patent applications are available to the public, anyone can examine and copy a recipe or culinary creation disclosed in the application, even if the U.S. Patent and Trademark Office subsequently rejects the application and does not issue a patent.<sup>274</sup> Coca-Cola, for example, whose original formula was patented in 1893, did not seek patent protection when its formula changed because the company knew that the public and competitors would have access to it.<sup>275</sup> Tricon Global Restaurant's Kentucky Fried Chicken similarly avoided patenting its famous fried chicken recipe.<sup>276</sup> Also, the patent term only lasts twenty years, at which point the patented recipe or culinary invention enters the public domain.<sup>277</sup>

#### D. Other Adequate Protections

In light of the policy arguments and difficulties associated with utilizing copyright, trademark and patent law to protect a chef's cuisine, chefs can look to alternative, adequate means of protecting their proprietary information. Norms that prevail in the culinary community partially regulate copying without attribution, and trade secret law, nondisclosure agreements, and breach

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268. See Wells, *supra* note 9.

269. See Wells, *supra* note 9. According to Cantu, licensing intellectual property is a better way to tap revenue streams than opening another restaurant—"I guarantee you that going this route can be as or more profitable than doing a restaurant empire." *Id.* Cantu has approached the Red Cross about his edible paper, touting it as a possible way of providing mass famine relief and is trying to enhance the paper with nutrients. *Id.*

270. Wells, *supra* note 9.

271. See Ruhlman, *supra* note 38 (writing that there are only five or six "techno-food" restaurants in the United States, and they are not replicable on a broad scale).

272. See Wells, *supra* note 9 (noting that "most chefs aren't trying to layer edible substrates on paper or build transparent heat-retaining ovens; they're too busy dealing with the table for eight that walked in unannounced thirty minutes ago"); Ruhlman, *supra* note 38; McLaughlin, *supra* note 10 (discussing intellectual property protections in terms of "high-end restaurant culture").

273. See Zvulony, *supra* note 267.

274. U.S. Patent and Trademark Office, *supra* note 128; see also Sabra Chartrand, *Patents; Many companies will forego patents in an effort to safeguard their trade secrets*, N.Y. TIMES, Feb. 5, 2001, at C5.

275. Zvulony, *supra* note 267.

276. Chartrand, *supra* note 274. Chartrand notes that McDonald's Big Mac's "special sauce" is also a trade secret. *Id.*

277. *Id.*

of fiduciary duty causes of action provide additional, viable means of protecting chefs' recipes, ideas and cuisine.<sup>278</sup>

Under the Uniform Trade Secrets Act, trade secrets can effectively protect any new method of making food and the food itself.<sup>279</sup> Many chefs and restaurants already guard their recipes closely enough to qualify for trade secret protection.<sup>280</sup> The Coca-Cola formula, Kentucky Fried Chicken, McDonald's Big Mac "Special Sauce," and traditional pizza recipes exemplify recipes that have benefited from trade secret protection.<sup>281</sup> As long as chefs take reasonably sufficient steps to keep recipes confidential and derive a monetary benefit from others' lack of knowledge of the recipes, the recipes will qualify for trade secret protection.<sup>282</sup>

While trade secret law offers little legal recourse once a secret "gets out," there is protection available if the secret gets out because of improper misappropriation.<sup>283</sup> Nondisclosure agreements also provide enforceable legal protection and lessen the risk of others becoming aware of a trade secret recipe.<sup>284</sup> Some chefs already utilize non-disclosure agreements to prevent misappropriation of their cuisine.<sup>285</sup> Cantu, for example, not only mandates that employees sign nondisclosure agreements but also requires visitors to sign a similar agreement before entering moto's kitchen.<sup>286</sup> The ethical guidelines of the International Association of Culinary Professionals maintain that restaurants and chefs should provide written contracts explicitly spelling out employees' responsibilities upon their departure from the business, particularly with respect to employees' use of proprietary information.<sup>287</sup>

A chef can also sue for breach of fiduciary duty if one of his or her

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278. See Neil, *supra* note 16; Daily Gullet Staff, *supra* note 10 (members discussing the important role that ethical norms play in the industry); Zvulony, *supra* note 267 (discussing trade secret protection)

279. Charles Valauskas, *quoted in* Aksamit, *supra* note 14.

280. See, e.g., Wells, *supra* note 3. Rebecca Charles maintains that although she taught her Caesar recipe to McFarland, her former sous chef, she guarded the recipe "more closely than some restaurateurs watch their wine cellars." *Id.* See also Posting of Aeilys to *Buzz Out Loud Lounge: Food recipe copyright law*, CNET.COM, (Oct. 11, 2006), *archived at* <http://www.webcitation.org/5Woja4tsS> (writing that during her experiences working in gourmet kitchens, she learned that signature recipes are kept highly secret, and no one, except the executive chef, generally has the knowledge to list all the ingredients comprising signature dishes).

281. Zvulony, *supra* note 267; Chartrand, *supra* note 274; *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 438 (2005).

282. See, e.g., *Magistro*, 270 Neb. at 442 (holding that pizza dough recipe was a trade secret where pizzeria owner's father had created the recipe in Sicily prior to coming to the United States, only family members knew the recipe, owner put ingredients in unmarked, sealed packets himself prior to use in kitchen, and recipe was superior because it was an old, personal Sicilian recipe).

283. Zvulony, *supra* note 267; see also Quinn, *supra* note 132 (writing that trade secrets are "fragile" because they lose their protected status once they become publicly known).

284. *Id.*

285. Neil, *supra* note 16.

286. Neil, *supra* note 16; see also Wells, *supra* note 9.

287. International Association of Culinary Professionals, *supra* note 26.

employees misappropriates information learned during the scope of employment.<sup>288</sup> Rebecca Charles contends in her complaint, for example, that because Ed McFarland was her sous chef and had intimate knowledge of the operations at Pearl, he had a fiduciary duty not to profit from that knowledge.<sup>289</sup> Fiduciary duties may obligate sous chefs and other employees, simply by the nature of the positions they hold, to keep information that they receive on the job confidential.<sup>290</sup>

## V. Conclusion

Although cuisine is frequently copied and imitated in the culinary industry, extending copyright, trademark and trade dress laws into a restaurant's kitchen is not the answer, given the history and traditions of the industry, the innovation already occurring, and the negative impact that an extension of the laws will have on creativity, competition and ultimately the public. While today's cooking has converged with technology more than ever before, chefs engaged in this new food movement are, in many ways, still deriving from the works of those who have come before them. Patenting may protect the inventive cuisine of the avant-garde chefs, but the costs are high, and most chefs continue to favor an open approach, believing ultimately that good cooking is something to share.

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288. Bruinius, *supra* note 210.

289. *See* Complaint, *Powerful Katinka*, *supra* note 1, at 3:13-17.

290. Charles Valauskas, *quoted in* Aksamit, *supra* note 14.