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Cooking and Copyright: When Chefs and Restaurateurs Should Receive Copyright Protection for Recipes and Aspects of Their Professional Repertoires

*Michael Goldman**

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INTRODUCTION

In August 2011, Bravo Network's *Top Chef* received its fifth nomination in as many years for a Primetime Emmy Award in the category "Outstanding Reality-Competition Program." The network received such a nomination every year starting with its second season.[1] Just one-year prior, the program won the 2010 Emmy for "Outstanding Reality-Competition Program", beating out CBS's *Amazing Race*, which had won the category seven straight years since the creation of the award.[2] This paradigm shift highlights Americans' obsession with food and cooking, and how far such lifestyle subject matters have invaded home entertainment. Each season viewers tune into *Top Chef* to witness a dozen chefs compete to be recognized for their expertise in the kitchen. In reality, the twelve chefs become a part of the entertainment world and the mainstream media, vying for the chance to become the next "celebrity chef." Such a category of entertainers opens up many more opportunities than merely being recognized for culinary accomplishments.

The rise in popularity of reality television in the last decade has propelled numerous chefs and restaurateurs into the lexicon of the entertainment industry and into the minds of American consumers and television viewers in massive numbers. Newer food-related cable network shows like Bravo's *Top Chef* and Travel Channel's *Anthony Bourdain: No Reservations* by no means represent the beginnings of this "food entertainment" revolution, but only the present manifestation of a continually growing part of the entertainment industry. Rather, this revolution can largely be credited to the *Food Network*, which debuted in 1993, as the only cable network dedicated solely to the topics of cooking and eating.[3] Since launching, the network has transformed chefs and restaurateurs into Hollywood

1. Primetime Emmy Award Database, EMMYS, http://www.emmys.com/award_history_search (last visited Sept. 20, 2012); *Top Chef*, IMDB, http://www.imdb.com/title/tt0765425/ (last visited Sept. 20, 2012).

2. Cynthia Wang, *How Top Chef Beat Amazing Race for the Emmy*, PEOPLE (Aug. 31, 2010), http://www.people.com/people/package/article/0,,20304925_20417343,00.html.

3. Helen Polaski, *A Brief History of Food Network TV,* LIFE123, http://www.life123.com/arts-culture/television/food-network/food-network-tv.shtml (last visited Sept. 20, 2012).

celebrities, propelling successful culinary careers to an even higher level on par with other celebrities of television and film. These household names include veterans Emeril Lagasse and Bobby Flay, already famous chefs and restaurateurs when the network started, as well as chefs like Rachael Ray and Guy Fieri, who largely owe their fame to the *Food Network*. In almost two decades, the *Food Network* has capitalized on the public's obsession with food and turned it into entertainment. Yet, just as *Top Chef* owes its origins to the *Food Network*, so does the *Food Network* owe its success to the groundbreaking work of Chef Julia Child. In 1962, Julia Child's cooking show *The French Chef* debuted on local Boston television, and was soon syndicated to networks around the country.[4] Child became an iconic celebrity for the remainder of the century.[5]

Thus, some form of "food entertainment" has existed for much of the latter part of the twentieth century into the present. The success of such programs and networks provides more evidence of our obsession with food and our desire for more entertainment involving food and cooking. And just like television, film, and other forms of entertainment, we have made celebrities of these chefs. Like other famous talent, celebrity chefs and restaurateurs have legal rights to protect. Unlike many other celebrities, chefs are creators, and when on television are more than just characters written in a script and shaped by an actor. They create recipes and food dishes, design entire menus, and start restaurant empires.[6] In this regard, perhaps celebrity chefs embody aspects of actor, screenwriter, author, and businessman all in one.

This proliferation of "food entertainment" necessitates an understanding of the laws that play a role in the industry. More importantly, knowledge of business and legal

4. *Julia Child*, BIOGRAPHY, http://www.biography.com/articles/Julia-Child-9246767?part=1 (last visited Sept. 20, 2012).

5. *Id.*

6. For example: Bobby Flay, Mario Batali, Guy Fieri, and Michael Symon. *Bobby Flay*, FOOD NETWORK, http://www.foodnetwork.com/bobby-flay/bio/index.html (last visited Sept. 20, 2012); *Mario Batali*, FOOD NETWORK, http://www.foodnetwork.com/mario-batali/bio/index.html (last visited Sept. 20, 2012); *Guy Fieri*, FOOD NETWORK, http://www.foodnetwork.com/guy-fieri-bio/bio/index.html (last visited Sept. 20, 2012); *Michael Symon*, FOOD NETWORK, http://www.foodnetwork.com/chefs/michael-symon-bio-repeat/index.html (last visited Sept. 20, 2012).

applications is crucial for those in the industry to protect and capitalize on their unique situations. This Comment will focus on celebrity chefs' roles as creators and their ability to protect their original recipes through federal copyright protection. While other intellectual property rights are undoubtedly important to famous members of the culinary industrymost specifically the right of publicity and trademark to protect branding and marketing opportunitiesthe notion that chefs may receive copyright protection for their recipes is a more contentious legal puzzle.

Part I of this Comment outlines the limited case history involving copyrightability of recipes, identifying the relevant sections of the Copyright Act and other sources of note, and the differences and similarities in statutory interpretations among the rare instances when this question has been analyzed by the courts. Part II focuses on why copyright should extend protection for most recipes, and explain how affording such protection fits within the parameters of the Copyright Act. Part III discusses the scope of suitable protection, should recipes be copyrightable. This includes limitations to certain exclusive rights, and the operation a statutory or compulsory royalty scheme for specific manners of use. Part IV concludes by arguing against copyright in the actual food dishes, instead opting for the system of recipe copyrighting advocated in Part II, except where culinary creations are as close to fine art as they are to food. Lastly, Part V addresses using trade secret protection as an alternative option to safeguard recipes.

I. COPYRIGHTABILITY OF RECIPES

Copyright litigation in the culinary industry is rather sparse, especially regarding the copyrightability of individual recipes.[7] This lack of legal battles may reflect several important consequences emanating from the crossroads of the culinary industry and the law. First, as discussed in detail in this section, the courts' reluctance in a few modern instances to extend the protection afforded under the Copyright Act of

7. Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1126 (2007).

1976 to recipes. Second, perhaps coupled with the industry's understanding that recipes are not copyrightable, industry standards and customs that protect stealing and misappropriation in lieu of formal protection at law.

The Copyright Act of 1976 ("Copyright Act") extends protection to "original works of authorship fixed in any tangible medium of expression."[8] Moreover, the Copyright Act enumerates protectable categories of works of authorship: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[9] Clearly absent from that list, at least for purposes of this discussion, is any reference to recipes or food creations. While the Copyright Act does not explicitly state whether this list of categories is inclusive or exclusive, in the House Report, Congress noted that the use of the word "include" pertaining to the list of categories characterized as "works of authorship" denotes that the list is not exhaustive and is "illustrative and not limitative."[10] Rather, "the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories."[11] Thus, § 102(a) does not necessarily foreclose copyright in recipes, but rather contemplates other types of works that meet the threshold requirements.

However, § 102(b) arguably presents the most significant hurdle for recipes being considered copyrightable subject matter. This subsection, which embodies the idea-expression dichotomy,[12] limits the copyrightable subject matter: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained,

8. 17 U.S.C. § 102(a) (2011).
9. 17 U.S.C. § 102(a) (2012).
10. 17 U.S.C. § 101 (2012); H.R. REP. NO. 94-1476, at 2 (1976).
11. H.R. REP. NO. 94-1476, at 53.
12. 17 U.S.C. § 102(b) (2012); Publ'n Int'l, Ltd. v. Meredith Corp., 88 F. 3d 473, 479 (7th Cir. 1996).

illustrated, or embodied in such work."[13] This clause clarifies the limits between copyright and patent.[14] Whether Congress contemplated works like recipes to fit within this clause is debatable: a question this Comment will attempt to answer. Section II will address these statutory particularities, and discuss whether and to what extent recipes meet the threshold requirements to be copyrighted.

The four cases that follow represent the few instances in which the courts had the opportunity to address copyright in recipes. The first, a rather ancient case, protects copyrights in recipes without much hesitancy or questioning. Contrastingly, the three modern cases thoroughly discuss why recipes are not subject to copyright protection. While the decisions do not go as far as holding that recipes are *per se* non-copyrightable, they arguably foreclose the culinary industry from utilizing copyright by narrowing the window of protection such that reliance on copyright would be impractical.

A. Fargo Mercantile Co. v. Brechet & Richter Co.

The courts' hesitance to offer copyright protection to recipes has not been a constant. Rather it seems that in the early twentieth century the courts were willing to apply the Copyright Act to recipes. In 1924, the Eighth Circuit analyzed copyright in a product label that included recipes in *Fargo Mercantile Co. v. Brechet & Richter Co.*[15] The plaintiff, a manufacturer of fruit nectars, sued the defendant for copyright infringement of the label on one of its nectars, that included among other things: Plaintiff's emblem and name, advertising matter, and *recipes* (emphasis added).[16] The label, including the recipes, was a registered copyright with the United States Patent Office.[17]

The issue in *Fargo Mercantile Co.* dealt with whether the label was copyrightable under the 1909 Copyright Act.[18] The circuit court held that, under that version of the Act, Congress

13. 17 U.S.C. § 102(b) (2012).
14. *Publ'n Int'l, Ltd.*, 88 F. 3d at 479.
15. Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823 (8th Cir. 1924).
16. *Id.* at 824.
17. *Id.*
18. *Id.* at 825.

intended for labels to be protected, so long as such labels met the basic requirements to be copyrightable.[19] Moreover, the court stated that for a label to be copyrightable "the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."[20] The court separated the label into two parts in evaluating whether it deserved copyright protection: (1) the emblem and other identifying information and (2) the recipes.[21] Dismissing the first part, the court then noted that the recipes were more than mere advertisements, but rather were *original compositions* (emphasis added) serving the useful purpose of advancing the culinary art.[22] More specifically, in holding that the Defendant's appropriation of the recipes from the label infringed Plaintiff's copyright, Judge Booth articulated the legal sufficiency of copyright in recipes: "If printed on a single sheet, or as a booklet, these recipes could undoubtedly be copyright, and we see no reason why this protection should be denied, simply because they are printed and used as a label."[23]

Judge Booth did not hesitate in reconciling the recipes with the requirements of copyright. But, *Fargo Mercantile Co.* extended such protection for recipes under both the 1874 and 1909 versions of the Copyright Act.[24] Unlike the current Copyright Act, which protects "original works of authorship," the 1909 Copyright Act merely defined copyrightable subject matter as "all the writings of an author."[25] Without clarification, this modern re-drafting of copyrightable subject matter potentially narrows the scope of protection. It is clear, however, that Congress had no intention of altering the boundaries of copyright subject matter. In the House Report to the 1976 Act, Congress noted that the "original works of authorship" standard was intended to carry over the standard of originality formulated by the courts under the previous

19. *Id.* at 827.
20. *Id.* at 828.
21. *Fargo Mercantile Co.*, 295 F. at 828.
22. *Id.* at 827.
23. *Id.* at 828.
24. *Id.*
25. 17 U.S.C. § 4 (1909).

version of the Act.[26] Assuming the Eighth Circuit's decision to find the recipes in *Fargo Mercantile Co.* was a sound one, the court arguably would have reached the same holding under the 1976 Act.

However, as discussed *infra*, the modern courts that have visited the issue of recipe copyrightability have not seen eye-to-eye with the Eighth Circuit's earlier decision. Obviously, the courts' ability and willingness to take the complete opposite approach to an issue within a similar, if not the same, legal context is neither unusual nor unexpected. Rather, the judiciary's change in views over long periods of time is arguably within the purview of the courts' responsibility to stay in touch with the social pulse of the nation.[27] In this instance, however, it is questionable whether Congress' intended application of copyright law has changed enough to affect the wholesale copyrightability of recipes. Most importantly, Congress specifically noted that the scope of copyright subject matter remained constant between the 1909 and 1976 Copyright Acts. But, the addition of the wording in § 102(b) to the Act in 1976 is somewhat troublesome, at least facially, in applying copyright protection to recipes.[28] At first glance recipes seemingly fit into one or more of the exceptions laid out in that section. The courts in the two more recent cases discussed below applied the 1976 Act, and discuss the relevance of § 102(b).

B. Publications International, Limited v. Meredith Corp.

Almost seventy-five years after the Eighth Circuit decided *Fargo Mercantile Co.*, the Seventh Circuit examined the copyrightability of recipes as a question of first impression in *Publications International, Limited v. Meredith Corp.*[29]

26. H.R. REP. NO. 94-1476, at 51 (1976).

27. Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 419 (Spring, 2005), *available at* http://www.mttlr.org/voleleven/sag.pdf (arguing, specifically with regards to copyright law, the necessity for judges to interpret copyright law in response to technological and social changes in lieu of Congress' failing to do so).

28. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (2012).

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

Meredith Corp. published magazines and books containing recipes, including the publication in question, "Discover Dannon—50 Fabulous Recipes With Yogurt", a cookbook of recipes using Dannon yogurt.[30] Meredith obtained a registered copyright for a "collective work" or "compilation" in the publication.[31] The publisher alleged that Defendant Publications International, Limited, had issued twelve publications containing recipes from Meredith's "Discover Dannon", claiming that Publications International infringed its copyright in "Discover Dannon".[32]

The district court found that the recipes were protectable under copyright, and issued Meredith a preliminary injunction.[33] In reviewing the district court's decision *de novo*, the Circuit court specifically looked at § 102(b)—the idea/expression dichotomy—to determine whether Meredith's recipes were copyrightable.[34] Publications International argued that Meredith's copyright extended only to the work as a compilation—which protects the order and manner in which the parts are arranged but not necessarily the parts—and not to the individual recipes because recipes are not within the purview of copyright protection.[35] Contrarily, Meredith argued that its "collective work" copyright protected the individual recipes.[36]

The court cited *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, in which the Supreme Court noted that unless the elements of a compilation meet the minimum copyright requirements, protection extends only to the author's original arrangement.[37] The court noted that the recipes in "Discover Dannon" were merely lists of ingredients and directions for combining those ingredients, and contained no "expressive elaboration upon either of these functional components, as opposed to recipes that might spice up functional directives by

30. *Id.*
31. *Id.*
32. *Id.* at 475-76.
33. *Id.* at 478.
34. *Id.* at 479.
35. *Publ'n Int'l, Ltd.*, 88 F.3d at 476.
36. *Id.* at 479-80.
37. *Id.* at 479 (citing Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349 (1991)).

weaving in creative narrative."[38] Thus, without expressing whether recipes are *per se* uncopyrightable, the court ruled that the merely functional listings of ingredients in Meredith's recipes were ideas and facts not within the meaning of "original" as contemplated by the Act.[39] Additionally, the court held that the directions for making the dishes fit perfectly within the § 102(b) exclusion as procedure[s], process[es], [or] system[s]," for producing the dishes.[40] In coming to this decision, the court looked at the Code of Federal Regulations, which states that copyright protection is not available for "mere listing[s] of ingredients or contents."[41]

The court then noted that some recipes may meet the requirements of originality to be copyrighted, for example, where the author intertwined the directions with "musings about the spiritual nature of cooking or reminiscences they associate with the wafting odors of certain dishes in various stages of preparation," or "suggestions for presentation, advice on wines to go with a meal, or hints on place settings and appropriate music."[42] While Meredith introduced several cases to support copyrightability of recipes, the Seventh Circuit declined to reach a holding of *per se* copyrightability, noting that more descriptive recipes *may* receive copyright protection (emphasis added).[43] But, the court seemed to easily distinguish *Fargo Mercantile Co.*[44] Just as the court found that Meredith's copyright protected only the compilation aspects of the publication, it saw *Fargo Mercantile Co.* as reaching only the question of whether the recipes on the label collectively were copyrightable as a compilation.[45] The court specifically addressed the Eight Circuit's statement that "[i]f printed on a single sheet, or as a booklet, these recipes could undoubtedly be copyrighted," as indicating the narrow scope

38. *Id.* at 480.
39. *Id.*
40. *Id.* at 480-81; 17 U.S.C. § 102(b) (2012).
41. *Publ'n Int'l, Ltd.*, 88 F.3d at 480; 37 C.F.R. § 202.1 (2012).
42. *Publ'n Int'l, Ltd.*, 88 F.3d at 481.
43. *Id.* at 480-81 (citing Belford, Clarke & Co. v. Scribner, 144 U.S. 488, 490 (1892); Marcus v. Rowley, 695 F.2d 1171, 1173 (9th Cir. 1983)).
44. *Publ'n Int'l, Ltd.*, 88 F.3d at 481-82
45. *Id.* (citing Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823, 827 (8th Cir. 1924).).

of that court's inquiry.[46] However, as noted, the Eight Circuit had analyzed the component parts of the label, examining the copyrightability of the elements.[47] The focus on this statement by the court in *Publications International,* is misplaced. Rather than distinguishing between copyright in the individual recipes and the compilation, the Eight Circuit was examining the differences between labels and other formats as valid formats for copyright protection, the issue presented in the case.[48] In determining that labels were copyrightable so long as they were not mere advertisements, the court found that the recipes as an element of the label reached the minimum requirements for copyright protection.[49]

It is significant that the court in *Publications International* misinterpreted *Fargo Mercantile Co.* To be sure, the Seventh Circuit may have still reached the conclusion that Meredith's recipes did not have the element of originality required for copyright, and were excluded from protection as mere facts and ideas, or processes, procedures, or systems under § 102(b). Likewise, there is no indication that the recipes in *Fargo Mercantile Co.* were any more complex than those in *Publications International,* except the Eight Circuit's note in its opinion that the recipes contained detailed directions and used diverse ingredients.[50] This short description from *Fargo Mercantile Co.* leaves much to the imagination, but arguably connotes our basic understanding of a food recipe.[51] Moreover, since the recipes appeared on product labels of consumer goods, one can infer that there would not have been much room for the "musings" the Eighth Circuit would require for copyright protection.[52] Perhaps the Eighth Circuit had a different perspective on the breadth of copyrightable subject matter and the limiting factor embodied in § 102(b). However, the addition of § 102(b) did not indicate

46. *Id.* (citing *Fargo Mercantile Co.*, 295 F. at 828).
47. *Fargo Mercantile Co.*, 295 F. at 828.
48. *Id.* at 825.
49. *Id.* at 827.
50. *Id.* at 824.
51. The recipes were not included or quoted in the opinion. Current information on Fargo Mercantile Company could not be found, suggesting that the company went out of business at some time in the past. Information on the company's closing could not be found either.
52. *See Fargo Mercantile Co.*, 295 F. at 824; Publ'n Int'l, Ltd. v. Meredith Corp., 88 F. 3d 473, 481 (7th Cir. 1996).

any real change in interpretation of copyrightability.[53] Rather, Congress noted that the clause's placement in the newer statute only served to restate distinction between expression and idea that existed under the previous Act.[54] Thus, the decision in *Fargo Mercantile Co.* may stand for the notion that recipes, when original, fall within the purview of copyright, and are not processes, procedures, or systems, at least in the manner of speaking that clause sought to prohibit from copyright protection. Alternatively, the two decisions may simply represent a Circuit split, and not a shift in the prevailing view on the issue. Regardless, as discussed *infra*, the Seventh Circuit's is arguably the more sound decision given a general understanding of copyright doctrine.

C. Lambing v. Godiva Chocolatier

Subsequent to the Seventh Circuit's decision, the same question arose again in the Sixth Circuit. Plaintiff Lambing sued chocolate manufacturer Godiva Chocolatier, Inc., for copyright infringement, claiming Godiva misappropriated the recipe she created for a truffle known as "David's Trinidad."[55] In a rather short opinion, with almost no analysis on the matter, the Sixth Circuit relied solely on *Publications International,* holding that recipes are not copyrightable.[56] The court briefly noted that recipes are excluded from

53. H.R. REP. NO. 94-1476, at 57 (1976).

54. *Id.* The courts' use of legislative history is a disputed issue. One commentator noted that "[t]he use (or 'abuse') of legislative history is at the core of contemporary debate over statutory interpretation primarily because once the wall of literalist is breached by reference to contextual material in search for the 'intent'" or 'will' of Congress, the statements of the body as spoken through its members arguably provide as good a guide to that intent as any other extra-textual material." Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1459-60 (1994). For most of the twentieth century legislative history enjoyed a favorable status with the Supreme Court, however in recent decades several members of the judiciary (including Justices Scalia and Kennedy) have voiced skeptical attitudes towards the use of legislative history. Despite this opposition by certain members of the Court, a recent commentary noted that "[n]evertheless, the federal courts are far from eschewing the practice completely." David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1659-64 (2010).

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

56. *Id.* at *3.

protection under § 102(b) as statements of facts.[57] It is interesting to note that following the court's decision, Lambing filed a writ of certiorari, an action not taken by the losing parties in *Fargo Mercantile Co.* or *Publications International*.[58] However, the Court denied the writ, sending a clear message that it believed copyrightability of recipes was not a contentious issue among the Circuit courts, and not important enough to warrant the Supreme Court's review.[59] Given the status of food culture on television and the internet, and the implications that a definitive answer regarding copyrightability would have on the industry, at least one scholar believes the Supreme Court should more strongly consider taking on such a case the next time it arises.[60]

D. Barbour v. Head

Several years after *Publications International* and *Lambing*, the Southern District of Texas visited the same issue. Plaintiff Barbour authored "Cowboy Chow", a Texas-themed cookbook, for which she received a registered copyright.[61] Several years after the cookbook was first published, both Defendant Head and Defendant Penfield Press published almost verbatim copies of recipes appearing in "Cowboy Chow" in an internet magazine and a cookbook, respectively, without Barbour's consent.[62] Upon discovering the use in 2001, Barbour and her publisher filed suit against Head and Penfield Press for copyright infringement.[63] Similar to *Publications International,* Penfield Press argued that Plaintiffs' recipes were processes and procedures, and therefore not copyrightable under § 102(b).[64]

The defendants directed the court to a letter from the Register of Copyrights that, like 37 C.F.R. § 202.1 cited in *Publications International*, stated that "[m]ere listings of

57. *Id.*
58. *Lambing*, 1998 U.S. App. LEXIS 1983, *cert. denied*, 524 U.S. 954 (1998).
59. *See generally* SUP. CT. R. 10.
60. Meredith G. Lawrence, Note, *Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age*, 14 VAND. J. ENT. & TECH. L. 187, 192-93 (2011).
61. Barbour v. Head, 178 F. Supp. 2d 758, 759 (S.D. Tex. 2001).
62. *Id.* at 760.
63. *Id.*
64. *Id.* at 761.

ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection."[65] But, as the court noted, defendant omitted the following sentence of the letter that stated "[h]owever, where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook, there may be a basis for copyright protection."[66] The court also addressed *Publications International*, stating that both sources declared that recipes were not *per se* uncopyrightable.[67]

In beginning its analysis into the copyrightability of Barbour's recipes, the court noted that it was not certain whether "Cowboy Chow" had been copyrighted as a compilation work or as a literary work, possibly distinguishing it from the facts in *Publications International*.[68] The notion of recipes as a type of protectable literary work is discussed in section two.[69] Beyond this factual distinction, however, the question to be answered for this compilation or literary work was whether the recipes were expressive enough to fall outside the § 102(b) restrictions.[70] Denying defendants' motion to dismiss, the district court found that there was a genuine issue of material fact as to whether the recipes were protected expression or unprotected facts, noting that at least some of the recipes included commentary making them perhaps sufficiently expressive.[71]

The *Barbour* court, if not going further than *Publications International*, and *Lambing* to support copyright in recipes, was at least more positive about the possibility. Under this decision, barebones recipes are not likely to be copyrightable. Neither court went far enough, however, to give any real guidelines for what amount of added commentary would cross the threshold into copyrightability. The remainder of this Comment will attempt to answer this question, and discuss the practical application of the Act to recipes.

65. *Id.* at 762.
66. *Id.* at 762–63.
67. *Barbour*, 178 F. Supp. 2d at 763.
68. *Id.*
69. *See infra* pp. 15–21.
70. *Barbour*, 178 F. Supp. 2d at 763–64.
71. *Id.* at 764.

II. RECIPES SHOULD RECEIVE COPYRIGHT PROTECTION

Copyrighting recipes certainly faces barriers, in the form of both judicial decisions and doctrinal theory. First, modern case law seems to be against recipes receiving copyright protection.[72] Although the courts have not gone so far to say that recipes are *per se* uncopyrightable, the Sixth and Seventh Circuit have used the Copyright Office's advice as justification for barring most recipes from receiving protection.[73] Likewise, Nimmer, while recognizing that case law exists that could support copyright in recipes, suggests that extending copyright protection to recipes "seems doubtful because the content of recipes are clearly dictated by functional considerations, and therefore may be said to lack the required element of originality."[74] Contrarily, this section will discuss why recipes meet the requirements of copyright, and should be copyrightable, albeit perhaps with a more limited scope of protection akin to the limitations of copyrights in sound recordings.

Most chefs and restaurateurs—and their publishers—would theoretically utilize § 103 of the Copyright Act, which recognizes copyright protection in compilations to protect their recipes. That is, industry professionals understand the usefulness of compilation protection, regardless of the copyrightability of individual recipe items. Compilation is defined by the Copyright Act as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[75] This falls short of the protection that chefs should be afforded in protecting their original recipes. Rather, recipes should be viewed in the same light as any other type of copyrighted work.

72. Publ'n Int'l, Ltd. v. Meredith Corp., 88 F. 3d 473, 473 (7th Cir. 1996); *Barbour*, 178 F. Supp. 2d at 764. *See also* Buccafusco, *supra* note 7, at 1122.

73. *Publ'n Int'l, Ltd.*, 88 F. 3d at 480–81; Lambing v. Godiva Chocolatier, No. 97-5697, 1998 U.S. App. LEXIS 1983, at *3 (6th Cir. Feb. 6, 1998).

74. 1–2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.18[I] (2011).

75. 17 U.S.C. § 101 (2012).

A. Fitting into Copyright Subject Matter

A preliminary issue to examine is determining how recipes should fit within the subject matter of copyright, that is, for categorical and organizational purposes, choosing the most efficient way to reconcile recipes as copyrightable with the language of the current copyright statute. One should note, however, that this determination is more of an exercise in organization and efficiency than it is a requirement to place recipes within enumerated categories. As discussed *supra*, the list of eight subject matter categories in § 102 of the Copyright Act is not exhaustive.[76] Rather, the scope of copyright protection extends to all works that meet the threshold requirements, regardless of whether they fit neatly into certain categories of works.

In 2006, several incidences of food plagiarism prompted a discussion chain on eGullet, a forum-based website dedicated to the culinary arts, on copycats and property rights.[77] Steven Shaw, lawyer and eGullet founder, joined the discussion, arguing that recipes should be copyrightable, despite what he had learned in law school.[78] Shaw went even further to advocate for changing the copyright statute by making food a subset of the "sculptural works" category, or recognize recipes as a form of "literary work."[79] His comments set up the basic framework for attempting to reconcile, or create, food and recipes with copyright law.

Recognizing recipes as literary works is perhaps the easiest and most efficient way to incorporate the culinary arts into the scope of copyright. Although the Copyright Act does not state expressly that recipes are protectable, it is not incomprehensible that they could fit into one of the enumerated subject matter categories. The Copyright Act defines "literary works" as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the

76. *See supra* pp. 4–5.

77. Pete Wells, *New Era of the Recipe Burglar*, FOOD & WINE MAGAZINE (November 2006), http://www.foodandwine.com/articles/new-era-of-the-recipe-burglar. *See generally* EGULLET, http://forums.egullet.org/index.php?app=core&module=search&do=active (last visited Sept. 20, 2012

78. Wells, *supra* note 77.

79. *Id*.

material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."[80] Without discussing the limitations of § 102(b), which are the topic of the next subsection, the literary works category seems to be extremely amenable to recipes. Recipes are, at their core, works expressed in words and numbers. Moreover, the nature of modern culinary entertainment places recipes in formats or material objects acceptable to the literary works definition; that is, recipes are most commonly embodied in text via print or websites, or through film of broadcasted cooking shows. *Barbour v. Head* provides an already existing example of considering recipes as literary works.[81] Although the district court did not reach a decision on the copyrightability of the specific recipes—but would also not hold that recipes are *per se* uncopyrightable—the court noted that it was quite conceivable that the recipes in question could potentially be literary works.[82] Amazingly, while the court was seemed unsure about the work's copyright status, the court documents excluded important details. A search on the Copyright Office database reveals that "Cowboy Chow" was registered in 1988 as a literary work.[83]

This method is sensible because it does not require any major amendment to the Copyright Act, although action by Congress to define literary works as including food recipes would be the most effective means of paving the way for copyright protection. However, change in this manner would necessarily rely on the courts to reevaluate their views on recipes as copyrightable. Likewise, without any formal action by the legislature of the Copyright Office, much of the weight would fall upon chefs and their partners in creating intellectual property (i.e. publishers and television networks). Thus, chefs must first take seriously the possibility of protecting their recipes through legal copyright means by filing registrations for their individual recipes in addition to registering cookbooks as compilations.[84] Second, chefs must

80. 17 U.S.C. § 101 (2012).
81. Barbour v. Head, 178 F. Supp. 2d 758, 758 (S.D. Tex. 2001).
82. *Id.* at 763.
83. *Id.*; United States Copyright Office Online Records, UNITED STATES COPYRIGHT OFFICE, http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First (use "Basic Search" and "Search by Title" options and search "Cowboy Chow").
84. Although copyright protection begins at the time of creation for works created

take affirmative action to bring copyright claims over alleged misappropriations. This would give courts the opportunity to reevaluate the copyrightability of recipes and to better define the parameters in which such works would be copyrightable.

Likewise, the Register of Copyright could adopt a more inclusive position in an advisory letter or the Code of Federal Regulations, describing the extent to which recipes could be copyrighted, and would hopefully have a swaying effect on the courts. In fact, such support could arguably be drawn from 37 C.F.R. § 202.1, which states that a "mere listing of ingredients" is not copyrightable, and from a similar letter from the Register of Copyrights that specifically states that a recipe accompanied by substantial literary expression *or* directions may create the basis for a copyright protection (emphasis added).[85] Although recent court decisions have viewed such comments as limiting the possibility of recipe protection, one could potentially extract the opposite conclusion.[86] That is, most original recipes—at least those relevant to this discussion—are more than mere listings of ingredients, and include detailed directions as well. While cookbooks and broadcasted cooking programs also include other so-called "musings" even recipes published online contain substantial directions, both of which seemingly meet the plain language of the Copyright Office's advisory letter. However, bringing recipes into copyright protection under the "literary works" category may not be the best option despite its simplicity. This is because without Congressional amendment there would be no way to facilitate the specific treatment of rights discussed in the next section. Given the uniqueness of recipes as a subject matter, and the landscape of the culinary industry, creating a set of rules that apply specifically to recipes and food may properly serve the goals of copyright.

Perhaps the best means of protecting the intellectual property rights of the culinary arts is through an amendment to the Copyright Act that would include recipes and/or food as

on or after January 1, 1978, the Copyright Act of 1976 requires that a work be registered with the Copyright Office in order to bring a copyright infringement claim. 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16 (2011).

85. 37 C.F.R. § 202.1 (2012); Barbour, 178 F. Supp. 2d at 761-62.

86. Buccafusco, *supra* note 7, at 1125.

an enumerated, protected category in § 102, or to note that recipes fit within one of the already existing categories. The latter option is not suggesting that Congress re-define the scope of copyright to include recipes, but rather that it explicitly state that recipes are already copyrightable under the Act. Congress did this in 1980 when it added the definition of "computer program" to § 101 of the Copyright Act without adding it to § 102.[87] Following the amendment computer programs are considered "literary works."[88] This amendment reflected the fact that Congress intended the categories in § 102(a) to be "illustrative and not limitative," so that the Act would remain relevant with regards to innovation and change that would otherwise be within the scope of copyright protection.[89] Like the addition of computer programs, Congressional action may in fact result in recipes being defined in the Act but subsumed within one of the enumerated categories. Although the same result can be effectuated without an amendment, a Congressional amendment adds an extra level of security. Such a drastic change would ensure that recipes receive proper recognition and protection.

We are left with two paths that can be taken to reach this result. The first is to treat a new recipes category like literary works, with the new category serving merely an organizational purpose in connection with administering the rights associated with recipes. This is the best way in which to protect chefs' creations. As noted, original recipes that are more than mere lists of ingredients should be copyrightable.[90] Like literary works, which can be fixed in diverse media, chefs and their publishers use a variety of means to express the recipes, including cookbooks, online publications, and cooking shows. Moreover, creating a new category specifically for recipes would allow Congress to insert into the Copyright Act details on how to administer the exclusive rights afforded to copyrighted recipes. Just as industry practices and statutory licenses play an important role in the music industry and the

87. Andrew W. Torrance, *Synthesizing Law for Synthetic Biology*, 11 MINN. J.L. SCI. & TECH. 629, 645-46 (Spring 2010); Deborah F. Buckman, Annotation, *Copyright Protection of Computer Programs*, 180 A.L.R. FED. 1, § 2(a) (2012).

88. Buckman, *supra* note 87, § 2(a).

89. H.R. REP. NO. 94-1476, at 53 (1976).

90. *See supra* pp. 15-20.

use of musical compositions, the culinary industry could benefit from a similar system of protections designed to protect the rights of chefs and publishers in their recipes.

The other option considers food in a more unique light, and pays more homage to the creativity of the culinary arts. Several commentators have presented the idea that food itself should be recognized as copyrightable.[91] This idea would consider the recipe to be the means by which a specific food dish can be "perceived, reproduced, or otherwise communicated."[92] This would be similar to the manner in which musical works are copyrighted. Although a musical composition is fixed in a tangible medium like sheet music, the underlying musical work, not the sheet music, is what is protected as a literary work.[93] In a similar way, original food dishes could be considered the underlying protected expression, with the recipe being considered the fixed tangible medium. Most importantly, recognizing food as the copyrightable expression would remove any real concerns involving § 102(b), as discussed *infra*.[94] While this method can arguably be reconciled with the Copyright Act, it has serious flaws as well, including issues of separability and fixation. As this paper advocates a Congressional amendment recognizing recipes as a copyrightable subject matter, and not the food itself, these issues are outside its scope.

While it seems doubtful that a new category could be added with ease, it is clear that listing recipes as an enumerated subject matter is the most promising means by which copyright protection could be extended to recipes. Furthermore , although the statute does not necessarily need to be amended in order for recipes to be protected under the scope of copyright, such Congressional action would provide the most efficient and comprehensive way of dealing with the complexities of the culinary arts and its business models. Likewise, this change would reflect the understanding that

91. Buccafusco, *supra* note 7, at 1123; J. Austin Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691, 703 (2008) (arguing that the dish itself, and not the recipe, is the proper subject matter of protection).

92. *See* 17 U.S.C. § 102(a) (2006); Buccafusco, *supra* note 7, at 1131.

93. Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1499 (1991).

94. *See* discussion *infra* pp. 23-27.

copyright awards and protects original creations, a characteristic that many recipes certainly exhibit.

B. Passing the Modicum of Originality Test

As noted, the most basic requirement of copyright is that "works of authorship" must be original and fixed.[95] The Supreme Court has stated that a work must be independently created and possess a minimal degree of creativity to receive protection.[96] Most works will easily meet these requirements because of their creative spark.[97] To qualify this requirement the Court noted that a work does not need to be novel to receive protection.[98] Given these basic copyright principles, it is difficult to see why recipes would fall outside the scope of copyright rather than being perceived as original works of authorship. Just like any "author" creating a copyrighted work, a chef or any other person crafting a new recipe puts much creativity and originality into the work. A chef must make many decisions with regard to which ingredients to use and the specific manner in which those ingredients will best come together. These choices are original, no different than the choice of words an author makes when penning a novel or a poem. Moreover, these decisions are arguably original in a copyright sense.

Likewise, the Copyright Office's statement regarding recipes in 37 C.F.R. § 202.1, could easily be construed as supporting copyright in recipes of the type we are concerned with.[99] This is because the essence of an original recipe is the original expression that goes into choosing the ingredients and the expressive manner of the directions. We are not concerned with the most basic of recipes. Moreover, we must assume that many recipes—especially those seen on the menus of your average restaurants—occupy a large public domain of recipes. This notion is two-fold, and not distinct from other types of work protected by copyright: this includes works with expired copyrights (were recipes afforded protect),

95. 17 U.S.C. § 102(a) (2006).
96. Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).
97. *Id.*
98. *Id.*
99. 37 C.F.R. § 202.1 (2012) ("Mere listings of ingredients or contents" are not copyrightable).

and works too unoriginal to receive protection. Beyond these limitations, chefs have created and are currently creating new recipes that arguably meet the modicum of originality required for copyright protection. Under 37 C.F.R. § 202.1, the Copyright Office has made it clear that while mere listings of ingredients may not be copyrighted, the addition of substantial directions would bring such a recipe into the realm of copyright.[100] Because a list of ingredients accompanied by detailed directions captures our basic understanding of most recipes, this type of expression is seemingly within the scope of copyright. Likewise, this format embodies the originality of the chef's ingredients and overall creative thought process that went into forming the dish. Regarding Nimmer's conclusion that recipes lack the minimum originality for copyright, one commentator noted that this was a reasonable perspective if one focused on well-known dishes like apple pie.[101] If we instead focus on innovative dishes, even on those with origins in the "culinary public domain", it is clear that recipes can be sufficiently expressive and original to warrant copyright protection.

C. 17 U.S.C. § 102(b): The Idea-Expression Dichotomy

Perhaps the more problematic issue when it comes to copyrighting recipes is the so-called idea-expression dichotomy. As noted supra, § 102(b) excludes from copyright protection "any idea, process, system, method of operation, concept, principle, or discovery."[102] *Publications International* and *Barbour* interpreted § 102(b) as barring the recipes therein from receiving copyright protection. But, neither case gave credence to *Fargo Mercantile Co.*, perhaps the only instance in which the courts held that recipes fit within the subject matter of copyright. The courts may not have thought it relevant to look to a case dating close to a century ago, especially one determined under an earlier version of the copyright statute. But, as discussed *supra*, the addition of this section did not completely change the way in which copyright subject matter was to be interpreted. Rather, as

100. 37 C.F.R. § 202.1.
101. Buccafusco, *supra* note 7, at 1131.
102. 17 U.S.C. § 102(b) (2006).

Congress noted in the House Report to the 1976 amendments, "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged."[103]

The 1976 incarnation certainly represented a milestone in intellectual property lawmaking. However, it is apparent that Congress did not wish to change the interpretation of the subject matter of copyright, but instead, to merely clarify it by adding § 102(b). Thus, even with the introduction of §102(b) to the new Act, *Fargo Mercantile Co.* would arguably still be good law under the 1976 Act. That is, *Publications International* and *Barbour* may represent a widespread departure from an earlier interpretation of the breadth of copyrightable subject matter; contrastingly, these cases may merely represent distinct splits in interpretation, or instances of misinterpretation.

Yet both *Publications International* and *Barbour* seem to struggle with the application of § 102(b) to recipes. That is, despite the wording of the section, it should not be assumed that recipes are the kind of works it sought to exclude from copyright protection. As noted in *Publications International*, the goal of § 102(b) was to set apart subject matter that is copyrightable from that which is protected by patent.[104] Suggesting that recipes are barred under § 102(b) leads to one of two results: either recipes are amenable to patent protection, or they occupy some sort of void unprotected by either copyright or patent.[105] United States Patent law protects the invention or discovery of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[106] Moreover, in order to receive patent protection, a process must be novel—a higher standard than copyright's "originality" requirement.[107] Members of the culinary industry have turned to patent law to protect creative cooking techniques and methods.[108]

103. H.R. REP. NO. 94-1476, at 57 (1976); *See supra* p. 13.
104. Publ'n Int'l, Ltd. v. Meredith Corp., 88 F. 3d 473, 479 (7th Cir. 1996).
105. Buccafusco, *supra* note 7, at 1122.
106. 35 U.S.C. § 101 (2006).
107. CRAIG JOYCE ET AL., COPYRIGHT LAW § 1.02(B)(2) (8th ed. 2010).
108. Buccafusco, *supra* note 7, at 1132-33. For example, Chef Homaru Cantu has

However, techniques used in cooking—like grilling or baking, or newly created methods—are the type of processes contemplated by patent law so long as the requirements for protection are met.[109] This notion of patent in culinary procedures is separate and distinct from an individual food dish—and arguably a recipe as well.[110]

The U.S. Patent Office rarely grants patents for recipes, noting that they lack invention.[111] In *Fargo Mercantile Co.*, the defendant argued that the labels in question were within the scope of patent rather than copyright.[112] In holding that the recipes were protected by copyright, the Eighth Circuit made it clear that labels—and recipes therein—were not the subject of patent law.[113] Since the definition of patentable subject matter has basically gone unchanged since 1793, recipes and food creations are by and large outside the scope of patent.[114] However, the inapplicability of patent law to recipes does not automatically signify that copyright protection is more amenable to the content of recipes.

Turning back to the boundaries of copyright, there must be a distinction between the expression found within recipes, and mere facts to avoid the limitations of § 102(b). As noted throughout this paper, the types of recipes we wish to protect are more complex than mere lists of ingredients or simplistic recipes like chocolate chip cookies. Likewise, the directions

filed several patent applications to protect his culinary innovations, including edible sheets of paper. Patent may be a useful form of intellectual property for chef's practicing "molecular gastronomy," a modern practice merging cooking, technology, and science, but not for most chefs, whose recipes are not based upon technological innovation. *See, e.g.*, Buccafusco, *supra* note 7, at 1132-33; Lawrence, *supra* note 60, at 201-02; Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen*, 9 J. HIGH TECH. L. 21, 25-26 (2009).

109. Buccafusco, *supra* note 7, at 1131-33.

110. *Id.*, at 1131.

111. Cunningham, *supra* note 108, at 33.

112. Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823, 825 (8th Cir. 1924); Buccafusco, *supra* note 7, at 1126.

113. *Fargo Mercantile Co.*, 295 F. at 827-28.

114. The 1793 Patent Act defined patentable subject matter as "any art, machine, manufacture, or composition of matter." Patent Act of 1793, ch. 11, 1 Stat. 318-23 (Feb. 21, 1973) (repealed 1836). The current version defines the protected subject matter as "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101 (2006); Stephen McKenna, Comment, *Patentable Discovery*, 33 SAN DIEGO L. REV. 1241, 1252 (1996).

within a recipe are distinct from the processes and procedures protected by patent, as are the expressive thoughts emanating from a chef's creativity. Moreover, when combined, the collectivity of the list of ingredients and directions that make up an original recipe arguably defeat these limiting principles. Again, looking to the letter from the Register of Copyrights cited in *Barbour* offers some advice, although as the court noted, such letters are not authoritative.[115] The letter stated, "Where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions . . . there may be a basis for copyright protection."[116] The district court in *Barbour* took this statement to invalidate any assertion that recipes were *per se* uncopyrightable.[117] Likewise, the Seventh Circuit in *Publications International*, came to a similar conclusion.[118] Despite the decision in *Publications International*, and our understanding of *Feist*, it is hard to imagine that the Copyright Office's letter does not suggest that the entire recipe—ingredients with directions— would be copyrightable if the minimum originality existed. Reaching the opposite conclusion, that in such a recipe only "musings" would be protected, arguably would serve to declare *per se* uncopyrightability. Each ingredient may be a fact, but in the context of a recipe an ingredient is no different than the words in a poem or note in a musical composition. Thus, in this context it is significantly different than the telephone numbers in *Feist*.[119]

III. COPYRIGHTABLE WITH LIMITED RIGHTS

While Part II advocates recognizing recipes as protectable works under current copyright law, this proposal does not come without caveats. First, similar to the absence of public performance rights for sound recordings,[120] only a few of the

115. Barbour v. Head, 178 F. Supp. 2d 758, 762-63 (S.D. Tex. 2001).
116. *Id.*
117. *Id.*
118. Publ'n Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480 (7th Cir. 1996).
119. Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991).
120. 17 U.S.C. § 106(4) (2002). Public performance rights apply to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works," but not to sound recordings.

exclusive rights enumerated in § 106 of the Copyright Act should apply to copyrights in recipes. Additionally, to the extent exclusive rights are granted, certain limitations should attach. This section will evaluate the implications of applying particular exclusive rights to copyrighted recipes.

A. The Reproduction Right

Treating recipes like literary works, the reproduction right is rather straightforward. Generally, a copyright owner alone has the right to produce material objects containing his or her copyrighted work.[121] In the context of recipes, the right of reproduction may be important not only to chefs who create recipes, but also to publishers of cookbooks and websites that contain recipes and television networks that air cooking programs, who would presumably own such copyrights in whole or in part through works made for hire and assignments. Ultimately, however, the reproduction right will likely provide thinner protection to authors of recipes than it gives creators of other types of works, at least in part because recipes—despite having the requisite originality—are often similar.

With respect to reproduction, the culinary industry faces unique problems, particularly as it relates to the ability of chefs and publishers to effectively exploit their property for financial gain. In addition to using recipes in restaurants, chefs who want to publicize and profit off of their recipes often seek to publish the recipes in cookbooks and other media, including online. For example, shortly after winning *Top Chef: All Stars* (*Top Chef* Season 8), Chef Richard Blais signed a cookbook deal with publisher Clarkson Potter.[122] Likewise, Bravo Network's *Top Chef* website houses recipes from each of the show's seasons.[123] One commentator noted, however, that the rise in popularity of food websites has also spurred more copying of recipes.[124] As a result, recipe

121. Craig Joyce et al., *supra* note 107, at § 7.02.

122. *Biography of Richard Blais*, http://www.trailblais.com/Bio.aspx; Paula Forbes, *Richard Blais' 'Quirky' Cookbook Coming November 2012*, EATER (July 18, 2011), http://eater.com/archives/2011/07/18/
richard-blais-quirky-cookbook-coming-november-2012.php.

123. Recipe Finder, FOOD BY BRAVO, http://www.bravotv.com/foodies/recipes.

124. Lawrence, *supra* note 60, at 203-04.

websites Allrecipes and Epicurious[125] lose an estimated $3.1 million and $1.6 million in ad revenue annually.[126] Meredith Lawrence proposed developing a new system under which an individual seeking to reproduce another's recipe would be allowed to obtain a license to do so.[127] Her system would recognize both the financial interests of the industry and the culinary arts' history of sharing.[128] Generally, Lawrence noted that allowing one to seek a license to reproduce another's recipe would be advantageous to the industry.[129]

If licenses were required to replicate recipes, consumers would not be able to freely reproduce recipes posted online. Rather, the right to view a recipe on a website would come with a license allowing a user to look at the recipe and make the dishes but not reproduce the recipe.[130] While this sort of implied license to use but not copy, exists explicitly in published, hardcover cookbooks, this system would address the distinct needs of the burgeoning web-based food industry.

eGullet's Steven Shaw proposed this same idea of establishing a uniform system to deal with copyrighting online recipes, suggesting the creation of an organization like ASCAP to enforce the rights of copyright holders.[131] Perhaps an even better system would be one similar to that enacted by the Harry Fox Agency, which collects mechanical license fees for music publishers.[132] Under a system like that, chefs, restaurants, and publishers could reproduce other copyrighted recipes without any barriers by paying a statutory or mechanical rate to do so. This would certainly be an improvement over the current system of rampant copying, and it would efficiently facilitate both sharing and financial gain in the culinary industry.

In addition, such a system would reflect the moral guidelines the industry has set for itself. The Code of Ethics

125. Although these websites may not directly profit from chefs creating recipes, they are the equivalent of publishers in the printed cookbook market.
126. Lawrence, *supra* note 60, at 203-04.
127. *Id.* at 214.
128. *Id.* at 204.
129. *Id.* at 214.
130. *Id.*
131. Wells, *supra* note 77; Lawrence, *supra* note 60, at 215.
132. *See generally* Harry Fox Agency, http://www.harryfox.com/public/AboutHFA.jsp.

of the International Association of Culinary Professionals (IACP), a professional organization for the culinary industry, states that its members shall "Respect the intellectual property rights of others and not knowingly use or appropriate to [their] own financial or professional advantage any recipe or other intellectual property belonging to another without proper recognition."[133] While the IACP's guidelines only require acknowledgement, the current environment of the culinary business warrants a financial system that would best protect the intellectual rights of chefs from being appropriated by others for financial gain. While many chefs support a culture of sharing, a more realistic approach to the industry recognizes the desire to profit in any way possible. To that end, a system similar to that used in the music industry would meet many of the goals of the industry, while allowing those opposing to opt out.

B. The Derivative Right

Section 106(2) of the Act gives the copyright owner the exclusive right "to prepare derivative works based upon the copyrighted work."[134] This right is known as the adaptation or derivative right.[135] The Act defines a derivative work as one into which a preexisting work has been "recast, transformed, or adapted."[136] Moreover, works consisting of elaborations or modifications that "represent an original work of authorship" fit within the derivative work definition.[137] While the absence of a derivative right would ultimately leave the copyright owner with protection only against exact or almost exact copies of his or her original work, granting only a limited adaption right to chefs might be best given that recipes are unique in their ability to be markedly similar and meaningfully distinct at the same time..

Moreover, a more limited application of the derivative right may be necessary to promote creation, a preeminent

133. *IACP Code of Ethics*, INTERNATIONAL ASSOCIATION OF CULINARY PROFESSIONALS, http://www.iacp.com/join/more/iacp_code_of_ethics.
134. 17 U.S.C. § 106(2) (2002).
135. Joyce et al., *supra* note 107, at § 7.03.
136. 17 U.S.C. § 101 (2010).
137. *Id.*

goal of copyright law.[138] In the context of recipes, derivative work protection should be limited to protecting the author of a recipe when he or she seeks to use or discuss the recipe in different mediums. For example, a chef who authors a written recipe should have the exclusive right to present that same recipe on a cooking show. One commentator discussed the problems that would arise if the holder of a copyright in a recipe were permitted to control derivative works formed by adding ingredients or steps in the directions.[139] While culinary creativity lends itself to an endless variety of recipes, chefs would have to constantly wonder whether their seemingly new creations were merely adaptations of another chef's dish, the two possibly differing by only one or two ingredients. These worries, coupled with the fact that chefs seeking to protect their work would need to obtain an enormous number of derivative licenses to accomplish that objective, would certainly curtail new creation.[140] Indeed, as a result of these concerns, authors of recipes deserve derivative rights, albeit ones characterized by an extremely narrow scope of protection.

C. The Public Performance Right

Arguably, the area where recipes present the most interesting landscape for exploring ways in which to administer and oversee a copyright holder's rights involves public performance rights. Under the Copyright Act, to "perform" is to recite, render, play, dance, or act it, either directly or by means of any device or process.[141] To perform "publicly" is to perform the work in a place open to the public or where a substantial number of people congregate.[142] This obviously includes the performance of recipes on broadcasted television programs. Moreover, it arguably contemplates a

138. The Copyright Clause of the Constitution illustrates the importance of creation by providing for limited protection to those contributing new works: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8.

139. Cunningham, *supra* note 108, at 38.

140. *Id.*

141. 17 U.S.C. § 101 (2012).

142. *Id.*

chef's use of a recipe in a restaurant. In light of the fact that using a recipe for financial gain almost always involves revealing the recipe to the public in some way, granting holders of copyrighted recipes public performance rights would be particularly significant.

First, it should be noted that many copyrighted works are afforded "grand rights" as part of the public performance right; but, recipes are not a type of work that would benefit from the protection provided by such rights.[143] As it relates to the "small rights" of public performances, perhaps the most efficient and beneficial way to administer the rights would be through the creation of a statutory or mechanical license rate, similar to that proposed for use with the reproduction right for recipes. This system could operate much like a hybrid of the mechanical rate and the performance rights licenses used for musical works. Specifically, the system would involve charging a congressionally mandated, but affordable, statutory rate for using a copyrighted recipe. The fee would be administered and collected by a performance-rights organization.[144] As noted, eGullet's Steven Shaw proposed this same idea, suggesting the creation of a system like ASCAP.[145]

The culinary industry is big-business and, as such, it certainly warrants and perhaps requires this type of organization to facilitate and oversee the use of such rights. In 2011, the restaurant industry was projected to earn $604 billion in sales, a staggering amount.[146] Assuming a somewhat affordable mechanical rate, use of other chefs' recipes should continue largely unhampered in the restaurant industry. But, it is also possible that the imposition of a statutory license would chill sharing. However, this might push chefs to create when they would otherwise borrow from others. Thus, the proposed royalty system would likely benefit chefs and publishers and would arguably not harm the

143. Grand rights are synonymous with dramatic performing rights. *See* 3-10 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §10.10(E) (2011).

144. This reference to performance rights organizations is an analogy to the music publishing industry. As this subsection is advocating a type of statutory or mechanical license rate, an analogy to organizations like the Harry Fox Agency, which collects mechanical license fees for music publishers, would also be appropriate.

145. Wells, *supra* note 77.

146. Lawrence, *supra* note 60, at 189.

industry's culture or expected creativity.

IV. WHEN CHEFS AND RESTAURATEURS SHOULD LOOK TO TRADE SECRET INSTEAD OF COPYRIGHT

Affording protection to recipes would give security and economic benefit to celebrity chefs and other chefs and restaurateurs alike seeking to publicize their recipes and creations largely via television programs, cookbooks, and websites. But, beyond seeking protection under the Copyright Act, certain chefs and restaurateurs may be more inclined to keep their recipes hidden from the consuming public. Such would be the case for chefs and restaurateurs who do not appear on television to share their recipes or publish cookbooks for sale, but rather only operate and cook at well-known restaurants with popular signature dishes. These members of the culinary industry would be much better suited to seek protection under the trade secrets doctrine. A "trade secret" is:

> Information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value. . .from not being generally known to, and not being readily ascertainable by proper means by others who can obtain economic value from its disclosure or us, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[147]

To obtain relief from trade secret infringement, a plaintiff must for show that the subject information is a trade secret, and then the plaintiff must prove that it has been misappropriated.[148] Protection for recipes and food creation

147. Cunningham, *supra* note 108, at 35 (citing 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).

148. *See, e.g.*, FLA. STAT. §§ 688.001-688.009 (2012); CAL. CIV. CODE §§ 3426.1-3426.11 (West 2012); 12 PA. CONS. STAT. §§ 5301-5308 (1990); N.J. STAT. ANN. §§ 56:15-1-56:15-9 (West 2012) (New Jersey is one of the more recent states to enact a Trade Secret statutory scheme, signed into law by Governor Christie on January 9, 2012. Jedd Mendelson, *New Jersey Trade Secrets Act Signed Into Law*, LITTLER MENDELSON P.C. (January 24, 2012), http://www.littler.com/publication-press/publication/new-jersey-trade-secrets-act-signed-law.) New York, which may be the most important state for the culinary industry, and especially with regard to celebrity chefs, does not have a trade secret statute. Instead, trade secrets are protected through common law. *See* Ashland Mgmt. Inc. v. Janien, 82 N.Y.2d 395 (N.Y. 1993). Likewise, Texas, another

processes alike as trade secrets is not a novel idea.[149] In the restaurant context, chefs create spectacular dishes that simply awe customers' taste buds. The high degree of patronage for a chef's signature dish warrants some form of intellectual property protection, unless the chef wishes to share the details of this recipe with the world.[150] "A trade secret, once lost, is lost forever; its loss cannot be measured in money damages."[151]

Given the large amount of turn-over in the restaurant industry, as well as the apprentice-type system by which chefs rise through the ranks from line cook to executive chef, head chefs should be well educated in the law of trade secrets. Those wishing to employ such rules could use non-disclosure agreements,[152] employee contracts and handbooks to inform employees of the sensitive nature of their creations and prevent misappropriation by employees (or at least attempt to).[153] A properly executed employment contract could effectively prevent sous chefs and other restaurant staff working under a chef creating signature dishes and recipes from taking recipes with them to new places of employment or their own restaurants.

That being said, chefs might be more open to their recipes leaving their kitchen if the copyright statute were more protective. Indeed, the public performance right discussed *supra* would play a large role in giving chefs some comfort that the recipes leaving their kitchen will still provide them

important state because of its size, enforces trade secret protection via common law. *See* In re Bass, 113 S.W.3d 737 (Tex. 2003).

149. Cunningham, *supra* note 108, at 35 (citing Magistro v. Lou, Inc., 703 N.W.2d 887 (Neb. 2005)); Sweetzel, Inc. v. Hawk Hill Cookies, Inc., No. 95-2632, 1995 U.S. Dist. LEXIS 13495, at *2 (E.D. Pa. Sept. 15, 1995); Buccafusco, *supra* note 7, at 1149 n.163. Many successful food industry corporations rely on trade secret protection for their special products: Coca-Cola's formula, Kentucky Fried Chicken, McDonald's Big Mac "Special Sauce," etc. *See* Cunningham, *supra* note 108, at 50.

150. For example, Anthony Bourdain, Chef-at-Large at Brasserie Les Halles in New York, and host of the Travel Channel's program *Anthony Bourdain: No Reservations*, published *Anthony Bourdain's Les Halles Cookbook* in 2004. In the cookbook Bourdain shared the recipes and techniques behind the well-known dishes at Les Halles.

151. EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 308-9 (S.D.N.Y. 1999) (citing North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 49 (2d Cir. 1999)).

152. Cunningham, *supra* note 108, at 35 n.285 (citing Martha Neil, *Mixing IP with MMM*, 6 NO. 19 ABA J. E-REPORT 3 (May 11, 2007)).

153. Cunningham, *supra* note 108, at 50.

with remuneration.[154] In other words, chefs could potentially benefit more from a thorough copyright system governing recipes than trade secret law. Chefs wishing to promote sharing in exchange for compensation would be incentivized to be open with regards to their recipes rather than secretive. Contrarily, those who would rather invest the "one of a kind" appeal of their recipe can still benefit from the protection afforded under state trade secret law.

Moreover, while many restaurateurs and chefs have used trade secret law to protect their recipes,[155] proving misappropriation is not an easy burden to overcome.[156] And, although a chef may have recourse against one who has improperly misappropriated the recipe, once a secret recipe becomes known to others it is no longer a secret, and the initial actions a chef took to keep the recipe secret will likely no longer be effective.[157] This is not by any means an attack on trade secret law, which serves its own purpose and has protected the recipes of many in the restaurant and food production industries. Rather, the argument is simply that a developed copyright system for recipes could provide an alternate method for chefs to use to protect and benefit from their intellectual property. Under the proposed copyright system, chefs would not need their kitchen staff to sign non-disclosure agreements; rather, they could freely share their recipes while collecting statutory royalty checks from subordinates and others wishing to appropriate the recipes.

This system would also encourage creation among chefs, an important goal of copyright doctrine.[158] First, many executive and head chefs assumingly always try to create original recipes; in addition, if their recipes were to be more widespread rather than kept as trade secrets they would be encouraged even more so to continuously come up with new signature dishes. Second, lower level chefs wishing to bring said recipes to new employers or their own restaurants would be disinclined to do so to avoid paying a royalty and would then be encouraged to create new, original recipes on their

154. *See supra* pp. 31-32.
155. Cunningham, *supra* note 108, at 35.
156. *See generally* Sweetzel, Inc. v. Hawk Hill Cookies, Inc., No. 95-2632, 1995 U.S. Dist. LEXIS 13495 (E.D. Pa. Sept. 15, 1995)
157. Cunningham, *supra* note 108, at 50.
158. *See supra* note 138.

own. For these reasons, as discussed *supra*, the culinary industry may benefit most from the protections afforded by copyright law, rather than those available under trade secret regulation. While trade secrets might initially seem like a perfect match for the culinary arts and restaurant industry, members of this community may be accustomed to industry standards that clash with such legal devices.

CONCLUSION

Little is needed to conjure up memories of your favorite restaurant or favorite meal. And, it is no wonder that a growing sector of the entertainment industry revolves around food and cooking. Indeed, millions tune in every day to learn how to emulate a recipe, to find that next restaurant to visit, or merely for entertainment purposes. Likewise, we become attached to the characters who impart us with new techniques or dishes to make at home. In fact, a burgeoning class of celebrity chefs has emerged who publish cookbooks, host television shows, and own restaurants that become part of each celebrity chef's persona. As creators, these chefs are no different than authors or poets. Their original recipe creations, beyond the most basic recipes like apple pie a la mode and chocolate chip cookies, should be granted copyright protection no different from the next great American novel. Moreover, a thorough analysis of the doctrine shows that the Copyright Act contemplates recipes as copyrightable.