

2-2019

Don't Steal My Recipe! A Comparative Study of French and U.S. Law on the Protection of Culinary Recipes and Dishes Against Copying

Claire M. Germain

University of Florida Levin College of Law, germain@law.ufl.edu

Follow this and additional works at: <https://scholarship.law.ufl.edu/working>

Part of the [Comparative and Foreign Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Germain, Claire M., "Don't Steal My Recipe! A Comparative Study of French and U.S. Law on the Protection of Culinary Recipes and Dishes Against Copying" (2019). *Working Papers*. 7.
<https://scholarship.law.ufl.edu/working/7>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Working Papers by an authorized administrator of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

Don't Steal my Recipe!
A Comparative Study of French and U.S. law
on the Protection of Culinary Recipes and Dishes against Copying

Claire M. Germain
Clarence J. TeSelle Professor of Law Emerita,
University of Florida, Levin College of Law
Professor of Law Emerita, Cornell Law School

Feb. 15, 2019

Abstract

Food and gastronomy are at the heart of every culture. In 2010, The Gastronomic Meal of the French was listed as Intangible Cultural Heritage of Humanity by UNESCO. Interest in gastronomy became mainstream in the U.S. starting in the late '70s/early '80s. The emergence of cooking literature, television cooking, celebrity chefs, and competitive cooking programs have now permeated American and French popular culture like never before. It is also a huge business for restaurants. This article examines the legal status of recipes and culinary creations in U.S. and French law, and what can be done to stop others from copying your culinary recipe.

It attempts to answer the following questions: can you copyright individual recipes, or a collection of recipes, as in a cookbook? Can you patent a method to prepare a dish? What about filing for a trademark for your recipe to prevent competitors from using a similar name for your dish? What about keeping your recipe a trade secret? What other legal protections might be available? In a world of the internet, social networks and the culture of sharing can you really protect your recipes from being copied and, more importantly, should you? What are the steps needed to share a recipe properly? Legal, doctrinal, sociological and practical aspects will be considered in this study.

This draft was originally prepared for the Juris Diversitas Annual Conference, *Law & Food: La Cuisine Juridique*, July 9-12, 2017, Lyon, France, and presented at the Southeastern Association of Law Professors (SEALS) Annual Meeting, Fort Lauderdale, FL, August 2018. It will be published in print as a book chapter at a future date. Many thanks to Stuart Basefsky and Seth Brostoff for reviewing this chapter and making useful suggestions. All translations from the French are from the author.

Outline

Introduction

- I. A Short History of Recipes and Gastronomy
 - A. Recipes
 - B. Gastronomy
 - C. Influence of Social Networks

- II. Droit d'Auteur & Copyright Protection for Recipes
 - A. Basic Rules in the USA and France
 - B. Exceptions
 1. Recipe as Literary Work & Cookbooks
 2. Photos of Recipes
 - C. Recipe as Artistic Work
 1. Culinary Art
 2. Hierarchy of the five senses
 3. Ephemeral Works, Perfume & Taste
 4. Norms-Based IP for Chefs

- III. Alternatives to Copyright
 - A. Patents
 - B. Trademarks
 - C. Designs and models
 - D. Trade Secrets & Non-Disclosure Agreements
 - E. Attribution in Social Networks

Conclusion

INTRODUCTION

Food and gastronomy are at the heart of every culture, both in France and in the United States. In 2010, The Gastronomic Meal of the French was listed as Intangible Cultural Heritage of Humanity by UNESCO. Interest in gastronomy became mainstream in the U.S. starting in the late '70s/early '80s. The emergence of cooking literature, television cooking, celebrity chefs, and competitive cooking programs have now permeated American and French popular culture like never before. It is also a huge business for restaurants. This article examines the legal status of recipes and culinary creations in U.S. and French law, and what can be done to stop others from copying your culinary recipe.

It attempts to answer the following questions: can you copyright individual recipes, or a collection of recipes, as in a cookbook? Can you patent a method to prepare a dish? What about filing for a trademark for your recipe to prevent competitors from using a similar name for your dish? What about keeping your recipe a trade secret? What other legal protections might be available? In a world of the internet, social networks and the culture of sharing can you really protect your recipes from being copied and, more importantly, should you? Legal, doctrinal, sociological and practical aspects will be considered in this study.

Joël Robuchon, one of the most important contemporary French chefs died in August 2018 in France.¹ He was both traditionalist and innovative. He was famous for his potato purée, a simple recipe known to all for centuries, but he also obtained a patent for a special soup recipe made with foie gras. He was a cook, artist and entrepreneur, owned twenty-six restaurants, and prepared dishes with food companies. His life and culinary art symbolize the issue at stake here. What is the right balance between the public domain and the recognition of the art of the writer/producer of the culinary recipe? Is a recipe a know-how or culinary art?

I. A Short History of Recipes and Gastronomy

A. Recipes.

The earliest known recipes were found on cuneiform tablets from Babylonia dated at around 1600 BC.² Recipes also survive from ancient Egypt, Greece, China, and Persia, with an even

¹ Corbet, Sylvie, "Joël Robuchon, Innovative French Cook Dies at 73," Washington Post, August 6, 2018. https://www.washingtonpost.com/local/obituaries/joel-robuchon-innovative-french-cook-of-the-century-dies-at-73/2018/08/06/64f325a2-9989-11e8-8d5e-c6c594024954_story.html?noredirect=on&utm_term=.c3f5012a9ac4

² Jean Bottéro, the foremost scholar of Mesopotamian civilization, describes some of the recipes written in Akkadian, in *Textes Culinaires Mésopotamiens*, 1995. Winona Lake, Ind. : Eisenbrauns, 1995. See also Mark Oliver, "Three Babylonian Recipes From 1600 BC You Can Make At Home Today." August 12, 2018. <https://www.ancient-origins.net/artifacts-ancient-writings/babylonian-recipes-0010531> .

more or less complete surviving cookbook from the classical Roman world “*De re Coquinaria*” attributed to Marcus Gavius Apicius.³ For centuries, however, most people were not literate and never wrote down cooking instructions. New cooks picked up knowledge by watching more experienced friends and family at work, in the kitchen or around the fire, through looking, listening, and tasting.⁴ Recipes, as a format and genre, only really blossomed in the 18th century, with the emergence of widespread literacy.⁵ Recipes today serve many purposes: they document cooking techniques, display a creator's skills, and provide pleasant leisure reading. But their most important goal is replicability, so that a cook can reproduce a dish in the future.⁶ A fascinating study documents the history of food choices and tastes over the centuries through thousands of recipes. This study actually led to a university teaching of historic gastronomy.⁷

It is often difficult to ascertain the true origin of certain recipes, because stories can be told and repeated, but later some myths are debunked after historical research. Pasta, for instance, is typically attributed to Marco Polo upon his return from from China, when he introduced them to Italy. The story of pasta is actually much more complex. The process of pasta was known for a much longer time, since the first known culinary text talks about it. This Babylonian text translated by Jean Bottéro mentioned *Les pâtes râpées*, called *Risnatu* ou *Bapirru*.⁸ They are made with wheat mixed with water to get a paste that is scattered in a boiling liquid. Historians are currently in agreement that the Mesopotamian pasta are the common cradle of Chinese and European pasta. At the time of Marco Polo, Italian pasta were at the intersection between these antique Mesopotamian pasta which arrived via the Greek world, and Arab pasta also inherited from Mesopotamia and introduced in Italy following the invasion of Sicily. China's pasta are

Bottéro, Jean. *The Oldest Cuisine in the World: Cooking in Mesopotamia*. Transl. Teresa Lavender Fagan. The University of Chicago Press, 2004. Kelley, Laura. “Some Mesopotamian Ingredients Revealed.” *The Silk Road Gourmet*. March 16, 2010. <https://www.silkroadgourmet.com/some-mesopotamian-ingredients-revealed/>

Slotky, Alice L., “Cuneiform Cuisine: Culinary History Reborn at Brown University,” *SBL Forum*, 2007. <https://www.sbl-site.org/publications/article.aspx?ArticleId=703>

³ The cookbook was actually written three centuries later. C. Biagio Conte & J.B. Solodow, *Latin Literature: A History*. JHU Press, 1999, 392. Today's Romanophiles have recreated some of the recipes. See a two-part blog series on Food and Dining in Ancient Rome. Part one looks at the various foods that you would have found in the average Roman household. <https://eaglesanddragonspublishing.com/ancient-everyday-food-and-dining-in-ancient-rome-part-i/>

⁴ Helen Zoe Veit, The Making of the Modern American Recipe. *Smithsonian.com*, September 19, 2017. <https://www.smithsonianmag.com/history/making-modern-american-recipe-180964940>

⁵ *Id.*

⁶ *Id.*

⁷ Liliane Plouvier. *L'Europe se met à table 7*. Brussels, 2000. http://www.oldcook.com/doc/plouvier_europe_table.pdf

⁸ Pierre Leclercq, “Les pâtes ramenées de Chine par Marco Polo,” March 2011. http://culture.uliege.be/jcms/prod_391117/les-pates-ramenees-de-chine-par-marco-polo-2e-partie?part=2

also probably inherited from Mesopotamia.⁹ Which version is true with conflicting stories? Most historians consider the version which is most plausible. No matter what the origin, though, what is clear is that many recipes are the common heritage of mankind, and have evolved over the centuries, each cook improving over the previous version, or changing it to please palates of the time. That is why it may be hard to distinguish the originality of a particular recipe.

B. Gastronomy

Gastronomy, etymologically, comes from the Greek, *gastèr*, “belly”, “stomach”, and *nomos*, “law”, literally, gastronomy is the art to regulate the stomach.¹⁰ The term was used for the first time in the title of a poem written by Joseph Berchoux in 1801, *Gastronomie ou l'homme des champs à table*.¹¹ The term “gastronome” became common usage since the publication of the work by Brillat-Savarin, *Physiologie du Goût*,¹² where he states: “Gastronomy is the reasoned knowledge of all what relates to man when he feeds himself. Its goal is to watch for the preservation of men through the best possible food.”¹³ The meaning of the term has progressively evolved toward the reasoned knowledge of everything that relates to the *bonne chère*.¹⁴ Gastronomy is not limited to France, of course. As an example, one notes Ziryab’s special contributions. Originally from Bagdad, he lived in Cordoba, and was the first to set the rules of serving dishes during a meal: appetizer, main dish and desserts, replacing the gold or silver goblet with a glass *à pied*, and reestablishing the tradition of banquet.¹⁵ Global cuisine is celebrated in a recent series of videos, from Chinese, to Aztec and Mexican, African and Aboriginal, Japanese, Islamic and Persian cuisines, to cite a few.¹⁶ Nevertheless, most historians note the importance of European cuisine, French in particular, in the cultural history of recipes and gastronomy.

Many works have been written over the centuries on the history of food and culture, with a particular focus on gourmet cuisines and the origin of the idea of gastronomy. Catherine de Medici is often mentioned as having had a strong influence on French cuisine. In 1533, upon marrying the *dauphin* who became Henry II of France, she brought cuisine from Florence to Paris, introduced Florentine dishes, new dishes, new spices and herbs, and different skills and

⁹ *Id.*

¹⁰ Émile Littré, *Dictionnaire de la Langue Française*, Vol, 2. Paris: Hachette, 1873.

¹¹ The term is first noticed back in the 17th century, citing a lost Greek poem by Arcestrate (4th Century BC), mentioned in the *Banquet des Sophistes*, a culinary treatise written by the Greek Athénée. See Florent Quellier, *Gourmandise. Histoire d'un péché capital*. A. Colin, 2010.

¹² [Jean Anthelme] Brillat-Savarin, *Physiologie du Goût* Paris: Gabriel de Gonet, 1848.

¹³ *Id.*, at 27.

¹⁴ Littré, note 10.

¹⁵ Paul Balta, “La civilisation arabo-musulmane n’a rien inventé» (idée reçue),” https://www.herodote.net/Science_arabe-synthese-1769.php

¹⁶ Ken Albala, *Food: A Cultural Culinary History. Course No. 9180*. <https://www.thegreatcourses.com/courses/food-a-cultural-culinary-history.html>

knowledge, with a style of good living imbued with grace and etiquette not seen before, for instance, tableware forks and nice glassware.¹⁷ This influence is challenged by some writers, insisting that French cuisine was well established before Catherine de Medici's birth.¹⁸ It is generally agreed upon that she influenced French food at the time of the Renaissance, and also that from that time, contemporaries started noticing the culinary superiority of the French. Already in the 14th century Guillaume Tirel, a court chef known as "Taillevent", wrote *Le Viandier*, a manuscript which was printed in 1486, one of the earliest recipe collections of medieval France.¹⁹ During the 17th century, the *Grand Siècle*, the "French model" of cuisine became a reference, like the *Cour de Versailles* and French civilization. By the mid 18th century *service français* was well established. Each service is shown and removed to the kitchen for portioning and forms the basis of today's menu. *Le Cuisinier François*, written in 1651 by Pierre de la Varenne, known as the founder of classical French cuisine, included dishes like: *Boeuf à la mode*, *Oeufs à la neige*, omelettes, and beignets. He went on to write a pastry book as well.²⁰ Cookbooks, which had made their appearance in France as early as the 13th century,²¹ became more numerous in the 18th and 19th century in France and England. One such cookbook from my family library dates back to 1775, and, interestingly, it does not have any recipes with potatoes.²² These were only introduced in France later by Parmentier with some resistance, but with the help from King Louis XVI who popularized them as a nutritious vegetable.²³

Influential cooks in France are numerous. Among the most famous is Antoine Carême (1784-1833), who cooked for Emperor Alexander of Russia, King George IV, Talleyrand and Rotschild, and is regarded as the founder of French *grande cuisine*.²⁴ Marie-Antoine Carême

¹⁷ "Behind the French Menu: Italy's Gift to the French Cuisine," 2013. <https://behind-the-french-menu.blogspot.com/2013/03/italys-gift-to-french-cuisine-catherine.html>

¹⁸ François de Melogue, "The True History of French Cooking: The Italian Myth of Catherine de Médicis Debunked," July 19, 2013 <https://chefdemelogue.com/2013/07/19/the-true-history-of-french-cooking-the-italian-myth-of-catherine-de-medicis-debunked/>. For a more nuanced evaluation of her contributions, see Ph. Leclercq, "Catherine de Médicis à la base de la gastronomie française," in *Culture, le magazine culturel en ligne de l'Université de Liège*. Université de Liège, September 12, 2018. <http://culture.ulg.ac.be/>

¹⁹ See digital copy at <https://www.gutenberg.org/files/26567/26567-h/26567-h.htm>

²⁰ De Melogue, note 18. See also Patrick Rambourg, *Histoire de la cuisine et de la gastronomie françaises*. Paris: Plon, 2010.

²¹ *Id.*

²² *La cuisinière bourgeoise*. Paris: chez Guillyn, 1775.

²³ Presley Swensson, "Gastronomy, History, Personalities, Influences and Trends," <https://prezi.com/cpxabayclhbs/gastronomy-history-personalities-influences-and-trends/>; Leclercq, "Les grands mythes de la gastronomie: Parmentier et la pomme de terre," 2018. https://www.news.uliege.be/cms/c_10043702/en/les-grands-mythes-de-la-gastronomie-parmentier-et-la-pomme-de-terre

²⁴ Nicole Jankowski, "Food History & Culture. How A Destitute, Abandoned Parisian Boy Became The First Celebrity Chef January 12, 2017.

began his life in Paris during the French Revolution. He wanted to "set the standard for beauty in classical and modern cookery, and attest to the distant future that the French chefs of the 19th century were the most famous in the world," as he wrote in his papers.²⁵ Auguste Escoffier (1846 - 1935) is another cook who made his mark in many ways, including recipes which became famous, such as Peach Melba, and simplified and modernized French cuisine.²⁶ He and Carême wrote several cookbooks and their memoirs.

The first American cookbook, *American Cookery*, was published in 1796, copied in part from an English cookbook, but also with original recipes using Native American ingredients such as pumpkins, cranberries and Indian corn.²⁷ By the very end of the 19th century, American home economics reformers felt that housekeeping in general, and cooking in particular, should be more methodical and scientific, and they embraced motion studies and standardization measures that were redefining industrial production in this era. This led to Fannie Merritt Farmer's *The Boston Cooking-School Cook Book* in the 1890s.²⁸ and American recipes with a list of ingredients in precise, numerical quantities: teaspoons, ounces, and cups.²⁹ Designed as a teaching tool for a mobile society, the modern recipe is grounded in principles of clarity, precision, and replicability that emerge clearly from the conditions of early American life.³⁰ U.S. recipes reflect the cultural and ethnic diversity of its people. They are often regional, but also national. Many times, they represent the fusion of different origins. Recent famous chefs and cookbook authors include Julia Child, Alice Waters, James Beard, and too many others to name. Julia Child (1912-2004), an American chef, author and television personality, is recognized for bringing French cuisine to the American public with her now classic cookbook, *Mastering the Art of French Cooking*,³¹ and her subsequent television programs, the most notable of which was *The French Chef*, which premiered in 1963.³² Today's French and US gastronomy may be on a par in its different manifestations, because of the general trend toward globalization and innovation in the kitchen. One writer even argues that French cuisine has been toppled as the king of fine dining.³³

<http://www.npr.org/sections/thesalt/2017/01/12/509154654/how-a-destitute-abandoned-parisian-boy-became-the-first-celebrity-chef>. For an extensive listing of books and materials on culinary history, see the website of the New York Public Library at <https://www.nypl.org/node/5629>.

²⁵ *Id.*

²⁶ <https://www.britannica.com/biography/Auguste-Escoffier>

²⁷ Helen Zoe Veit, "The Making of the Modern American Recipe," *Smithsonian*, Sept. 17, 2017.

<https://www.smithsonianmag.com/history/making-modern-american-recipe-180964940/> See also Helen Zoe Veit, *Modern Food, Moral Food: Self-Control, Science, and the Rise of Modern American Eating*.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Julia Child, Simone Beck & Louisette Bertholle. *Mastering the Art of French Cooking*. Knopf, Vol. 1, 1961; Vol. 2, 1970.

³² Charles Baker-Clark. *Profiles from the Kitchen: What Great Cooks have Taught us about Ourselves and our Food* 52. Lexington: University Press Kentucky, 2006.

³³ Paul Freedman, "How was French cuisine toppled as the king of fine dining?," October 20, 2016; Updated April 16, 2017, *The Conversation*. <http://theconversation.com/how-was-french-cuisine-toppled-as-the-king-of-fine-dining-66667>

Restaurants

The first text mentioning the term *restaurateurs*, is a decree of June 8, 1786. The term restaurant until then meant a spiced restoring broth (*bouillon*).³⁴ The first restaurant was open in France just after the French Revolution. There is some uncertainty as to who initiated the first restaurant. Alfred Gottschalk mentions either a certain Boulanger, or a Chantoiseau, but they could be the same.³⁵ This question arose the interest of Rebecca Spang in her book on restaurants.³⁶

It is also somewhat unclear when the first restaurant opened in the United States, but it seems that it was in the early part of the 19th century. It may be more important to talk about the history of the restaurants which were important to U.S. society. The restaurant Delmonico's is often mentioned, as well as Antoine's, and others. Paul Freedman retraces the history of cuisine in the United States in his book, explains how the history of restaurants reflects the history of America, race and class, immigration and assimilation.³⁷

Influence of Social Networks

Social networks have completely modified the relationship of cooks, customers and food, and the domain of "food" has been overrun by the web culture. Recipes have become more and more present in today's culture and world appreciation of gastronomy. Recipes are sometimes called culinary creations, especially when performed by professional and starred chefs. The "foodie" culture brings attention to the financial interests at stake from restaurant revenue, and the influence of social media and enthusiasm to take pictures of dishes often leads to an emphasis on presentation more than content.

III. *Droit d'Auteur* (Author's Right) and Copyright Protection for Recipes

Several commentators have mentioned the lack of clarity of the subject matter at hand. Are we talking about the recipe *per se*, the execution of the dish, the dish itself, the presentation of the dish, or a combination of all these elements? Even though the courts only seem to consider the recipe itself, we will consider all the elements, because, as Gaëlle Beauregard aptly states, there is a dichotomy, but one is indispensable to the other. The recipe and the dish are intimately bound.³⁸ The instructions, ingredients and quantity are an integral part of the dish which will be

³⁴Some restaurants in Paris have kept that name, e.g., the Bouillon Chartier restaurant.

<https://www.bouillon-chartier.com/en/>

³⁵ Alfred Gottschalk, *Histoire de l'alimentation et de la gastronomie depuis la préhistoire jusqu' à nos jours*. 2 vols. Paris Hippocrate Editions, 1948. Captivating, erudite history of food, cookery, art of the table, and gastronomy. Dr. Gottschalk was the co-author of the first edition of the Larousse Gastronomique (Paris: Larousse, 1938) with his friend and colleague the famous chef Prosper Montagné.

³⁶ Christine Blau, "Who Invented the First Modern Restaurant," *National Geographic*, March 2015. <https://www.nationalgeographic.com/people-and-culture/food/the-plate/2015/03/13/who-invented-the-first-modern-restaurant/>; Rebecca L. Spang, *The Invention of the Restaurant: Paris and Modern Gastronomic Culture*. Harvard Historical Studies, 2000.

³⁷Paul Freedman. *Ten Restaurants that Changed America*, Norton, 2016.

³⁸ Gaëlle Beauregard. *Entre l'art, l'invention et la nourriture : examen de la possibilité de protéger les recettes de cuisine en droit de la propriété intellectuelle canadien*. LLM Thesis, Aug. 2010.

realized, and without them, it will be difficult to recreate the dish. It is the recipe that allows for the creation of the dish.³⁹

At first glance, it seems that the author of a recipe should have a right over it, preventing others from copying it. It is, however, not so simple, according to the French *Droit d'auteur*, or the US Copyright law. The laws do not mention recipes explicitly as being protected, and the courts have not been favorable to granting protection, except in certain situations.

As a brief comparative note, the two systems of intellectual property have different foundations and objectives. Historically, copyright provided an economic model, granting solely proprietary rights to authors. The French *droit d'auteur* provides economic rights, but also personal rights, the *droit moral*, which sees the expression of the personality of the author in the work.⁴⁰ In practice, the author will have a right to disclosure, a paternity right, a guarantee that the integrity of the author's work and wishes are respected as well as a right of withdrawal. This right is attached to the author; it is inalienable and transmissible at the death of the author.⁴¹ However, international law agreements have led to more similar treatments in the member countries. Several countries have harmonized their legislation since the ratification of the Berne Convention.

A. Basic Rules in US and French Law

International

The Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886, and revised several times since then, deals with the international protection of works and the rights of their authors. It is administered by the World Intellectual Property Organization (WIPO). Under WIPO, Copyright *Droit d'auteur*, that is, author's right in French law is a legal term used to describe the rights that creators have over their literary and artistic works. Art. 2 (1) states: The expression "literary and artistic works" shall include every production in the literary, scientific, and artistic domain, whatever may be the mode of expression." Art. 2 (2) lists the works covered by copyright, ranging from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.⁴² It is not an exhaustive list. The US and France are both member countries and have enacted their own national legislation.

<https://papyrus.bib.umontreal.ca/xmlui/handle/1866/4860>. Her thesis led to a book: *Entre l'art, l'invention et la nourriture : la propriété intellectuelle des recettes au Canada*. Yvon Blais, 2011.

³⁹ *Id.*

⁴⁰ Jean-Michel Bruguière & Michel Vivant. *Droit d'auteur et droits voisins*. 4e edition. Paris: Dalloz, 2019.

⁴¹ *Id.*

⁴² <http://www.wipo.int/copyright/en/>

U.S. Law

U.S. Copyright law protects a number of original literary, musical and other subjects, but does not explicitly mention food dishes and recipes.⁴³ Three general criteria are required for copyright protection: (1) existence as a work of authorship (rather than an idea or procedure); (2) fixation in a tangible medium; and (3) a degree of originality.⁴⁴ The U.S. Copyright Office provides examples of material not subject to copyright, including “the mere listing of ingredients or contents.”⁴⁵ There have only been a few U.S. court cases, but courts have generally ruled that recipes are functional and therefore cannot be copyrighted. An often cited case on the interpretation by the courts on this issue is the Meredith case, a case involving a book of Dannon yogurt recipes.⁴⁶ Meredith had in 1988 published a book called “Discover Dannon – 50 Fabulous Recipes With Yogurt.” In the case, Meredith alleged that Publications International, Ltd. copied many of the recipes from their Dannon book and printed in them in various publications (some of them copying up to 22 recipes). The court stated that the recipes did not “contain even a bare modicum of the creative expression” that receives copyright protection. “The identification of ingredients necessary for the preparation of each dish is a statement of facts.” and also: “[The] recipes’ directions for preparing the assorted dishes fall squarely within the class of subject matter specifically excluded from copyright protection by 17 U.S.C. § 102(b).”⁴⁷ In other words, the court ruled that both the ingredients and the directions were not protected by copyright, because they are a “procedure, process, [or] system,” and copyright does not extend to those things. Other cases, such as *Lambing v Godiva Chocolatier*, involving the recipe for a chocolate truffle, have ruled in the same way.⁴⁸

French Law

In France, Art. L112 of the Code of Intellectual Property on *droit d’auteur* provides copyright protection. Case law has interpreted the legislative provisions to require three conditions: (1) a work of the mind; (2) that is put into a concrete form⁴⁹; and (3) carrying the imprint of the

⁴³ Title VII of the U.S. Code. <https://www.copyright.gov/title17/>

⁴⁴ Section 102 (a) specifies “original works of authorship fixed in any tangible medium of expression.” Section 102 (b) excludes copyright protection for “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”

⁴⁵ U.S. Copyright Fact Sheet <https://www.copyright.gov/fls/fl122.html>; http://scireg.org/us_copyright_registration/fls/fl122.html

⁴⁶ *Dannon Yoghurt Publications International, Ltd. v. Meredith Corp.* 88 F.3d 473 (7th Cir. 1996)

⁴⁷ *Id.*

⁴⁸ *Lambing v Godiva Chocolatier*, 142 F.3d 343 (6th Cir. 1998)

⁴⁹ The French term *Mise en forme* means that the creation must have a concrete form, to be perceptible by the senses. It is not the idea, or the concept, but the expression, the formalization of the idea which is protected. It does not mean that the work must have a material support. It is enough form if for instance a public speech, an improvised song is interpreted. The creation has been audible for third parties and the work has received a form of concrete expression. <https://economie.fgov.be/fr/themes/propriete-intellectuelle/droit-dauteur/protection-des-oeuvres/protection-par-le-droit/que-protege-le-droit-dauteur>

personality of its author, the criterion of originality.⁵⁰ As a comparative note, French law does not require that the expression of the idea be fixed in a tangible material form, while U.S. law specifically requests it. Art. 2(2) of the Berne Convention lets each member state decide the determination of the works whether they need to be fixed in some material form or not, to benefit from author's right. The enumeration of works of the mind does not mention recipes, culinary creations or their appearance, even though the code article does not exclude the principle of such a protection.⁵¹ One French court decision on the topic is of note. It ruled that, if recipes can be protected in their literary expression, they do not constitute themselves a work of the mind. They are analyzed in a "succession of instructions, a method. It is a know-how (*savoir faire*), which is not protected."⁵² No case has been found that recognized that a dish was original enough to deserve the copyright protection for a recipe.⁵³

In another case, the *Cour de cassation* refused the quality of co-author to a cook who had participated in an audio-visual production.⁵⁴ In this case the plaintiff, a renowned chef had been filmed performing culinary dishes. After the filming of his performance, they were further broadcasted without his consent. The chef invoked copyright protection as co-author of the audiovisual work rather than copyright for the recipes or dishes that were used during the filming. The Court of Appeals ruled that the chef was a co-author, together with the director and the music composer and contributed to the writing of the scenario and the dialogues while demonstrating his cooking. That decision was, however, reversed by the *Cour de cassation* because "the object of the taping was the professional activity of M. Duribreux, which in no way establishes his contribution to the intellectual conception, filming and montage of the audiovisual work".⁵⁵ This decision was criticized by a commentator, arguing that the Chef indeed contributed to the intellectual creation of the audiovisual work, comporting with the broad language of the Code of Intellectual Property article L212-1 which states the broad language of realize the "intellectual creation of the work."⁵⁶

⁵⁰ Article L112-1 "The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose."

<https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006278873&dateTexte=&categorieLien=cid> English translation as of 2006 in <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

Carine Bernault, André Lucas, & Agnès Lucas-Schloetter. *Traité de la propriété littéraire et artistique*. 5th ed. LexisNexis, 2017.

⁵¹ Article L112-2 of the Code of Intellectual Property.

⁵² *Tribunal de grande instance* (TGI) Paris July 10, 1974.

⁵³ Matthieu Pacaud, "Le droit d'auteur a-t-il bon goût?" <https://www.pacaud-avocat.fr/droit-auteur-restaurant-gastronomie/>

⁵⁴ *Cour de cassation*, February 5, 2002, First Civil Chamber (n° 99-15549).

⁵⁵ *Tribunal de grande instance* (TGI) Paris, 3e ch. 1re sect., Sept. 30, 1997, *P. Duribreux et autres c/ Société Les Muses Production et autres*; *Revue Internationale du droit d'auteur* (RIDA), July 1998, 273; Court of Appeals Paris, March 17, 1999, *RIDA* 1998 n° 182, 203, obs. Kérever at 121; Cass. February 5, 2002, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007450686>

⁵⁶ *R.T.D. Com.*, 2000, 94, obs. Françon.

In sum, US copyright law and French *droit d'auteur* do not protect recipes against copying, except in certain situations.

B. Exceptions

We will follow the French terminology of “Literary and Artistic Property.”

Literary Works & Cookbooks

While copyright law does not protect recipes that are mere listings of ingredients, copyright protection may, however, extend to substantial literary expression, that accompanies a recipe or formula or a combination of recipes, as in a cookbook. These can take the form of a description, explanation, or original illustration, creative writing, recommendation of accompanying wine, history of recipe, evocation of souvenirs. If that is the case, one could copyright all these elements, remembering that the recipe in itself cannot be protected. Thus, each copy of such an improved recipe could specify the copyright, together with the necessary information, such as the date of publication and the author’s name, although these are not necessary elements for the copyright protection.⁵⁷

There is no central copyright office deposit in France since the copyright exists with the creation of the work by itself.⁵⁸ There is, however, such an office in the USA. If, one wants to deposit a recipe, *Circular 1, Copyright Basics*, provides additional information.⁵⁹ Note that if the recipe has secret ingredients, one may not want to submit it for registration, because applications and deposit copies are public records.

Cookbooks

A cookbook will be protected as an original work if composed in a way to make the recipes the most attractive possible for the readers. It then becomes a literary work. In the *Barbour v. Head* case, the court decided in favor of the plaintiff, stating that the recipes in the cookbook *Cowboy Chow* were “infused with light-hearted or helpful commentary.”⁶⁰ The same applies to culinary videos, an audiovisual work which may benefit from protection.⁶¹ Any non authorized

⁵⁷“What Does Copyright Protect?” <https://www.copyright.gov/help/faq/faq-protect.html>

⁵⁸ Arts. L111-1 and L111-2 of Code of Intellectual Property

⁵⁹ <https://www.copyright.gov/fls/fl122.html>

⁶⁰ *Barbour v. Head*, 178 F. Supp. 2d 758, 764 (S.D. Tex. 2001).

⁶¹ “Comment protéger les recettes de cuisine ? Droit d’auteur ou Savoir-faire?” July 8, 2016. <http://www.dreyfus.fr/marques-internet/comment-protoger-les-recettes-de-cuisine-droit-dauteur-ou-savoir-faire/>

reproduction of the presentation of these recipes, e.g., on internet sites or blogs, may be considered as counterfeiting and punished.

Photos of Culinary Work

Many people like to take photos of the dishes they eat. Some chefs have become annoyed about the distraction, and have reacted in different ways, for instance, in allowing clients to take pictures of the dish in the kitchen, or in prohibiting photographs, or flash photographs, saying that it distracts from the enjoyment of the food and conversation.⁶² As we have seen, gastronomy is often considered as art in French culture (*art culinaire*), but in the legal sense it is rather considered as know-how (*savoir faire*), which is not protected by intellectual property. Consequently, nothing prevents the client in a restaurant from taking a photograph of their dish and exploit it later on. The photograph itself, if it is original enough in its composition, may be protected by intellectual property, to the benefit of the photographer and not the restaurant owner, and it has to represent the personality of its author.⁶³ One interesting German Federal Court decision ruled that the presentation of the dish is protected by author's right and cannot be photographed without permission. One commentator stated that the creator of the dish has the legitimate right to decide where and to what extent his/her work can be reproduced.⁶⁴ This decision seems to have been made in application of the moral rights given to the creator of the dish.

Overall, the limits of copyrighting a recipe are that it is impossible to prevent someone from executing the recipe, take pictures of the different steps, or the final dish, or describing the recipe in different terms or expressions.

C. Recipe & Dish as Work of Art

Although the courts have not been favorable yet, there are many good reasons why a culinary creation should be considered as a work of the mind, not as know-how (*savoir faire*).

Culinary Art as the 9th Art

Many works describe recipes and dishes as *art culinaire*. In France, over the centuries, a long tradition led to what Julia Csergo calls an *artification du culinaire*, that is, the transformation into art of the culinary expressed through new recipes based on visual pleasure, rather than ingestion. The cooks of the years 1400 knew through their culinary techniques how to integrate

⁶² Helene Stapinski, "Restaurants Turn Camera Shy," New York Times Jan. 22, 2013. <https://www.nytimes.com/2013/01/23/dining/restaurants-turn-camera-shy.html>;

⁶³ Pacaud, note 53.

⁶⁴ Céline Revel-Dumas, "En Allemagne, poster votre assiette sur les réseaux sociaux pourrait vous coûter cher... » *Le Figaro*, August 23, 2015. <http://www.lefigaro.fr/secteur/high-tech/2015/08/23/32001-20150823ARTFIG00001-en-allemande-poster-votre-assiette-sur-les-reseaux-sociaux-pourrait-vous-couter-cher8230.php>

food innovations brought about by commerce, into the cuisine of the banquets, while responding to the aspirations of an aristocratic society. which wanted to live the present in representations of the glorious past.⁶⁵ The cooks who offered a culinary language adapted to this society of nobles acquired esteem, honor and fame, to the point that they were asked to write down their recipes.⁶⁶ It is not the writing of the recipes that transformed the cuisine into art, but it allowed the cooks of the princes to become conscious of their status of creator.⁶⁷

Between the end of the 19th century and the period between WWI and WWII, the conditions seemed to be favorable for the recognition of cuisine as an “art.” 1864 saw the publication of a few issues of the *Journal de l’Art Culinaire*, then from the years 1880 on, the term *art culinaire* became widely used and adopted by cooks who attempted to organize and defend their rights, wondering about the social and legal status of their profession.⁶⁸ 1880 saw the appearance of the *art culinaire* expression, and the move toward cooks being called artists rather than workers.⁶⁹ In 1923 the Salon welcomed *l’Art Culinaire*, which it officially added to the number of the fine arts (*beaux-arts*) through the voice of the writer and folklorist Austin de Croze.⁷⁰ “Why would not this Cuisine be included in France among the Arts and since Painting, Sculpture, Architecture and Printing—the Quat’Z’ Arts—Literature, Music and Dance, Cinegraphy and Fashion have taken to eight the number of our arts, why would not Cuisine be the ninth Art?”⁷¹ However, in the middle of the Sixties, Cuisine lost its denomination, and the terminology was diverted to the profit of comic strips (*la bande dessinée*)! One can wonder why, and a hypothesis is that the chefs were oriented toward modernity and a new model of economic success, and by becoming entrepreneurs of multinationals and emerging stars, the great chefs did not mobilize to remind all that the field of the 9th art belonged to Cuisine.⁷²

In today’s world, with the globalization of interest in food and gastronomy, the idea that the starred chefs who do an original composition of their dish have created a recipe which is permeated with the personality of cook makes sense, even though it has not yet been accepted by the courts, or even tested. Several theories have been elaborated to entertain the notion that chefs should have intellectual property interests in their gastronomic creations, because of the growth of dining as revenue, and the dependence of the *grande cuisine* on originality and innovation in menus. Hence the proposition that a recipe could be considered a work of the mind, not know-how, and thus be protected by copyright. We will now turn to some of these ideas.

⁶⁵ Julia Csergo, “L’art culinaire ou l’insaisissable beauté d’un art qui se dérobe Quelques jalons (XVIIIe-XXIe siècle),” *Sociétés & Représentations* 13-16 (2012/2) (n° 34) <https://www.cairn.info/revue-societes-et-representations-2012-2-page-13.htm?contenu=resume#no80>

⁶⁶ *Id.*

⁶⁷ *Id.* Fn 40 or 60

⁶⁸ *Id.*, citing to Alain Drouard. *Histoire des cuisiniers en France xixe-xxeme siècle*. Paris: CNRS, 2015.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* “9e Art. Le Livret d’Or de la section gastronomique? “ There is even a restaurant by that name today, “le 9eme art” in Lyon, France.

⁷² *Id.*

Some writers have commented on the philosophical debate of what constitutes an *oeuvre gastronomique*. Some express the thought that these culinary creations are the fruit of the faculty that a human being has to construct and take original food concepts and to translate them into dishes because of their understanding, but also their mind.⁷³ There is a vast literature describing culinary art as art, and analogies made to the protected categories of novels, ballets, sculptures, paintings, etc. Food philosopher Elizabeth Telfer writes that food can be art when it is intended or used wholly or largely for aesthetic consideration.⁷⁴

Hierarchy of the Five Senses.

Other philosophical musings have to do with the Greeks and the hierarchy of the five senses, putting touch, smell and taste at the bottom of the hierarchy of the senses. The Greeks, in the writings of Aristotle, had a hierarchy of senses, first mentioning sight and hearing leading to art and music, followed by lower taste and smell, because, after all, animals have to eat as well.⁷⁵ Since the fifth century in classical Greece, philosophers have argued which sense they find to be most significant for human life and intellect, making it a popular debate topic in seventeenth century France.⁷⁶ Nowadays, can one recognize the work of the mind thanks to the smell or taste of the dish? The provisions of the current French Code of Intellectual Property protects the rights of the authors on all the works of the mind, no matter what the genre, the form of expression, the merit or the destination. The list of protected works is not exhaustive or limitative, or reserved for works accessible through sight and hearing.⁷⁷ With regard to the two articles L112-2 et L112-1 of the Code of Intellectual Property, it is not impossible to include the protection of works of smell and taste, olfactive and gustative. One needs to determine the originality of the creation. What needs to be protected is the creation of the dish, not the recipe itself, residing in the creative activity of the cook.

In both France and the USA, a work of the mind is considered original by the courts if it is permeated with the personality of its author and if it is expressed in a tangible manner (US law requires fixation in a tangible medium, French law does not have that requirement). These two criteria are necessarily imperfect because it is easier to recognize the originality of a work thanks to hearing or visual senses, rather than trusting the smell, taste or the touch. Visual examples include books, drawings, choreographic works, and cinema. Hearing and touch include musical compositions and sculptures. Taste and smell include only temporary expressions, such as dishes and perfumes.⁷⁸ However, an argument can be made that a dish can be a work of the mind. A culinary recipe can be original, inventive, permeated with the personality of its author, like any

⁷³ Elizabeth Telfer. *Food for Thought: Philosophy and Food* 47. Routledge, 1996.

⁷⁴ *Id.*

⁷⁵ Jutte, Robert. *A History of the Senses: From Antiquity to Cyberspace*. Cambridge, MA: Polity Press, 2005. Cited in <http://csmt.uchicago.edu/glossary2004/taste.htm>

⁷⁶ Samantha Lanjewar, "Which of the Five Senses Is Most Noble," <https://sites01.lsu.edu/faculty/virtuosi/conference-xxivi-which-of-the-five-senses-is-most-noble/>

⁷⁷ *Tribunal de grande instance* (TGI) Bobigny, November 28, 2006.

⁷⁸ Céline Bondard, "Un zeste de protection des recettes de cuisine par le droit de la propriété intellectuelle," Jan. 1, 2018. <https://www.village-justice.com/articles/zeste-protection-des-recettes-cuisine-par-droit-proprieete-intellectuelle,27076.html>

other work, whether permanent, e.g. a musical composition, or temporary like an ice sculpture, for example the recipe of a famous chef may have a distinct taste. One immediately thinks of Pierre Hermé's macaron recipes and their distinct taste.⁷⁹

Ephemeral Works

Dishes are by nature ephemeral, but ephemeral works can be protected as well. For instance, a 1986 French Court of Appeals decision recognized the protection of the wrapping of the Pont Neuf by Christo, even though the work itself only existed for two weeks.⁸⁰ This could mean that the notion of ephemeral work could be applied to recipes. Another case involved a floral composition, and there again the Court of Appeals, confirmed by the Cour de cassation determined that it was an original work of the mind.⁸¹ In that instance, at the request of the Paris City hall, Kenzo had covered a bridge in Paris with a multitude of flowers. The City hall then took pictures of it without his permission, and Kenzo successfully filed suit, claiming that the creative, original arrangement of the flowers and colors was a work of the mind according to Art. L112.2 of the Code of Intellectual Property. If a floral composition can be deemed original work of the mind, why not an original culinary creation?

Perfume

Some commentators have wondered whether recipes could be analogized to perfumes, the subject of some conflicting court decisions in Europe. The *Cour de cassation* in a 2006 landmark case (*arrêt de principe*) refused copyright protection to a perfume fragrance, ruling that it was the simple technical implementation of a know-how (*savoir-faire*), putting chemicals together.⁸² This position was reaffirmed in a decision of the Commercial Chamber of the *Cour de cassation* in 2013.⁸³ The lower courts, however, had ruled in at least two decisions in 2006 and 2007, that copyright protection could be extended to works perceptible by smell, and that perfume might constitute a work of the mind.⁸⁴ On the other hand, the Dutch Supreme Court in *Lancôme v. Kecofa* (2006) held that Lancôme's *Trésor* product was indeed protected by copyright, which was infringed upon by a perfume using 24 of *Trésor's* 26 ingredients. It awarded copyright protection to the liquid substance that gives off the fragrance. In the past, this liquid would only be protected by patents and trade secrets. The court held that this liquid was subject to copyright protection because it is a fixed substance that gives off a fragrance that can be recognized by the senses, which makes it tangible enough to be regarded as a copyrightable work under Dutch law.⁸⁵

⁷⁹ *Id.*

⁸⁰ Court of Appeals, Paris, March 13, 1986.

⁸¹ Court of Appeals, Paris, April 29, 1998, RIDA, Oct. 1998, 278; confirmed by *Cour de cassation*, February 6, 2001, Jurisdata No. 008161.

⁸² *Cour de cassation*, June 13, 2006, *Bsiri-Barbir v. Haarmann & Reimer*.

⁸³ *Cour de cassation*, Commercial Chamber, Dec. 2013, (No.11-19872)

⁸⁴ *Tribunal de grande instance (TGI)*, Bobigny, November 28, 2006. Court of Appeals, Paris, February 14, 2007.

⁸⁵“Copyright Protection of Fragrances is Largely a Matter of Common Sense, “

<https://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/posts/european-copyright-protection-of-fragrances-is-largely-a-matter-of-common-scents>, August

Following this reasoning or analogy, why could not a culinary recipe be recognized as a work of the mind? It can be original, inventive, permeated with the personality of his/her author, like any other work, whether it be permanent, like a musical composition, or temporary, like an ice sculpture.

Taste

Another question of relevance to recipes is whether one can copyright taste. A recent decision by the European Court of Justice dealt with the taste of Dutch cheese.⁸⁶ Levola, which makes the cheese and herb spread Heksenkaas, claimed that its competitor Smilde was infringing on its copyright because it made a product that tasted like it. Levola argued to the courts that its cheese flavor was protected under EU copyright. The court ruled that a “work’s” claim to copyright came down to whether its characteristics can be determined with “sufficient precision and objectivity,” and that flavor is too subjective an attribute. The court wrote: “The taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable.”⁸⁷

Regarding the standards of subjectivity and objectivity, the use of senses exists for industrial products involving hearing, touch and smell. There is, for instance, an amusing story about *cornichons*. According to the European Code of Good Practices, there is a requirement of *sons croquants* (crunching sounds) for the finished cornichon product.⁸⁸ Thus the law guarantees gastronomic sounds!⁸⁹ Madeleines need to be *moelleuses* (soft and springy), to deserve their appellation, hence the sense of touch. Sardines in their cans need to smell like sardines.⁹⁰

Norms-Based IP for Chefs

As we have seen, the need for intellectual property protection mostly arises in the field of cooking professionals and restaurants, because of the economics involved. A long time ago, in the 6th century B.C., in the colony of Sybaris, Italy, chefs could have the equivalent of an

24, 2010; A.A. Quaedvlieg, “Copyright and Perfume: Nose, Intellect and Industry,” 77 *Revue internationale du droit d’auteur (RIDA)* 230 (2011).

⁸⁶ <https://www.droit-technologie.org/actualites/gout-protegeable-droit-dauteur/>
<https://www.droit-technologie.org/actualites/un-gout-nest-pas-une-oeuvre-pas-de-propriete-intellectuelle/>

⁸⁷ For a critique of the decision motivation, see Frédéric Lejeune, “Exclusion des goûts et des saveurs du droit d’auteur : mes premières réflexions,” Nov. 18, 2018. <https://www.fredericlejeune.be/exclusion-des-gouts-et-des-saveurs-du-droit-dauteur-mes-premieres-reflexions/>

⁸⁸ *Code européen de bonnes pratiques fruits et légumes au vinaigre (dont les cornichons)*. Rev. Jan 2018 <http://www.fedalim.net/publications/codes-de-bonnes-pratiques-valides/>

⁸⁹ Jean-Paul Branlard. *Droit et gastronomie* 264. Paris: L.G.D.J., 1999.

⁹⁰ *Id.*

author's right for a limited number of years.⁹¹ Chefs were granted a one-year monopoly on the preparation of an unusual or outstanding dish, before releasing it to the public. This was to inspire others to do the same.⁹²

Works of art

Following these considerations, it seems that to ensure the protection of culinary dishes, there could be some alternatives under the US Copyright Act and the French Code of Intellectual Property, if the culinary dish is considered either a work of art, or a work of applied art or artistic craftsmanship. The latter only covers visual, not taste, but could be used by analogy. However, the counter argument is the chilling effect of copyright protection on innovation. It may be bad to remove dishes from robust public domain. New chefs cannot try them, etc. Some commentators argue for maintaining a balance.⁹³ Many top chefs today are also known for their artistic food designs and arrangements. Speaking of art, there are even museums dedicated to food and drink.⁹⁴ An example is the case of the Mondrian Cake plagiarism. Bay Area pastry chef Caitlin Freeman created her famous signature cake in the likeness of artwork by Piet Mondrian at the San Francisco Museum of Art Blue Bottle Café. She lost her contract with the restaurant, but noticed that her cake was still on the menu. She accused the Museum of plagiarism. It did not go further, as there is no way she could prevent someone from reproducing her cake. She wrote a cookbook on her desserts in 2013.

Codes of Honor and Conduct

It is somewhat of a mystery why in the history of gastronomy, cooks/chefs have not pressed further for recognition of their rights over their recipes and dishes. Some argue that it is because of the puritan approach to food, and the low level of cooks in society.⁹⁵ This may have been the case in England. In France, however, there is a long tradition of gastronomy and enjoyment of food, and cooks hold a good status.

⁹¹Marie Christine Janssens, "Copyright for Culinary Creations: a Seven Course Tasting Menu Accompanying Wines," 2013,

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538116

⁹²*Loi de Sybaris, extrait, selon l'historien Pylarque cité par Athénaeus au IIIème siècle av. J.C. dans le «Banquet des sages»*) http://www.eduki.ch/fr/doc/dossier_12_histo.pdf

⁹³ Austin Broussard, "An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation," 10 *Vanderbilt Journal of Entertainment & Technology Law* 691,725-27 (2009)

⁹⁴Natasha Reed, "Eat Your Art Out: Intellectual Property Protection for Food," June 21, 2016. <https://www.trademarkandcopyrightlawblog.com/2016/06/eat-your-art-out-intellectual-property-protection-for-food/>

⁹⁵ Christopher Buccafusco, "On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?" 24 *Cardozo Arts & Entertainment Law Journal* 1121 (2007), citing Stephen Mennell at 1142.

Nowadays, the reality is that there are codes of culinary ethics among professional chefs, and tacit intellectual property agreements among them. Chefs actually do adhere to these norms, and violators are punished by a refusal to provide further information and by lowered reputation in the community. A code of ethics, set forth by the International Association of Culinary Professionals, requires its members to pledge to respect the IP rights of others and not knowingly use for financial or professional gain the intellectual property belonging to another without proper recognition.⁹⁶

Empirical research, conducted in 2006 by Fauchart and von Hippel, concludes that chefs find ways to protect their creations through norms-based intellectual property (IP) systems, and get protection analogous to what they could to with legal means.⁹⁷ These norms operate entirely upon the basis of implicit social norms that are held in common by members of a given community. The authors identify three strong implicit social norms related to the protection of recipe IP and find that accomplished chefs enforce these norms, and apply them in ways that enhance their private economic returns from their recipe-related IP. (1) A chef must not copy another chef's recipe innovation exactly. (2) If a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission. (3) Colleagues must credit developers of significant recipes as the authors of that information.⁹⁸ This leads the authors to conclude that information not afforded the protection of intellectual property law may nonetheless be controlled and enforced by an effective intellectual property regime based entirely on implicit norms. Their conclusion is that norms based IP is an important complement to or substitute for law-based intellectual property systems.

As Chef Cédric Grolet states: "One can copy, if one recognizes the creator by name. If one tries to reproduce my work, this means that one likes what I am doing. This is not a concern, but I prefer nevertheless that they indicate that they were inspired by my creations. In practice, this recognition of the work and inspiration can often be the mention "inspired by..." or "like..." or "like the recipe of ...".⁹⁹ "It is a kind of moral obligation that the chefs have among one another," says Maître Berguig. "They do not claim property rights, but they want to see their names mentioned. They do not prevent anyone to reproduce the recipe, they even explain it in books."¹⁰⁰

III. Alternatives to Copyright: Trade-Marks, Trade Secrets, Patents, and Non-Disclosure Agreements

If copyright protection is not easily obtainable, some other solutions mostly from the industrial property field allow for protection in certain cases.

⁹⁶ <https://www.iacp.com/>

⁹⁷ Emmanuelle Fauchart and Eric von Hippel. "Norms-based intellectual property systems: the case of French chefs", *MIT Sloan School of Management Working Paper* 4576-06, January, 2006..

⁹⁸ *Id.* at 4

⁹⁹ Ulla Majoube, "Un pâtissier est-il propriétaire de son dessert?" Oct. 13, 2018.

https://www.lexpress.fr/styles/saveurs/un-patissier-est-il-proprietaire-de-son-dessert-signature_2038817.html

¹⁰⁰ *Id.*

A. Patent Protection

In 1994, Joël Robuchon, the famous French chef, filed for a patent (*brevet*) for a hot foie gras soup with hen jelly recipe which allowed him to make a soup in which the foie gras did not mix with the hen jelly.¹⁰¹ This patent conferred to him an exclusive right granted for an invention or novelty, which provides a new way of doing something, or offers a new technical solution to a problem.¹⁰² As the patent owner, he had the exclusive right to prevent or stop others from commercially exploiting the patented invention. The protection is granted for a limited period, generally 20 years from the filing date of the application in France and 14 years in the USA, and is not renewable.¹⁰³ The patent protection may be deemed essential for certain types of innovation, such as molecular cuisine. It is used for some products, such as Viennetta, an ice cream millefeuille-like pastry, well known in the U.K. and elsewhere.¹⁰⁴ In France, the National Institute of Intellectual Property (*Institut national de la propriété intellectuelle*, INPI), has a website for all the deposited patents, for instance, a recipe combining black truffle and chocolate. This is particularly useful when trying to commercialize the recipe. Article L611-10 of the Code of Intellectual Property details what can be patented. The International Classification of Patents (*la Classification Internationale des Brevets*, CIB) includes classes relative to food, including Class A23L indexing patent requests regarding food items and their preparations, such as the Robuchon soup.¹⁰⁵

B. Trademarks

In France, a pastry chef wanted to copyright her special revisited recipes for oriental pastries. The INPI advised her that she could not protect her recipes because they were considered a

¹⁰¹ The invention relates to a new recipe for hot foie gras soup with hen jelly, avoiding the foie gras mixing with the jelly. According to the invention, a composition based on raw foie gras and single cream is placed in individual cups and cooked in a steam oven at 80 centigrades for 16 minutes, then allowed to cool, after which a composition based on hen jelly is poured into each cup of cooked and cooled foie gras and, just before serving, the mixture is cooked in a steam oven at 87 centigrades for 17 minutes. Patent here

http://fr.espacenet.com/publicationDetails/biblio?DB=fr.espacenet.com&adjacent=true&locale=fr_FR&FT=D&date=19940902&CC=FR&NR=2701815A1&KC=

¹⁰² “What is a patent?” <http://www.wipo.int/patents/en/>

¹⁰³ “Comment protéger quoi.” <http://commentprotegerquoi.inpi.fr/#panel/recette/brevet/>
Practical advice on step by step <https://www.inpi.fr/fr/comprendre-la-propriete-intellectuelle/le-brevet>

¹⁰⁴ Thomas Farrell, “Viennetta: the First Branded Ice Cream Dessert,” Aug. 15, 2014.
<http://letslookagain.com/2014/08/viennetta/>

¹⁰⁵ Marie Auger, “Du droit à l’assiette : Existe-t-il une protection juridique pour les créations culinaires?,” May 4, 2015. https://www.lepetitjuriste.fr/propriete-intellectuelle/du-droit-a-l-assiette-existe-t-il-une-protection-juridique-pour-les-creations-culinaires/#_ftn5

know-how, but that she could give each of them a name and protect the brand name.¹⁰⁶ A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. The famous pastry chef, Pierre Hermé, has deposited the names of some of his pastries as trademarks, e.g., Mogador, Satine, Ispahan, which institutionalizes and labels them. It proves who created the pastry and preserves the creators from an indelicate industrial who would like to profit from them. At the same time, the pastry chef states that the recipe itself constantly evolves and that he now has come up with seventy different recipes for his Ispahan pastry.¹⁰⁷ Another famous trademark is the *Vache qui rit*.¹⁰⁸ The trademark protection does not protect the culinary creation or the recipe itself, but it allows to associate a product with an enterprise, a person, and to give his author a monopoly of exploitation to oppose to a third party. The third party could, however, reproduce the creation and present it under a different name. A trademark cannot be descriptive or consist in the form of the product. But it can take the name of the creator. This is how the prepared dishes are commercialized under the name of a star chef, like Bernard Loiseau or Joël Robuchon.¹⁰⁹

Trademark protection can be obtained through registration, at the national or international level. A trademark registration will confer an exclusive right to the use of the registered trademark or licensed to another party for use in return for payment. The term of trademark registration can vary, but is usually ten years. It can be renewed indefinitely on payment of additional fees. A word or a combination of words, letters, and numerals can perfectly constitute a trademark. But trademarks may also consist of drawings, symbols, three-dimensional features such as the shape and packaging of goods, non-visible signs such as sounds or fragrances, or color shades used as distinguishing features – the possibilities are almost limitless.

C. Designs and Models

The classification “*boulangerie, biscuits, pâtisserie, pâtes et autres produits...*” provides examples of design, drawings and models for bakery, biscuits, pastries, pasta and other products.¹¹⁰ Practical advice is available from the INPI on step by step protection.¹¹¹

D. Trade Secrets

A trade secret has no formality requirement. Broadly speaking, any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. The protection of the recipe relies on its secret. Very few people know the secret ingredients in Coca-Cola or Kinder. These brand names, however, are not protected by patent (which would

¹⁰⁶ <http://www.entrepreneurs.fr/linpi-repond-a-vos-questions-on-deposer-protoger-recettes/>

¹⁰⁷ Majoube, note 99.

¹⁰⁸ <https://www.inpi.fr/fr/valoriser-vos-actifs/le-mag/la-vache-qui-rit-et-pas-une-autre>

¹⁰⁹ Alexandra Lachowsky, “Protéger ses recettes de cuisine ou ses créations culinaires contre les copies,” Jan. 2, 2018, *Créations, savoir-faire et secret d'affaires* <https://blockchainyourip.com/protoger-recettes-de-cuisine-creations-culinaires-contre-copies-propriete-intellectuelle-droit-auteur/>

¹¹⁰ http://bases-modeles.inpi.fr/Typo3_INPI_Modeles/dessins_resultats_figuratifs.html

¹¹¹ <https://www.inpi.fr/fr/comprendre-la-propriete-intellectuelle/les-dessins-modeles>

expire after a number of years) or copyright. Employees have to sign non disclosure agreements because the recipe is considered a trade secret. If the recipe was confidential and reproduced identical way without authorization, by a former employee, it can be protected on basis of confidential clause or clause de non-disclosure, not copyright. This allows for an action in unlawful competition against third parties for abusive use of the recipe and breach of the contractual agreement relative to the confidentiality of the recipe.¹¹²

A European Directive on the protection of know-how and trade secrets (*secrets d'affaires*), adopted in 2016, increases the protection of know-how and non-revealed commercial information against illicit obtention, use and dissemination. It involves secret information, with a current or potential commercial value because of the secret, and where the confidentiality takes reasonable measures to keep them secret.¹¹³

The unauthorized use of such information by persons other than the holder is regarded as an unfair practice and a violation of the trade secret. Depending on the legal system, the protection of trade secrets forms part of the general concept of protection against unfair competition or is based on specific provisions or case law on the protection of confidential information. unfair practices in respect of secret information include industrial or commercial espionage, breach of contract and breach of confidence.

Several cases have taken up the issue of protection of a confidential recipe through a clause of non disclosure, not copyright. If the recipe was confidential and reproduced in an identical way without authorization, by a former employee, the recipe can be protected on the basis of the confidential clause. In the Pearl Oyster Case, Rebecca Charles sued a former sous chef for stealing her recipes in his new restaurant. The case was settled out of court.¹¹⁴

There are also some formal and legal rules on labels and appellations which are outside of the scope of this chapter, when, for instance, the name is defined by the recipe. A famous 1967 decision of the Criminal Chamber of the *Cour de cassation* condemned a baker who had sold a quatre quart made with margarine and not butter.¹¹⁵ it is not the substance of the recipe itself which is protected, but the name.

E. Attribution in Social Networks

Social networks have completely modified the relation between restaurants and their clients. The client can now click on any recipe of a famous chef, can reproduce a dish that appears on their restaurant menus, without, of course, having the same *coup de main*. The foodie community

¹¹² <http://commentprotegerquoi.inpi.fr/#panel/recette/> INPI's practical advice on trade secrets.

¹¹³ Lachowsky, note 109.

¹¹⁴ <https://ny.eater.com/2008/4/19/6798571/eds-lobster-bar-settles-suit-with-pearl-oyster-bar>

¹¹⁵ *Cour de cassation, chambre criminelle*, Thursday, October 1967 (67-90313).
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007057654>

shares the most beautiful food pictures.¹¹⁶ For food bloggers, advice is readily available from internet postings. The suggestion is that it is ok to copy a recipe from another source, as long as it is only the list of ingredients and the directions. One is, however, discouraged from copying any photos or illustrations accompanying a recipe! There have been several recent cases of photograph copyright infringement. It is also important to give attribution and credit to the person who wrote the recipe, with a name and possibly a link. If you find your content being used without authorization or if your content has been turned into an unauthorized book on Amazon or e-book store, the advice is to contact them immediately. Attribution and permissions are important. For Caitlin, the San Francisco chef who did not pursue litigation, below is what would have been a correct example of attribution.

Mondrian Cake. Recipe by author of cookbook. Inspired by Mondrian, this is an aspirational cake for advanced bakers who are up for a fun challenge. Reprinted with permission from *Modern Art Desserts: Recipes for Cakes, Cookies, Confections, and Frozen Treats Based on Iconic Works of Art*, by Caitlin Freeman, copyright (c) 2013. Published by Ten Speed Press, a division of Random House, Inc.¹¹⁷

Conclusion

In spite of the differences in origin and purpose of author's right and copyright, and the different perspectives, the U.S. being more focused on the economics, and the French more on the author/creator of the work, the two legal systems seem to be similar in their conclusions. Solutions to the problem of the protection of recipes and dishes involve both intellectual and industrial property protection. We have seen the solutions offered by patents, trademarks, designs, trade secrets, and non-disclosure agreements. Intellectual property protection through author's right or copyright is much harder to get, even though there is abundant evidence that recipes and dishes could be considered works of the mind. The few court decisions in both countries persist to say that the recipe is know-how (*savoir faire*).

Opinions vary on both sides of the Atlantic Ocean on what should be done or not. Some plead for some kind of copyright, others are against it. On the protection side, Caroline Bondard proposes a *sui generis* protection, partly through author's right--criterion of originality, and partly through patent protection for a limited duration.¹¹⁸ The list of precise ingredients and instructions allowing for the realization of a dish with a distinct and original taste and revealing the personality of its author could thus be protected by a combination of author's right (criteria of protection) and patent (object of the protection).¹¹⁹ Romy Duhem-Verdière suggests protection through a Creative Commons License, arguing that what can be protected is not so much the

¹¹⁶ "10 Food Photographers You Need to Follow on Instagram," November 14, 2017. <https://blog.sharegrid.com/blog/10-food-photographers-to-follow-on-instagram>

¹¹⁷ <https://www.mindfood.com/recipe/mondrian-cake/>

¹¹⁸ Bondard, note 78.

¹¹⁹ *Id.*

recipe as its publication.¹²⁰ The best way to protect your publications is to indicate the conditions of use by putting them for instance under one of the licences of Creative Commons, among which the CC by sa is free.¹²¹ Austin Broussard argues that chefs' recipes should be considered as original works of authorship and copyrighted as works of applied art.¹²² Thimothée Fringans argues that the legislator could intervene and modify the Code of Intellectual Property. She proposes a draft legislation--a Certificate of Culinary Creation for new recipes.¹²³ Each creator who thinks that they meet the required criteria, could deposit a request in the proper agency to request protection. If accepted, a certificate of culinary creation would be granted, conferring a temporary monopoly on the culinary creation. The holder of the certificate could use increase the value of their creation by either benefitting from the monopoly, or licensing their creation. After a certain time, the certificate would go into the public domain, enriching the French culinary *patrimoine* (heritage). All the certificates would present culinary, nutritional and dietary information gathered into an official database accessible to the public. This compilation would allow creators of recipes, cooks and industrials to be rewarded for their work and creativity, and at the same time, benefit everyone.

On the other side of the issue, several commentators have expressed their views against copyright protection of recipes. Christopher Buccaffusco writes that although recipes meet the formal doctrinal requirements of copyright law, an extension of the monopoly is neither necessary nor appropriate at this time. It seems to him that, creating monopolies in dishes, would not substantially reward innovators, promote knowledge, or enlarge the public domain, and that doing so might, in fact, have the opposite effect. He also thinks that chefs are happy to share them with others if appropriate norms of attribution are followed.¹²⁴ Accordingly, the goals of copyright law will be best achieved through the system of informal professional norms already in place and not through an extension of the copyright statute. Marie Christine Janssen agrees with that proposition, writing that granting copyright to chefs in their culinary creations would not result in more creations and, ultimately, the growth of the public domain after termination of the statutory period.¹²⁵

Gaëlle Beauregard takes a practical approach. She thinks that currently the question is solved for industrial recipes, with patents and trade secrets. For restaurant recipes, she thinks that the best solution right now is the trade secret.¹²⁶ If the courts only focus on the recipe itself, not the dish, she suggests creating a new legal category, the culinary creation. Fauchart and von Hippel's

¹²⁰Romy Duhem-Verdière, "Les recettes de cuisine sont-elles libres?" <http://romy.tetue.net/les-recettes-de-cuisine-sont-elles-libres?lang=fr>; Practical advice at <https://creativecommons.org/licenses/by-sa/2.0/>

¹²¹ *Id.*

¹²² Broussard, note 93.

¹²³ Thimothée Fringans « *Protection et valorisation des recettes et créations culinaires* » <http://thimothee.fringans-ozanne.fr/proposition-de-loi/>

¹²⁴ Christopher Buccafusco, "On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?" 24 *Cardozo Arts & Entertainment Law Journal* 1121, 1155 (2007).

¹²⁵ Janssens, note 91.

¹²⁶ Beauregard, note 38, at 162

solution, documenting the existence of three implicit social norms for chefs, has very useful practical effects.¹²⁷ The first requirement not to copy another chef's recipe innovation has a functional effect analogous to patenting. The requirement to keep recipe-related secret is similar to a contract under trade secrecy law. The third requirement to credit developers of significant recipes acknowledges the authorship.¹²⁸ The authors conclude that these implicit norms become an effective IP regime, and an important complement to or substitute for law-based IP systems.

Lachowsky suggests the use of a timestamp system to register the creative process and the culinary creation as a preventive measure, so that one can prove the existence of your recipe, its identity and anteriority, if needed in the future.¹²⁹

Marie Auger finds that the question is still open and wonders if the absence of protection benefits plagiarism and agro industries, or whether the empty legal field allows for an illimited transmission of culinary knowledge.¹³⁰

My own perspective is to keep in mind the origin of the idea of copyright. Copyright law is designed to promote incentives to creativity, and reward creativity. It aims to balance the interests of those who create content, with the public interest in having the widest possible access to that content.¹³¹ There is thus a need to maintain a balance between the public domain, the sharing of recipes, and unethical copying without attribution. Chefs may have a good case in certain circumstances, especially when commercial dealings are in play. As we have seen, some law IP solutions will help. Some social norms solutions will complement these. Most important is the personal aspect, the need for attribution. To answer the question asked in the introduction, is a recipe a know-how (*savoir faire*) or culinary art, we have to consider the recipe and the dish together, and say that if it meets the requirements of originality and is permeated with the personality of its author, it should, indeed be considered a work of the mind, culinary art. But this is the theory, not the practice or reality. It certainly provides a solid foundation, where the courts or the legislator be willing to evolve on that issue. It will, of course, remain in the hands of the chefs and cooks, to see whether that is what they want and whether this matters enough to them to make claims in court.

¹²⁷ Fauchart, note 97.

¹²⁸ *Id.* at 4.

¹²⁹ Lachowsky, note 109.

¹³⁰ Auger, note 102.

¹³¹ <http://www.wipo.int/copyright/en/>