PROTECTION OF RECIPES AND DISHES THROUGH INTELLECTUAL PROPERTY
(LEGAL OPINION)

ABSTRACT

Cookery has long been ingrained in human history. It has also been tradition in the culinary world to re-interpret existing, classical recipes to give each dish the chef's own personal flair. However, the line between re-interpreting recipes and outright plagiarizing and copying recipes have become blurred. In addition, haute cuisine is becoming more innovative, blending scientific techniques with time-old traditions. Coupled with the virality of recipes and dishes in the digital world, there is a renewed need to consider stronger protection for chefs and cooks for their efforts. This paper combines a legal and practical analysis of copyright and culinary creations, looking into two questions: should copyright be extended to protect recipes and dishes, and what actions can chefs take under the existing legal framework to protect their creation.

TABLE OF CONTENTS

I.	**INTRODUCTION** ……	1
II.	**CURRENT STATUS OF COPYRIGHT FOR RECIPES AND DISHES** …….	3
II. a.	LEGAL ARGUMENTS AGAINST COPYRIGHT PROTECTION FOR RECIPES AND DISHES ……...	3
II. b.	RESISTANCE FROM CHEFS AGAINST COPYRIGHT PROTECTION FOR RECIPES AND DISHES ……	6
III	**SHOULD RECIPES AND DISHES BE COPYRIGHTABLE?** ……..	10
III. a.	THE COPYRIGHTABILITY OF RECIPES …….	12
III. b.	THE COPYRIGHTABILITY OF DISHES ……...	13
IV.	**EXISTING SOLUTIONS FOR PROTECTION OF RECIPES AND DISHES** …….	15
IV. a.	COPYRIGHT PROTECTION – COMPILATION OF COOKBOOKS AND BLOGPOSTS ……...	16
IV. b.	TRADEMARK PROTECTION – 2D TRADEMARKS ……...	17
IV. c.	TRADEMARK PROTECTION – TRADE DRESS AND 3D TRADEMARKS ……	19
IV. d.	TRADEMARK PROTECTION – PASSING OFF ……...	23
IV. e.	PATENT PROTECTION ……..	25
IV. f.	TRADE SECRETS ……	28
IV. g.	A NEW SOLUTION: A NORMS-BASED INTELLECTUAL PROPERTY SYSTEM? …….	30
V.	**CONCLUSION** …….	35
VI.	**BIBLIOGRAPHY** ……	36

I. INTRODUCTION

Food and nourishment have been inextricably linked with humanity, and given heavy significance throughout history. Almost every culture in the world has some sort of quote or saying related to food – the most famous being "You are what you eat". With time, those who specialised in cookery and cuisine gained importance, rising to become celebrities in their own right.

In the past, cooking and recipes were a closely guarded secret. Apprentices would be set to individual tasks and would only be able to learn bits and pieces of their masters' recipes without ever gaining the full picture. This meant even if the apprentices were to move on to a new post, or start their own restaurant, they would not be able to fully replicate the recipes their masters cooked in their kitchen. In this way, it helped to protect the master's secrets and original recipes.

The advent of the Internet also gave rise to a new wave of chefs: ones who were not classically trained, but had ideas and access to Internet and social media. Some chefs and bloggers started their roots as food bloggers, sharing tips, tricks, recipes with other similar-minded Internet citizens, creating an online community based around sharing knowledge and publicising it on social media. This "foodie" culture highlights the lucrativeness of restaurants and cooking, and the amount of revenue that can be brought in based on this industry[1].

To illustrate, the food and beverages industry is projected to reach some USD$236,529 million by 2020, with an expected growth rate of 10.7%. If this projection is

[1] Claire M. Germain and Clarence J. TeSelle, '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). <https://ssrn.com/abstract=3393891> accessed 31 August 2020

accurate, this means that the industry will be generating up to USD$354,758 million by 2024[2].

However, with the proliferation and increased popularity of food, more people sought to replicate the experiences they had in a restaurant or in a favourite shop. This phenomenon has become so popular that aspiring chefs and bloggers attempt to replicate the recipe they tasted in a restaurant or had seen on social media.

Ordinarily, this interest is a boon to the culinary industry. Culinary tradition thrived on taking recipes and reinventing and reinterpreting them to fit not only the chef's vision, but also the modern palate. However, there are less scrupulous actors who take these reinvented recipes and pass them off as their own, while intellectual property does not recognise culinary arts as a work that is deserving of protection. As some have noted, there is a likelihood that litigation in the arena of food and beverages is about to spike, given the large amount of money at stake[3].

This paper seeks to analyse the legal positions on copyrighting recipes and dishes, and provide a chef or anyone seeking to protect their recipes or dishes with certain guidelines as how best to achieve that effect using existing legal frameworks and social norms.

[2] Statista, "Food – Worldwide" (*Statisa*, 27 June 2020) < https://www.statista.com/outlook/253/100/food-beverages/worldwide> accessed 31 August 2020

[3] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121

II. SHOULD RECIPES AND DISHES BE COPYRIGHTABLE?

Recipes and dishes are currently unprotected. As pointed out, the area exists "in one of copyright's "negative spaces", i.e. a realm of creativity not covered by copyright law"[4]. Analysing the relevant literature, there are two clear reasons for this: firstly, academics have been dismissive of the idea that food and the culinary arts deserve any form of copyright protection; secondly, chefs and creators in the culinary sphere are highly resistant to this idea.

a. LEGAL ARGUMENTS AGAINST COPYRIGHT PROTECTION FOR RECIPES AND DISHES

One of the prominent experts in copyright, Nimmer, is hostile to this concept[5], stating that recipes are "functional and necessitate"[6]. Several academics have also questioned the necessity of using copyright to protect recipes and food: Buccafusco argues that copyright law would create monopolies over recipes and would fail to "reward innovators, promote knowledge, or enlarge the public domain"[7]; Cunningham believes that extending copyright and intellectual property laws are "not the answer" to protecting culinary innovation due to the nature of the industry itself[8].

There has been a lack of cases on copyright of recipes in the EU and the US[9]. Even if litigated, the law emphasizes recipes cannot be copyrighted. In the US, recipes are considered mere listings of ingredients, and thus cannot be protected. Given the US ruling in *Feist*

[4] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121
[5] *Ibid*
[6] Fabris, Daniele, 'Food Industry, Haute Cuisine and Copyright (2019)' 41(11) European Intellectual Property Review 704-713

[7] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121
[8] Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen' (2009) 9 J High Tech L 21

[9] Daniele Fabris, 'Food Industry, Haute Cuisine and Copyright (2019)' 41(11) European Intellectual Property Review 704-713

Publications Incorporated v Rural Telephone Service Co[10], this makes good sense. *Feist Publications* ruled that a collection of facts did not constitute an original work, as it lacked a "spark of creativity"; by the same token, recipes, having been classified as a "mere listing" of ingredients, would also lack the creative spark[11]. This was borne in *Publications International Ltd v Meredith Corp*[12], where a court held that recipes copied from a "particular compilation cookbook were not entitled to copyright protection". In the same way, there was *Lambing v Godiva*, where the Court for the Sixth Circuit rejected copyright protection for recipes, stating "recipes […] are not copyrightable"[13].

Interestingly, a US case in 2001 seems to state if a recipe has sufficient creative expressiveness, it could qualify for copyright. In *Barbour v Head*[14], the plaintiff was the author of a cookbook called "Cowboy Chow". However, the court distinguished the case from *Publications International Ltd*, finding there were "statements that may be inherently expressive to exceed the boundaries of mere fact", and that "the recipes in Cowboy Chow are infused with light-hearted or helpful commentary"[15].

While this case was settled, it gives rise to a possibility where if one copied a recipe with personal anecdotes or literary flair, the creator could successfully sue for copyright protection. In short, the recipe itself did not merit copyright protection – but the literary commentary would.

In the EU, a well-known case would be *Levola Hengelo BV v Smilde Foods BV*[16]. The ultimate ruling of the European Court of Justice indicated that taste was excluded from copyright protection, stating that the taste of a food was not a work within the meaning of

[10] U.S. 340
[11] *Feist Publications Incorporated v Rural Telephone Service Co* U.S. 340
[12] 88 F.3d 473 (7th Cir. 1996)
[13] 524 U.S. 954 (1998)
[14] **178 F. Supp. 2d 758 (2001)**
[15] Ibid
[16] Case C310/17 – *Levola Hengelo BV v Smilde Foods BV* [2018] OJ C269

Directive 2001/29, and that a taste could not be identified with precision and objectivity. Advocate General Wathelet made clear in *Levola* that "copyright does not protect the recipe as such (the idea)", as copyright protection "extends to original expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"[17]. That being said, the European Court of Justice only mentioned taste could not be copyrighted; it makes no comment on whether the recipe itself is excluded from protection, as per the Advocate General's opinion.

At its heart, the difficulty in protecting recipes under copyright law lies in one key issue: the idea-expression dichotomy. It is trite law that copyright protects the expression of an idea, not the idea itself. In the same way, a recipe supposedly is an idea: a combination of ingredients and techniques are a list and lacks creativity. This theme is repeated in litigation handling culinary creativity with the same conclusion: traditional copyright cannot protect recipes.

[17] Opinion of Advocate General Wathelet, Case C310/17 – *Levola Hengelo BV v Smilde Foods BV [*2018] OJ C269

b. RESISTANCE FROM CHEFS AGAINST COPYRIGHT PROTECTION FOR RECIPES AND DISHES

The general reluctance to use copyright as a means to protect recipes has also extended to chefs in the *haute cuisine* world. In this area, most chefs agree that cooking is a form of expression, that it gives rise to culinary expressiveness[18]. They spend time, effort, and research putting together their dishes. Some have even gone as far as to research what flavour pairings work together based on a food's chemical makeup – the most famous being Heston Blumenthal and Francois Benzi in 1992[19]. They are not the only ones to do so: James Briscione of the New York Institute of Culinary Education has gone as far as to create a database and to research flavour chemistry, eventually culminating in the book "The Flavour Matrix"[20].

And yet, chefs reject the idea of copyrighting recipes. Cooking and recipes have been passed on from chef to chef, and it is difficult to pinpoint when and where the "original" recipe came from. The lack of historic record-keeping, along with the fact many well-known recipes are passed down from person to person, means it is harder to reach the required threshold for copyrighting a recipe. Chefs see recipes and the culinary arts as "collective, cumulative inventions, a heritage created by hundreds of generations of cooks"[21]. In addition, chefs "recognise the collective nature of recipes and dishes, and seem to endorse the idea about sharing and hospitality as an alternative to exclusive ownership"[22].

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[18] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121

[19] Beth Hoffman, 'The Flavour Wars' (Food Tech Connect, 2 January 2012)< https://foodtechconnect.com/2012/01/02/the-flavor-wars/> accessed 31 August 2020

[20] Taylor Shaw-Hamp, 'Learn to Combine Flavors in a Whole New Way with "The Flavour Matrix"' (Foodal, 21 May 2019) < https://foodal.com/kitchen/general-kitchenware/recipe-books/flavor-matrix-briscione/> accessed 31 August 2020

[21] Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen' (2009) 9 J High Tech L 21

[22] Marie-Christine Janssens, 'Copyright for Culinary Creations: A Seven Course Tasting Menu With Accompanying Wines' (SSRN, January 2013) <https://ssrn.com/abstract=2538116> accessed 31 August 2020

Simultaneously most chefs are glad to simply be credited for their recipes whenever it is used. This is codified in the IACP's Code of Professional Ethics, which states two situations where credit should be given: firstly, "where one obtains a recipe from another source and makes minor changes, but the recipe remains fairly intact, one should credit the source"; secondly, "where one has made changes to a recipe, but the original essence remains intact, one should indicate the recipe is "adapted from" or "based on another"; and thirdly, "where one has changed a recipe considerably, but still wants to indicate derivation from the original, one should indicate it as "loosely adapted from" or "inspired by" another recipe"[23].

This is echoed in amongst the chefs as well. Momofuku's David Chang once tweeted "Wylie, René, Heston, Ferran, and Andoni give proper credit to other chefs, why can't the rest of us? We lose [the] ability to keep the past alive."[24], while Wylie Dufresne of wd-50 is clear that journalists and experts need to hold chefs and creators accountable if a recipe is copied[25]. Some chefs are even unconcerned with obtaining credit for their work, viewing it as flattering[26].

Even if these recipes have been taken and republished as an "original" recipe, very few chefs would bring legal recourse, and find it costly and expensive to do so. In the few situations where litigation has been brought to court, it will not be under copyright infringement. For example, the proprietor of the Pearl Oyster Bar sued her former apprentice, claiming his Ed's Lobster Bar copied every element of her restaurant, suing under the

[23] Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen' (2009) 9 J High Tech L 21
[24] Gabe Ulla, 'Inspiration and Attribution in Cooking: How and When Should Chefs Creddit Their Sources?' (Eater, 3 December 2012) < https://www.eater.com/2012/12/3/6524745/inspiration-and-attribution-in-cooking-how-and-when-should-chefs> accessed 31 August 2020
[25] Gabe Ulla, 'Inspiration and Attribution in Cooking: How and When Should Chefs Creddit Their Sources?' (Eater, 3 December 2012) < https://www.eater.com/2012/12/3/6524745/inspiration-and-attribution-in-cooking-how-and-when-should-chefs> accessed 31 August 2020
[26] Ibid

grounds of trade dress[27]; a Chinese eatery, Mr. Chow, sued the newer restaurant "Phillipe Chow" on the grounds of trademark infringement, false advertising, and unfair competition for allegedly stealing Mr. Chow's menu and poaching their veteran chef[28]. These claims relied on trade dress and unfair competition instead of copyright.

But without some form of legal protection, copying seems to be rife in all cooking circles. Taking haute cuisine as an example, other chefs can copy the original chef's presentation and dishes without crediting them – and be highly praised for their apparent originality. This situation occurred in 2006, where an Australian restaurant called Interlude was found to be copying the menu and dishes of WD-50 and Alinea, two well-known American restaurants[29].

Examples can also be found in social media and blogging world. In 2012, former Food Network host Anne Thornton was caught copying recipes from Martha Stewart and Ina Garten[30]. In the same year, well-known vegan food blogger Susan Voisin found her recipes liberally copied from her websites - then sold as an eBook on Amazon under several aliases[31]. In 2017, *Buzzfeed Tasty* was memorably accused of plagiarising recipes and food videos from other lesser-known food bloggers to gain hits – a valuable currency in the Internet world[32].

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[27] Laren Spirer, 'The Lobster Roll Wars', (Gothamist, 27 June 2007) < https://gothamist.com/food/the-lobster-roll-wars> accessed 31 August 2020

[28] Lesley Abravanel, 'Chow vs Chow: The Million Dollar Verdict Is In' (Eater Miami, 23 February 2012) < https://miami.eater.com/2012/2/23/6611101/chow-vs-chow-the-million-dollar-verdict-is-in> accessed 31 August 2020

[29] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121

[30] Khushbu Shah, 'Recipe Plagiarism in the Food World Is Still Rampant'(Eater, 19 March 2015) < https://www.eater.com/2015/3/19/8259393/recipe-plagiarism-in-the-food-world-is-still-rampant> retrieved 31 August 2020

[31] Garrett McCord, 'Theft of a Food Blog: Copyright Infringement in the e-Book marketplace' (Huffington Post, 3 October 2012) < https://www.huffpost.com/entry/food-blog-cookbook-copyright-infringement_b_1721929> retrieved 31 August 2020

[32] Alex Orlov, 'The secret ingredient to BuzzFeed's viral Tasty videos: Recipe theft, food bloggers say' (Mic, 10 January 2017) < https://www.mic.com/articles/163958/the-secret-ingredient-to-buzz-feed-s-viral-tasty-videos-recipe-theft-food-bloggers-say> retrieved 31 August 2020

These only came to light because they were larger, well-known public entertainment figures, with public opinion shaming them enough to make a change in their behaviour. But smaller, independent cooks, food bloggers, and restauranteurs have no such recourse available to them, leaving them vulnerable to exploitation and unscrupulous actors piggybacking off their hard work. Thus, there is a need to extend copyright protection to the vulnerable, less well-known players in the culinary world.

III. SHOULD RECIPES AND DISHES BE COPYRIGHTABLE?

Copyright infringement for individual recipes is unrecognised. The question the becomes: can and should recipes and dishes, as non-traditional copyright works, be protected under the current framework?

I propose to analyse this aspect by separating recipes and dishes into their own respective categories. "Recipe", as under the Oxford Dictionary, is a "set of instructions for preparing a particular dish, including a list of the ingredients required"[33]; "dish", on the other hand, is defined as "a particular variety or preparation of food served as part of a meal"[34]. It would be useful to revisit what can be protected under copyright.

Traditionally, copyright was offered to any subject matter that fit within the definition of the Berne Convention. This is defined as Article 2(1), where any work that is in the "literary, scientific, and artistic domain, whatever may be the mode or form of its expression" can be protected[35]. Note the specific phrasing used is "literary and artistic works", which has been recognised as a catch-all term.

Ricketson and Ginsburg have defined two key principles in offering copyright protection. First, some creativity is required, along with any intellectual creation "within the sphere of letters and the arts"[36] . The Berne Convention is unconcerned with the aesthetic value of the work: the requirement is creativity and originality[37]. The second principle is that copyright must be used to protect the expression of the idea, and not the idea itself. Again, as according to the Berne Convention, the mode or form of expression is irrelevant - so long as it has elements of creativity and originality.

[33] 'recipe, n' (Lexico) <https://www.lexico.com/definition/recipe> accessed 31 August 2020
[34] 'dish, n' (Lexico) < https://www.lexico.com/definition/dish> accessed 31 August 2020
[35] Berne Convention (adopted 28 September 1979) art 2(1)
[36] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights* (2nd ed, OUP 2005)
[37] Ibid

Levola[38] re-stated these two conditions: firstly, that the work "must be original in the sense that it is the author's own intellectual creation"; and secondly, that only the expression of the author's own intellectual creation may be classified as a work under the Information Society Directive[39] . *Levola* also added a third requirement: the work must be identifiable "with sufficient precision and objectivity, even if the expression is not necessarily in permanent form".

"Originality" itself was originally set out in *Infopaq International A/S v Danske Dagblades Forening*[40], where the courts clearly stated that creativity was expressed "through the choice, sequence and combination of those works […] in an original manner and achieve a result which is an intellectual creation"[41]. As such, the conclusion is clear: with regards to any non-traditional copyright works such as recipes, at least, in European law, originality and expression are key.

Thus, to sum up, the key components of a copyright-protectable work would be that the work had to have creativity and originality, and with *Levola*[42], it adds an additional requirement of it being identifiable "with sufficient precision and objectivity".

[38] Case C310/17 – *Levola Hengelo BV v Smilde Foods BV* [2018] OJ C269
[39] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167
[40] Case C5/08 – *Infopaq International A/S v Danske Dagblades* Forening [2009]
[41] Ibid
[42] Case C310/17 – *Levola Hengelo BV v Smilde Foods BV* [2018] OJ C269

a. **THE COPYRIGHTABILITY OF RECIPES**

Applied to recipes, it would be prudent to first consider if a recipe would have creativity and originality. Academics have long argued that recipes traditionally were not accorded this status, as they were merely a set of instructions. This is the position in US law, as established in *Meredith*[43]. In France, recipes were ruled as "know-how" (*savoir faire*), and therefore were not protected[44].

In the context of ordinary recipes, such as those of a cake or baked goods, most under this rubric would not qualify as a copyrightable work, and with good reason. These recipes are a process, and with it, its underlying ideas, processes, or methods. As pointed out, copyright protects the expression of an idea - and not the process or idea itself[45]. In addition, these basic recipes serve a functional purpose: that is, the instructions are "dictated by functional necessities"[46].

Every day, new innovations and creations are put together, creating recipes and combinations that have not been seen before. One only need to turn to haute cuisine to see how original and innovative recipes are. El Bulli was renowned not only as a restaurant, but an experiment lab where chefs married science and cooking, creating dishes that had never been seen before; before the Fat Duck, no one would have thought to put white chocolate and scallop together; Thomas Keller created his famous Oyster and Pearls; Steinreck at Stadtpark cooks fish in hot beeswax.

[43] *Publications International Ltd v Meredith Corp* 88 F.3d 473 (7th Cir. 1996)
[44] Claire M. Germain and Clarence J. TeSelle, '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). <https://ssrn.com/abstract=3393891> accessed 31 August 2020
[45] Marie-Christine Janssens and Clarence J. TeSelle, 'Copyright for Culinary Creations: A Seven Course Tasting Menu With Accompanying Wines' (SSRN, January 2013) <https://ssrn.com/abstract=2538116> accessed 31 August 2020
[46] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121

Thus, the correct position with regards to recipes' copyrightability is this: restatements for ordinary dishes do not deserve copyright protection[47]. Even if they were deserving of copyright protection, these would have gone into public domain. But for highly creative recipes who have "no gastronomic precedent"[48], they are creative, original, and can be easily identified with "sufficient precision and objectivity"[49], thus deserving of copyright

b. COPYRIGHTABILITY OF DISHES

Meredith clearly stated that "recipes contain no expressive elaboration upon either of the functional components"[50]. Yet, chefs are required to innovate upon existing recipes to create new expressions of dishes to "answer and satisfy customers' expectations", in the process experiment with traditional or novel food components and their interactions[51].

Even in its most basic form, a recipe does not necessarily produce exactly the same result - or the same dish. Consider the number of people seeking help online for following a recipe: even with clear measurements and ingredients written out, you will always find commentators complaining that their dish did not turn out the way the recipe promised or looked. At the other end of the scale, consider the variations on well-known recipes a restaurant can produce.

Coupled with the increasing reliance on science and precision to combine and create tastes that have never been tasted or seen before, it is clear the culinary arena has innovations that transcend mere lists and utilitarian functions, as alleged. As some can and have argued: "cooking should be considered a work of the mind, and that chefs who do an original

[47] Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable' (2007) 24 Cardozo Arts & Ent LJ 1121
[48] *Ibid*
[49] Case C310/17 – *Levola Hengelo BV v Smilde Foods BV* [2018] OJ C269
[50] *Publications International Ltd v Meredith Corp* 88 F.3d 473 (7th Cir. 1996)
[51] Angelo Presenza, Tindara Abbate, Gian Luca Casali, Mirko Perano, 'An innovative approach to the intellectual property in haute cuisine' (2017) International Journal of Hospitality Management 65 (2017) 81 - 88

composition have created a dish that is permeated with the personality of a cook"[52]. There are also compelling arguments that the end result of a haute cuisine dish is "not different from more traditional works of the fine arts"[53].

Now consider *Levola*'s third requirement: precision and objectivity[54]. *Levola* failed because the courts stated taste could not be expressed with "sufficient precision and objectivity"[55], as taste was highly subjective. But a recipe is not about whether a dish tastes the same – it is about how ingredients are cooked, how it is presented on a plate. In addition, the courts in *Levola* only ruled out copyrighting taste, but there was no mention made of a dish. As correctly pointed out, "it is evident […] that the taste of a food product and a dish composition are two different kinds of 'works'.[56]"

As such, one thing becomes clear: while recipes are not protected under copyright, in practice, there is no principled legal reason why creative, modern recipes and dishes cannot be protected under copyright law. And yet, copyright protection is denied to chefs and restauranteurs who create and develop their own recipes, leaving them vulnerable of so-called "recipe burglars"[57].

[52] Marie-Christine Janssens and Clarence J. TeSelle, 'Copyright for Culinary Creations: A Seven Course Tasting Menu With Accompanying Wines' (SSRN, January 2013) <https://ssrn.com/abstract=2538116> accessed 31 August 2020
[53] Daniele Fabris, 'Food Industry, Haute Cuisine and Copyright (2019)' 41(11) European Intellectual Property Review 704-713
[54] Case C310/17 – *Levola Hengelo BV v Smilde Foods BV* [2018] OJ C269
[55] Ibid
[56] Ibid 53
[57] Pete Wells, 'New Era of the Recipe Burglar' (Food & Wine, 31 March 2015) < https://www.foodandwine.com/news/new-era-of-the-recipe-burglar> accessed 31 March 2020

IV. EXISTING SOLUTIONS FOR PROTECTION OF RECIPES AND DISHES

From the previous analysis, the problem is two-fold: firstly, there is no basis in traditional copyright law when it comes to protecting recipes; and secondly, chefs are reluctant to use such methods. Yet, there is a clear need for some form of protection, given the controversies and the indignation by other chefs when it is discovered an unscrupulous actor has taken a recipe for their own use.

I have argued in the previous section why copyright should be able to protect highly innovative recipes and dishes. However, I am also mindful of the spirit of sharing, and the fear that using legal solutions would ultimately stifle innovation for fear of litigation.

Therefore, any alternative solution must achieve balance between the following aims. It must be able to provide some recourse for the victimised chef to either stop the infringement or to reclaim some sort of credit; it must be able to deter any would-be thieves or transgressors from doing so again; but it also must be accessible to the vast majority of chefs, and not only the few elite chefs at the top of the culinary arts chain. Finally, it must provide effective protection, while simultaneously allowing for the free exchange of ideas and innovation, so long credit is given.

To that end, I propose to analyse the traditional ways of protection, that is patent, trademark and passing off, and trade secrets; and the norms-based intellectual property system, as coined by Fauchart and von Hippel[58].

[58] Emmanuelle Fauchart, Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) Organization Science 19(2):187-201

a. COPYRIGHT PROTECTION – COMPILATION OF COOKBOOKS AND BLOGPOSTS

Modern-day case law regarding the copyrightability of recipes has been scarce - and even if it were discussed, most courts have found it to be a mere statement of facts. As mentioned at the outset, this follows on from *Feist Publications Inc*[59], where it was held facts are not independently created, and lack "even the minimal degree of originality required"[60]. The Berne Convention is also clear that literary and artistic works can be protected[61]. Thus, while a recipe was not copyrightable, the contents of a cookbook[62] or a blogpost itself can be.

This creates a glaring inconsistency. A published recipe alone would not merit any copyright protection. However, if the cookbook or recipe contained personal anecdotes or stories, that part of the book or the blog would be protected. In other words, a person could simply lift a recipe from a book or a blog, claim it as their own, and the original creator would have no legal recourse against the thief. However, short of case law amending this concept, the best protection a chef would want for their recipes is to create a recipe, then lace it with their personal anecdotes or pictures of their own creation[63] . The anecdotes in a cookbook or blogposts can be copyrighted as they would constitute a literary work, indirectly protecting the recipe contained inside.

This method is made easier by the fact anyone with an Internet connection could register for a blog or a social media account to share their recipes and their personal story. However, this route only provides a partial or collateral form of protection, making it undesirable for anyone seeking a complete protection of their works.

[59] *Feist Publications Incorporated v Rural Telephone Service Co* U.S. 340
[60] Daniele Fabris, 'Food Industry, Haute Cuisine and Copyright (2019)' 41(11) European Intellectual Property Review 704-713
[61] Berne Convention (adopted 28 September 1979) art 2(1)
[62] *Barbour v. Head*, 178 F. Supp. 2d 758 (S.D. Tex. 2001)
[63] Ibid 60

b. **TRADEMARK PROTECTION – 2D TRADEMARKS**

A trademark ordinarily is a sign that distinguishes the goods and services of one company from another. Initially, traders would apply these marks to their goods to indicate ownership[64], but in modern day commerce, a person would see trademarks everywhere - usually applied to labels, wrapping or containers that package a product[65].

This is because these marks no longer are simple marks of ownership - instead, they have become, "valuable assets in their own right […] by virtue of their distinctiveness or appeal"[66]. It creates an "advertising quality", causing people to desire the product not only for their quality, but for the brand associated with the mark itself[67]. Think of the devoted customers to luxury fashion brands, and the scramble for their products whenever a new season drops. In this way, a trademark gains a variety of associations - and a devoted customer base.

When someone purchases an item or an object associated with a certain brand, "they purchase an 'experience envelope' that helps to construct their identity"[68]. Research has already shown that many consumers nowadays seek out a social exclusivity, where consumers covet prestige, hedonism, or escapism[69] - a trademark is an indicator, along with the reputation and promise that a trademark conveys. This gives value to a mark - also known as "goodwill" that businesses exploit and generate custom from, so much that trademarks are jealously guarded.

[64] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP, 2014)
[65] Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen' (2009) 9 J High Tech L 21
[66] Ibid 64
[67] Ibid
[68] Ibid
[69] Jonas Holmqvist, Jochen Wirtz, Martin P. Fritze 'Luxury in the digital age: A multi-actor service encounter perspective' (2020). *Journal of Business Research*

Trademarks, however, are different from typical copyright infringement in that it protects the presentation of the product[70] to avoid others from passing off the goods as their own.

Large-scale food producers have already used trademark to protect the names of their products: one need look no further than your usual, day-to-day brands like Oreo, KitKats, even Popsicles. Chefs too have used trademark to protect their dishes and pastries: Pierre Hermé, notably, has trademarked the names of several of his pastries to prevent others from selling similar pastries under identical names[71].

Trademarking is one of the easiest ways to protect an aspiring chef's creations: it can be obtained easily through registration, and depending on the trademark, can be used at a national or international level. While the term of registration varies, it can be continually renewed for a fee, sustaining its protection and the use of the name.

However, there are disadvantages to using trademark: it only protects the name, and not the object or the creation itself. If an infringer decides to sell an identical dish or creation, but alter the name so that it does not infringe trademark, the original creator of the recipe cannot sue to prevent the creation being sold.

[70] Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen' (2009) 9 J High Tech L 21

[71] Claire M. Germain and Clarence J. TeSelle, '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).

c. **TRADEMARK PROTECTION – TRADE DRESS AND 3D TRADEMARKS**

A corollary of trademark is trade dress. "Trade dress" is able to cover not only a mark or symbol, but also other parts that are associated with a particular business or a producer. This includes "size, shape, colour, textures, or graphics", as well as the design of a product[72]. This protects how an entire product is presented. Trade dress is best applied to dishes, and not the recipe.

The US has principle of trade dress is elucidated in the Lanham Trademark Act. It does not require registration in the United States, and permits the owner of a particular trade dress to sue an infringer for violation[73].

To succeed under a claim of trade dress, firstly, the claimant must demonstrate that their trade dress can be legally protected; secondly, the infringer's actions are likely to cause consumer confusion[74]. This protects non-functional, distinctive presentation.

There is also precedent in the European Union for 3D trademarks, which in turn could go to being used as trade dress. The European Court of Justice in *Philips v Remington*[75] clearly set out how 3D trademarks could qualify for protection: that is, (1) "the shape of the article in respect of which the sign is registered does not require any capricious addition, such as an embellishment which has no functional purpose; (2) as a result of the extensive use of the sign, it causes a substantial proportion of the relevant class of persons to associate that shape with the trader and no other undertaking or believes that goods of that shape come from that trader"; (3) the shape cannot be a result of the essential functional features attributable only to the technical result".[76].

[72] Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen' (2009) 9 J High Tech L 21
[73] Lanham Act s. 43(a)
[74] Ibid 72
[75] Case C299/99 *Philips v Remington* [2002] I-05475
[76] Ibid

Since *Philips v Remington*, several other cases claimants have sought similar protection. *Apple Inc v Deutsche Patent-und Markenamt*[77] broadened the concept of non-traditional trademarks by allowing Apple's distinctive store layout and design to be a trademark. In other cases, claimants have failed[78]. Thus, one thing becomes clear with the European Union's approach to trade dress: the elements are easy to fulfil, but proving it qualifies as a 3D trademark is challenging and potentially cost prohibitive[79].

The question is, however, how does this protect a dish? Simply put, trade dress or a 3D trademark has potential to assist in protecting the presentation of a dish. While copyright could protect the execution of an idea - a certain set of flavour pairings, flavours, ingredients put together, trade dress protects its presentation, how a dish looks on the plate, how it presented, its textures and combinations. Altogether, they create a feast for the eyes - and, as a commentator has put, go beyond "just an act of superficial beautification"[80].

Yet protecting a dish and its presentation gives rise to legal problems. In the EU and in the US, one cannot protect a design or a 3D trademark if the shape or design is the result of a functional feature, and the presentation must be non-functional and distinctive[81]. Both of these elements are difficult to prove.

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[77] Case C421/13 *Apple Inc. v Deutsches Patent-und Marknamt*

[78] For example, both Christian Louboutin's attempt to trademark their red-soled shoes and Lego to trademark their brick as a 3D trademark have failed.

[79] Vincenzo Melilli, 'Focusing on trade dress in the European Union' (World Trademark Review, 1 May 2019) <https://www.worldtrademarkreview.com/brand-management/focusing-trade-dress-european-union-1> accessed 31 August 2020

[80] Kiran Mary George, 'Trade Dress Law in the Commercial Kitchen: Exploring the Application of the Lanham Act to Food Plating in the Culinary Industry' (2017) 10 NUJS L Rev 609

[81] EUIPO, 'Trade mark and Design Cuidelines' (EUIPO, 1 February 2020) <https://guidelines.euipo.europa.eu/1803468/1789398/trade-mark-guidelines/1-introduction> accessed 31 August 2020

Firstly, whether the appearance of a dish is "functional" or not could go both ways. On one hand, food can simply be served "as is". Yet, haute cuisine insists on presentation above all else: nitrogen spilling from ice cream mixers; latticeworks of carrots and vegetables; hiding food in faux eggshells, to be cracked open[82]. There is no practical function to these decorations and flourishes, but chefs persist in creating that moment of awe. As Fabris states, people choose a dining experience "for the same reason that they choose to go to the theatre or listen to a concert" - it is for the pleasure and to "satisfy what is rather an intellectual and aesthetic need" [83]. The more complex the dish, the likelier diners will view the dish as being worthy of value[84]. In this way, you could argue that these are non-functional aspects, worthy of some form of trademark or trade dress protection.

However, there are hurdles to overcome. For example, plating a dish may be functional. There is no other way to consume food, save for putting the food itself directly onto the table. Plating is an essential, functional part of service, and one cannot escape presenting it in front of the diner.

There are also arguments about what comes under the "non-functional" presentation of the dish. Questions would arise as to which element - or elements - would fall under protection: is it the individual elements that make up the dish, like the dots of sauce, the arrangement of vegetables and cooked foodstuffs on the plate? Or is it the dish taken as a whole? And if it is the dish taken as a whole, how would one judge if another dish was coincidentally arranged, or if it was a deliberate attempt at copying trade dress?

[82] Dinner by Heston modernised a 300-year old recipe, hiding a verbena and coconut pancetta in a white chocolate shell. This was dubbed "Eggs in Verjuice".

[83] Fabris, Daniele, 'Food Industry, Haute Cuisine and Copyright (2019)' 41(11) European Intellectual Property Review 704-713

[84] Kiran Mary George, 'Trade Dress Law in the Commercial Kitchen: Exploring the Application of the Lanham Act to Food Plating in the Culinary Industry' (2017) 10 NUJS L Rev 609

Moving on from arguments regarding the functionality of plating and presentation, the next element - distinctiveness - is equally difficult to meet. Once again, the issue of whether the individual elements should be considered or if the dish as a whole should be considered.

A dish as a whole would, overall, look distinctive. Some dishes are more readily protectable than others: take the Sound of the Sea, or the Liquid Olives[85]. Very few would mistake it for anything else - and any other chef attempting to do exactly the same would be called out for the outright plagiarism. But what of a simple arrangement of meats and vegetables on a plate? Do they need to be stacked in a different way so as not to confuse them with another chef's work?

There are only so many ways one can present food on the plate, non-functionality aside. It would be far too easy for there to be overlaps between different chefs, creating a legal quagmire for anyone attempting to argue trade dress or 3D trademark protection for their dish. Even if the courts found the plate of food to qualify under the "non-functional" limb of the test, distinctiveness remains a harder requirement.

Comparatively, it is uncertain whether dishes will fall under the purview of trade dress and 3D trademarks. Firstly, the lack of clarity as to what constitutes "distinctiveness" and "non-functionality" is likely to weigh heavily against any attempt at trade dress or 3D trademarks being used to protect most dishes, save for the most innovative. Secondly, should an application succeed, it poses a policy nightmare: does one need to seek permission over an arrangement of vegetables? Finally, the amount of money and time spent to try and apply for the trademark - or, in the case of trade dress, enforce it - makes this option expensive and unattractive to all but the most litigious.

[85] The former presents a selection of seafood accompanied by an iPod in a seashell that plays beach sounds; the latter is a famed el bulli dish, creating perfect olive spheres from olive juice.

d. **TRADEMARK PROTECTION – PASSING OFF**

The UK has a common law concept of passing off. This doctrine prevents competitors from passing off another trader's good as their own. As noted by commentators, this allows for regulation of trade behaviour, giving it a flexibility that is "particularly attractive"[86]. However, passing off is enshrined in case law, and requires three elements: (1) the claimant accumulating goodwill, (2) the infringer making a misrepresentation aimed at deceiving the public, and (3) that this misrepresentation will damage the goodwill of the claimant[87]. Goodwill, as a concept, is closely associated with reputation, packaging, get-up, and trade dress.

Under passing off, goodwill would be established: the way a dish is cooked and presented will reverberate through foodie circles. Goodwill is the backbone of modern-day culinary establishments and enterprises: dishes are increasingly being associated not with the recipe itself, but the personality behind the dish. If the first requirement is satisfied, the infringer could potentially create a misrepresentation, and damage the claimant's goodwill.

This is evident not only in the dishes these chefs cook, but the endeavours the chefs dabble in. Cookbooks compile the personal fridges and home food cooked by celebrity chefs, allowing eager readers to have a voyeuristic look into their world; brands vie for chef endorsements. Even supermarkets collaborate with these chefs, creating food products branded with the chef's name. All these endeavours hinge on the chef's goodwill and reputation.

[86] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP, 2014)
[87] *Reckitt & Colman Ltd v Borden Inc* [1990] 1 All E.R. 873

The same goes for the dishes these chefs cook: their dishes are distinctive, their presentation style unique. The more inventive and unique the presentation of the dish, the further the restaurant's reputation spreads.

However, as argued earlier with trade dress, there are hurdles with passing off. It requires the dish to have obtained goodwill, and the defendant wilfully passing off the dish as their own, causing damage to the original creator of the dish. Simpler dishes will find it hard to claim their dish was original and distinctive enough to obtain goodwill. More technically complicated dishes would have a better chance of succeeding.

e. **PATENT PROTECTION**

Patents are an alternative way to protect recipes as under the existing framework. Effectively, a patent grants the owner a monopoly over an invention for a number of years. A minimum of twenty years is necessary, as according to the World Trade Organisation's TRIPS Agreement ("TRIPS").

Most laypeople are aware that drafting a patent is difficult: patent law requires description of a certain kind in order to fulfil the form demanded by patent law, and sometimes requires development of specific rules and procedures in order to fulfil patent requirements[88]. That said, there is no restriction on what patents can protect or can be filed: in theory, TRIPS has stated that patents should be available for any WTO member state for any invention and in all fields of technology[89] . In this aspect, food is also encompassed within patent technology.

Indeed, there are existing patents on food, or related to food technology. Most notably, in the US, the US Patent and Trademark Office ("USPTO") has numerous patents on food products issued every year. In fact, the USPTO has been clear in that "recipes are eligible for patent protection because they potentially contain patentable subject matter"[90].

An example of a well-known treat's process being protected by patent is the candy floss machine. Patented in 1899 in the United States and created by dentists, the cotton candy machine was one of the earlier food-technology related patents[91]. The premise itself is

[88] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP, 2014)
[89] Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994) art 27
[90] United States Patent and Trademark Office, 'Can Recipes be Patented?' (Inventor's Eye, June 2013) <https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/can-recipes-be-patented> accessed 31 August 2020
[91] Rebecca Rupp, 'The Sticky-Sweet Story of Cotton Candy' (National Geographic, 15 July 2016) < https://www.nationalgeographic.com/culture/food/the-plate/2016/07/the-sticky-sweet-history-of-cotton-candy/> accessed 31 August 2020

simple: take some sugar, put it into a machine with enough centrifugal force, and spin into spun sugar.

Patents have also been used in the EU to protect food. For example, Quorn was first patented in 1985, and pioneered alternative vegan meats. While the patent expired after 20 years, it was sufficient to allow Quorn to market share, becoming a household name[92].

However, in order for a recipe to qualify for a patent, there are certain requirements. In the EU and the UK, for example, the invention must be "new", involve an "inventive step" and be "susceptible of industrial application"[93]; in the US, an invention must be "novel" and "nonobvious", meaning that the invention itself cannot have existed before, nor could it be an improvement or an alteration over a previous invention[94].

A patent's clearest benefit is that patents protect the invention and the process. A recipe is a process, combining ingredients and cooking techniques to create a final product for consumption. Patent law is also no stranger to food and food technology, giving certainty to using patents to protect recipes.

Patents, depending on the type, can also have a relatively short life cycle. With the minimum mandated time period of 20 years[95], this allows the patent holder some time to profit off the work while defending it against any interlopers or would-be violators. After twenty years, the recipe is released to the public, free for anyone and everyone who has

[92] Reddie & Grose, 'World Food Day! Patentable foods: The "Impossible" and the eggless' (Reddie & Grose, 16 October 2018) <https://www.reddie.co.uk/2018/10/16/world-food-day-patentable-foods-the-impossible-and-the-eggless/> accessed 31 August 2020
[93] EUROPA, 'Patents in the EU: Protection and Registering' (Europa, 18 June 2020) <https://europa.eu/youreurope/business/running-business/intellectual-property/patents/index_en.htm> accessed 31 August 2020
[94] United States Patent and Trademark Office, 'Can Recipes be Patented?' (Inventor's Eye, June 2013) <https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/can-recipes-be-patented> accessed 31 August 2020
[95] Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994) art 33

knowledge of the process to create. It allows for innovation, giving third party access after a set period of time while protecting the patent-holder's interest.

However, patenting has downsides. First is the difficulty and technicality of filing a patent application. It is specifically is recommended that to hire a patent attorney or a patent agent to file these documents, due to the complexity. This is because a patent is a document with three purposes: technical, commercial, and legal[96], and thus requiring specialist skills. Hiring a patent attorney or a patent agent will come with high costs, possibly rendering it cost-prohibitive for anyone who hopes to patent a recipe.

In addition, patent law in the EU, the UK, and the US are clear in that the invention must be *novel*. This filters several commonly used recipes that ordinary people cook, as well as any improvements on currently existing recipes that others have discovered and altered. As pointed out, 'utility patents have a high standard of 'originality' that food items rarely qualify"[97]. This leaves recipes in molecular gastronomy eligible - but not much else.

Finally, using patents to protect recipes may be anathema to the spirit of cooking and sharing recipes: if someone were to use a patented recipe, they would have to pay a fee to the patent holder. This is ideal if the recipe was appropriated by a large corporation, but what of a fellow chef who wishes to replicate the dish? While in practice, it is unlikely that patent-holders will go after every chef, there is a chilling effect in innovating and sharing recipes.

Patents would perhaps be best suited for those who implement scientific processes and methods in their cooking. Even then, those who patent a recipe must consider the costliness, and potentially risk reputational damage.

[96] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP, 2014)
[97] Malla Pollack, 'Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal' (1990) 12 Cardozo L Rev 1477

f. **TRADE SECRETS**

The use of trade secrets has been key to protecting recipes in restaurants. The food industry also makes extensive use of trade secrets to protect their own: famously, Coca Cola's recipe is jealously guarded. Any leak in these recipes would inevitably net the leaker an injunction and extensive litigation for the financial damage.

Chefs too can potentially rely on trade secrets to protect their recipes. To do so is straight forward: to qualify any information as a trade secret, the information must (1) be commercially valuable; (2) it be known only to a small group of people; and (3) have been subject to reasonable steps by the rightful holder of the information to keep it secret. This usually includes the use of confidentiality agreements for business partners and employees[98].

Thus, in theory, almost anything a chef does can constitute a trade secret. There is no dispute that a chef's own repertoire of recipes is commercially valuable - it is the literal bread and butter of a restaurant that sustains the chef's reputation as a cook of some renown. However, the difficulty lies in fulfilling the second and the third criteria.

The second ground, the trade secret being known only to a small group of people, can be somewhat maintained: if the chef teachers only those working in his kitchen, in theory, that could constitute a limited number of people knowing the secret. Yet, consider a modern-day restaurant kitchen, where teams of people brainstorm, conceptualise, and taste a dish to go onto a menu. Even if each chef focuses on an individual component, they would know what the dish itself is made up of, given enough time. This also fails to account for apprentices leaving to start their own restaurants, taking with them the recipes their master had taught them in the past. When these apprentices teach these recipes to their own sous

[98] World Intellectual Property Organisation, 'Trade Secrets: What is a trade secret?' (WIPO) <https://www.wipo.int/tradesecrets/en/> accessed 31 August 2020

chef and staff, it would be harder to argue these recipes were limited to a “small group of people”.

Of course, chefs may use reasonable steps to maintain the information as a secret. In the past, some restaurants have requested employees sign non-disclosure agreements before setting foot in the kitchen. That way, if an employee is caught disclosing a recipe, or if it is sold on to another restaurant, chefs will have recourse as the employee would be breaching both their contract and their duty of confidentiality. Thus, a non-disclosure agreement avoids most of the legal hassle that comes with trademarking, patent, or passing off. For most part, this would be the most effective in commercial restaurants and kitchens.

However, there is one more downside to using trade secrets: the moment a recipe is published, it loses its status as a trade secret. This should be fairly obvious: one cannot claim something is secret if it is accessible in books, or published by the chef online. Thus, any chef seeking to rely on the use of trade secret to protect their recipes must avoid any sort of publication, unless they no longer intend to serve the recipe in their restaurant or wish to share it with the public at large.

g. A NEW SOLUTION: A NORMS-BASED INTELLECTUAL PROPERTY SYSTEM?

Finally, there is the norms-based intellectual property system, first identified by Fauchart and von Hippel in 2006. Originally, their paper examined a practice amongst well-known French chefs in protecting and developing their recipes through means of an "'information commons'" that "may prove to be criss-crossed by norms-based fences, with community access controlled by community IP owners"[99].

In the late 2000s, this norms-based intellectual property had been the attention of a few academic papers, but has yet to be adopted. However, at the turn of this decade, there is potentially a more compelling case to adopt this system, being easier to enforce in the 2010s and onwards.

Norms-based intellectual property systems were defined as a system that "functioned within a group to provide group members with intellectual property rights based upon social norms only".[100] This system granted monopoly rights to innovations, but also "must enforce these rights" after assessment. Such an assessment in a norms-based intellectual property system was by "informal community consensus". However, the sanctions to be applied were community based: usually by loss of reputation, credibility, or ostracization.

Fauchart and von Hippel identified three implicit social norms held by chefs in their research: "first, a very strong norm" that "a chef must not copy another chef's recipe innovation exactly"; second, "if a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission"; and

[99] Emmanuelle Fauchart, Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) Organization Science 19(2):187-201
[100] Ibid

third, “colleagues must credit developers of significant recipes as the authors of that information”[101].

As contrasted against a law-based intellectual property system, where violation of intellectual property rights were punished by sanctions and financial damages, a norms-based intellectual property system exists by punishing and transgressing those who violate those norms[102]. However, the punishment does not merely stop at those who violate these norms: the punishment is extended to people who “do not join in punishing [the violator of these norms]”. By doing so, this creates a stable norms-based IP system, giving creating an interest for “third parties to participate in punishing transgressions” - that is, they either participate, or face the cost of being punished as well[103].

Fauchart and von Hippel, ultimately concluded a norms-based intellectual property system offered a higher degree of protection against recipe theft versus the uncertainty of legal protection. As they point out, complaints under this system could be remedied by bringing attention to the problem to influential members of the community[104]. Using the example of Robin Wickens, the whole matter was reported to the online forum of eGullet, publicized, and the matter was resolved in a matter of days[105]. This case was also notable in that this was eventually publicised and brought to the attention of media, effectively shaming the chef for his copyright infringement.

Yet, there are inherent disadvantages to this system. A norms-based IP system also has fault with regards to enforcement: that is, this intellectual property system only remedies faults if it is brought to the attention of influential members of the community. This begs

[101] Emmanuelle Fauchart, Eric von Hippel, ‘Norms-Based Intellectual Property Systems: The Case of French Chefs’ (2008) Organization Science 19(2):187-201
[102] Ibid
[103] Ibid
[104] Ibid
[105] Bob Krummert, ‘Buzz Kill: Recipe Thieves’ (Restaurant Hospitality, 29 November 2007) <https://www.restaurant-hospitality.com/observer/rh_imp_18581> accessed 31 August 2020

several questions: how are these faults brought to the attention of these "influential members"? Who are these "influential members"? And what remedies are available to those who do not know or are in touch with these members?

Finally, it is clear a norms-based intellectual property system alone is insufficient to protect blatant plagiarism, if someone does not value the systems[106]. This intellectual property system could not prevent Robin Wickens from copying from much more well-known and successful cooks; it did not prevent the so-called Duffingate from happening[107]; and it has failed to stop the myriad of copycats borrowing dishes without the creators' consent to upload online. The norms-based intellectual property system fails if the violator or transgressor does not value nor care for the ostracization from the community[108].

In a traditional haute cuisine setting, this makes enforcing a norms-based intellectual property system harder. A chef's recipes can only be protected if they have access to these resources to stop transgressors in their tracks - but if they exist outside these influential circles, their path to recourse is almost none. These chefs also have no pathway to legal recourse, due to the cost-prohibitive nature and the difficulty in establishing a legal case in protecting recipes. In this way, a norms-based intellectual property system does little to protect the restauranteurs or the chefs that do not belong to this circle nor the financial resources to take this to court.

[106] Kiran Mary George, 'Trade Dress Law in the Commercial Kitchen: Exploring the Application of the Lanham Act to Food Plating in the Culinary Industry' (2017) 10 NUJS L Rev 609
[107] Duffingate was the hashtag coined for Starbucks UK being caught stealing a doughnut-muffin hybrid called a Duffin from a much-loved London bakery, called Bea's of Bloomsbury.
[108] Ibid 104

However, cooking is no longer the domain of haute cuisine - cooking and the publication of recipes has become democratised thanks to the Internet and social media. With the right drive, anyone could become a celebrated chef in their own right.

This turns a norms-based intellectual property system into a double-edged sword. On one hand, the influential members of a norms-based system have "spread out" from these members' hands into that of the well-informed and well-connected general public. An allegation is likely to spread in a matter of hours. This is due to the "virality" of Internet news. Where once it would have taken days for news to bleed out, social media means a cause can be trending in a matter of hours.

Coupled with the fact consumers nowadays are by far more focused on social justice and ethics, this makes a norms-based intellectual property system much more effective in enforcing recipe protection. Should a transgressor be perceived to be copying, it directly impacts their image and their ethics - potentially causing great loss of position, as well as widespread ridicule. Ridicule in the age of social media not only causes reputational loss, but will directly impact an influencer's financial standing.

On the other, social media also means a norms-based intellectual property system also brings about more harm than originally envisioned. While social media is able to amplify causes and issues at a breakneck speed, complaints risk being drowned out by the volume of messaging and day-to-day communications. This means anyone who wishes to implement utilise this norms-based system through the Internet risks their issue buried if no one picks up their clause.

Another issue with applying a norms-based system to the 21st century of the Internet and social media is speed of information and misinformation, sometimes spreading rumours

beyond anyone's control[109]. In this fast-paced world, most people wish to spread the news, get their word out as fast as possible. However, the virality means if a claim is discovered to be false, retraction is made much harder due to the number of people who have transmitted the false message forwards.

One of the key disadvantages with a norms-based intellectual property system is the difficulty in contacting or locating an "influential" member to make the grievances to. This problem is amplified tenfold by social media: on the Internet, there are various niches, based around locality, topic, and other parameters. With everyone claiming to be an influencer, it can be harder for smaller, independent chefs to find the correct influential member to publicise the transgression against them to make a case for their cause.

[109] Paul Resnick, Zhe Zhao, Qiaozhu Mei, 'Enquiring Minds: Early Detection of Rumors in Social Media from Enquiry Posts', (WWW '15: Proceedings of the 24th International Conference on World Wide Web May 2015) < http://www.www2015.it/documents/proceedings/proceedings/p1395.pdf> accessed 31 August 2020

V. CONCLUSION

The food and beverage industry is expected to explode in the coming years, and while it will benefit culinary arts – both professional and domestic – the lack of protection for its products mean that there is a high risk of infringement and copying, but without recourse for chefs and creators. There is a desperate need for both legal protection and for accountability for chefs in sharing and crediting each other's creations going forward.

While it is clear both highly innovative recipes and dishes ought to be protected under copyright, the current state of affairs show that courts and legislation have yet to accord them with proper legal protection. Thus, the suggested recourse is twofold: firstly, investigate whether a dish or recipe can be protected by the legal methods outlined above, then make use of the norms-based intellectual property system to publicise the matter. While these methods used alone will not provide sufficient legal protection, using a combination of these existing causes of action should cover most of the aspects a chef wishes to protect.

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