

## Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry

Naomi Straus



### ABSTRACT

Cuisine exists in intellectual property law's "negative space": It is relatively unprotected by formal intellectual property (IP) laws, yet creativity and innovation flourish. This runs contrary to the given economic wisdom that propertization is required to incentivize creation. Community norms and the first-mover advantage help to explain how cuisine thrives in this low-IP equilibrium. However, such norms are relatively fragile, and recent cases and discussions have shown that as the restaurant industry grows, these community norms may fail to protect creative chefs adequately. This will likely lead chefs and restaurateurs to push for an expansion of existing law to replace or replicate those norms.

Commentators in the legal community and the culinary world have debated the merits of expanding IP law to cover restaurant dishes. Most have focused on copyright and, to a lesser extent, patent law. This Comment is the first to explore in depth how trade dress law, a subset of trademark law, presents another possibility for protecting restaurant dishes. I argue that a small expansion of trade dress to cover the plating of restaurant dishes is an ideal way to codify existing norms in the restaurant industry and to maintain an industry-appropriate level of IP protection.

Ultimately, I conclude that protections built into the trademark system will adequately address many of the fears about increased IP protection in the restaurant industry, and I suggest that a small increase in formal protection for this traditionally low-IP industry is worth the risk, because it is likely to spur a higher quality of creative production and may increase chefs' ability to monetize their creativity.

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## INTRODUCTION

The signature *amuse bouche* at The French Laundry, Thomas Keller's award-winning restaurant in Yountville, California, is a cornet: salmon tartare presented in a cone-shaped tuile cracker.<sup>1</sup> This unlikely presentation, designed to evoke the joys of eating an ice cream cone, has become a signature of Keller's culinary style and ethos, and each meal at The French Laundry begins with a cornet.<sup>2</sup> When Keller first created it, the only way to experience this dish was to somehow, magically, obtain a reservation at The French Laundry, drive to the middle of Sonoma County, and spend over one hundred dollars on the required prix fixe menu.<sup>3</sup>

To eat a salmon cornet today, however, simply attend a catered event. Drawn to the ease with which they can be eaten while standing, the aesthetic appeal of the cone shape, and perhaps the association with Keller, caterers have made these cones a staple of "passed appetizer" menus.<sup>4</sup>

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1. See THOMAS KELLER, *THE FRENCH LAUNDRY COOKBOOK* 4 (1999).
  2. *Id.* at 4 ("[At] a sad time in my life . . . I ordered an ice-cream cone. The guy put it in a little holder—you take it from a holder—and said, 'Here's your cone.' The moment he said it, I thought, 'There it is! We're going to take our standard tuiles, we're going to make cones with them, and we're going to fill them with tuna tartare.' . . . Because it was a canapé that people really began to associate us with, I decided that everyone who eats at the restaurant should begin the meal with this cornet.").
  3. The nine-course chef's tasting menu at The French Laundry is currently priced at \$270 (not including beverages). *Reservations Info*, FRENCHLAUNDRY.COM, <http://www.frenchlaundry.com> (last visited Sept. 24, 2012) (follow "Reservations" hyperlink; then follow "Reservations Info" hyperlink). Keller also serves the cornets at Per Se in New York City. The tasting menu there costs \$295. *Reservations Information*, PERSENY.COM, <http://www.perseny.com> (last visited Sept. 24, 2012) (follow "Reservations" hyperlink; then follow "Information" hyperlink).
  4. See, e.g., STANFORD CATERING, *STANFORD CATERING MENU 2011–2012*, at 18 (2012), available at [http://www.stanford.edu/dept/rde/cgi-bin/drupal/hospitality/sites/default/files/menus/SC\\_CateringMenu\\_TAG.pdf](http://www.stanford.edu/dept/rde/cgi-bin/drupal/hospitality/sites/default/files/menus/SC_CateringMenu_TAG.pdf); DIBARIS CATERING, <http://www.dibariscatering.com> (last visited Sept. 24, 2012) (featuring "Salmon Tartare in Sesame Cornet" in the main page photo gallery); *Photo Gallery*, GOURMET M.D. CATERING, <http://www.gourmetmdcatering.com/photo-gallery> (last visited Sept. 24, 2012) (offering "tartar cones" of salmon or tuna on the "tray pass" menu); "budlit," Comment to *Trendy Hors D'oeuvres*, CHOW.COM (Jun. 24, 2007, 1:26 PM) (suggesting, in 2007, that "salmon tartare in miniature cones, à la Thomas Keller, passed in those little ice cream cone holders" were a hot trend in wedding appetizers); *Cocktail Reception Menu V*, CHEESE BOARD, <http://cheeseboardcatering.com/horsdoeuvrespackages.html> (last visited Sept. 24, 2012) ("Smoked Salmon Tartare with sesame aioli, scallions, and avocado served in a savory cone."); Amy Zuber, *Tall Tales: Cone-Shaped Foods Scale New Heights*, NATION'S RESTAURANT NEWS, June 19, 2000, at 43, available at <http://business.highbeam.com/409700/article-1G1-62990518/tall-tales-coneshaped-foods-scale-new-heights> (identifying Thomas Keller as being "credited with resurrecting the popularity of savory cones," a "craze" among upscale chefs); Paula Disbrowe, *Cone Heads*, RESTAURANT BUS., Nov. 15, 1999, at 83 (reporting that a "crispy little cone" was the latest way to transform staple menu items into something more appealing to customers).

Consumers may rejoice: They can now have a salmon cornet without incurring the expense of getting to The French Laundry. And many more people experience cornets than would if the dish were confined to the rarefied world of chef-driven restaurants.<sup>5</sup> Yet what of those consumers who do make it to The French Laundry? Will they feel thrill and wonder when impeccably timed food runners present them with a trio of cornets, or will prior exposure have dulled the effect? Caterers, by recreating this dish, have arguably reduced the value of The French Laundry dining experience.

Yet Keller continues to use the cornet as his signature appetizer, both at The French Laundry and at Per Se, his “urban interpretation of The French Laundry” in New York City.<sup>6</sup> Should Keller be able to enjoin knockoffs or obtain royalties from those who also serve cornets? Keller’s goal in creating a tasting menu is to delight his guests with a new sensation: “What we want you to experience is that sense of surprise when you taste something so new, so exciting, so comforting, so delicious, you think, ‘Wow’—and then it’s gone.”<sup>7</sup> When cornets become commonplace, Keller’s chances of achieving this goal are reduced.

If Keller were a writer, director, musician, or choreographer, he could copyright his expressive creations. If he were an inventor or engineer, he could apply to patent his more unusual dishes.<sup>8</sup> And as a restaurant owner, he can claim

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5. Since Thomas Keller published his recipe, attempting to make cornets at home has become a favorite test of skill for cooking bloggers, who report abject failure and, occasionally, heart-warming success. See, e.g., Carol Blymire, “Cornets”—*Salmon Tartare With Sweet Red Onion Crème Fraîche*, FRENCH LAUNDRY AT HOME (Oct. 10, 2008), <http://carolcookskeller.blogspot.com/2008/10/cornets-salmon-tartare-with-sweet-red.html>; *Salmon Tartare Cornets With Sweet Red Onion Crème Fraîche*, ZEN CAN COOK (Dec. 23, 2011), <http://www.zencancook.com/2011/12/salmon-tartare-cornets-with-sweet-red-onion-creme-fraiche>.
  6. “You will see a connection [between The French Laundry and Per Se] in the food, in the cornet, which opens all meals as it does in both restaurants . . .” *About Per Se*, PERSENY.COM, <http://www.perseny.com> (follow “About Per Se” hyperlink) (last visited Sept. 24, 2012).
  7. *Menus & Stories*, FRENCHLAUNDRY.COM, <http://www.frenchlaundry.com> (follow “Menus & Stories” hyperlink) (describing the goals of the kitchen in preparing the nine-course tasting menu, which changes daily). Each meal at The French Laundry begins with Keller’s signature dish of “Oysters and Pearls,” a “Sabayon” of Pearl Tapioca with Island Creek Oysters and White Sturgeon Caviar.” *Chef’s Tasting Menu*, FRENCHLAUNDRY.COM, <http://www.frenchlaundry.com> (follow “Menu & Stories” hyperlink; then follow “Menu” hyperlink) (last updated Aug. 28, 2012).
  8. Some chefs have in fact obtained utility patents for certain culinary techniques, but not for individual dishes. See *System and Method for Preparing Substitute Food Items*, U.S. Patent No. 20,060,081,619 (filed Apr. 20, 2006) (application from chef Homaru Cantu describing process for creating cotton-candy paper). Producers of processed foods may obtain patents as well, for the process used to make the food. See *Dippin’ Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1200 (11th Cir. 2004).

a trademark in his restaurant name, logo, and even the “total image”<sup>9</sup> of the restaurant, from its stonework exterior to the service china.<sup>10</sup> Oddly, however, our current intellectual property (IP) laws provide little or no protection for the actual dishes Keller creates and serves in the restaurant.<sup>11</sup>

Cuisine thus exists in IP’s “negative space”<sup>12</sup>: It is relatively unprotected by formal IP laws. Although it is legal to copy culinary creations, creative production somehow continues, which would seem to contradict the accepted wisdom that intellectual property protection is required to stimulate creation. In other words, the restaurant industry functions in what Kal Raustiala and Christopher Sprigman have identified as a “low-IP equilibrium.”<sup>13</sup> A recent study may help to explain how this low-IP equilibrium remains stable: Among French chefs, at least, an existing set of community norms limits the most blatant copying.<sup>14</sup>

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9. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 n.1 (1992); *see id.* at 776 (holding that restaurant décor may be inherently distinctive and function as trade dress).
  10. Of course, Keller would first have to prove that these marks are sufficiently distinctive to obtain trademark protection. *See* Trademark (Lanham) Act of 1946, 15 U.S.C. § 1125(a) (2006).
  11. *See generally* Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1124–30 (2007) (reviewing cases and commentary to find that recipes have generally been held uncopyrightable and critiquing these holdings); J. Austin Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691, 703–07 (2008) (examining prior cases on the copyrightability of “food creations”); Emily Cunningham, Note, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 J. HIGH TECH. L. 21 (2009) (surveying copyright, patent, trademark, and trade dress law related to creative cuisine and finding little protection); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright A Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991) (describing how copyright law could expand to protect “edible art,” *id.* at 1482). *But see* Lisa K. Krizman, *Trademark Protection for Restaurant Owners: Having Your Cake and Trademarking It, Too*, 99 TRADEMARK REP. 1004, 1010 (2009) (suggesting that the unusual shape of food “can be added to the list of possible things that restaurateurs can claim as a proprietary trademark” (emphasis added)).
  12. I use this term as defined in Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (defining IP’s negative space as “a substantial area of creativity into which copyright and patent do not penetrate and for which trademark provides only very limited propertization”). *See also* Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317, 326 (2011).
  13. *Id.* Even low-IP industries are peripherally supported by the IP regime. High fashion houses, for example, make money from their trademarked logos even while their creative designs are knocked off. Similarly, celebrity chefs make money by appearing on television shows and by selling cookbooks—both of which are protected by copyright—and by using their name as a trademark on cooking utensils or packaged food. *See* Krizman, *supra* note 11 (detailing how trademark can be used to protect various aspects of a chef’s brand); Raustiala & Sprigman, *supra* note 12, at 1700–01.
  14. *See* Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

However, such norms are relatively fragile and would seem to work best within small communities where social and professional sanctions have bite.<sup>15</sup> As the restaurant industry grows and large corporations with solely financial interests enter the field, it is likely that these community norms will begin to break down.<sup>16</sup> If these community norms fail, chefs and restaurateurs will likely push for, and judges and legislators may feel inclined to expand, existing law to replace or replicate those norms.<sup>17</sup> Before this happens, and to avoid harmful and unnecessary intrusions into IP's productive negative space, it is worthwhile to consider what an expansion of formal IP law into the culinary world ideally would look like.<sup>18</sup> Even if existing community norms do not break down, expanding legal protection for chefs' creations may in fact improve the quality and variety of cuisine being offered.

This Comment provides original interviews with chefs and surveys existing literature to explore how the community norms of the cuisine world function, or fail to function, and how existing IP schemes support them. It also looks at several cases in recent years in which community norms have failed to protect chefs against blatant copying, resulting in lawsuits of varying success.<sup>19</sup> Such lawsuits will likely become more numerous in the future, as the internet and food bloggers have made and continue to make identification of knockoff dishes readily accessible.<sup>20</sup> This calls for an evaluation of the proper level of protection for creative restaurant dishes.

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15. The chefs surveyed by Fauchart & von Hippel all work within the relatively small world of Michelin-recognized restaurants in France. *Id.* at 192. Because norms-based IP systems are only successful when the norms-enforcing group controls stimuli (or sanctions) that are valued by the would-be infringer, "norms-based IP systems [may] apply to a more limited scope of actors than do law-based systems." *Id.* at 198.

16. See discussion *infra* Part I.E.

17. See Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1582 (2010) (suggesting that common law intellectual property laws may evolve when community norms cease to protect creators); David J. Franklyn, *Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law*, 56 HASTINGS L.J. 117 (2005).

18. See Rosenblatt, *supra* note 12, at 364–65.

19. See Krizman, *supra* note 11, at 1010 (discussing complaints filed by Pearl Oyster Bar of New York City and Peso's Kitchen and Lounge of Seattle alleging trade dress infringement, both of which reportedly reached settlement agreements that included promises from the defendants to change certain menu items).

20. See Katy McLaughlin, *'That Melon Tenderloin Looks Awfully Familiar . . .'*, WALL ST. J., Jun. 24, 2006, <http://online.wsj.com/article/SB115109369352989196.html>; see also Pete Wells, *New Era of the Recipe Burglar*, FOOD & WINE, Nov. 2006, <http://www.foodandwine.com/articles/new-era-of-the-recipe-burglar>. The online food community eGullet, for example, exploded with debate over a case of blatant and identical copying of intricate dishes from Alinea, a high-end restaurant in Chicago, by the chef of a restaurant in Australia. See *Sincerest Form*, EGULLET (Mar. 20, 2006,

A few commentators in the legal community and the culinary world have already debated the merits of expanding IP law to cover restaurant dishes. But most have focused their analyses on copyright<sup>21</sup> and, to a lesser extent, patent law.<sup>22</sup> This Comment is the first to explore in depth how trade dress law, a subset of trademark law, presents an alternative area for legal protection of creative restaurant dishes.<sup>23</sup> I argue that trade dress doctrine, in its current unsettled state, allows at the very least for the registration of the plating—the visual appearance or presentation of a dish—of restaurant dishes on the Primary Federal Trademark Register. Registration of a trade dress mark<sup>24</sup> provides the owner many advantages, such as the right to assert the mark nationally, and creates favorable presumptions as to the distinctiveness and ownership of the mark.<sup>25</sup> Moreover, the registration serves as a form of limited recognition of the mark, which may then be sold as part of a restaurant's goodwill.<sup>26</sup> The many requirements built into current law mean that actually prevailing on a plating trade dress infringement claim, even for a registered mark, will be quite difficult. But this barrier is ideal, I argue, because such difficulty will help maintain an industry-appropriate level of IP protection.

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12:44 AM), [http://forums.egullet.org/index.php/topic/84800-sincerest-form/page\\_\\_hl\\_\\_interlude](http://forums.egullet.org/index.php/topic/84800-sincerest-form/page__hl__interlude) food similarities.

21. Twenty years ago, Malla Pollack suggested that copyright be extended to cover cuisine as edible art. See Pollack, *supra* note 11, at 1482. Later, she wrote that this suggestion was made “almost seriously.” Malla Pollack, *A Rose Is a Rose Is a Rose—But Is a Costume a Dress? An Alternative Solution in Whimsicality, Inc. v. Rubie’s Costume Co.*, 41 J. COPYRIGHT SOC’Y U.S.A. 1, 1 n.4 (1993). At the time, Pollack recognized that her “factual premise—that the public recognizes food as art—may not yet be true.” Pollack, *supra* note 11, at 1523. This premise seems much more likely to be true today. See discussion *infra* Part II.A.
22. See Cunningham, *supra* note 11, at 32.
23. At least one restaurant has already claimed trade dress in the presentation of its dishes. See Complaint, *Vaca Brava, Inc. v. Hacienda Vaca Brava & Steak House, Inc.*, No. 3:09-cv-01633 (D.P.R. July 8, 2009) [hereinafter Complaint, *Vaca Brava*] (claiming trade dress in presentation of steak dish).
24. A trade dress mark functions and is treated much like a trademark. I will use “mark” to refer to trade dress marks, trademarks, and service marks. Trade dress, like trademarks, may be registered with the U.S. Patent and Trademark office. See TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.02 (8th ed. 2011), available at <http://tess2.uspto.gov/tmdb/tmep> (explaining procedures for examining attorneys determining whether to allow registration of a trade dress mark).
25. 15 U.S.C. § 1057 (2006) (an application is considered constructive use of the mark so as to establish priority nationally and a certificate of registration serves as prima facie evidence of ownership of mark); *id.* § 1065 (the incontestability of right to use mark in certain circumstance); see also *Wolf Appliance, Inc. v. Viking Range Corp.*, 686 F. Supp. 2d 878, 887 (W.D. Wis. 2010) (finding that registration created a presumption of a valid mark, referring to 15 U.S.C. §§ 1057(b) and 1115(a)).
26. 15 U.S.C. § 1060(a)(1) (a registered mark may be assigned as part of the goodwill of a business).

Ultimately, I conclude that the protections built into the trademark system will adequately address many of the fears about increased IP protection in the restaurant industry. I also suggest that a small increase in formal protection for this traditionally low-IP industry is worth the risk because it is likely to spur a different quality of creative production and may increase chefs' ability to monetize their creativity.

This Comment proceeds as follows: In Part I, I explain the current state of IP protection in the restaurant industry and suggest why and how chefs may wish to expand current legal protections of culinary creations. Part II discusses how copyright law could expand to cover restaurant dishes. Part III introduces the concept of trade dress protection for signature dishes, and analyzes how such protection could play out under existing law. In Part IV, I predict that chefs are more likely to rely on trade dress than on an expansion of copyright and explain why this is an appropriate solution. Part V considers normative arguments both against and in favor of a slight expansion of formal IP protection for cuisine and concludes that a slight expansion is more likely to benefit the restaurant industry than to harm it.

## I. THE CURRENT STATE OF CREATIVE CUISINE

### A. A Brief Introduction to the Restaurant Industry

As background to exploring how IP law currently applies to creative cuisine and how it should apply in the future, a brief summary of the restaurant industry's current state is in order. The restaurant industry is a vital contributor to the U.S. economy and is the nation's second-largest private sector employer.<sup>27</sup> Moreover, it is a growing industry. The National Restaurant Association projected \$580.1 billion in restaurant sales in 2010, up from \$379 billion in 2000.<sup>28</sup> On a typical day, the restaurant industry does \$1.6 billion in sales, and the restaurant industry's share of American food dollars is now 49 percent, up from 25 percent in 1955.<sup>29</sup> Because this industry grows yearly and because interest in chefs and restaurant culture has blossomed over the past several years, legal issues surrounding restaurants seem destined to increase.

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27. See Press Release, Nat'l Restaurant Ass'n, National Restaurant Association Welcomes Industry Representation on U.S. Travel and Tourism Advisory Board (Feb. 22, 2010), <http://www.restaurant.org/pressroom/pressrelease/print/index.cfm?ID=1892>.

28. NAT'L RESTAURANT ASS'N, 2010 RESTAURANT INDUSTRY: POCKET FACTBOOK (2010), *available at* [http://www.restaurant.org/pdfs/research/2010forecast\\_pfb.pdf](http://www.restaurant.org/pdfs/research/2010forecast_pfb.pdf).

29. *Id.*



There are different categories of restaurants within the industry. Full-service restaurants,<sup>30</sup> which are those with waiter service, compose about half of all restaurants in the United States,<sup>31</sup> and most of the culinary creativity this Comment focuses on develops in these restaurants. However, fast-food style walk-up counters and mobile food services,<sup>32</sup> such as food trucks, are increasingly the sites of interesting new dishes as well.<sup>33</sup>

Within the category of full-service restaurants, many different business and ownership models exist. Many chefs cooking at the highest level are owners of their own restaurants.<sup>34</sup> They have control over the food and business aspects of their restaurants, and they may be very concerned with protecting their intellectual property. Some of these well-known chefs have established chef-driven empires of sorts, with Wolfgang Puck being the most prominent and financially successful example.<sup>35</sup> Lower down on the creative scale,<sup>36</sup> restaurant groups develop and own several restaurants, usually with a different chef for each

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30. *Id.*

31. See *American FactFinder, 2007 Economic Census, Detailed Statistics, Sector 72: Accommodation and Food Services*, U.S. CENSUS BUREAU (June 16, 2010), <http://factfinder2.census.gov>.

32. *Id.*

33. See, e.g., DANNY MEYER, *SETTING THE TABLE: THE TRANSFORMING POWER OF HOSPITALITY IN BUSINESS* 130–38 (2006) (describing how Shake Shack, a casual kiosk serving well-made hamburgers evolved out of the high-end restaurants owned by the Union Square Hospitality Group); Julia Moskin, *Turf War at the Hot Dog Cart*, N.Y. TIMES, June 30, 2009, <http://www.nytimes.com/2009/07/01/dining/01truck.html> (describing the explosion of upscale food trucks in New York City and the resistance they have met both from traditional restaurants and established mobile vendors).

34. To give just a few examples, Susan Feniger is a co-owner of her restaurants Street and Border Grill. See Interview With Susan Feniger (Mar. 24, 2011) (notes on file with author). David Chang is the owner and head chef of the Momofuku restaurants in New York City. DAVID CHANG & PETER MEEHAN, *MOMOFUKU* 8 (2009). Marcus Samuelsson is executive chef and an owner of Red Rooster Harlem and Eric Ripert is the executive chef and an owner of Le Bernadin. Glenn Collins, *Follow a Hungry Chef and See Where It Takes You*, N.Y. TIMES, May 22, 2012, <http://www.nytimes.com/2012/05/23/dining/where-chefs-head-in-their-downtime.html>. Daniel Boulud is chef-owner of several restaurants, including DANIEL. *About Daniel Boulud*, DANIELNYC.COM, <http://www.danielnyc.com/aboutDB.html> (last visited Sept. 24, 2012).

35. Puck opened his first restaurant, Spago, in West Hollywood in 1982, and now his dining group owns twenty-two fine dining restaurants. Puck also franchises casual dining restaurants worldwide. See *Biography*, WOLFGANG PUCK, <http://www.wolfgangpuck.com/meet-wolfgang/biography> (last visited Sept. 24, 2012). In 2008, Puck earned \$16 million. See Chaniga Vorasarun, *Ten Top-Earning Celebrity Chefs*, FORBES.COM (Aug. 8, 2008, 6:00 PM), [http://www.forbes.com/2008/08/08/celebrity-chef-earners-forbeslife-cx\\_cv\\_0808food.html](http://www.forbes.com/2008/08/08/celebrity-chef-earners-forbeslife-cx_cv_0808food.html).

36. Andrew Dornenburg and Karen Page suggest a hierarchy of three categories of chefs: trade chefs (“burger-flippers”), craft chefs (“accomplished chefs”), and art chefs (“culinary artists”). ANDREW DORNENBURG & KAREN PAGE, *CULINARY ARTISTRY* 7 (1996). This hierarchy is useful in understanding how the restaurant industry operates on multiple levels, from producing highly original cuisine to providing simple sustenance.

restaurant.<sup>37</sup> Such franchises and chain restaurants often centralize recipe development in a corporate kitchen.<sup>38</sup> And of course, there are many “Mom & Pops,” or neighborhood restaurants, owned by individuals and operated as small businesses. These restaurants may be highly creative, or they may serve more traditional dishes. Each type of restaurant will seek to distinguish itself in the marketplace with inventive dishes, appealing ambiance, efficient service, or all three and more.

### B. Cuisine Exists in a Low-IP Equilibrium

U.S. restaurants currently operate and compete within a legal regime that generally provides little protection for innovative culinary creations. Kal Raustiala and Christopher Sprigman have explored how certain creative industries flourish despite a lack of IP law officially protecting original creations. They call such situations “low-IP equilibria.”<sup>39</sup> For example, fashion designs receive “only very limited protection” from copyright, patent, and trademark law, yet the fashion industry continues to be highly creative, with high fashion houses churning out new designs several times a year.<sup>40</sup> This runs contrary to the orthodox wisdom of IP law that without strong property rights in creativity, there will be no incentive to create.<sup>41</sup> Moreover, this low-IP regime, which allows for rampant copying, has been “politically stable” and “has persisted unchanged for over six decades,” which suggests that players in the fashion industry have not truly required greater IP protection to promote creative innovation.<sup>42</sup>

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37. For example, Lettuce Entertain You Enterprises, Inc. “owns, licenses or manages more than 80 establishments,” each with a different name and style, from Antico Posto (Italian cafe and wine bar) to Wow Bao (serving Asian steamed buns). See *Restaurants & Reservations*, LETTUCE ENTERTAIN YOU ENTERPRISES, INC., <http://www.leye.com/restaurants> (last visited Sept. 24, 2012).

38. For example, Blaze Pizza, an anticipated chain of franchises, highlights its executive pizza chef, who develops its recipes, to entice potential franchisees. *Franchise Brochure*, BLAZE PIZZA 4, [http://www.blaze-pizza.com/files/Franchise\\_Brochure.pdf](http://www.blaze-pizza.com/files/Franchise_Brochure.pdf) (last visited Sept. 24, 2012).

39. Raustiala & Sprigman, *supra* note 12, at 1765.

40. *Id.* at 1699.

41. *Id.* at 1717.

42. *Id.* at 1689, 1699. In 2011, the fashion industry pushed Congress to expand copyright to cover fashion designs. See Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010). However, to date, these attempts have not succeeded, and some characterize the extent of lobbying as “quite low.” Raustiala & Sprigman, *supra* note 12, at 1756. Moreover, since the economic justification of copyright and patent law is to stimulate innovation, and there is plenty of innovation in the fashion industry, Raustiala and Sprigman have argued that Congress should be wary of modifying copyright law to cover fashion design, as the purported benefits of copyright protection have been achieved without risking possible chilling effects. *Id.* at 1744; *Innovative Design Protection and Privacy Act: Hearing Before the H. Subcomm. on Intellectual Prop., Competition,*

Creative cuisine, like fashion, is an example of a low-IP environment in which there is plenty of innovation.<sup>43</sup> Creative cuisine is often developed in a kind of “open source” model.<sup>44</sup> Training is achieved through apprenticeships, and cooks and sous chefs<sup>45</sup> move between restaurants frequently, taking techniques and ideas they learned in previous restaurants with them.<sup>46</sup> Many chefs embrace this system, particularly as many dishes grow out of a shared background of classic dishes and flavor profiles.<sup>47</sup>

Despite a background of classic dishes, there is still a great deal of innovation at the level of high-end restaurants. In the past several years, so-called molecular gastronomy<sup>48</sup> has introduced new techniques to an otherwise relatively

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*and the Internet*, 112th Cong. 77–90 (2011) (comments of Kal Raustiala and Christopher Sprigman); *see also* Rosenblatt, *supra* note 12, at 359. Others have also noted that high-IP regimes can result in reduced production and impeded innovation. *See* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921 (2010) (suggesting that increased IP protection of socially undesirable creative fields, such as pornography and tax-shelter planning, may have the beneficial result of dampening these industries).

43. *See* Raustiala & Sprigman, *supra* note 12, at 1765.

44. *See* Cunningham, *supra* note 11, at 24; Ferran Adrià et al., *Statement on the 'New Cookery'*, OBSERVER (Dec. 9, 2006), <http://www.guardian.co.uk/uk/2006/dec/10/foodanddrink.obsfood> monthly (“The world’s culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks. Tradition is the base which all cooks who aspire to excellence must know and master. Our open approach builds on the best that tradition has to offer.”).

45. *Sous chef* is French for “under chef.” ANDREW DORNENBURG & KAREN PAGE, *BECOMING A CHEF* 135–37 (1995). In the classic *brigade* kitchen scheme, the *sous chef* is second-in-command to the Executive Chef. *Id.*

46. *Id.* at 85–113.

47. *See* Interview With Susan Feniger, *supra* note 34 (explaining that kaya toast, the signature dish in her restaurant Street, is based on a traditional Singaporean dish, that “anyone walking on the street in Singapore could figure out”); Interview With Kenneth and Daria Boxer (May 1, 2012) (notes on file with author) (“A new idea is always based on something that is already known and creating something new, so something on my menu is either a creation from a book, or if I’m looking for a new idea, I’ll go looking at other people’s menus . . . and you might vary it based on your concept.”); Buccafusco, *supra* note 11, at 1135 (quoting Chef Norman Van Aken, who explained that he “uses traditional recipes and sauces as major chords . . . in a dish that [he] would be making into a whole song” (alteration in original) (internal quotation marks omitted)). Chef Thomas Keller also expressed that he encourages his staff to use what they have learned in his restaurant to progress in their careers: “It’s almost as important, sometimes more important, to be able to give [my staff] the philosophies and culture, the repertoire, the techniques, the knowledge for them to go out and do a better job than me.” *Id.* at 1152 n.177.

48. Although the term “molecular gastronomy” is not clearly defined, it generally refers to the application of scientific processes to change the texture and appearance of food. *See* Cunningham, *supra* note 11, at 25; D.T. Max, *A Man of Taste*, NEW YORKER, May 12, 2008 [http://www.newyorker.com/reporting/2008/05/12/080512fa\\_fact\\_max](http://www.newyorker.com/reporting/2008/05/12/080512fa_fact_max) (“[M]olecular gastronomy . . . aims to take familiar foods and, using scientific techniques, give them new tastes and textures.”). Many of the chefs that are associated with the movement actually eschew this label. *See* Adrià et al., *supra* note 44 (“The fashionable term ‘molecular gastronomy’ was introduced relatively recently, in 1992, to name a particular academic workshop for scientists and chefs on the basic food chemistry of traditional dishes.

tradition-bound industry.<sup>49</sup> The most creative chefs, exemplified by Ferran Adrià, often develop new techniques and present their dishes in increasingly unusual ways.<sup>50</sup> They have brought attention to the creative, inventive, and artistic aspects of composing restaurant dishes. Grant Achatz, chef of Alinea and Next, and known for his inventive culinary creations, is an example of how apprenticeship can lead to innovation in the restaurant industry: He began his career working in his parents' basic diner-style restaurant, then worked for Chef Charlie Trotter, a well-respected chef at a traditional high-end restaurant, then for Chef Thomas Keller, "a cook's cook who emphasizes fresh ingredients and combines them in often dazzling ways," and finally for Ferran Adrià, who serves dishes in very inventive ways, using foams, gelatins, and unusual delivery methods, such as "a plastic ampule to squirt mushroom cream into [diners'] mouths."<sup>51</sup>

Despite a high level of creativity in the creation of new dishes, copyright protection is not available for recipes,<sup>52</sup> and many chefs believe they have no legal right to protect their creations.<sup>53</sup> Nevertheless, like most low-IP regimes, cuisine is supported peripherally by traditional IP law.<sup>54</sup>

### C. Current IP Support for Restaurants

Copyright, patent, and trademark law are the three main areas of formal intellectual property protection. This Part discusses the protections available to chefs and restaurateurs under current IP law.

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That workshop did not influence our approach, and the term 'molecular gastronomy' does not describe our cooking, or indeed any style of cooking.").

49. See generally HERVÉ THIS, *MOLECULAR GASTRONOMY: EXPLORING THE SCIENCE OF FLAVOR* (Malcolm B. DeBevoise trans. 2006) (2002).

50. See Arthur Lubow, *A Laboratory of Taste*, N.Y. TIMES, Aug. 10, 2003, <http://www.nytimes.com/2003/08/10/magazine/a-laboratory-of-taste.html>.

51. Max, *supra* note 48.

52. See Part I.C.1, *infra*.

53. See Interview With Susan Feniger, *supra* note 34 ("[T]here really isn't anything [protecting my restaurant dishes]."); Interview With Kenneth and Daria Boxer, *supra* note 47 ("[N]othing's protected, except I do have a few slogans [trademarked]."); Buccafusco, *supra* note 11, at 1134–35 (reporting Chef Charlie Trotter's recollection of being a "young culinarian reading old cookbooks" who would "prepare[] [the dishes] in [his] mind in order to gain an understanding of what the chefs were trying to do" and Thomas Keller's explanation that "much culinary expression is about experimenting with established flavor profiles" (latter alterations in original) (internal quotation marks omitted)).

54. See Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1450 (2010) ("Chefs cannot protect the ingredients of individual recipes, but they can use copyright to protect compilations of recipes and the way that recipes are expressed—and, indeed, many chefs sell copyrighted cookbooks.").

## 1. Copyright

Copyright protects original works of authorship from actionable copying.<sup>55</sup> That is, it protects “expression” rather than “ideas” or “methods of operation.”<sup>56</sup> The copyright cases that do exist about food have focused on recipes rather than on restaurant dishes.<sup>57</sup> Recipes have generally proved ineligible for copyright protection, as they are considered ideas or methods of operation.<sup>58</sup> Cookbooks, however, are copyrightable as compilations or combinations.<sup>59</sup> Courts have also protected copyrights to individual recipes in cookbooks that incorporated elements of storytelling or historical and cultural descriptions.<sup>60</sup>

Hence, well-known chefs benefit from the copyright system by selling cookbooks. Chefs that appear on television also benefit from copyright protection of television shows. Still other chefs have written books about their experiences opening restaurants, and these books are obviously entitled to copyright protection.<sup>61</sup> These cookbooks, memoirs, and television shows, all of which are protected by copyright, often serve as marketing materials that draw customers to the chefs’ restaurants. In this way, the copyright system peripherally supports the creative work of chefs.<sup>62</sup>

Furthermore, an entire restaurant menu is likely entitled to copyright protection. If a sufficient “modicum of creativity” went into the order in which dishes are arranged on the menu, the creator would likely be entitled to protection of the

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55. 17 U.S.C. §§ 102(a), 106 (2006); *see also* *Barbour v. Head*, 178 F. Supp. 2d 758, 762 (S.D. Tex. 2001) (“A copy is legally actionable only if the alleged infringer actually used the copyrighted material to create his own work, and substantial similarity exists between the two works.”).

56. 17 U.S.C. § 102(a).

57. *See* Buccafusco, *supra* note 11, at 1125–31.

58. *See* discussion *infra* Part II.A.

59. U.S. COPYRIGHT OFFICE, FL-122, RECIPES (2011), *available at* <http://www.copyright.gov/fls/fl122.html> (“Copyright law does not protect recipes that are mere listings of ingredients. Nor does it protect other mere listings of ingredients such as those found in formulas, compounds, or prescriptions. Copyright protection may, however, extend to substantial literary expression—a description, explanation, or illustration, for example—that accompanies a recipe or formula or to a combination of recipes, as in a cookbook.”).

60. *See, e.g., Barbour*, 178 F. Supp. 2d at 764 (finding that the wording of recipes “infused with light-hearted or helpful commentary” is entitled to copyright protection, though without this wording the recipes would be mere unprotectable facts).

61. *See, e.g.,* GABRIELLE HAMILTON, *BLOOD, BONES & BUTTER: THE INADVERTENT EDUCATION OF A RELUCTANT CHEF* (2011) (written by the chef-owner of Prune, a popular restaurant in Manhattan’s Lower East Side); MARCUS SAMUELSSON, *YES CHEF: A MEMOIR* (2012) (memoir of the James Beard award-winning chef, who recently opened the highly successful Red Rooster restaurant in Harlem).

62. *See* Dreyfuss, *supra* note 54, at 1450; Raustiala & Sprigman, *supra* note 12, at 1765.

overall written menu as a compilation.<sup>63</sup> A menu's overall layout is also entitled to thin copyright protection, as long as it meets the (minimal) creativity requirement.<sup>64</sup> Indeed, some chefs may be interested in copyrighting an entire menu. Susan Feniger, chef of Border Grill and Street, muses: "There should be a way, if someone takes a certain percentage of the menu, the concept of the menu, to consider it copying."<sup>65</sup> Individual dishes on a menu, however, would generally only be considered the building blocks of such creation—ideas or facts that are not independently copyrightable.<sup>66</sup>

## 2. Trademark

Trademark protects words or symbols used in commerce to identify specific goods or services.<sup>67</sup> The names of restaurants, the names of individual dishes, and catchphrases may serve as trademarks.<sup>68</sup> Chefs may also trademark their own names, which they can then license to their own restaurant business entity, other restaurants, or diffusion lines of packaged food, cookware, or other forms of merchandise.<sup>69</sup>

63. *See Vasquez v. Ybarra*, 150 F. Supp. 2d 1157, 1170 (D. Kan. 2001) (denying summary judgment on the "issue of whether creativity was used to create the order of the items offered" on the menu at a Mexican restaurant, as this was best left to the trier of fact); *cf. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that the alphabetical ordering of phone numbers in a phone book did not include the requisite modicum of creativity).

64. *See Vasquez*, 150 F. Supp. 2d at 1171 (allowing question of substantial similarity between two restaurant menu layouts to proceed to trial); *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 548 (S.D.N.Y. 2001) (finding a valid copyright in the overall design of a Chinese restaurant menu comprising text and photographs), *aff'd in part, appeal dismissed in part sub nom. Oriental Art Printing, Inc. v. GS Printing Corp.*, 34 F. App'x 401 (2d Cir. 2002); *TM Foods of Avon, Inc. v. Jimmy John's Enters.*, No. 05-CV-0220 (S.D. Ind. Oct. 5, 2005) (noting that a sandwich franchise claimed copyright and trade dress in its menu layout). The parties in the *TM Foods* case settled, and the alleged infringer reportedly acknowledged the validity of the copyright, agreed to destroy its menus, and paid \$50,000. Press Release, Inside Ind. Bus., Avon Sandwich Shop Settles Lawsuit With Jimmy John's (Nov. 2, 2005), <http://www.insideindiana.com/newsitem.asp?id=15726>.

65. Interview With Susan Feniger, *supra* note 34.

66. *See* the discussion of possible expansion of copyright to include dishes, *infra* Part I.C.1.

67. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

68. *See Krizman*, *supra* note 11, at 1013–14, 1021 n.106.

69. *See, e.g., Shop, WOLFGANG PUCK*, <http://www.wolfgangpuck.com/shop> (last visited Sept. 24, 2012) (selling cookware and other Wolfgang Puck-branded merchandise); WOLFGANG PUCK, Registration No. 2,601,677 (registering the trademark "Wolfgang Puck" for electric cooking utensils, knives, and other similar products). Susan Feniger reports that she trademarked the name of her restaurants and her own name, which she then licenses to the entities created for each of her individual restaurants. Interview With Susan Feniger, *supra* note 34; *see SUSAN FENIGER'S STREET*, Registration No. 3,635,986. The owners of Palazzio restaurant in Santa Barbara have also

Trade dress is a subset of trademark law: Trade dress is a type of trademark created by the overall look and feel of a product's packaging or design.<sup>70</sup> A restaurant's distinctive exterior or interior décor, for example, can function as trade dress.<sup>71</sup> Recognition of restaurant décor as trade dress began in lower courts in the 1980s,<sup>72</sup> and the U.S. Supreme Court case *Two Pesos, Inc. v. Taco Cabana, Inc.*<sup>73</sup> solidified this rule. The Court held that the décor of a Mexican-themed restaurant, including its awnings, wall colors, and menu style,<sup>74</sup> could be inherently distinctive and thus protectable as trade dress.<sup>75</sup> Since then, there have been several claims of décor trade dress infringement, and even more registrations of restaurant décor as trade dress.<sup>76</sup> Whether courts will protect the look and feel

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trademarked their restaurant name as well as a catch phrase. Interview With Kenneth and Daria Boxer, *supra* note 47; PALAZZIO, Registration No. 3,512,062; PEOPLE DON'T LEAVE HERE HUNGRY OR THIRSTY!, Registration No. 4,125,455.

70. See *Two Pesos*, 505 U.S. at 764 n.1; Cent. Mut. Ins. Co. v. StunFence, Inc., 292 F. Supp. 2d 1072, 1077 (N.D. Ill. 2003).

71. *Two Pesos*, 505 U.S. at 767.

72. See, e.g., *Fuddrucker's, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837 (9th Cir. 1987) (remanding to determine whether there might be any consumer confusion as to the ownership of or parent company of defendant hamburger restaurant with similar tiling, in-house bakeries, open food-prep areas, self-service condiment bars, in-restaurant newspaper, and dog bones for purchase as plaintiff restaurant, which defendant had expressed an interest in franchising).

73. 505 U.S. 763.

74. *Id.* at 765 ("Taco Cabana describes its Mexican trade dress as a festive eating area having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme." (quoting *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1117 (5th Cir. 1991)) (internal quotation marks omitted)).

75. *Id.* at 776. *Two Pesos* also established that the tests for trade dress are no different than those for other trademark issues. *Id.* at 773.

76. See Krizman, *supra* note 11, at 1008–12 (describing several restaurant décor trade dress claims, both successful and unsuccessful, as well as restaurants that have registered trade dress); Anne Gilson LaLonde & Jerome Gilson, *Getting Real With Nontraditional Trademarks: What's Next After Red Oven Knobs, the Sound of Burning Methamphetamine, and Goats on a Grass Roof?*, 101 TRADEMARK REP. 186, 210–12 (2011) (providing examples of décor trade dress registrations and lawsuits). While the lawsuit settled before it could be decided, one Swedish-themed restaurant even brought a trade dress claim based on the goats that grazed on its grass roof. *Id.*; Justin Scheck & Stu Woo, *Lars Johnson Has Goats on His Roof and a Stable of Lawyers to Prove It*, WALL ST. J., Sept. 17, 2010, <http://online.wsj.com/article/SB10001424052748704285104575492650336813506.html> (reporting that the owner of a registered service mark in goats on a grass roof filed a lawsuit in Northern District of Georgia against a grocery store that he alleged infringed this trademark). The case settled with the defendant agreeing to pay the plaintiff a licensing fee. *Id.*; see also Registration No. 2,007,624 (registering restaurant service mark for "goats on a roof of grass"). For a critique of this trade dress registration, see Lee B. Burgunder, *Trademark Protection of Live Animals: The Bleat Goes On*, 10 J. MARSHALL REV. INTELL. PROP. L. 715 (2011).

of individual restaurant dishes as protectable trade dress is as yet untested.<sup>77</sup>

### 3. Patent and Trade Secrets

In addition to copyright and trademark law, chefs may look to trade secrets and patent law to protect their creations. In most cases, these avenues will be even less fruitful than copyright or trademark.<sup>78</sup>

Trade secrets are information, formulas, compilations, or devices that obtain economic value from not being generally known to other people who could obtain economic value from their disclosure and use, and that are the subject of reasonable efforts by the owner to maintain such secrecy.<sup>79</sup> Thus, recipes may be protected as trade secrets, but only to the extent that they embody behind-the-scenes techniques or secret ingredients.<sup>80</sup>

Some chefs require nondisclosure agreements from their employees or interns, which may entitle them to trade secret protection.<sup>81</sup> However, most chefs do not require their employees to sign nondisclosure agreements, and since the restaurant industry is one with famously high turnover, recipes tend to move freely from kitchen to kitchen.<sup>82</sup>

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77. See discussion of application of trade dress principles to restaurant dishes, *infra* Part III.

78. For an in-depth discussion of patent and trade secrets as applied to cuisine, see Cunningham, *supra* note 11, at 28–34.

79. See UNIFORM TRADE SECRETS ACT § 1(4) (1985).

80. In *Magistro v. J. Lou, Inc.*, 703 N.W.2d 887 (Neb. 2005), the court held as a matter of law that a pizzeria's recipes constituted a trade secret when the owner made "reasonable efforts to . . . maintain their secrecy" "by putting the ingredients into packets that were sealed and refrigerated until . . . [a]n employee . . . would add water to make the sauce and the dough," the recipes had been created by the owner's father and only family members knew the recipes, and the result was what the owners felt was a "superior" pizza. *Id.* at 890–91. However, the court went on to find that there was no proof that the defendant, a former licensee of the plaintiff's restaurant name and trade secrets, had used these trade secrets in operating a differently named restaurant. *Id.* at 891. Rather, the defendant testified that he had attended a pizza convention, where "he discovered that there were recipes for 'anything you wanted: [p]izza sauce, pizza dough,' and . . . 'there were no secrets' because the people at the convention were willing to share information." *Id.* at 891–92 (former alteration in original) (quoting defendant's testimony). He claimed to be using a *different* recipe that produced the same result as the plaintiff's family recipe. *Id.* at 892. This dispute illustrates the evidentiary difficulty in proving a trade secrets infringement claim even when the owner has gone to great lengths to keep a recipe secret, at least when the recipe is for a relatively common type of food.

81. See Cunningham, *supra* note 11, at 50 (discussing Homaru Cantu's requirement that all visitors to his kitchen sign nondisclosure agreements).

82. Indeed, Kenneth Boxer told me that he asks his cooks to sign a noncompete agreement, but even with these protections he has seen dishes from his restaurant move to other restaurants when a cook leaves his employ. Interview With Kenneth and Daria Boxer, *supra* note 47. Unless that cook has opened a successful competitor restaurant, a lawsuit against a former cook would rarely be worth the expense. Damages would be hard to prove and cooks are generally paid very little, so recovery could be difficult.



Moreover, in an era of open kitchens, cooking shows, and chef-written cookbooks, many chefs have eliminated the possibility of classifying their recipes as trade secrets through their own actions, as their business models center around exposure.

The patent system protects novel, nonobvious, and useful ideas for a set period of time.<sup>83</sup> Thus, patent law theoretically provides protection for unique culinary techniques.<sup>84</sup> However, patent laws cannot be used to protect restaurant dishes that are created using classic cooking techniques or fail to meet the high standards of originality that the patent system requires because these dishes do not fulfill the requirement that an invention be novel and nonobvious.<sup>85</sup> Furthermore, as a practical matter, the patent process is long and expensive, which makes it inappropriate for the low-margin, quick-innovation restaurant industry.<sup>86</sup>

#### D. Community Norms Protect Against Copying of Dishes

With such minimal legal protection against copying, it may seem surprising that we do not see even more copying within the restaurant world.<sup>87</sup> Social scientists Emmanuelle Fauchart and Eric von Hippel explored this phenomenon by surveying a number of French Michelin-starred chefs.<sup>88</sup> They found that these chefs rely on a set of self-enforced community norms to create a form of intellectual property rights in their dishes.<sup>89</sup>

The chefs that Fauchart and von Hippel interviewed identified several community norms that serve to protect original creations: (1) A chef must not copy another chef's recipe innovation exactly; (2) if a chef reveals a recipe-related secret to another chef, that chef may not pass along the information without permission; and (3) chefs must credit developers of significant dishes as the authors of that creation.<sup>90</sup> These norms are enforced through a series of community sanc-

83. 35 U.S.C. §§ 101–103 (2006).

84. For example, Homaru Cantu, chef-owner of Moto, in Chicago, has patented several of his very novel cooking techniques. *See supra* note 8.

85. 35 U.S.C. §§ 102–103; *see* Cunningham, *supra* note 11, at 33.

86. On average, it takes around two years to process a utility patent. *See How Long Does It Take for a Patent to Be Processed?*, USPTO.GOV (Aug. 14, 2003), <http://www.uspto.gov/main/faq/p220026.htm>. The basic filing fee for a utility patent is \$850, and over the lifetime of a patent, fees can exceed \$4000. *Fee Schedule*, USPTO.GOV, <http://www.uspto.gov/web/offices/ac/qs/ope/fee2009september15.htm> (last updated Sept. 24, 2012).

87. For examples of copying in the restaurant industry, *see infra* Part III.B.

88. Fauchart & von Hippel, *supra* note 14.

89. *Id.* at 187–88.

90. *Id.* at 188.

tions. For example, a chef who reveals another chef's recipe secret will be refused access to other chefs' secrets.<sup>91</sup> The chefs share information about infringers, allowing the whole community to enforce such sanctions.<sup>92</sup>

The norms-based system Fauchart and von Hippel describe seems to work remarkably well among the small community of elite chefs surveyed, who rely on each other for collaboration and run within the same circle. While there has not yet been a formal survey of chefs in the United States, it seems likely that a similar norms-based system exists among those chefs working at the highest level in the United States. These chefs share customers, cooks, and investors, and come under great scrutiny for their dishes.<sup>93</sup> Norms-based systems may also work within small geographic areas, such as a single city, regardless of the renown of the chefs involved, because these restaurant communities are small enough to police and enforce their norms informally.<sup>94</sup> For instance, cooks tend to congregate in late-night restaurants and bars after work.<sup>95</sup> In these informal meeting spaces they may learn of any violation of the norms and begin the process of imposing social sanctions on violators.

It seems unlikely, however, that a norms-based system could work nationwide in the United States (except, as stated above, among the most respected and well-known chefs) because the threat of sanctions loses its bite when the

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91. *Id.* at 193–94.

92. *Id.* at 194.

93. Chef Susan Feniger acknowledges that there may be similar unspoken rules at work in the United States. See Interview With Susan Feniger, *supra* note 34 (“It’s not talked about, but I think there’s something that . . . anyone I knew, would never think about putting Kaya [a dish at Street] on the menu. They just wouldn’t. It’s too signature. . . . There is some unspoken boundary around people who know each other, might be different with people who don’t know each other. I don’t think this New York restaurateur [who hired one of her chefs and opened several Border Grill-inspired restaurants] cares.”). Christopher Buccafusco also spoke to several chefs who expressed that while they were generally happy to share ideas with other chefs, they expected some form of attribution. Buccafusco, *supra* note 11, at 1152–53 (reporting Chef Norman Van Aken as saying, “I would also be just as happy . . . if a professional were to [use my recipe], *provided* that they gave credit in some way shape or form”; Chef Charlie Trotter as being pleased with other chefs using his recipe ideas, “as long as his priority was acknowledged”; and Chef Wylie Delforge as likewise “pleased to see his culinary ideas gaining circulation, as long as others do not merely copy him” (internal quotation marks omitted)).

94. Cf. Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1794 (2008) (suggesting that comedians are an “intermediate-knit” rather than “close-knit” group, yet their social-norms system effectively polices against copying jokes).

95. See, e.g., CHANG & MEEHAN, *supra* note 34, at 32 (describing how Momofuku Noodle Bar became “a regular stop on [their friends from other kitchens] after-work rounds” and then “a whole bunch of other kitchen crews started coming in . . . because the beer was cheap and cold and because Momofuku was like a freak show”).

community expands. If Chef A creates a signature dish in Pittsburgh, and Chef B, working in Miami, sees a photograph of Chef A's signature dish and precisely copies it, it is unlikely that Chef A will ever learn of the copying. Moreover, if Chef B knows that Chef A is unlikely to learn of it, Chef B has no incentive to refrain from copying, as the likelihood of sanctions is low.

Nevertheless, an internal sense of morality and personal pride likely keeps most chefs from directly stealing dishes from other restaurants.<sup>96</sup> Thus, the situation in which a norms-based system is least likely to protect against piracy is when the pirate is not another chef-owner but rather a restaurant group or a corporate chain.

If a large restaurant empire, interested more in cuisine's business aspects than its creative aspects, finds an appealing signature dish in a lesser-known restaurant, the fear of community sanctions will not keep the owners of the restaurant group from copying the dish to use as their own signature dish, as a corporate entity would be immune to most community sanctions.<sup>97</sup> After all, if a restaurant

96. See Rachel Gibson, *Is Copying a Fancy Dish Flattery?*, AGE (Austl.), Apr. 1, 2006, <http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html> (quoting Cath Claringbold, principal chef and co-owner of Mecca and Livebait in Australia, that replicating dishes is "not the right thing to do," though it is acceptable "to take inspiration from a certain technique" (internal quotation marks omitted)).

97. It is not unheard of for a corporate chain to knock off the concept of a small regional restaurant, and sometimes blatantly so. For example, Eater.com recently reported that the owners of Wetzel's Pretzels, a large national chain, plan to open and franchise a restaurant "concept" named Blaze Pizza that appears to be entirely borrowed from two successful Los Angeles pizza restaurants. Kat Odell, *If Pitfire Pizza and 800 Degrees Had a Child, Blaze Pizza Would Be It*, EATER.COM (Apr. 11, 2012), [http://la.eater.com/archives/2012/04/11/if\\_pitfire\\_pizza\\_and\\_800\\_degrees\\_had\\_a\\_child\\_blaze\\_pizza\\_would\\_be\\_it.php](http://la.eater.com/archives/2012/04/11/if_pitfire_pizza_and_800_degrees_had_a_child_blaze_pizza_would_be_it.php). The restaurant's assembly-line concept, where customers select the ingredients for the pizza while workers prepare it in front of them before firing the pizza in a very hot oven, is the same as that used at 800 Degrees, a new and popular pizzeria. *Id.* Moreover, Blaze Pizza uses a very similar logo to that of small Los Angeles chain Pitfire Pizza. *Id.* It also hired the same architect Pitfire used to design its interiors, and not surprisingly, Blaze's interior design looks remarkably similar to Pitfire's. *Id.* For example, Blaze highlights to its potential franchisees that the design uses "[c]olor 'pops' in accent walls and the oven" and "concrete floors, exposed ceilings, and accents of wood, metal and steel." *Franchise Brochure*, *supra* note 38, at 3. This could easily be a description of Pitfire's interiors, which features a glossy red pizza oven, concrete floors, and exposed ceilings. See Kat Odell, *Wowee, Pitfire Pizza Fairfax Is a Looker, Opening Tomo*, EATER.COM (Mar. 19, 2012), [http://la.eater.com/archives/2012/03/19/wowee\\_pitfire\\_pizza\\_fairfax\\_is\\_a\\_looker\\_opening\\_tomo.php](http://la.eater.com/archives/2012/03/19/wowee_pitfire_pizza_fairfax_is_a_looker_opening_tomo.php). Blaze Pizza reported that it planned to open over fifteen locations in Southern California by the end of 2013 and to franchise a national brand. Press Release, Blaze Pizza Launches Into Fast-Casual Dining With Two Locations Set to Open This Summer (May 3, 2012), <http://www.blaze-pizza.com/media/file/PressRelease/7>.

While Blaze Pizza is seemingly a knockoff of a restaurant concept, décor trade dress, and logo—rather than a specific dish—the story highlights that the norms that may keep local, privately owned restaurants from directly copying each other's ideas do not have the same effect on corporate chains that look for business opportunities and are not worried about community sanctions.

owner is not interested in innovating, but rather seeks to set a menu and then expand the concept around the country or a region, norms-based threats will have no teeth. Similarly, a personal sense of pride and respect for other individual chefs is likely inapplicable to a large restaurant chain. In these situations, a formal legal remedy may be necessary to protect culinary creativity.

#### E. When Norms Fail, Legal Protection Often Expands

While community norms currently seem to protect at least the highest-level restaurants from blatant copying by other high-end restaurants, “any system that depends on norms is vulnerable to their breakdown.”<sup>98</sup> At the point of breakdown, formal law may begin to develop to enshrine those norms.

Shyamkrishna Balganesh suggests that “when the equilibrium [of custom] is disrupted, common law intellectual property regimes can restore the equilibrium by developing rules to replicate the functioning of the custom.”<sup>99</sup> For example, the tort of misappropriation was expanded in *International News Service v. Associated Press*<sup>100</sup> to replace custom in the news industry when the difficulties of war caused customary norms to collapse.<sup>101</sup> Traditionally, the news organizations Associated Press (AP) and International News Service (INS) had an internal custom of not stealing each other’s news stories, but rather reporting on events independently, but during World War II, INS was cut off from the front lines and the European cable system.<sup>102</sup> At that point, INS started copying AP’s news stories for their news content—that is, for the uncopyrightable facts contained in the news stories.<sup>103</sup> The Supreme Court responded by stepping in and creating a “quasi-property” interest for such news matters as between the two parties through the new tort of misappropriation.<sup>104</sup>

Recent restaurant-industry cases have shown that the community norms system does not always succeed at stopping copying, and occasionally the knockoffs are blatant enough to inspire lawsuits. In those cases, the plaintiffs look

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98. Dreyfuss, *supra* note 54, at 1458.

99. Balganesh, *supra* note 17, at 1581.

100. 248 U.S. 215 (1918).

101. See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 97 (1992) (“[T]here developed an industry custom (as opposed to a conscious agreement), in which all wire services joined, not to use information from rivals’ bulletin boards or early editions.”).

102. See *id.* at 92.

103. See *id.*

104. *Int’l News Serv.*, 248 U.S. at 236, 242.

to the formal IP system to protect them where informal industry norms have failed.<sup>105</sup>

Other restaurant knockoffs, however, garner media or food community attention, but the original chefs never pursue legal action.<sup>106</sup> Perhaps more common, though hard to quantify, are blatant knockoffs that no one, other than the restaurants involved, notices.<sup>107</sup> The more valuable restaurant ideas become, the more common such restaurant piracy is likely to become, and the more likely we are to see chefs looking to the courts to expand formal protection of their creations.

### 1. Chefs' Ideal Level of Protection

Before exploring how our formal IP system could expand to protect culinary creativity, it is worthwhile to consider what chefs say they want, and what their norms-based system already protects. Chefs, in general, want to keep working in the open-source, collaborative world that allows for culinary invention.<sup>108</sup>

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105. See, e.g., Complaint, *Powerful Katinka, Inc. v. McFarland*, No. 07-CV-6036 (S.D.N.Y. June 26, 2007), 2007 WL 2064059 [hereinafter Complaint, *Powerful Katinka*] (the owner of Pearl Oyster Bar sued her former cook when he opened a very similar-looking restaurant that served nearly identical dishes); *TM Foods of Avon, Inc. v. Jimmy John's Enters.*, No. 05-CV-0220 (S.D. Ind. Oct. 5, 2005) (sub sandwich shop knockoff case that was settled with an agreement to change menus); Scheck & Woo, *supra* note 76 (discussing a grocery store that settled a lawsuit alleging it had infringed a restaurant's trademark in goats on a roof).
  106. See, e.g., Wells, *supra* note 20 (describing a scandal that exploded on the eGullet message boards in 2006 when a member discovered that an Australian chef was serving nearly identical dishes to ones served at the Alinea restaurant in Chicago). I discuss this scandal *infra*, Part I.C.3. See also 412: *Million Dollar Idea*, *THIS AM. LIFE* (July 16, 2010), <http://www.thisamericanlife.org/radio-archives/episode/412/million-dollar-idea?act=0> (interviewing the owner of a Vietnamese sandwich shop in Park Slope, Brooklyn, whose shop was replicated nearly identically by a competitor on the same block).
  107. Susan Feniger and Mary Sue Milliken's menu for their restaurant Border Grill, for example, has been knocked off twice. See Interview With Susan Feniger, *supra* note 34. Both times, the pirate restaurants hired away sous chefs from Border Grill and put nearly identical items on their own menu. *Id.* The second knockoff occurred after Feniger and Miliken had engaged in negotiations with a restaurant group to open a Border Grill branch as a joint venture. When negotiations fell through, the other restaurateur simply hired away a sous chef and recreated the Border Grill menu without paying Feniger or Milliken for their ideas. *Id.* The owners of Palazzio restaurant in Santa Barbara likewise report that they have had their entire restaurant concept stolen. Interview With Kenneth and Daria Boxer, *supra* note 47.
  108. See Buccafusco, *supra* note 11, at 1151–52 (interviewing Thomas Keller, Charlie Trotter, and Norman Van Aken and concluding that there is a “hospitality gene” that “makes it difficult for these chefs to exclude others from using their creations”). For example, Thomas Keller expressed discomfort with the idea of copyrighting the cornet and asking others to pay him royalties to use it. *Id.* at 1152.

At the same time, they desire recognition and attribution for their work, and would like to stop others from direct copying.<sup>109</sup>

The ideal level of protection chefs seem to desire is thin—it would only stop other restaurants from directly copying a signature dish or a significant portion of a menu.<sup>110</sup> Any expansion of formal IP protection for cuisine should certainly not preclude home cooks from preparing dishes they have observed in restaurants or in a cookbook. Such overprotection would unnecessarily intrude into the private sphere and would only harm chefs by discouraging cookbook sales. Nevertheless, a chef should have some recourse against blatant copying, provided such recourse does not significantly dampen the current open-source tradition in the culinary arts.<sup>111</sup> A system providing such support would protect chefs who are in the process of creating regional or national brands, and also chefs at individual restaurants who might create a great dish only to see a major chain restaurant use it without any attribution.<sup>112</sup>

Such attribution, or recognition, serves an important role in supporting a low-IP equilibrium.<sup>113</sup> Fauchart and Von Hippel identified an unspoken rule that chefs must give credit to other chefs when using their dish or technique.<sup>114</sup> Recognition helps a chef secure investors for future projects, entice customers to the chef's restaurants, and sell cookbooks. Indeed, the very concept of a signature dish<sup>115</sup> embodies a desire for recognition and attribution, as it serves the same function as a signature on a painting: to identify the creator. Any expansion of formal IP rights for chefs would ideally encourage attribution or provide a means for recognizing creators.<sup>116</sup>

109. *Id.* at 1152–53. Giving proper attribution or acknowledgement is a central norm in the community of French chefs surveyed by Fauchart and von Hippel. Fauchart & von Hippel, *supra* note 14, at 193.

110. See Buccafusco, *supra* note 11, at 1153 (quoting Chef Wylie Dufresne: “There is nothing wrong with [another chef] taking [my] techniques and *making them his own*.” (emphasis added) (internal quotation marks omitted)); Fauchart & von Hippel, *supra* note 14, at 192–93 (“It is not honorable for chefs to *exactly* copy recipes developed by other chefs.”).

111. See “tb86,” Comment to *Interlude Food Similarities*, EGULLET (Mar. 14, 2006, 8:29 PM), <http://forums.egullet.org/index.php?/topic/84509-interlude-food-similarities> (“[C]opying someone else’s [sic] food right down to the components [sic] flavours and plate style and then putting a photo of it on your website letting people think its [sic] yours is not evolution.”).

112. Essentially, chefs would like an industry-specific IP system. Industry-specific IP is theoretically enticing in many industries but may be very difficult to implement. See generally Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361 (2009); Raustiala & Sprigman, *supra* note 12, at 1695–1705.

113. See Rosenblatt, *supra* note 12, at 343.

114. See Fauchart & von Hippel, *supra* note 14, at 188.

115. See discussion of the importance of signature dishes, *infra* Part I.E.2.

116. See Rosenblatt, *supra* note 12, at 359.

Interviews with chefs make it clear that these goals of protection against exact copying and in favor of attribution could best be achieved by codifying the unspoken community-based norms that currently exist among certain high-level chefs.<sup>117</sup> Such codification would not impede competition in any serious way, as these norms only protect against nearly exact copying and allow for chefs to build off each other's ideas without sanction.<sup>118</sup>

Two concepts that chefs and restaurateurs already use to distinguish their restaurants—signature dishes and plating—are central to my discussion in Part III of how trade dress law could be used to protect restaurant dishes. Before beginning this discussion, it is helpful to define these terms and to touch briefly on how they function in the industry.

## 2. Signature Dishes Are Important Branding Tools for Chefs and Restaurants

Signature dishes serve an important purpose in the creation of a restaurant's brand. For purposes of this Comment, a signature dish is one that is representative of the chef or the restaurant's style.<sup>119</sup> It may also represent or highlight the chef's ethos, background, or goals, whether for one restaurant or for an entire brand.<sup>120</sup> Some signature dishes are a chef's personal take on one of the classics,<sup>121</sup> while others showcase the chef's innovative cooking techniques.

The signature dish serves as a way to introduce the chef's brand to diners and will generally be on the menu every night, even if other dishes change.<sup>122</sup>

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117. See Buccafusco, *supra* note 11, at 1151–53; Fauchart & von Hippel, *supra* note 14, at 192–93.

118. See Fauchart & von Hippel, *supra* note 14, at 193.

119. See Krizman, *supra* note 11, at 1025 (adopting definition of signature dish as a “recipe that identifies an individual chef” (internal quotation marks omitted)).

120. For example, Susan Feniger's Street serves kaya toast as its signature dish. This dish is sold at street food stands in Singapore, and is representative of the casual street food that inspired the restaurant. Interview With Susan Feniger, *supra* note 34.

121. Danny Meyer, who owns several restaurants in New York, reports that he “do[es] not want to see a [ubiquitous] dish like tuna tartare . . . on any of [his] menus unless [his] chefs are doing something singularly excellent with it. That challenge led [them] to come up with an impressive signature dish for Eleven Madison Park: tuna tartare seared on one side.” MEYER, *supra* note 33, at 100.

122. For example, Rivoli Restaurant in Berkeley, California features a menu that changes every three weeks, but its signature portabella mushroom fritters have been on the menu, and plated the exact same way, since the restaurant opened in 1994. See *Welcome to Rivoli*, RIVOLIRESTAURANT.COM, <http://rivolirestaurant.com> (last visited Sept. 24, 2012) (follow “Restaurant” hyperlink, then follow “Introduction” hyperlink); *Dinner Menu*, RIVOLIRESTAURANT.COM, <http://rivolirestaurant.com> (last visited Sept. 24, 2012) (follow “Food and Wine” hyperlink; then follow “Dinner Menu” hyperlink) (explaining how the menu changes but for the fritters, Caesar salad, and hot fudge sundae).

Many independent restaurants have signature dishes, as do large chains.<sup>123</sup> Some chefs serve their signature dishes at multiple restaurants to strengthen their brands.<sup>124</sup>

Establishing a signature dish is an important part of a chef's brand creation, and it can take considerable creativity and effort. David Chang, for example, describes the process he employed in developing the signature dish for his restaurant Momofuku Ko as a synthesis of his Korean heritage, his travels in Japan, his experiments in the kitchen, his previous restaurant traditions, and his admiration for chefs at other successful restaurants.<sup>125</sup> Ultimately, he developed a soft-cooked egg with caviar—"eggs in an egg"—which pays homage to culinary traditions of many countries and exhibits Chang's playfulness.<sup>126</sup>

Chang's dish highlights one of the reasons why protecting signature dishes through trade dress law may be worthwhile.<sup>127</sup> Chang aimed to make a restaurant that centered entirely on the food it serves, without the usual trappings of a high-end restaurant—even without waiters.<sup>128</sup> This strategy means, however, that the signature dishes at Momofuku Ko are an even more important part of Chang's brand than signature dishes are at other restaurants because Chang has essentially stripped his restaurant of all décor and has boiled it down to its essence—food and its presentation. As discussed above, the décor of a restaurant would normally be considered part of the restaurant's trade dress.<sup>129</sup> But because its décor is intentionally nondistinctive, Momofuku Ko would not be entitled to such protection. Protecting the unique appearance of the dish would serve the same function as protecting its décor by acknowledging the goodwill built into Chang's brand.

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123. For examples of extremely successful signature dishes that have existed for years as symbols of the restaurants in which they are served, see Beth Kracklauer, *9 Signature Dishes*, SAVEUR (Mar. 10, 2009), <http://www.saveur.com/article/Kitchen/9-Signature-Dishes> (ranging from black cod with miso, reportedly responsible for the expansion of Nobu restaurant to eighteen locations around the world, to Bookbinder's Famous Snapper Soup, originally served in Bookbinder's Hotel in Philadelphia and now served at Chicago's Drake Hotel, which both claims the dish as its own and gives attribution to Bookbinder's in the name "Drake's Signature Bookbinder Soup").

124. For example, Thomas Keller serves Oysters and Pearls at The French Laundry and at Per Se. See PERSENY.COM, <http://www.perseny.com> (last visited Sept. 24, 2012). His cornets are likewise served before each meal at both restaurants. Keller's Bouchon and Ad Hoc restaurants, which could be considered diffusion lines, do not serve these dishes.

125. David Chang & Peter Meehan, *The Story of a Signature Dish*, BON APPÉTIT (Sept. 2009), [http://www.bonappetit.com/magazine/2009/09/david\\_chang\\_signature\\_dish](http://www.bonappetit.com/magazine/2009/09/david_chang_signature_dish).

126. *Id.*

127. See *infra* Part III.B.

128. See CHANG & MEEHAN, *supra* note 34, at 217.

129. See *supra* Part I.C.2.



### 3. Plating Serves as a Proxy for Restaurant Quality

Plating is the arrangement of the various elements of a dish on a plate.<sup>130</sup> It can also include the choice of china or other service ware on which a dish is served.<sup>131</sup> The plating of dishes is very important because restaurant customers agree to pay for the product before having a chance to evaluate its quality. Unlike in the world of fashion design, for example, where a knockoff's inferior quality might be obvious upon examination in a store, a restaurant customer does not have an opportunity to taste the food before purchasing it. The plating of dishes has thus increasingly become a way of distinguishing restaurants because a potential customer may evaluate the presentation of the dish through photographs on websites or in magazines before she makes a reservation and sits down at the restaurant. Thus, the dish's appearance becomes a proxy for its culinary quality—the more aesthetically pleasing the plating, the higher the presumed quality of the restaurant. Intricate plating of food takes more energy and focus than an unconsidered presentation, so diners may assume a higher quality of food when they see appealing and unique plating.<sup>132</sup> Beyond merely serving as a proxy for quality, attractive plating also contributes value to the dining experience, just as a pleasant ambience increases the value of a restaurant meal.<sup>133</sup>

Glossy food magazines, such as *Saveur* and *Bon Appétit*, show full-page color photographs of dishes, which serve as illustrations and as a form of advertising for the restaurants. Similarly, cookbooks written by chefs are printed in full color,

130. See CHRISTOPHER STYLER, *WORKING THE PLATE: THE ART OF FOOD PRESENTATION* 1 (2006).

131. *Id.*

132. See Oliver Strand, *When Fingers Would Fumble, Chefs Turn to Tweezers*, N.Y. TIMES, Jan. 19, 2010, <http://www.nytimes.com/2010/01/20/dining/20tweez.html> (describing how certain chefs are so concerned with their plating designs that their cooks use surgical tweezers to place each element precisely on the plate).

133. Some chefs, such as Grant Achatz are particularly known for their inventive plating, and the presentation of the food is a very important part of the dining experience they create. For an in-depth depiction of Chef Achatz' plating, creative process, and battle with tongue cancer, see Max, *supra* note 48. Even less elaborate plating may improve a diner's reaction to the dish, if it makes the dish more attractive; conversely, an unattractive presentation may detract from an otherwise successful dish. See Interview With Susan Feniger, *supra* note 34 ("[T]he flavor, is the thing that's most important. But [the look of the dish] may make a first impression if it's ugly. . . . I think the bel puri [a dish served at Street] is not that pretty—so it may be one of those dishes that just doesn't blow people away, that might be part of it. I think the pani puri [a different dish] is more interesting looking, so people responded more to that dish.").

often with as many pages of photographs as text. These visuals also serve as a form of advertising for restaurants.<sup>134</sup>

The ease of posting images on the internet has further increased the importance of a dish's visual appeal and also the likelihood of copycat plating being discovered. Potential diners look online for information not only about restaurant locations and hours, but also to view menus and evaluate prices. Pictures of the restaurant's food on its website play a large role in luring customers.<sup>135</sup> Because there is no way to convey taste or smell over the internet, restaurants rely on the visual impact of their dishes (and their dining rooms) via photographs to demonstrate to potential diners that theirs is a worthy dining experience.

The visual importance of dishes is further emphasized on consumer-generated review sites, such as Yelp.com, where users post their own reviews of restaurants. A skim through Yelp reveals that diners frequently upload photographs of dishes as a way to communicate the quality of the experience to other diners.<sup>136</sup>

A story that made headlines in the food world a few years ago demonstrates both how seriously the visual appearance of food is taken in the restaurant world, and how photographs and the internet have allowed for policing and enforcement of community culinary norms on a worldwide scale. In 2006, eGullet, an online dining and food forum, exploded with the news that Robin Wickens, a chef in Sydney, Australia was serving dishes identical to dishes served at Grant Achatz's Chicago restaurant Alinea, and Wylie Dufresne's WD~50 in New York.<sup>137</sup> Someone who saw pictures of the dishes on the website of Wickens's

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134. For example, a potential patron of the The French Laundry can learn the story of the cornets and see a picture of a waiter serving them in the French Laundry cookbook. See KELLER, *supra* note 1, at 4. This experience establishes for the diner what to expect when she actually dines at the restaurant. Few readers of the French Laundry cookbook will make the recipes at home, but by viewing the pictures and reading about the dishes, they develop an interest in Keller's brand and know what to expect when they are eating at his restaurants.

135. A Miami catering company was recently discovered to have used photographs of dishes from Grant Achatz's Alinea restaurant on their own website as advertisement for its catering services. Ari Bendersky, *Was Alinea Ripped Off? Grant Achatz Thinks So*, EATER.COM (Mar. 1, 2011), <http://chicago.eater.com/archives/2011/03/01/was-alinea-ripped-off-grant-achatz-thinks-so.php>. Presumably the catering company believed that these attractive photographs would help them obtain customers. If the photographs were indeed copied from the Alinea website, this obviously constitutes copyright infringement of the photographs. It might also constitute false advertising, as the infringers did not prepare the dishes and likely would be unable to recreate them.

136. See, e.g., *Alinea: Photos*, YELP.COM, [http://www.yelp.com/biz\\_photos/pbEiXam9YJL3neCYHGwLUA?select=uBQq5RiOpPJCR3A0HT6KzQ](http://www.yelp.com/biz_photos/pbEiXam9YJL3neCYHGwLUA?select=uBQq5RiOpPJCR3A0HT6KzQ) (last visited Aug. 30, 2012). Nearly all of the user-submitted photographs for the Alinea Yelp reviews are of individual dishes. *Id.*

137. See *Interlude Food Similarities*, *supra* note 111.

restaurant, Interlude, discovered the similarities.<sup>138</sup> This poster reported that the dishes *appeared* identical to those served at other restaurants and also had similar menu descriptions.<sup>139</sup> eGullet soon published photographs of the Interlude dishes, taken from the restaurant website, with photographs of the same dishes at Alinea, and the visible similarity of the dishes furthered community outrage.<sup>140</sup> That Wickens copied not only the flavor profiles of the dishes but also the plating of the dishes demonstrates that outstanding plating creates value; it signals a high quality of food and also adds value to the dining experience.

Given the importance of a restaurant's signature dishes and its novel plating arrangements in creating a successful restaurant brand, securing legal protection for these aspects of the restaurant business could significantly help chefs monetize their creativity. In the following Part, I investigate which areas of IP law are most likely, and most suitable, to accommodate an expansion of legal protections to protect culinary creativity from increased copying, focusing in particular on the application of copyright and trademark law to signature dishes and plating.

## II. COPYRIGHT PROTECTION FOR RESTAURANT DISHES

### A. Feasibility and Theories of Copyright Protection for Restaurant Dishes

Though courts have traditionally denied copyright protection to recipes or dishes, as discussed above, some commentators have suggested that copyright doctrine does not inherently require this result and that dishes could in fact be entitled to copyright protection.<sup>141</sup> The impulse toward protecting dishes under copyright law is based on the idea that chefs are engaging in a form of expression

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138. *See id.*

139. *Id.*

140. *See* Daily Gullet Staff, *Sincerest Forms*, EGULLET (Mar. 20, 2006, 12:44 AM), <http://forums.egullet.org/index.php?/topic/84800-sincerest-form>. This internet debate went on for several pages and over many weeks, with many known chefs contributing their thoughts. *Id.*; *see also* Frank Bruni, *Sci-Fi Cooking Tries Dealing With Reality*, N.Y. TIMES, May 11, 2005, <http://www.nytimes.com/2005/05/11/dining/11avant.html> (describing that in Achatz's dish, "[r]ibbons of bison meat filled egg-size indentations in the surface of a horizontal glass tube, the hollow interior of which contained burning sticks of cinnamon").

141. *See, e.g.*, Buccafusco, *supra* note 11 (determining that the doctrinal bars to copyright could be avoided but concluding that copyright protection of dishes would not achieve the goals of copyright law); Broussard, *supra* note 11, at 714–26 (arguing that copyright should expand to encompass cuisine and that the fair use doctrine is sufficient to protect against chilling effects); Pollack, *supra* note 11, at 1523 (suggesting the addition of a new category of “edible art” as a protected category under the Copyright Act).

when they create their dishes. Chefs themselves, for example, sometimes describe their creative process as being similar to that of a musician or other artists.<sup>142</sup>

In the few recent cases where courts have considered the question of the copyrightability of culinary creations, the issue has been whether *recipes*, which describe how to make a dish, rather than the dish itself, are entitled to copyright protection.<sup>143</sup> Overall, recipes have been found ineligible for copyright protection because they failed to meet the statutory requirement of originality.<sup>144</sup> Courts looked at the recipes as mere statements of the processes required to make a dish.<sup>145</sup> While any type of literary explanation surrounding the recipes would be entitled to copyright protection, the lists of ingredients and description of steps are considered an “idea” rather than “expression.”<sup>146</sup>

Christopher J. Buccafusco traces these recent recipe holdings to the influence of Melville Nimmer, who rejected the idea of copyright for recipes in his leading treatise on copyright.<sup>147</sup> Nimmer considers recipes to be statements of facts that the functionality of dishes dictates—that is, the functional necessities of creating a particular dish requires the combination of ingredients.<sup>148</sup> In this view, there is no originality in calling for flour in a piecrust or apples to fill a pie.<sup>149</sup>

142. See Buccafusco, *supra* note 11, at 1134 n.75 (quoting Rick Tramonto, chef-owner of TRU, as saying: “When you put on a Miles Davis piece or a Santana piece, and you’re just listening to this guy riff on this guitar or riff on this horn . . . it gives you goose bumps. You’re feeling the emotions through that spirit of music. It’s just like when you get a great dish in front of you if you’re eating in some restaurant.” (alteration in original) (internal quotation marks omitted))).

Of course, not all restaurant dishes are creative. Andrew Dornenburg and Karen Page, for example, have suggested that the restaurant industry functions at various levels of creativity, from producing highly original cuisine on the one extreme to providing simple sustenance on the other. See DORNENBURG & PAGE, *supra* note 36, at 7.

143. See Buccafusco, *supra* note 11, at 1127–30.

144. See, e.g., *Lambing v. Godiva Chocolatier*, 142 F.3d 434, 434 (6th Cir. 1998) (denying copyright protection to plaintiff’s unpublished recipe and design for a chocolate truffle on the grounds that recipes are functional descriptions, and seemingly ignoring the design aspect of the claim); *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480, 482 (7th Cir. 1996) (finding a “negligible chance” of establishing copyright in recipes using Dannon brand yogurt, as they lack even “a bare modicum of the creative expression—i.e. the originality—that is the ‘*sine qua non* of copyright” (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991))).

145. See Buccafusco, *supra* note 11, at 1131 (explaining how the courts in these cases have looked at the recipes themselves and not at the underlying dishes to determine copyright eligibility).

146. 17 U.S.C. § 102(b) (2006).

147. See Buccafusco, *supra* note 11, at 1127 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 2.18 (2005)).

148. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 2.18, at 2–208 (2012).

149. See *id.*

Buccafusco and Malla Pollack have both argued that this conception of copyright protection for dishes is flawed because it focuses on the recipe rather than on the underlying culinary creation.<sup>150</sup> The dish, they claim, not the recipe, is the work of authorship, and the written recipe is simply the fixation required by the copyright statute.<sup>151</sup> Buccafusco compares cooking to other performative arts and explains that just as a music or dance performance is ephemeral but may be described on paper and achieve copyright protection, a chef can write down a recipe to allow the expression to be “perceived, reproduced, or otherwise communicated” as required under current copyright laws.<sup>152</sup>

To show that dishes are in fact forms of “expression,” Buccafusco interviewed several chefs about their creative processes and found that they draw inspiration from many sources, not just the culinary world.<sup>153</sup> Indeed, entire television shows are developed around the concept that cooking is highly creative. For example, in every episode of the show *Top Chef*, the contestants are charged with inventing creative dishes and often are given themes from beyond the cooking world to inspire them.<sup>154</sup> Twenty years ago, when Malla Pollack suggested that copyright could extend to “edible art,” her claim seemed controversial.<sup>155</sup> Today, with such increased interest in chefs and their creative processes, and increased creativity by chefs like Adrià and Achatz, Pollack’s suggestion seems quite reasonable.

Buccafusco and others have pointed out that another barrier to copyright protection for dishes is the Copyright Act’s functionality—or “useful articles”—doctrine, which precludes protection of the functional aspects of applied art—that is, art or design incorporated into useful objects, such as a lamp or a piece of silverware.<sup>156</sup> This doctrine was incorporated into the 1976 Copyright Act to

150. See Buccafusco, *supra* note 11, at 1131; Pollack, *supra* note 11, at 1499.

151. See Buccafusco, *supra* note 11, at 1131–32.

152. *Id.* (quoting 17 U.S.C. § 102(a) (2006)).

153. See *id.* at 1135.

154. These challenges are quite similar to those assigned to the aspiring fashion designers who compete with one another in the show *Project Runway*, aired on the Bravo Network. In fact, the world of Bravo’s reality television shows is significantly populated by low-IP industries such as fashion design (*Project Runway*), cuisine (*Top Chef* and its many spinoffs), and hair styles (*Shear Genius*). As noted above, this reflects that low-IP regimes are often supported on the periphery by traditional IP regimes, such as the copyright laws that protect these shows. See Dreyfuss, *supra* note 54, at 1450.

155. See Pollack, *supra* note 11, at 1477 n.\*.

156. See 17 U.S.C. § 101 (“[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”). A useful article is defined as “an article having an intrinsic

separate the utilitarian aspects of designed products from their aesthetic elements.<sup>157</sup> Under this doctrine, courts generally extend copyright protection to design aspects of applied art only when there is physical or conceptual separability between the artistic and functional elements of an object. Physical separability means that the art can literally be separated from the object. Conceptual separability means that the object would be desirable for the designer's artistic judgment considered separately from the object's functional aspects.<sup>158</sup>

Buccafusco suggests that for dishes, it is easy to conceptually separate the functional elements from the artistic.<sup>159</sup> In his view the function of dishes is simply to provide caloric content, and in many restaurant dishes it is easy to separate the "aesthetic merits" of the dish from this "basic need to provide calories."<sup>160</sup> However, the functionality doctrine only applies, and conceptual separability is only necessary, if restaurant dishes are considered useful articles.<sup>161</sup> If inventively plated dishes are considered a form of sculpture, and the food is considered a useful article, then in fact, conceptual separability would be required to separate the sustenance from the presentation.<sup>162</sup>

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utilitarian function that is not merely to portray the appearance of the article or to convey information." *Id.*

157. See H.R. REP. NO. 94-1476, at 55 (1976).

158. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 211–14 (1954) (finding figurative sculptures incorporated into a lamp base conceptually separable from the useful article of the lamp itself); see also 1 NIMMER & NIMMER, *supra* note 148, § 2.08, at 2-101 ("[C]onceptual separability exists where there is any substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities."). For a critique of the conceptual separability doctrine, which can result in protecting artistically motivated designs that many would consider "inferior" rather than functional items, see Raymond M. Polakovic, *Should the Bauhaus Be in the Copyright Doghouse? Rethinking Conceptual Separability*, 64 U. COLO. L. REV. 871, 874–81 (1993).

159. Buccafusco, *supra* note 11, at 1139.

160. *Id.* Of course, many diners would be ecstatic if the chef could *physically* separate the aesthetic and flavor merits of the dish from its caloric content. See NAT'L REST. ASS'N, WHAT'S HOT IN 2011, at 4 (2010), [http://www.restaurant.org/pdfs/research/whats\\_hot\\_2011.pdf](http://www.restaurant.org/pdfs/research/whats_hot_2011.pdf) (Fifty-one percent of chefs surveyed ranked "lower calorie" as a "hot trend" of restaurant service ideas in the coming year).

161. See 17 U.S.C. § 101.

162. See *Someone's Stealing My Food!—Intellectual Property for the Food & Hospitality Industry*, COWAN, LIEBOWITZ & LATMAN, P.C. (Nov. 19, 2008), <http://cll.com/webinars/food-hospitality-08-someone-s-stealing-my-food-intellectual-property-for-the-food-hospitality-industry> (discussing the possibility of claiming copyright in the appearance of dishes as sculpture). That a sculpture is created out of a consumable food product should not serve to deny it copyright protection. In fact, several contemporary artists work in foods. See, e.g., Janine Antoni, *Gnaw* (1996) (three-part installation including 600 pounds of chocolate gnawed by the artist, 500 pounds of lard gnawed by the artist, and lipstick- and heart- shaped candies created from portions gnawed off of the chocolate and lard blocks); Dieter Roth, *Chocolate Lion Tower* (1968–69) (arrangement of 252 chocolate objects that are allowed to decay). Recently, artist Jennifer Rubell blurred the lines between sculpture made

Even then, and granting that it is not clear whether flavor is an aesthetic (it appeals to the sense of taste) or functional (a main purpose of the dish is to taste good) component of a dish, courts should easily be able to conceptually separate plating from the functional content of the dish, as plating does not reveal or affect (significantly) the flavors or caloric content of the dish. For example, on the cooking television show *Iron Chef*, contestants receive a score for plating separate from the score for taste.<sup>163</sup> Such televised competitions could be a model for how a judge might separate the appearance of a dish from its flavor in completing a useful articles analysis.

However, as mentioned above, the useful articles doctrine may not even be necessary in an analysis of whether dishes are entitled to copyright protection. Instead of analogizing an individual dish to a useful article like clothing or furniture, the entire experience of going to a restaurant could be considered akin to watching a dance performance.<sup>164</sup> This would avoid the separability issue entirely, as the useful articles doctrine applies only to graphic, pictorial, or sculptural work but not to performances, and performances are also generally not considered to be “functional.”<sup>165</sup>

Of course, protecting the restaurant experience as a form of performance also has disadvantages. Primarily, it would bring judges into the role of tastemakers, as they would have to determine whether a particular restaurant was sufficiently expressive to be considered a form of performance art or was simply providing sustenance. Copyright law protects original expression without regard

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of edible media, performance art, and commerce when she spent several months in Mario Batali's food emporium, Eataly, as the store's official vegetable butcher, carving and then selling vegetables to shoppers. See Rob Patronite & Robin Raisfeld, *Eataly's Vegetable Butcher Revealed*, N.Y. GRUB STREET (Aug. 18, 2010, 12:40 PM), [http://newyork.grubstreet.com/2010/08/eatalys\\_vegetable\\_butcher\\_reve.html](http://newyork.grubstreet.com/2010/08/eatalys_vegetable_butcher_reve.html).

163. IRON CHEF AM., <http://www.foodnetwork.com/iron-chef-america/index.html> (last visited Sept. 24, 2012).

164. Buccafusco himself makes this comparison earlier in his article. See Buccafusco, *supra* note 11, at 1131 (“[C]uisine belongs with the performative arts . . .” (quoting PRICILLA PARKHURST FERGUSON, ACCOUNTING FOR TASTE: THE TRIUMPH OF FRENCH CUISINE 20 (2004)) (internal quotation marks omitted)). Likewise, Kenneth Boxer, owner of Palazzio restaurant in Santa Barbara, compares running a restaurant to a Broadway production. Every night, the ambiance, food, and service must combine in the same way to cause a positive dining experience for the customers, whom Boxer compares to the audience at a show. Interview With Kenneth and Daria Boxer, *supra* note 47. Alternatively, the Copyright Act could be amended to include a new form of expression: “edible art.” Pollack, *supra* note 11, at 1486.

165. See 17 U.S.C. § 101 (the separability discussion regarding “useful articles” is part of the definition of “pictorial, graphic, and sculptural works,” whereas performances are defined separately).

to its artistic merits,<sup>166</sup> so this line drawing would be problematic from a doctrinal standpoint. Additionally, this kind of line drawing would be difficult from a practical standpoint. An inventive restaurant with a long chef's tasting menu, like Alinea or The French Laundry, would clearly fall into the performance category, while a standard diner would fall into the utilitarian category. However, it would be much harder to make this distinction when trying to categorize higher-end restaurants that serve classic dishes a la carte, where elements of performance are present but not as central to the experience as in a restaurant with a carefully choreographed chef's menu.

### B. Addressing Fears of a Chilling Effect

The most common arguments against extending copyright protection to dishes are that such protection would stifle creativity and grant certain chefs monopolies over dishes that belong to the community as a whole.<sup>167</sup> Both chefs and scholars fear this chilling effect.<sup>168</sup>

Broussard suggests that the fair use doctrine would adequately prevent the chilling effects of possible copyright infringement litigation.<sup>169</sup> Fair use is a statutory carveout that declares that use of copyrighted material "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."<sup>170</sup> However, it is difficult to determine *ex ante* whether a particular use will be considered fair or not, so many people will choose not to offer dishes that are very similar to those of others to avoid the uncertainty of a lawsuit. Also, in a field known for development of skills through apprenticeships rather than schooling, it might be difficult to draw the line between preparing a dish for teaching or learning purposes—which would likely be considered fair use—and commercial uses requiring a license.<sup>171</sup>

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166. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (cautioning judges against judging the worth of artwork when deciding copyright cases).

167. See Broussard, *supra* note 11, at 724–25; Cunningham, *supra* note 11, at 38–39.

168. See Buccafusco, *supra* note 11, at 1152 (quoting several chefs saying they do not want copyright protection).

169. See Broussard, *supra* note 11, at 724 n.220.

170. 17 U.S.C. § 107.

171. Most culinary colleges, for example, which are clearly educational institutions, also maintain restaurants that sell the dishes cooked by students as part of their learning experience. See, e.g., *CLA Restaurants*, CULINARY INST. AM., <http://www.clarestaurants.com> (last visited Sept. 24, 2012). Moreover, much of a developing chef's training takes place in the kitchens of commercial restaurants. See DORNENBURG & PAGE, *supra* note 45, at 144.



Buccafusco's discussion of a "culinary public domain" more adequately addresses fears of a chilling effect. This culinary public domain would include those "recipes [that] have been produced for years, if not for generations, and [whose] original creators are unknown."<sup>172</sup> Copyright protection would not extend to restatements of these dishes because they would not be original to the chef.<sup>173</sup> Beyond the mere doctrinal reasons for denying copyright to such recipes, recognizing a culinary public domain would serve the important purpose of keeping available to all cooks and restaurants the right to keep preparing perennial crowd pleasers and to riff on the classics. "[O]bviously innovative dishes like [Keller's] 'Oysters and Pearls' that have no gastronomic precedent," however, should receive protection, as there would not be any question as to their originality.<sup>174</sup>

However, a focus on very common and very innovative dishes leaves out those signature dishes that are a chef's personal take on one of the classics, yet creative enough that they are not simply re-creations of the classics. For example, Danny Meyer has explained how his chefs at Eleven Madison Park developed a signature dish of tuna tartare that "looks and tastes different from any other version."<sup>175</sup> The tuna is "seared on one side" and "[s]erved with sliced avocado and a radish salad."<sup>176</sup> While tuna tartare has been served in restaurants for years, bringing it into the culinary public domain, I propose that the Eleven Madison Park dish could be considered a "derivative work," and the chefs could obtain a "thin copyright" over just their contributions to the work.<sup>177</sup> This thin copyright could be used to keep others from directly copying the signature dish, but would not extend to the underlying public domain dish, allowing other chefs to make their own derivations of the classics.<sup>178</sup> In the case of the Eleven Madison Park dish, that restaurant would hold a copyright in tuna tartare served

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172. Buccafusco, *supra* note 11, at 1130.

173. *See id.*

174. *Id.*

175. MEYER, *supra* note 33, at 100.

176. *Id.*

177. *See* 17 U.S.C. § 101 (2006) (defining derivative work as "a work based on one or more preexisting works . . . in which a work may be recast, transformed, or adopted. A work consisting of editorial revisions, elaborations, or other modifications which, as a whole, represent an original work of authorship").

178. *See id.* § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.").

seared on one side, with sliced avocado and a radish salad, but only in those new additions to the dish. Other restaurants could continue to develop their own versions of tuna tartare.<sup>179</sup>

Any such copyright, whether in a single dish or a menu as a compilation, would be “thin” because it would protect against little more than exact copying. Such a limitation would provide for the free flow of ideas but would also allow chefs to bring suit if someone copied a dish exactly. Moreover, fears of excessive litigation would be reduced because a plaintiff would have to show actual copying to receive a remedy for infringement. Without direct evidence of such copying, a plaintiff could only prevail by offering proper circumstantial proof—that is, the plaintiff would have to show both that the defendant had access to the copyrighted work and that there was probative similarity<sup>180</sup> between the works to prove that the expressive portions of the work had actually been copied.<sup>181</sup> A defendant chef who had independently conceived of the dish could show evidence of where she found her inspiration. For example, if a different restaurant served tuna tartare seared on one side, with avocados and radishes, and Eleven Madison Park claimed copyright infringement, the other restaurant could prevail by showing that its chef never saw the Eleven Madison Park version, and that the dish was that chef’s own variation on the classic tuna tartare. If both chefs drew from the culinary public domain, there would be no infringement.

Copyright law, however, is not the only area of IP law that offers the potential for greater legal protection of culinary creations. Trademark law, and in particular trade dress law, presents another potential avenue that chefs could use to protect their dishes as brand identifiers.

### III. TRADE DRESS PROTECTION OF SIGNATURE DISHES

Trademark law, while often described as a form of intellectual property protection, actually grew out of the common law doctrine surrounding unfair competition,<sup>182</sup> and the federal trademark statute, the Lanham Act, owes its authority

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179. The impulse to play with tartare dishes is apparently quite strong. Daniel Humm, the chef of Eleven Madison Park, is now serving a “carrot tartare” based on the classic steak tartare, with fresh carrots ground at the table in a classic meat grinder. Jeff Gordinier, *Reinventions, With Card Tricks and a Drink Cart*, N.Y. TIMES, Sept. 4, 2012, <http://www.nytimes.com/2012/09/05/dining/at-eleven-madison-park-a-reinvention.html>.

180. “Probative similarity” is similarity that suggests the work has been copied rather than independently created. Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1190 (1990).

181. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

182. See *Trade-Mark Cases*, 100 U.S. 82 (1879).

to the Commerce Clause rather than the Intellectual Property Clause.<sup>183</sup> As a result, the forces driving trademark protection are somewhat different than those driving copyright and patent law. Rather than focusing on incentives for creation, with the goal of promoting a wide variety of works, trademark law grew out of unfair competition law and is intended to protect consumers through the identification of brands, which promotes the sale of high-quality products.<sup>184</sup> It protects both consumers, who rely on trademarks when they purchase goods, and also producers, who have invested “energy, time, and money” in presenting their product, against the harms of “misappropriation by pirates and cheats.”<sup>185</sup> Trade dress law, a subset of trademark law, may prove to be a fruitful avenue for chefs looking for greater protection of their culinary creations.

#### A. What Is Trade Dress?

Trade dress is the overall image of a product, when it functions as a brand signifier.<sup>186</sup> Classic examples of trade dress are the shape of a Coca-Cola bottle,<sup>187</sup> or Tiffany & Co.’s robin’s-egg-blue jewelry boxes.<sup>188</sup> Even stripped of a textual mark, consumers recognize that these packages hold products from a single source. In recent years, trade dress has increasingly been used to protect “nontraditional marks,” such as sounds, scents, and product designs.<sup>189</sup> This expansion has been based on a broad understanding of the statutory definition of trademark as including “any word, name, symbol, or device or any combination thereof” used by any person “to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”<sup>190</sup> Moreover, “[s]ince human beings might use as a ‘symbol’ or ‘device’ almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive.”<sup>191</sup>

To obtain protection of trade dress, just as for other trademarks, the owner must show (1) that the mark is used in commerce; (2) that it is nonfunctional; (3)

183. Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051–1127 (2006).

184. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).

185. S. REP. NO. 79-1333, at 3 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1274.

186. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.* 529 U.S. 205, 209–10 (2000).

187. Registration No. 1,057,884.

188. Registration No. 2,359,351 (“The mark consists of a shade of blue often referred to as robin’s-egg blue which is used on boxes. The matter shown in broken lines represents boxes of various sizes and serves to show positioning of the mark. No claim is made to shape of the boxes.”).

189. See generally *LaLonde & Gilson*, *supra* note 76.

190. 15 U.S.C. § 1127 (2006).

191. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

that it is distinctive, either inherently or through secondary meaning; and (4) that it is recognized by consumers as symbolic of, or associated with, a source of goods or services.<sup>192</sup> Unregistered trade dress, like other unregistered marks, is protected under the Lanham Act in actions for trademark infringement.<sup>193</sup> Trade dress may also be registered on the principal trademark register, which establishes a presumption of the mark's validity in the case of any future lawsuit.<sup>194</sup> While registration is not a requirement for protection against infringement, it provides some benefits for the owner, such as the ability to sell or license the mark.<sup>195</sup>

Trade dress received its true imprimatur in *Two Pesos, Inc. v. Taco Cabana, Inc.*,<sup>196</sup> in which the Supreme Court held that the overall décor of a Mexican-themed restaurant, including its awnings, wall colors, and menu style could be inherently distinctive and thus protectable as trade dress.<sup>197</sup> The case reverberated far beyond the restaurant industry, as it was the first time the Supreme Court affirmed that the Lanham Act<sup>198</sup> in fact protects trade dress as well as traditional word marks or logos.<sup>199</sup> The Court read the statute very broadly, allowing for the interpretation that almost anything could serve as a “symbol” used in trade to identify the source of goods and thus be entitled to trademark protection.<sup>200</sup>

The Court's expansive view in *Two Pesos* of what constitutes trade dress led to an explosion of trade dress claims in the years that followed.<sup>201</sup> Perhaps in response to this expansion, the Court in *Wal-Mart Stores, Inc. v. Samara Bros, Inc.*<sup>202</sup> limited the reach of trade dress protection by holding that product design can never be inherently distinctive.<sup>203</sup> This means that a product's

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192. See 15 U.S.C. § 1125.

193. See, for example, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992), in which a Mexican-themed restaurant claimed unregistered trade dress in its décor.

194. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209–10 (2000); see also Karen Feisthamel, Amy Kelly & Johanna Sistik, *Trade Dress 101: Best Practices for the Registration of Product Configuration Trade Dress With the USPTO*, 95 TRADEMARK REP. 1374 (2005).

195. See *supra* notes 25–26.

196. 505 U.S. 763.

197. *Id.* at 776.

198. 15 U.S.C. §§ 1051–1127 (2006).

199. See *Two Pesos*, 505 U.S. at 776 (Stevens, J., concurring in the judgment) (pointing out that trade dress appears nowhere in the original Lanham Act, but that the concept comports with the legislative purpose of the act). *Two Pesos* also established that the tests for trade dress are no different than those for other trademark issues. *Id.* at 773 (majority opinion).

200. See Joan L. Dillon & Michael Landau, *Two Pesos v. Taco Cabana: Still More Interesting for What It Did Not Decide*, 94 TRADEMARK REP. 944, 945 (2004).

201. See *id.*

202. 529 U.S. 205 (2000).

203. *Wal-Mart*, 529 U.S. at 216. Dillon and Landau argue that the Court's “statutory hyper literalism” in *Two Pesos* may have set the stage for an “epidemic of trade dress claims,” which in turn led to the

design cannot qualify for automatic protection as a trademark.<sup>204</sup> To obtain trade dress protection for the design of products—as opposed to the packaging they come in, which can still be shown to be inherently distinctive—the claimant must now show that the claimed trade dress has acquired secondary meaning:<sup>205</sup> that the currently consuming public associates the trade dress with a single source.<sup>206</sup> To put it another way, “[I]n the minds of the public, the primary significance of a [mark has to be] to identify the source of the product rather than the product itself” for trade dress protection to attach to a particular product design.<sup>207</sup> However, this limitation has not stopped companies from registering and asserting unusual forms of trade dress, including sounds, scents, and goats on the roof of a restaurant.<sup>208</sup> The field thus remains open for claims of trade dress in restaurant dishes.

## B. Signature Dishes as Trade Dress

Plaintiffs in a few restaurant-knockoff cases have already claimed infringement of the appearance of their dishes among other aspects of their trade dress.<sup>209</sup> These cases form the background of my analysis of the suitability of trade dress law for the protection of creative dishes.

In 2007, Rebecca Charles, chef of Pearl Oyster Bar in Manhattan sued her former sous chef Ed McFarland when he opened a look-alike restaurant, Ed’s Lobster Bar, in the same neighborhood.<sup>210</sup> Charles alleged that McFarland had

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judicially created, and perhaps overly restrictive, standard articulated in *Wal-Mart*. See Dillon & Landau, *supra* note 200, at 945, 976.

204. See *Wal-Mart*, 529 U.S. at 216.

205. See *id.*

206. See *Yankee Candle Co., Inc. v. Bridgewater Candle Co.*, 259 F.3d 25, 44 (1st Cir. 2001); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (4th ed. 2012).

207. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 842, 851 n.11 (1982), *quoted in Wal-Mart*, 529 U.S. at 211, *and Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 766 n.4 (1992).

208. See *LaLonde & Gilson*, *supra* note 76, at 186.

209. See Amended Complaint, *Mini’s Cupcakes, Inc. v. LuAnn’s Cupcakes, Inc.*, No. 2:10-cv-57 (C.D. Utah May 15, 2010); Complaint, *Vaca Brava*, *supra* note 23, at 6–7; Complaint, *Powerful Katinka*, *supra* note 105, at 10 (alleging that the defendant copied exactly the appearance of dishes from the plaintiff’s oyster bar); *see also* *Papa John’s Int’l v. Pizza Magia Int’l*, No. 00-cv-00548 (W.D. Ky. Sept. 12, 2000) (accusing Pizza Magia of imitating Papa John’s pizza crust with a “highly recognizable raised border” and toppings placed under the cheese), *cited in LaLonde & Gilson*, *supra* note 76, at 200 n.61; Counterclaim ¶ 16, *TM Foods of Avon, Inc. v. Jimmy John’s Enters.*, No. 05-CV-0220 (S.D. Ind. June 20, 2005), 2005 WL 516406 (“Jimmy John’s created distinctive subs and distinctive sandwiches . . . using eight inch French bread as its sub rolls and fresh sliced wheat bread for its sandwiches; pulling the guts out of the top of the sub roll and then filling it with condiments . . .”).

210. See Complaint, *Powerful Katinka*, *supra* note 105.

copied the look of the restaurant space, the service style, and, importantly, the “arrangement and presentation of all dishes previously served and now served at Pearl.”<sup>211</sup> The alleged copying included “placing doilies under plated dishes”<sup>212</sup> and “prepar[ing] and plat[ing] dishes in the same manner as Charles does at Pearl.”<sup>213</sup> The parties reportedly agreed in their settlement that McFarland would change certain décor elements and the names of dishes on the menu, but not, apparently, that he would change the dishes served or the plating of the dishes.<sup>214</sup>

Similarly, in *Mini’s Cupcakes, Inc. v. LuAnn’s Cupcakes, Inc.*,<sup>215</sup> the plaintiff alleged trade dress infringement of its “Breakfast at Tiffany’s” cupcake.<sup>216</sup> The alleged trade dress “features vanilla cake, blue cream cheese frosting, and silver and white gems.”<sup>217</sup> The defendant had been offering a virtually identical looking cupcake, named the “Tiffany Jewels” cupcake, to some of Mini’s retailers.<sup>218</sup> Customers on a Utah cupcake lovers’ blog noted how “freakishly alike” the two products were (see Figures 1 and 2).<sup>219</sup>

Finally, in *Vaca Brava, Inc. v. Hacienda Vaca Brava*,<sup>220</sup> a casual sit-down restaurant in Puerto Rico claimed that a competitor had infringed its trade dress in the plating of a meat dish, as well as in its décor and waitress uniforms.<sup>221</sup> The plaintiff, Vaca Brava, developed special steel plates that allowed meat to be served standing at an angle to the plate (see Figure 3) and were “designed to create a first and inescapable impression in the client’s eyes.”<sup>222</sup> This presentation was directly replicated in the defendant’s restaurant, Hacienda Vaca Brava (see Figure 4).<sup>223</sup>

In the following Subparts, I examine how courts and the U.S. Trademark Trial and Appeal Board (which processes trademark registrations) would likely evaluate these claims of trade dress in the plating of restaurant dishes. Because these cases settled, there is little direct precedent, which means an analysis of the potential for these claims will be based on analogy to other nontraditional

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211. *Id.* at 19.

212. *Id.*

213. *Id.* at 10.

214. See Pete Wells, *Chef’s Lawsuit Against a Former Assistant Is Settled Out of Court*, N.Y. TIMES, Apr. 19, 2008, <http://www.nytimes.com/2008/04/19/nyregion/19suit.html>.

215. No. 2:10-cv-57.

216. See Amended Complaint, *supra* note 209; see also *infra* figs. 1–2.

217. Amended Complaint, *supra* note 209, at 4.

218. *Id.* at 3.

219. *Id.* at 4.

220. No. 3:09-cv-01633 (D.P.R. July 8, 2009).

221. See Complaint, *Vaca Brava*, *supra* note 23, at 10–13.

222. See *id.* at 5.

223. See *id.* at 10; see also *infra* figs. 3–4.

trademark cases. There are many moving parts in trade dress law, and the doctrine is still relatively unsettled, so a trade dress claim could be rejected for any number of reasons. However, many nontraditional marks have succeeded in making it onto the register and are thus eligible for protection,<sup>224</sup> which makes clearer analysis important.<sup>225</sup> The doctrinal requirements that trade dress be distinctive and nonfunctional<sup>226</sup> will be the most challenging for signature-dish plaintiffs. I address them in turn.

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224. See LaLonde & Gilson, *supra* note 76 (describing many nontraditional marks that have been claimed in recent years).

225. A few other commentators have suggested briefly that trade dress protection may be available for the plating or appearance of a dish without going into detail as to how plaintiffs would make these claims. See Krizman, *supra* note 11, at 1025–27 (suggesting that signature dishes with strange shapes, like a piece of lasagna shaped like a car, might constitute distinctive trade dress); LaLonde & Gilson, *supra* note 76, at 200 (noting two food product trade dress claims that were never litigated). This Comment is the first to do an extended analysis of how a chef could claim that the plating of a restaurant dish served as trade dress.

226. 15 U.S.C. § 1125 (2006).

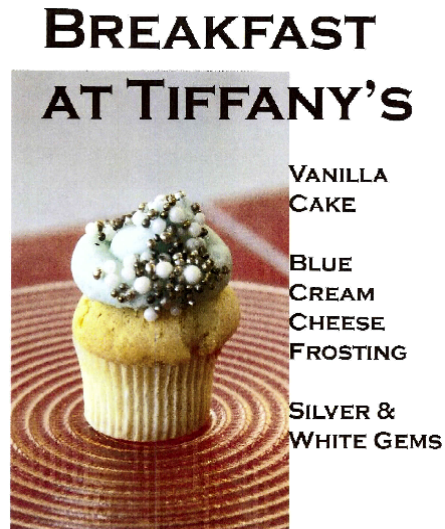
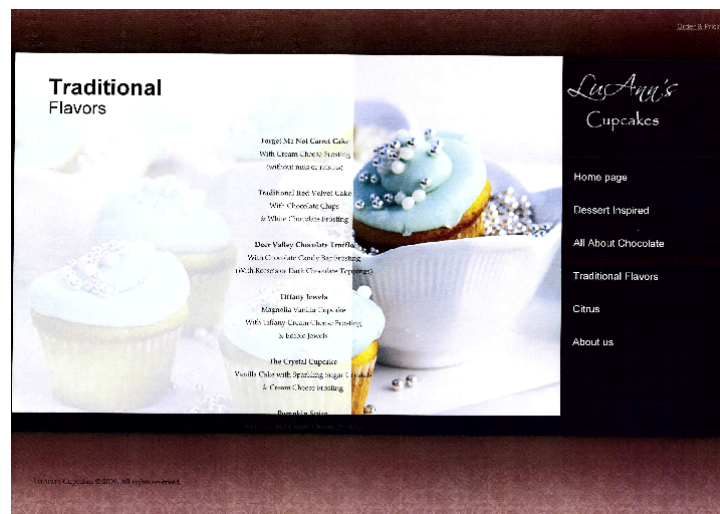
FIGURE 1. Mini's Cupcakes's "Breakfast at Tiffany's" Cupcake<sup>227</sup>FIGURE 2. LuAnne's "Tiffany Jewels" Cupcake, Allegedly Infringing Mini's Cupcakes's Trade Dress<sup>228</sup>227. Amended Complaint, *supra* note 209, at Exhibit A.228. *Id.* at Exhibit B.



FIGURE 3. Vaca Brava's Handcrafted Steel Plate<sup>229</sup>



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229. Complaint, *Vaca Brava*, *supra* note 23, at Exhibit 4.

FIGURE 4. Vaca Brava's "Vaca Brava" Dish (Top);  
Hacienda Vaca Brava's "Toro" Dish (Bottom)<sup>230</sup>



230. *Id.* at 12.

## 1. Distinctiveness

All trademarks must be distinctive. That is, the mark must distinguish the product from others like it, and customers must recognize it as a source identifier.<sup>231</sup> Some marks are inherently distinctive, which means that they serve as a source identifier from the first time they are used.<sup>232</sup> Others develop acquired distinctiveness through use in the marketplace. This acquired type of distinctiveness is known as secondary meaning.<sup>233</sup> Certain types of nonverbal marks may never be inherently distinctive and must always develop secondary meaning to be protectable.<sup>234</sup>

### a. Can Plating Trade Dress Be Inherently Distinctive?

In *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*,<sup>235</sup> the Court drew a bright line between protection of product packaging and protection of product design.<sup>236</sup> The Court found that product design, the configuration of the product itself, can never be inherently distinctive, because “consumer predisposition to equate the feature with the source does not exist.”<sup>237</sup> Product packaging, on the other hand, can sometimes be inherently distinctive because customers are inclined to view a “garish form of packaging” as a symbol of a brand.<sup>238</sup>

The Court acknowledged that the line between product packaging and product design would not always be easy to draw.<sup>239</sup> In cases where it is unclear whether the claimed trade dress is product packaging or product design, the Court

231. See 15 U.S.C. § 1127; *Paramount Pictures Corp.*, 213 U.S.P.Q. 1111 (T.T.A.B. 1982) (examining *Mork & Mindy* logo on t-shirts and asking whether the logo is purely ornamental or serves as an indication of authorization).

232. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000).

233. *Id.*

234. Product design, as mentioned above, may never be inherently distinctive. *Id.* Color alone may never be inherently distinctive either. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 161 (1995).

235. 529 U.S. 205.

236. *Id.* at 215.

237. *Id.* at 213.

238. *Id.* at 212 (giving the example of Tide laundry detergent, whose “squat, brightly decorated plastic bottles” will stand out on store shelves, identifying the product’s source to the consumer).

239. *Id.* at 215 (illustrating this difficulty with the example of a classic glass Coca-Cola bottle: The bottle “may constitute packaging for those consumers who drink the Coke and then discard the bottle, but may constitute *the product itself* for those consumers who are bottle collectors, or part of the product itself for those consumers who buy Coke in the classic glass bottle, rather than a can, because they think it more *stylish* to drink from the former.” (emphasis added)).

suggested that lower courts should err on the side of requiring a showing of secondary meaning to avoid depriving customers of the benefit of competition among products they find useful or aesthetically pleasing.<sup>240</sup>

While the above rules seem relatively clear, the *Wal-Mart* Court complicated things by distinguishing its earlier holding in *Two Pesos*. The Court declared that restaurant décor “seems to [the Justices] not to constitute product *design*,” and thus is capable of being inherently distinctive.<sup>241</sup> Justice Scalia, writing for the unanimous Court, announced that restaurant design is either product packaging or “some *tertium quid*.”<sup>242</sup> Following the Supreme Court’s guidance after *Wal-Mart*, lower courts and the Trademark Trial and Appeal Board (TTAB) have continued to hold that nontraditional marks for restaurants can be inherently distinctive.<sup>243</sup>

The lack of clarity that persists today in cuisine trademark cases can also be attributed to the fact that restaurants sell both services and products. In deciding whether to allow registration of a service mark,<sup>244</sup> the TTAB does not attempt to separate packaging from product design as it does for tangible goods, it simply asks “whether it is reasonable to assume that the consumer is predisposed to view the trade dress as a source indicator” for the service.<sup>245</sup> If so, a nonverbal service mark may be protected as inherently distinctive.

Thus, looking at the trade dress infringement cases and materials described above together, there are three ways in which a court or the TTAB could find that dishes are eligible to be inherently distinctive trade dress: (1) if plating is character-

240. *Id.* at 213, 215; *cf.* *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671 (2010) (holding plaintiff’s whisky bottle seal of red dripping wax inherently distinctive, and thus, by reverse inference, product packaging).

241. *Wal-Mart*, 529 U.S. at 215.

242. *Id.* “*Tertium quid*” is Latin for a third thing. This term has vexed commentators, as it is unclear exactly what Justice Scalia meant to accomplish when he coined the term. For an in-depth discussion of how to solve the *tertium quid* issue, see Lars Smith, *Trade Distinctiveness: Solving Scalia’s Tertium Quid Trade Dress Conundrum*, 2005 MICH. ST. L. REV. 243. Smith suggests that a *tertium quid* could be better explained as “trade distinctiveness” or a design with a “source-identifying meaning” in general. *Id.* at 250.

243. *See* *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776 (1992); *Vasquez v. Ybarra*, 150 F. Supp. 2d 1157 (D. Kan. 2001).

244. A service mark is a trademark that identifies services rather than goods. 17 U.S.C. 1127 (2006).

245. *In re Chippendales USA Inc.*, 90 U.S.P.Q.2d 1535, 1539–40 (T.T.A.B. 2009). The Trademark Trial and Appeal Board (TTAB) has indicated that the product design–packaging dichotomy is inapplicable for service marks. Evaluating the “Cuffs & Collar” uniform worn by Chippendales dancers, for example, the Board stated that “[i]n cases of trade dress used in connection with *services*, it is not feasible to categorize such cases as either a ‘product’ or ‘packaging’ case. Rather, we must simply assess whether it is reasonable to assume that the consumer is predisposed to view the trade dress as a source indicator.” *Id.* (emphasis added).

ized as product packaging; (2) if plating is considered a *tertium quid*; or (3) if the dish functions as a service mark.

### i. Plating as Product Packaging

Under this argument, when a restaurant serves a dish, the food would be considered the product, while its presentation and plating—on specific plates and with precise arrangements—constitute the packaging.<sup>246</sup> The *packaging* could then be protected as inherently distinctive trade dress.

Recall that plating is not merely the arrangement of the elements of a dish but also includes literally the choice of the plate on which the food will be served.<sup>247</sup> Keller's cornet, for example, is served in a "specially designed Lucite holder."<sup>248</sup> Grant Achatz serves dishes in test tubes.<sup>249</sup> Susan Feniger chose the round tin plates used at her restaurant Street to evoke the casual, inexpensive vendors to whom her restaurant pays homage.<sup>250</sup> If a product consists of food, the plate may be considered the "package" it comes in.

The distinction between plating and product design (the dish itself) is harder to make when the container is also made of food, such as Thomas Keller's cornet shaped tuile, which is edible but also holds a filling. In arguing for trade dress protection for his cornet, Keller might be able to show that the shape of the tuile is distinctive and conceptually closer to packaging, as he serves it filled with either salmon or vegetables, depending on the tasting menu.<sup>251</sup>

### ii. Plating as *Tertium Quid*

A court could also find the plating of a dish analogous to restaurant décor and declare it a *tertium quid* because, like restaurant décor, plating is part of what you are paying for when you are in the restaurant but is neither the main product nor its

246. Compare Cunningham, *supra* note 11, at 43 n.216 (speculating that courts would consider food presentation as product design because it "renders food more appealing to diners"), with Krizman, *supra* note 11, at 1027 (suggesting that the appearance of a dish, particularly the use of a decorative ingredient, such as "a glob of grape jelly on top of a piece of lasagna," arguably "act[s] as distinctive trade dress or packaging").

247. See Part I.E.3, *supra*.

248. KELLER, *supra* note 1, at 6.

249. See Louisa Kamps, *Comfort Food From a Rebel Chef*, FOOD & WINE, Dec. 2006, <http://www.foodandwine.com/articles/comfort-food-from-a-rebel-chef>.

250. Interview With Susan Feniger, *supra* note 34.

251. See KELLER, *supra* note 1, at 4; see also *The French Laundry*, NO MEAT, NO PROBLEM (Mar. 25, 2012, 8:09 PM), <http://nomeatnoproblem.com/2012/03/25/the-french-laundry> (reporting on the "tasting of vegetables" meal at The French Laundry, which included an avocado tartare cornet).

packaging. Justice Scalia, during oral argument in the *Two Pesos* case, gave a hint that he considers a restaurant experience to be as much about the ambiance as it is about the food when he said, “I don’t think [restaurant décor] is packaging. I think you’re talking about the substance of what’s being sold. You’re selling atmosphere and food, the two of them. You can have wonderful food in a lousy atmosphere. I’m not going to pay as much money.”<sup>252</sup> Just as diners pay more for a nice ambiance, they will generally pay more for attractively plated food because good plating contributes to their dining experience. Like décor, the plating could be considered neither the product nor the packaging, and thus would be a *tertium quid*. As indicated in the *Wal-Mart* decision, therefore, the plating of dishes, if found to be a *tertium quid*, could be found inherently distinctive and thus protectable as trade dress immediately upon use.

### iii. Signature Dish as a Service Mark

Chefs seeking protection for their culinary creations might also argue that their signature dishes function as service marks and thus may be shown to be inherently distinctive if “the consumer is predisposed to view the trade dress as a source indicator.”<sup>253</sup> A true signature dish distinguishes a particular restaurant experience or chef’s work as a service rather than being a simple food product. Thomas Keller, for example, advertises his cornet as a symbol of his culinary identity: “[Y]ou will see a connection [between The French Laundry and Per Se] in the food, *in the cornet*, which opens all meals as it does at both restaurants . . . .”<sup>254</sup> Customers are thus often encouraged to recognize signature dishes as symbols and identifiers of a restaurant.

Treating signature dishes as service marks<sup>255</sup> would solve the conceptual issues that arise when trying to apply the *Wal-Mart* rule to the restaurant industry. The

252. Oral Argument, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (2012) (No. 91-971), 1992 WL 687823, at \*16 (Scalia, J., speaking).

253. See *In re Chippendales USA, Inc.*, 90 U.S.P.Q.2d 1535, 1539–40 (T.T.A.B. 2009).

254. *About Per Se*, PERSENY.COM, <http://www.perseny.com> (last visited Aug. 30, 2012) (follow “ABOUT PER SE” hyperlink) (emphasis added). Diners choosing the vegetable tasting menu are served a beet cornet.

255. A service mark is simply a mark used to identify the source of services, rather than source of goods. 17 U.S.C. § 1127 (2006). The term “mark” may refer to trademarks or service marks. *Id.* Moreover, “trademark” is often used to refer to service marks as well as trademarks. *Trademarks FAQs—What Is a Service Mark?*, USPTO.GOV, <http://www.uspto.gov/faq/trademarks.jsp> (last visited Sept. 25, 2012). Lars Smith has suggested that *Two Pesos* and *Wal-Mart* may be distinguished by the fact that *Two Pesos* dealt with services, while *Wal-Mart* dealt with goods, and thus trade dress for services may be inherently distinctive, while product design may not be. Smith, *supra* note 242, at 306.

problems arise because the product packaging–product design dichotomy simply does not make sense in the service category. Justice Scalia acknowledged this tension when he declared restaurant décor a *tertium quid*.<sup>256</sup> Since restaurant décor distinguishes the restaurant services as a whole, courts should abandon the product–packaging distinction and acknowledge that it is functioning as a service mark. Likewise, a true signature dish represents the restaurant services as a whole. When Thomas Keller serves cornets as an *amuse bouche* before each meal, he is signaling the quality of service provided at his restaurants. His restaurant websites and cookbooks emphasize how this dish is served at the beginning of meals as a defining aspect of the experience at The French Laundry and Per Se and could thus legitimately be viewed, and protected, as a service mark.

In the case of a signature dish being claimed as a service mark for the restaurant, the chef could demonstrate that the plating is serving as a mark for the chef's services. If the dish is a service mark, it may be found inherently distinctive, provided the customer would likely see it as source indicator upon a first view.<sup>257</sup>

The desserts sold by Mimi's Cupcakes, on the other hand, would likely be considered a product and not a service, as they are sold in retail establishments and not as part of a restaurant service experience. As a product, the cupcake design would have to be evaluated under the *Wal-Mart* standard. That is, Mimi's Cupcakes would have to show either that the frosting functioned as packaging or that the company had established secondary meaning in its specific product design trade dress of frosting and sprinkles on its cupcakes.

#### b. What Is the Appropriate Test for Inherent Distinctiveness?

Even if a court were to hold that a plating trade dress constitutes product packaging, a *tertium quid*, or a service mark, and thus that it could be inherently distinctive, there is further confusion about what the correct legal standard is for proving inherent distinctiveness in nonverbal marks. Some courts attempt to use the *Abercrombie* categories,<sup>258</sup> which classify word marks as fanciful, arbitrary, suggestive, descriptive, or generic, and determine their distinctiveness accordingly.<sup>259</sup>

256. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 215 (2000).

257. *See Chippendales USA*, 90 U.S.P.Q.2d at 1539–40.

258. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

259. “Word marks that are ‘arbitrary’ (‘Camel’ cigarettes), ‘fanciful’ (‘Kodak’ film), or ‘suggestive’ (‘Tide’ laundry detergent) are held to be inherently distinctive,” whereas descriptive or generic marks are only protectable upon a showing of secondary meaning. *Wal-Mart*, 529 U.S. at 210–11 (explaining Judge Friendly’s “now famous test”); *see, e.g., Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60, 70 (S.D.N.Y. 2003) (finding, based on *Wal-Mart*, that interior décor trade dress is not product

However, other courts, the TTAB, and scholars have pointed out that *Abercrombie's* scheme is meaningless when applied to nonverbal marks, because shapes, smells, and other nonverbal marks that are not descriptive, in that they do not describe or bring to mind the item being sold, may nonetheless be far from distinctive—no consumer would see them as distinguishing the good.<sup>260</sup> Thus, many courts and the TTAB use the *Seabrook* test,<sup>261</sup> a modification of *Abercrombie* designed to evaluate the inherent distinctiveness of nonverbal marks.<sup>262</sup> Applying *Seabrook* to the plating of dishes would require courts to ask whether customers are inclined to recognize the presentation of the food as source identifying. Analyzed from the perspective of a customer upon first consumption, the relevant questions are

- (1) “whether the [mark] is a common basic shape or design,” in which case it would not be inherently distinctive; *or*
- (2) “whether the [mark] is unique or unusual in the particular field,” in which case it would be inherently distinctive; *and*
- (3) “whether the [mark] is a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods or services viewed by the public as a dress or ornamentation for the goods or services,” in which case it would not be inherently distinctive; *or*
- (4) “whether the [mark] is capable of creating a commercial impression distinct from any accompanying words,” in which case it would be inherently distinctive.<sup>263</sup>

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packaging and should be analyzed “under the product packaging standard for inherent distinctiveness set forth in this Circuit by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc.*”). *Best Cellars* misleadingly refers to *Abercrombie* as if it were a product packaging case, when in fact it was a straightforward trademark case about the word mark “Safari” and its use in apparel advertisements. See *Abercrombie*, 537 F.2d at 7. Of course, the Supreme Court itself indicated in dicta in *Two Pesos* that the Fifth Circuit “was quite right . . . to follow the *Abercrombie* classifications consistently” in determining whether a restaurant’s trade dress was inherently distinctive, as the statute makes no distinction between verbal marks and trade dress. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 773 (1992).

260. See 1 MCCARTHY, *supra* note 206, § 8:13 (“Only in some cases does such a classification make sense. For example, a tomato juice container in the shape of a tomato might be classified as ‘descriptive’ of the goods. While a commonly used, standard sized can used as a tomato juice container is not ‘descriptive’ of the goods, it is hardly inherently distinctive. The word spectrum of marks simply does not translate into the world of shapes and images.”); Dillon & Landau, *supra* note 200, at 946 (“The courts have continued to apply the *Abercrombie & Fitch* taxonomy to types of marks to which the *Abercrombie & Fitch* categories just don’t fit.”).

261. *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342 (C.C.P.A. 1977).

262. For example, the TTAB adopted the *Seabrook* test to evaluate service marks. *Chippendales USA*, 90 U.S.P.Q.2d at 1539.

263. *Id.*



Applying this type of analysis to signature dishes would allow courts to distinguish among various plating claims more easily. For example, serving a cupcake topped with frosting and sprinkles is common, so customers are unlikely to see this form of plating as representing a single source. Serving meat standing at an angle to the plate, as in the Vaca Brava dish, is not common or basic, and thus might be considered source identifying and distinctive. However, Vaca Brava's bull horn meat presentation might also be considered a refinement of barbecuing beef on skewers, in which case it would not be considered to be inherently distinctive. Truly innovative presentations, like Achatz's glass tube holding burning cinnamon sticks below hollows of meat, on the other hand, are both so unlike any other restaurant dish and so unique from any other plating "ornamentation" that they should be found to be inherently distinctive.

As described above, only truly innovative or unusual presentations would be considered inherently distinctive using the *Seabrook* test. Other courts may reject the argument that plating is analogous to product packaging, a *tertium quid*, or a service mark, and would instead consider it product design. If it is product design, the dish by definition could not be found inherently distinctive and would not be immediately protectable. Even if the plating were considered product packaging, a *tertium quid*, or a service mark, it is likely that a court would not find the presentation inherently distinctive. If the trade dress is not inherently distinctive, the proponent will have to show that the plating trade dress has developed secondary meaning.

### c. Secondary Meaning

Any mark that is not inherently distinctive is protectable only if it has acquired secondary meaning—that is, consumers recognize it as serving to identify a single source.<sup>264</sup> This requirement is not necessarily, as some have suggested, a death knell for a plating trade dress claim. However, it will force those who claim such protection to make a strong case that the public associates their trade dress

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264. Secondary meaning, or acquired distinctiveness, arises through use. Secondary meaning attaches when, despite a lack of inherent distinctiveness of the mark, the public has come to associate the mark with the source of the product, and "in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself." *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163 (1995) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982)).

with a particular source, often by referring to advertising, customer surveys, or third-party sources.<sup>265</sup>

Color marks, for example, can never be inherently distinctive, and thus must always be shown to have acquired distinctiveness.<sup>266</sup> This requirement has made it difficult for companies to prevail in registering or claiming infringement of color marks, but it has not completely foreclosed protection.<sup>267</sup> Recently, a federal district court found that Wolf Appliances had shown sufficient evidence of secondary meaning to obtain a preliminary injunction against a competitor using knobs of a similar color and shape.<sup>268</sup> The court found that Wolf's federal trademark registration had created a presumption of secondary meaning.<sup>269</sup> During the registration process, Wolf had provided the reluctant TTAB examiner with customer surveys, advertising, and news articles that indicated that customers did not find the red knobs to be "merely an 'ornamental feature'" but that the knobs had acquired secondary meaning instead.<sup>270</sup> For example, "[i]n 2001, an article in *The New York Times* stated: 'Wolf [is] known for its red knobs,'" and "[a] 2006 article on Kitchens.com entitled *Wolf v. Viking: What's the Difference Between Wolf and Viking?*, noted: 'One thing your money can't get with Viking: Wolf's trademark red knobs, considered a status symbol in some circles.'"<sup>271</sup>

Likewise, a chef who is well known for a particular dish or two, like Thomas Keller is for his cornets and Oysters and Pearls, could submit articles suggesting that he is known for these dishes. Restaurants also advertise their signature dishes, as Keller does on his website for The French Laundry and Per Se. Restaurants already have an incentive to promote their signature dishes, as they draw customers to their restaurant and form an important part of the chef's or restaurant's brand.<sup>272</sup>

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265. See, e.g., *Wolf Appliance, Inc. v. Viking Range Corp.*, 686 F. Supp. 2d 878, 888–89 (W.D. Wis. 2010) (using newspaper articles and advertisements to show secondary meaning).

266. *Qualitex*, 514 U.S. at 166 (finding that green-gold color on dry cleaning presses had acquired distinctiveness but that color could not be inherently distinctive).

267. *LaLonde & Gilson*, *supra* note 76, at 202.

268. *Wolf Appliance*, 686 F. Supp. 2d at 887 (finding that registration created presumption of valid mark, referring to 15 U.S.C. §§ 1057(b) and 1115(a)).

269. *Id.*

270. *Id.* at 883.

271. *Id.* at 883–84.

272. See Mike Dempsey, *NRN 50: Branding Craveability*, NATION'S RESTAURANT NEWS (Jan. 21, 2011), <http://www.nm.com/article/nm-50-branding-craveability> (highlighting signature dishes at chain restaurants, such as the Outback Steakhouse's "Bloomin' Onion"). Signature dishes are so important to some restaurant chains that the chains go to great lengths to promote them and to maintain strict quality control. *Id.* Dempsey reports that Outback Steakhouse worked with food scientists to find the ideal breed of onion for its fried appetizer and contracts with suppliers throughout the United States to consistently meet customer demand for this "menu driver." *Id.*

In the context of a chef's claim for trade dress protection of her signature dish, these advertisements would have the added benefit of increasing the likelihood that the dish will acquire secondary meaning. Being able to point to such advertisement would help a chef demonstrate that diners see the dish as identifying the particular source of the restaurant services and that the dish had thus acquired secondary meaning.

#### d. Vague or Generic Trade Dress Cannot Be Distinctive

By arguing that a chef could claim trade dress protection in the plating of a dish, I do not mean to suggest that trade dress law would protect a mere concept or style of plating.<sup>273</sup> Business or merchandising ideas are not protectable as trade dress.<sup>274</sup> Therefore, for example, a court held that a wine store that included in its alleged trade dress a method of arranging wine by taste could not obtain trade dress over this marketing idea alone because granting it protection would create a monopoly in "operating retail stores that categorize wines by taste."<sup>275</sup> However, the same wine store was found to have developed a valid, inherently distinctive trade dress in the specific impression formed by its "wall of wine," described by the court as

color-coded, iconographic wall signs identifying eight taste categories above single display bottles on stainless-steel wire pedestals which run along the store perimeter, above identical color-coded textually formatted square shelf-talkers, above vertical arrays of nine glowing bottles stacked horizontally, above a strip of cabinets or drawers which extend to the floor.<sup>276</sup>

Thus, even though trade dress is sometimes broadly described as the "overall image or appearance" of a product or its packaging, "the plaintiff must precisely articulate the specific elements that comprise its distinct trade dress, so that courts

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273. See *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 382 (2d Cir. 1997) (refusing to acknowledge the style of a line of furniture as trade dress because "[i]f the law protected style at such a level of abstraction, Braque might have prevented Picasso from selling cubist paintings in the United States").

274. See generally 1 MCCARTHY, *supra* note 206, § 8:6.

275. *Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60, 80 (S.D.N.Y. 2003).

276. *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 452 (S.D.N.Y. 2000). This description was cited affirmatively in a later case alleging a different knockoff of the same wine store. See *Wine Made Simple*, 320 F. Supp. 2d at 72.

can evaluate claims of infringement and fashion relief that is appropriately tailored to the distinctive combination of elements that merit protection.”<sup>277</sup>

The reasoning behind this demand for specificity is twofold. One is to assuage monopolization worries such as those expressed in the “wall of wine” case above. Another is that when an alleged trade dress is described very generally, consumers are unlikely to view it as a source identifier. For example, Andy Warhol’s estate sued to prevent publication of a calendar with pictures in his pop-art style, claiming a trademark in the style of the silk screens.<sup>278</sup> The court rejected this argument because the pictures themselves had never been used as a trademark to identify the source of a good. As the court stated, “To prevail, Plaintiffs must show not that these images have come to signify Andy Warhol as the artist, but Plaintiffs as the source of the product—the calendars.”<sup>279</sup>

Similarly, to restaurant connoisseurs, the style of using culinary foams on dishes might immediately draw Ferran Adrià to mind. Though Adrià is likely as well known in the culinary world for his foams<sup>280</sup> as Warhol is in the art world for his prints,<sup>281</sup> Adrià would not be able to claim trade dress protection in the plating style of using foam, and he could not stop other chefs from also using foam in their own plating because such a claimed trade dress would be too general. However, if Adrià had a signature dish that incorporated foam in a specific way, and he used this dish to distinguish his brand, he could claim trade dress in the particular arrangement of foam and other elements on the plate, so long as customers recognized it as a signature dish meant to identify the “Adrià brand.”<sup>282</sup> Thomas Keller’s

277. *Wine Made Simple*, 320 F. Supp. 2d at 69. Best Cellars, for example, described its alleged trade dress as a combination of fourteen specific elements, which were distilled by a different court in *Grape Finds* into the description of the “wall of wine” cited above. *Id.* at 71; *Grape Finds*, 90 F. Supp. 2d at 452.

278. See *Hughes v. Design Look, Inc.*, 693 F. Supp. 1500, 1501–03 (S.D.N.Y. 1988); 1 MCCARTHY, *supra* note 206, § 8:6.

279. *Hughes*, 693 F. Supp. at 1507.

280. Adrià makes these foams by “aerat[ing] sauces with a nitrous-oxide siphon that is ordinarily used to whip cream . . . .” *Times Topics, Ferran Adrià*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/a/ferran\\_adria/index.html](http://topics.nytimes.com/top/reference/timestopics/people/a/ferran_adria/index.html) (last visited Sept. 24, 2012).

281. See *id.* (listing “foam” as one of Adrià’s two most famous and influential creations); Elizabeth Gudrais, *The Harvard Center for Gastrophysics?*, HARV. MAG., Mar.–Apr. 2009, at 13, 13, *available at* <http://harvardmagazine.com/2009/03/the-harvard-center-gastrophysics> (describing Adrià’s foams as “perhaps his most famous invention”).

282. In fact, over the years, Adrià has used foam less and less, and it is possible that he has no signature dish whatsoever. Indeed, the “signature feature” of his restaurant El Bulli was its constant change and innovation. See Mark Bittman, *Adrià May Be Relaxing, but His Obsessions Are Still Abuzz*, N.Y. TIMES, Sept. 13, 2006, <http://www.nytimes.com/2006/09/13/dining/13ferr.html?ref=ferranAdria>.

cornets, which *are* used as a symbol of his restaurant brand, would accordingly not fail as a mere style of presentation but instead be protectable as a valid trade dress.<sup>283</sup>

Moreover, if a particular form of plating claimed to be trade dress were standard within the industry, it would be rejected as being generic and thus not protectable. Trade dress does not cover generic designs because doing so would stifle competition by allowing common designs to be made only by one source.<sup>284</sup> A court in Hawaii found, for example, that a cookie design was too common to be distinctive, noting that the combination of design elements was dictated by the method of making cookies and that “the rectangular shape is a classic shape for shortbread.”<sup>285</sup> A partial chocolate covering at a diagonal angle did not add enough distinctiveness to sufficiently distinguish the design from others, as many cookies are chocolate dipped.<sup>286</sup> The claimed trade dress was thus “nothing more than a non-distinctive combination of a few basic, common design elements.”<sup>287</sup> Likewise, the appearance of the Caesar salad at Pearl Oyster Bar would likely be found to be generic, as placing salad in a bowl and topping it with croutons is a common way of serving it. The design Mimi’s Cupcakes uses is also likely to be found generic. After all, there is nothing unusual about topping a cupcake with bright frosting and sprinkles, and the particular combination of turquoise cream cheese and silver sprinkles is likely too basic to be distinctive.<sup>288</sup>

While some might reasonably fear that it would be difficult to define distinctive trade dress in plating adequately, consider David Chang’s highly detailed instructions for composing his signature dish at Momofuku Ko, “eggs-in-an-egg”:

We serve this dish in a very wide, very shallow bowl, almost like a concave plate. Putting together the dish, we imagine the middle of the plate as a circle: the right half of the circle should be onion soubise, two-thirds of the left half should be potato chips, and the remainder—the part of the circle that will face the diner—a little pile of fines herbes salad. Make a small indentation into the onions on each plate, using the back of a spoon, and nestle an egg in it. Split the egg open a little more

283. Query, however, whether a court might find the cornet to be functional, and thus not protectable, because it holds a filling. See *infra* Part III.B.2.

284. *Yurman Design, Inc. v. Paj, Inc.*, 262 F.3d 101, 114 (2d Cir. 2001) (holding that the plaintiff’s failure to identify which elements of its jewelry design formed its claimed trade dress required dismissal of its Lanham Act claim as a matter of law).

285. *Big Island Candies, Inc. v. Cookie Corner*, 269 F. Supp. 2d 1236, 1247–48 (D. Haw. 2003).

286. *Id.*

287. *Id.* at 1247.

288. While the complaint in the cupcake case does provide some examples of the public noticing the resemblance between the two companies’ cupcakes, there is no evidence that the public thought that either cupcake had a particularly unusual design.

than halfway with a small knife, and then use a small spoon to sneak the caviar into the egg and settle it into the yellow river of yolk spilling out onto the plate. Add a few grains of smoked salt on top of each egg and a tiny splash of sweet potato vinegar over by the onions.<sup>289</sup>

By comparison, Frito-Lay successfully registered a trade dress in a shape of tortilla chips that is described only as “the bowl-shaped configuration of the goods,” and is accompanied by a basic sketch.<sup>290</sup> The sketches many chefs make for their plating ideas may be much more specific (see Figure 5) and could thus easily translate into official designs submitted to, and approved by, the U.S. Patent and Trademark Office (USPTO).<sup>291</sup> And though restaurant dishes, unlike manufactured food products, must be individually assembled, skilled cooks can consistently recreate a chef’s design and thus preserve the uniqueness of the claimed trade dress.<sup>292</sup> Indeed, at many high-end restaurants the plating is so precise that cooks use tweezers to assemble the elements of the dish.<sup>293</sup>

However, there is also a downside for would-be trade dress holders in defining their trade dress too precisely. The more specific the combination of elements, the more likely it is to be found inherently distinctive. But a more specific description also “makes it correspondingly difficult for a plaintiff to prove likelihood of confusion. . . . [D]efendant-competitors who have some similar elements as well as noteworthy dissimilar elements in their trade dress may be able to show that the specific combination of elements that *they* use *also* constitutes protectable trade dress.”<sup>294</sup> If both parties claim a distinctive, protectable trade dress, differences contained in specific descriptions will make it difficult for either side to demonstrate a likeliness of confusion among consumers.<sup>295</sup>

289. See CHANG & MEEHAN, *supra* note 34, at 254.

290. CORN-BASED SNACK FOODS, NAMELY, TORTILLA CHIPS, Registration No. 2,766,278.

291. See, e.g., *From Paper to Plate: Recipe Sketches From Alinea and Le Bernardin*, SAVEUR, <http://www.saveur.com/gallery/Chef-Sketches> (last visited Sept. 25, 2012). Chef Grant Achatz’ sketch in Figure 7 is so detailed that it could likely form the basis of a product design registration submission.

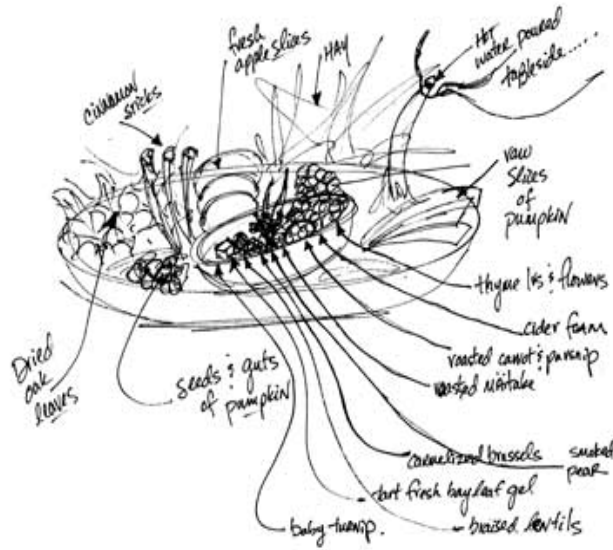
292. The Cheesecake Factory, a large national chain restaurant, ensures consistent presentation across its many locations by providing for its line cooks precise descriptions and photographs of the presentation of each dish and hiring kitchen managers who, among other things, oversee the plating. See Atul Gawande, *Big Med*, NEW YORKER, Aug. 13, 2012, [http://www.newyorker.com/reporting/2012/08/13/120813fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2012/08/13/120813fa_fact_gawande).

293. See Strand, *supra* note 132.

294. *Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60, 72 (S.D.N.Y. 2003) (second emphasis added). Likelihood of confusion is a required element to prove trademark infringement, see *infra* Part III.B.

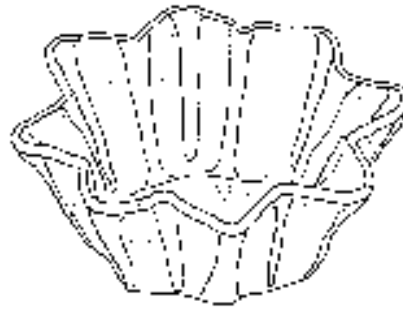
295. See *id.*

FIGURE 5. Chef Grant Achatz's Brainstorming Sketch (Top) and Photo (Bottom) of Final Dish "Roasted Maitake Mushrooms With Chestnuts, Roasted Vegetables, and Autumnal Aromas"<sup>296</sup>



296. *From Paper to Plate: Recipe Sketches From Alinea and Le Bernardin*, *supra* note 291.

FIGURE 6. Sketch of Frito-Lay Tortilla Chip Snack From Application for Trademark Registration on Principal Register<sup>297</sup>



## 2. Functionality

Another statutory requirement besides distinctiveness is that trade dress must be “nonfunctional.”<sup>298</sup> If the trade dress configuration is “essential to the use or purpose of the product, or if it affects the cost or quality of the product” it is functional and may not be trademarked.<sup>299</sup>

Functionality of an alleged trade dress is both a bar to registration and a defense against a charge of trademark infringement.<sup>300</sup> The policy rationales underlying the functionality bar to trade dress protection are (1) to protect free competition and (2) to maintain the patent system as the place to obtain protection for utilitarian ideas.<sup>301</sup> At the heart of the nonfunctionality requirement is the notion that “there exists a fundamental right to compete through imitation of a competitor’s

297. CORN-BASED SNACK FOODS, NAMELY, TORTILLA CHIPS, Registration No. 2,766,278.

298. For years, courts imposed a judge-made rule that they would not protect trade dress that was functional. *See, e.g., In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1336 (C.C.P.A. 1982). In 1998 and 1999, this rule was formally incorporated in the Lanham Act. 15 U.S.C. § 1125(a)(3) (2006).

299. *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001) (“[B]eyond serving the purpose of informing consumers that the sign stands are made by MDI (assuming it does so), the dual-spring design provides a unique and useful mechanism to resist the force of the wind.”); *Inwood Labs., Inc. v. Ives Labs., Inc.* 456 U.S. 844, 850 n.10 (1982). For more on functionality after *Traffix*, see Amy B. Cohen, *Following the Direction of Traffix: Trade Dress Law and Functionality Revisited*, 50 IDEA 593, 639 (2010).

300. 15 U.S.C. § 1125(a)(3); TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 24, § 1202.02(a)(vi).

301. 1 MCCARTHY, *supra* note 206, § 7:63.



product, which right can only be temporarily denied by the patent or copyright laws.”<sup>302</sup>

This does not mean, however, that a valid trade dress may not contain any functional elements. Rather, trade dress law protects the entire effect created by the many elements that compose a trade dress, even if some of them are individually functional.<sup>303</sup> This is highlighted in restaurant décor cases, where trade dress protects the combination of several elements that on their own may be functional.<sup>304</sup> For example, in *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*,<sup>305</sup> many of the individual elements of the claimed trade dress—such as oversized condiment dispensers on each table—were functional, yet the trade dress as a whole was not functional because it did not limit activity in the market so as to significantly reduce competition.<sup>306</sup> Likewise, the particular arrangement of dining room elements in *Two Pesos* would not hinder another upscale Mexican restaurant from opening with a different combination of functional dining room elements and thus was not considered to be functional.<sup>307</sup>

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302. *Morton-Norwich*, 671 F.2d at 1336.

303. See *Motorola, Inc. v. Qualcomm, Inc.*, 45 U.S.P.Q.2d 1558, 1568 (S.D. Cal. 1997), *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (“The issue is not whether the ‘individual elements are functional but whether the whole collection of elements taken together are [sic] functional.’” (alteration in original) (quoting *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819 (9th Cir. 1993))); *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 453 (S.D.N.Y. 2000) (“[A]t least some of the elements of [the wine store’s] trade dress are not commonly used or functional, which is all that is required under the law.”).

304. Consider, for example, the following trial court jury instruction in *Two Pesos* on the issue of trade dress functionality:

Even if the trade dress is made up of individual elements, some of which serve a functional purpose, the trade dress may be protectable so long as the combination of these individual elements which define Taco Cabana’s trade dress taken is arbitrary. On the other hand, if you find that Taco Cabana’s trade dress taken as a whole must be used by others in order to compete in the Mexican fast-food restaurant business, then you should find that Plaintiff’s trade dress is functional and not protectable.

[T]he inquiry into whether Taco Cabana’s trade dress is functional or non-functional should not be addressed to whether individual elements fall within the definition, but whether the whole collection of elements taken together are functional or non-functional.

*Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1119 (5th Cir. 1991), *aff'd sub nom. Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). While the question of functionality was presented to the Supreme Court, certiorari was granted only as to the question of whether trade dress that is inherently distinctive can be protected without a showing of secondary meaning. See *Two Pesos*, 505 U.S. at 767; Dillon & Landau, *supra* note 200, at 961.

305. 826 F.2d 837 (9th Cir. 1987).

306. *Id.*

307. See *Taco Cabana*, 932 F.2d at 1119.

Most courts and the USPTO evaluate functionality using the *Morton-Norwich* factors, which ask (1) whether there is a utility patent for the product that discloses utilitarian advantages of the design; (2) whether the applicant's advertising touts the utilitarian advantages of the design; (3) whether alternative, equally functional designs are available to competitors; and (4) whether the design results from a comparatively simple or inexpensive method of manufacture.<sup>308</sup>

Applying this standard, a court denied trade dress protection to a manufacturer of frozen French fries when the manufacturer asserted trade dress in the curlicue shape of its fries because the design of the fries resulted in higher yield at a lower cost:

[T]he shape of this product configuration provides several advantages to the customer. These advantages include superior yield, lower portion cost, better cosmetic plate coverage, and advantages realized in the cooking process that result in improved flavor, faster service time and better heat penetration. . . . [T]he configuration of the curlicue fries affects the cost and quality of the product and renders it functional.<sup>309</sup>

Following this logic, a chef would not be allowed to claim trade dress protection and create a monopoly over a form of presentation that made it less expensive to serve a particular type of food. However, while some restaurant dish plating is designed to save the restaurant money, many forms of distinctive plating will actually result in more food waste, rather than less, and are employed more for presentation and branding than for their functionality and utilitarian value. For example, to serve a perfect round of foie gras, a chef cuts circles out of pâté that has been spread on a sheet tray.<sup>310</sup> Choosing this shape results in waste at the corners around every circle and provides no utilitarian advantage.

When the decision regarding the size or shape of a food product is dictated by practical concerns, the product will be considered functional and ineligible for trade dress protection. For example, the size of "Dippin' Dots" ice cream was found to be functional because the plaintiff's own materials "emphasized how the quick freezing of tiny round beads was crucial to the taste and consistency of the product."<sup>311</sup>

One factor that might cause courts to be more inclined to grant trade dress protection to the plating of restaurant dishes than to the curlicue fries or spherical

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308. *In re Morton-Norwich Prods, Inc.*, 671 F.2d 1332 (C.C.P.A. 1982); see 1 MCCARTHY, *supra* note 206, § 7:75 (providing examples of the "many courts [that] agree [with the author] that the availability of alternative designs is a very important evidentiary key to unlocking the mystery of the functionality puzzle"); Feisthamel, Kelly & Sistek, *supra* note 194, at 1378.

309. *Universal Frozen Foods, Co. v. Lamb-Weston, Inc.*, 697 F. Supp. 389, 392 (D. Or. 1987).

310. I observed this during a tour of The French Laundry kitchen in May 2006.

311. *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1206 (11th Cir. 2004).

ice cream mentioned in the cases described above is that the fries and ice cream cases are about individual food items, whereas the plating of a restaurant dish generally comprises many different items placed in a distinct arrangement. Plating is thus more like the arrangement of functional elements within a dining room that compose a restaurant's protectable décor trade dress. Such food arrangements via plating are rarely comparatively simple or inexpensive—in fact, it will generally take longer and require more attention to plate food in a distinctive arrangement.<sup>312</sup> In plating cases, there will also generally be other equally functional designs available to other chefs—thus making successful trade dress claims more likely—because there are myriad ways to arrange a plate of food.

However, evaluating plating decisions for functionality might lead courts down the confusing path of trying to evaluate aesthetic functionality, a concept that many courts have rejected.<sup>313</sup> Read broadly, this rule would reject as functional any design that renders a product commercially attractive, leading to the perverse result of only allowing unattractive designs to serve as trademarks.<sup>314</sup> Recently, Judge Easterbrook rejected a broad application of aesthetic functionality when finding that the circular design of a thermostat was not aesthetically functional simply because some customers might prefer its look.<sup>315</sup> According to Easterbrook, “It would always be possible to show that *some* consumers like the item's appearance; then the corner jewelry store could emulate the distinctive Tiffany blue box, which

312. See Strand, *supra* note 132 (describing how chefs use tweezers to plate dishes carefully).

313. See 1 MCCARTHY, *supra* note 206, § 7:80 (“[T]he majority of courts have rejected the theory of aesthetic functionality with varying degrees of zeal.”); TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 24, § 1202.02(a)(vi) (“The concept of ‘aesthetic functionality’ (as opposed to ‘utilitarian functionality’) has for many years been the subject of much confusion.”); Dana Beldiman, *Protecting the Form but Not the Function: Is U.S. Law Ready for a New Model?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 529, 557 (2004) (“Aesthetic functionality is deemed to be one of the least well understood concepts in IP law.”); Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress Protection*, 83 CORNELL L. REV. 1116, 1160 (1998). But see *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001) (suggesting in dicta the continuing vitality of the aesthetic functionality doctrine); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, No. 11-3303-cv, 2012 WL 3832285, at \*9 (2d Cir. Sept. 5, 2012) (explaining that, while other circuits have rejected the doctrine, the Second Circuit uses a “[m]odern [f]ormulation of the [a]esthetic [f]unctionality [d]octrine” that denies trademark protection if to do so would “significantly hinder competition”).

314. See *Pagliero v. Wallace China Co.*, 198 F.2d 339, 343 (9th Cir. 1952) (holding that a floral design on china could not serve as a trademark for the china because the attractive pattern was one of its selling features); cf. *Keene Corp. v. Paraflex Indus., Inc.*, 653 F.2d 822, 825 (3d Cir. 1981) (rejecting a broad “commercial desirability” definition of functionality: “[I]t provides a disincentive for development of imaginative and attractive design. The more appealing the design, the less protection it would receive.”).

315. *Eco Mfg. LLC v. Honeywell Int'l, Inc.*, 357 F.3d 649 (7th Cir. 2003).

would lose its ability to identify origin. ‘Beauty lies in the eye of the beholder’ therefore cannot by itself establish functionality of trade dress.”<sup>316</sup>

The Restatement of Unfair Competition also offers a more limited version of the concept, which is similar to the fourth *Morton-Norwich* factor for utilitarian functionality: “[A] design is functional because of its aesthetic value only if it confers a significant benefit that cannot practically be duplicated because of the use of other designs.”<sup>317</sup>

The aesthetic functionality concept has recently been invoked to describe functionality that is properly an issue of utility of color or shape,<sup>318</sup> such as a black outboard engine for boats (no other color would match as many boats),<sup>319</sup> or the color blue for a water filter (no other color is uniquely associated with clean water).<sup>320</sup> Thus, if plating trade dress were found functional, it would likely be for reasons that are actually utilitarian, such as preventing a trade dress claim in the use of a color that is associated with the flavor of the food.<sup>321</sup>

For example, in ice cream the color brown generally indicates chocolate flavor, pink indicates strawberry flavor, and white indicates vanilla. Thus, the color element of an ice cream manufacturer’s asserted trade dress has been held functional because it indicates flavor, though it might also be considered attractive.<sup>322</sup> An arbitrary or decorative use of color, such as the turquoise blue frosting used on the Breakfast at Tiffany’s cupcake, however, would not be precluded from receiving trade dress protection for reasons of “aesthetic functionality” simply because customers are attracted to blue frosting, given that other cupcake makers could use a different attractive color. But if the color of the frosting communicated its flavor, it would likely be considered functional and thus not protectable as trade dress.<sup>323</sup>

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316. *Id.* at 654.

317. RESTATEMENT (THIRD) UNFAIR COMPETITION § 17, cmt. c (1995).

318. 1 MCCARTHY, *supra* note 206, § 7:81.

319. *See* Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527, 1533 (Fed. Cir. 1994).

320. *See* Sun Water Sys., Inc. v. Vitasalus, Inc., No. 4:05-CV-574-Y, 2007 WL 628099, at \*10 (N.D. Tex. Feb. 28, 2007) (“Blue is the only color that is almost exclusively associated with water, and routinely blue is more specifically connected with water that is clear, pure, healthy, and beautiful.”).

321. *See* Dippin’ Dots, Inc. v. Frosty Bites Distribution, LLC, 369 F.3d 1197, 1206 (11th Cir. 2004).

322. *Id.* at 1204.

323. Unusual flavor indicators might still receive trade dress protection. Sprinkles Cupcakes, for example, has trademarked its “modern dot,” which consists of two edible concentric circles placed on top of the cupcake, the color combination of which indicates the flavor of the cupcake. Registration No. 3,224,075. However, the color combinations of the dots do not always correspond to generally accepted indicators of flavor—that is, a white dot inside a red dot indicates a chocolate marshmallow cupcake. While the dots thus do have some communicative utility, there are many other ways a cupcake bakery could communicate flavor, and the dots will likely not be considered functional. *See* Complaint, Sprinkles Cupcakes, Inc. v. Famous Cupcakes, Inc., No. 2:08-cv-05349 (C.D. Cal. Aug.

Thus, if the plating of a dish were sufficiently distinctive, well defined, and nonfunctional, it could be registered as trade dress. Yet enforcement of the trade dress against infringing copies requires that the plaintiff prove more than just that a valid trade dress exists.

### 3. Enforcement of Plating Trade Dress Against Infringement

In the previous Subpart, I explained how the plating of a signature dish could qualify as trade dress either for purposes of trademark registration or as the basis for an infringement suit based on unregistered trade dress. But recognizing that plating can serve as trade dress is only one aspect of a successful trade dress infringement suit. And while the recent expansion of nontraditional marks that have been registered as trademarks makes it quite likely that the plating of a signature dish that is sufficiently unique and well defined will obtain registration,<sup>324</sup> enforcing the protected status of the mark against another restaurant's use will be more difficult.<sup>325</sup>

To prevail in a trademark infringement case, a plaintiff must prove that the defendant's use of the protected mark is likely to cause customer confusion regarding the source or sponsorship of the product.<sup>326</sup> In most infringement cases involving restaurant dishes, it is unlikely that plating trade dress will cause actual customer confusion as to the origin of the product because once in one restaurant, the customer will not think that a chef from a different restaurant prepared the dish.<sup>327</sup>

For the likelihood-of-confusion analysis, however, "a consumer need not believe that the owner of the mark actually produced the item and placed it on the market,"<sup>328</sup> because the Lanham Act also protects against confusion regarding the association or sponsorship of a good or service.<sup>329</sup> In this context, there are two different types of confusion. If a customer thinks that a chef known for a signature dish has sponsored or approved of the restaurant in which the knockoff dish is

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14, 2008); Kimi Yoshino, *A Point of Cupcake Contention*, L.A. TIMES, Aug. 21, 2008, <http://articles.latimes.com/2008/aug/21/business/ft-cupcakewar21>.

324. See LaLonde & Gilson, *supra* note 76, for examples of the range of unusual nontraditional marks that have made it onto the register or have been upheld as protectable trade dress in courts of law.

325. See *id.*; see also Cunningham, *supra* note 11, at 44–45 (suggesting that there is no customer confusion regarding copy-cat dishes because such copying is akin to plagiarism, not palming off).

326. Lanham Act, 15 U.S.C. § 1125(a)(1) (2006).

327. See Cunningham, *supra* note 11, at 44–45.

328. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204 (2d Cir. 1979).

329. 15 U.S.C. § 1125(a)(1).

being served, there is regular customer confusion.<sup>330</sup> If the customer thinks that the infringer is the source of the dish served in the original chef's restaurant, there is so-called reverse confusion, which can also have adverse consequences for the reputation of the original restaurant.<sup>331</sup> The décor trade dress cases further show that there may be a likelihood of confusion even once customers have entered an establishment, despite the defendant restaurant having exterior signage that clearly identifies it as a differently named restaurant than the plaintiff's.<sup>332</sup>

Likelihood of confusion is thus a fact-intensive inquiry, and each federal circuit has articulated its own list of factors that lower courts must consider in determining the likelihood of confusion.<sup>333</sup> These factors can be grouped, however, into market factors, defendant's intent to confuse, and proof of actual confusion.<sup>334</sup> If the plaintiff can show proof of actual confusion, this factor will be highly persuasive.<sup>335</sup> It is not strictly necessary, however, for a finding of likelihood of confusion.<sup>336</sup> Courts recognize that it can be difficult to gather evidence of confusion, so a plaintiff may prevail in showing likelihood of confusion based merely on market factors and the intent to confuse.<sup>337</sup>

Market factors include, *inter alia*, the degree of similarity between the marks, the sophistication of customers, and the geographic markets of the two businesses.<sup>338</sup>

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330. See, e.g., *Dallas Cowboys Cheerleaders*, 604 F.2d at 205 ("The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement.").

331. Many chefs would not want to be associated with poor copies of their dishes, for example, as it might reflect badly on them. Cf. INT'L ASS'N OF CULINARY PROFS, ETHICAL GUIDELINES 13 (2009) (recounting how chef Anne Rosenzweig was served a "sodden gooey mess" at an unaffiliated restaurant that proudly announced this was "Anne Rosenzweig's chocolate bread pudding," a dish she was known for creating).

332. See, e.g., *Fuddrucker's, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 845 (9th Cir. 1987) (holding that customers need not believe defendant's restaurant was owned or franchised by plaintiff to be confused, although testimony showed that customers in both restaurants frequently asked if the restaurants were owned by the same people or affiliated with the other restaurant); *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 457 (S.D.N.Y. 2000) (finding a substantial likelihood of customer confusion for the purposes of a preliminary injunction when evidence showed that customers had inquired while inside defendant's store whether it had a "sister store").

333. For trade dress cases, the Second Circuit, for example, uses a variation on its eight *Polaroid* factors, used to determine the likelihood of confusion in word marks, which include "(1) the strength of the plaintiff's trade dress, (2) the similarity between the two trade dress, (3) the proximity of the products in the marketplace, (4) the likelihood that the prior owner will bridge the gap between the products, (5) evidence of actual confusion, (6) the defendant's bad faith, (7) the quality of defendant's product, and (8) the sophistication of the relevant consumer group." *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 1002–03 (2d Cir. 1997).

334. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 21–23 (1995).

335. See *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 352 (9th Cir. 1979).

336. *Id.*

337. *Id.*

338. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21.

The similarity of the marks should be analyzed based on the overall impact of the marks on the customer when viewed sequentially, not in a side-by-side comparison.<sup>339</sup> This means that the more distinctive and unusual the trade dress, the more likely it is there will be an impression of similarity, because a consumer will better remember the specific aspects of a distinctive appearance than one that seems common.<sup>340</sup> When the shared elements of the trade dress are functional, however, courts will be disinclined to find a likelihood of confusion.<sup>341</sup> Thus, functional decisions about plating, like serving condiments on the side of a burger, will essentially fall out of the likelihood-of-confusion analysis. Lastly, the more elements that are used in the definition of a particular trade dress, the more likely it is that a defendant will have only used some of those elements, making it less likely that the marks will be found confusingly similar.

Sophistication of customers will likely be an important market factor in the confusion analysis for restaurant dishes.<sup>342</sup> The different levels of sophistication between potential consumers at high-end restaurants and middlebrow chain restaurants, for example, could affect the trade dress infringement analysis in different ways. While the customers of high-end restaurants, who pay hundreds of dollars for a meal, might reasonably be assumed to have done some sort of due diligence into who is responsible for the dishes they purchase, and thus are less likely to be confused, they are also the consumers most likely to recognize specific plating as associated with a chef, and for that reason might be more confused if they see the same plating in a different restaurant. High-end restaurants attract customers who have an interest in food, who likely read food magazines or restaurant reviews, and who may have eaten in the original chef's restaurants.<sup>343</sup> Therefore, they might be

339. See *Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 117 (2d Cir. 2006) (remanding for reconsideration because the district court had overemphasized side-by-side comparison when denying a preliminary injunction in a trade dress case involving Louis Vuitton handbags).

340. See *Libman Co. v. Vining Indus., Inc.*, 69 F.3d 1360, 1363 (7th Cir. 1995) (stating that confusion was unlikely when trade dress was a stripe of colored bristles on a broom "since adding a colored stripe is hardly a distinctive way of marking a product").

341. *Motorola, Inc. v. Qualcomm, Inc.*, 45 U.S.P.Q.2d 1558, 1571 (S.D. Cal. 1997) (finding that the similar elements of two telephone designs were "functionally dictated" and thus confusion was unlikely), *aff'd*, 135 F.3d 776 (Fed. Cir. 1998).

342. Cf. *Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671, 695 (W.D. Ky. 2010) (finding that purchasers of defendant's high-end tequila would be likely to exercise a high degree of care in selecting the product, but nevertheless finding a likelihood of confusion based on other factors).

343. Indeed, Pearl Oyster Bar's complaint alleged that it had received "dozens of phone calls after Ed's Lobster Bar opened, inquiring whether Pearl had opened another branch." Complaint, *Powerful Katinka*, *supra* note 105, at 14. Loyal customers of Maker's Mark also recognized the defendant's use of a red-wax seal as potentially infringing Maker's Mark's branding and reported it back to the plaintiff. *Maker's Mark*, 703 F. Supp. 2d at 693. The court specifically stated that these customers could

more likely to identify a particular chef as the creator of the dish and thus upon seeing a knockoff might more likely be confused.

Indeed, as more restaurants are owned by groups that run several different establishments,<sup>344</sup> it is conceivable that sophisticated customers who know about the prevalence of such restaurant groups might think that the original chef was affiliated with a parent company responsible for the knockoff dish. For example, Mario Batali first served his “love letters” ravioli at Babbo in New York. They are now also served at other Batali restaurants, such as B&B Ristorante in Las Vegas. Imagine if another Italian restaurant, not owned by Batali but seemingly of similar quality as Babbo or B&B Ristorante, began serving the “love letters” ravioli. A diner who knew of Batali’s dish might reasonably assume that a restaurant serving “love letters” ravioli was part of Batali’s restaurant group or that Batali had consulted on the menu.<sup>345</sup> The more distinctive and well known the dish, the more likely this sort of confusion is to occur.

On the other hand, diners at middlebrow restaurants may be expected to pay less attention to the source of the food—because they are paying less for it—and thus may be more easily confused. Moreover, national chains, like Olive Garden or Outback Steakhouse, make television commercials featuring signature dishes that are likely to result in broad product recognition and connection with the brand.<sup>346</sup> Thus, if customers saw a similar looking dish in a different restaurant, they could be confused and think that the restaurants were affiliated. If the dish at the other restaurant is inferior, then the trade dress fails to function as a quality-assurance mechanism.

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not be used to show confusion, however, because they had recognized the use of the mark as a misuse rather than believing that the allegedly infringing tequila was actually produced or affiliated with Maker’s Mark. *See id.* at 699.

344. Mario Batali and his partner Joe Bastianich, for example, have developed a collection of restaurants. “While each location offers its own culinary identity, all have the signature combination of thoughtful and memorable food, intelligent wine lists, and an emphasis on living life to its absolute fullest.” *Our Restaurants*, OTTO PIZZERIA, [http://www.ottopizzeria.com/our\\_restaurants.cfm](http://www.ottopizzeria.com/our_restaurants.cfm) (last visited Sept. 25, 2012).

345. It is relatively common for new restaurants to hire well-known chefs to consult on their menus, even if that chef has no ownership interest and may not ever cook at the restaurant. For example, Rick Bayless, a Chicago-based chef, created the menu for Red O restaurant in Los Angeles. The Los Angeles Times describes his relationship with the restaurant not as an owner but “more [as] a creative consultant responsible for the overall culinary vision” who “flies in at least once a month . . . to tweak the dishes and consult with [the] executive chef.” S. Irene Virbila, *The Review: Red O*, L.A. TIMES, Aug. 5, 2010, <http://articles.latimes.com/2010/aug/05/food/la-fo-review-20100805>.

346. These companies spend millions of dollars on prime-time commercials and employ food stylists and directors to make sure their dishes appear irresistible in television ads. *See* David Segal, *Grilled Chicken, That Temperamental Star*, N.Y. TIMES, Oct. 9, 2011, <http://www.nytimes.com/2011/10/09/business/in-food-commercials-flying-doughnuts-and-big-budgets.html>.



The geographic location of a competing restaurant is another market factor to consider in the confusion analysis of trade dress infringement cases for signature dishes. When one restaurant moves into the same city as another restaurant with a similar style of presenting its food, the likelihood of confusion as to a dish's original and knockoff source is greater. Sometimes, courts will worry about reverse confusion if the junior user of the mark uses it in a location to which the original user might naturally expand.<sup>347</sup> Within a large city, the geographic proximity likely to cause confusion may be as specific as an individual neighborhood.<sup>348</sup> All else being equal, a copycat dish used all the way across the country is less likely to confuse than one used in the same city as the initial dish.

The defendant's intent to copy is another likelihood-of-confusion factor. In this context, it is important to note that intent to copy is not necessarily the same as intent to deceive consumers; only the latter weighs in favor of a finding of likelihood of confusion.<sup>349</sup> Maintaining a clear distinction between competitive copying and copying to deceive the consumer is important because it complies with the trademark policy goal of protecting against unfair competition without harming legitimate competition.<sup>350</sup>

In practice, however, the restaurant and retail cases where a defendant has intentionally and blatantly copied the plaintiff restaurant's scheme because the defendant finds it an attractive business model—the type of copying that should not, theoretically, lead to infringement liability—have also tended to favor plaintiffs. Anti-free riding sentiment against “reaping what another has sown” seems to play an unspoken role in these cases. For example, there was evidence in *Two Pesos* that the people responsible for designing the Two Pesos restaurants had visited Taco Cabana restaurants and “were sufficiently impressed with the distinctiveness of

347. For example, Two Pesos opened in Houston before Taco Cabana did, but the court found that Two Pesos had moved into Taco Cabana's “natural zone of expansion” from its original market of the San Antonio area. *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 n.20 (5th Cir. 1991).

348. The court in *Best Cellars, Inc. v. Wine Made Simple, Inc.*, for example, questioned whether Manhattan's Upper West Side and Upper East Side constituted a single market for retail sale of inexpensive wine. The court found that “a reasonable New York jury would be more than justified in questioning whether stores carrying a limited stock of inexpensive wines, located in geographically and socially distinct neighborhoods of the City, are in direct competition at all.” *Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60, 75–76 (S.D.N.Y. 2003).

349. *Id.* at 78 (“[T]he intent to compete by imitating the successful features of another's product is vastly different from the intent to deceive purchasers as to the source of the product.” Only the latter form of imitation is bad-faith copying.” (citation omitted) (quoting *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d 739, 745 (2d Cir. 1998))).

350. See *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, No. 11-3303-cv, 2012 WL 3832285, at \*5 (2d Cir. Sept. 5, 2012).

Taco Cabana's trade dress to replicate it."<sup>351</sup> Similarly, in *Best Cellars, Inc. v. Grape Finds at Dupont, Inc.*<sup>352</sup> there was evidence that the defendant had sent his interior designer to the plaintiff's wine store to copy the appearance of the wine display system and that he recognized that the plaintiff had a good business concept that he wanted to exploit.<sup>353</sup> The fact that the plaintiff had invested significant time and money into developing its business style, which the court found quite unique, was persuasive to the court in finding a likelihood of customer confusion.<sup>354</sup> In the legal equivalent of a control case, *Best Cellars, Inc. v. Wine Made Simple, Inc.*,<sup>355</sup> nearly all the facts were the same—the same plaintiff store and a defendant wine store that opened with a similar store layout and appearance. However, there was no evidence that defendants acted in bad faith or that they had intentionally copied the plaintiff's business model.<sup>356</sup> Accordingly, the court found that there was no likelihood of customer confusion resulting from the defendant's copying of the plaintiff's store layout.<sup>357</sup>

Thus, while it will be difficult to show a likelihood of customer confusion in a plating trade dress claim, such proof is not impossible, particularly if a plaintiff can show that the defendant intentionally copied the plating. This means that a chef who has created a protectable trade dress in the plating of a dish should be able to prevail against a blatant and intentional knockoff of the dish.

#### IV. TRADE DRESS WILL EXPAND RATHER THAN COPYRIGHT

As illustrated in the previous Parts, neither trade dress nor copyright law presents a clear path to formal protection of restaurant dishes, yet there is potential in both bodies of law for an expansion to cover cuisine. In practice, we are more likely to see an expansion of trade dress law to encompass the plating of signature dishes than an expansion of copyright to protect either dishes or their appearance. This Part explains why this is so, and it addresses concerns that this expansion of trade dress will create indefinite monopolies and chilling effects.

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351. See *Taco Cabana Int'l*, 932 F.2d at 1121.

352. 90 F. Supp. 2d 431 (S.D.N.Y. 2000).

353. See *id.* at 440. Evidence of copyright infringement (direct copying from Best Cellars's brochures into Grape Finds's brochures and business plan) further harmed the defendant's case. *Id.* at 447.

354. *Id.* at 435–36.

355. 320 F. Supp. 2d 60 (S.D.N.Y. 2003).

356. *Id.* at 77–78.

357. *Id.*

### A. Expansion of Copyright Is Unlikely

Whether attributable to a reluctance among courts, community norms, or the expense of enforcement, chefs have not yet attempted to broaden copyright's reach by claiming copyright in their dishes as edible art, though doubtless some of the beautiful, inventive plating at a restaurant like Alinea is at least as creative and worthy of protection as many of the banal objects protected under the Copyright Act as sculpture.<sup>358</sup>

While the statutory language and legislative history of the Copyright Act should not be an impediment to expanding copyright to encompass cuisine,<sup>359</sup> chefs do not seem to be moving toward such an expansion. Recent scholarship has suggested an explanation for this: The expansion of copyright protections for dishes would harm chefs more than it would help them, as it might have chilling effects and stifle creativity by increasing both the length of protection and the fear that riffing on another chef's dish would constitute copyright infringement.<sup>360</sup>

One possibility to prevent such overprotection would be to create a *sui generis* provision in the Copyright Act that would allow dishes to be copyrighted but would provide for a shorter period of protection and clear guidelines on what constitutes actionable copying. Similar proposals to add protection for fashion design, however, have been unsuccessfully introduced to Congress for several years in a row.<sup>361</sup> Given the difficulty the fashion design bill has encountered—despite backing from the Council of Fashion Designers of America<sup>362</sup>—it seems fanciful to think that an analogous provision for cuisine will pass any time soon. Moreover, just as fashion designers in Europe decline to use the copyright protections actually

358. See, e.g., *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 671 (3d Cir. 1990) (holding nose masks in shape of animal snout copyrightable as sculptural works); *Lucky Break Wishbone Corp. v. Sears, Roebuck & Co.*, 528 F. Supp. 2d 1106, 1121 (W.D. Wash. 2007) (asserting that plastic wishbone modeled off turkey's wishbone met the "extremely low" standard for "minimal creativity" (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)) (internal quotation marks omitted)), *aff'd*, 373 F. App'x 752 (9th Cir. 2010).

359. See Pollack, *supra* note 11, at 1523 ("Both the wording and legislative history of the 1976 Copyright Act favor judicial expandability of copyrightable subject matter. Food meets the criteria for a newly important art form whose importance has increased to copyrightable stature.").

360. See Buccafusco, *supra* note 11, at 1150; Cunningham, *supra* note 11, at 36. These are "uniformity costs" inherent in our copyright system, which does not adjust based on industry need. See Carroll, *supra* note 112, at 1364.

361. See Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010). See also versions of the Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); H.R. 2033, 110th Cong. (2007); S. 1957, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

362. Over 400 leading fashion designers, including Diane von Furstenberg, Calvin Klein, and Marc Jacobs, belong to the Council of Fashion Designers of America. *Members*, COUNCIL FASHION DESIGNERS AM., <http://www.cfda.com/members> (last visited Sept. 26, 2012).

available to them,<sup>363</sup> chefs in the United States have already announced that they would be reluctant to enforce copyrights against their peers.<sup>364</sup>

This reluctance may be attributed to the inherently hospitable nature of the cuisine industry,<sup>365</sup> but it may just as easily be explained by economic concerns. Elizabeth Rosenblatt, for example, has explained how creative communities will eschew formal legal regimes when they overprotect certain participants or are too expensive to enforce.<sup>366</sup> Pursuing infringers and proving damages in cuisine cases will be expensive and difficult. Without a statutory change that provides explicit copyright protection for restaurant dishes (which, as stated above, is unlikely), a plaintiff who asserts a copyright over a dish will always be subject to the defendant challenging the very premise of the suit—that the plaintiff held a copyright in her dish—and early dismissal would be likely because the standard wisdom is that copyright does not protect recipes.<sup>367</sup> Most chefs will avoid the expense of fighting such an uphill battle.

## B. Trade Dress Has Already Begun to Expand

Trade dress doctrine, on the other hand, is more likely to expand to encompass the plating of restaurant dishes. In recent years, the USPTO has been so generous in granting registration to various nontraditional marks that it is unsurprising that restaurants have begun to claim trade dress in the plating of their signature dishes.<sup>368</sup> Indeed, the lack of clarity regarding trade dress requirements has created a sort of vacuum—a doctrine of trade dress so empty or ill defined that plaintiffs have rushed to fill it, and to push its boundaries.<sup>369</sup> Exploiting this vacuum to

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363. See Raustiala & Sprigman, *supra* note 12, at 1737 (reporting that although legal protection for fashion designs is available in Europe, there is little litigation regarding fashion designs, and widespread copying remains the norm).

364. See the discussion of culinary norms *supra* Part I.D. But see Pollack, *supra* note 11, at 1480 n.20 (reporting that several professional chefs agreed “to be quoted as supporting the proposition that legal protection for food would encourage the creation and dissemination of new dishes”).

365. Both Thomas Keller and Susan Feniger, for example, have expressed that chefs are “in the hospitality business” and it is not “hospitable” to use the legal system against other chefs. See Buccafusco, *supra* note 11, at 1152; Interview With Susan Feniger, *supra* note 34 (“Philosophically, I might say, you know, the food service business is about hospitality, sharing, people enjoying. Why would you go down that path of ownership? It’s food.”).

366. See Rosenblatt, *supra* note 12, at 363; see also Oliar & Sprigman, *supra* note 94, at 1822.

367. The antipathy shown by judges and treatises toward protecting recipes under copyright laws means prevailing on a copyright claim will be quite difficult. See the discussion of existing copyright doctrine *supra* Part II.A.

368. See *supra* Part III.A.

369. See Beldiman, *supra* note 313, at 546.

protect their creations is particularly attractive to those who operate in low-IP industries.<sup>370</sup>

The ability to apply existing trade dress principles to signature dishes, as described in Part III.B, highlights the malleability of current trade dress law.<sup>371</sup> For chefs, using trade dress to protect signature dishes may prove a relatively elegant way to formalize established community norms. Trade dress already protects the interior décor of restaurants, which is no more likely to confuse a customer already in the restaurant about its source or sponsorship of the restaurant than the plating of a dish. In fact, in some restaurants, the signature dish, rather than the décor, will define the restaurant.<sup>372</sup> For example, when a restaurant group based in New York copied Border Grill, the group borrowed many dishes from the menu but changed the look of the restaurant.<sup>373</sup>

It seems inconsistent, then, that trade dress law should protect the look of a Mexican restaurant like Taco Cabana, but not the menu concept of Border Grill, when customers sitting in the Border Grill knockoff could be equally confused about the sponsorship of the restaurant because of the similarity in menu items.<sup>374</sup>

Moreover, trademark law is intended mainly to protect consumers from confusion, and expanding trade dress to signature dish plating would help eliminate customer confusion of a specific sort. Consumers go to high-end restaurants for many reasons, including to experience innovative food, to have an unusual

370. In addition to the cuisine cases mentioned in this Comment, fashion designers have been attempting to use trade dress to protect their designs as well. *See, e.g.*, Complaint, Marc Jacobs Trademarks, LLC v. Nervous Tattoo, Inc., No. CV 10-00456 (C.D. Cal. Jan. 21, 2010), 2010 WL 337054 (claiming trade dress in quilted nylon tote bag); Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc., 778 F. Supp. 2d 445, 453 (S.D.N.Y. 2011); *see also* Beldiman, *supra* note 313, at 543.

371. Indeed, some may see this analysis and the uncertainty that persists in trade dress law today as an argument for reforming or eliminating trade dress protection of everything but the most obvious product packaging. *See, e.g.*, Beldiman, *supra* note 313, at 574–75 (suggesting that the “overall look” form of trade dress has opened the door to the creation of inappropriate monopolies over styles and should be limited to avoid a depletion of the public domain); *cf.* Dillon & Landau, *supra* note 200, at 977 (concluding that product design can be inherently distinctive, but calling for legislation that would set forth a clear test for determining distinctiveness of trade dress).

372. Compare Momofuku Ko (minimal décor, intricate plating) with Taco Cabana (distinctive, bright colored décor, no mention of unusual food).

373. Interview With Susan Feniger, *supra* note 34 (“This place in New York, they are a company that’s growing. They have the money. Basically, they totally took our concept, not the look of the place at all, they basically took our menu, they took our food, they had our salsas on the table. . . . [T]hey opened three in New York, then they opened one in Vegas.”).

374. One could argue that *Taco Cabana* itself is a flawed decision, and that the line of cases protecting interior décor of restaurants should be overruled, because the likelihood of confusion in such cases is so low. *Cf.* Dillon & Landau, *supra* note 200, at 945 (characterizing *Taco Cabana* as “a rather broad holding that was largely based upon statutory hyper literalism”). Assuming this does not occur, however, there seems little reason not to protect dishes as well as décor.

experience, to enjoy the creative efforts of the chef, and of course, to benefit from the results of a chef's technique—better food. Knockoffs harm consumers not because consumers are confused about who has prepared the food but because they may be confused about the creative *quality* of the restaurant they chose to patronize. For example, diners at Robin Wickens's restaurant in Australia were paying high prices to eat in what they thought was an innovative, creative restaurant, when in fact, they were paying for a stale copy of another chef's restaurant.<sup>375</sup>

Practically, a gradual expansion of trade dress protection through court cases will be less disruptive than legislative changes to the copyright statute because it will allow protection to develop slowly and with consideration of the equities of individual cases as well as of monopolization concerns.<sup>376</sup> If the TTAB continues to be more generous in granting nontraditional trademark registrations than courts are in finding infringement,<sup>377</sup> registration of signature dish trade dress may serve as a kind of limited right of recognition.<sup>378</sup> Chefs could then point to the registration to show they were there first, so to speak, and thus have developed goodwill in a signature dish. This may prove valuable when selling a restaurant or obtaining investors for another venture. More importantly, however, because this formal recognition of protection would be limited mainly to source attribution, chefs would not be dissuaded from creation because a finding of infringement would only occur in instances of blatant and deceptive copying.

Some will see this as an argument that chefs are entitled to attribution rights, which U.S. law generally does not protect.<sup>379</sup> However, chefs themselves already recognize such a right, and they generally give attribution for borrowed or inspired

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375. See discussion of Alinea, *supra* Part I.E.3.

376. Cf. Balganes, *supra* note 17, at 1616 (suggesting that common law intellectual property protection “focuses on what parties affected by the law seek in practice, and the multi-faceted ways in which courts balance, limit, and help realize these needs on a nuanced basis over time, allowing the area of law as a whole to ‘work itself pure’” (quoting HARRY KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 506 (Jamie Kalven ed., 1988))); Rosenblatt, *supra* note 12, at 358 (recommending that any changes to IP's negative space be “nuanced”).

377. See LaLonde & Gilson, *supra* note 76.

378. See Rosenblatt, *supra* note 12, at 359 (“[It is] rather uncontroversial . . . that a desire for recognition is a powerful driver of innovation and creation, and that attribution is both reward and incentive for creation. . . . [T]his is not a revolutionary assertion, [but] it is one that pops into relief when observing IP's negative space, because the desire for recognition seems so frequently intertwined with creating or perpetuating negative space.”).

379. One notable exception is the Visual Artists Rights Act (VARA), 17 U.S.C. § 106A (2006) (granting visual artists a right of attribution in their works). Rochelle Cooper Dreyfuss has suggested that “it may be worthwhile to develop a formal right of attribution” as “[c]urrently, U.S. law offers very little protection along those lines,” yet a right of attribution has been very popular among users of the Creative Commons and in various low-IP areas. Dreyfuss, *supra* note 54, at 1468–69.

recipes either on menus, in cookbooks, or in interviews.<sup>380</sup> Trademark law, by protecting some signature dishes as trade dress, could provide a limited version of the attribution rights already recognized within the restaurant community without creating an actual right to attribution.<sup>381</sup> The current trademark system, for better or worse, already encompasses some anti-free riding sentiment, so it makes sense that this is an area chefs will look to for expanded protection of their creative labor.<sup>382</sup>

### C. Important Limitations Within Trade Dress Will Prevent Harmful Monopolies

Furthermore, limited expansion of trade dress protection for signature dishes will not result in harmful monopolies. This is because built into the nonfunctionality requirement of trademark law is a consideration of how recognizing trade dress in a particular configuration will affect the marketplace.<sup>383</sup> This requirement of considering market impact before granting trade dress protection should help avoid anticompetitive scenarios in which chefs have to obtain licenses from other chefs to sell a common dish in their restaurant. When enforcing a nontraditional mark, courts will likely be quite sensitive to the effect on legitimate competition.

A recent high-profile fashion industry case demonstrates courts' sensitivity to the realities of how enforcing a trademark can affect competition within an industry. In 2011, a district court denied shoe designer Christian Louboutin's request for a preliminary injunction against Yves Saint Laurent's use of red soles on high heeled shoes, despite plenty of evidence that the "red outsole [had become] closely associated with Louboutin."<sup>384</sup> Considering the realities of competition in the designer shoe market, the district court determined that the fashion industry depends so much on color and current taste that to grant trademark protection in a color would form a monopoly that "impermissibly hinder[s] competition."<sup>385</sup> On

380. See Fauchart & von Hippel, *supra* note 14, at 193; *IACP Code of Ethics*, INT'L ASS'N CULINARY PROFS., [http://www.iacp.com/join/more/iacp\\_code\\_of\\_ethics](http://www.iacp.com/join/more/iacp_code_of_ethics) (last visited Aug. 31, 2012) ("I pledge myself to . . . [r]espect the intellectual property rights of others and not knowingly use or appropriate to my own financial or professional advantage any recipe or other intellectual property belonging to another without *proper recognition*." (emphasis added)); Interview With Susan Feniger, *supra* note 34.

381. See Randolph Stuart Sergeant, *Building Reputational Capital: The Right of Attribution Under Section 43 of the Lanham Act*, 19 COLUM.-VLA J.L. & ARTS 45 (1995).

382. See Franklyn, *supra* note 17; Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999) (noting with dissatisfaction that trademark law is being used to punish free riding).

383. See *supra* Part III.B.2.

384. *Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445, 448 (S.D.N.Y. 2011).

385. *Id.*

appeal, the Second Circuit affirmed the denial of the injunction, but for different reasons.<sup>386</sup> This court recognized that the red outsole is a valid trademark, as it has developed secondary meaning among consumers of high-end shoes, but only when it contrasts with the color of the upper portion of the shoe.<sup>387</sup> Because the allegedly infringing shoe was monochrome—red on both the outsole and the upper portion of the shoe—it did not infringe Louboutin’s trademark.<sup>388</sup> Significantly, however, the Second Circuit did not reach the functionality analysis,<sup>389</sup> leaving open the possibility that another court will consider whether the trademark of a contrasting color on the sole of a shoe “significantly hinder[s] competition” within the fashion industry.<sup>390</sup> If other courts prove to be equally willing to consider the realities of the restaurant industry, they will not grant harmful monopolies over important elements commonly used in plating dishes. Only truly unusual plating will then be considered sufficiently distinctive and nonfunctional to be protected.

## V. SHOULD RESTAURANT IP EXPAND?

All of the foregoing, however, begs the normative question: Should intellectual property protection of restaurant cuisine expand at all? Many have argued that there is no need for increased IP protection of cuisine because the restaurant industry is healthy<sup>391</sup> and chefs continue to create.<sup>392</sup> When it comes to promoting creativity, the community norms system and the reputational capital that comes from being a first mover seem to function well, particularly in the internet age and at the top levels of creative cuisine. In this Part, however, I first elaborate on, and then counter, some of these common arguments against increasing protection of restaurant cuisine.

Community norms within the restaurant industry do seem to protect against blatant copying, and the internet has made detection of copiers possible across multiple time zones, as exemplified by the Alinea scandal.<sup>393</sup> In the context of that

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386. *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, No. 11-3303-cv, 2012 WL 3832285, at \*1 (2d Cir. Sept. 5, 2012).

387. *Id.* at \*12–13.

388. *Id.* at \*14.

389. *Id.* at \*15.

390. *Id.* at \*14.

391. *See supra* Part I.A.

392. *See, e.g.*, Buccafusco, *supra* note 11, at 1150; Cunningham, *supra* note 11, at 37; Interview with Kenneth and Daria Boxer, *supra* note 47 (opining that the fact that other restaurants can copy their dishes and ideas “keeps you on your toes”).

393. *See supra* Part I.E.3.



scandal, the internet facilitated the norms system<sup>394</sup> because it allowed both for discovery—Wickens had photographs of his identically plated dishes up on his restaurant’s website, which allowed community members to verify that he was copying the Alinea dishes—and for sanction—the eGullet community, which includes actual chefs, thoroughly shamed Wickens.<sup>395</sup> Wickens took down the pictures, apologized to Achatz, and presumably stopped serving knockoff dishes.<sup>396</sup> As Oliar and Sprigman point out, the fact that there are occasional infringements does not necessarily mean that a norms system is not working.<sup>397</sup> The likelihood of getting caught, and the community opprobrium that follows, may be enough to limit copying.

The importance of the first-mover advantage in promoting creativity among chefs also should not be discounted.<sup>398</sup> Elizabeth Rosenblatt has identified qualities of industries that make first-mover advantages particularly strong:

[W]hen development of an idea is relatively inexpensive, but copying is relatively expensive or slow; when the reputational advantage of being first outweighs the potential for lost sales . . . ; when an industry is small enough that it can only support one source; or when a product will become obsolete before it can be copied.<sup>399</sup>

Of particular weight in the world of cuisine is the reputational benefit of being first. This benefit likely “outweighs the potential for lost sales such that consumers will continue to purchase an original even after imitations are available.”<sup>400</sup> Indeed, the very fact that a dish is widely copied may burnish the chef’s reputation. Alain Passard’s *Arpège Egg*, for example, is widely emulated in high-end restaurants,<sup>401</sup>

394. Dotan Oliar and Christopher Sprigman have also identified how in the field of stand-up comedy, the internet generally and YouTube videos specifically have facilitated defensive publication and also made it easier to detect stealing. See Oliar & Sprigman, *supra* note 94, at 1861–62 (“[T]he costs of detection and enforcement are reduced by widely trafficked websites, such as YouTube, that offer audio and video clips of comedians’ performances.”).

395. See *Interlude Food Similarities*, *supra* note 111.

396. See Fauchart & von Hippel, *supra* note 14, at 198 (reporting that Wickens apologized to Achatz and Dufresne).

397. *Id.*

398. For a discussion of the first-mover advantage in other contexts, see Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1584–86 (2003).

399. Rosenblatt, *supra* note 12, at 347.

400. *Id.*; cf. Carroll, *supra* note 112, at 1414–15 (examining the first-mover advantage as a basis for tailoring IP rights, noting that research indicates that “in product markets with patentable goods incumbents often enjoy significant market share advantages even after competitors have entered a market”).

401. David Kinch serves the *Arpège Egg* on the tasting menu at his Michelin-starred restaurant, Manresa (with attribution to Passard). For David Chang’s version of the famous egg dish, see Dave Chang, *Arpège Egg*, LUCKY PEACH, Summer 2011, at 142.

and if anything, this has only increased demand for the original.<sup>402</sup> Aside from the reputational advantage of being a first mover, it is also practically difficult to copy very new or intricate dishes quickly, as the copier often needs to be close to the food, either in the kitchen or as a diner, to have a sense of how the dish actually works. This gives the original chef time to recover her investment in creating a dish before others begin imitating it.<sup>403</sup>

There is also a valid concern among commentators and chefs that any expansion of IP rights in the restaurant world will have anticompetitive effects.<sup>404</sup> The very fact that restaurants could then engage in more prelitigation behavior, such as sending cease-and-desist letters, might have a chilling effect on chefs' current system of free appropriation and experimentation.<sup>405</sup> The undesirability of such effects means that a broad expansion of intellectual property protection for the restaurant industry is ill advised.

However, this does not mean that *any* expansion of legal protections will necessarily result in reduced production or increased cost. Rather, it means that courts should proceed with caution.<sup>406</sup> Commentators and chefs seem worried about the possibility of disrupting the status quo, but few have asked whether it is in chefs' or consumers' best interests that chefs have significant freedom to copy each other, given community norms that prevent only exact copies. Some top-level chefs in the United States already bemoan the "sameness" of contemporary restaurants.<sup>407</sup> A small expansion of IP laws, and the accompanying specter of litigation, might spur, rather than chill, creation.

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402. *See id.*

403. *See* Carroll, *supra* note 112, at 1414–15 (explaining that the value of the first-mover advantage varies based on the cost to competitors of copying the original and that the greater the "imitation costs," the more valuable lead time is).

404. *See* Buccafusco, *supra* note 11, at 1150; Cunningham, *supra* note 11, at 38.

405. For a discussion of how some trademark holders use unmeritorious cease-and-desist letters and "strike suits" to expand the scope of their trademark rights and keep competitors out of the marketplace, see Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 WASH. & LEE L. REV. 585, 589–91 (2008).

406. *See* Rosenblatt, *supra* note 12, at 358–59 (suggesting that "nuanced revisions" to IP's negative space can help optimize production); Dreyfuss, *supra* note 54, at 1460 (highlighting that both classic IP and negative IP may promote either too little or too much production, depending on the industry and the level of protection).

407. *See, e.g.*, Anthony Bourdain, Dave Chang & Wylie Dufresne, *Mediocrity: A Conversation*, LUCKY PEACH, Summer 2011, at 48, 50 ("Dave: If you look at the restaurants that are opening up now, everything's Italian. . . . And if it's not Italian, it's food south of the Mason-Dixon Line. . . . Anthony: . . . I'm pretty happy to see a lot of pretty good to very good to really excellent Italian restaurants in New York—Wylie: You're happy with sameness? . . . [S]taggering sameness . . .").

While increasing protection likely will not change the *quantity* of dishes created, it may improve their *quality*. Oliar and Sprigman explain how a strong norms-based IP system that emerged among comedians over the past century promoted the development of personality-based jokes.<sup>408</sup> These long-form jokes stand in contrast to the stock jokes prevalent during the post-vaudeville era when copying was rampant and comedians distinguished themselves through their *presentation* of the stock jokes.<sup>409</sup> When the strong norms-based system developed, comedians had an incentive to focus on the development of new, long-form jokes, and the nature of standup comedy changed.<sup>410</sup> Now, there is a greater variety of jokes, and more comedians write their own material, but investment in presentation of the jokes has diminished.<sup>411</sup>

Increased protection of original dishes might likewise change the nature of restaurants. In a world where copying is less accepted, a young chef, instead of opening a clone of the latest casual Italian restaurant to get a great review, would be forced to invent something new. The increased cost attributable to inventing new dishes and fear of infringing another's copyright or trademark could, as some have predicted, lead to fewer restaurants opening, higher prices, and reduced invention.<sup>412</sup> But considering Americans' voracious preference for dining out,<sup>413</sup> it

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408. See Oliar & Sprigman, *supra* note 94, at 1854.

409. *Id.*

410. *Id.*

411. *Id.*

412. See Buccafusco, *supra* note 11, at 1150 (“[I]t is possible that innovation would actually decrease if copyrights in dishes extended beyond just publishing the recipes to actually performing the dishes. . . . [A]ny copyright in a dish would have to entail an exclusive right to perform the dish publicly, thereby dissuading other chefs from experimenting with the dish for fear of running foul of the law.” (footnote omitted)); Cunningham, *supra* note 11, at 44 (predicting, based on the monopoly effect, that if a restaurant can have a trademark dish and the exclusive right to serve it, the “market price” will be “significantly higher” and that dining options will be more limited).

413. A U.S. Census Bureau statistical abstract found that in 2010, 49.3 percent of Americans surveyed reported “dining out” as a leisure activity they had engaged in during the past year, while only 38.3 percent reported entertaining friends or relatives at home. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 1240 (2012), *available at* <http://www.census.gov/compendia/statab/2012/tables/12s1240.pdf> (Adult Participation in Selected Leisure Activities by Frequency: 2010). This is actually a slight decrease from 2009, when 51.4 percent reported dining out. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 1239 (2011), *available at* <http://www.census.gov/compendia/statab/2011/tables/11s1240.pdf> (Adult Participation in Selected Leisure Activities by Frequency: 2009). Moreover, Americans spend a high percentage of their food expenditures on food away from home. *Current Spending Topics: How Do U.S. Expenditures Compare to Those of Other Countries?*, U.S. BUREAU OF LABOR STATISTICS (Mar. 2012), [http://www.bls.gov/opub/focus/volume2\\_number16/cex\\_2\\_16.htm](http://www.bls.gov/opub/focus/volume2_number16/cex_2_16.htm) (“Of the 14.6 percent of total expenditures allocated to food expenditures in the United States, 41.1 percent was spent outside the home.”). This is in contrast to Japan, where 21.4 percent of food expenditures was on food outside the home. *Id.* The National Restaurant Association reported in 2000 that the typical American

just as likely might lead to a higher quality (or at least greater variety) in restaurants, with the same or similar number of restaurant openings. Those chefs and restaurateurs who had a very good concept, worthy of replication, could expand into other markets or franchise their concept and thus reap the benefits of their creative efforts without fear of direct copycats.<sup>414</sup>

Fears that a slight increase in formal protection would destroy the open-source cooking community are likewise overstated. Under either a thin copyright or trade dress protection for the appearance of signature dishes, chefs would still be allowed to use shared knowledge. No chef would have to ask permission to use techniques he had learned in another kitchen. He would not need to request a license if he found the combination of flavors in someone else's dish appealing and could easily bring this idea back to his restaurant. Flavor trends could still diffuse from high-end restaurants to those lower on the creative scale.<sup>415</sup> But a chef would have to come up with his own way of presenting the dish, forcing the new chef to build off the former work rather than just copy it. For any dish with more than a few components, there are many ways to present it. And if there were truly only one way to present a particular dish, IP protection for the plating would be rejected on grounds of functionality. While plating is often an add-on to the main creative work that goes into creating a dish, changing the plating still requires some creativity. This modicum of creativity is what the norms-based system already requires.<sup>416</sup>

The legal claims for greater IP protection for restaurant dishes that we have seen so far have come mostly from middlebrow restaurants rather than from the level of *haute cuisine*, where perhaps the norms-based system is sufficient. However, a little fear of potential litigation at the level of chefs just below the very highest ranks might spur creation there. Imagine if Ed McFarland knew that he

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eats on average 4.2 commercially prepared meals per week. Robert Ebbin, *Americans Eat 4.2 Commercially-Prepared Meals a Week According to a New Report*, RESTAURANTS USA, Nov. 2000, <http://www.restaurant.org/tools/magazines/rusa/magArchive/year/issue/article/?ArticleID=138>.

414. Some chefs already license their restaurant concepts and their names. See, e.g., *Jean-Georges Vongerichten Biography*, JEAN-GEORGES.COM, <http://www.jean-georges.com> (follow "history" hyperlink) (last visited Sept. 26, 2012) (describing chef Jean-Georges Vongerichten's new licensing business, "Culinary Concepts by Jean-George," which will "develop, own, operate, manage, and license" Vongerichten's existing restaurants and create new restaurants for the Starwood Hotel chain).

415. See Christine Muhlke, *Trickle-Down: The Circuitous Path of Ideas in Food and Fashion*, LUCKY PEACH, Spring 2012, at 62; see also NAT'L REST. ASS'N, *supra* note 160 (ranking 226 food and beverage items, cuisine styles, and methods of preparation as "hot trends," "yesterday's news," or "perennial favorites").

416. See Fauchart & von Hippel, *supra* note 14, at 188.

could not get away with copying Rebecca Charles' oyster bar and her menu items and had instead opened the "red sauce Italian" joint he had told her he was planning.<sup>417</sup> McFarland might have applied what he had learned working for Charles to come up with a personal spin on a different type of restaurant, improving on the "classic red sauce joint" just as Charles had improved on the oyster bar. This would have helped customers by increasing the variety of restaurants in the area rather than just the quantity.

Promoting creativity is important, but restaurants are businesses as well as creative outlets. The restaurant industry is one of incredibly small margins,<sup>418</sup> so protecting a restaurant's competitive advantage is important. In major cities, it can take millions of dollars to start a high-end restaurant, and investors want a return—which means investors, and not only chefs, should be concerned with IP rights available to the restaurants in which they invest.<sup>419</sup> Moreover, if a chef can effectively extract value from her actual restaurant dishes, she may be able to focus on making more and better food instead of relying on diffusion to lines of cookware and the like.<sup>420</sup> Currently, the top-earning chefs make most of their money through merchandizing and expanding into television shows, but if their actual dishes were better protected, this might change.<sup>421</sup> Rochelle Cooper Dreyfuss points out that in hierarchical low-IP industries "workers at the low end may get an unfair share of

417. See Complaint, *Powerful Katinka*, *supra* note 105, at 8 ("McFarland told Charles . . . that he planned to open a 'red sauce Italian' sea food restaurant. . . . Charles wished him well and offered him help and advice with his new concept.").

418. The average profit margin for a restaurant in the United States is 5 percent, before taxes. Mark Pastore, *Is OpenTable Worth It?*, INCANTO RESTAURANT (Oct. 22, 2010), <http://incanto.biz/2010/10/22/is-opentable-worth-it>.

419. See T.J. Jacobberger, *The Cost of Opening a Restaurant in San Francisco*, INSIDE SCOOP SF (Jan 21, 2011, 10:13 AM), <http://insidescoopsf.sfgate.com/blog/2011/01/21/the-cost-of-opening-a-restaurant> (estimating that it costs around \$2.5 million to open a restaurant in San Francisco).

420. See Wells, *supra* note 20, for a similar argument. Chefs trademark their names and signature phrases to capitalize on their brand. See, e.g., Krizman, *supra* note 11, at 1021 n.106 (listing Rachael Ray's many trademark registrations, such as the phrase "YUM-O").

421. Rachael Ray was the top earning "celebrity chef" in 2008, taking in \$18 million from her television shows, cookware, magazine, and Dunkin' Donuts endorsement—notably, not from a restaurant, as she is not a restaurant chef. See Vorasarun, *supra* note 35. Wolfgang Puck took in \$16 million. *Id.* The earnings drop off rapidly after Puck, down to \$7.5 million for Gordon Ramsey, \$5 million for Nobuyuki Matsuhisa and Alain Ducasse, each of whom owns many restaurants, \$3 million for Mario Batali, and \$2 million for Tom Colicchio. *Id.* These are all chefs who own multiple restaurants and most of them make money from television shows as well. *Id.* It is notable that Ray and Puck make significantly more money than the others on the list as they participate in the most extensive merchandizing. Marcus Samuelsson is another example of a chef who has put great effort into making himself a "brand." See Adrienne Carter, *Marcus Samuelsson, a Chef, a Brand and Then Some*, N.Y. TIMES, Aug. 4, 2012, <http://www.nytimes.com/2012/08/05/business/marcus-samuelsson-both-a-chef-and-a-brand.html>.

the rewards” of creativity.<sup>422</sup> This is true in the restaurant industry, where cook and sous chef wages are below the national average, and even very well-known chefs make little money compared to other industries.<sup>423</sup> Increasing formal IP protection for restaurant dishes might improve the industry’s ability to pay lower-level knowledge workers, like sous chefs, who often contribute to the creation of dishes but do not see the financial rewards.<sup>424</sup>

Of course, enforcing formal IP rights can be costly. The extra expense of lawyers could be quite damaging in an industry with such small profit margins. Enough new restaurants go out of business without having the added expense of legal fees to determine whether they are infringing another restaurant’s dish or to enforce their own rights against others using their signature dish.<sup>425</sup> However, a few cases protecting the plating trade dress of a truly distinctive signature dish against direct, intentional copies should be enough to discourage blatant copying without overly burdening restaurants with the need for legal teams.

While it is far from a perfect solution, a small expansion of trade dress protection to cover the plating of signature restaurant dishes will allow for an appropriately tailored protection of culinary intellectual property. As I have shown here, trade dress should prove a fruitful and appropriate place for legal codification of existing norms for several reasons: The expansion will be gradual because it will develop through case law, rather than new legislation, making it less likely to result in overprotection; trade dress registration provides a limited form of recognition, which chefs desire and which they can sell as part of the goodwill of their restaurants; the potential effect on fair competition of protecting a given plating arrangement is built into the infringement analysis, which should prevent unfair monopolies; and increased protection, provided that it is not unduly burdensome, may stimulate chefs to create higher-quality dishes.

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422. Dreyfuss, *supra* note 54, at 1463.

423. See Mark Wilson, *Should You Go to Culinary School? Maybe, but Probably Not*, LUCKY PEACH, Spring 2012, at 108, 111 (reporting the average salary for cooks as \$23,260 and for head chefs as \$44,780, and comparing these figures to the average salary across all food-preparation occupations (\$21,240) and across all U.S. occupations (\$44,410)); Vorasarun, *supra* note 35 (noting that chefs at the “bottom” of the top-ten-celebrity-chef list make under \$2 million a year).

424. See Interview With Susan Feniger, *supra* note 34 (“You get a million restaurants where you get [sous] chefs . . . who come up with a dish, it goes onto the menu, eventually it winds up in the restaurant’s book. Best case scenario is they get credit and thanks.”).

425. Cf. Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 FLA. L. REV. 1011, 1035–36 (2009) (discussing how the high costs of litigation and the use of cease and desist letters to stop use of trademarks in the entertainment context, even though most cases that have been litigated have found that the uses are permissible).

## CONCLUSION

At the moment, community norms and the first-mover advantage support cuisine's productive low-IP equilibrium. While eliminating cuisine's IP negative space entirely would likely harm the industry more than it would help, an incremental increase in formal IP protection will protect creative chefs in situations when community norms do not function. Trade dress is where this expansion is most likely to occur. We have already begun to see restaurants push for trade dress protection for their dishes as well as for their décor. This expansion, if done through careful case-by-case adjudication in the courts, should echo community norms and create an industry-appropriate level of formal IP protection. A small increase in formal protection may also encourage more variety in dishes and greater investment in new restaurants, benefitting chefs and, ultimately, their customers.