CHEF'S CANVAS: RECOGNIZING RIGHTS AS ARTISTS UNDER COPYRIGHT LAW

SHELBY DOLEN*

Intellectual property rights seek to promote creativity by providing artists with legal protection over their work and therefore, incentivizing them to continue to create. Historically, copyright law has denied chefs the opportunity to gain protection on food design due to the utilitarian aspects associated with food. However, Star Athletica, a rare copyright case, reached the Supreme Court in 2017 and provided a glimmer of hope for certain artists and their industries. Individuals, now more than ever, are viewing chefs as creators and artists in their own industry. The "food porn" trend exemplifies this viewpoint, with its continuous spread across social media accounts and hashtags, webpages, blog posts, and even within culinary institutes. As artists, chefs' works may be deserving of some type of legal protection, and Star Athletica has opened the door to allow specifically for copyright protection. Nonetheless, this Note will argue that this protection should not be extended to food design, despite the "food porn" trend and the liking of chefs to celebrities.

This Note reviews the history of food design under copyright law, analyzes food design under copyright law prerequisites, and applies Star Athletica to food design—before finally proposing that although copyright protection is now available, it will not be to the benefit of chefs. Throughout the twenty-first century food design and cuisine have existed in a "negative space," a space in which artistry thrives creatively without protection. In order to exist in this "negative space" chefs have relied on a norms-based system to allow for certain types of copying and to restrict the more egregious forms of copying. A norms-based system remains proper for the culinary world by allowing chefs and food design to truly flourish creatively, while a law-based system would only confine the industry.

* J.D., University of Colorado, Class of 2020, Lead Articles Editor of CTLJ; B.A., University of Denver, Class of 2017. Thank you to Professor Kristelia Garcia and Professor Margot Kaminski for encouraging me to consider the impact of *Star Athletica* on artistic industries beyond the world of fashion, and for valued guidance and mentorship along the way. Special thanks to the CTLJ team for many thoughtful edits and suggestions.

INTRODUCTION

Historically, the Copyright Act has not provided many creative industries with protection due to the functionality purposes industries served.[1] Functionality restrictions have not necessarily stopped these industries from seeking such protection and some industries have even found limited success.[2] In the spring of 2017, *Star Athletica* gained momentum in the media for being one of the rare cases to reach the Supreme Court concerning copyright and an industry with utilitarian aspects.[3] Fashion designers anxiously

1. 1 Nimmer on Copyright § 2A.02 (2019).
2. *Id.*
3. Robert Mann, *Opinion Analysis: Court Uses Cheerleader Uniform Case to Validate Broad Copyright in Industrial Designs*, SCOTUSBLOG (Mar. 2, 2017, 9:31 PM), https://www.scotusblog.com/2017/03/opinion-analysis-court-uses-cheerleader-uniform-case-validate-broad-copyright-industrial-designs/ [https://perma.cc/ZTE8-35XP];

anticipated a decision that would provide protection for their art form, while lower courts looked forward to a decision that would create a clear separability test, explaining how to separate function from expression.[4] The latter goal remains to be met.[5] Justice Clarence Thomas, in the majority opinion, used traditional statutory interpretation to grant fashion designs broad protection.[6] The Court crafted a test that would allow a fashion design of a useful article to be eligible for copyright protection if that design could be perceived as a work of art separate from the useful article and could qualify as a pictorial, graphic or sculptural work in another tangible medium.[7] Despite the industry's desire for consistency in legal doctrine, *Star Athletica* did not eliminate the complexity of the separability test.[8] Still, fashion designers may rejoice, because this new test may afford slightly more protection to a form of art that was previously unprotected.[9]

This Note explores how *Star Athletica* opened the door to copyright protection, but proposes that copyright protection is not proper or necessary in the culinary world. Specifically, this Note argues that copyright protection is unsuitable for food design because copying is inherent in the culinary world, a law-based system would be inefficient, and social norms offer adequate protection within the industry.

Section I will examine the "food porn" trend and its prominence in the twenty-first century. It will explore the history and progression of the food industry in the United States, and then it will assess how the progression of the food industry and the "food porn" trend aligned to create chefs as industry stars and artists. Section II will review copyright law and the dichotomy between idea and expression. It will address how food design previously failed to gain copyright protection under copyright law and the various separability tests that plagued the circuit courts throughout the twentieth and twenty-first centuries. The lack of unanimity throughout the circuit courts will illustrate the Supreme Court's reasoning for granting certiorari on the *Star Athletica* case.

Section III will review the Supreme Court's *Star Athletica* decision and the new separability test. Section IV will follow with a full analysis of food design under the new separability test. It will provide examples to demonstrate how food design successfully

Supreme Court Sounds Off on Copyright in Cheerleading Uniform, THE FASHION LAW (Mar. 22, 2017), http://www.thefashionlaw.com/home/supreme-court-says-cheerleader-uniform-is-protectable-by-copyright-law [https://perma.cc/67AB-N89V].

4. THE FASHION LAW, *supra* note 3.
5. *Id.*
6. *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).
7. *Id.* at 1010.
8. Mann, *supra* note 3.
9. THE FASHION LAW, *supra* note 3.

passes both bars of the separability test. Section V will discuss other legal barriers under copyright law including originality and fixation, and this section will study examples to establish how food design has the potential to surpass the other copyright prerequisites.

Lastly, Section VI will propose that although copyright protection is now available, a norms-based system remains proper for the culinary world by allowing chefs and food design to truly flourish creatively. It will do so by considering how the culinary industry has operated in a negative space—a space in which artistry thrives creatively without protection. This section will review how certain types of copying have existed and even promoted creativity, while social norms have restricted more egregious forms of copying. This section will end by examining how copyright protection would exist in the culinary world and by offering other intellectual property protection options, before concluding that a law based system is not the suitable option.

I. FOOD PORN – THE TREND DOMINATING THE INTERNET

A. Food Porn

In the past decade, the term "food porn" has blossomed from a phrase into a full internet trend, transforming a chef into the ultimate artist on the internet.[10] Rosalind Coward first coined the term "food porn" long before the age of social media.[11] In 1984, in her book *Female Desire*, Coward crafted the term to illustrate that food could be presented in such a tantalizing way as to signify the same pleasure as sex.[12] Decades later, a hashtag was added to the phrase, and the term exploded in the social-media world.[13] The idea of food arousing an individual's senses has only grown with the viral use of the hashtag.[14] At the beginning of 2020, Instagram users used *#foodporn* in 218 million posts (and rising) on the social media site.[15] Hundreds of Twitter, Instagram, and Facebook users alike

10. Karen Stabiner, *Lights! Camera! Culinary Schools Will Teach Instagram Skills*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/dining/food-photography-culinary-schools-instagram.html [https://perma.cc/Z3ZP-NZLY].

11. Allison Kugel, *How 'Food Porn' Posted on Social Media Has Become an Industry*, ENTREPRENEUR (June 1, 2017), https://www.entrepreneur.com/article/295126 [https://perma.cc/2QB9-9N5S].

12. *Id.*

13. *See id.*

14. *Id.*

15. #foodporn (@#foodporn), INSTAGRAM, https://www.instagram.com/explore/tags/foodporn/ [https://perma.cc/LX6Q-SDAW].

have created accounts dedicated to the trend.[16] Other cellular applications such as Tender and FoodFaves allow users to instantly have access to the food porn of their choice.[17]

Researchers disagree as to why humans have an obsession with posting and viewing images of food, and how food porn satisfies an individual.[18] However, it seems that the trendiness of food porn is indicative of the importance of food appearance.[19] As the age old saying goes: "you eat with your eyes first."[20] This saying alludes to the idea that a person who perceives food as appealing will be more likely to eat the food and enjoy it.[21] Conversely a person may be less likely to eat food and enjoy it if they perceive the food as unappealing or unattractive.[22] Studies have shown that visual sensors often dominate other senses,[23] and a person may find a more appealing dish to taste more satisfying.[24] The idea of pornography partnered with food is indicative of a sensory overload, in this case an overload from the decadent appearance of food.[25]

B. The Culinary World in the United States – Past and Present

Around the time Coward was writing *Female Desire* in the 1980s, the culinary world in the United States was blossoming.[26] However, prior to the end of World War II, a mass culture appreciation for the culinary world did not exist and Americans rarely dined in restaurants.[27] It was not until the end of the twentieth century when a new age of chefs entered the industry, changing it forever.[28] Americans began to dine out more than ever before, and chefs were known for their reputations of innovation and bold new ideas.[29] Flash forward to the twenty-first century, when the

16. Kugel, *supra* note 11.
17. *Id.*
18. Cari Romm, *What 'Food Porn' Does to the Brain*, THE ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/health/archive/2015/04/what-food-porn-does-to-the-brain/390849/ [https://perma.cc/MJU8-X486].
19. *Id.*; Jeannine F. Delwiche, *You Eat with Your Eyes First*, *in* 107 PHYSIOLOGY AND BEHAVIOR 502, 502–04 (2012).
20. Delwiche, *supra* note 19, at 502.
21. *Id.*
22. *Id.*
23. *Id.*
24. *See id.* at 502–03.
25. *See* Romm, *supra* note 18.
26. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPURS INNOVATION 61 (Oxford University Press 2012).
27. *Id.* at 60.
28. *See id.* (discussing how American cuisine evolved in the 1970s through new U.S. culinary training institutions, the redefining of fine dining and the popularization of lighter and more exotic ingredients).
29. *See id.*

restaurant industry was projected to reach annual sales of $863 billion in 2019 and constitute 4% of the US GDP.[30] The United States has become a food-centric nation, with its focus on culinary art, chefs, and the rise of restaurants.[31]

Today, chefs are stars; television shows, magazines, and newspapers follow current chefs, watch the rise of up and coming chefs, and the fall of old ones.[32] Television shows on the Food Network and Bravo created an entire world of celebrity chefs and competitions for chefs on series such as *Top Chef*, *Food Network Star*, and *Iron Chef America*.[33] Netflix found incredible success with *Chef's Table*, a documentary series that takes an intimate look into a chef's world in each episode.[34] Websites like the Art of Plating are dedicated to meeting with chefs and learning their specific technique for food designs.[35] The Culinary Institute of Art is now pivoting to providing courses that no longer focus on the traditional restaurant route but open the door to other career opportunities.[36] For consumers who have the means, the search for unique, creative meals is a part of life.[37]

Food is no longer just what you eat. Innovation and creation have crafted a food-centric nation where chefs have the opportunity to explore their passion and their mode of self-expression,[38] as artists in their own kitchen.[39] Grant Achatz, executive chef and owner of Alinea, is one of the top chefs in the United States and *Chef's*

30. *2019 Restaurant Industry Factbook*, NAT'L RESTAURANT ASS'N (2019), https://restaurant.org/Downloads/PDFs/Research/SOI/restaurant_industry_fact_sheet_2019.pdf [https://perma.cc/S8CK-JJYV].

31. RAUSTIALA & SPRIGMAN, *supra* note 26, at 62.

32. *See* Lisa Abend, *The Cult of the Celebrity Chef Goes Global*, TIME (June 21, 2010), http://content.time.com/time/magazine/article/0,9171,1995844-2,00.html [https://perma.cc/BK3C-FZAT].

33. *Top Chef*, BRAVO, https://www.bravotv.com/top-chef [https://perma.cc/T4GD-Y8BF]; *TV Shows*, THE FOOD NETWORK, https://watch.foodnetwork.com/tv-shows/?utm_source=marketingsite&utm_medium=trending [https://perma.cc/UC6C-386T].

34. Mike Gibson, *How Chef's Table is Changing the Food Documentary Format*, FOODISM (Sept. 13, 2016), https://foodism.co.uk/features/chefs-table-food-documentary-alain-passard/ [https://perma.cc/4CEF-R2BR].

35. Maria Nguyen, *A Letter from Our Founder*, THE ART OF PLATING (July 22, 2019), http://theartofplating.com/risingtalent/ [https://perma.cc/Y6Q2-BAJA].

36. Stabiner, *supra* note 10.

37. *See* Dawn Papandrea, *Food Content Marketing: Top Brands Cooking Up Effective Strategies*, NEWSCRED INSIGHTS (July 23, 2019, 10:00 AM), https://insights.newscred.com/food-content-marketing-top-brands-cooking-up-effective-strategies/ [https://perma.cc/QLL4-569S].

38. *See* Anne E. McBride, *Interview with Grant Achatz*, DICED (Mar. 29, 2018), https://www.ice.edu/blog/interview-with-grant-achatz [https://perma.cc/P4Y8-F2VU].

39. Noah Charney, *Are Chefs Also Great Artists?*, TASTE (June 25, 2018), https://www.tastecooking.com/great-chefs-also-great-artists/ [https://perma.cc/3KPX-YWGY].

Table featured him on the second season.[40] Achatz is a chef who views himself and his peers as artists, where the food that chefs craft, evoke emotions in a similar fashion to art.[41] He derives his inspiration from his experiences in life, just as the traditional artist might.[42] He views his food as his expression of the world, and looks to allow patrons to feel with their emotions the food he creates.[43] Achatz is just one example of a chef who views food as artistry.[44] Eric Ripert, chef and co-owner of Le Bernadin in New York, television host, and author,[45] views cooking as both craftsmanship and artistry.[46] Craftsmanship refers to the techniques of cooking and nourishing the body,[47] whereas artistry refers to the creativity—"inventing new techniques, by using new ingredients in new ways, by creating new flavors and consistencies, and so on."[48] The food porn trend only further emphasizes this idea—that chefs are creators, artists over their own medium.[49] Yet, even though chefs are artists in a creative industry, the law has offered chefs very little legal protection over their creations.[50]

II. COPYRIGHT LAW, AND WHERE FOOD DESIGN PREVIOUSLY FIT IN

Copyright law focuses on the line between idea and expression.[51] It promotes expression which requires some measure of creativity and artistry, but discourages protection of productions that are fact and function-based.[52] The difficulty in distinguishing the

40. McBride, *supra* note 38; *see also* Tribune News Services, *Alinea Chef Grant Achatz to Appear on Netflix's 'Chef's Table'*, CHICAGO TRIB. (Mar. 8, 2016, 1:17 PM), https://www.chicagotribune.com/entertainment/tv/ct-chefs-table-netflix-3-more-seasons-20160308-story.html [https://perma.cc/AT73-8V4P].

41. McBride, *supra* note 38.

42. *See id.*

43. *Id.*

44. *Id.*; Charney, *supra* note 39 (explaining that other chefs, including Eric Ripert and Charlie Palmer, also view chefs as artists and craftsmen).

45. *Eric Ripert*, AVEC ERIC, http://www.aveceric.com/eric-ripert [https://perma.cc/JEE2-WFNP].

46. Charney, *supra* note 39.

47. *Id.*

48. *Id.*

49. *See* Kugel, *supra* note 11.

50. Natasha Reed, *Eat Your Art Out: Intellectual Property Protection for Food*, TRADEMARK & COPYRIGHT L. BLOG (June 21, 2016), https://www.trademarkandcopyrightlawblog.com/2016/06/eat-your-art-out-intellectual-property-protection-for-food/ [https://perma.cc/SNX4-4LGS] (Reed points out several examples where some limited intellectual property rights have been acquired to protect the creation of specific food products, including: Breyer's Viennnetta ice cream cake covered by a design patent, Pepperidge Farm's Milano Cookies protected by a trademark, and Blue Bottle Coffee's Mondrian Cake inspired by copyrightable art).

51. Nimmer, *supra* note 1, at 2A.04.

52. *Id.* at 2A.02.

idea-expression dichotomy occurs when the "functional impinges on the artistic."[53] In 1879, the Supreme Court first addressed the question of whether copyright protection could be provided for a work that was primarily functional and utilitarian in its structure and purpose.[54] In *Baker v. Selden*, the plaintiff sought protection for a new method of double-entry bookkeeping, which consisted of a unique arrangement of columns, headings, ruled lines, and illustrations.[55] The Court recognized that processes, systems, methods of operations, and modes of expression were not protected by copyright.[56] Shortly after, Congress enacted the Copyright Act, specifically separating idea from expression in its codification.[57] The Copyright Act itself exemplifies this purpose, providing that protection does not extend to any "idea, procedure, process, system, method of operation, concept, principle, or discovery."[58] Courts often use the term "idea" to encompass all eight of the categories presented in the statute, in order to keep the idea-expression dichotomy present.[59]

The Supreme Court did not address the issue of functionality and artistic design again until 1954 in *Mazer v. Stein*.[60] In *Mazer v. Stein*, the respondents manufactured and sold electric lamps.[61] One respondent crafted sculptures in the shape of human figures.[62] The Copyright Office granted copyright to the respondents for the human statuettes, but the respondents did not include lamp components in the application materials.[63] Nonetheless, the respondents proceeded to sell the human statuettes alone and as lamp bases.[64] The petitioners, another lamp manufacturer, copied the human statuettes and used them for its lamp bases as well.[65] Although the copyright did not cover lamp bases, the Court held that the respondents could receive copyright protection on the human statuettes because of the original expression, and furthermore, the use of the statuettes as lamp bases did not bar protection.[66]

In the House Report of the Copyright Act of 1976, the Committee on the Judiciary aimed to amend the act in order to reflect the

53. *Id.* at 2A.03.
54. *Id.* at 2A.05.
55. Baker v. Selden, 101 U.S. 99, 100 (1879).
56. Nimmer, *supra* note 1, at 2A.05.
57. *Id.* at 2A.06.
58. 17 U.S.C. § 102 (2018).
59. Nimmer, *supra* note 1, at 2A.06.
60. Mazer v. Stein, 347 U.S. 201 (1954).
61. *Id.* at 202.
62. *Id.*
63. *Id.* at 202–03.
64. *Id.* at 203.
65. *Id.*
66. *Id.* at 218.

Court's decision in *Mazer*.[67] The current codification of the Copyright Act still reflects the holding in *Mazer* by defining a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[68] The Copyright Act also explains that the "design of a useful article . . . shall be considered a pictorial, graphic or sculptural work only if . . . [it] can be identified separately from, and [is] capable of existing independently of, the utilitarian aspects of the article."[69] The Committee aimed to draw a clear line between copyrightable works of art and uncopyrightable works of industrial designs.[70] However, following the holding in *Mazer* and the codification of it in the Copyright Act, many questions remained unanswered for the lower courts, leading to decades of inconsistent holdings.[71]

In the decades before *Star Athletica*, there were nine different separability tests floating among the circuit courts, aiming to distinguish a useful article from its design.[72] The House Report suggested that an element can be identified as separable either physically or conceptually, and the circuit courts developed a split on whether the test should require one or the other.[73]

Physical separability is the idea that a design of a useful article is subject to protection if the design can be "physically separated from the article without impairing the article's utility and if, once separated, it can stand alone as a work of art traditionally conceived."[74] For example, courts could consider a jaguar sculpture attached to the hood of a vehicle as a sculpture that can be physically separated from the useful article, and thus protectable.[75] The physical separability test at first appears simple, however, courts have sometimes produced arbitrary distinctions.[76] In *Esquire, Inc. v. Ringer*, for example, the D.C. Circuit Court upheld the Copyright Office's determination that the overall shape of a lighting fixture was not physically separable from its utilitarian function.[77] There, the plaintiff sought a writ of mandamus directing the Copyright

67. H.R. REP. NO. 94-1476, at 54 (1976).
68. 17 U.S.C. § 101 (2018).
69. *Id.*
70. H.R. REP. No. 94-1476, at 55 (1976).
71. Nimmer, *supra* note 1, at 2A.08.
72. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484–85 (6th Cir. 2015) (summarizing nine then-existing tests for separability and describing the resultant circuit split).
73. H.R. REP. No. 94-1476, at 55 (1976); Nimmer, *supra* note 1, at 2A.08.
74. 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.5.3, at 2:75 (1989).
75. *See id.*
76. *Id.*
77. *Id.*

Office to register a claim for the overall shape of certain outdoor lighting fixtures.[78] The court agreed that the office correctly barred registration due to the overall shape and configuration of the utilitarian article, despite its aesthetically pleasing aspects.[79] In this opinion, the D.C. Circuit concluded that conceptual separability alone was not sufficient to offer copyright protection, relying on a physical separability test to come to its decision.[80]

On the other side of the split are circuits that utilize the conceptual separability analysis.[81] Courts on this side of the split struggled to develop one clear definition of conceptual separability, leading to inconsistent uses.[82] The Second Circuit primarily developed the conceptual separability analysis, issuing multiple opinions on the subject.[83] In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the plaintiff crafted belt buckles with ornamental designs created from original renderings, which the plaintiff conceived, sketched, and carved before casting them in silver and gold.[84] The plaintiff created two commercially successful belt buckle models, the Winchester and the Vaquero.[85] The defendant created exact copies of the designs, but placed them in common metals, rather than precious metals.[86] The defendant argued that the belt buckles were purely functional or useful objects, and that the decorative features were for aesthetic and utilitarian purposes, and thus could not receive protection.[87] The Second Circuit, found the ornamental aspect of the "Vaquero and Winchester buckles [to be] conceptually separable from their subsidiary utilitarian function."[88] The court noted that consumers had used the buckles for ornamentation on various parts of their bodies, not just the waist, and therefore the designs served at least some non-utilitarian function.[89] Here, the court laid the foundation for conceptual separability but did not define a clear test for determining it.[90]

Following *Kielselstein*, the Second Circuit explored conceptual separability in *Carol Barnhart, Inc. v. Econ. Cover Corp.* and

78. Esquire, Inc. v. Ringer, 591 F.2d 796, 798 (D.C. Cir. 1978).
79. *Id.* at 800.
80. *See id.* at 804–05.
81. GOLDSTEIN, *supra* note 74, at 2:77.
82. *Id.*
83. *See, e.g.*, Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 991 (2d Cir. 1980); *see also* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1144 (2d Cir. 1987).
84. *Kieselstein-Cord*, 632 F.2d at 990–91.
85. *Id.*
86. *Id.* at 991.
87. *Id.* at 993.
88. *Id.*
89. *Id.*
90. *See id.*

Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.[91] Through various discussions and opinions, the Second Circuit eventually concluded in *Brandir* that a design element is conceptually separable when artistic considerations influenced the design elements independently of utilitarian functions.[92]

The Seventh Circuit adopted the Second Circuit's conceptual separability test in *Pivot Point Int'l, Inc. v. Charlene Prods*.[93] There, the Seventh Circuit found a mannequin to be copyrightable because the sculptor developed the mannequin with artistic judgment in mind, independent of its use as a hair or makeup tool.[94] Following these cases the evolution of the conceptual separability test became more complicated and more diverse.[95] Beyond the discrepancy between physical and conceptual separability was the issue of the various tests under the conceptual separability branch that resulted in at least nine separability analyses.[96]

Circuit courts disagreed amongst themselves for decades, but the Supreme Court avoided tackling the separability analysis until recently.[97] The Supreme Court granted writ of certiorari on *Star Athletica* to provide clarification over the widespread disagreement involving the separate identification and independent existence requirements under copyright law.[98]

III. *STAR ATHLETICA*

Star Athletica, commonly referred to as the cheerleading uniform case, drew attention for its subject matter focused on chevrons and stripes.[99] However, the Supreme Court granted certiorari for *Star Athletica* in order to draw a clear line between artistic and industrial designs, and the interaction between the two.[100] Although the case focused on fashion designs, other artistic industries could look forward to an outcome that would allow them to protect their own creations.

91. Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1142 (2d Cir. 1987); Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985).

92. *See Brandir Int'l*, 834 F.2d at 1145.

93. Pivot Point Int'l, Inc. v. Charlene Prods., 372 F.3d 913 (7th Cir. 2004).

94. *Id.* at 930–31.

95. *See, e.g.*, Jane C. Ginsburg, *"Courts Have Twisted Themselves into Knots": US Copyright Protection for Applied Art*, 40 COLUM. J.L. & ARTS 1, 2 (2016) (explaining that "courts' application of the statutory 'separability' standard has become so complex and incoherent that the U.S. Supreme Court has agreed to hear [what would become *Star Athletica v. Varsity Brands*]").

96. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484 (6th Cir. 2015).

97. *Id.*

98. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017).

99. Mann, *supra* note 3.

100. *Id.*

The plaintiff, Varsity Brand, designed, made, and sold cheerleading uniforms.[101] The company held over two hundred copyright registrations on two-dimensional designs that appeared on its cheerleading uniforms.[102] The two-dimensional designs were primarily chevrons, lines, stripes, and diagonal lines.[103] Varsity Brand filed a complaint against another cheerleader uniform manufacturer, Star Athletica, claiming copyright infringement on five of its designs.[104] The U.S. District Court for the Western District of Tennessee held that copyright law did not protect the Varsity Brand uniform designs, because the designs could not be conceptually or physically separated from the utilitarian aspects of the cheerleading uniforms.[105] The Sixth Circuit reversed, holding that the graphic features of Varsity Brand's designs were copyrightable subject matter.[106] The Sixth Circuit identified the utilitarian aspects of the cheerleading uniforms, and then asked whether the designs could be identified separately from the utilitarian functions.[107] There, the court rejected other circuit court tests, preferring to craft its own based on a series of questions.[108] The Supreme Court followed suit and affirmed the Sixth Circuit's decision, but crafted its own test.[109]

The Supreme Court relied heavily on statutory interpretation to develop a two-part test in which "an artistic feature of the design of a useful article is eligible for copyright protection if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article." [110] The first part of the test simply involved the decision-maker identifying "some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities."[111] The second part of the test required the decision-maker to look at whether the

101. *Star Athletica*, 137 S. Ct. at 1007.
102. *Id.*
103. *Id.*
104. *Id.*
105. Varsity Brands, Inc. v. Star Athletica, LLC, No. 10-2508, 2014 U.S. Dist. LEXIS 26279, at *26 (W.D. Tenn. Mar. 1, 2014).
106. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 492 (6th Cir. 2015).
107. *Id.* at 487.
108. *Id.* at 490 (Question 1: whether the designs are pictorial, graphic, or sculptural works; Question 2: are the designs of useful articles; Question 3: what are the utilitarian aspects of cheerleading uniforms; Question 4: can we identify pictorial, graphic, or sculptural features separately from the parts of the cheerleading-uniform design; Question 5: can the arrangement of stripes, chevrons, color blocks, and zigzags exist independently of the utilitarian aspects of a cheerleading uniform).
109. *Star Athletica*, 137 S. Ct. at 1010, 1016.
110. *Id.* at 1016.
111. *Id.* at 1010.

design feature had the ability to exist apart from the utilitarian aspects.[112] The Court concluded that Varsity Brand's designs complied with the two-part test.[113] First, the Court identified Varsity Brand's designs as features with pictorial, graphic, or sculptural qualities.[114] Second, the Court found that the chevrons on the cheerleading uniforms could be "separated from the uniform and applied in another medium—for example, on a painter's canvas" and still qualified as two-dimensional works of art.[115] The Court emphasized that "imaginatively removing the surface decorations from the uniforms and applying them in another medium would not replicate the uniform itself" and therefore, the designs could be separated from the uniform's utilitarian aspects.[116] Thus, the Court concluded that the designs could be eligible for copyright protection if the other copyright requirements were met.[117]

The Court abandoned the conceptual and physical separability tests floating around the circuit courts and adopted an "imaginative separability" test.[118] Now, in order to solve the separability question, courts simply must imagine whether decorative aspects have the ability to be removed, placed on a different medium, and still exist as a two- or three-dimensional work of art.[119] This "imaginative" legal test is less than clear and will likely lead to discrepancy within an already murky area of copyright law.[120] Yet the new test will likely provide lower barriers for artistic industries, not just in the fashion realm but also in the food industry.[121]

IV. *STAR ATHLETICA* APPLIED TO FOOD DESIGN

Star Athletica requires courts to determine whether a pictorial, graphic, or sculptural feature incorporated into a useful article (1) can be identified separately from and; (2) is capable of existing independently of, the utilitarian aspects of the article in order to receive copyright protection.[122] The Court characterizes the first requirement simply: asking whether a decision-maker can look at the

112. *Id.*
113. *Id.* at 1012.
114. *Id.*
115. *Id.*
116. *Id.*
117. *See id.* at 1016.
118. Doris Estelle Long, *The Unimagined Consequences of Star Athletica's 'Imaginative Separability' Test*, IP WATCHDOG (Dec. 11, 2017), http://www.ipwatchdog.com/2017/12/11/unimagined-consequences-imaginative-separability/id=90829 [https://perma.cc/TP7Y-L93B].
119. *Star Athletica*, 137 S. Ct. at 1012.
120. Long, *supra* note 118.
121. *Id.*
122. *Star Athletica*, 137 S. Ct. at 1010.

useful article and "spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities."[123] In food design, imagine a deep-red-colored flower with complex petals, sitting on top of a slice of pastry.[124] It is a rhubarb mousse that a chef has intricately carved and placed on top of a slice of pastry to be eaten.[125] This is food, but yet it appears as a meticulously crafted flower sculpted by an artist.[126] This example would satisfy the first requirement because designs of food often contain elements that seem to be plucked from a picture, a graphic, or resemble a creative sculpture.[127] Even simpler designs than a rhubarb flower will have the same result under this low bar.

Figure 1[128]

The second requirement presents a higher barrier generally, but the Court's imagination test made this requirement far less strenuous.[129] The decision-maker must be able to determine that the "separately identified feature has the capacity to exist apart from the utilitarian aspect."[130] In this part of the analysis the Court abandoned the distinction between conceptual and physical

123. *Id.*
124. *See infra* Figure 1.
125. *Id.*
126. *Id.*
127. *Id.*
128. The Art of Plating (@theartofplating), INSTAGRAM (June 25, 2018), https://www.instagram.com/p/BkdA3NqhAch [https://perma.cc/9DZ5-Z8ET] ("[H]oney poached rhubarb and levian mousse on a flaky puff pastry w[ith] brown butter levian ice cream.").
129. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1012 (2017).
130. *Id.* at 1010.

separability, and instead focused on "imagining" the designs removed from the useful article and placed in another medium.[131] The Court rejected the idea that once the designs are removed, the article must remain useful in the same manner.[132] It described this idea as unnecessary to the separability analysis, because it was immaterial as to whether the useful article could exist on its own without the design features.[133] In the particular case, the Court presented the example of placing the chevrons and stripes on a canvas rather than a uniform, identifying the chevrons and stripes no longer as a design on a uniform, thus satisfying the second part of the test.[134]

With food design, the imagination test and the second requirement under the new *Star Athletica* test offer lower barriers to copyright protection. Imagine the same plate, with the rhubarb mousse flower. Remove the design features, the flower itself, and place it onto another medium. When the flower is placed on another medium, is it still recognizable as a two-or-three dimensional work of art? Although the food and the design are intermingled, the design can be identified as existing separately from the food itself. The design could exist as a sculpture of a flower, a painting of a flower, or a graphic featuring a flower.

After the creation of the new imagination test, food design is more likely to be identified separately from its utilitarian function. Under this new test, it will be the decision-maker's imagination that will determine whether or not certain designs may be separated from their functionality. However, if chevrons, stripes, and basic patterns can pass the test, it seems that most artistic designs will have the ability to do so as well.

V. FOOD DESIGN UNDER FIXATION AND ORIGINALITY REQUIREMENTS

Although *Star Athletica* made copyright protection feasible under the separability analysis, food design must surpass other essential copyright requirements.[135] The Copyright Act protects "original works of authorship fixed in any tangible medium," meaning a work must surpass originality and fixation requirements in order to receive copyright protection.[136]

131. *Id.* at 1012–14.
132. *Id.* at 1014.
133. *Id.* at 1013.
134. *Id.* at 1012–13.
135. 17 U.S.C. § 102 (2018).
136. *Id.*

A. Originality

A work requires a *de minimis* of creativity in order to be characterized as original.[137] In *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, the Court declared a telephone directory as unoriginal because it was a compilation of facts.[138] The Court explained that the arrangement, coordination, and selection of facts could have potentially met the originality requirement if an individual used creativity to arrange, coordinate, or select the facts.[139] However, that did not occur in the case.[140] The telephone directory company listed every name in the area and arranged the names and phone numbers alphabetically.[141] The Court found the arrangement to be a common way to create a telephone directory and thus the directory did not meet the originality requirement.[142]

Unlike telephone directories, most food design will pass the originality requirement—particularly dishes created with aesthetic properties in mind, like the dishes showcased on The Art of Plating.[143] The Art of Plating is an international media and events company that provides a platform for chefs to share their artistry, vision, and story.[144] The authors of The Art of Plating interview popular chefs and photograph their dishes.[145] At the end of every editorial with a chef, the author asks the chef what their specific style of plating is and what their plating tips are for other chefs.[146]

Dan Graham and Merlin Labron-Johnson are two chefs who consider "the art of plating" in their Michelin-starred restaurants.[147] Dan Graham, head chef at Pidgin, focuses on developing dishes that appear more natural or striking.[148] His style of plating involves leaving space on the plate and using geometry to divide the

137. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991).
138. *Id.* at 364.
139. *Id.* at 361.
140. *Id.* at 363–64.
141. *Id.* at 362–63.
142. *Id.* at 362.
143. *See id.*
144. *About*, THE ART OF PLATING (2019), http://theartofplating.com/about-2 [https://perma.cc/2QP9-YYX9].
145. *See Editorials*, THE ART OF PLATING (2019), http://theartofplating.com/editorials [https://perma.cc/8YMT-HBF5].
146. *Id.*
147. *See* Monica R. Goya, *Dan Graham: From Architect to Michelin Starred Chef*, THE ART OF PLATING (Mar. 13, 2017), http://theartofplating.com/editorial/dan-graham-from-architect-to-michelin-starred-chef [https://perma.cc/TU7P-K9AG] [hereinafter Goya, *Dan Graham*]; Monica R. Goya, *Merlin Labron-Johnson: A Young and Bright London Chef*, THE ART OF PLATING (Nov. 2, 2017), http://theartofplating.com/editorial/merlin-labron-johnson-a-young-and-bright-london-chef [https://perma.cc/Q4CU-749E] [hereinafter Goya, *Merlin Labron-Johnson*].
148. Goya, *Dan Graham*, *supra* note 147.

plate in an appealing way.[149] His restaurant plates every dish on the same plate, so "it is very much like we have a white canvas that we work on."[150] Merlin Labron-Johnson received a Michelin star nine months after opening his first restaurant.[151] Labron-Johnson describes the art of plating as "an expression of how you imagined a dish," noting that it may be just as important as flavor.[152] His art of plating involves layers with surprises hidden in different places.[153]

Figure 2[154]

Figure 3[155]

The Art of Plating and its featured chefs illustrate the prominence of food design within the culinary world, and how design plays an essential role in the dishes that chefs create.[156] Chefs arrange food, design plates, and craft creations that should easily surpass the originality requirement.[157] It is unlikely that a chef's food designs will lack originality, unless it involves a piece of food simply

149. *See, e.g.*, *id*; *see infra* Figure 2.

150. Goya, *Dan Graham*, *supra* note 147; *see infra* Figure 2.

151. Goya, *Merlin Labron-Johnson*, *supra* note 147.

152. *Id.*

153. *Id.*; *see infra* Figure 3.

154. PiDGiN Restaurant (@pidginyvr), INSTAGRAM (Feb. 20, 2020), https://www.instagram.com/p/B8zTrqlh1KO/ ("Brussel sprouts and pickled turnips, miso, fennel and caraway salt, brown butter crumb.").

155. Merlin Labron-Johnson (@merlin_johnson), INSTAGRAM (Oct. 29, 2019), https://www.instagram.com/p/B4NmsIRnTsZ/ ("Roast potato, smoked herring and land cress.").

156. *See About*, THE ART OF PLATING (2019), http://theartofplating.com/about-2 [https://perma.cc/7CPC-TBEK] (describing its mission as providing a platform for innovators in gastronomy to share their work); *see infra* Figures 4, 5.

157. *See* 17 U.S.C. § 101 (2018); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991); *see infra* Figures 4, 5.

thrown on a plate or arranged in a simplistic, uncreative fashion.[158] In that instance the creation may not exceed the originality requirement, like the telephone directory in *Feist*.[159] Overall, although food design may overcome the originality requirement it must still meet the fixation requirement laid out in the Copyright Act.[160]

Figure 4[161]

Figure 5[162]

B. Fixation

Congress added the fixation requirement to the Copyright Act in 1976 in order to differentiate ideas from expression.[163] The focus shifted to the expression, rather than making copyrightability dependent on the form or medium of the work.[164] The Copyright Act provides a broad definition of the fixation requirement: "[a] work is 'fixed' in a tangible medium of expression when its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of time more than a transitory duration."[165] To be fixed means that the work "is sufficiently permanent or stable to permit it to be perceived, reproduced,

158. *See Feist*, 499 U.S. at 358–59 ("Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity.").

159. *Id.*

160. 17 U.S.C. § 102(a) (2018).

161. The Art of Plating (@theartofplating), INSTAGRAM (Apr. 6, 2020), https://www.instagram.com/p/B-p5_7VDXc1/ ("Squab, white cabbage, mustard, and shiitake sauce.").

162. The Art of Plating (@theartofplating), INSTAGRAM (July 1, 2018), https://www.instagram.com/p/BkrPSgxBKLN/ ("Rhubarb and rose sorbet, white chocolate and raspberry cremeux, pistachio, and bronze fennel.").

163. *See* H.R. REP. NO. 94-1476, at 52 (1990).

164. *Id.*

165. 17 U.S.C. § 101 (2018).

or otherwise communicated for a period of more than transitory duration."[166] The Copyright Act does not clarify what mediums are permissible and does not clarify what would qualify as a "period of more than a transitory duration."[167] Naturally, this has led courts to interpret the fixation definition in a variety of ways independent of food design.[168]

Currently *Kim Seng Co. v. J&A Imps., Inc.* is the sole case that addresses fixation in food design.[169] In *Kim Seng*, the plaintiff contended that it owned copyright protection to a bowl of Vietnamese noodles.[170] The California Central District Court held that the traditional Vietnamese dish did not meet the fixation requirement.[171] The court relied on a Seventh Circuit case, *Kelley v. Chicago Park District*, involving a recognized artist who created a live garden called Wildflower Works.[172] In *Kelley*, the Seventh Circuit concluded that an "artistically arranged garden" did not meet the fixation requirement because it was not permanent or stable enough.[173] The court focused on the idea that the work would inherently change over time.[174] The California District Court in *Kim Seng* extended the *Kelley* holding to deny copyright protection to perishable works.[175] The court found that, like a garden, a bowl of food is "inherently changeable" because it will eventually perish.[176] With this holding, the California District Court implemented a standard that declared any perishable material as a medium incapable of receiving protection.[177]

The court's conclusion in *Kim Seng* contrasts with the idea that food design may satisfy copyright requirements, but the decision is problematic for two reasons under copyright law. First, the conclusion does not align with the definition of "fixed" under the Copyright Act, which allows for "any tangible medium" that can be perceived, reproduced, or otherwise communicated.[178] Food design can surely be "perceived, reproduced, [and] or otherwise communicated"

166. *Id.*
167. *Id.*
168. *See, e.g.*, Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 129 (2d Cir. 2008) (declaring that the "fixed" requirement is composed of two elements: an embodiment and a duration); Kim Seng Co. v. J&A Imps., Inc., 810 F. Supp. 2d 1046 (C.D. Cal. 2011).
169. *Kim Seng Co.*, 810 F. Supp. 2d at 1053–54.
170. *Id.* at 1052.
171. *Id.* at 1054.
172. *Id.*
173. Kelley v. Chicago. Park Dist., 635 F.3d 290, 305 (7th Cir. 2011).
174. *Id.* at 304–06.
175. *Kim Seng Co.*, 810 F. Supp. 2d at 1054.
176. *Id.*
177. *See id.*
178. 17 U.S.C. § 101 (2018).

although its medium may perish eventually.[179] Individuals in restaurants perceive the food they eat. Individuals watching television cooking shows and competitions perceive the food design before it is judged and eaten. Often, food design is reproduced and communicated through photographs, videotapes, cookbooks, menus, and so on.[180]

Second, the Copyright Act does not require permanency, or that the work even last for a long period of time.[181] In *Cartoon Network v. CSC Holdings*, the Second Circuit declared 1.2 seconds as less than a transitory duration of time.[182] Although this is the only case to designate a specific time limit, food design would surely surpass even the Second Circuit's test.[183] In most scenarios food design would surpass the fixed requirement. In a restaurant, a chef creates, composes, and plates the dish, thereby creating the food design.[184] Then the food expediter directs a server or food runner to take the dish to the specific table and customer.[185] The customer observes the dish, and depending upon the customer, they might take a photograph of the plate to post on social media.[186] Throughout this period of time, the design is fixed for longer than 1.2 seconds and surely for longer than a transitory duration.

Further examples illustrate how food design surpasses the fixation requirement. On a Food Network television show or on a competitive cooking show such as *Top Chef*, a chef prepares a dish, plates the dish, and presents the dish. The food design is perceived by the chef, judges, contestants, producers, set workers, etc. Then, the food design is reproduced and communicated through the television, allowing viewers to observe the design. These examples demonstrate the variety of ways in which food design can be perceived, reproduced, and communicated. The fixed requirement is not meant to be stringent. To allow all perishable materials to be barred from protection would prevent copyright law from protecting the expression it is designed to safeguard.[187] Although a

179. *Id.*

180. *See* Reed, *supra* note 50.

181. *See* 17 U.S.C. § 101 (2018) (omitting definition of "transitory" as it pertains to a fixed medium).

182. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008).

183. *Id.* at 127 (holding that the Copyright Act imposes a two-part test of embodiment and duration, requiring work to be embodied for "more than [a] transitory duration").

184. *Explore Industry Careers*, NAT'L RESTAURANT ASS'N, https://restaurant.org/Restaurant-Careers/Career-Development/Career-Options/Job-Titles [https://perma.cc/4CWT-S5W7].

185. *Id.*

186. Reed, *supra* note 50.

187. *See* 17 U.S.C. § 102 (2018); Reed, *supra* note 50 (noting "[c]opyright law protects an artist's original, creative expression").

copyrighted work may perish, it should not immediately fall into the public domain as soon as the physical embodiment no longer exists. Food design should surpass the fixation requirement as well as the originality requirement, and thus receive copyright protection.

VI. PROPOSAL

Intellectual property in the United States is based on the incentive theory.[188] The incentive theory hypothesizes that by granting exclusive rights to a work, an individual can profit, and this profit incentivizes the individual to continue to create.[189] According to the incentive theory, in order to promote creation, artists and creators must be granted exclusive rights for a period of time.[190] This rationale is illustrated in the Constitution where the Commerce Clause states that "Congress shall . . . promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[191] The Copyright Act currently grants copyright owners the exclusive rights to reproduce, prepare derivative works, distribute copies, perform the work, and display the work publicly.[192] According to the incentive theory, granting these exclusive rights promotes individuals to create.[193]

Intellectual property's "negative space" defies the incentive theory.[194] Negative space is a term that refers to a "substantial area of creativity" where intellectual property laws have provided very limited to no protection at all.[195] To qualify as existing in a negative space, an industry must not just exist but thrive in a space without protection.[196] Many creative industries function in a negative space, where there is an absence of intellectual property protection.[197] Cuisine—both recipes and food design—has thrived in this negative space, empty of any laws or doctrinal protection.[198] The trendiness of food porn and how chefs have transitioned into stars and artists, only helps to illustrate how the culinary industry has continuously

188. Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 318 (2011).
189. *Id.* at 318.
190. *Id.*
191. U.S. CONST. art. I, § 8, cl. 3.
192. 17 U.S.C. § 106 (2018).
193. Rosenblatt, *supra* note 188, at 318.
194. *Id.* at 319.
195. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (Dec. 2006).
196. Rosenblatt, *supra* note 188, at 325.
197. *Id.* at 319.
198. *Id.* at 327; *see supra* Sections I–III.

thrived without legal protection.[199] It is clear that exclusivity may be only a small portion of what incentivizes creators,[200] and with industries like the culinary industry there may be other factors that incentivize creation, such as recognition and attribution. Accordingly, some industries may need intellectual property protection more than others,[201] and this Note proposes that the culinary industry is not a creative industry that would thrive with legal protection.

A negative space can exist for various reasons, but in the food design space social norms govern in a way that makes it possible for creators to function without intellectual property protection.[202] Under intellectual property law, bodies of legislation and case law rule the land.[203] In law-based systems, violations are resolved in the courts and financial payments and further prohibitions are offered as solutions, whereas in a norms-based systems, social norms and community consensus command.[204] For violations in a norms-based system, sanctions may include shaming and loss of status or reputation.[205] Social norms govern the behavior of a group and are enforced by the members of that group.[206] Generally, sociologists characterize social norms as informal understandings that are rarely discussed explicitly.[207]

Kal Raustiala and Chris Sprigman, intellectual property scholars, proposed in 2012 that copying promotes creativity and innovation in various industries.[208] Raustiala and Sprigman specifically addressed inherent copying in four industries: cuisine, stand-up comedy, football, and fashion.[209] Within cuisine, the scholars introduced three main ideas for why copying exists and actually promotes creativity; (1) copying can burnish a chef's reputation for creativity, (2) copies in the culinary world are not exact copies but reinterpretations, and (3) social norms restrain the more egregious forms of copying in the culinary world.[210]

199. *See* Reed, *supra* note 50.
200. Rosenblatt, *supra* note 188, at 321.
201. *Id.*
202. *Id.* at 338–39.
203. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* (MIT Sloan School of Management, Working Paper No. 4576, 2006) (revised July 2007), https://evhippel.files.wordpress.com/2013/08/vonhippelfauchart2006.pdf [https://perma.cc/BUU5-N78T].
204. *Id.* at 3.
205. *Id.* at 4.
206. *Id.* at 5.
207. *Id.*
208. RAUSTIALA & SPRIGMAN, *supra* note 26, at 7.
209. *Id.* at 5.
210. *Id.* at 89.

1. Reputation and Creativity

Reputation has a strong hold in the culinary world, because chefs often desire a reputation for bold and inventive cooking among their peers.[211] When a chef creates a particularly inventive or new dish, other chefs, restaurateurs, and critics often grant them recognition.[212] The chef is known as the true creator and receives attribution for being so.[213] For chefs, this attribution is key.[214] In a world where chefs not only have a reputation amongst their peers but within the public eye, receiving recognition is critical.[215] Public attention and recognition amongst their peers allows for new opportunities in different areas of the market, whether that is a cooking television show, a contract for a new cookbook, a profile in a magazine, or on an internet blog.[216] With newfound fame and opportunity, chefs may find themselves dealing with copiers. Although copiers may avoid acknowledging the true creator, the true creator's strong reputation may prevent copiers from benefitting from the dish.[217] In their proposal, Raustiala and Sprigman emphasized that due to the value of public attention, having a creation widely copied is a "testament to one's influence and creative power."[218] Copying is powerful and has the ability to advance a chef's reputation when it is partnered with public attention.

2. Dishes as Reinterpretations

Second, Raustiala and Sprigman proposed that copies in the culinary world are not exact copies but merely reinterpretations.[219] In cuisine, a dish is often discernible from its original copy. From dish to dish the exact ingredients and the quality of ingredients may vary, the chef may tweak the composition, and the execution may not be the exact same each time.[220] At many high-end restaurants, the original creator may not be the chef preparing the dish every evening.[221] Often the original creator or the executive chef supervises the process after the original developmental period.[222] These distinctions generate natural variation in the culinary world,

211. *Id.* at 86.
212. *Id.* at 87.
213. *Id.*
214. *See id.*
215. *Id.*
216. *Id.*
217. *See id.* at 88.
218. *Id.*
219. *Id.* at 89.
220. *Id.* at 84.
221. *Id.*
222. *Id.*

where the consumer never receives the original copy.[223] Raustiala and Sprigman suggested that the lack of exact copying may explain the forgiving nature of culinary copying, where the "differentiation defang[s] copies."[224] The first two theories provided for why those in the culinary world may forgive certain forms of copying,[225] but for the more egregious forms of copying a proper restraint is still necessary.[226]

3. Social Norm Restraints

Finally, Raustiala and Sprigman proposed that social norms restrain the more flagrant forms of copying that can occur.[227] Legal scholar Christopher Buccafusco conducted a study examining the social norms of elite American chefs, including Chef Thomas Keller, chef and proprietor of The French Laundry, and Chef Wylie Dufresne, former chef of WD-50.[228] Buccafusco found that overall the "culture of hospitality" enabled chefs to shape their culinary profession.[229] The study indicated that the nature of culinary work influenced chefs by persuading them to share their creations with others and to not exclude other chefs from being inspired by that creation.[230] Chef Keller explained that, "There's a hospitality gene that we have as chefs that makes us want to share what we do."[231] He noted further that it made him uncomfortable to refer to a dish solely as his own, and he would have a problem if another chef would require his permission to use his creations.[232] Chef Dufresne, another advocate for collaboration and sharing, emphasized that he enjoyed his creations being in circulation as long as other chefs did not create blatant copies.[233] In the end, a chef that has a creation in circulation emphasizes that they have developed a technique or a concept that matters, influences others, and is a contribution to the industry.[234] Chefs covet this type of influence. The chefs featured in the study were welcome to providing inspiration, but again

223. *See id.*
224. *Id.* at 85.
225. *See id.* at 89
226. *Id.* at 66–67 (discussing copyright protection for literally expressions that accompany a recipe).
227. *See id.* at 78–83.
228. Christopher Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZOA ARTS & ENT. L.J. 1121 (2007).
229. *Id.* at 1151.
230. *Id.* at 1152.
231. *Id.*
232. *Id.*
233. *Id.* at 1153.
234. *See id.*

attribution was crucial, and blatant copying without attribution would not be tolerated.[235]

Buccafusco's study provides support to Raustiala and Sprigman's theory that some forms of copying are tolerated in certain industries and may even help drive innovation.[236] However, a strict norms-based system provides the necessary protection to chefs that the U.S. law-based system currently does not.[237] A perfect example of the norms-based system operating within the culinary world is the story of Robin Wickens, chef of Interlude, a restaurant in Melbourne, Australia.[238] In 2006, on the website eGullet.com, administrators posted dishes from Interlude that looked strikingly similar to dishes that American restaurants featured.[239] Dishes included noodles made of shrimp and a glass tube filled with eucalyptus jelly and yogurt.[240] The chefs of WD-50 and Alinea originally crafted the dishes, and Wickens volunteered in those restaurants a few months prior.[241]

Shortly after the posting on eGullet, many commentators from the culinary world weighed in with hostile commentary.[242] The culinary world recognizes a staging system where young chefs can intern with prestigious chefs in order to share information and promote creativity, and commentators took issue with the way in which Wickens abused this tradition.[243] Chef Grant Achatz of Alinea frequently recognizes this tradition and welcomed Wickens into his kitchen.[244] Wickens used the opportunity to not just learn, but to recreate the dishes down to the recipe and plating in his own kitchen.[245] Shortly after the internet criticism, Wickens removed the dishes from his menu and his site, explaining that he did not claim the dishes as his own.[246] The community force and Wickens' final decision illustrates the strong role that social norms play in protecting against blatant copying of dishes.[247] Although intellectual property law did not protect Chef Achatz's creations, the strong

235. *Id.* at 1156.
236. *See* RAUSTIALA & SPRIGMAN, *supra* note 26, at 80.
237. *Id.*
238. *See* Katy McLaughlin, *That Melon Tenderloin Looks Awfully Familiar*, WALL ST. J. (June 24, 2006, 11:59 PM), https://www.wsj.com/articles/SB115109369352989196 [https://perma.cc/L7V7-LMZS].
239. *Id.*
240. *Id.*
241. *Id.*
242. *See* RAUSTIALA & SPRIGMAN, *supra* note 26, at 73.
243. *Id.* at 75.
244. *Id.*
245. *Id.* at 73.
246. *See* McLaughlin, *supra* note 238.
247. *See* RAUSTIALA & SPRIGMAN, *supra* note 26, at 78.

pull of the community tarnished Wickens' professional reputation and forced him to cease serving the dishes at his restaurant.[248]

This example among others emphasizes the work of social norms within the culinary world.[249] In order to fully analyze how social norms provide the best solution, it is necessary to look at a few more examples and compare how both a law-based and norms-based system apply.

A. Chefs Copying Chefs

A common example of copying in the culinary world is where a chef copies another chef, similar to the Wickens incident. A chef designs a dish by handpicking and developing the ingredients, visualizing the plating of the dish, prepping, tasting, and finally presenting the dish to customers.[250] Similarly to Wickens, a chef may intern with another chef and copy the dish in their own restaurant. Perhaps, a chef dines at another chef's restaurant and copies the dish, or maybe a chef views a television show and decides to copy the dish. In order to avoid repercussions, a chef copying a chef could follow a law-based system or abide by a norms-based system.

Under an intellectual property law-based system, a chef could pay a licensing fee to the creator in order to copy the dish and sell it.[251] As Chef Achatz from Alinea explained, this would feel strange.[252] He has declared, "Chefs won't use [a copyright system]. Can you imagine Thomas Keller calling me and saying, 'Grant, I need to license your Black Truffle Explosion, so I can put that on the menu'?"[253] In Buccafusco's study, Chef Thomas Keller reiterated this idea by stressing his discomfort with other chefs asking him for permission to use his creations.[254] Although a license under a law-based system could be a workable option, generally chefs do not want a legal regime to prevent copying amongst themselves.[255]

B. Customers Copying Chefs

Besides chefs-copying-chefs, chefs may want to prevent customers from copying their food design by taking photographs while dining in the restaurant, and then publishing those photographs on

248. *See* McLaughlin, *supra* note 238.
249. *See* RAUSTIALA & SPRIGMAN, *supra* note 26, at 78.
250. *See Developing a Dish*, CHEF STEPS, https://www.chefsteps.com/activities/developing-a-dish [https://perma.cc/53N6-FWRM].
251. *See* RAUSTIALA & SPRIGMAN, *supra* note 26, at 81.
252. *Id.*
253. *Id.*
254. Buccafusco, *supra* note 228, at 1152.
255. *See id.* at 1151–55.

social media accounts, websites, and magazines.[256] In Germany, the Federal Court of Justice extended copyright protection to "elaborately arranged food."[257] Individuals who post photographs of their "food porn" in Germany could potentially be subjected to copyright infringement claims if permission is not acquired first.[258] After *Star Athletica*, chefs could potentially rely on the same law-based system to prevent Instagram and Twitter users from posting the "food porn" that is not their own creation.[259] This type of system could force consumers to face potentially large fines or costly court proceedings.[260] Overall, this type of system seems unwise, because it involves chefs bringing suits against their own customers. Customers often provide free marketing and advertising using social media sites, and so chefs would be dismissing the public attention and attribution that is so desired.[261]

C. Law-based Options Outside of Copyright

Outside of the copyright realm, chefs could utilize trade secret, trade dress, trademark, or patent law to protect their creations, but this protection is limited in scope.[262] Trade secret law prevents individuals from sharing trade secrets when they owe a duty to the owner.[263] Trade secret law is limited primarily to protecting recipes and ingredients.[264] For example, although it is a beverage, the creators of Coca-Cola have kept the recipe well-guarded with trade secret protection.[265] Trade dress law is beneficial for owners looking to protect the design and décor of their restaurant.[266] If the design or décor is distinctive and well-known they may receive trade dress protection, however, trade dress law cannot provide protection for actual food or food design.[267]

Chefs may look to trademark law to protect the names of their restaurants and the names of specific dishes, but again, the actual food and food design cannot receive trademark protection.[268] For example, Chef Chang of Momofuku restaurant, received trademark

256. *See* Khushbu Shah, *Instagram Food Porn Violates Copyright Law Says German Court*, EATER (Aug. 14, 2015, 9:49 AM), https://www.eater.com/2015/8/14/9153029/instagram-food-porn-copyright-law-germany [https://perma.cc/A559-RMTY].
257. *Id.*
258. *Id.*
259. *See supra* Section III.
260. *See* Shah, *supra* note 257.
261. *See id.*; *see supra* Section VI.
262. *See* RAUSTIALA & SPRIGMAN, *supra* note 26, at 71.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 70–71.
267. *Id.*
268. *Id.* at 71.

registration for his desserts—Crack Pie and Compost Cookies.[269] The trademark does not protect the actual composition of the dish, but protects the name of the specific products.[270]

Lastly, some chefs have turned specifically to patent law to protect particularly inventive dishes.[271] The late Chef Homaro Cantu filed dozens of patent applications including applications for cotton candy paper and a flavored fork, in order to protect his unique food designs and creations.[272] However, patent protection requires a significant amount of time and money, and protection is only provided to a new device, method, process or substance.[273] It is unclear whether there are other chefs like Chef Cantu, focused on technological inventions involving food.[274]

In each realm of intellectual property law the options for chefs are limited in terms of the actual dish and its design, and copyright law offers the most fruitful option. However, based on these examples, a law-based system would appear strange and unnecessary in the culinary world. For copying that is egregious, chefs can rely specifically on social norms for reparations and deterrence.

CONCLUSION

Intellectual property rights seek to promote creativity by providing artists with legal protection, incentivizing them to continue to create. Historically, copyright law has denied chefs the opportunity to gain protection on food design, due to the utilitarian aspects associated with food. However, *Star Athletica* may be the case to afford copyright protection to artistic industries that have previously been denied access. In *Star Athletica*, the Court crafted an "imaginative test" that now provides low barriers to design industries that meet the requisite originality and fixation requirements under copyright law. Despite its previous inability to receive legal protection, the culinary world has thrived in what is known as a negative space. A negative space defies the incentive theory and refers to an area of creativity where intellectual property laws have provided little to no protection at all. The culinary world has prospered in this negative space, absent of any laws or doctrine. The "food porn" trend exemplifies the success that chefs have experienced while operating in this negative space. Even without legal protection chefs have gained notoriety and fame for their food

269. *Id.*
270. *Id.*
271. *Id.*
272. Pete Wells, *New Era of the Recipe Burglar*, FOOD & WINE (Mar. 31, 2015), https://www.foodandwine.com/articles/new-era-of-the-recipe-burglar [https://perma.cc/XR6T-KWZ3].
273. *Id.*
274. *Id.*

designs, illustrating that protection is unnecessary. In order to protect chefs and their culinary creations, a norms-based system is proper. A norms-based system is fitting for the culinary world because it allows chefs and food design to truly flourish creatively.