INTELLECTUAL PROPERTY PROTECTION FOR FOOD: BALANCING COMPETING POLICY OBJECTIVES

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ABSTRACT

For millennia, developers of unique culinary dishes have sought legal protection for their culinary innovations. Such legal protection encourages innovation in food, but it also creates tensions with the competing policies of ensuring low prices for food and protecting freedom of expression in the culinary context. This note explores the historical and contemporary role of intellectual property in protecting culinary innovation. It then examines how strong IP protection for food would create tensions with the United States' objectives of ensuring broad freedom of expression in the context of food and maintaining low prices for food. Finally, this note examines trade secrets as an appropriate means of protecting culinary innovation, with a focus on the role of prior restraint doctrine in the context of trade secrets. The note concludes that trade secrets, combined with a modified approach to prior restraints, would strike the right balance between encouraging culinary innovation, ensuring low prices for food, and protecting freedom of expression in the context of food.

INTRODUCTION

On September 23, 2015, the ubiquitous coffee chain, Starbucks, released a new espresso drink for the fall season known as the toasted-graham latte, or TGL.[1] The TGL featured graham crackers "soaked in a milk-and-sweet-cream concoction," with "a layer of cinnamon-graham crumbles" sprinkled on top.[2] Yoke Wong, who created the latte, looked to the back-to-school season for inspiration for the TGL, noting that the taste of cereal milk, "the delicious leftovers in your breakfast bowl," appeared to be quite popular in the United States.[3]

If Wong independently came up with the idea of leveraging the popular taste of cereal milk in a new medium, she would not be the first to

1. Clint Rainey, *Starbucks' New Toasted-Graham Latte Rips off Momofuku Milk Bar*, GRUB STREET (Sept. 23, 2015), http://www.grubstreet.com/2015/09/starbucks-milk-bar-cereal-milk-knockoff.html.
2. *Id.*
3. *Id.*

do so. Clint Rainey observes that Starbucks' TGL was highly similar to Christina Tosi's Cereal Milk Affogato, which "combined a doppio Stumptown espresso with a scoop of the soft-serve."[4] The recipe for the Cereal Milk Affogato appeared in the *Milk Bar* cookbook, which had been released four years previously.[5]

A few months after the release of the TGL, Starbucks was accused of duplicating another Milk Bar creation. David Chang of Momofuku alleged that Starbucks' bagel balls copied from Chang's and Tosi's Bagel Bombs, which Milk Bar had been serving since at least as early as 2011.[6] Beyond publicly confronting Starbucks for allegedly copying Milk Bar ideas, it is not clear if Chang and Tosi have legal recourse against the coffee giant. This is because, in the United States, food innovations do not enjoy the same intellectual property protections as patented inventions or copyrighted works.

This note examines what protections apply to innovative food and culinary dishes, and it evaluates whether the current intellectual property framework for food and beverages is desirable. Part I briefly outlines the historical and contemporary roles of patent and trademark protection, copyright, and trade secrets in protecting food innovators. Part II discusses the conflicts that exist between intellectual property protection for food, on the one hand, and the First Amendment and America's commitment to inexpensive food, on the other hand. Part III discusses the role trade secrets can play as a means of protecting culinary innovation, and it examines the challenges that the prior restraint doctrine poses in protecting culinary innovation. Finally, Part IV reasons that trade secrets, combined with a modified approach to prior restraints, strike the right balance among the competing interests of advancing food diversity and innovation, protecting First Amendment rights, and maintaining low prices for food and beverages.

I. A BRIEF HISTORY OF INTELLECTUAL PROPERTY PROTECTION FOR FOOD

According to Diego and Valter Giugni, theprincipal instruments' of the intellectual property system are "patents, utility models, designs, trademarks, copyrights, unfair competition, and antitrust."[7] "Within this

4. *Id.*

5. *Id.*; *see generally* CHRISTINA TOSI, MOMOFUKU MILK BAR (2011).

6. Daniela Galarza, *David Chang Puts Starbucks on Blast for Milk Bar-Esque Bagel Balls*, EATER (Dec. 4, 2015), https://www.eater.com/2015/12/4/9849778/david-chang-starbucks-milk-bar-bagel-bomb-balls.

7. Diego Giugni & Valter Giugni, *Intellectual Property: A Powerful Tool to Develop Biotech Research*, 3 MICROBIAL BIOTECHNOLOGY 493, 494 (2010).

set, there are three basic categories that are relevant to culinary innovation: patents, trademarks, and copyrights.[8] Additionally, trade secrets play a prominent role in protecting culinary innovation.[9] This Part briefly examines the historical and contemporary application of these categories of protections.

A. Patent and Trademark Protection from Ancient Greece to Genetically Modified Organism ("GMO") Products

There is a long history of patent protection for culinary innovations. The history of trademark protection for food is shorter, but patents and trademarks can operate in similar ways in the context of food, and they are examined together in this Section.

"Patent law protects new, unobvious, and useful inventions, such as machines, devices, chemical compositions, and manufacturing processes."[10] The Patent Act establishes that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements" of the statute.[11] Under the Lanham Act, "trademark" includes "any word, name, symbol, or device, or any combination thereof," which is used "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."[12]

Patent protection for food traces its origins to at least as far back as 500 B.C. in the Greek colony of Sybaris.[13] If any confectioner in this colony "invented a peculiar and excellent dish," a monopoly was granted to this confectioner where no other artist was allowed to prepare it for one

8. Natasha Reed, *Eat Your Heart Out: Intellectual Property Protection for Food*, TRADEMARK & COPYRIGHT LAW (June 21, 2016), http://www.trademarkandcopyrightlaw-blog.com/2016/06/eat-your-art-out-intellectual-property-protection-for-food/. Unfair competition and antitrust also have clear applications in the culinary context, but their operation in the culinary context is not significantly different from their application in any other context, and so their discussion is omitted from this note.

9. *Id.*

10. DONALD S. CHISUM, 1 CHISUM ON PATENTS 1 (2018).

11. Patent Act, 35 U.S.C. § 101 (1952).

12. Lanham Act, 15 U.S.C.S. § 1127 (2006) (explaining that the "word, name, symbol, or device, or any combination thereof [must either be] used by a person, or which a person has a bona fide intention to use it in commerce and applies to register on the principal register established by this Act. . ."); *see also* ANNE GILSON LALONDE & JEROME GILSON, 1-1 GILSON ON TRADEMARKS § 1.02 (2017).

13. Giugni & Giugni, *supra* note 7.

year.[14] In modern intellectual property ("IP") law, patent protection is more likely to be available for a component[15] or an additive[16] to food, rather than a culinary dish itself.[17] Patent protection also applies to genetic innovations to food. This application is illustrated in the case of *Bowman v. Monsanto*, where the holder of a patent for a genetically altered soybean seed successfully sued a farmer for patent infringement under the doctrine of patent exhaustion.[18]

Like patents, modern trademark law generally does not provide protection for food creations themselves.[19] However, it can protect brand names, designs, and other elements of food products.[20] An early application of trademark protection to food products is discussed in *Moxie Nerve Food Co. v. Baumbach*, where the manufacturers of a beverage called the "Moxie Nerve Food" filed a trademark application for it in 1885.[21]

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14. *Id.* This form of intellectual property protection most closely mirrors patent protection in that it protects a new and useful composition of matter, which is eligible for protection under the Patent Act.

15. *See* Iovate Health Scis., Inc. v. Bio-Engineered Supplements & Nutrition Inc., No. 9:07–CV–46., 2008 WL 2359961 (E.D. Tex. 2008) (discussing a patent for hydrosoluble organic salts of creatine).

16. *See* Lifeline Techs., Inc. v. Archer Daniels Midland Co., No. 4:08–CV–279 CAS., 2009 WL 995482 (E.D. Mo. 2009) (discussing two patents for food additives based on water-soluble plant sterols).

17. *See, e.g.*, Ignite USA, LLC v. CamelBak Prods., LLC, 709 F. App'x. 1010 (Fed. Cir. 2017); Intercontinental Great Brands LLC v. Kellogg N. Am. Co., 869 F.3d 1336 (Fed. Cir. 2017) (explaining patent protection may also extend to containers and packages for food).

18. *See generally* Bowman v. Monsanto, 569 U.S. 278 (2013). The doctrine of patent exhaustion states that if a patent applies to a particular article (item) and the article is sold to a purchaser, the purchaser and any subsequent owner may use or resell that article. *Id.* at 280. However, the purchaser and any subsequent owner does not have the right to make copies of the patented article. *Id.* In *Bowman*, Monsanto invented a genetically modified soybean plant that survives exposure to certain herbicides and markets the seeds for this plant as Roundup Ready seeds (Roundup being the name of Monsanto's herbicide). *Id.* at 280–81. Vernon Bowman, a farmer in Indiana, purchased commodity soybeans from a grain elevator under the suspicion that they may be Roundup Ready seeds. *Id.* at 281–82. When Bowman planted the seeds and confirmed that they were indeed Roundup Ready seeds, he saved the seeds and used them for future harvests. *Id.* at 282. Monsanto sued Bowman for patent infringement, and Bowman raised patent exhaustion as a defense. *Id.* at 282–83. The Supreme Court ruled in favor of Monsanto, reasoning that the patent exhaustion doctrine does not give Bowman the right to make copies of the patented seeds. *Id.* at 280.

19. Oliver Herzfeld, *Protecting Food Creations*, FORBES (Mar. 7, 2014), https://www.forbes.com/sites/oliverherzfeld/2014/03/07/protecting-food-creations/#486b41914508.

20. *Id.*; *see also* S. Bertram, Inc. v. Citizens Ins. Co. of Am., 657 F. App'x 477 (6th Cir. 2016) (trademark for the word "Eden" used on food label); Seven-Up Co. v. Green Mill Beverage Co., 191 F. Supp. 32 (N.D. Ill. 1961) (trademark infringement by holders of trademark "7-Up" against makers of "Fizz Up" soft drink).

21. Moxie Nerve Food Co. v. Baumbach, 32 F. 205 (Tex. Cir. Ct. 1887).

Additionally, trademark law can be used to protect the design and appearance (i.e., trade dress) of a food configuration as long "as the design is non-functional and has achieved consumer recognition as a source identifier."[22] Thus, the swirl icing design on a cupcake can be trademarked, as can ice cream cones topped with a "baby scoop" of ice cream.[23] However, because the design must be non-functional to qualify for trade dress protection, this protection would not extend to the underlying recipe of a particular dish.[24]

B. Copyright Protection for Writings and Art

Copyright provides another avenue for protecting culinary innovation. Copyright protection applies to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[25] Works of authorship include "literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works."[26]

Because food and beverages are not covered within the enumerated categories of works of authorship, it is doubtful that copyright protection would apply to culinary innovations themselves. However, copyright protection may apply to writings related to a food or beverage product, including food labels[27] and, in some cases, recipes.[28] J. Austin Broussard has argued that copyright protection should extend to culinary innovation, reasoning that eating has evolved from a perfunctory activity into one done for entertainment, that this has led to competition among chefs, and

22. Reed, *supra* note 8.
23. *Id.*
24. *Id.*
25. 17 U.S.C.A § 102 (West 1990).
26. *Id.*
27. Harrell v. St. John, 792 F. Supp. 2d 933, 946-948 (S.D. Miss. 2011) (discussing ownership of copyrights to food product labels).
28. *Compare* Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480 (7th Cir. 1996) (concluding that listing of ingredients lacked expressive element and therefore was outside scope of copyright protection), *with* Barbour v. Head, 178 F. Supp. 2d 758, 764 (S.D. Tex. 2001) (refusing to grant summary judgment in favor of defendant on basis that copyright protection may apply to recipes, which contained expressive element and were not mere recitations of fact).

that chefs' original menu items should be copyrightable as works of applied art.[29] Broussard provides six explanations for why copyright protection has not embraced culinary dishes;[30] among these six, Broussard notes that recipes "have not been considered to fall within the scope of subject matter contemplated by the Copyright Act"[31] and, under *Baker v. Selden*, recipes are "works of utility" and are therefore not entitled to copyright protection.[32]

In addition, copyright law relies on a distinction between ideas and expressions to differentiate between what kinds of elements of a work may be protected. Conceptualized as a way to address tensions between the First Amendment and intellectual property,[33] the idea-expression dichotomy dictates that "the 'ideas' that are the fruit of an author's labors go into the public domain, while only the author's particular expression remains the author's to control."[34] While there are ambiguities in how the dichotomy operates generally, it is especially unclear how the idea-expression dichotomy would operate in the context of food.

The fair use doctrine is another mechanism for resolving the conflict between copyright protection and freedom of speech.[35] The Copyright Act lists four factors for courts to consider to determine whether a particular use of a copyrighted work is fair (and therefore not an infringement of the copyright): "(1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the copyrighted work used, and (4) the economic effect of the use."[36] Like the idea-expression dichotomy, it is not clear whether the fair use doctrine could apply in the food context, nor how it should operate.

By the language of the Copyright Act, it is questionable whether copyright protection could apply to food because of the Copyright Act's

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29. J. Austin Broussard, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691, 691 (2008).

30. *Id.* at 703–14.

31. *Id.* at 704.

32. *Id.* at 707–08.

33. *See* Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 395–94 (1989) ("Theoretically, the idea/expression dichotomy discharges copyright's first amendment duties because the application of copyright protection to expressions, but not to ideas, serves to prohibit only speech that is constitutionally valueless.").

34. Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 322–23 (1989).

35. L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 2 (1987).

36. Copyright Act, 17 U.S.C. § 107 (1992).

"works of authorship" language. "Author" and "authorship" are commonly defined with specific reference to writings or art,[37] and it is doubtful whether these definitions would encompass all forms of food. While other definitions of "author" and "authorship" define the terms broadly enough to encompass food,[38] the use of the phrase "works of authorship" in the Copyright Act's language creates questions about whether it could apply to items other than writings and art.

Prevailing law, therefore, allows for copyright protection for recipes when the recipes contain sufficient expressive elements, but not when a recipe is a mere recitation of ingredients and steps for creating a dish. Copyright law may also apply to other writings or recordings associated with food and beverages, such as labels. However, under existing law, copyright protection does not extend to the underlying culinary dish, and it likely cannot extend to food generally without changes to the language of the Copyright Act.

C. Trade Secrets in Modern Cuisine

Unlike copyright and patent law, which find support in the US Constitution and federal statutes, trade secret law originated in the common law and has been codified in state statutes as opposed to federal statutes.[39] Under the Uniform Trade Secrets Act ("UTSA"):

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

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37. *See, e.g.*, *Author*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/author (last visited May 7, 2018) (in one definition, defining author as "[a] writer of a book, article, or document"); *Author*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/author (last updated Apr. 20, 2018) (in one definition, defining author as "the writer of a literary work (such as a book)"); *Authorship*, DICTIONARY.COM, http://www.dictionary.com/browse/authorship (last visited Apr. 20, 2018) (in one definition, defining authorship as "the occupation or career of writing books, articles, etc."); *Authorship*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/authorship (last updated Mar. 18, 2018) (in one definition, defining authorship as "the source (such as the author) of a piece of writing, music, or art").

38. *See, e.g.*, *Author*, DICTIONARY.COM, http://www.dictionary.com/browse/author (last visited Apr. 20, 2018) (in one definition, defining author as "the maker of anything; creator; originator").

39. Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 8 (2007).

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[40]

Misappropriation of a trade secret involves improper means used to acquire or use a trade secret, and it contemplates any of three acts: acquisition, disclosure, and use of the trade secret.[41] Here, the key for liability is that the acquisition, disclosure, or use is improper,[42] which is defined in the UTSA as including "theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means."[43]

In the United States, trade secrets have been the basis of disputes about, among other things, the product recipe for an energy drink,[44] specifications and instructions for making thin pizza crusts,[45] and a concept for making pet food.[46] An early case involving trade secrets for food is *Henning v. Kitchen Art Foods*, in which the plaintiff alleged that the defendant had wrongfully appropriated the trade secret for the manufacture of angel food cake mix.[47] The court concluded that the defendant did not appropriate any trade secrets from the plaintiff, reasoning that the plaintiff's recipe for angel food cake mix "is made up entirely of matter which was common and public knowledge, and was well known to the defendant long prior to" the period in question.[48]

Emmanuelle Fauchart and Eric von Hippel have observed that a norms-based system of protecting intellectual property in food has developed in France.[49] The norms involved in this system are that (1) one chef must not copy a second chef's recipe exactly, (2) one chef must not pass secret recipe-related information revealed by a second chef to a third party without the permission of the second chef, and (3) colleagues must

40. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM'N 1986); *see also* Uniform Trade Secrets Act, CAL. CIV. CODE § 3426.1(d) (West 2012) (using operationally the same definition).

41. Risch, *supra* note 39, at 8–9.

42. *Id.*

43. UNIF. TRADE SECRETS ACT § 1(1).

44. Bodemer v. Swanel Beverage, Inc., 884 F. Supp. 2d 717, 726 (N.D. Ind. 2012) (concluding that there were no facts or arguments in the record as to why the formula for the energy drink in question constitutes a trade secret).

45. Fast Food Gourmet, Inc. v. Little Lady Foods, Inc., No. 05 C 6022, 2006 WL 1460461 (N.D. Ill. Apr. 6, 2006).

46. Wysong Corp. v. M.I. Indus., 412 F. Supp. 2d 612, 627 (E.D. Mich. 2005) (rejecting the argument that the plaintiff's concept or philosophy for making pet food constituted a trade secret).

47. Henning v. Kitchen Art Foods, 127 F. Supp. 699 (S.D. Ill. 1954).

48. *Id.* at 702.

49. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 188 (2008).

give credit to the developers of important recipes as the authors of that recipe.[50] While Fauchart and von Hippel note that this system is norms-based and not law-based, their observations provide a useful framework for analyzing the US law-based intellectual property system in the context of trade secrets for food.

Whereas in the United States, the legal rights of innovators are enforced through recourse and the threat of recourse to courts, in France, the norms regarding culinary innovation are enforced through social retaliation and the threat of such retaliation.[51] This retaliation includes negative gossip about the offending party within the community, a lowered reputation in the community, and a decreased likelihood that additional requests for information will be answered by community members.[52] Using the Chang-Starbucks dispute as a reference point, Chang's retaliation against the coffee giant on social media is calculated to lower Starbucks' reputation in the community, but given the niche nature of the dispute, it is not clear that Chang's criticism will significantly impact Starbucks' reputation among its core consumer base.[53] On the other hand, if the establishment that had allegedly copied Chang's culinary idea were a highly prestigious high-end restaurant catering to gastronomes, Chang's criticism would likely have more sway within this consumer base.

Given that food is such a central aspect of French culture[54] and that food commands so much attention in the country,[55] it is not surprising that social retaliation is an effective means of enforcing the norms-based intellectual property system in France. While it is plausible that such a

50. *Id.* at 3–4.

51. *Id.* at 5.

52. *Id.*

53. For an overview of the different major components of Starbucks' consumer base, *see* Barbara Bean-Mellinger, *Who Is Starbucks' Target Audience?*, CHRON, (June 29, 2018), http://smallbusiness.chron.com/starbucks-target-audience-10553.html. Bean-Mellinger observes that one major target audience of Starbucks is the socially conscious, suggesting that criticism that Starbucks' policies are socially inequitable would be especially harmful to the company's reputation; *see Starbucks: Protesters Call for Boycott After Black Men Arrested*, BBC (Apr. 16, 2018), https://www.bbc.com/news/world-us-canada-43787667; *see also* Christopher Zara, *Here's How Quickly "Boycott Starbucks" Spread Across the Internet*, Fast Co. (Apr. 18, 2018), https://www.fastcompany.com/40560741/heres-how-quickly-boycott-starbucks-spread-across-the-internet (noting that after an incident in which two black men were arrested at a Philadelphia Starbucks, "#BoycottStarbucks" was mentioned over one hundred thousand times on social media platforms Facebook, Twitter, and Instragram over the next three days).

54. *See* Kim Ann Zimmerman, *French Culture: Customs & Traditions*, LIVESCIENCE (July 21, 2017), https://www.livescience.com/39149-french-culture.html ("Food and wine are central to life at all socioeconomic levels.").

55. *See About French Food*, SBS (May 13, 2015), https://www.sbs.com.au/food/article/2008/07/01/about-french-food.

mechanism could be effective for a subset of US restaurants popular with culinary enthusiasts, it is doubtful that such a mechanism would be as effective in the US as it is in France. Additionally, while a prestigious, high-end restaurant may hesitate to risk its reputation by copying a culinary innovation from another restaurant, less well-known restaurants probably have little to lose and much to gain by borrowing culinary innovations from others, and any negative publicity these restaurants receive as a result may merely enhance their profile. Because of the differences in the composition of the American and French restaurant industries,[56] it is questionable whether a norms-based system of protecting intellectual property interests in food would be as viable in the United States as it is in France. Nevertheless, the norms-based framework of France shows that there are non-legal avenues of protecting intellectual property in the culinary context, and there may indeed be viable mechanisms of intellectual property protection for food in the United States that do not rely on legal recourse.

II. CONFLICTS BETWEEN STRONG IP PROTECTION FOR FOOD AND UNITED STATES POLICY OBJECTIVES

This Part analyzes the conflicts that exist between strong IP protection for food and other societal objectives. The first Section looks at the conflict between intellectual property and First Amendment principles, examining first the general conflict between IP protection and freedom of expression and then applying this analysis to the food and culinary context. The second Section examines the conflict between intellectual property and America's commitment to maintaining low prices for food.

A. First Amendment Conflicts with IP Protection for Food

This Section examines the tensions that exist between freedom of expression and expansive IP protection for food. It begins with a discussion of the general conflict that exists between the First Amendment and intellectual property rights. It then conceptualizes some forms of culinary

56. For a rudimentary comparison of the high-end restaurant industries in the United States and France, *see* Edith Hancock, *18 Cities with the Most Michelin Stars in the World*, BUS. INSIDER (Dec. 18, 2016, 10:43 AM), http://www.businessinsider.com/cities-with-the-most-michelin-stars-in-the-world-2016-12. In 2016, Paris had one hundred Michelin-starred restaurants, for a total of 134 stars. The city with the highest number of Michelin-starred restaurants in the United States was New York City, with seventy-seven such restaurants and ninety-nine stars in 2016. For comparison, Paris had a population of approximately 2.2 million people in 2014, compared to 8.3 million for New York City in the same year. *City Population by Sex, City, and City Type*, UNDATA, http://data.un.org/Data.aspx?d=POP&f=tableCode%3A240 (last updated May 7, 2018).

innovation as conduct that communicates, and closes by discussing *Masterpiece Cakeshop* and the associated First Amendment principles as applied to food.

1. Underlying Theory of the General Conflict

That there are tensions between First Amendment principles and intellectual property rights is well-recognized by scholars.[57] Beckerman-Rodau explains that First Amendment "[f]reedom of speech favors free dissemination of ideas and information . . . whereas private property rights rely on restricting access to and use of private property."[58] While freedom of speech is usually fully compatible with private property rights when real or tangible personal property are at issue, he observes that "intellectual property is more problematic."[59]

Beckerman-Rodau cites *Ford Motor Co. v. Lane* as an example of a case dealing with the conflict between the First Amendment and intellectual property rights. In *Lane*, a District Court declined to grant a preliminary injunction that would have prohibited Robert Lane from releasing Ford's trade secrets on the Internet.[60] The court reasoned that issuing such an injunction would be an invalid prior restraint of speech and would have violated the First Amendment.[61]

On the other hand, Alan Garfield observes that in the copyright context, courts typically reject the assertion that the First Amendment places limits on the scope of copyright rights.[62] Courts generally recognize that copyright law has been developed with due consideration given to First Amendment principles, including the fact that "copyright law precludes protection for ideas and allows for the 'fair use' of expression."[63] Garfield nevertheless concludes that additional First Amendment restraints should be built into copyright law.[64] In examining the general conflict between the First Amendment and intellectual property, Garfield notes that the

57. *See, e.g.*, Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash Between Intellectual Property and the First Amendment from an Economic Perspective*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2001); Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM. & ENT. L.J. 587 (2000); Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547 (2009).

58. Beckerman-Roudou, *supra* note 57, at 2.

59. *Id.* at 3.

60. *Id.*; *see also* Ford Motor Co. v. Lane, 67 F. Supp. 2d 745 (E.D. Mich. 1999).

61. *Lane*, 67 F. Supp. 2d at 746.

62. Garfield, *supra* note 57, at 588.

63. *Id.* at 588–89.

64. *Id.* at 590.

task of striking the right balance between property rights and public access to information "lies at the heart of the entire field" of intellectual property, and that the First Amendment provides one additional judicially-enforced check on whatever balance legislators arrive at.[65]

2. *Food as Conduct that Communicates:* Masterpiece Cakeshop *and First Amendment Principles*

In the context of food, however, the tensions between the First Amendment and intellectual property rights are less readily apparent. Historically, food has been seen as serving the physiological function of allowing humans to obtain nutrients and energy,[66] as opposed to an expressive purpose within the realm of First Amendment protection. However, the emergence of upper-class society, both in France and later in America, has led to the development of the notion that dining should "satisfy aesthetic tastes" and not merely bodily needs.[67] Dining—and dining out in particular—has become a source of "pleasure, entertainment, and leisure."[68]

The evolution of food and dining to incorporate aesthetic considerations helps clarify the relevance of First Amendment principles. In many respects, food has become a form of artistic expression, and the First Amendment provides protection in this context. While food is not pure speech, in many cases the creation of food can appropriately be analyzed as conduct that communicates. The US Supreme Court developed its approach to conduct that communicates in *Spence v. Washington*.[69] Under the approach used in *Spence*, conduct is analyzed as speech under the First Amendment if (1) there is the intent to convey a specific message and (2) there is a substantial likelihood that the message would be understood by those receiving it.[70] In the same vein that conventional artistic expression is entitled to First Amendment protection for conveying a specific message that is likely to be understood by those that observe the art, food makers may be entitled to First Amendment protection if they intend to convey a specific message and that message has a substantial likelihood of being understood by those observing the food.

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65. *Id.* at 592.

66. *See* Broussard's observation that eating has historically been seen as primarily a "perfunctory activity," though more recently it has evolved into serving purposes related to entertainment and leisure. Broussard, *supra* note 29, at 695.

67. *Id.* at 697.

68. *Id.*

69. Spence v. Washington, 418 U.S. 405 (1974).

70. *Id.* at 410–11; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1538–39 (5th ed. 2017).

The question of whether food may be entitled to First Amendment protection was considered by the Colorado Court of Appeals in *Craig v. Masterpiece Cakeshop, Inc.*[71] In *Masterpiece Cakeshop*, a bakery owner, citing his religious beliefs, refused to create a cake to celebrate a same-sex couple's wedding.[72] The couple, Charlie Craig and David Mullins, filed discrimination charges against the bakery with the Colorado Civil Rights Division, alleging that the bakery's actions violated the Colorado Anti-Discrimination Act.[73] The bakery owner, Jack C. Phillips, argued that decorating cakes is a form of art and that creating cakes for same-sex weddings would violate his religious beliefs.[74]

An administrative law judge ("ALJ") presided over the administrative tribunal between the Colorado Civil Rights Commission and Phillips. Masterpiece argued that preparing a wedding cake for a same-sex wedding involves expressive conduct such that refusing to prepare a cake is protected by the First Amendment, but the ALJ rejected this argument.[75] The ALJ recognized that baking and creating a wedding cake involves "skill and artistry," but because the refusal to prepare a cake for Craig and Mullins occurred before any discussion of the cake's design, the ALJ could not determine whether the desired wedding cake would constitute symbolic speech subject to First Amendment protections.[76] The Court of Appeals agreed with the ALJ that refusing to prepare a wedding cake for a same-sex wedding is not protected expression under the First Amendment.

After the Colorado Supreme Court denied certiorari, the US Supreme Court granted certiorari.[77] In a narrow ruling, the Court reversed the decision of the Court of Appeals.[78] The Supreme Court concluded that the Civil Rights Commission's treatment of Phillips' case "has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection," and that this hostility "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[79] As to the expressive elements of refusing to prepare a wedding cake, the majority opinion observed that

71. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *rev'd,* 137 S.Ct. 2290 (2017).
72. *Id.* at 276.
73. *Id.* at 277.
74. *Id.* at 277.
75. *Id.* at 285.
76. *Id.*
77. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S.Ct. 2290 (2017).
78. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018).
79. *Id.* at 1729, 1732.

"[t]he free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech."[80] The majority opinion, however, mostly avoided the question of what expressive elements are involved in creating or refusing to create a wedding cake. However, in concurrence, Justice Kagan noted that by requiring Phillips to provide the cake, "Colorado is requiring Phillips to be 'intimately connected' with the couple's speech, which is enough to implicate his First Amendment rights."[81] Additionally, in a separate concurrence, Justice Thomas concluded that "[t]he conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive."[82]

The Colorado Court of Appeals did not address in detail whether food or the creation of food may amount to expressive conduct, but the ALJ's determination that food creation may amount to expressive conduct is probably accurate—and consistent with Justice Thomas's concurring opinion in the US Supreme Court decision in the case.[83] While the ALJ's reasoning suggests that some aspects of food and culinary creation can amount to artistic expression, it is not clear whether conflicts with intellectual property rights might be implicated in these forms of expression. However, it is probable that if food is expression, IP protections that restrict the use and copying of food would create tensions with First Amendment principles.

It is certainly questionable whether First Amendment principles of expression in the culinary context matter for the typical consumer. While food may be a canvas for artistic expression for culinary innovators and others at the top of the food market, the expressive value of food is probably fairly low for those closer to the bottom of the market. Nevertheless, the Bill of Rights is counter-majoritarian by its nature,[84] and if there is expressive content in food, its protected status should not depend on the artistic value assigned to it by the majority. Ultimately, the US Supreme Court's decision in *Masterpiece Cakeshop* may clarify the extent of First Amendment protection in the culinary context.

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80. *Id.* at 1723.

81. *Id.* at 1743–44.

82. *Id.* at 1742 (Thomas, J., concurring).

83. *Masterpiece Cakeshop, Ltd*, 138 S.Ct. 1719, 1742 (Thomas, J., concurring) ("The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive."); *Id.* at 1743 n.3 ("And we do not need extensive evidence here to conclude that Phillips' artistry is expressive . . . .").

84. *See* Linda R. Monk, *Rights*, PBS SoCAL, http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/#.WvEU6IgvzIU (last visited May 7, 2018) (observing that the American system is one of majority rule with minority rights, with the Bill of Rights protecting certain fundamental rights from the will of the majority).

B. America's Commitment to Inexpensive Food

In addition to the First Amendment concerns, strong IP protection in the culinary context would conflict with the United States' societal objective of maintaining low prices for food. The American government has been strongly committed to ensuring inexpensive food, at least since the Great Depression. From 1933 to 2003, the percentage of disposable income that Americans spent on food decreased from approximately 25% to just over 10%.[85] Americans spend less on food than people in any other country in the world.[86] In the United States, 6% of household expenditures go to food, compared to over 10% in most European countries.[87]

This result is due in no small part to federal policies that pour billions of dollars into agricultural commodities to maintain artificially low prices. Since 2007, federal support for commodity and conservation programs has averaged roughly $10 billion annually—after reaching a peak of $26 billion in 2005—and the majority of this support has gone to the commodity programs.[88] In 2018, 18% of the USDA's $140 billion in outlays, or approximately $25 billion, went to its farm and commodity programs.[89]

In addition to federal agricultural subsidies, other government policies help ensure low prices for food. The Federal Crop Insurance Corporation ("FCIC") provides multi-peril federal crop insurance for farmers across America.[90] The Risk Management Agency ("RMA"), which manages the FCIC, oversaw the sale of 1.17 million policies insuring 282

85. J. Corey Miller & Keith H. Coble, *Cheap Food Policy: Fact or Rhetoric?*, 32 FOOD POL'Y 98, 99 (2007). Charlotte Tuttle & Annemarie Kuhns, *Percent of Income Spent on Food Falls as Income Rises*, U.S. DEP'T AGRIC. (Sept. 6, 2016), https://www.ers.usda.gov/amber-waves/2016/september/percent-of-income-spent-on-food-falls-as-income-rises/.

86. Alyssa Battistoni, *America Spends Less on Food than Any Other Country*, MOTHER JONES (Feb. 1, 2012), https://www.motherjones.com/food/2012/02/america-food-spending-less/.

87. *Id.*

88. SUSAN A. SCHNEIDER, FOOD FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 62 (2d ed. 2016). In 2011, 72.7% of this support was for the commodity programs, with the remainder going to conservation programs.

89. FY 2018 Budget Summary 2 (U.S.D.A. 2018), https://www.usda.gov/sites/default/files/documents/USDA-Budget-Summary-2018.pdf. From 2005 to 2014, five crops (corn, cotton, wheat, rice, and soybeans) accounted for roughly 90% of federal support for farm commodities; DENNIS A. SHIELDS, CONG. RESEARCH SERV., R43448, FARM COMMODITY PROVISIONS IN THE 2014 FARM BILL (P.L. 113-79) 2 (2014), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43448.pdf. However, following the 2008 farm bill, an average of $676 million in mandatory program funding was authorized annually from 2008 to 2012 to support specialty crops and organic agriculture. SCHNEIDER, *supra* note 88, at 97.

90. SCHNEIDER, *supra* note 88, at 99.

million acres and $117 billion in crop value in 2012 alone.[91] Additionally, farmers who are not eligible for crop insurance may participate in the Noninsured Disaster Assistance Program ("NAP") to obtain crop loss assistance.[92] Finally, the price of agricultural commodities are further depressed by the low wages paid to farm workers, who were excluded from the protections of the Fair Labor Standards Act until 1966.[93] All of these policies and programs reflect the United States government's commitment to ensuring extremely inexpensive food for consumers.

It is highly likely that expanding IP protection for culinary innovation would result in higher prices for food and agricultural commodities. In the medical context, strong IP protection for drugs is generally associated with increased prices of medicine.[94] Matthew Herper notes that a pharmaceutical company in Illinois obtained authorization from the Food and Drug Administration ("FDA") to sell a steroid used to treat children with Duchenne muscular dystrophy and began selling it at a list price of $89,000—a price that was 6,000% more than what patients in Europe and Canada were being charged for it.[95] Herper points out that this enormous price increase is largely the result of the seven-year monopoly granted to the company under the Orphan Drug Act.[96]

Of course, the medical context is different from the culinary context, and we might expect the effects of intellectual property policies to be different in the two contexts. However, even specifically in the context of food and agriculture, there is evidence that expanded intellectual property protection would result in higher food prices. As Christoph Then and Ruth Tippe have pointed out, the rising share values for Monsanto, a major holder of patents on seed varieties,[97] in 2007 and 2008 paralleled the

91. *Id.* at 100.

92. *Id.* at 111–12.

93. *US Labor Law for Farmworkers*, FARMWORKER JUSTICE (last visited Apr. 11, 2018), https://www.farmworkerjustice.org/advocacy-and-programs/us-labor-law-farmworkers. (Although the FLSA now applies to farm workers, many employers continue to "skirt minimum wage laws or engage in other forms of wage theft", and workers are often made to work in "unhealthy or dangerous conditions or live in grossly substandard housing.")

94. *See, e.g.*, Alison Kodjak, *Tighter Patent Rules Could Help Lower Drug Prices, Study Shows*, NPR (Aug. 23, 2016), https://www.npr.org/sections/health-shots/2016/08/23/491053523/tighter-patent-rules-could-help-lower-drug-prices-study-shows; Matthew Herper, *Why Did That Drug Price Increase 6,000%? It's the Law*, FORBES (Feb. 10, 2017), https://www.forbes.com/sites/matthewherper/2017/02/10/a-6000-price-hike-should-give-drug-companies-a-disgusting-sense-of-deja-vu/#2069f48471f5.

95. Herper, *supra* note 94.

96. *Id.*

97. *Patents*, MONSANTO, https://monsanto.com/products/product-stewardship/patents/ (last visited Apr. 13, 2018).

rising prices of food and agricultural companies,[98] suggesting that food prices are positively correlated with patent protection in the culinary context.

Moreover, given that intellectual property rights generally operate by granting a temporary monopoly to a particular person or group in an industry, and given that monopolistic firms generally charge higher prices than firms in competitive industries, one would expect the prices of food to rise as intellectual property protection in the culinary context expands.[99] Therefore, in addition to conflicting with First Amendment principles, strong IP protection in the culinary context would conflict with the United States' societal objective of maintaining low prices for food and agricultural products, militating against expanded IP protection in this context.

III. TRADE SECRETS AND PRIOR RESTRAINTS IN THE CONTEXT OF FOOD

This Section examines the use of trade secrets to protect intellectual property in food, including the related topic of prior restraints in trade secret disputes. It begins with an overview of some of the advantages of relying on trade secrets in protecting culinary innovation, including the balance with the First Amendment in this context and the likelihood that trade secrets would not substantially undermine the US policy objective of maintaining low food prices. It then moves on to a discussion of the role of prior restraints in the context of food innovation and the challenges caused by prevailing law on prior restraints. The Section closes with a conclusion that trade secrets, combined with a modernized approach to prior restraints, would be the best approach to protecting food and culinary innovation.

A. The Desirability of Trade Secrets

This Section examines some of the advantages of trade secrets as a means to protect intellectual property in culinary innovation. Trade secrets are a well-established means of protecting intellectual property in

98. CHRISTOPH THEN & RUTH TIPPE, GREENPEACE GER., PATENTS ON HUNGER?: A SELECTION OF RECENT PATENT APPLICATIONS IN SEEDS, FOOD AND AGROFUELS AND ITS POSSIBLE IMPLICATIONS ON WORLD FOOD SECURITY (2008), http://www.keine-gentechnik.de/fileadmin/files/Infodienst/Dokumente/08_10_then_patents_on_hunger_report.pdf; *see also* P.J. Huffstutter, *Rising Food Prices May Start with Seeds*, L.A. TIMES (Mar. 11, 2010), http://articles.latimes.com/2010/mar/11/business/la-fi-food-monopoly12-2010mar12.

99. It is likely that these prices would at least increase temporarily, as the intellectual property protection runs. Because intellectual property protection is temporary, we may expect the prices to decrease once the intellectual property protection ends and competitors are allowed to use the previously protected work.

food that do not require substantial changes to existing IP law, and the use of trade secrets strikes the right balance between ensuring culinary innovation, protecting First Amendment rights, and maintaining low prices for food.

First, trade secrets are a well-established means of protecting intellectual property in food. The use of trade secrets in this context can be traced to at least as early as the 1950's, when *Henning v. Kitchen Art Foods* was decided.[100] Because trade secrets have a basis in the common law and are implemented by state statutes, trade secret protection is generally more versatile than copyright, trademark, and patent protection; and states can modify their laws on trade secrets to respond to changing needs of the culinary industries within each state. Moreover, trade secret laws are not limited in scope to "new, unobvious, and useful inventions" (patents); "word[s], name[s], symbol[s], or device[s]" (trademarks); or "original works of authorship" (copyrights), which enhances trade secrets' applicability to culinary innovations.

While the tensions between the First Amendment and intellectual property certainly exist in the context of trade secrets, there is less tension compared to the contexts of copyrights, trademarks, and patents. These IP instruments all operate to create a temporary monopoly to protect the first innovator in a field, and no other individual—including later innovators—can interfere with that monopoly. In contrast, trade secrets are available to any innovator in a field, not merely the first innovator, and misappropriation of a trade secret only occurs when its acquisition, disclosure, or use is improper. While the UTSA definition of improper probably is not exhaustive,[101] the requirement of impropriety narrows the breadth of trade secret protections; and therefore, reduces the potential for conflict with the First Amendment.

Moreover, because of the more limited scope of trade secret protection as compared to patent, trademark, and copyright, trade secrets most likely have a lesser impact on prices than other forms of IP protection. There is little doubt that trade secrets create a barrier to entry within a field, and they therefore contribute to the existence and persistence of monopolies. However, a person or firm that develops the same innovation in a way that does not amount to misappropriation of the trade secret will be able to compete with the original innovator and end the monopoly.

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100. *See supra* note 47 and accompanying text.

101. UNIF. TRADE SECRETS ACT § 1(1). Under the UTSA, "'[i]mproper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." *Id.* The use of the word "includes" suggests that there are other improper means that are not enumerated in the UTSA.

Because the monopolies created by trade secrets are less secure than those created by other forms of IP protection, the price markup for products protected by trade secrets is likely lower than the markup for products protected by other forms of IP. As a result, trade secrets for culinary innovations can be expected to create a lesser conflict with the US policy objective of maintaining low prices for food and beverages than patents, trademarks, and copyrights do.

B. The Challenges of Prior Restraint Doctrine

While a perfectly comprehensive definition of a prior restraint may be elusive, a prior restraint may be defined as an administrative system or a judicial order that prevents speech from occurring.[102] Prior restraints have been described by the US Supreme Court as "the most serious and least tolerable infringement on First Amendment rights."[103] The Supreme Court stated that a system of prior restraint comes before the court "bearing a heavy presumption against its constitutional validity."[104] This is in part due to the history of the First Amendment—the First Amendment was largely a reaction against the licensing requirements for publications that had existed in England prior to independence.[105]

It is not surprising, then, that courts are averse to issuing injunctions preventing the dissemination of information except in extraordinary circumstances. In non-copyright cases, preliminary injunctive relief is nominally governed by the traditional four-factor preliminary injunction test.[106] This test asks "(1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether the balance of hardships tips in the plaintiff's favor; and (4) whether granting the injunction would be in the public interest."[107] In the copyright context, however, plaintiffs are generally treated more favorably than plaintiffs in other areas of the law, with the four-factor test usually collapsing into an inquiry into the likelihood of success on the merits.[108] Likewise, notwithstanding the ruling in *Ford*

102. CHEMERINSKY, *supra* note 70, at 1291.
103. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
104. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
105. CHEMERINSKY, *supra* note 70, at 1290.
106. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 158 (1998).
107. *Id.*
108. *Id.* at 162.

Motor Co. v. Lane,[109] courts routinely grant preliminary injunctions in trade secret cases.[110]

Given the special treatment that intellectual property enjoys with respect to prior restraints, one may reasonably wonder whether additional protection for trade secrets is needed. Beckerman-Rodau answers this question in the affirmative, arguing that prior restraints should be allowed to prevent "third party use or disclosure of the communicative aspects of intellectual property when such action is needed to prevent irreparable harm or destruction of the intellectual property."[111] He asserts that "[p]rotection of the underlying economic value of a trade secret requires the issuance of preliminary relief," reasoning that "the consequence of public disclosure of [a] trade secret is its total destruction."[112]

Critically, plaintiffs in trade secret disputes must show misappropriation to succeed on their claims, and misappropriation will be extremely difficult to show if somebody with knowledge of the trade secret openly reveals the trade secret to the public. Unlike patents, trademarks, and copyrights, where the legal standard is based on infringement, the legal standard for trade secrets leaves the holder of a trade secret extremely vulnerable to those who have knowledge of the trade secret. For this reason, trade secrets must be entitled to greater protection than other forms of intellectual property and relaxing the presumption against prior restraints is an appropriate means of achieving that goal. As Beckerman-Rodau suggests, shifting the legal standard from an inquiry into the likelihood of success on the merits to an inquiry into whether the plaintiff will suffer irreparable injury if the injunction is not granted would achieve this objective.

C. Trade Secrets, in Conjunction with a Reformed Approach to Prior Restraints, Would Strike the Right Balance Between Conflicting US Policy Objectives

Patents, trademarks, copyrights, and trade secrets all present unique means to protecting intellectual property interests in the culinary context. Of these four methods, trade secrets, combined with a modified approach to prior restraint doctrine, is the most desirable means of protecting intellectual property interests in the culinary context while balancing other conflicting policy objectives.

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109. Zimmerman, *supra* note 54; *see also About French Food*, *supra* note 55.

110. *See* Beckerman-Rodau, *supra* note 57, at 4 n.19 (collecting cases in which preliminary relief was granted to protect trade secrets from disclosure).

111. *Id.* at 4–5.

112. *Id.* at 56.

First, trade secret protection for food is consistent with historical approaches and with modern approaches internationally. Prevailing legal standards for trade secrets operate naturally in the food context, with trade secrets applied to fried chicken,[113] soft drinks,[114] French fries,[115] and many other foods and beverages. A relatively early case applying trade secrets to food is *Henning v. Kitchen Art Foods*, discussed earlier in this note.[116] Internationally, culinary norms have evolved in line with the principles of trade secrets to protect culinary innovation. Fauchart and von Hippel explain that formal legal mechanisms have evolved to protect culinary innovation, with chefs in international contexts sometimes requiring employees to sign contracts binding them to not disclose recipe-related trade secrets as a condition of employment.[117] Thus, relying on trade secrets and a modified approach to prior restraints represents a modest modernization of IP protection for food that is accepted historically and internationally.

Second, the proposed enhancements to trade secret protection include protections for First Amendment concerns that are not present in other forms of expanded IP protection for food. As discussed, the different forms of IP protection generally contain safeguards and limitations designed to account for First Amendment considerations. The doctrine of fair use and the idea-expression dichotomy limit copyright's scope and applicability to protected expression. Patents are only available to inventions and discoveries of new and useful processes, machines, manufactures, and compositions of matter. Trademark protection applies only to words, names, symbols, devices, and combinations thereof. There are questions about whether these safeguards and limitations could apply in the context of food in a workable way. In contrast, trade secret protection is already currently available for culinary innovations without significant adverse effects on First Amendment principles. Modifying the legal standard for prior restraints to inquire into whether the plaintiff will suffer irreparable harm if the injunction is not granted would be a modest

113. KFC Corp. v. Marion-Kay Co., Inc., 620 F. Supp. 1160 (S.D. Ind. 1985).

114. Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288 (Del. 1985).

115. Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 972 (9th Cir. 1991).

116. *Henning*, 127 F. Supp. at 699.

117. Fauchart & von Hippel, *supra* note 49, at 189–90 (explaining that where the costs of participating in these formal mechanisms exceed the benefits of doing so, social norms have evolved to fill the role that formal legal mechanisms have been too burdensome to fill).

change, and any excessive adverse impact it has on speech would generally only be temporary.[118] Thus, unlike other forms of IP protection, enhanced trade secret protection in the culinary context would not significantly undermine First Amendment concerns.

Finally, trade secret protection would not substantially conflict with the US policy objective of maintaining low prices for food and beverages. Trade secrets represent a balance between the two extremes of no intellectual property protection and the stronger forms of intellectual property protection embodied in patents, trademarks, and copyrights. Whereas patents, trademarks, and copyrights would create a legal monopoly on culinary innovations, trade secret protection presents a less significant barrier to entry that can be overcome through advances by later innovators who wish to enter the market. Therefore, trade secret protection provides less protection to monopolists, and trade secret protection can be expected to result in lower food and beverage prices than stronger forms of IP protection.

CONCLUSION

This note began by recounting the dispute between David Chang and Starbucks, regarding Starbucks' alleged appropriation of culinary innovations produced by Chang and his Momofuku brand. One may wonder whether this note's proposal for enhanced trade secret protection would impact the dispute between Chang and Starbucks. The answer is likely no. Unless Chang can show that Starbucks misappropriated a trade secret in some way, it is unlikely that enhanced trade secret protection would impact the dispute between Chang and Starbucks.

In fact, it is unlikely that any modified approach to intellectual property protection for food that adequately addresses First Amendment concerns would substantially impact the dispute between Chang and Starbucks. An expansion of copyright protection to food, for example, would likely need to include some kind of idea-expression dichotomy to protect First Amendment principles. In this context, Starbucks would likely argue that cereal-milk-flavored beverages and bagel balls constitute ideas, not expressions of a more general idea, and that no infringement occurred by copying the idea of cereal-milk-flavored beverages and bagel balls.

118. Such an injunction would restrain a defendant in a trade secret dispute from revealing the ostensible trade secret until the dispute is fully resolved. If, at the conclusion of the dispute, the court concludes that the information is not protected by trade secret, then the defendant will typically be free to reveal the information. Generally, the defendant will be prevented from revealing the information after the dispute is fully resolved only if the court concludes that the information is in fact entitled to trade secret protection.

Nevertheless, the choices that a society makes about how best to protect innovation reflects the predominant democratic values of that society, including values reflecting the importance of private ownership and free expression. The tension between protecting intellectual property and encouraging the fair use of innovative ideas in the culinary context therefore demands attention.

Additionally, regardless of whether the changes proposed in this note would impact the dispute between David Chang and Starbucks, it is likely that the proposed changes would encourage chefs like Chang to pursue culinary innovation differently in the future. In particular, with a reformed prior restraint approach that inquires primarily into whether the plaintiff will suffer irreparable harm if the injunction is not granted, plaintiff innovators will be able to prevent their innovations from being released to the world when that release would economically harm them in a significant way. Applied to the facts of the Chang-Starbucks dispute, this is likely to make innovators like Chang more likely to create culinary innovation with the knowledge that they have a more robust means of protecting their intellectual property interest.

Moreover, this note has observed—and largely taken for granted—that maintaining low prices for food and beverages is a major United States policy objective. A broader question is whether this policy objective is a desirable one. It is no secret that the United States suffers from an obesity epidemic that is unmatched by other countries, with the highest proportion of overweight and obese people living in the United States.[119] Critics have argued that US agricultural subsidies contribute to this epidemic, with experts observing that US public policy "encourages obesity at the expense of sound nutritional practices."[120] While extending patent protection to culinary innovation may raise food prices to some degree, the possibility that this would have benevolent side effects for health in the United States is not absurd.

Pursuing the changes proposed in this note is valuable for three primary reasons. The first is results-oriented: By enacting the modest reform proposed by this note, culinary innovators will have somewhat greater

119. Christopher J.L. Murray et al., *The Vast Majority of American Adults Are Overweight or Obese, and Weight is a Growing Problem Among US Children*, IHME, (May 28, 2014), http://www.healthdata.org/news-release/vast-majority-american-adults-are-overweight-or-obese-and-weight-growing-problem-among (noting that 13% of the global total of overweight and obese people live in the United States); *see also Adult Obesity Facts*, Ctrs. for Disease Control & Prevention (June 12, 2018), https://www.cdc.gov/obesity/data/adult.html (noting that the prevalence of obesity was 39.8% and affected approximately 93.3 million American adults in 2015–2016).

120. Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, 112 ENVTL. HEALTH PERSPECTIVES. A 820, A 821 (2004).

protections for their innovations, which will encourage these innovators to experiment with food and create new cuisine that might otherwise be economically unviable. Second, there is a fairness interest in giving an economic reward to culinary innovators for investing significant time and bearing large fixed costs associated with experimenting with and developing new cuisine. Third, by making the proposed changes, a society signals to the restaurant and food industry that culinary innovation is valued and that innovators who use their knowledge and skills to improve the dining experience will be rewarded for doing so, and this encourages additional experimentation and innovation in the culinary context. Thus, the modest changes proposed by this note may only have a modest impact on the culinary landscape, but the very act of making the changes sends a signal that can encourage and motivate additional culinary innovation. In light of these three benefits, the modest approach proposed in this note is a worthwhile and practical approach to promoting innovation and experimentation in the culinary context.

Ultimately, not all disputes related to copying ideas will or should be resolved in courts or by legal doctrine. Some disputes will be fought and won in the battlefield of publicity and public relations. David Chang's comments on social media about Starbucks' alleged copying of his ideas may be his most effective line of attack against the coffee giant. There are also other disputes about culinary creativity which probably will not be resolved by legal rules regarding intellectual property. For example, certain food practices are often shared among members of native groups to perpetuate indigenous food knowledge,[121] but these food practices are not protected by any form of intellectual property. The right to adopt these cultural food practices in a commercial context—and the desirability of doing so—will likely be resolved through social norms rather than legal rules. While this note's proposal for enhanced trade secret protections for food and beverages will not be determinative of all disputes involving the copying of culinary ideas, it is likely the most viable means of expanding IP protection to the culinary context while also balancing the competing policy objectives of the United States.

121. *See* Wendy Foley, *Tradition and Change in Urban Indigenous Food Practices*, 8 POSTCOLONIAL STUD. 25 (2005) (analyzing cultural food practices in an Australian indigenous communities).