

THE CASE AGAINST COPYRIGHT PROTECTION OF FOOD

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ABSTRACT

This Article will discuss the interface between intellectual property law and food. While this interface could yield many discussions, I focus on the relationship between haute cuisine as a social and cultural phenomenon and copyright law. The goal of this Article is to explain the mismatch between intellectual property law generally, copyright law specifically, and the protection of culinary products. Through such mismatch I will discuss general difficulties underlying copyright law. For this, I will suggest the thought exercise of protecting the visual outcome of gourmet dishes by copyright. It will allow me to make the case against copyright protection of food both normatively and descriptively. First, I will argue that haute cuisine is an efficient and flourishing market even absent copyright protection, thus making such protection redundant and unjustified. I will add that keeping copyright protection off food even makes this market more efficient due to its own piracy paradox. Second, and more importantly, I will argue that copyright protection of culinary products is unjustified due to the broader cultural and distributive effects such protection may have. I will argue that the case of haute cuisine shows that despite copyright's aspiration to aesthetic neutrality, it appears that in many cases works of "high" culture are granted

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more protection than those of “low” culture. Such distinction, that has no place in copyright law, may lead to unjustified gaps between different groups of authors and consumers which does not fit the main goal of copyright—promoting authorship and access to expressions.

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I. INTRODUCTION

During the second half of the eighteenth century, a guild of catering professionals (*traiteurs*) was acting in France.¹ Through political lobbying, the guild acquired an exclusive right to sell cooked meat dishes of the ragout style,² but limited its members to only selling dishes consisting of whole meat parts for consumption at the customer’s residence.³ In 1765, Boulanger, a bouillon soup seller in Paris, expanded his culinary offerings to adapt to the trend of restaurants opening around Paris and becoming popular at the time.⁴ Boulanger started selling a sheep leg in white sauce dish and offered it to the public for consumption in his business.⁵ The *traiteurs* guild was not enthusiastic about Boulanger’s business innovation, which up until then only sold dishes that were outside of the guild’s exclusivity scope and filed a court claim arguing that Boulanger’s sheep leg is in fact a Ragout.⁶ The French parliament stepped in and clarified, through legislation, that a sheep leg in white sauce is not a ragout.⁷ This may have been the first lawsuit attempting to monopolize a cooked dish.

¹ See STEPHEN MENNELL, *ALL MANNERS OF FOOD: EATING AND TASTE IN ENGLAND AND FRANCE FROM THE MIDDLE AGES TO THE PRESENT* 138 (2d ed. 1996).

² Ragout is a stew with strong flavors originally prepared from meat or vegetables and is characterized by long low-stove cooking. The origin of the name is the French verb “*ragoûter*” which translates as “reviving the taste.” *Ragout*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ragout> [<https://perma.cc/4KWB-48KS>] (last visited Nov. 18, 2022).

³ MENNELL, *supra* note 1, at 138–39.

⁴ “Restaurant” here is meant in the sense of “restorative,” i.e., businesses who serve nutritious and healthy food. *Id.* at 138.

⁵ *Id.* at 138–39.

⁶ *Id.*

⁷ *Id.*

Almost 250 years later in 2007, Rebecca Charles, the owner and chef of Manhattan's famous Pearl Oyster Bar, sued her former sous-chef, Edward McFarland. Charles argued that McFarland copied Pearl's menu in its entirety, alongside all serving characteristics of her dishes, in his new Ed's Lobster Bar opened weeks after he resigned the position at Pearl.⁸ The parties secretly settled the lawsuit,⁹ but the matter left quite a journalistic and legal echo.¹⁰

There is no doubt that there are significant differences between the two cases—starting from the era and ending at the applicable legal doctrine—but the substantive question remains the same: should the law grant protection to culinary products? This paper will review a more articulated matter: the protection intellectual property and copyright afford to gourmet dishes. The legal writing

⁸ *Powerful Katinka, Inc. v. McFarland*, No. 07-CV-6036, 2007 WL 2064059 (S.D.N.Y. 2007) (claiming trade dress infringement). The Charles case was not the first in which a chef was accused of culinary “theft.” In 2006 the eGullet organization published an opinion in which Australian chef Robin Wickens, of the Interlude restaurant, offers dishes of high resemblance to those served at Willy Dufrense's WD~50 and Grant Achatz's Alinea. Daily Gullet Staff, *Sincerest Form*, EGULLET FORUMS (Mar. 20, 2006), <https://forums.egullet.org/topic/84800-sincerest-form> [<https://perma.cc/2B9U-88FQ>]; see also Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1122 (2007).

⁹ Pete Wells, *Chef's Lawsuit Against a Former Assistant is Settled Out of Court*, N.Y. TIMES (Apr. 18, 2008) http://www.nytimes.com/2008/04/19/nyregion/19suit.html?_r=0 [<https://perma.cc/2NGH-JXAD>].

¹⁰ See Emily Cunningham, *Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen*, 9 J. HIGH TECH. L. 21 (2009); Austin J. Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691, 693 (2008).

on the interrelations between food and intellectual property law is scarce. One type of literature reviews the ways to protect culinary products by various intellectual property doctrines;¹¹ another type portrays the social norms chefs adopt and follow as a substitute to a legal protection to their life's work.¹² The purpose of this article is to explain why copyright law should not apply to gourmet dishes and raise some broader difficulties that the application of such laws create.

I suggest a doctrinal discussion that will portray the mismatch between intellectual property laws and the protection of culinary products such as recipes, methods of preparation, and the visual outcome of dishes. For the normative discussion I suggest, as a thought exercise, the possibility of protection of the visual outcome of gourmet dishes under current copyright law. First, I argue that the haute cuisine market thrives efficiently without application of copyright law, which makes its application redundant; it may even be that keeping this market open for copying makes haute cuisine even more efficient. Second, as my main point, I argue that copyright protection for culinary products is unjustified from a broader perspective, given the cultural and distributional effects that such protection may have. I argue that copyright protection for culinary products may cause an aesthetic distinction between “high” and “low” culture. Such a distinction, which has no place under copyright law, may lead to unjustified gaps between groups of authors and groups of users inconsistent with copyright law's goal of enriching the world with expressions and allowing maximum access to them. Thus,

¹¹ See, e.g., Buccafusco, *supra* note 8; Broussard, *supra* note 10.

¹² See, e.g., Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 187, 192 (2008).

my conclusion is that copyright protection for haute cuisine culinary dishes is normatively unjustified.

Although my argument is to the contrary, I focus this article on gourmet dishes and not on restaurant dishes generally to demonstrate flaws in the customary assumption that haute cuisine products are clearly artistic and thus have a stronger connection to copyright law. Focusing on gourmet dishes will assist in demonstrating why this assumption is wrong and why copyright law may sometimes undermine the celebrated aesthetic neutrality of gourmet dishes.¹³

The article will proceed as follows: Part II will review the developments of haute cuisine as a social phenomenon and will present the economic characteristics of the field, as well as the social norms that characterize its participants. Part III will engage in a doctrinal analysis of the protection of culinary products by intellectual property and specifically copyright. It will also suggest how copyright could, as a matter of current law, protect food dishes and why it is unjustified on an economic-utilitarian basis. Part IV will discuss the question of aesthetic judgment in copyright, and will explain why it is expected to be of significant importance in the case of copyright protection for gourmet dishes. It will also show the distributional and social implications such protection may have and explain why it is also unjustified on these grounds. Part V will conclude.

II. HAUTE CUISINE AS A SOCIAL PHENOMENON

Along the years we have developed certain behavioral patterns that often replace survival as a key

¹³ Questions pertaining to intellectual property law may be relevant to other culinary products such as industrial food. However, such culinary products, due to their industrial character, do not fall under the scope of copyright law, which is the subject of this article.

factor. in our choice of food. These behavioral patterns now drive us to choose our meals out of aesthetic appreciation to tastes and culinary innovation.¹⁴ Such patterns led to the development of the recreational culinary culture, which led to the ever-growing distinction between home cooking and professional cuisine and eventually to the development of a thriving culinary market.¹⁵ At the beginning of this Part I will portray the historical development of haute cuisine to clarify how this market, which has broad economic and cultural implications, developed. I will then present the economic characteristics of the haute cuisine market and will show that it is economically thriving. This will allow me to map the influential stakeholders in this market and explain how they can affect its legal regulation. Finally, I will discuss the behavioral norms of chefs who are key stakeholders in the haute cuisine market. These norms have a significant effect on the self-regulation of the market and implications on the legal aspects reviewed later in this article.

The beginning of the development of haute cuisine is associated with the French revolution. Stephen Mennell extensively detailed the growth process of modern culinary in France.¹⁶ He argued that the first signs of the “eating-out” culture are traceable even to the era preceding the French revolution. In twelfth-century England, cookshops were rather common; lower-class individuals could send in their raw meat for cooking or purchase cooked dishes.¹⁷ However, according to Mennell, the French revolution was the founding moment allowing the advancement of recreational culinary both from the demand and the supply

¹⁴ ELIZABETH TELFER, *FOOD FOR THOUGHT: PHILOSOPHY AND FOOD* 1–3 (1996).

¹⁵ *See id.*

¹⁶ MENNELL, *supra* note 1, at 134–44.

¹⁷ *Id.* at 136.

side.¹⁸ The elimination of professional guilds such as the *traiteurs* allowed restaurants serving high-quality food to open across cities, making high-quality food publicly available and establishing competition between chefs on the diners' pockets.¹⁹

Mennell identified two main eras in the development of modern cuisine (“*grande cuisine*” in his words): the Carême era and the Escoffier era.²⁰ Antonin Carême, born in 1784, was employed as a chef at various important patrons, including the Austrian prince Tzar Alexander and the Baron de Rothschild.²¹ Carême was among the first to gather the knowledge of French cuisine in the nineteenth century and consolidate it.²² The cooking school of Carême included expensive ingredients and long cooking processes that were not available to large parts of the population at the time.²³ Mennell explained that despite the complexity of his cooking style, Carême significantly contributed to the simplification of the professional cooking process—simplification that was key in developing the modern *haute cuisine*.²⁴ In addition, Carême simplified the process of preparing the variety of sauces that were at the heart of French cuisine at the time and narrowed it to three base sauces. These techniques contributed to a clearer perception of cuisine, which established the process of culinary production in the coming eras.²⁵

The second era Mennell references is that of George August Escoffier.²⁶ Escoffier was active in the beginning

¹⁸ *Id.* at 141.

¹⁹ *Id.* at 141–42.

²⁰ *Id.* at 135.

²¹ *Id.* at 144–45.

²² MENNELL, *supra* note 1, at 144–45.

²³ *Id.* at 140.

²⁴ *Id.* at 147–48.

²⁵ *Id.* at 147 (highlighting simplification by favoring three base sauces: *Espagnole*, *Velouté* and *Bêchamel*).

²⁶ *Id.* at 157–63

of the twentieth century and his work *Guide Culinaire* was celebrated in his lifetime and years later.²⁷ Escoffier worked with the financial support of the grand hotels opening across Europe at the end of the nineteenth century and the beginning of the twentieth century, including the prestigious Ritz and Savoy.²⁸ Cooking at hotels and hosting numerous visitors required shifting to methods of mass catering. For this, Escoffier developed a method of division of labor—a significant change from the customary culinary approach of the time.²⁹ An additional contribution of Escoffier to modern culinary was the simplification of the components of the meal to the more commonly known sequence of soup, meat with vegetables, and dessert.³⁰ According to Mennell, Escoffier also promoted a revolution in tastes when he abandoned the common perception that the original taste of the ingredients must be camouflaged by sauces with predetermined tastes by shifting to cooking with extractions of tastes from the main ingredients themselves—namely fish and meat.³¹

Both eras were key in supporting the rise of modern cuisine in France, and later in the rest of the Western World in the second half of the twentieth century. This phenomenon was referred to as the *nouvelle cuisine* and is the basis for what we know today as *haute cuisine*.³² *Haute cuisine* does not have a clear definition. Trubek suggests a broad definition according to which *haute cuisine* is

²⁷ *Id.* at 157.

²⁸ MENNELL, *supra* note 1, at 158.

²⁹ *Id.* at 159.

³⁰ *Id.*

³¹ *Id.* at 160.

³² *Id.* at 163–64. According to Mennell, the term “*nouvelle cuisine*” refers to current *haute cuisine*. However, the *nouvelle cuisine* movement is associated with a certain historic era and therefore this term alone cannot define *haute cuisine* at any given time. The term *haute cuisine* in this article refers to a broader phenomenon that is not dependent on historic context.

determined by the characteristics that make the audience that consumes the culinary products distinct and more privileged, by determining the types of dishes and underlying ingredients, the availability of unique ingredients, and the working hours and skills dedicated to making them.³³ She added that the identity of chefs and their level of expertise also defined a restaurant as belonging to haute cuisine.³⁴ To these criteria, one could add the dish prices, the location of the restaurant, and other aesthetic criteria in the visuality of the dishes and the restaurant design.

Modern culinary at large and haute cuisine are no longer limited to restaurants. Cooking and culinary culture reached the television screens in the Western world and is now a significant part of the broadcasting slots of many channels. The Food Network was rated first in non-news/non-sports cable channels for 2020.³⁵ Alongside the expansion of the modern culinary culture and haute cuisine, the phenomenon of celebrity chefs grew exponentially. While existing in previous eras, such as with Careme and Escoffier, the phenomenon grew to a much larger scale.³⁶ Today, chefs of haute cuisine restaurants regularly use the media to promote their culinary approach and their businesses. The development of modern culinary and haute cuisine, in addition to the media characteristics that assisted

³³ AMY B. TRUBEK, *HAUTE CUISINE: HOW THE FRENCH INVENTED THE CULINARY PROFESSION* 145 (2000).

³⁴ *Id.*

³⁵ *Food Network and Cooking Channel's 2020 By the Numbers*, DISCOVERY (Dec. 17, 2020) <https://corporate.discovery.com/discovery-newsroom/food-network-and-cooking-channels-2020-by-the-numbers/> [<https://perma.cc/L6RF-SFKQ>]. For a review of the appearance of food television shows in the United States, see Broussard, *supra* note 10, at 698–99.

³⁶ See Charalampos Giousmpasoglou, Lorraine Brown & John Cooper, *The Role of the Celebrity Chef*, INT'L J. HOSP. MGMT., Feb. 2020, at 1, 1–2.

their expansion and distribution to larger audiences, have established a broad social field with unique economic and behavioral norms.

A. *How Much Is a Michelin Star Worth?*

The restaurant market offers significant economic promise. According to the National Organization of Restaurants, in 2020 the projected annual sales of restaurants in the United States aggregated to \$899 billion.³⁷ Additionally, in 2011 the upscale restaurants in the United States constituted ten percent of the aggregate sales of restaurants.³⁸ According to a narrower definition of haute cuisine, luxury restaurants constitute less than 0.5 percent of the restaurant market in the United States.³⁹ This means that the annual turnover of haute cuisine restaurants ranges between \$4.5-89.9 billion. Thus, Menell’s description of chefs needing to compete for clients is portrayed on a very large scale in modern times.⁴⁰ The enormous supply of culinary options on one hand and

³⁷ *National Restaurant Association Releases 2020 State of the Restaurant Industry Report*, NATIONAL RESTAURANT ASSOCIATION, (Feb. 27, 2020), <https://restaurant.org/research-and-media/media/press-releases/national-restaurant-association-releases-2020-state-of-the-restaurant-industry-report/> [<https://perma.cc/B6XK-Y9ZY>].

³⁸ CIJI A. TLAPA, RICHARD K. MILLER & KELLI WASHINGTON, *THE 2011 RESTAURANT, FOOD & BEVERAGE MARKET RESEARCH HANDBOOK* 102-03 (2011) (defining upscale restaurants as full-service restaurants offering high-level menus, sophisticated design and atmosphere, and skilled service staff); *see also* Volha Ban, *Analysis of the Upscale/Fine Dining Sector in the Restaurant Industry* (May 3, 2012) (unpublished MBA thesis, Johnson & Wales University) (on file at SCHOLARSARCHIVE@JWU, https://scholarsarchive.jwu.edu/mba_student/10/ [<https://perma.cc/3CBA-W57Z>]).

³⁹ Bernard Surlemont & Colin Johnson, *The Role of Guides in Artistic Industries: The Special Case of the “Star System” in the Haute-Cuisine Sector*, 15 *MANAGING SERV. QUALITY*, 577, 578 (2005).

⁴⁰ MENNELL, *supra* note 1, at 142.

the ever-growing demand for consumption of culinary products on the other hand led to the rise of intermediary institutions for chefs and consumers. These are ranking institutions for restaurants based on their culinary quality. The two most important and influential ranking institutions for haute cuisine are the Michelin Guide and San Pellegrino's World's 50 Best Restaurants.⁴¹

The Michelin Guide may be the most well-known restaurant ranking guide in the world and is certainly the oldest. The first edition was published in 1900 and sold 35,000 copies.⁴² The renowned guide started as a technical guide for travelers on their journeys across Europe and became a general tourist guide after a decade.⁴³ Starting in 1934, the guide focused on gastronomy and retains this character today.⁴⁴ Since the 1930s, the Michelin restaurant guide included the star method that is known to any culinary enthusiast.⁴⁵ This method divides ranked restaurant into four main categories: no stars, one star (very good restaurant in its field), two stars (justifies a detour),

⁴¹ Bo T. Christensen & Jesper Strandgaard Pedersen, *Restaurant Ranking in the Culinary Field*, in *EXPLORING CREATIVITY: EVALUATIVE PRACTICES IN INNOVATION, DESIGN, AND THE ARTS* 235, 245 (Brian Moeran & Bo T. Christensen eds., 2014).

⁴² *About Us*, MICHELIN GUIDE, <https://guide.michelin.com/en/about-us> [<https://perma.cc/XN3Z-KS4G>] (last visited Nov. 21, 2022) [hereinafter MICHELIN GUIDE, *About Us*]; *The History of the Michelin Guide*, MICHELIN GUIDE (June 14, 2019), <https://guide.michelin.com/kr/en/article/features/history-michelin-guide> [<https://perma.cc/B7A8-X3A2>] [hereinafter MICHELIN GUIDE, *History*]; see also Christensen & Pedersen, *supra* note 41.

⁴³ MICHELIN GUIDE, *History*, *supra* note 42.

⁴⁴ Isabelle Bouty, Marie-Léandre Gomez & Carole Drucker-Godard, *Maintaining an Institution: The Institutional Work of Michelin in Haute Cuisine around the World* 7 (ESSEC, Working Paper No. 1302, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328259 [<https://perma.cc/VT5P-V9PP>].

⁴⁵ MICHELIN GUIDE, *History*, *supra* note 42.

and three stars (exceptional cuisine justifying a special journey).⁴⁶

The Michelin ranking method is based on four principles: the first being independence. The Michelin Guide does not include any advertisements and it is not sponsored by interested parties.⁴⁷ The second principle is its inspectors. The inspectors are professionals in the hotel and catering fields, specially trained and anonymous.⁴⁸ The third principle is the frequency of review. The inspectors visit candidate restaurants several times prior to a ranking decision, once per 18 months.⁴⁹ When a three-star ranking is considered, there may be ten visits of different inspectors to a restaurant.⁵⁰ The fourth principle is the confidentiality of ranking criteria, kept as a trade secret.⁵¹ Nevertheless, the general principles of the ranking method are known. From an interview with Jean-Francois Mesplede, former editor of *Michelin Guide France*, it appears that the inspectors fill in a feedback form focusing on both the overall atmosphere of the restaurant and the food served.⁵² The food ranking is based on samples of many dishes (*essai de table*) and includes reference to appetizers, entrees, cheese, and dessert.⁵³ The ranking ranges from “very bad”, “bad”, and “average,” to one, two, or three stars.⁵⁴ Finally, once a star ranking decision is proposed, all inspectors from a specific region convene to discuss the specific restaurant,

⁴⁶ Christensen & Pedersen, *supra* note 41, at 246–48; Bouty, Gomez & Drucker-Godard, *supra* note 44, at 8.

⁴⁷ Christensen & Pedersen, *supra* note 41, at 247–48.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Bouty, Gomez & Drucker-Godard, *supra* note 44, at 8.

⁵¹ Christensen & Pedersen, *supra* note 41, at 247–48.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

and a final decision is made based on a consensus of all visiting inspectors.⁵⁵

San Pellegrino's guide is far newer than the *Michelin Guide*. The World's 50 Best Restaurants list was first published in 2002, and rapidly became one of the most important guides for haute cuisine restaurants.⁵⁶ The ranking method of San Pellegrino is completely different from that of Michelin, due to the fact that the reviewers and voting method are publicly known, as depicted in the published manifest.⁵⁷ The San Pellegrino reviewers include over 1,000 reviewers selected according to their accomplishments in culinary and food critique.⁵⁸ Every reviewer has the option to propose seven restaurants per year but he or she are obligated to vote for at least three restaurants outside their ranking region and are prohibited from ranking any restaurant in which they have a personal interest.⁵⁹ The reviewers can only vote on restaurants they visited in the previous 18 months, and the vote is cast for a restaurant and for a chef or owner.⁶⁰ Beyond those rules, any reviewer can vote for any restaurant in the world without any formal requirements.⁶¹ As of 2019, due to the establishment of the new Best of the Best list, former first-ranked restaurants are excluded from the list.⁶²

In addition to the prestige associated with high ranking in either guide, the ranking has significant economic implications on the future of luxury restaurants.

⁵⁵ *Id.*

⁵⁶ *Id.* at 240.

⁵⁷ *The Voting System*, THE WORLD'S 50 BEST RESTAURANTS, <https://www.theworlds50best.com/voting/the-voting-system> [<https://perma.cc/F8NX-H3AL>] (last visited Nov. 21, 2022).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

In research by Snyder & Cotter, reviewing the pricing strategy of French restaurants between 1970–1994, the authors found a full correlation between obtaining or losing a Michelin star and the price of the dishes offered in the restaurant.⁶³ The authors also found that a spike in prices is sometimes apparent up to two years before the actual ranking change, most likely due to the excessive expenses of the restaurant attempting to increase its ranking.⁶⁴ In broad research by Gergaud, Guzman & Verardi, the authors sought to review how much a Michelin star is worth.⁶⁵ For this, they reviewed Parisian restaurants ranked by the Zagat review, based on consumer reviews stating the average dish price in each restaurant. The data was compared to the then current Michelin Guide. The authors identified a spike of nine percent in dish prices for restaurants entering the Michelin Guide without a star ranking, and an additional spike of 27 percent per each star obtained.⁶⁶ No research was yet conducted on the affect of the San Pellegrino list on dish prices, but from reviewing the menus of the top ten ranked restaurants, the effects of the list on pricing are apparent. As of January 2021, the average price for a tasting menu in such restaurants was 212 euros per person, excluding service and beverages.⁶⁷ From the foregoing, it

⁶³ Wayne Snyder & Michael Cotter, *The Michelin Guide and Restaurant Pricing Strategies*, 3 J. REST. & FOODSERVICE MKTG. 51, 65–66 (1998).

⁶⁴ *Id.*

⁶⁵ Olivier Gergaud, Linett Montano Guzman & Vincenzo Verardi, *Stardust over Paris Gastronomic Restaurants*, 2 J. WINE ECON. 24, 31–32 (2006).

⁶⁶ *Id.*

⁶⁷ Mirazur, ranked first, offers a tasting menu for 380 euro. MIRAZUR, <https://www.mirazur.fr/reserver.php> [<https://perma.cc/NLD6-BW9R>] (last visited Sept. 17, 2022). Noma, ranked second, offers a tasting menu for 3000 DKK. NOMA, <https://noma.dk/food-and-wine/> [<https://perma.cc/RL6U-W3GG>] (last visited Sept. 17, 2022). Asador Etxebarri, ranked third, offers a tasting menu for 242 euro. ASADOR ETXEBARRI, <https://asadoretxebarri.com/index-eng.html#information>

is apparent that the haute cuisine market is a developed market with a significant revenue potential. It is also apparent that business innovation in this market—most of which if focused on innovative culinary products—has significant value for the various market players.

B. Behavioral Norms and Ethics in Haute Cuisine

As with any community, and especially when its members are competitors to a great extent, the chefs' community adopted certain rules depicted in written and unwritten rules of ethics and behavioral norms. In this part I will discuss some of these rules and norms, focusing on those that affect the protection of the (economic and cultural) value of the culinary products. This discussion will serve as another basis for the legal discussion in the next part, but it is important to note that these rules of

[<https://perma.cc/N53F-AJ2U>] (last visited Sept. 17, 2022). Gaggan, ranked fourth, offers a tasting menu for 14,124 THB. GAGGAN ANAND, <https://www.sevenrooms.com/experiences/gaggananandrestaurantbangkok/gaggan-anand-team-are-back-in-town--8185841948> [https://perma.cc/FH4Z-9BAB] (last visited Oct. 10, 2022). Geranium, ranked fifth, offers a tasting menu for 3,200 DKK. GERANIUM, <https://www.geranium.dk/en/> [https://perma.cc/5LKN-PN5C] (last visited Sept. 17, 2022). Central, ranked sixth, offers a tasting menu for 782 PEN. CENTRAL, <https://www.centralrestaurante.com.pe/en/reservations.html> [https://perma.cc/ENY8-3F75] (last visited Sept. 17, 2022). Mugaritz, ranked seventh, offers a tasting menu for 242 euro. MUGARITZ, <https://www.mugaritz.com/en/faq-039s/co-1395924772/> [https://perma.cc/EQ9D-QNVY] (last visited Sept. 17, 2022). Arpege, ranked eighth, offers a tasting menu for 490 euro. ARPEGE, <https://www.alain-passard.com/wp-content/uploads/2022/09/Cuisine-choisie-Septembre22.pdf> [https://perma.cc/ZV2W-B8FA] (last visited Sept. 17, 2022). Disfrutar, ranked ninth, offers a tasting menu for 235 euro. DISFRUTAR, <http://www.disfrutarbarcelona.com/offer> [https://perma.cc/8WZ7-HL9A] (last visited Sept. 17, 2022). Maido, ranked tenth, offers a tasting menu for 559 PEN. MAIDO, <https://maido.pe/en/> [https://perma.cc/7X7X-W2KA] (last visited Sept. 17, 2022).

ethics and behavioral norms exist due to the lack of effective legal rules protecting culinary products. However, it is impossible to determine whether or not such norms and rules developed specifically due to the legal vacuum.

Many chefs around the world are members of professional organizations. The largest parent-organization for chefs is the World Association of Chefs' Societies, aggregating over one hundred official chef's organizations with millions of members across the globe.⁶⁸ Despite the fact that this is an important organization, it did not adopt a professional code for its members. In contrast, other more local organizations tend to adopt codes of conduct and ethics binding their members.

One example is the American Culinary Federation, with over 14,000 members.⁶⁹ Its ethics code states that members of the Federation will refrain from copying original materials of their colleagues, including cookbooks, even if those materials are not protected by copyright.⁷⁰ Before addressing the limitations of existing legal doctrines with respect to culinary products, it is interesting to note that professional organizations choose to privately regulate the use of culinary products, explicitly stating that such self-regulations are not parallel to legal boundaries.⁷¹

⁶⁸ *About Us*, WORLD ASS'N OF CHEFS' SOCIETIES, <https://worldchefs.org/About-Us/> [<https://perma.cc/B32C-UVL2>] (last visited Sept. 17, 2022).

⁶⁹ AM. CULINARY FED'N, CODE OF PROFESSIONAL ETHICS 1 (2020), <https://www.acfchefs.org/ACF/Resources/Downloads/Default.aspx?WebsiteKey=b3353b7b-2497-4bb3-8dae-4c6ecac72f92&hkey=f5e045cb-b16c-454b-bef2-20bfbe2feba4> [<https://perma.cc/7UPU-S8KZ>].

⁷⁰ *Id.* at 2.

⁷¹ This self-regulation comes with sanctions. For example, a violation of the ethics code of the Federation may lead to decertification. *See id.* at 1–2.

Another example for self-regulation of culinary ethics is the International Association of Culinary Professionals, with more than 3,000 members across 32 countries.⁷² The Association's ethics code requires its members to respect intellectual property of colleagues and forbids the use of a colleague's recipe without proper attribution.⁷³ Again, it is interesting to see the importance that the Association attributes to proper credit and their view that recipes are protectable components.

Importantly, in addition to written codes of conduct, it is interesting to observe the behavioral norms between colleagues in the culinary profession. In a study by Fauchart and von Hippel, the two sought to learn the behavioral norms of accomplished haute cuisine chefs in France with respect to the protection of recipes.⁷⁴ For this purpose, they interviewed ten leading chefs in French haute cuisine to identify their common norms for the protection of recipes and collected questionnaires from 94 Michelin ranked chefs.⁷⁵

Fauchart and von Hippel identified three main behavioral rules customary in the chef community in France, as far as recipes are concerned. First, a chef must refrain from copying an innovative recipe verbatim.⁷⁶ Second, if a chef is exposed to secrets of a colleague's recipes, he or she must refrain from disclosing it to third parties without permission.⁷⁷ Third, chefs must give proper

⁷² *About IACP*, INT'L ASS'N OF CULINARY PROFESSIONALS <https://www.iacp.com/about/> [<https://perma.cc/9UKT-6B7W>] (last visited Sept. 18, 2022).

⁷³ INT'L ASS'N OF CULINARY PROFESSIONALS, IACP CODE OF ETHICS, <http://iacp.com/wp-content/uploads/2019/08/IACP-CODE-OF-ETHICS.pdf> [<https://perma.cc/9SAV-NXD4>] (last visited Sept. 18, 2022).

⁷⁴ Fauchart & von Hippel, *supra* note 12, at 187.

⁷⁵ *Id.* at 192.

⁷⁶ *Id.* at 192–93.

⁷⁷ *Id.* at 193.

credit to their colleagues when they use their culinary innovation.⁷⁸ Legally speaking, the first rule refers to copyright's reproduction right.⁷⁹ Notably, the rule only relates to verbatim copying whereas copyright doctrine prohibits partial reproductions as well as the making of derivative works, which are works that are substantially based upon previous works.⁸⁰ In this regard, the chefs' self-regulation is different than the statutory copyright protection.⁸¹ The second rule, in fact, deals with trade secret misappropriation and generally follows the legal doctrine in its entirety.⁸² The third rule refers to moral rights, specifically the attribution right in copyright law.⁸³ The basic assumption of the authors was that in most cases recipes are not protected by intellectual property law, but given their significant economic value chefs sometimes need to protect them.⁸⁴ They argued that this assumption—which is legally accurate—led the chefs' community to establish quasi-intellectual-property norms.⁸⁵ In the next part, I will discuss the limitations of intellectual property protection of culinary products, propose how these could be surpassed, and address problems that awarding protection may cause.

⁷⁸ *Id.* at 188 (explaining that such norms are enforced, for example, by chefs refusing to disclose secret recipes to chefs know for violating the norms).

⁷⁹ Copyright law prohibits the reproduction of a protected work or of a substantial part thereof. *Compare id.* at 188, with 17 U.S.C. § 106(1).

⁸⁰ *See* 18 U.S.C § 1832.

⁸¹ *Compare* Fauchart & von Hippel, *supra* note 12, at 188, with Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL. STUD. 95, 95–96 (1997).

⁸² Fauchart & von Hippel, *supra* note 12, at 193.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

III. LAW AND HAUTE CUISINE

Despite the existence of relatively established behavioral norms, the case of Rebecca Charles discussed above—as with other cases that did not reach the courts—may show that additional legal protections are required for culinary products. This Part will first discuss the limitations intellectual property laws have as far as protection of culinary products is involved. As I will explain, patent law, design law, trademarks, and trade dress are not suitable to protect culinary products. Copyright law similarly does not allow such protection, at least with respect to recipes. I will then review suggestions made to overcome these limitations and will suggest another practical approach to protect the visual outcome of a gourmet dish by copyright. To conclude, I will offer some criticism, internal to intellectual property law, of the mere intervention of law in the field of culinary products. This criticism is based on the argument that the lack of protection may in and of itself incentivize the market and make it more efficient, thus promoting the main goals of copyright law.

A. *The Limitation of Intellectual Property Protection of Culinary Products*

Intellectual property laws, and their underlying doctrines, struggle to provide effective protection to culinary products at large and to haute cuisine specifically. Given that my suggested discussion focuses on copyright law, I will begin with explaining the difficulties of other laws and doctrines to protect culinary products.

To examine the protection intellectual property laws provide, we must identify the components of culinary dishes that may be subject to protection. The first is the recipe, including the list of ingredients constituting the

dish, the types of ingredients, and their exact measurements with which the dish could be prepared. The second is the process of preparing the dish, which are the instructions necessary to actually prepare the dish using the ingredients. The third is the visual outcome of the dish, commonly known as plating.

Patent law, primarily aimed at protecting useful technological processes, could have protected the first two components of food dishes: recipes and methods of preparation.⁸⁶ However, patent law's onerous requirements, including novelty (meaning that the process was not previously published) and non-obviousness (meaning that a professional in the field will not deem the process obvious), are a high threshold for most food dishes.⁸⁷ A natural candidate for the protection of the third component—the visual outcome of the dish—is industrial design or design patent law.⁸⁸ However, although the visual outcome of the gourmet dish may be protected in principle, such protection is only afforded when the design is registered.⁸⁹ Given the lengthy and costly registration process, it is unlikely that culinary products sold in low quantities in luxury restaurants will justify such registration.⁹⁰

Two other sets of legal doctrines are almost completely irrelevant to the components described. The first is trademark law, the main purpose of which is to

⁸⁶ See 35 U.S.C. § 101. Patent law protects “new and useful process, machine, manufacture, or composition of matter . . .” Thus, the protection of recipes and methods of preparation could be granted to the entire preparation process, including the underlying ingredients, but not to the list of ingredients itself.

⁸⁷ 35 U.S.C §§ 102–103.

⁸⁸ Design patents protect the visual elements of an industrial product but not its method of preparation. 35 U.S.C § 171.

⁸⁹ 35 U.S.C §§ 111, 171.

⁹⁰ For elaboration on the relationship between copyright law and design law, see *infra* Part III.C.

prevent consumer deception and confusion of products, and trade dress law, which protects the reputation of the owner of a specific product or service.⁹¹ As far as gourmet dishes, there will be very few cases where a specific dish is identified by consumers as being made by a specific chef, thus making trademarks and trade dress less effective at providing protection. Another legal doctrine that may apply here is trade secrets. A trade secret is generally defined as business know-how or information that is kept confidential and provides its owner with competitive advantage.⁹² The recipe and methods of preparation can obviously constitute trade secrets, and the doctrine may allow chefs to prevent misappropriation of such secret recipes and processes by apprentices and kitchen workers.⁹³ However, trade secrets do not protect chefs from the reverse engineering of their dishes by others.⁹⁴ In the haute cuisine field (and culinary at large) many chefs will be capable of reconstructing the components and processes underlying a specific dish merely by viewing and tasting it, thus being able to recreate it without infringing any right.

As far as copyright law is concerned, the most obvious route would be attempting to protect the literary works involved: the recipe and preparation instructions. First, one must examine several principal rules in copyright law. Copyright law generally protects original works of authorships that are, to a certain extent, fixed.⁹⁵ The originality requirement was at the heart of many legal debates, but the general understanding today is that a work would be considered original if it originated with the author

⁹¹ See Cunningham, *supra* note 10, at 28–32.

⁹² 18 U.S.C. § 1839.

⁹³ Fauchart & von Hippel, *supra* note 12, at 193.

⁹⁴ See 18 U.S.C. § 1839(6)(B).

⁹⁵ 17 U.S.C. § 102.

(i.e. was not copied) and shows a modicum of creativity.⁹⁶ A second principle in copyright law is that only the expression, but not the idea underlying the work, can be protected.⁹⁷ The idea/expression dichotomy is based on the assumption that protecting ideas will prevent others from using them and will limit the ability of others to create other works of authorship, thus undermining the main purpose of copyright law—promoting creativity and leaving enough “raw materials” in the public domain.⁹⁸

One qualification for copyright protection is that the work must be one of the types of works that the Copyright Act acknowledges. One such type is a literary work, and a recipe undoubtedly qualifies as one.⁹⁹ However, despite the theoretical ability to protect recipes as literary works under copyright, in most cases, such attempts did not prevail.

The Court of Appeals for the Seventh Circuit decided the most cited copyright case on recipes: Meredith’s lawsuit.¹⁰⁰ Meredith was engaged in publishing books and magazines including recipes and registered a publication for copyright protection that included five recipes based on popular Dannon yogurts.¹⁰¹ The lawsuit was filed against Publications Int’l., a competitor who

⁹⁶ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

⁹⁷ *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

⁹⁸ *See, e.g.*, 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[D] (2014).

⁹⁹ 17 U.S.C. § 102(a) (“Works of authorship include the following categories: (1) literary works.”).

¹⁰⁰ *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 475 (7th Cir. 1996).

¹⁰¹ *Id.* at 474–75.

published 12 recipes out of Meredith's registered publication.¹⁰² The Court rejected the copyright claims due to the fact that the list of ingredients in the recipe did not meet the originality threshold; recipes are mere facts, and facts are explicitly not protected by copyright.¹⁰³ Another justification to deny the claim was that the description of the use of such ingredients to make the dish constituted mere methods and processes which are also excluded from copyright protection.¹⁰⁴ However, the Court noted that there may be cases where recipes will qualify for copyright protection if—and only if—the expression in them depicts something beyond the mere list of ingredients and methods of preparation.¹⁰⁵

We can thus see that the protection copyright law affords to recipes and methods of preparation of food as literary works is extremely limited. Moreover, even if recipes and methods of preparation of gourmet dishes were protectable, this would not allow chefs to prohibit others from making the actual dishes based on the recipe.¹⁰⁶ This is because when copyright protects a work that includes functional knowledge, such as an explanation of a process or method, such protection does not apply to the application of such knowledge nor to the products of such application.¹⁰⁷ It may be argued that it is unclear why copyright protection for recipes is even necessary in haute cuisine. In some cases, access to the recipe itself will not be sufficient to make the dish given the extensive skills and expertise required by the chef who wishes to make it. This

¹⁰² *Id.* at 475.

¹⁰³ *Id.* at 480–81.

¹⁰⁴ *Id.* (referring to the guidelines of the Copyright Office, according to which a list of ingredients is an example for a work that does not qualify for protection. 37 C.F.R. § 202.1).

¹⁰⁵ *Id.* at 481.

¹⁰⁶ NIMMER & NIMMER, *supra* note 98, § 2A.13.

¹⁰⁷ *See Baker v. Selden*, 101 U.S. 99, 103 (1880).

is a valid argument when amateur cooks or less-skilled chefs attempt to use the recipe. However, in a field of professional chefs, it is expected that many of them would be able to follow even the most complex and innovative recipes.¹⁰⁸ I will now turn to discuss the possibility to protect the third component of culinary products—the visual outcome—by copyright.

**B. *A Possible Solution under Copyright Law:
Gourmet Dishes as Visual Arts***

In the previous part, I explained the mismatch between intellectual property law, specifically copyright, and the protection of culinary products. Such mismatch has led several authors to suggest new methods of protecting culinary products under copyright law, not by means of a literary work such as a recipe, but by means of the end-product itself. In this part I will review these suggestions and their underlying justifications and will suggest an alternative method for protecting gourmet dishes under existing copyright law.

Austin Broussard criticized the reluctance of courts to protect recipes.¹⁰⁹ He argued that a recipe is one expressive way to fix a culinary work of art, much like notes are for music.¹¹⁰ In his view, the visual outcome of a dish meets the fixation requirement and therefore should be considered as a work of authorship in and of itself. Broussard added that, to the extent that the visual outcome of a dish could be considered a work of authorship, the

¹⁰⁸ See Daily Gullet Staff, *supra* note 8.

¹⁰⁹ Broussard, *supra* note 10, at 715.

¹¹⁰ Compare *id.*, with Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1499 (1991) (suggesting a similar distinction by comparing food dishes with musical compositions).

underlying recipe should be considered a literary work worthy of protection.¹¹¹

Substantively, Broussard based his argument on the fact that the visual outcome of culinary products could be considered works of authorship in the sense that they have expressive and aesthetic value.¹¹² Broussard reviewed philosophical perceptions of food as art and explained that there is no material difference between the artistic value of food and that of other arts.¹¹³ Broussard explained that the statutory text of the Copyright Act technically allows protection of the visual outcome of dishes under the category of useful arts.¹¹⁴ The Copyright Act, as explained, defines an open list of types of works eligible for copyright protection, such as pictorial, graphic or sculptural works.¹¹⁵ This definition includes useful arts, but the Act explicitly states that for useful arts to be protected, they must demonstrate graphic characteristics that could exist and be identified and distinguished in a disconnected manner from the functional aspects of the work.¹¹⁶

Broussard explained that dishes constitute works of useful arts in the sense that they have intrinsic functional values, such as their nutritious characteristics and the fact that they are consumed, *inter alia*, for survival.¹¹⁷ However, he argued that the visual outcome of food could undoubtedly have separate aesthetic value and could thus qualify for copyright protection.¹¹⁸ Broussard explained that such protection would apply only to the artistic visual aspects of the dish and not to the artistic nature of its taste,

¹¹¹ Broussard, *supra* note 10, at 716.

¹¹² *Id.* at 723.

¹¹³ *Id.* at 717–21.

¹¹⁴ *Id.* at 723.

¹¹⁵ 17 U.S.C. § 102(a)(5).

¹¹⁶ *Id.* § 101.

¹¹⁷ Broussard, *supra* note 10, at 723.

¹¹⁸ *Id.*

and this is due to the philosophical tendency to ignore “lower” senses such as taste and smell as opposed to “higher” senses such as sight and hearing.¹¹⁹

Another proposal, brought by Malla Pollack, challenged the fact that copyright law in its current form is not sensitive enough to protect tastes and scents underlying works of authorship.¹²⁰ She argued that with respect to culinary products used both for consumption and for artistic expression, there is no justification against applying copyright law and the protection it offers—even with respect to the taste of the dish that distinguishes it from other works.¹²¹ The starting point for Pollack focused on the mismatch between intellectual property law, copyright specifically, and the protection of culinary products.¹²² Pollack explained that during the eighteenth century food was not conceived as an artistic craft, but in modern times it constitutes art that includes visual aspects as well as taste, textures and aromas.¹²³ Moreover, Pollack argued that there is no prohibition against protecting useful arts, much like the previous discussion, and that modern aesthetic approaches do not distinguish between the value of useful arts and “high” arts.¹²⁴ Due to the foregoing, Pollack suggested acknowledging a new category of works of authorship—edible art form—that will encapsulate both the visual outcome of dishes and their taste and texture.¹²⁵

¹¹⁹ *Id.* at 723–24.

¹²⁰ *See* Pollack, *supra* note 110, at 1478–79.

¹²¹ *Id.* at 1498–99.

¹²² *Id.* at 1481–89.

¹²³ *Id.* at 1489–90.

¹²⁴ *Id.* at 1490, 1494–97.

¹²⁵ *Id.* at 1486. This suggestion was explicitly rejected by the Court of Justice for the European Union. *See* Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, ECLI:EU:C:2018:899, ¶¶ 42–44 (Nov. 13, 2018) (determining that “[t]he taste of a food product cannot . . . be pinned down with precision and objectivity. Unlike, for example, a literary, pictorial, cinematographic or musical work, which

Much like Pollack, Christopher Buccafusco argued that a food dish should be recognized as susceptible to copyright protection.¹²⁶ He argued that courts err when they deny copyright protection from recipes because the recipe is simply a literary way to fix food in a tangible manner, and if the end-product is creative enough, it should be protected.¹²⁷ According to his approach, food dishes can hold expressive value that should be protected by copyright, and recipes do not necessarily describe mere unprotected facts.¹²⁸

This Part showed that the visual outcome of dishes could, technically and substantively, be protected by existing copyright law. Alongside the doctrinal discussion—whether the visual outcome of a dish be protected by copyright—one must review the underlying normative difficulties that an affirmative answer entails. The fact that the visual outcome of a food dish would be protected only if it shows expressive value that is distinct from its functional capacity raises important and interesting questions regarding the protection of culinary products and useful arts by copyright at large. I will address these questions in the next Part, but I will first address economic criticism that challenges the normative justification of protecting culinary dishes by copyright.

is a precise and objective form of expression, the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed.”).

¹²⁶ Buccafusco, *supra* note 8, at 1123.

¹²⁷ *Id.* at 1130–40.

¹²⁸ *Id.*

C. *Protecting Food by Copyright: the Piracy Paradox and Self-Regulation*

I mentioned the similarity between culinary products and fashion products with respect to the mismatch of the interrelation of each of these fields with intellectual property laws. Both fields do not enjoy sufficient intellectual property protection for their artistic products, and with respect to copyright law, this is due to both culinary products and fashion products being, to a certain extent, useful arts that borderline copyright and design patent subject matter. Similarly, adapting the legal regime such to protect both by copyright raises similar difficulties. In this part, I will discuss the economic difficulties that arise in discussions of the protection of fashion products by copyright and will explain how these apply to food dishes generally and gourmet dishes specifically. These difficulties will lead to the ultimate question: should we protect food dishes by copyright?

In their fundamental article, Raustiala & Sprigman suggested an analysis of the fashion products market, challenging the basic underlying assumption of copyright law according to which copyright protection is justified by promoting creativity.¹²⁹ The authors characterized the fashion market as a prosperous market of innovation and creativity despite the lack of intellectual property protection and repeated copying and design piracy.¹³⁰ The authors showed that the fashion market is not adversely affected by copying of design; rather, it largely prospers due to them.¹³¹ They call this anomaly the piracy paradox and explain it

¹²⁹ Kal Raustiala & Christopher Sprigman, *The Piracy and Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688–92 (2006).

¹³⁰ *Id.* at 1689.

¹³¹ *Id.* at 1732–33.

with two models that characterize the fashion market: induced obsolescence and anchoring.¹³²

The first model (induced obsolescence) is based on the fact that fashion items express social status.¹³³ They become desirable when a certain audience uses them but become less luxurious when more and more people own them.¹³⁴ Thus, the more copies a status-based product has, the less it is worth, and the respective clients wishing to preserve their social status purchase new designs—eventually promoting innovation and creativity in the market.¹³⁵ The second model (anchoring) is about the anchoring of the demand for a certain design in the market.¹³⁶ This model complements the first.¹³⁷ The authors argued that to preserve the circle of induced obsolescence, designers must signal to their audience when would a new design enter the market.¹³⁸ For this, they must establish a trend.¹³⁹ The authors argued that disseminating the new design by allowing copies to circulate assists authors in conveying the message and signals their consumers when fashion changes, what defines the new fashion, and when to purchase it to stay on the status wheel.¹⁴⁰

¹³² *Id.* at 1691-92.

¹³³ *Id.* at 1718-20.

¹³⁴ *Id.*

¹³⁵ See Raustiala & Sprigman, *supra* note 129, at 1718-21.

¹³⁶ *Id.* at 1728-31.

¹³⁷ See *id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1728.

¹⁴⁰ *Id.* at 1728-29. Hemphill & Suk criticized these models. They argued that Raustiala & Sprigman ignored the distinction between verbatim copying of fashion products and derivative works. See Scott C. Hemphill & Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 STAN. L. REV. 1147, 1180-84 (2009). They further argued that creating verbatim copies of fashion products undermines the initial incentive of authors to create—much like any other field of authorship—whereas it is derivative works that support the

The similarity between fashion products and the market for haute cuisine products is clear:¹⁴¹ haute cuisine products too do not enjoy broad intellectual property protection, and one could identify the phenomena of unauthorized copying and making of derivative works in both markets.¹⁴² However, the haute cuisine market is prospering and can produce innovative and artistic products even absent intellectual property protection. One may argue that Raustiala & Sprigman’s models do not fully align with haute cuisine market. Broussard, for example, argued that haute cuisine is not characterized by periodic fashion and thus induced obsolescence and anchoring cannot explain the piracy paradox of haute cuisine.¹⁴³

development of the market. *Id.* Hemphill & Suk also explained that the distinction between verbatim copying and derivative works is substantive for consumers as well. *Id.* at 1164–66. In the field of fashion consumers not only seek to flock and be part of a mainstream of consumers, but also wish to differentiate from other consumers and design their personality independently. Thus, derivative works in the same trend allow consumers to meet both needs whereas verbatim copying does not meet the latter need. *Id.* For the purpose of this Article, I do not believe that this criticism is material, since making unauthorized derivative works infringes copyright much like verbatim copies, and thus Hemphill & Suk themselves suggest diverting from existing copyright doctrine with respect to the fashion market. *See also* Kal Raustiala & Christopher Sprigman, Response, *The Piracy Paradox Revisited*, 61 *STAN. L. REV.* 1201, 1205 (2009).

¹⁴¹ In fact, Raustiala & Sprigman also identified the connection between their discussion on fashion and the artistic culinary field when they argued that the latter is part of the “negative space” of intellectual property law, much like magic, tattoos and hairstyles. *See* Raustiala & Sprigman, *supra* note 129, at 1765–76. *See* Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *VA. L. REV.* 1787 (2008) for further discussion on standup comedy as such negative space.

¹⁴² *See* 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works.”).

¹⁴³ Broussard, *supra* note 10, at 713.

However, he explained that haute cuisine culinary products constitute status symbols.¹⁴⁴ Thus, gourmet restaurants that offer cutting-edge culinary innovation and price their dishes accordingly have a fixed demand and are not adversely affected by “cheap” copying of the same culinary products.¹⁴⁵

I am not convinced that Raustiala & Sprigman’s models could be so easily dismissed with respect to haute cuisine. One may think that the anchoring model assists in establishing culinary trends through the repeated copying or making of derivative works, even if not at the same frequency as with fashion. Literature on culinary and restaurants has identified resemblance between the food and fashion industries generally and haute cuisine and haute couture specifically. Cailein Gillespie recognized that a haute cuisine chef must be updated in trends in the culinary market and update her menu accordingly and that chefs often do so by copying from the menus of their peers.¹⁴⁶ In addition, cheaper and more available copying of culinary products contributes to culinary education, which, in turn, raises the culinary bar of expectations and thrusts the demand for further innovation among consumers who are interested in status bearing culinary products. Thus, induced obsolescence could also be relevant to haute cuisine. Even if this field is based, *inter alia*, on traditionality and grounded culinary perceptions to the extent that the general public will consume more culinary

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 712–14.

¹⁴⁶ See Cailein H. Gillespie, *Gastrosophy and Nouvelle Cuisine: Entrepreneurial Fashion and Fiction*, BRITISH FOOD J., Nov. 1994, at 19, 21–22. Surlemont & Johnson similarly offered that “[i]ndeed, as haute-couture operates in the fashion industry, haute-cuisine plays a key role in trend setting, image building and in setting quality standards for the industry as a whole. It operates as a kind of lighthouse in the industry.” Surlemont & Johnson, *supra* note 39, at 578.

products of a certain type, these products will require replacements, upgrades, or newer innovative versions to meet the demand. Those who could meet such demand are the established players in the market that do not set their culinary supply based on copying, much like in the fashion industry.

Even if the piracy paradox does not exist in its entirety with haute cuisine, a broader justification against copyright protection in this field is that there is simply no market failure requiring intervention. The economic assumption of copyright is that although the cost of creating a work of authorship is high, the cost of copying one is low; thus, absent protection, authors will be unable to recoup their investment and will refrain from creating at all.¹⁴⁷ As shown above, the market of haute cuisine is not characterized by such market failure. First, it is an efficient and prosperous market despite the fact that existing copyright law does not extend significant protection. Second, there are internal self-regulation mechanisms that likely allow authors of culinary products to recoup their investment and keep creating and enriching the expressive world.¹⁴⁸ This is coupled with unwritten behavioral norms and ethics rules that establish norms prohibiting copying in the community of haute cuisine.¹⁴⁹

In addition to the economic prosperity of haute cuisine and its internal regulation mechanisms, institutions assist in enhancing the value of haute cuisine by focusing on the reputation of chefs. The haute cuisine market offers its customers experiences as goods. Pine & Gilmore used the term “experience economy” to refer to circumstances

¹⁴⁷ See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328–329 (1989); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 108–115 (2003).

¹⁴⁸ See *supra* notes 64–84 and accompanying text.

¹⁴⁹ *Id.*

where a business is charging for the time the customer spends inside.¹⁵⁰ Muller identified the restaurant field as one selling experiences because customers are not there to purchase a product; in fact, the customers have “purchased” the meal by merely entering the restaurant.¹⁵¹ Surlemont & Johnson argued that the field of haute cuisine is an obvious market of experiences and thus requires credible signaling tools allowing consumers to make decisions without investing too much in searching while mitigating information gaps between them and restaurants.¹⁵² They argued that ranking institutions are efficient signaling tools for the market and have absolute effect on it—so much that they can create and destroy a restaurant.¹⁵³ The ranking institutions I mentioned above signal to the consumer audience which restaurants serve the highest quality of culinary products and thus create and maintain the reputation of the respective authors of such products.¹⁵⁴ One may assume that the ranking guidelines of such institutions calculate, *inter alia*, the innovation and originality of chefs as well as the norms prohibiting copying. Thus, ranking institutions are overseeing and promoting the efficiency of the market for culinary products and creating economic value for restaurants that is easily identified by consumers. In a market governed by such signaling tools, copying culinary products is simply not worth it and will adversely affect the economic value of the copier. In contrast, innovation and originality are awarded not by monopolies such as copyright, but rather by

¹⁵⁰ B. Joseph Pine II & James H. Gilmore, *Welcome to the Experience Economy*, HARV. BUS. REV., July–Aug. 1998, at 97, 98; B. JOSEPH PINE II & JAMES H. GILMORE, *THE EXPERIENCE ECONOMY: WORK IS THEATRE & EVERY BUSINESS A STAGE* 194 (1999).

¹⁵¹ Christopher C. Muller, *The Business of Restaurants: 2001 and Beyond*, 18 INT’L J. HOSP. MGMT. 401, 403–04 (1999).

¹⁵² Surlemont & Johnson, *supra* note 39, at 578, 580.

¹⁵³ *Id.* at 581.

¹⁵⁴ See *supra* notes 40–55 and accompanying text.

other governing institutions signaling the value of such innovation to the market.

If this is the case, copyright protection for culinary products is not intrinsically justified, since the main goal of copyright—to promote authorship and enriching the world of expressions—is already met without legal protection and no market failure is observed. In the next Part, I will discuss non-economic arguments against copyright protection of culinary products.

IV. COPYRIGHT AND FOOD: ON AESTHETIC JUDGEMENT AND CULTURAL DOMINATION

In this Part I will offer another argument against copyright protection for culinary products. This argument will not be based on economic analysis. Rather, it is pinned in the cultural implications that may result from copyright protection and the distortion of the balance of powers between different types of authors in the same creative field without legal or moral justification. As I will explain below, this is due to the expected undermining of aesthetic neutrality, which is a central pillar in copyright law where culinary products are concerned.¹⁵⁵ Without clear aesthetic neutrality, copyright may be afforded to authors of “high” culture and be deprived from authors of “low” culture. The main argument here is that due to expected aesthetic bias, copyright law will protect haute cuisine culinary products which are perceived as highly artistic and will deny protection from more popular, daily culinary products. This will shift the cultural domination to authors of high culture and will restrict access to culinary products for various groups in society. This outcome also has severe distributional effects that justify rethinking the appropriate copyright regime.

¹⁵⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

A. *Aesthetic Neutrality in Copyright Law*

One of the basic principles of copyright law is its manifested aesthetic neutrality and lack of aesthetic criteria for protection. This was expressed by the important decision in *Bleistein* dating back to 1903.¹⁵⁶ In that case, the Supreme Court was asked to rule whether a circus advertisement should be protected by copyright.¹⁵⁷ After the two lower courts determined that if the visual product was meant for advertising purposes only, it is not eligible for protection, the Supreme Court reversed the decision.¹⁵⁸ Writing for the majority, Justice Holmes mentioned the following well-known comment: “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁵⁹

However, despite the explicit statement of aesthetic neutrality in copyright law, doubts were raised with respect to courts’ ability to actually apply such neutrality in their decisions. Amy Cohen, for example, suggested that aesthetic judgment is inherent to one of the most basic copyright doctrines: the idea/expression dichotomy.¹⁶⁰ Cohen reviewed court decisions ruling on whether an

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 248, 252.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 251–52 (explaining the dangers underlying aesthetic judgment of works as a precondition for copyright protection and stating that many works will not be duly protected at the time of first publication and that often time the judge who will have to decide on the matter will be more “educated” than the audiences identifying value in such work, and thus such judge will err in denying protection of such work).

¹⁶⁰ Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements*, 66 *IND. L.J.* 175, 229–30 (1990).

allegedly infringing work used protected expressions or mere ideas from the protected work.¹⁶¹ Her conclusion was that ruling on this issue tends to be an aesthetic judgment with respect to the creativity of the work and whether it surpasses the artistic obviousness.¹⁶² Alfred Yen also explained that despite judges' attempt to avoid aesthetic judgement and to support their decisions by purely legal arguments, most of their decisions are in fact characterized by well-known aesthetic argumentation.¹⁶³ Yen demonstrated how judges make aesthetic judgment in three main copyright doctrines: originality, useful arts, and substantial similarity for copyright infringement.¹⁶⁴ Due to the fact that aesthetic argumentation is blended into legal decisions, Yen suggested that judges should be more self-aware of the aesthetic judgment they make and explicitly choose an aesthetic argumentation to limit their subjective biases.¹⁶⁵

As shown above, the Copyright Act explicitly inserted the aesthetic debate into the legal debate as far as useful arts are concerned. The Act requires a distinction between the functional and expressive parts of a work and protects only the expressive parts, but in many aspects, whether a part of the work is functional or expressive

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 266–97 (1998).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 300–02. Christine Farley reached a similar conclusion. She argued that courts determine—implicitly or explicitly—when a certain object amounts as a work of art. Due to the fact that courts are bound by aesthetic neutrality, they reach distorted legal and aesthetic reasoning despite their intuitive inclination to aesthetic argumentation. Thus, if judges adopt awareness to theoretical aesthetic analysis they will be able to reach a conscious argumentation allowing them to suppress their subjective biases. *See* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 841–57 (2005).

revolves around aesthetic concepts.¹⁶⁶ In the next part, I will demonstrate how the problem of aesthetic judgement in copyright could apply to copyright protection of culinary products, and of haute cuisine in particular.

***B. Oysters, Pearls, and Philly Cheesesteak:
High and Low Culture in Copyright***

The field of useful arts raises questions with respect to copyright protection which clearly includes questions of aesthetic judgement.¹⁶⁷ Copyright protection for culinary products serves as a case study for the protection of useful arts and allows for discussion of the difficulties and concerns raised by applying aesthetic judgement to these types of works, where aesthetic questions arise intrinsically. However, as opposed to the difficulties raised in existing literature and court decisions, which mainly focus on economic justifications to copyright,¹⁶⁸ I suggest a non-economic analysis of the effects that protecting culinary products would have on cultural design and the preference of certain groups of authors over others.

Copyright law, much like other laws, has not only economic distributional effects, but also cultural distributional effects. One may expect such distributional effects if copyright law will fully apply to culinary products. The main effect I wish to emphasize is the expected distinction between low and high culture for determining which culinary works would be protected by copyright. Such distinction will have distributional effects

¹⁶⁶ See, e.g., Yen, *supra* note 163, at 275–84 (identifying the field of useful arts as one of the domains in which copyright law deals, often explicitly, with aesthetic judgment).

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Bleistein, 188 U.S. at 251–52 (expressing concern about under-protection of works whose aesthetic value is not yet appreciated); see also Farley, *supra* note 155, at 810–18.

both on authors and consumers, and these effects directly result from the aesthetic judgment required to decide whether useful arts are protected by copyright, as discussed above.

To demonstrate my argument, take the example of two culinary products as candidates for copyright protection. The first is Chef Thomas Keller’s famous “Oysters and Pearls.” It is an appetizer served in a small deep bowl, containing a golden crème consistent of zabaglione sauce and tapioca pearls, ornamented with two Island Creek Oyster, together with an oval hill of Sterling White Sturgeon black caviar.¹⁶⁹ It is one of the flag dishes in Keller’s tasting menu at the Per Se restaurant offered at a price of US\$355.¹⁷⁰ The second is the Philly Cheesesteak sandwich served at the famous Pat’s King of Steaks. It consists of sliced steak strips and onions in a white wheat bun, covered by melted cheese.¹⁷¹ The expected outcomes of reviewing the copyrightability of both dishes under the useful arts doctrine are almost inevitably predictable. Keller’s Oysters and Pearls can likely be characterized by clear and distinct aesthetics from its functional culinary purpose. The decision to mix these specific ingredients in the specific composition offered by Keller is unlikely to result from the functional purpose of eating oysters or caviar, as one may argue. In contrast, Pat’s Philly Cheesesteak sandwich will not likely be considered an

¹⁶⁹ Thomas Keller, *Oysters and Pearls*, EPICURIUS (Aug. 20, 2004) <https://www.epicurious.com/recipes/food/views/oysters-and-pearls-105859> [<https://perma.cc/V5D9-BXRQ>].

¹⁷⁰ *Per Se*, RELAIS & CHATEAUX, <https://www.relaischateaux.com/us/united-states/perse-new-york> [<https://perma.cc/M99L-UWA9>] (last visited Nov. 22, 2022); photograph of Oysters and Pearls, *in* Karsten Moran, *Per Se Review*, THE NEW YORK TIMES (Jan. 13, 2016), <https://www.nytimes.com/slideshow/2016/01/13/dining/per-se-review/s/13REST-slide-DPTT.html> [<https://perma.cc/7A4T-5BKQ>].

¹⁷¹ Images of Pat’s Cheesesteaks, GOOGLE IMAGES, <https://images.google.com> (search “Pat’s Cheesesteaks”).

artistic work with distinct aesthetic character from its functional purpose: feeding customers with a satisfying and relatively cheap food dish based on ingredients commonly used by other food businesses.

Is this a normatively desired outcome? Does it align with copyright law's internal logic? The analytical distinction between the two dishes for the purpose of copyrightability review is not sufficiently stable. The ingredients themselves in both dishes do not qualify for copyright protection because they did not originate with the authors. This is true for black caviar, the classic and well-known zabaglione sauce, as well as white wheat buns, sliced steak and melted cheese. Protecting the first and not the second can be justified based on a specific aesthetic argumentation due to the unique visual composition of the first dish, the author's intention, or that the work belongs to an institution with artistic characters.¹⁷² Is it impossible to think of a certain Philly Cheesesteak having a visual outcome which could meet its functional purpose but could also be recognized by distinct aesthetic characters by a certain audience? It is important to note that the question of whether the dish has distinct aesthetic value is different than the question of whether it has artistic value. In many cases, the first question (which is in the interest of the court under useful arts doctrine) is dictated by the second question (which courts do not necessarily have the adequate tools to answer).

To clarify, I do not address a scenario where a dish is composed of the basic ingredients of a Philly Cheesesteak, but the visual outcome of the ingredients is materially changed. Thus, for example, it may be that a dish of sliced steak and melted cheese served in a pink heart-shaped bun could be afforded copyright protection.

¹⁷² See Yen, *supra* note 163, at 256–60; Farley, *supra* note 165, at 843–44 (elaborating on the author intention approach and the institutional approach in aesthetics theory).

Similarly, a haute cuisine interpretation of a Philly Cheesesteak by deconstructing its ingredients to a completely unfamiliar visual outcome, or preserving the well-known visual outcome but replacing the ingredients with more unique ones to create a more “artistic” feeling to the dish, may also be afforded copyright protection. Thus, I do not address, for example, a Philly Cheesesteak including the commonly expected ingredients but where the visual outcome and the ingredients’ texture grants it an added aesthetic value in comparison to other Philly Cheesesteaks for a certain audience.

The aesthetic analysis required to explain why such dish should be afforded copyright protection exceeds the law’s boundaries and capacity. First, a full and complete aesthetic analysis of a food dish must also address the aesthetics of its taste and scent, which is completely foreign to copyright law. Moreover, reviewing whether aesthetic characteristics that are distinct from functional purposes exist in a food dish requires determining what its functional purpose is. In the context of a Philly Cheesesteak, is the visual functional purpose only inserting a certain amount of sliced steak into a bun, or is it in fact signaling to a potential customer that he or she should purchase this specific cheesesteak and not the other? If it is the latter, it may well be that Oysters and Pearls also lacks any distinct aesthetic character from its function.

Copyright law’s inability to be sufficiently sensitive to these aesthetic questions results in an intrinsic preference to certain artistic circles that are commonly recognized by parts of the public, and potentially courts, as high culture, the products of which yield clearer aesthetic value. Moreover, the willingness to protect high culinary products at a certain point in history may result in two material biases. First, such willingness may divert investment in culinary products toward limited artistic circles. Second, it may establish a power construct granting broad domination

over new culinary products and genericizing culinary products already embedded in folklore and thus perceived as lower.¹⁷³ This possibility is one example of copyright law's power to grant cultural domination to groups of authors engaged in certain fields of authorship. Authors engaged in high culture will be protected from unauthorized copying of their works and the ancillary advantages, whereas authors engaged in low culture will be exposed to copying by larger and more powerful institutions and to appropriation of their culinary products by the former. This phenomenon will have a distributional implication on the balance of powers between authors.

In contrast to the discussion here, in many other non-useful art fields such as music, painting or sculpture, it seems that the aesthetic distinction between lower and higher culture does not affect copyright protection. However, even in such other art fields, copyright may have distributional effects. Molly Van Houweling, for example, argued that one of copyright law's purposes is to enable a broader distribution of methods of communication and cultural participation.¹⁷⁴ She argued that copyright law has accomplished this goal in the past and was used to subsidize underprivileged authors and allow them to participate in the world of authorship.¹⁷⁵ However, with technological advancements and the development of new authorship domains, the application of copyright doctrines changed and can now burden underprivileged authors instead of supporting them.¹⁷⁶ Van Houweling also argued

¹⁷³ In culinary, this is of higher importance since this is a field characterized by clear inter-generational as well as inter-cultural knowledge transfer—which yields additional distributional effects.

¹⁷⁴ See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1562–66 (2005).

¹⁷⁵ *Id.* at 1540–42.

¹⁷⁶ *See id.*

that copyright law should grant protection to non-sophisticated authors.¹⁷⁷

At this point, one may argue that a suitable solution to the problems raised due to the aesthetic distinction between different useful arts is adopting a doctrine that will grant copyright protection to all types of works in a specific cultural domain, regardless of aesthetic characteristics. Pollack’s suggestion, arguing that copyright should be granted to any “edible art form,” is an example of such a solution.¹⁷⁸ Accepting this type of work as susceptible to copyright protection excludes these works from the useful arts category and removes any aesthetic discussion. In fact, this was Buccafusco’s main argument, when he asked to blur copyright’s distinction between works aimed at the sight and hearing senses and those aimed at the feeling, smell and taste senses.¹⁷⁹ According to his approach, such distinction is based on the western aesthetic culture, which is no longer applicable in modern times, and once modern aesthetics scholars recognized the aesthetic and expressive value of the “lower” senses, there was no room for the fundamental premise that lower senses works are necessarily works of useful arts.¹⁸⁰

These solutions raise several difficulties. First, even if we accept the assumption that “lower” senses can bear equivalent expressive value as the “higher” senses—an assumption that I agree with—applying this to the law is problematic, especially on the evidentiary part. The saying “there’s no accounting for taste” demonstrates the epistemological difficulty in objectively comparing tastes and scents, and such comparison would be required when the protection of a food dish will be claimed for its taste or

¹⁷⁷ *Id.* at 1541.

¹⁷⁸ Pollack, *supra* note 110, at 1498–99.

¹⁷⁹ See Christopher J. Buccafusco, *Making Sense of Intellectual Property Law*, 97 CORNELL L. REV. 501, 541–46 (2012).

¹⁸⁰ *Id.*

smell. Second, and more importantly, while culinary products may have artistic value, these are still—sometimes daily—consumption products with cultural value. The mere grant of copyright protection to such products may have additional distributional effects distinguishing between high and low cultures, also impacting consumers and their access to cultural products.

In contrast to non-useful artistic fields such as sculpture, painting, music, and cinema, where most artistic products are generally accessible to the general public, the haute cuisine field is different. As I demonstrated, a meal at one of the world's ten best restaurants will cost 212 euros on average, an expenditure that is simply not feasible for most. Today, absent copyright protection for gourmet dishes, this price is a direct result of the chef's abilities and reputation. Even if such price will not rise due to additional copyright protection, such protection may further limit access to the already restricted field of arts. This is because original and innovative culinary products will not be "copied" and reproduced in cheaper versions and will not be extended to the "lower" parts of the culinary market. This will limit the potential culinary development of the general public and has a clear distributional effect: those who can afford expensive dishes will be exposed to broader culinary arts than the average person. This too undermines copyright's main purpose of promoting authorship and expanding the world of expressions.

This last point can be examined from various views. One is to view it as an argument based on distributive justice, which is essentially external to the basic normative justifications to copyright law, in contrast to the economic justification which is internal to copyright law.¹⁸¹ Using this line of argument is more convincing to the extent that

¹⁸¹ See Michael Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1292–1305 (2003) (discussing the internal and external tensions in copyright law).

economic analysis itself cannot justify the protection of culinary products by copyright, as I suggest above. The other is to view this argument as internal to the basic justifications to copyright.

Bracha & Syed emphasized that distributional considerations should be integral to the normative justifications of copyright.¹⁸² They explained that distributional considerations could be weighed in as part of the basic economic paradigm of copyright law in several aspects, and that various decisions based on equitable distribution, as opposed to maximizing welfare, may lead to a different scope of copyright protection.¹⁸³ Bracha & Syed focused on constitutional questions related to consumers regarding equal access to products of authorship. They explained that distributional considerations should be applied when focusing on underprivileged groups.¹⁸⁴ One way to do so, they argued, is to identify circumstances where a specific copyright policy directly impacts such groups.¹⁸⁵ They opined that in such circumstances, one option would be to grant weaker copyright protection to products significantly less consumed by such groups.¹⁸⁶

Bracha & Syed focused on the possibility that changing the copyright protection regime will directly impact underprivileged groups' ability to consume certain intellectual products.¹⁸⁷ But there is another option. Changing the copyright protection regime may indirectly affect the ability to consume certain intellectual products by removing entry barriers to new authors capable of

¹⁸² Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 *BERKELEY TECH. L.J.* 229, 289–99 (2014).

¹⁸³ *Id.* at 296–99.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 307–08.

¹⁸⁶ *Id.* at 310–11.

¹⁸⁷ *Id.* at 296–99.

authoring new works of lower cost in the same artistic domain, thus extending the access to such works to more consumers.¹⁸⁸ It seems that culinary products, and those of haute cuisine specifically, are an example of a case where distributional factors should be considered when designing the copyright regime. The reason for this is that such artistic products also have a clear functional purpose, and are, to a great extent, consumption goods. As shown above, such goods in the field of haute cuisine are highly inaccessible to many. A large number of groups are left outside this cultural domain, and this could be changed by denying protection from culinary products altogether. In this way, chefs can recreate haute cuisine culinary products and sell them at a lower price which is accessible to wider audiences. Due to the economic characteristics of haute cuisine, as explained above, it appears that denying copyright protection will not have a material economic impact on the profit margins of existing actors in the field as seen in the haute cuisine market under today's regime, which further supports taking such distributional considerations in account.

The difficulties I described are not unique to culinary products and seem to characterize many works that are perceived as functional.¹⁸⁹ In addition, such difficulties may arise with respect to new types of art that raise the idea/expression dichotomy analysis.¹⁹⁰ In such cases, where judicial decisions will be based on aesthetic judgement, one must carefully discuss whether adopting

¹⁸⁸ Van Houweling, *supra* note 174, at 1546.

¹⁸⁹ One example is fashion which was discussed at length above. See Rautiala & Sprigman, *supra* note 129, at 1745–46 (discussing the issue of the idea/expression dichotomy)

¹⁹⁰ See Justin Hughes, *The Photographer's Copyright - Photograph as Art, Photograph as Database*, 25 HARV. J. L. & TECH. 339, 345–51 (2012) (discussing the distinction between artistic photography and photographs as facts or databases).

aesthetic neutrality doctrines that could transcend the inclination toward aesthetic judgement could provide a more equitable protection to works of different artistic circles. As far as useful arts are concerned, such aesthetic neutrality seems almost impossible and we should thus carefully consider whether copyright protection should be granted to works in this fields of art to begin with. This is coupled by the distributional difficulties pertaining to the access to certain cultural products, which require further scrutiny. These difficulties tilt the scale toward denying copyright protection altogether and adapting to a softer regime of protection where necessary.

V. CONCLUSION

In this Article, I used the field of haute cuisine and its culinary products as a case study to review the interrelations between law and culture. I first demonstrated the extent that the field of haute cuisine has developed economic importance. I explored the economic characteristics of the field and explained how players in this field self-regulate their activities through written codes of ethics and behavioral norms with internal enforcement mechanisms. I then showed why the law—meaning intellectual property law—does not currently provide stable protection for culinary products and haute cuisine in particular. I also explained how this can be overcome and, at least as a thought exercise, suggested a doctrine under which culinary products could be protected by copyright.

Through this exercise, I have explained why it is inadvisable and perhaps even normatively unjustified to protect culinary products by copyright. First, I showed why, much like fashion, haute cuisine may benefit from the lack of copyright protection in a manner that essentially fulfills its underlying purposes, or at least that it is flourishing without copyright protection. Second, and

more importantly, I portrayed the social and cultural difficulties related to copyright protection of culinary products. These result from copyright law's inability to maintain its stated aesthetic neutrality to the extent that useful arts are concerned. Diverting from such aesthetic neutrality may cause inherent biases in the power structure of certain artistic circles and may change the patterns of artistic activity and even ground cultural dominance by authors operating in specific institutions over others. This can lead to distributive preference, which affects the ability of groups of consumers to access and consume certain cultural products.

Due to these difficulties, I made the normative case against copyright protection for culinary products at large. This is required to allow the free development of the cultural field of culinary products both from the authors' side but perhaps more importantly from the consumer side, and thus allow appropriate access to culinary products as cultural consumption goods. This Article focused on culinary products, but the line of argument suggested in it may well apply to other cultural consumption goods, which, if protected by copyright, may yield the same difficulties. A full and deep understanding of the cultural and distributional effects of copyright law could teach if and how the law should intervene in other artistic fields characterized by such difficulties and how the law generally affects the design of various artistic fields.