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Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal

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Note

***1477 INTELLECTUAL PROPERTY PROTECTION FOR THE CREATIVE CHEF, OR HOW
TO
COPYRIGHT A CAKE: A MODEST PROPOSAL [\[FN1\]](#)
[Malla Pollack](#)**

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No man but a blockhead ever wrote, except for money.

J. Boswell, *Boswell's Life of Johnson*

We may live without poetry, music, and art;

We may live without conscience, and live without heart;

We may live without friends; we may live without books;

But civilized man cannot live without cooks.

R. Lytton, *The Poetical Works of Owen Meredith*

Food and art may be related in three different ways. First, an art object may be a representation of a food item. Copyright law has traditionally protected this category as it has protected artistic likenesses of other aspects of the world. [\[FN1\]](#) An example is Ron Stark's *Delicacies*, [\[FN2\]](#) a compilation of original photographs of household objects such as eggs and potatoes--the modern equivalent of the still life, an artistic genre which dates at least from the time of the an-

cient Greeks. [\[FN3\]](#)

Second, food may be used as a medium to create a nonedible physical representation of another object in the real world or the artist's psyche. Consider the chocolate table and chairs (edible materials mounted on plastic frames) exhibited at the American Crafts Museum, [*1478](#)[\[FN4\]](#) or objects created from baker's clay, cornstarch dough, salt dough, or breadcrumb dough. [\[FN5\]](#) Such objects are legally no different than any other "pictorial, graphic, or sculptural works" [\[FN6\]](#) composed of more traditional materials which are protected by the 1976 Copyright Act.

Third, an object may be intended both to be eaten and to appeal to the aesthetic impulse. [\[FN7\]](#) This Note deals only with this third category of food art. Members of this category may resemble nonedible objects [\[FN8\]](#) but most do not look like anything but food. For example, a well-known cookbook is illustrated by reproductions of the chef's own pastel drawings of the food ready to be served. [\[FN9\]](#) The illustrations are obviously protectable pictorial works. This Note suggests that the original dishes used for models are also protectable.

Because this Note deals with food as an art form, the existence of "museums" displaying food or food paraphernalia to illustrate its production, nutritive value, folkways, or other nonartistic qualities is not relevant. [\[FN10\]](#) Art exhibits of food, however, are relevant and, perhaps, determinative proof that food is art. [\[FN11\]](#) Such exhibits include "America Eats" at the Museum of American Folk Art, New York City, [\[FN12\]](#) "Eat Your Art Out" in Berkeley, California, [\[FN13\]](#) and "Food Art" in Cambridge, England. [\[FN14\]](#)

This Note presents an original proposal for extending copyright protection to food [\[FN15\]](#) (not to the appearance of the food, nor to the [*1479](#) recipe for the food, but to the food itself). Because of the unusual nature of the suggestion, this Note will begin with a detailed statement of the proposal (Part I): the intended beneficiaries (IA), the dearth of current protection (IB), and the recommended judicial action (IC-IG). It will then cover the proposal's relationship to the

Constitution (Part II) and the legislative history of the current copyright statute (Part III). Finally, this Note will briefly discuss the proposal's administrability (Part IV).

I. THE PROPOSAL

A. The Intended Beneficiaries

The current lack of legal protection for culinary creations encourages a refusal to share recipes. [\[FN16\]](#) This refusal and the underlying jockeying for prestige are so common that they are humorous. [\[FN17\]](#) Lack of protection, however, also has serious results. A chef loses not only the direct financial benefits of licensing or selling his creation, but also the indirect economic benefit of enhancing his reputation.

***1480** Increased protection for culinary creations will directly benefit professional chefs, including cookbook authors, such as Julia Child or Simone Beck, and restaurant proprietors, such as Lidia Bastianich of Felidia or André Soltner of Lutèce. [\[FN18\]](#) It will also benefit some processors or wholesalers as the equivalent of protecting publishers in order to encourage authors' creativity. [\[FN19\]](#)

Copyright protection for food items will encourage chefs to create and share original food items. [\[FN20\]](#) As with all copyright protection, the ultimate beneficiary will be the public. Chefs will create more; their creations will not only be available for immediate use but will eventually enter the public domain. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal ***1481** gain is the best way to advance public welfare through the talents of authors and inventors...." [\[FN21\]](#) Moreover, as discussed below, [\[FN22\]](#) existing doctrines of copyright law can limit the possible dangers of extending protection to too many items (thus impoverishing the public domain), or extending protection to too many persons (thus raising prices).

B. Current Legal Protection

Current legal protection is greatly limited. According to accepted legal theory neither recipes

nor food prepared from recipes should be copyrightable. Nevertheless, Melville Nimmer, the noted copyright scholar, stated that even though the Copyright Office denies the copyrightability of a "mere listing of ingredients or contents," case authority exists for extending copyright protection to recipes. He disliked these decisions, however, since he believed recipes to be based on merely functional considerations and, therefore, missing the requisite copyright originality, despite their possible culinary novelty. "In any event," Nimmer concluded, "copyright for a recipe clearly will not prevent others from creating culinary 'dishes' based upon such a recipe even if it could prevent the word for word reproduction of the recipe." [\[FN23\]](#)

The cases cited by Nimmer do not provide much protection for chefs. [\[FN24\]](#) In 1892, a cookbook was held to infringe an earlier work where the court found both word for word copying of substantial sections and reuse of the author's selection and arrangement of recipes. [\[FN25\]](#) Arguably, less blatant reproduction would not have been infringement. Similarly, where recipes on a label were protected, the court specified that the infringement consisted of "bodily appropriating most, if not all, of the recipes appearing on the label." [\[FN26\]](#) In the most recent case, "almost 50% of defendant's work was a verbatim copy of plaintiff's booklet and that 50% contained virtually all of the substance *1482 of defendant's book." [\[FN27\]](#) Nimmer's last case is irrelevant; the challenged material is in the public domain. [\[FN28\]](#)

Patent law also rejects chefs' creations. Utility patents require such a high standard of "originality" [\[FN29\]](#) that food items rarely qualify, especially if they are concoctions of common ingredients. [\[FN30\]](#) A new type of cheese, rather than a new cheese cake, is patentable. [\[FN31\]](#)

Design patents do not greatly help culinarians because they protect only the appearance of a manufactured item. [\[FN32\]](#) (This Note suggests protection of more than the appearance of an edible art form.) *1483 Design patents are also impractical. They are expensive to obtain (compared to copyrights), give no protection during the long application period (when much copying occurs), have a high "originality" standard, and often encounter judicial hostility. [\[FN33\]](#)

Perhaps chefs could be included in other theories which have been advanced to protect the rights of creative persons, [FN34] for example: breach of contract, [FN35] defamation, [FN36] misappropriation of persona, [FN37] right of publicity, [FN38] unfair competition, [FN39] and trademark. [FN40]

*1484 Some states offer additional statutory protection modeled after European moral rights; [FN41] similar federal legislation has just been enacted. [FN42] All these alternatives are arguably inadequate. [FN43] Common-law doctrines are still in flux. [FN44] Both common-law and state statutory *1485 rights are vulnerable to federal preemption. [FN45] Neither recent state *1486 statutes nor the federal legislation protect food. [FN46]

Some available doctrines, furthermore, are designed to promote less relevant policies and, therefore, do not address this exact problem. For example, unfair competition and trademark are generalized doctrines based on factors common to all merchants, not just creators of new products. [FN47] Trademark is also inappropriate because it creates too much protection; marks are potentially immortal. [FN48] Invoking trade secret protection necessitates not sharing the information with the public. [FN49] Protection is, furthermore, available only against those in a contractual or confidential relationship. [FN50] Even if other legal protection is available, copyright has certain distinct advantages which make it valuable, rather than redundant, protection. [FN51]

C. Suggested Judicial Construction of the Copyright Act of 1976

Food items should be protected under the Copyright Act of 1976 [FN52] (Act) as an unlisted category, "edible art forms." The Act now states:

The terms "including" and "such as" are illustrative and not limitative.

....

Copyright protection subsists, in accordance with this title, in 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 *1487 or with

the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings. [\[FN53\]](#)

Food items do not fit neatly into any of these categories. Indeed, the only listed category which could plausibly be extended to include food items is "[p]ictorial, graphic, and sculptural works, [which] include ... three-dimensional works of fine ... and applied art." [\[FN54\]](#) The protection afforded this category, however, is limited by an express qualification restricting protection of 'useful' objects to those features of "useful articles ... that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.... A 'useful article' is an article having an intrinsic utilitarian function...." [\[FN55\]](#) Before the 1976 Act, useful articles were those items whose "sole intrinsic function" [\[FN56\]](#) was practical. This change in formulation implies a specific legislative intent to expand the excluded category. A food item, if it were to be considered a "pictorial, graphic, or sculptural work," [\[FN57\]](#) would clearly be unprotectable because of this usefulness exception.

Usefulness per se, however, is not necessarily a bar to copyrightability. Computer programs are both useful and protected. [\[FN58\]](#) Traditional *1488 art forms are also useful; art and music therapy are not modern upstarts. [\[FN59\]](#) Aristotle encouraged drama and music for their cathartic effects. [\[FN60\]](#) The Stoics justified poetry by its moral effects. [\[FN61\]](#) David's harp playing soothed Saul's depression. [\[FN62\]](#) Congress recently decided to protect buildings as "architectural works." [\[FN63\]](#)

The usefulness limitation in the Act can be attacked in three different ways, any of which is

sufficient to support the present proposal. First, one could attack any usefulness limitation. The constitutional phrase creating patent and copyright protection targets the "useful Arts." [FN64] Congress cannot overrule the Constitution without an amendment. [FN65] Second, one could argue that the usefulness limitation is only relevant to "pictorial, graphic, and sculptural works" [FN66] while *1489 food is a separate unique category. This is the main argument advanced in this Note. Finally, the usefulness limitation on "pictorial, graphic, and sculptural works" [FN67] could be attacked as a violation of the first amendment [FN68] since it makes an unacceptable content-based distinction between the upper and lower senses (sight and hearing verses taste, smell, and touch). [FN69] This constitutional argument is related to the charge that the limitation on what is copyrightable in useful objects under the 1976 Copyright Act [FN70] has led courts to a philosophically suspect bias towards traditional representational ornamentation, another unacceptable content-based restriction. [FN71] This third argument is discussed in footnotes. [FN72]

D. Food as Art

Food is a separate art. Food contains elements of color and form, as do painting and sculpture. Food also includes aromas, tastes, and textures. While one could touch a painting or sculpture, most museums obviously consider this unnecessary. [FN73] If food is an art form, it is a new category. This Note contends that while food may not have been so considered in the eighteenth century, it is so considered now, at least by an epicurean segment of the population.

Art is not a static concept. The social acceptance of music and painting as "art," and of musicians and painters as "artists," rather *1490 than servants, is part of the history of the Renaissance. [FN74] Western culture has had centuries to assimilate this and accept as "axiomatic" a distinction between fine and applied art that is philosophically optional. [FN75] Chefs, in contrast, have only recently acquired social status, [FN76] and scholarly interest in food is only now beginning to grow. [FN77] *1491 In addition, several disciplines which observe human behavior have concluded or assumed that food can be art. Mary Douglas, a social anthropologist, argues that food functions as an art form--fine or applied. [FN78] A recent controversy between edu-

cators concerned what edible art forms were useful in early grades. The status of food as an art medium was assumed. [\[FN79\]](#)

Acceptance of food as an art form is growing. For example, Cook's reported on a series of "Artists and Cuisine" dinners for which chefs and artists collaborated to create meals with the taste of the chef's cuisine and the appearance of the artist's more traditional works. [\[FN80\]](#)

Cakes and centerpieces have often been viewed as decorative constructions. The Royal Institute of British Architects held a cake-decorating contest (all entries, of course, looked like architectural models) in which the criteria of artistic merit included the appearance of edibility. [\[FN81\]](#) Carême, a famous nineteenth-century chef, classified art in five branches: "painting, sculpture, poetry, music, and architecture, the main branch of which is pastry-making." [\[FN82\]](#)

***1492** Several museum shows have highlighted edible art. The contest entries for "Eat Your Art Out" were limited to sculptures providing at least fifty taste samples each. The exhibits were consumed after the judging. [\[FN83\]](#) Both "The Confectioner's Art" and "Food Art" included edible and nonedible works. [\[FN84\]](#) "America Eats: Forms of Edible Folk Art" asserts the artistic quality of dishes which are not display pieces. [\[FN85\]](#)

Artists, not just chefs, proclaim food to be art. Mollie Katzen, a creative chef who illustrated her own cookbook, [\[FN86\]](#) considers painting and food more congruent than does present legal theory. [\[FN87\]](#) Katzen's ***1493** view is not limited to relatively unknown chefs with delusions of artistic ability. [\[FN88\]](#) This perspective is also advanced by Salvadore Dali, who is both better known and an artist, as opposed to a self-serving chef. Dali has asserted a profound connection between food, art, and metaphysics: [\[FN89\]](#) gastronomy is "a serious art" [\[FN90\]](#) and "the supreme philosophical tool of man is his contact with reality through his jaws." [\[FN91\]](#) Craig Claiborne, well-known food critic, regards food as similar to music. [\[FN92\]](#)

Antoni Miralda is part of the avant-garde of the international artistic, not gourmet, community. [\[FN93\]](#) His works often include ritualized activities, audience participation, and food.

[FN94] For example, he created a housewarming in which guests were given colored cloaks by a series of young girls clothed in matching colors, ate a colored banquet, and viewed a colored nude. [FN95] "Breadline" included a marching band, college cheerleaders, and a wall of colored loaves. Spectators both ate the bread and altered the wall. [FN96] Many "art periodicals" discuss his work seriously. [FN97] Miralda may be considered the modern reviver of the banquet as an art form. This genre was widely practiced from the Middle Ages through the late Renaissance; the designers included "real artists" such as Leonardo da Vinci. [FN98]

The closeness between food and art should not be dismissed as a *1494 temporary, or even Western, aberration. Consider this excerpt on the history of bread baking in ancient Egypt which refers to all the categories of food-art relationship listed above in the introductory section.

Leavened bread profoundly captured the imaginations of its creators. It was endowed with a mystique that lay deeply embedded in the religious, social, and creative traditions of many civilizations. Bakers in Egyptian society were as highly regarded as priests, and the baking furnaces were often built in temples.... Paintings of conical-shaped loaves [category one, representation of a food item in traditional material] on altars reveal the early sacrificial uses made of bread [category three, edible item].... Fish, bird, and animal "cookies," [category two, food used as an art medium] colored with earth pigments or sprinkled with seeds, were left in tombs for the dead spirits to enjoy. The ancient kitchen had found not only a form of religious expression but an art form as well. [FN99]

Food, as both a ritual object and an art form, is also part of early American history. American funeral biscuits, symbolically decorated hard cakes distributed at graveside, were, "in the most literal sense, edible folk art." [FN100] These biscuits were artistically and psychologically related to the gravestones themselves. [FN101] Gravestone art is, incidentally, copyrightable. [FN102]

Dismissing food as "practical" rather than "pure" art, and thus not worthy of copyrightability status, is tenuous since the theoretical distinction between practical and pure art is not universally

accepted. While an analysis of the history of aesthetic philosophy is beyond the scope of this Note, a chronological list of positions illustrates the lack of consensus. Plato did not distinguish between various kinds of crafts or fine arts. [\[FN103\]](#) St. Thomas Aquinas, however, excluded the perception of beauty from the lower senses (smell, taste). [\[FN104\]](#) Ficino, a Renaissance Neoplatonian, continued this separation. [\[FN105\]](#) Schiller explained art as the play impulse which combined man's sensuous and formal impulses. [\[FN106\]](#) The modern American school of naturalism, or contextualism, urged the connection between "fine" and "useful" arts *1495 (for example, George Santayana and John Dewey). [\[FN107\]](#) Ernst Cassirer and Susanne K. Langer, among others, see art as one form of emotive communication. [\[FN108\]](#)

The relation of function to art is discussed by many modern philosophers. Working within the contextualist tradition, Fitzgerald argues that the distinction between fine art and craft is an irrelevant holdover from the Renaissance and suggests that the modern artist deals instead in a world of "fine craft." [\[FN109\]](#) Fitzgerald insists that all art, fine or applied, serves a function. [\[FN110\]](#) Art objects are man-created lures for the expansion of human understanding through concrete experiences. [\[FN111\]](#) Craft objects also serve this function--especially since they have been liberated from mere utility by the advent of mass production. [\[FN112\]](#) While not singling out food for artistic status, Fitzgerald's position trivializes the distinction between individually created useful and decorative objects.

Quinet specifically addresses the problem of whether food is barred from status as an art form because of its function (to be eaten for taste or nutrition). This philosopher concludes that food is an aesthetic object whose functionalism increases its artistic quality. [\[FN113\]](#) Quinet also attacks the distinction between the lower and higher senses as sources of artistic stimulation [\[FN114\]](#) in direct contradiction of Beardsley's belief that "taste-symphonies and smell-sonatas" are impossible. [\[FN115\]](#)

Dickie [\[FN116\]](#) has a broad institutional view of art which highlights the artificiality of the traditional distinctions. He originally defined a "work of art" as "(1) an artifact (2) a set of the as-

pects of which has had conferred upon it the status of candidate for appreciation by some person or persons acting on behalf of a certain social institution (the artworld)." [\[FN117\]](#) The artistic aspects of the artifact are delineated by conventions which are learned, like language, from society. [\[FN118\]](#) This *1496 view implies that the acceptance (or rejection) of food as an art form is a decision based on learned cultural bias.

Consider Dickie's view in conjunction with (1) the flimsiness of language as an accurate mirror of reality, [\[FN119\]](#) and (2) the historical connection between the upward revaluation of pictorial art and the social and economic ambitions of painters. [\[FN120\]](#) The sum is an assumed list of art forms, not a reasoned one. In legal terminology, the traditional limitation on what is an art object is unprincipled.

Dickie's later formulation also supports this Note's proposal. [\[FN121\]](#) Dickie summarizes his more sophisticated statement with the following definitions:

I) An artist is a person who participates with understanding in the making of a work of art.

....

II) A work of art is an artifact of a kind created to be presented to an artworld public.

....

III) A public is a set of persons the members of which are prepared in some degree to understand an object which is presented to them.

....

IV) The artworld is the totality of all artworld systems.

....

V) An artworld system is a framework for the presentation of a work of art by an artist to an artworld public. [\[FN122\]](#)

Dickie's main clarification is the type of institution he means by the "artworld." Critics had

thought Dickie intended what is technically called a person/institution, that is a specific set of people, such as art critics, or what is designated an institution/token--an organization such as the Metropolitan Museum of Art. [\[FN123\]](#) Dickie's artworld is, however, an institution/type, "a practice such as tool-making, storytelling, ... or the like." [\[FN124\]](#) This formulation affirms the historical and conventional nature of art.

The distinction between systems of creation and appreciation *1497 which are and are not part of the artworld cannot be drawn by reference to some predetermined essential characteristic. A system is part of the artworld if the culture in which it exists so perceives it. [\[FN125\]](#) More avant-garde art forms are those presented to a public which is only minimally prepared for their reception, for example, Duchamp's Fountain (an industrially manufactured urinal). [\[FN126\]](#) The shock caused by an avant-garde creation and its later acceptance show, according to Dickie, that while the roles (critic, artist, public) included in the artworld are not conventional (they remain the same even though the definition of an art object changes), the specific qualities accepted as belonging to works of art are entirely conventional (they change according to the whims of the society). [\[FN127\]](#) Under Dickie's theory, edible art forms are art when a culture so considers them. [\[FN128\]](#) Dickie concludes that even traditional theories of art assume a culture-determined framework; they merely fail to discuss it because it is too basic to notice. [\[FN129\]](#)

E. Practical Application of the Proposal

This Note does not suggest protection for the appearance of the cake, [\[FN130\]](#) nor any particular copy of the cake, [\[FN131\]](#) but for the cake itself. *1499 [\[FN132\]](#) This proposal only sounds obscure or revolutionary. It is directly parallel to the current status of music under the Act. [\[FN133\]](#) The Act makes a clear distinction between protecting a recorded musical performance (sound recording) and protecting a musical work. [\[FN134\]](#) They are two different protectable works. This Note does not suggest protection for any one "performance" of a cake. The "edible art form" to be protected is the common element between all physical versions of the cake. This is no different than protecting a concerto which is the common element of all performances of

the concerto. [\[FN135\]](#) The concerto is fixed in the sheet music, but it is not the sheet music as a "literary work," [\[FN136\]](#) a different protectable art form listed in the Act which does not include musical scores. The protected "edible art form" includes all aspects of the cake, such as appearance, taste, smell, consistency. To clarify, let us analyze several likely scenarios based on our archetypical cake. [\[FN137\]](#)

Cook A creates a cake and fixes it in a recipe. Cook B uses the written recipe to reproduce the same cake. This is an infringement. Copying has been proven by the use of the recipe. To illustrate the absurdity of a defense based on the claim that you copied the unprotected recipe rather than the protected cake, consider a musician who publicly performed a copyrighted work by using the written score. He could not defend himself by saying he had never actually heard the protected musical work but had only used the written score. The score is the recipe for the musical sounds.

Change the scenario by having Cook B not consult the recipe *1500 but, instead, recreate the work by reverse engineering. [\[FN138\]](#) This is copying the protected work directly (albeit inefficiently). If after "discovering" the recipe through reverse engineering, B markets his "original" edible art form by selling plates of the dish at a restaurant, he would be infringing as if a musician after listening to a performance of a hit song had recreated the same tune. [\[FN139\]](#)

A third more complex scenario occurs when B publishes copies of the recipe itself, the written fixation. Certainly, a musician who publishes the written score of another's copyrighted tune is infringing. [\[FN140\]](#) The right of reproduction [\[FN141\]](#) is "the right to produce a material object in which the work is duplicated, transcribed, imitated or simulated in a fixed form from which it can be 'perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.' " [\[FN142\]](#) A written recipe is a physical transcription from which a chef could reproduce the edible art form with the aid of various kitchen devices. Alternatively, if the chef is skilled enough at "visualizing" dishes from recipes, the art form has been "communicated." [\[FN143\]](#)

***1501** Now suppose that the copier is a bad cook whose cake emerges from the oven as a liquid mess. This person has copied, but his copy fails the test for substantial similarity. If, however, the chef is such a good baker that he creates a totally different recipe which results in exactly the same product, his liability would depend on whether he had started with the protected cake. If he did so, he has infringed, not the recipe, but the cake. [\[FN144\]](#) If he created his recipe independently, he has not copied. [\[FN145\]](#)

Finally, suppose a restaurateur exhibits in his window a plaster replica of a protected cake. This also fails the test for substantial similarity. It may look like the original, but no ordinary person would say it had the same aesthetic appeal when considering the taste, smell, texture, and appearance. [\[FN146\]](#) This is comparable to a fabric pattern which copied only the color of a protected design without any of the shapes--a pattern of red roses alleged to have infringed a pattern of teddy bears printed in the same hue. Whether the restaurateur's behavior is prohibited through trademark or unfair competition is a separate issue.

These scenarios illustrate that copyrightable food can be dealt with by the same legal rules as any other copyrightable work. For example, when the copied version differs from the original, the court will have to decide if the differences are so large as to negate infringement. Obviously such a question is not easy when applied to edible art forms. [\[FN147\]](#) This, however, is not a new and unsolvable problem which can be avoided simply by not protecting cakes. It is the familiar legal question of how close two items have to be to support a finding of substantial similarity. Courts do this routinely for other media. To hazard a guess, comparing allegedly infringing works to the archetypical ***1502** cake, [\[FN148\]](#) an otherwise identical cake with a filling made of a different type of cherries would be an infringing copy while the cake identical except for a filling made with pears would be an infringing derivative work, as would the same cake in a different shape. An otherwise comparable cake with anchovy filling would not infringe because it is too dissimilar in appeal. [\[FN149\]](#) As with all other copyrightable subject matter, the court will have to decide at what point in ***1503** variation a copy supposedly embodying the protected work

is a different work, a derivative work, or a compilation including aspects of the ***1504** work. [\[FN150\]](#) This may be a practical problem, but it is precisely the problem courts handle now in copyright cases. [\[FN151\]](#)

F. Requirements of the Act

The Act requires any protected work to meet certain listed criteria: originality, fixation, and expression (as opposed to ideas or facts). [\[FN152\]](#) "Edible art forms" meet these criteria.

***1505** "Originality" in copyright is a de minimis standard based on "original creation," rather than "novelty." [\[FN153\]](#) This requirement is constitutionally based. [\[FN154\]](#) An item to be protected must not have been copied from an existing work. An independently created identical work, however, is separately copyrightable. This originality requirement will limit the number of "edible art forms" protected, but is not a theoretical bar to the entire class.

"Fixation" is both required [\[FN155\]](#) and defined by the Act. "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." [\[FN156\]](#)

An "edible art form" is arguably fixed when it is prepared. A cake exists for more than a "transitory duration." Even if courts were to refuse this analysis, a cake can be fixed in its written recipe, an obvious parallel to fixing a musical work in a written score. [\[FN157\]](#) Nor should the need of some persons for a chef to create a copy of the work be a problem. Most persons need a musician to re-create a concerto. Likewise, variation between created copies of a cake is not a bar to protectability. Performances of a musical composition are not identical. [\[FN158\]](#)

The Act clarifies the "expression" requirement of section 102(a) by providing in section 102(b) that:

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, re-

ardless of the form in which it is described, explained, illustrated, or embodied in *1506 such work. [\[FN159\]](#)

This provision underlies the "merger rule": when an idea can only be expressed by a small number of formulations, no expression of that idea is copyrightable. This rule protects the public's right to use an idea. [\[FN160\]](#) An "edible art form" is not automatically barred by the merger rule. Taste sensations may exist that will be unprotectable due to the merger rule, [\[FN161\]](#) but to say every cake is a unique "idea" is just as absurd as saying that every melody is a unique "idea." They both are unique in fact, but holding them unique in law would be letting the exception devour the rule. [\[FN162\]](#)

Likewise, an "edible art form" is neither the "method" of creating the cake (baking), the "concept" of the taste sensation (cherries taste good with chocolate), or the "process" (beating egg whites and folding them into melted chocolate). True, cakes are often fixed in recipes that describe them in terms of the actions a person takes to create a copy. This might sound [\[FN163\]](#) like protecting a process, which is *1507 not allowable under the Copyright Act, but it is no different than protecting a piece of music fixed in a written score (directions to a musician on how to create a performance). [\[FN164\]](#)

*1508 Courts do not decline to enforce copyrights on violin sonatas to prevent a pernicious monopoly on all violin playing. We do not have to refuse protection to specific cakes to prevent a pernicious monopoly on all baking. Our original discomfort with the idea seems based on habit and the larger percentage of the public who make good food as opposed to good music. [\[FN165\]](#) Similar arguments against protecting ideas or processes were unsuccessfully advanced to prevent the copyright protection of computer programs. [\[FN166\]](#)

*1509 G. Burden and Benefit

Infringement of copyright takes place when an unauthorized person exercises one of the exclusive rights of the copyright holder and is not excused by the fair use provisions of the Act. In

the case of our "edible art form" these exclusive rights are the reproduction of copies, the preparation of derivative works, and the distribution of copies. [FN167] When unexcused by fair use, baking or selling a copied or derivative cake would be an infringement.

The basic argument against the proposal that edible art forms be copyrightable is that the burden this would place on the public would outweigh the benefits. This proposal, however, would definitely benefit the public [FN168] and the burden would not be excessive. In addition whatever burden would exist could easily be further limited by already existing legal doctrines. [FN169] First, the courts could choose thin copyright which only protects the original from virtually identical works. [FN170] Returning to our cake examples, [FN171] a court could refuse to protect against the cake with a pear filling, or even the cake with a different cherry filling. Second, the courts could use the well-developed concepts of fair use (which would include home baking), [FN172] public *1510 domain, [FN173] the need for nontrivial variations, [FN174] the need to prove copying, [FN175] and the defenses of independent creation, [FN176] common *1511 sources, [FN177] and scenes a faire. [FN178]

The Act provides both for legal and equitable remedies. [FN179] One could object that, in most cases, cakes are too inexpensive to be worth a suit for damages. This objection ignores both the scale of the food industry and the importance of equitable relief. Since a chef's reputation encourages his business (more people would buy a famous chef's cookbook or eat in his restaurant), an injunction merely forcing an infringer to give the originating chef credit for his creation would be valuable. [FN180] Copyright protection, furthermore, has several benefits *1512 not provided by other legal theories. First, it creates federal subject matter jurisdiction. Second, it allows for statutory damages, recovery of attorney's fees, and confiscation and/or destruction of infringing copies as well as the means to manufacture such copies. [FN181] Copyright may also be used to protect creative persons from illusory contracts. [FN182]

II. CONSTITUTIONALITY

Federal copyright and patent statutes are based on one constitutional grant: [FN183] "The

Congress shall have power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [\[FN184\]](#) The constitutional question is whether "edible art forms" can be covered by this provision. [\[FN185\]](#)

***1513** Beyond the general debates on the importance and definition of framers' intent, [\[FN186\]](#) this specific clause presents an additional problem because Madison's notes give no clear indication of that intent. [\[FN187\]](#) Historically, the terms of this clause have been interpreted expansively ***1514** and not held to limit protection to what was covered, or specifically intended to be covered, in 1789. [\[FN188\]](#) "Writings" is interpreted very broadly. Thus, photographs are copyrightable, even though they did not exist in the framers' lifetimes because "they are representative of original intellectual conceptions of the author." [\[FN189\]](#) "Writings" ... include any physical rendering of the fruits of creative intellectual or aesthetic labor." [\[FN190\]](#) "Author" has been given a similarly extensive meaning. [\[FN191\]](#)

The original constitutional question therefore reduces to the (only apparently) "factual" question of whether "edible art forms" are art. This question could be approached by asking either how many people consider food to be "art" or whether aesthetics includes food. [\[FN192\]](#) The short answers would be that a growing number of people see food as art and that some aesthetic theories define art broadly enough to include food. [\[FN193\]](#)

***1515** The underlying constitutional questions thus become how many people have to see food as art to allow this construction and who decides what aesthetic theory to apply. In the famous words of Justice Holmes: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations...." [\[FN194\]](#) Similarly, it would be a dangerous undertaking for persons trained only in the law to decide the worth of theories of the nature of art itself.

The Constitution seems to permit copyright protection of "edible art forms." The Constitu-

tion, however, does not force Congress to protect art; it merely allows Congress to choose to do so. "The first amendment does not protect the right to copyright..." [\[FN195\]](#) The determinative *1516 question is: did Congress intend to protect "edible art forms?" [\[FN196\]](#)

*1517 III. LEGISLATIVE HISTORY

A. Congressional Intent to Include

The language of the 1976 Copyright Act clearly states that the categories listed are inclusive, not exclusive. [\[FN197\]](#) The accompanying report shows this language was intentional.

The history of copyright law has been one of gradual expansion in the types of works accorded protection....

... The bill does not intend ... to freeze the scope of copyrightable subject matter....

The historic expansion of copyright has ... applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. [\[FN198\]](#)

*1518 This returns us to the question of how many people recognize cake as art.

This Note cannot supply the definitive answer as to whether social acceptance of food as art has reached the level where it deserves copyright protection. It can only point out congressional intent for courts to expand copyright protection to food if the courts so decide.

My duty as judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotions are with a time that is past. [\[FN199\]](#)

While legislative silence may be construed as a warning to courts not to extend protection, the legislative history and language of the Act support the opposite interpretation. [\[FN200\]](#) In several places Congress specifically endorsed prior judicial interpretation. [\[FN201\]](#)

The unusual legislative history of the Act creates an even stronger argument for its judicial

expandability. The Act was a complex negotiated compromise between representatives of competing interests in which Congress acted as midwife. [FN202] The interests that were *1519 not represented at the discussions were not considered. [FN203] Chefs and other professional culinarians were not represented. [FN204] Judicial construction of the Act is the obvious way for missing parties to be represented. [FN205] The express legislative language allowing expansion [FN206] supports such judicial activism, as does the legislative history. [FN207]

*1520 B. Congressional Intent to Exclude

Critics of this Note might argue that Congress did not intend to include "edible art forms" in the coverage of the 1976 Copyright Act.

First, they might argue, the legislative history clearly proves that the Act was not intended to include all items permitted by the Constitution. [FN208] This point will not be contested here since the discussion above is sufficient refutation--Congress clearly intended the coverage of the Act to expand with public acceptance of new forms. [FN209]

Second, the decision not to pass Title II of the Act (the section of the 1976 Copyright Act which provided protection for industrial designs), [FN210] and the failure to enact later bills to protect industrial designs might be argued to represent a Congressional desire not to protect manufactured objects. [FN211] Food is such a commercially produced and sold commodity; [FN212] therefore, Congress did not desire to protect food. This argument, while more convincing, is also inadequate.

This second assertion combines two attacks: (1) that the intent of Congress at the time it passed the Act did not include protection for edible art forms [FN213], and (2) that later Congressional action (or nonaction) provides a gloss on legislative intent which mandates narrow court interpretation of the earlier statute.

To address the latter point first, "legislative intent" is "legislative history," [FN214] not legislative future; it is the intent which existed at the time legislation is passed and which is shown by

committee reports and other documents which discuss occurrences before the bill was passed. [\[FN215\]](#) Even if, arguendo, later Congressional actions are relevant, considering Congress took twenty years to pass a copyright revision [\[FN216\]](#), design protection is not yet so overdue as to be proved ***1521** unwanted.

If in 1976 Congress had specifically intended not to protect food even if food became an important art form, the courts should theoretically bow to Congressional decision making. The proof of such intent is, however, lacking. The Congressional report recommending deletion of Title II did not say it was ill-advised, merely that several problems were unresolved which necessitated consideration unencumbered by the pressure involved in a total revision of the Copyright Act. [\[FN217\]](#)

More basically, neither Title II of the Act nor the currently pending design legislation would cover this Note's "edible art forms." [\[FN218\]](#) They only protect the appearance of a manufactured object. Under the proposed design statutes the plaster cake discussed above would be an infringement. It is not an infringement according to this Note's proposal. [\[FN219\]](#)

***1522** The concern underlying these exclusionary arguments is that protection for "edible art forms," like protection for industrial designs, would overly burden the public without sufficient recompense in new creative products. This assertion has already been refuted. [\[FN220\]](#) Protection would encourage chefs to create and share new edible art forms.

IV. ADMINISTRABILITY

This proposal is unlikely to impose a large burden on the court system. Most copyright decisions are not made by the courts. The Copyright Office does the original review of applications, [\[FN221\]](#) but since the Copyright Office does not do a substantive check of the claim, it too will not be overburdened. [\[FN222\]](#)

Since copyright registration creates only prima facie evidence of protectability, [\[FN223\]](#) a party sued for infringement can claim the copyright ***1523** is invalid. [\[FN224\]](#) Moreover, if the

Copyright Office refuses registration, the owner of the denied right can still sue for infringement if he notifies the Copyright Office. [\[FN225\]](#) Of course, decisions of the Copyright Office are granted deference by the courts. [\[FN226\]](#) More basically, judicial fatigue is an unacceptable reason for refusing protection to any form of expression. [\[FN227\]](#)

Composers, publishers and lyricists created performing rights societies to make their copyrights effective. These groups have efficiently organized the sale of blanket licenses to users of copyrighted works. [\[FN228\]](#) Chefs could follow this already charted path.

V. CONCLUSION

"Edible art forms" should be protected intellectual property. The constitutional provision which supports the statutory creation of copyright is broad enough to encompass this proposal. The policy of the constitutional clause would be furthered by such an inclusion--which might even be required.

Both the wording and legislative history of the 1976 Copyright Act favor judicial expandability of copyrightable subject matter. Food meets the criteria for a newly important art form whose importance has increased to copyrightable stature. Therefore, "edible art forms" should be protected by the courts as a statutorily unlisted category.

This Note has presented a novel, but hardly revolutionary, thesis. The analysis is grounded in existing law and a basic distaste for judicial artistic valuation. Arguably, the factual premise--that the public recognizes food as art--may not yet be true, but the implications of a judicial policy which discriminates against modern art are serious. [\[FN229\]](#)

[FN\[FN a1\]](#). An earlier version of this Note won a local first prize in the Nathan Burkan Memorial Competition sponsored by the American Society of Composers, Authors and Publishers. N.Y.L.J., Aug. 14, 1990, at 2, col. 2.

Swift, A Modest Proposal: For Preventing the Children of Poor People in Ireland from Being

a Burden to Their Parents or Country, and for Making Them Beneficial to the Public, in 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1389 (1962) (proposal to help the Irish by encouraging them to sell their children as food to the wealthy). Jonathan Swift reached an outrageous conclusion by arguing with impeccable logic from immoral premises. This Note is not a spoof. Numerous persons previewing it have, however, reacted with disbelief. The author respectfully suggests that (1) this proposal and its justification are both logical and beneficial—even if arguably ahead of public opinion, and (2) that the reader's possible discomfort with the idea signals a problem with the underlying assumptions of the current law.

FN[FN1]. See, e.g., [Cameron v. Kellner, 195 U.S.P.Q. \(BNA\) 138 \(S.D.N.Y.1977\)](#) (silver sculptures of fortune cookies are copyrightable).

FN[FN2]. R. STARK, DELICACIES (1978).

FN[FN3]. Goldberg, Introduction to R. STARK, DELICACIES (1978).

FN[FN4]. Friedrich, How Sweet It Is!, AM. CRAFT, Feb./Mar. 1989, at 38, 70.

FN[FN5]. P. GARDNER & K. GLEASON, DOUGH CREATIONS: FOOD TO FOLK ART 55-138 (1977) (noting nativity figurine, necklace, and landscape, id. at 121, 133, 109).

FN[FN6]. [17 U.S.C. § 102\(a\)\(5\) \(1988\)](#).

FN[FN7]. Some objects may overlap the second and third categories, but this is a minor question which need not be discussed in this Note. A court would merely have to make a case-by-case determination of which rubric to use.

FN[FN8]. See, e.g., P. GARDNER & K. GLEASON, supra note 5, at 12 (edible brioche lamb); Friedrich, supra note 4, at 70-71 (Schmidt's chocolate bowls).

FN[FN9]. M. KATZEN, STILL LIFE WITH MENU: FIFTY NEW MEATLESS

MENUS WITH ORIGINAL ART (1988).

FN[FN10]. For example, the Alimentarium in Vevey, Switzerland. Schärer, A Museum Exhibition on Food, 39 MUSEUM 3, 1987, at 145.

FN[FN11]. See infra notes 82-84 and accompanying text.

FN[FN12]. W. WEAVER, AMERICA EATS: FORMS OF EDIBLE FOLK ART xiii (1989).

FN[FN13]. Adler, A Matter of Taste, HORIZON, Sept. 1981, at 6, 8.

FN[FN14]. KETTLE'S YARD GALLERY, FOOD ART (1977).

FN[FN15]. A slightly similar proposal was suggested by Nora Mout-Bouwman. Mout-Bouwman, Protection of Culinary Recipes by Copyright, Trade Mark and Design Copyright Law, 10 EUR.INTELL.PROP.REV. 234 (1988). She proposes construing the Netherlands' copyright statute to protect both written and unwritten recipes to the extent of protecting the resulting food products. She also claims that German courts have occasionally protected recipes and that the Swedish statutes could be construed to do so. *Id.* at 236. Mout-Bouwman's article differs from this proposal in two ways. First, copyright law, in continental Europe, is based on a personal right, M. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 1.1 (1989), while American law is based on a property right created to benefit the public, see infra note 21 and accompanying text. Second, she suggests that protecting recipes should result in protecting food while this Note reverses the relationship.

FN[FN16]. As early as 1673, a professional chef introduced his cookbook with a defense against his expected criticism by fellow professionals for limiting their market. "I do not question but divers Brethen of my own Fraternity may open their mouths against me, for publishing this treatise, pretending that thereby it may teach every Kitchen-Wench ... and

so be prejudicial to the Fraternity of Cooks." Attar, *A Dabble in the Mystery of Cookery*, PETITS PROPOS CULINAIRES 24, Nov. 1986, at 45, 45 (quoting W. RASHIBA, *THE WHOLE BODY OF COOKERY DISSECTED* (1673)).

FN[FN17]. Consider the scene where Jerome Berin finally shares the recipe for saucisse minuit with Nero Wolfe as payment for Wolfe clearing him of a murder charge.

"If you please." Wolfe snapped. "Let's don't row about it. You put a price on your recipe. That's your privilege. I put a price on my services....

....

... I suppose I should remind you that I offered a guarantee to disclose the recipe to no one. The sausage will be prepared only in my house and served only at my table. I would like to reserve the right to serve it to guests--and of course to Mr. Goodwin, who lives with me and eats what I eat."

Berin, staring at him muttered, "Your cook."

"He won't know it. I spend quite a little time in the kitchen myself."

Berin continued to stare, in silence. Finally he growled, "It can't be written down. It never has been."

"I won't write it down. I have a facility for memorizing."

Berin got his pipe to his mouth without looking at it, and puffed. Then he stared some more. At length he heaved a shuddering sigh and looked around at Constanza and me. He said gruffly, "I can't tell it with these people in here."

"One of them is your daughter."

"Damn it, I know my daughter when I see her. They'll have to get out."

R. STOUT, *TOO MANY COOKS* 188 (1938).

FN[FN18]. S. BECK, *NEW MENUS FROM SIMCA'S CUISINE* (1979); S. BECK, *SIMCA'S CUISINE* (1973); J. CHILD, *FROM JULIA CHILD'S KITCHEN* (1979); J. CHILD, *THE FRENCH CHEF COOKBOOK* (1968); R. SAX, *NEW YORK'S MASTER*

CHEFS 14, 93-94 (1985).

FN[\[FN19\]](#). Publishers acquire revenue from the copyrights given to their authors. This has been attacked as a tax on the public for the benefit of a class not intended by the framers. Chafee presents the classic defense of this protection. Books might be written even if only authors were protected, but for the books to reach the public, publishers also need protection. This gives them an incentive to distribute the authors' works to the public. Authors are not necessarily effective printers or distributors. Publishers provide this business expertise. Chafee, *Reflections on the Law of Copyright*, 45 COLUM.L.REV. 503, 509-11 (1945). Similarly, because chefs also are not necessarily efficient businessmen, food processors or wholesalers must be given incentives to help food reach the public.

FN[\[FN20\]](#). The author of this Note could not discover if chefs have been frustrated by refusal to register their works. The Public Information Office, which is described in [37 C.F.R. § 203.3\(f\) \(1990\)](#), states that, because of their indexing procedure (which is intended to help trace particular works), no one can check if anything edible has been presented for registration (unless, of course, someone either knew of such an item or looked at all registration requests). Letter from the Copyright Office to the author (July 5, 1990) (on file at Cardozo Law Review Office) (the Copyright Office has never maintained subject indexes).

The author of this Note sent letters at random to corporate counsel for various well-known food companies asking for their response to this proposed theory. Quaker Oats expressed interest. Letter from Quaker Oats to the author (Feb. 6, 1990) (on file at Cardozo Law Review Office).

Firms have demonstrated their economic stake in protecting edibles by using other legal theories. Quaker Oats has a registered trademark on the unique shape of a dog food product. *Id.* Procter & Gamble patented their chewable cookie formula. The firm sued Nabisco, Keebler, and

Frito-Lay for infringement. After five years of pretrial battles, Procter & Gamble accepted a \$125 million settlement. Margolick, *At the Bar*, N.Y. Times, Sept. 22, 1989, at B20, col. 1.

The author of this Note did not do a scientific study of the opinions of chefs or artists. Several professional chefs, however, did agree to be quoted as supporting the proposition that legal protection for food would encourage the creation and dissemination of new dishes: Lidia Bastianich, owner of Felidia; Jane Butel, cookbook author and proprietor of Pecos River Cafe; Professor Dieter Faulkner, Culinary Institute of America, Hyde Park, New York [hereinafter CIA]; Professor Fedele Panzarino, New York City Technical College, Brooklyn, New York; Eugene Scanlan, former executive chef of the Waldorf-Astoria Hotel; and Professor Frederic H. Sonnenschmidt, CIA, (letters to the author on file at Cardozo Law Review Office).

FN[FN21]. [Mazer v. Stein, 347 U.S. 201, 219 \(1954\)](#).

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant ... is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

[Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 \(1984\)](#).

FN[FN22]. See *infra* text accompanying notes 172-80.

FN[FN23]. M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT*, § 2.18[I] (1990) [hereinafter *Nimmer*].

FN[FN24]. *Id.* § 2.18[I] n. 79.

FN[FN25]. [Belford v. Scribner, 144 U.S. 488, 490, 492-94 \(1892\)](#).

FN[FN26]. [Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823, 829 \(8th](#)

[Cir.1924](#)).

FN[[FN27](#)]. [Marcus v. Rowley, 695 F.2d 1171, 1177 \(9th Cir.1983\)](#) (cake decorating instruction booklet).

FN[[FN28](#)]. [Superfine Prods., Inc. v. Denny, 54 F.Supp. 148, 150 \(N.D.Ga.1943\)](#) (publication of labels without notice dedicates them to the public).

FN[[FN29](#)]. Patent terminology does not include "originality," but patent protection requires inter alia both "novelty" and "nonobviousness" which together necessitate more of a creative leap by the inventor than copyright's "originality" requires of an author. D. CHISUM, PATENTS §§ 3.01, 5.01 (1990).

FN[[FN30](#)]. Id. § 1.02[6].

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent.

[In re Levin, 178 F.2d 945, 948 \(C.C.P.A.1949\)](#) (butter substitute not patentable).

Food items are patentable, but the culinary creativity of chefs is not the type of creativity which meets the standards for patentability. See [General Mills v. Pillsbury Co., 378 F.2d 666 \(8th Cir.1967\)](#) (first commercially successful one step mix for angel food cakes is not patentable because of nonobviousness standard since alleged invention is only the exact proportion of an already known leavening agent). Cakes or cookies are patented in class 426, "food or edible material: processes, compositions and products," U.S. DEPT OF COMMERCE, PATENT & TRADEMARK OFFICE, PATENT CLASSIFICATION DEFINITIONS 426-1 (1989) (microfiche available from Government Printing Office), subclass 549, "[s]ubject matter ... wherein the basic ingredient is amyl-

um (i.e., a carbohydrate made from plant cells, ... e.g., ... wheat ...) and in the form of a pourable mixture, a soft pasty mass, a finished baked product or any variations of any of the named forms," id. at 426-71. Recent patents issued in this subclass include U.S. Letters Patent # 4,940,592 for a "[p]rocess for microwave chocolate flavor formation in and/or on foodstuffs and products produced thereby," held by International Flavors & Fragrances Inc.; U.S. Letters Patent # 4,885,180 for a microwaveable baked good with a long shelf life, held by General Foods Corp.; and U.S. Letters Patent # 4,857,353 for a "[d]ry mix for microwave layer cake," held by General Mills, Inc.

FN[FN31]. [P.E. Sharpless Co. v. Crawford Farms, Inc., 287 F. 655 \(2d Cir.1923\)](#) (protecting a cheese with the flavor of Roquefort and the physical qualities of uncured cream cheese).

FN[FN32]. [35 U.S.C. § 171 \(1988\)](#).

The design of an object consists of the visual characteristics or aspects displayed by the object. It is the appearance presented by the object which creates an impression, through the eye upon the mind of the observer.

... [A design includes] the configuration or shape of an object, ... the surface ornamentation thereof, or both.

U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 1502 (3d rev. ed. 1977) (quoted in D. CHISUM, supra note 29, § 1.04[2][a]).

FN[FN33]. Lehrer, The Design of Design Law Today, 35 COPYRIGHT L.SYMP. (ASCAP) 145, 148-49 (1988).

FN[FN34]. The proper protection for creative persons in general is not yet settled. Moral rights, personal rather than economic rights in one's creations, are standard in Europe but still controversial in the United States. The United States only recently joined the Berne

Convention, an international copyright treaty, and redrafted its statutes to conform with the convention's requirements. Yet no specific moral rights provisions were included in the Berne Convention Implementation Act of 1988, [Pub.L. 100-568, 102 Stat. 2853](#) (codified at [17 U.S.C. §§ 101-804 \(1988\)](#)), because the required minimum protection was already provided by "the Copyright Act and Lanham [trademark] Act, various state statutes, and common law principles such as libel, defamation, misrepresentation and unfair competition." S.REP. NO. 352, 100th Cong., 2nd Sess. 9, reprinted in 1988 U.S.CODE CONG. & ADMIN.NEWS 3706, 3714. But see generally [Corr. Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change, 38 AM.U.L.REV. 855 \(1989\)](#) (comparison of American statutes with European moral rights, suggests state and federal statutes are needed to strengthen the right of integrity in fine art); DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL.COPYRIGHT SOC'Y U.S.A. 1 (1980); Comment, *Toward Artistic Integrity: Implementing Moral Rights Through Extension of Existing American Legal Doctrines*, 60 GEO.L.J. 1539 (1972) (discussing contract interpretation, right to publicity, and waste). Congress recently passed a statute granting narrowly defined moral rights to a very limited class of artists. Visual Artists Rights Act of 1990, [Pub.L. No. 101-650, 104 Stat. 5128](#) (to be codified at 17 U.S.C.).

FN[FN35]. See, e.g., [Gilliam v. ABC, 538 F.2d 14, 21 \(2d Cir.1976\)](#) (ABC may not edit script as contract does not transfer right to create derivative works).

FN[FN36]. See, e.g., [Lahr v. Adell Chem. Co., 300 F.2d 256, 258-59 \(1st Cir.1962\)](#) (commercial imitating Burt Lahr's voice raises triable question of defamation).

FN[FN37]. See, e.g., [Midler v. Ford Motor Co., 849 F.2d 460, 463 \(9th Cir.1988\)](#) (imitating singer's voice in a commercial is pirating her identity).

FN[FN38]. See, e.g., [Estate of Presley v. Russen, 513 F.Supp. 1339, 1361 \(D.N.J.1981\)](#)

(live stage imitation of Elvis Presley could violate the estate's inherited right of publicity; factual issue not decided as no further history).

FN[FN39]. Unfair competition is the generalized legal doctrine which seeks to protect businesses from those practices which subvert competition on the merits while allowing untrammelled those types of competition which improve the operation of the market. S. OPPENHEIM, G. WESTON, P. MAGGS & R. SCHECHTER, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION 2-3 (4th ed. 1983) [hereinafter S. OPPENHEIM]. For a case illustrating the use of unfair competition doctrine to protect a creative person, see, e.g., [Estate of Presley, 513 F.Supp. at 1375](#) (imitator's advertising may be unfair competition; the performance itself is not since protection from unfair competition is not intended to reach that far); [Chaplin v. Amador, 93 Cal.App. 358, 363, 269 P. 544, 546 \(1928\)](#) (performance imitating Charlie Chaplin is unfair competition).

FN[FN40]. A trademark is a word or symbol which is used by a supplier of goods or services to identify his products and distinguish them from those of his competitors in the minds of his customers. S. OPPENHEIM, *supra* note 39, at 31-39. For a case illustrating the use of trademark to protect creativity, see, e.g., [Estate of Presley, 513 F.Supp. at 1371](#) (imitator's use of pictures resembling Elvis in a characteristic pose may be trademark infringement). The correct interpretation of the broadest protection in the Lanham Act is the subject of major disagreement. See, e.g., Bauer, [A Federal Law of Unfair Competition: What Should Be the Reach of Section 43\(a\) of the Lanham Act?](#), 31 UCLA L.REV. 671, 672 (1983-84) (suggests construing § 43(a) to redress "a wide variety of competitive wrongs"). But see Meyer, *Mis application of the Misappropriation Doctrine to Merchandising: A Reply to Professor Bauer*, in 35 COPYRIGHT L.SYMP. (ASCAP) 69 (1988) (wide construction of § 43(a) is doctrinally incorrect because it (a) blurs the valid distinction between trademark and copyright and (b) misunderstands the economic balance created by current law). Any current evaluation of federal trademark and unfair competition

law must be tentative. Section 43(a) was totally replaced effective November 16, 1989. Trademark Law Revision Act of 1988, [Pub.L. No. 100-667, 102 Stat. 3935](#) (codified as amended at [15 U.S.C. §§ 1051-1127 \(1988\)](#)). Courts have acknowledged that this amendment changes the section's effect. [Monoflo Int'l v. Sahm, 726 F.Supp. 121, 122 n. 1 \(E.D.Va.1989\)](#) (implying that plaintiff's losing argument might have won under the new statute). The extent of the change has yet to emerge from case law. For an analysis of the expected impact, see Driscoll, *The "New" 43(a)*, 79 TRADEMARK REP. 238 (1989).

Misappropriation doctrine may also only cover misattribution, not nonattribution. Compare [Smith v. Montoro, 648 F.2d 602, 605 \(9th Cir.1981\)](#) (nonattribution is "implied reverse passing off"; statement is dicta as case held substitution of actors' names on movie credits is misappropriation) with [CCS Communication Control v. Law Enforcement Assocs., 628 F.Supp. 1457, 1460 \(S.D.N.Y.1986\)](#) (dictum) (while such removal had not been shown, removal of identification letters would not have been a violation of the Lanham Act). The CCS court relied explicitly on [Pic Design Corp. v. Sterling Precision Corp., 231 F.Supp. 106, 113-15 \(S.D.N.Y.1964\)](#), which held removal of manufacturer's identification mark before resale of item is violation of neither common law nor Lanham Act. See [CCS, 628 F.Supp. at 1460](#). But see Trademark Law Revision Act of 1988, [Pub.L. No. 100-667, § 132, 102 Stat. 3935, 3946](#) (codified at [15 U.S.C. § 1125\(a\)](#)) which removed language relied on by the court in [Pic Design, 231 F.Supp. at 113](#).

FN[FN41]. All of the following protect the author's right to claim or disclaim credit for the work. [GA.CODE ANN. § 8-5-7 \(1989\)](#) (statute limited to works of art owned by the state). Several prohibit public display of altered or mutilated works of fine art. [LA.REV.STAT.ANN. § 51:2151-51:2155](#) (West 1987); [ME.REV.STAT.ANN. tit. 27, § 303 \(1988\)](#); [NEV.REV.STAT. §§ 598.970-598.978 \(1989\)](#); N.J.STAT.ANN. § 2A:24A (West 1987); [N.M.STAT.ANN. § 13-4B-2 to 13-4B-3 \(Supp.1988\)](#) (right limited to works displayed in state buildings); [N.Y.ARTS & CULT.AFF.LAW § 14.03 \(McKinney 1990\)](#); [R.I.GEN.LAWS §§ 5-62-2 to 5-62-6 \(1987\)](#). Others prohibit the mutilation itself.

[CAL.CIV.CODE § 987 \(West 1982 & Supp.1990\)](#); [CONN.GEN.STAT.ANN. § 42-116t \(West Supp.1990\)](#); [MASS.GEN.LAWS ANN. ch. 231, § 85S \(West 1989\)](#); 73 PA.CON.S.TAT.ANN. §§ 2101-2110 (Purdon 1989); [S.D.Codified Laws Ann. § 1-22-16 \(Supp.1990\)](#) (right limited to works acquired by the state under §§ 1-22-9 to 1-22-17). For further discussion, see Corr, *supra* note 34, at 856-58.

FN[FN42]. The Visual Artists Rights Act of 1990, [Pub.L. No. 101-650, 104 Stat. 5128](#) (to be codified at 17 U.S.C.).

FN[FN43]. Even if other legal possibilities exist, the desire of chefs for further protection shows that they do not feel protected. See *supra* note 18. Since the copyright statute is intended to motivate persons to create, their subjective appraisal is perhaps more important than the economic reality.

FN[FN44]. A review of all the listed legal theories is beyond the scope of any one note. However, see *supra* notes 34-42 and accompanying text.

FN[FN45]. Federal copyright law preempts other remedies. [17 U.S.C. § 301](#). See R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE NINETIES* 743-86 (3d ed. 1989) (extended discussion of preemption); cf. D. CHISUM, *supra* note 29, § 1.04[6] (discussion of preemptive effect of federal trademark law).

Preemption presents an additional danger. Courts hostile to chefs' rights could (a) extend copyright coverage to "edible art forms," then (b) limit the protection with the devices described *infra* notes 172-80 and accompanying text, and (c) hold that this thin copyright preempts other legal remedies, using the legal theory proposed by this Note to constrict rather than expand protection for culinarians. A similar problem may arise because of the recent enactment of the Artists Rights Act of 1990. [Wojnarowicz v. American Family Ass'n, 745 F.Supp. 130 \(S.D.N.Y.1990\)](#) (N.Y. State Artists' Authorship Rights Act is not currently preempted by the Copyright Act but may be if the Visual Artists

Rights Act of 1990 becomes law.).

Courts have varied in their reading of [17 U.S.C. § 301](#). Compare [Sinatra v. Goodyear Tire & Rubber Co.](#), 435 F.2d 711, 717-18 (9th Cir.1970) (preemption prevents suit for imitation of singer's recorded voice by a commercial), cert. denied, [402 U.S. 906 \(1971\)](#) with [Midler](#), 849 F.2d at 462 (preemptive effect of federal statute immaterial to singer's right to prevent imitation of her recorded voice in a commercial). Perhaps Midler shows the emerging consensus. A similar liberality towards artists' rights appears in [Korman v. Iglesias](#), 736 F.Supp. 261, 264-65 (S.D.Fla.1990) (coauthors' inability to sue each other under the Copyright Act does not create preemption of a state cause of action for civil theft between coauthors). But see [Association of Am. Medical Colleges v. Carey](#), 728 F.Supp. 873 (N.D.N.Y.1990) ([§ 301](#) preempts New York State's "Truth-in-Testing" Act). Preemption doctrine has generated a voluminous and very contradictory literature. See, e.g., Abrams, Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection, 1983 SUP.CT.REV. 509, 580-81 (preemption statement of [§ 301 of 1976](#) Copyright Act is "naive [,] ... simplistic ... [and an in]adequate basis for judicial decisionmaking"); Brown, Unification: A Cheerful Requiem for Common Law Copyright, 24 UCLA L.REV. 1070 (1977) (new 1976 Copyright Act intends to provide benefit of one unified system by preempting state copyright remedies, but statute is neither clear enough, nor strongly enough drafted to accomplish this); Diamond, Preemption of [State Law](#), 25 BULL.COPYRIGHT SOC'Y 204 (1978) (legislative history muddies meaning of [§ 301](#)); Fetter, Copyright Revision and the Preemption of State "Misappropriation" Law: A Study in Judicial and Congressional Interaction, 27 COPYRIGHT L.SYMP. (ASCAP) 1 (1982) ([§ 301](#) forces the courts to delineate the preemption of misappropriation by copyright); Francione, The California Art Preservation Act and Federal Preemption by the 1976 Act--Equivalence and Actual Conflict, 31 COPYRIGHT L.SYMP. (ASCAP) 105 (1984) (the California statute is not itself preempted by the exercise of the rights it provides will probably create preemption by actual conflict); Gold-

stein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 UCLA L.REV. 1107 (1977) (the 1976 Act's preemption policy is against basic copyright principles); Hoffman, Limitations on the Right of Publicity, 28 BULL.COPYRIGHT SOC'Y 111, 130-33 (1980) ([§ 301](#) bars many right-of-publicity actions); Jorgensen & McIntyre-Cecil, The Evolution of the Preemption Doctrine and Its Effect on Common Law Remedies, 19 IDAHO L.REV. 85 (1983) (historical analysis of changing scope of preemption doctrine); Moskin, Make Room for the Stars: Copyright Preemption and the Right of Publicity, 33 COPYRIGHT L.SYMP. (ASCAP) 159 (1987) (right of publicity is not preempted by [§ 301](#)); Shipley, Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption, 66 CORNELL L.REV. 673 (1981) (preemption decisions should discriminate between types of publicity claims); Comment, The Fine Art of Preemption: [Section 301](#) and the Copyright Act of 1976, 60 OR.L.REV. 287 (1981) (narrow reading of [§ 301](#) would frustrate Congressional intent to create uniformity, suggests a test comparing underlying purpose of state statute to purpose of federal copyright statute); Note, Copyright Preemption: Effecting the Analysis Prescribed by [Section 301](#), [24 B.C.L.REV. 963 \(1983\)](#) (language of [§ 301](#) is unclear and has been variously interpreted, suggests a policy-based analysis to create uniform results consistent with Congressional purpose); Note: The [California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law](#), [81 COLUM.L.REV. 1315 \(1981\)](#) (California resale statute should not be preempted as it does not conflict with purpose of 1976 Act).

FN[\[FN46\]](#). The formulation varies; most protect fine art. See statutes listed supra note 41. The Visual Artists Rights Act of 1990 protects "visual art" which is narrowly defined.

FN[\[FN47\]](#). R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 1.01 (4th ed. 1981); S. OPPENHEIM, supra note 39, at 32.

FN[FN48].

48. The copyright laws are based on an entirely different concept than the trademark laws, and contemplate that the copyrighted material, like patented ideas, will eventually pass into the public domain. The trademark laws are based on the needed protection of the public and business interests and there is no reason why trademarks should ever pass into the public domain by the mere passage of time.

[Boston Professional Hockey Ass'n. v. Dallas Cap & Emblem Mfg., 510 F.2d 1004, 1010-11 \(5th Cir.\), cert. denied, 423 U.S. 868 \(1975\).](#)

FN[FN49]. Broadly defined, trade secrets are any types of information which are of economic value to a business and which that business has taken steps to protect through secrecy. S. OPPENHEIM, *supra* note 39, at 298-354. Trade secrets are only legally protectable if the effort at secrecy is sufficient. R. MILGRIM, *MILGRIM ON TRADE SECRETS* § 2.01, at 2-16 (1990).

FN[FN50]. *Id.* § 1.10.

FN[FN51]. See *infra* notes 178-81 and accompanying text.

FN[FN52]. [Pub.L. No. 94-553, 90 Stat. 2541 \(1976\)](#) (codified at 17 U.S.C. (1988)).

FN[FN53]. [17 U.S.C. §§ 101, 102\(a\) \(1988\)](#). Architectural works were recently added. See *infra* note 81.

FN[FN54]. *Id.*

FN[FN55]. [Id. § 101](#) (emphasis supplied).

FN[FN56]. [37 C.F.R. § 202.10\(c\) \(1977\)](#) (revoked Jan. 5, 1978, [43 Fed.Reg. 965, 966](#)) (emphasis supplied).

FN[FN57]. [17 U.S.C. § 102\(a\)\(5\)](#).

FN[FN58]. [Apple Computer v. Franklin Computer Corp.](#), 714 F.2d 1240, 1249 (3d Cir.1983) (protecting operating systems program written in object code and fixed in ROM chip or floppy disk), cert. dismissed, [464 U.S. 1033 \(1984\)](#).

Early statutes specifically covered maps, charts, and directories. Act of May 31, 1790, 1 Stat. 124, 124 (protecting maps and charts, passed by the First Congress, 2d Session); Copyright Act of 1909, ch. 320, § 5(a), 35 Stat. 1075, 1076 (protecting directories). These inclusions have fueled the controversy over whether protection is based on expression, arrangement, or selection as opposed to effort. See [Illinois Bell Tel. Co. v. Haines & Co.](#), 905 F.2d 1081 (7th Cir.1990) (protecting white-page telephone directory's new listings with strong statement of requirement of independent original research for anyone using those listings to update their independent product); [Rockford Map Publishers v. Directory Serv. Co.](#), 768 F.2d 145, 148-50 (7th Cir.1985) (protecting map purportedly on grounds of arrangement, but with dicta protecting labor), cert. denied, [474 U.S. 1061 \(1986\)](#); [Leon v. Pacific Tel. & Tel. Co.](#), 91 F.2d 484 (9th Cir.1937) (white-page telephone directory organized alphabetically infringed by numerically organized directory); [Clark Equip. Co. v. Lift Parts Mfg. Co.](#), 1986 Copyright L.Dec. (CCH) ¶ 25,989 (N.D.Ill.1986) (reading Rockford as an endorsement of protection based on labor); Denicola, [Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works](#), 81 COLUM.L.REV. 516 (1981) (factual works should be protected as an incentive to expend effort in their creation); Whicher, Originality, Cartography and Copyright, 38 N.Y.U.L.REV. 280, 292, 295-96 (1963) (industrious collection doctrine is a statutorily unjustifiable judicial error).

FN[FN59]. See generally 2 ENCYCLOPEDIA OF PSYCHOLOGY 413, 439 (R. Corsini ed. 1984) (acceptance of music and art therapy).

FN[FN60]. Beardsley, History of Aesthetics, in 1 THE ENCYCLOPEDIA OF PHILOSOPHY 18, 21 (1972).

FN[FN61]. Id.

FN[FN62]. 1 Samuel 16:14-23.

FN[FN63]. Architectural Works Copyright Protection Act of 1990, [Pub.L. No. 101-650 § 702, 104 Stat. 5133](#), 5133 (to be codified at [17 U.S.C. § 101](#)).

FN[FN64]. [U.S.CONST. art. I, § 8, cl. 8](#).

FN[FN65]. Id. art. V.

A weaker argument supports the same conclusion. The courts are estopped from refusing some objects protection because they do not refuse to protect other useful "pictorial, graphic, [or] sculptural works." [17 U.S.C. § 102\(a\)\(5\)](#). For example, illustrations for advertisements are both useful and protected. [Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 \(1903\)](#) (circus advertising pictures are copyrightable). See generally NIMMER, *supra* note 23, § 2.08[G][4] (advertisements are copyrightable). This estoppel proposition probably would not convince a court because of two strong reply arguments. First, under the 1976 Act the protected category-five works are only being protected to the extent of the separability of their artistic and useful aspects. See *supra* note 55 and accompanying text. Second, this is a suggestion to constrain the federal government under the equal protection component of the fifth amendment. [United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-76 \(1980\)](#) (fifth amendment challenge to federal statute analyzed as an equal protection problem); [Buckley v. Valeo, 424 U.S. 1, 93 \(1976\)](#) (*per curiam*) (upholding constitutionality of federal statute under an equal protection analysis of the fifth amendment). In nonsuspect categories, only a rational relationship between the category and the allowable congressional purpose is needed to uphold the statute. Courts are very deferential to legislative decisions on such relationships. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2 (2d ed. 1988). Congress could have reasonably decided that the allowable purpose specified by the copyright clause, [U.S.](#)

[CONST. art. I, § 8, cl. 8](#), could be advanced by protecting some category-five items and not others.

FN[FN66]. [17 U.S.C. § 102\(a\)\(5\)](#). For a general discussion of the effect of usefulness on the definition of art in copyright law, see DuBoff, [What Is Art? Toward a Legal Definition](#), 12 HASTINGS COMM/ENT L.J. 303, 304-22 (1990).

FN[FN67]. [17 U.S.C. § 102\(a\)\(5\)](#).

FN[FN68]. [U.S. CONST. amend. I](#).

FN[FN69]. See discussion *infra* notes 195-197.

FN[FN70]. *Supra* notes 55-56 and accompanying text.

FN[FN71]. [Kieselstein-Cord v. Accessories by Pearl](#), 632 F.2d 989, 994-96 (2d Cir.1980) (Weinstein, J., dissenting) (belt buckle is not copyrightable; language of statute regrettably forces judges to deny protection to non-representational works). But see [Esquire, Inc. v. Ringer](#), 591 F.2d 796, 805 (D.C.Cir.1978) (refusing protection to overall shape of lighting fixtures, bias against modern art is a practical necessity, not a theoretical problem), cert. denied, [440 U.S. 908](#) (1979).

FN[FN72]. See *infra* notes 192-94.

FN[FN73]. One is sometimes permitted to touch an art object, especially at children's museums, but that is not the equivalent of considering the tactile sensation an essential part of the work. Of course, many persons, both knowledgeable and untutored, enjoy touching art works. COUNCIL ON MUSEUMS AND EDUCATION IN THE VISUAL ARTS, THE ART MUSEUM AS EDUCATOR 386 (1978). The professional discussions on physical handling of museum displays focus on the educational value of such touching. This value is disputed completely by some and consistently acknowledged to be more relevant to science than art facilities. *Id.* at 108-110, 164-66, 270, 299-308,

319-325, 358, 385-394. Field's list of hands-on museums, while created for an art organization, lists a preponderance of science museums. B. FIELD, *HANDS-ON MUSEUMS: PARTNERS IN LEARNING*, (1975) (ERIC microfiche ED 113 832) (sponsored by the National Endowment for the Arts).

FN[FN74]. Beardsley, *supra* note 60, at 24.

FN[FN75]. Freud tracks the cultural downgrading of the olfactory sense to man's first standing erect. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 66 n. 1 (J. Riviere trans. 1930). Copyright, however, is for all art, not just "good" art or "upper class" art. See, e.g., [Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 \(1903\)](#) (protecting circus advertisement). See the list of aesthetic theories which do not accept the dichotomy between fine and applied art, *infra* notes 102-128 and accompanying text.

The legislative history of the Act clearly rejects the dichotomy between the higher and lower senses. See *infra* note 103 and accompanying text. Early drafts phrased the fixation requirement in terms of only the senses of hearing and sight. STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., *PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT 1* (Comm.Print 1964) (§ 1(a)), reprinted in 3 G. GROSSMAN, *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY* (1976). Congress responded to requests that other senses, especially touch and smell, be relevant. STAFF OF HOUSE COMM. ON THE JUDICIARY, 86TH CONG. 2D SESS., *FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW* 46-47 (Comm.Print 1964), reprinted in 3 G. GROSSMAN, *supra*; STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., *1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS* 37-38 (Comm.Print 1965), reprinted in 4 G. GROSSMAN, *supra*. It changed the language of the Act to include fixation in tangible objects which could be perceived by any human sense. H.R. 11,947, 88th Cong.,

2nd Sess. § 1(a). This language ignores Schiffer's limiting comment:

I should prefer to exclude perfumes and other commercial products which may, in fact, be merely devices for the production of smells. A smell incorporated in another work [e.g., movies that include smells in their presentation] might be a proper subject of copyright but only when so incorporated.

STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 455 (Comm.Print 1964), reprinted in 3 G. GROSSMAN, *supra*.

FN[EN76]. The U.S. Department of Labor originally listed chefs as "domestics." They were not classified as "professionals" until 1976. Backas, *The Newest Profession: Culinary Arts Comes [sic] of Age in America*, RESTAURANTS & INSTS., Oct. 15, 1986, at 205.

This Note carefully omits a related argument. Feminists could argue that the traditional American attitude of downgrading chefs is related to the view that cooking is woman's work. The author of this Note expresses no opinion on the validity of that possible link but suggests that the possibility deserves separate detailed exploration.

FN[EN77]. Recent scholarly articles on cooking abound. J. Fisher, *A Phenomenological Study of Creativity in the Culinary Arts* (Ph.D.Diss., U.S.Int'l U., 1976) (reprint available from University Microfilms Int'l); The New York Public Library, "*Food Food for Thought*": Meeting the Needs of the Research Community (March 7-8, 1986) (conference sponsored by the New York Public Library, available on cassette from Track 2 Taping, P.O. Box 24, Rockville, CT 06066); M. Pollack, *Information Seeking Behavior of Professional Chefs When Creating and Recreating Recipes* (Nov. 23, 1988) (unpublished research project on file at Cardozo Law Review Office). Several series of gastronomic symposia flourish: the International Symposia for Ethnological Food Research and the Oxford Symposia, Davidson, Oxford Symposium 1981, PETITS PROPOS CULIN-

AIRES 9, Oct. 1981, at 52, 53; the Symposium of Australian Gastronomy, Santich, Food in Festivity, PETITS PROPOS CULINAIRES 31, March 1989, at 21; Symposia on the Turkish Kitchen, Roden & Davidson, Symposia in Turkey and Spain, PETITS PROPOS CULINAIRES 18, Nov. 1984, at 29; [Symposium of the] Universidad Internacional Ment'endex y Pelayo, id. Oxford University has begun to treat food as a serious subject. An Oxford Symposium, 19 September 1981, PETITS PROPOS CULINAIRES 6, Oct. 1980, at 8. The American Institute of Wine and Food was founded in 1981 at the University of California at Santa Barbara. Davidson, The American Institute of Wine and Food, PETITS PROPOS CULINAIRES 10, March 1982, at 8. Scholarly bibliographies include B. FERET, GASTRONOMICAL & CULINARY LITERATURE: A SURVEY & ANALYSIS OF HISTORICALLY-ORIENTED COLLECTIONS IN THE U.S.A. (1979); A. SIMON, BIBLIOTHECA GASTRONOMICA, A CATALOGUE OF BOOKS & DOCUMENTS ON GASTRONOMY (1978).

FN[FN78]. Douglas, Food as an Art Form, STUDIO: INT'L J. OF MODERN ART, Sept. 1974, at 83, 84.

FN[FN79]. Holt, Food as Art?, YOUNG CHILDREN, May 1985, at 18 (advocating only art uses which respected the edibility of food); Moravcik, Food as Art-- Another Viewpoint, YOUNG CHILDREN, Sept. 1985, at 2 (advocating wider use of food materials in a child's educational experience).

FN[FN80]. Caldwell, Food Imitates Art, COOK'S, May/June 1986, at 38, 38-48, 80.

FN[FN81]. Buildings That Are Good Enough to Eat, RIBA J., Feb. 1984, at 15.

FN[FN82]. Newark, Cakes as Art, ART & ARTISTS, Dec. 1983, at 17, 19: Note that an art magazine was reviewing the work of chefs as an art form. Id.

This Note suggests that food is a separate art form, not a subset of architecture. Protection of actual buildings under the 1976 Copyright Act was controversial. The House

Report which accompanied the 1976 Act asserted some protection.

A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend on the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection....

H.R.REP. NO. 1476, 94th Cong., 2d Sess. 55, [hereinafter H.R.REP. NO. 1476] reprinted in 1976 U.S.CODE CONG. & ADMIN.NEWS 5659, 5668 [hereinafter 1976 USCAN]. Subsequent case law, however, is both divided and unclear.

Three decisions state in dicta that buildings are not copyrightable, while three other decisions could be read as indicating that they are. [The Copyright Office was] not able to find a single decision, though, that squarely presented the issue of a claim to copyright in a work of architecture, and certainly nothing involving the type of 'fine architecture' created by America's leading architects. The evidence on this important point is, therefore, regrettably inconclusive. Even those courts that seem disposed not to protect buildings ... have found ways to punish deliberate infringers....

U.S. COPYRIGHT OFFICE, THE REPORT OF THE REGISTER OF COPYRIGHTS ON WORKS OF ARCHITECTURE 14 (1989).

The Solomon R. Guggenheim Museum in New York, designed by Frank Lloyd Wright, was submitted for registration to the Copyright Office on June 19, 1989, and the status of this request is "in process" as of this writing. Letter from Deborah Lloyd to the author (Sept. 24, 1990) (on file at Cardozo Law Review Office). United States adherence to the Berne Convention requires some protection of actual buildings. U.S. COPYRIGHT OFFICE, *supra*, at 221-23; Note, [Copyright Protection for Architecture and the Berne Convention](#), 65 N.Y.U.L.REV. 403 (1990). The Copyright Office suggested four possible alternative solutions:

(1) Create a new subject matter category for works of architecture in the Copyright Act and legislate appropriate limitations.

....

(2) Amend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans.

....

(3) Amend the definition of "useful article" in the Copyright Act to exclude unique architectural structures.

....

(4) Do nothing and allow the courts to develop new legal theories of protection.... U.S. COPYRIGHT OFFICE, *supra*, at 223-25 (emphasis deleted). The first suggestion was recently enacted by the Architectural Works Copyright Protection Act, [Pub.L. No. 101-650, 104 Stat. 5133](#) (to be codified at 17 U.S.C.).

FN[\[FN83\]](#). Adler, *supra* note 13, at 6, 8.

FN[\[FN84\]](#). Friedrich, *supra* note 4, at 38; KETTLE'S YARD GALLERY, *supra* note 14, at 2-3, 10.

FN[\[FN85\]](#). W. WEAVER, *supra* note 12, at 7, 22, 40.

FN[\[FN86\]](#). See *supra* note 9 and accompanying text.

FN[\[FN87\]](#).

I am honored to present you with this new series of menus and pastel drawings....

....

My love for art and for cooking spring from the same source. Both interests are life long, and at times they have readily intertwined.... For me, the boundary between these two creative channels is a soft one, sometimes disappearing altogether. This book is an embodiment of that relationship. M. KATZEN, *supra* note 9, at unpaginated preface.

FN[\[FN88\]](#). This characterization is intended as an a fortiori argument, not an evaluation of Katzen.

See also Bauman, LES GALETTES DES ROIS: The Eating of Fine Art, PETITS PROPOS CULINAIRES 27, Oct. 1987, at 7 (connection between the French view of eating as an art and the beauty of the food they eat).

FN[FN89]. Roumequère, Preface to S. DALI, LES DINERS DE GALA 10 (1973).

FN[FN90]. Id. at 10.

FN[FN91]. Id. at 12.

FN[FN92]. "As I see it, cooking is like music. It's comforting when you are alone. It can reach heights when shared by others. Either way it's to be enjoyed." NEW SCHOOL FOR SOCIAL RESEARCH, NEW SCH. BULL. SPRING 1990, Dec. 3, 1989, at 244 (quote from Craig Claiborne in description of course entitled "A Conversation with Craig Claiborne").

FN[FN93]. Gibson, Art? Para- and Meta- at the Paris Biennale, ART IN AMERICA, Nov.-Dec. 1972, at 138, 139.

FN[FN94]. Shapiro, Visions of 200-Foot Bread Walls Dance in the Head of Antoni Miralda, Who Creates Food for Thought, PEOPLE, June 23, 1986, at 71.

FN[FN95]. M. Barras, Situacio Color (1976) (English-language synopsis).

FN[FN96]. Stellweg, Seven Artists in Post-Franco Spain, ARTnews, March 1980, at 58, 62.

FN[FN97]. E.g., Artsmagazine, Dec.-Jan. 1973, at 85; Melcher, Kansas City: Unholy Blues, ARTnews, Feb. 1982, at 149; Peck, Mixed Marriage, ARTnews, Mar. 1987, at 15; Zimmer & Nadelman, Why Foreigners Call It Home, ARTnews, Nov. 1981, at 101, 102. Miralda's supporters include James Harithas, former director of the Contemporary Art Museum, Houston. Shapiro, *supra* note 93, at 71.

FN[FN98]. Capponi, Table and Food, in 13 ENCYCLOPEDIA OF WORLD ART 884, 889- 91 (1967).

FN[FN99]. P. GARDNER & K. GLEASON, *supra* note 5, at 3-4 (emphasis added).

FN[FN100]. W. WEAVER, *supra* note 12, at 106.

FN[FN101]. *Id.* at 112.

FN[FN102]. [Jones Bros. Co. v. Underkoffler, 16 F.Supp. 729 \(D.Pa.1936\)](#) (infringement of design for cemetery monument).

FN[FN103]. Beardsley, *supra* note 60, at 19.

FN[FN104]. *Id.* at 23.

FN[FN105]. *Id.* at 24.

FN[FN106]. *Id.* at 28.

FN[FN107]. *Id.* at 31.

FN[FN108]. *Id.* at 32.

FN[FN109]. J. Fitzgerald, A Philosophy of Fine Craft 1-7 (1986) (doctoral dissertation accepted by the Philosophy Department of Southern Illinois Univ. at Carbondale).

FN[FN110]. *Id.* at 7.

FN[FN111]. *Id.* at 100.

FN[FN112]. *Id.* at 100-01.

FN[FN113]. Quinet, Food as Art: The Problem of Function, 21 BRITISH JOURNAL OF AESTHETICS 159, 169 (1981).

FN[[FN114](#)]. Id. at 165-68.

FN[[FN115](#)]. Id. at 165-66 (replying to M. BEARDSLEY, AESTHETICS 98-99 (1958)).

FN[[FN116](#)]. Dickie bases his theory on the work of Beardsley. G. DICKIE, ART AND THE AESTHETIC 147 (1974).

FN[[FN117](#)]. Id. at 179-80.

FN[[FN118](#)]. Id. at 177-79.

FN[[FN119](#)]. See discussion of language habits *infra* note 163.

FN[[FN120](#)]. See discussion *supra* note 73 and accompanying text.

FN[[FN121](#)]. In *The Art Circle*, Dickie reformulated his position in direct response to specific criticisms of his theory by other aesthetic philosophers. G. DICKIE, THE ART CIRCLE 7 (1984).

FN[[FN122](#)]. Id. at 79-82. Dickie proclaims that circularity is necessary; philosophical definitions do not function by explaining totally unknown terms, but by clarifying the use of terms already partially understood.

FN[[FN123](#)]. Id. at 51-52.

FN[[FN124](#)]. Id. at 51.

FN[[FN125](#)]. Id. at 67.

FN[[FN126](#)]. Id. at 62-63, 81.

FN[[FN127](#)]. Id. at 74.

FN[[FN128](#)]. While one person is not sufficient, *id.* at 60-62, he does not specify how many persons need to agree to confer this cultural acceptance. This open-endedness is

very reminiscent of Congress's definition of the limits of copyrightable subject matter under the Act. See *infra* notes 197-99 and accompanying text.

Dickie's theory is also congruent with the constitutional purpose of copyright. See *supra* text accompanying note 21 and *infra* text accompanying note 183. As construed by Dickie, Timothy Binkley's broader related theory is not. Binkley bases status as art on the artist's mere specification that the object is an art work. This definition makes no distinction between artifacts and natural objects. G. DICKIE, *supra* note 120, at 57-62. Dickie finds a similar flaw in the more traditional aesthetic theories of Beardsley and Iseminger which (while not considering natural objects to be art) "treat works of art as if they were natural objects such as orange trees and sunsets." *Id.* at 98. Regardless of the philosophical importance of this criticism, it destroys their ability to define art for copyright purposes. The constitutional clause only permits Congress to protect the works of "Authors and Inventors." [U.S. CONST. art. I, § 8, cl. 8](#). No matter how broadly this is construed, see discussion *infra* notes 182-95 and accompanying text, it does not include natural objects. The opposite viewpoint implies the rationality of providing economic incentives for the Creator (whether defined scientifically or theologically), a viewpoint this Note will not bother to refute.

FN[[FN129](#)]. G. DICKIE, *supra* note 120, at 63-64.

FN[[FN130](#)]. For simplicity, "cake" will occasionally be substituted for "edible art form" for the remainder of the Note. The archetype of the protected object is Simone Beck's Montmorency cake. S. BECK, *NEW MENUS FROM SIMCA'S CUISINE* 194 (1979).

Le Montmorency:

....

For a 9-inch (23 cm) cake:

(14 ounces (400 g) semisweet chocolate, broken into bits

2 tablespoons instant coffee granules [optional]

1/2 cup (1 dL) imported kirsch

4 eggs, separated

12 tablespoons (170 g) unsalted butter, at room temperature

1/3 cup (45 g) all-purpose flour

Pinch of salt

2/3 cup (125 g) granulated sugar

1 pound (450 g) fresh cherries or a 1-pound (450 g) can of pitted sour cherries packed in water, drained

Additional fresh cherries for garnish [optional]

Recommended equipment: A 9-inch (23 cm) cake pan

Line the bottom of the pan with a piece of buttered waxed paper or baking parchment, then spread the sides evenly with butter.

In a heavy-bottomed saucepan set over low heat, melt 8 ounces (225 g) of the chocolate with 1 tablespoon of the coffee granules and 1/4 cup (1/2 dL) kirsch, stirring occasionally until smooth. Off heat stir in the egg yolks, one at a time, then return the pan to the heat and stir the mixture briefly until the yolks are warmed and have thickened the chocolate slightly. Off heat again, beat in the butter by tablespoons, stirring until smooth. Stir in the flour.

Beat the egg whites with the pinch of salt until they form soft peaks. Sprinkle on 1/3 cup (65 g) of the sugar and continue beating until the whites form fairly stiff and shiny peaks. Fold the warm chocolate mixture delicately into the meringue and turn the batter into the prepared pan. Bake at 375° F (190° C) for 20 to 25 minutes, until the cake has puffed and a knife inserted in the center comes out with only a slightly creamy layer. Do not overcook. Set the pan on a rack to cool for at least 45 minutes before unmolding. As it cools, the cake will sink and the surface crack slightly.

You can prepare the cherries while the cake is baking and cooling. Pit the fruit and set in a saucepan with the remaining 1/3 cup sugar (65 g) and 2 tablespoons kirsch. Cook over medium-low heat, partially covered, for 30 to 40 minutes, stirring occasionally. Uncover the pan

for the last 10 minutes or so; the cherries should reduce to a thick compote. When done, allow to cool, then chop roughly and set aside. (If you are using canned cherries, prepare them as above, but cook them for only 20 to 25 minutes.)

Invert the cake onto a serving platter and remove the paper. Using a large spoon, trace about a 5-inch (13 cm) circle in the center of the cake; then scoop out the top part of the circle, leaving at least 1/2 inch (1 1/4 cm) of cake at the bottom. Add the scooped-out cake to the cherries and stir together well. Return the chocolate-cherry mixture back into the cake, smoothing it nicely with a flexible metal spatula.

In a heavy-bottomed saucepan, melt remaining chocolate with 1 tablespoon coffee granules, 3 tablespoons water and 2 tablespoons kirsch, stirring occasionally until smooth. Allow to cool slightly, then spread evenly over the top and sides of the cake. Use a towel dipped in hot water to remove any smudges from the platter and set the cake in the refrigerator until 30 minutes before serving. The chocolate glaze will lose a bit of its shine when chilled, but the cake is really better served slightly below room temperature. Serve the cake garnished, if you wish, with more whole cherries.

Variation: For the cherries in the recipe substitute a purée of fresh figs; or chopped dried pitted prunes or dried apricots, plumped in water and a little kirsch and flavored with orange marmalade.

This cake is in the public domain, see *infra* note 172, but this complication will be ignored for the sake of argument throughout this Note.

FN[FN131]. [17 U.S.C. § 109 \(1988\)](#) clearly distinguishes between the copyrightable work and the physical copy in which it is embodied.

FN[FN132]. Such wording is based on philosophical terminology, for example, Plato's "forms" or Kant's "thing-in-itself." Beardsley, *supra* note 60, at 19, 28. This language will be eschewed in the remaining Note to prevent confusion with nonsynonymous legal terms of art such as "idea" in [17 U.S.C. § 102\(b\)](#).

FN[FN133]. Craig Claiborne considers music and food comparable. See supra note 91.

FN[FN134]. [17 U.S.C. § 102\(a\)\(2\), \(7\)](#). For explanation, see W. PATRY, *LATMAN'S COPYRIGHT LAW* 65 (6th ed. 1986).

FN[FN135]. Some musicians may point out that they can mentally "hear" a work by looking at the score. Chefs, including this author, can mentally "taste" a cake by reading the recipe. Of course, not all chefs or all musicians are equally adept at sight reading such notations.

FN[FN136]. [17 U.S.C. § 102\(a\)\(1\)](#).

If a different culture existed in which "our" musical notation symbolized different sounds, a similar appearing score which represented a totally different aural experience would not infringe the musical work represented by that score in our culture.

FN[FN137]. See supra note 129.

FN[FN138]. Nero Wolfe tried to obtain Berin's recipe for saucisse minuit by buying a portion and having it analyzed in turn by a chef, a food chemist, and a food expert. R. STOUT, supra note 17, at 21.

FN[FN139]. [Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F.Supp. 177, 180-81 \(S.D.N.Y.1976\)](#) (infringement by subconscious copying of tune heard on the radio).

FN[FN140]. See [White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 18 \(1908\)](#) (perforated player-piano roll is not a copy under 1897 act because it is not as humanly readable as protected sheet music).

FN[FN141]. [17 U.S.C. § 106\(1\)](#).

FN[FN142]. H.R.REP. NO. 1476, supra note 81, at 61, reprinted in 1976 USCAN, supra

note 81, at 5674-75 (emphasis supplied) (quoting proposed [§ 106](#) of the Copyright Act in S. 22, 94th Cong., 2d Sess. (1976)).

FN[\[FN143\]](#). Alternatively, the printing of the recipe is contributory infringement because readers are expected to create infringing copies of the edible art form. Contributory infringement has been defined as "knowingly induc[ing], caus[ing] or materially contribut[ing] to the infringing conduct of another...." [Wales Indus. v. Hasbro Bradley, Inc., 612 F.Supp. 510, 518 \(S.D.N.Y.1985\)](#) (sales representative with actual or constructive knowledge that he is materially furthering sale of an infringing item is a contributory infringer).

The Supreme Court has limited contributory infringement to cases where the contributing item has no capability of "substantial unfringing uses." [Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 442 \(1984\)](#) (marketing of Betamax is not contributory infringement of broadcast works since homeowners may use it for fair use copying). A VCR is, however, a "staple article or commodity of commerce." [35 U.S.C. § 271](#) as relied on by the [Court. Sony, 464 U.S. at 440 n. 20](#). A cookbook is, perhaps, not so classifiable.

The author of this Note has been unable to locate a post-Sony contributory infringement case dealing with supplying directions to create an infringing object as opposed to supplying an object or device used to perform infringing action. Pre-Sony cases do exist. A retail store owner who sold copyrighted plans to an architectural and engineering firm was found innocent of contributory infringement. [Schuchart & Assocs. v. Solo Serve Corp., 1983 Copyright L.Dec. \(CCH\) ¶ 25,593 \(W.D.Tex.1983\)](#). The court based this decision on the defendant's lack of knowledge that the infringement had or was about to occur. *Id.* The direct infringement alleged, however, was copying the supplied plans themselves, not building a structure from the plans. More on point, the court enjoined the authors of an instruction booklet which gave directions for the construction of soft-sculpture dolls which were substantially similar to copyrighted dolls. [Original Appalachian Artworks v. Cradle Creations, 1982 Copyright L.Dec. \(CCH\) ¶ 25,387 \(N.D.Ga.1982\)](#). The

court's decision does not mention fair use even though the purchasers of the book are implied to be members of the public, not commercial doll manufacturers. *Id.* In our cookbook hypothetical, the court could limit Sony to articles such as machinery and find contributory infringement. The court could, however, decline to find infringement unless the book was directed only to commercial culinarians.

FN[FN144]. Cf. [Williams Elecs. v. Artic Int'l, 685 F.2d 870, 875 \(3d Cir.1982\)](#) (distinguishing protection of generating program from that of audiovisual display in a computer game).

FN[FN145]. Nimmer, *supra* note 23, § 8.01[A].

FN[FN146]. [Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487, 489 \(2d Cir.1960\)](#) (substantial similarity between fabric designs exists when an ordinary observer finds same aesthetic appeal).

FN[FN147]. Mout-Bouwman considers it the most difficult problem when dealing with copyright protection of recipes under the continental schemes. Mout-Bouwman, *supra* note 15, at 237.

FN[FN148]. *Supra* note 129.

FN[FN149]. Main dish "cakes" do exist, as do savory dishes made with chocolate. Mole sauce is a savory chocolate topping served on meat. Jane Butel, one of the culinary professionals relied on *supra* note 20, has several published mole recipes. For example,

MOLE POBLANO DE GUAJOLOTE

(TURKEY IN MOLE POBLANO)

Mole poblano is a traditional Mexican dish dating back to early colonial times, reputedly having been created by a nun in a convent in Puebla, Mexico.

1 turkey breast, about 3 pounds, cut in serving-size pieces

2 turkey thighs, about 3 pounds total, cut in serving-size pieces

Water

1 carrot, cut in 1-inch pieces

1 small onion, halved

1 bay leaf

3/4 teaspoon salt

8 whole black peppercorns

1 recipe Mole Sauce ...

1 tablespoon toasted sesame seeds ...

1. Place turkey breast and thigh pieces in a large pot and cover with enough water to just cover. Add the carrot, onion, bay leaf, salt, and peppercorns. Bring to a boil, cover, and simmer until tender, about 1 1/4 hours. Drain and reserve broth.

2. ... [P]repare Mole Sauce [see below] in a large, heavy skillet, using the turkey broth to prepare it.

3. Place the cooked, drained turkey pieces in the skillet with the mole, turning to coat evenly. Cover and simmer for 30 minutes, adding a bit more broth if sauce becomes too thick. Taste and adjust seasonings.

4. Remove to a deep serving platter, sprinkle with toasted sesame seeds, and serve.

MOLE SAUCE ...

2-day old, air-dried corn tortillas

2 tablespoons seedless raisins

1/2 square (1/2 ounce) unsweetened chocolate

1/4 cup blanched almonds

1 small onion, chopped

1 medium-size green pepper, coarsely chopped

1 large fresh tomato, quartered

1 clove garlic

3 tablespoons flour

1 tablespoon ground pure hot red chile

1/4 teaspoon ground cinnamon

1/4 teaspoon ground cloves

2 1/2 cups [turkey] stock

1. Grind tortillas, raisins, chocolate, almonds, onion, green pepper, tomato, and garlic in a food processor or electric blender. Place mixture in a medium-size saucepan.

2. Stir in flour and spices. Add the 2 1/2 cups ... [turkey] stock and stir until well blended. Bring mixture to a boil, reduce heat and simmer, uncovered, for about 20 minutes, stirring occasionally. Sauce should be of medium consistency--a little thicker than heavy cream. If necessary, thin with a bit more ... [turkey] stock.

J. BUTEL, WOMAN'S DAY BOOK OF NEW MEXICAN COOKING 61, 176-178 (1984). Recipe reprinted with permission. Letter on file at Cardozo Law Review Office.

The readers' request column in Bon Appétit reprinted an appetizer recipe for caviar cheesecake, an appetizer or main dish cake created by Forager House, a Pennsylvania restaurant.

CAVIAR CHEESECAKE

Crust

1 1/2 cups breadcrumbs

1/2 cup (1 stick) butter, melted

3 tablespoons freshly grated Parmesan cheese

Filling

3 8-ounce packages cream cheese, room temperature

5 eggs, room temperature

3 tablespoons grated onion

1/2 teaspoon lemon extract

1/4 cup (1/2 stick) butter, melted

4 cups sour cream, room temperature

7 ounces black lumpfish caviar, rinsed and drained

For crust: Line bottom of 10-inch springform pan with waxed paper. Mix crumbs, 1/2 cup melted butter and Parmesan in small bowl. Press crumbs firmly against bottom and sides of springform pan. Refrigerate pan while preparing filling.

For filling: Preheat oven to 350° F. Mix cream cheese, eggs, onion, and lemon extract in processor or blender until smooth. Blend in 1/4 cup melted butter. Transfer to bowl. Stir in sour cream. Fold in caviar.

Spoon filling into chilled crust. Bake 45 minutes. Turn off oven. Let cheesecake stand in oven 15 to 20 minutes; filling will appear unset. Let cool to room temperature. Cover with plastic wrap and refrigerate at least 12 hours before serving.

R.S.V.P.: Letters to the Editor, *Bon Appétit*, Aug. 1983, at 8, 10 (italics omitted). Recipe reprinted with permission of Forager House Collection. Letter on file at Cardozo Law Review Office.

As with all other copyrighted items, the first-sale doctrine will allow an owner of a legitimately acquired copy (for example, a cake bought in a bakery) to do what he wishes with that copy provided he does not use it to create an unauthorized derivative copy. Compare [Fawcett Publications v. Elliot Publishing Co., 46 F.Supp. 717 \(S.D.N.Y.1942\)](#) (allowable to rebind and resell copyrighted comic books) with [Mirage Editions v. Albuquerque A.R.T. Co., 856 F.2d 1341 \(9th Cir.1988\)](#) (not allowable to resell artwork page prints after removing them from artbooks and mounting them on ceramic tiles), cert. denied, [489 U.S. 1018 \(1989\)](#). Trademark or unfair competition doctrines may limit the labeling of the resold articles, but that is not the concern of copyright. See [Gilliam v. ABC, 538 F.2d 14, 24 \(2d Cir.1976\)](#) (broadcasting of altered skit under author's name violates Lanham Act § 43(a), not Copyright Act).

FN[[FN150](#)].

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version,

sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.... A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

[17 U.S.C. § 101 \(1988\)](#). For a discussion of the pervasiveness of the need to make this distinction, see Nimmer, *supra* note 23, § 13.03[A], at 13-23. For a discussion of courts' methods of making this distinction, see *id.* § 13.03.

FN[[FN151](#)]. Deterioration is a related objection. Courts will not have the original copy of the cake available to compare with the allegedly infringing copy. (They might have a frozen and defrosted early copy, but this raises the question of the effect of preservation on food quality.) Deterioration does not, however, present insurmountable problems. First, the recipe can be used as evidence in the same way as a musical score or choreographic notation. Second, this evidence may be supported by testimony from someone who tasted an earlier copy. Third, the difficulty (far short of impossibility) of presenting evidence does not theoretically bar protectability; it does, however, supply another reason not to fear the practical effect of protecting cakes. Fourth, not all protected items are on file at the Library of Congress. [17 U.S.C. § 407\(c\)](#). This problem, therefore, is not unique to cakes.

FN[[FN152](#)]. [17 U.S.C. §§ 101, 102 \(1988\)](#).

The idea/expression dichotomy may be an outgrowth of the Platonic definition of art as imitation. Plato, Republic, in *THE PORTABLE PLATO* 658-61 (1977). This definition seems plausible when considering traditional literary, pictorial, or sculptural works. Consider, however, nonrepresentational paintings or sculptures. Consider music: not all symphonies are program music. Plato's definition of art, furthermore, has long been discarded as inadequate by mainstream aesthetic philosophers. G. DICKIE, *supra* note 120,

at 4. Lawyers will recognize the spread of Plato's definition into illogical areas as a corollary of the most persistent sin of legal disputation: assuming that the definition of a word for one purpose is the same as its definition in a differently motivated context. W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 167 (1942); Hancock, *Fallacy of the Transplanted Category*, 37 *CAN.B.REV.* 535, 574-75 (1959). Plato's imitation theory of art was a justification for his proposed severe controls on public displays which he felt had a corrupting influence on the public. G. DICKIE, *supra* note 120, at 4; Plato, *supra*, at 658-79. In the United States, copyright is not motivated by a desire for moral controls on the public, see *supra* text accompanying note 21, and is not considered an appropriate vehicle for censorship, see *infra* note 194.

The idea/expression dichotomy may itself be indefensible. Consider Marshall McLuhan's axiom, "The medium is the message." M. MCLUHAN & Q. FIORE, *THE MEDIUM IS THE MESSAGE* 26 (1967). Proust asserted that effective art forms were not created, but discovered. M. PROUST, *3 REMEMBRANCE OF THINGS PAST* 915 (C. Moncrieff & T. Kilmartin trans. 1982). If Proust and McLuhan are correct--a discussion well beyond the limits of this Note--one could either interpret the legal criteria liberally so as to do as little injustice as possible to reality, make all legal decisions about copyrightability on purely pragmatic grounds, or rewrite the statute. [17 U.S.C. § 102\(b\)](#). This Note's position could be justified under any of the above options, but is not tied to accepting this concept of art.

FN[FN153]. See, e.g., [Magic Mktg. v. Mailing Servs.](#), 634 *F.Supp.* 769, 771-72 (W.D.Pa.1986) (phrases and bold lines on envelopes are below originality threshold for copyrightability).

FN[FN154]. [U.S. CONST. art. I, § 8, cl. 8](#); Nimmer, *supra* note 23, § 1.06 [A]; *infra* text accompanying notes 190-93.

FN[FN155]. [17 U.S.C. § 102\(a\)](#); *supra* text accompanying note 53.

FN[FN156]. [17 U.S.C. § 101](#).

FN[FN157]. Under the 1909 Act, a musical work was copyrightable only if it had been reduced to human-readable form such as sheet music. See [White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 \(1908\)](#) (player-piano rolls are not copies of musical works as not humanly readable, in contrast to sheet music). The 1976 Act allows other fixations. Nimmer, *supra* note 23, § 2.05 [A].

FN[FN158]. Courts also protect video game displays despite their wide variations. See, e.g., [Williams Elecs. v. Artic Int'l, 685 F.2d 870, 874 \(3d Cir.1982\)](#) (despite alleged coauthorship of user in play mode of video game, the visual effects of the play mode are copyrightable since some aspects of the display are repetitive). See generally Nimmer, *supra* note 23, § 2.18[H][3][b] (overview of video game cases); Comment, [Video Voodoo: Copyright in Video Game Computer Programs, 38 FED.COMM.L.J. 103 \(1986\)](#) (reviewing copyrightable elements of both the display and the program, suggesting thinning of protection for the program); Annotation, [Copyrightability of Video Games, 66 A.L.R.FED. 490 \(1984\)](#) (overview of cases).

FN[FN159]. [17 U.S.C. § 102\(b\)](#).

FN[FN160]. See, e.g., [Baker v. Selden, 101 U.S. 99 \(1879\)](#) (blank accounting forms); [Morrissey v. Procter & Gamble Co., 379 F.2d 675 \(1st Cir.1967\)](#) (contest rules).

FN[FN161]. Pommes de terre soufflées are a likely candidate for merger. They were supposedly created by accident when already-fried potatoes were reimmersed in hot fat to reheat them for late arriving train passengers at the Pecq station in 1837. An analytical chemist conducted experiments to isolate the factors needed to recreate this very tasty phenomenon. P. MONTAGNÉ, *THE NEW LAROUSSE GASTRONOMIQUE* 729 (1977). The merger rule may be appropriate because the conditions allow very little leeway. 1 I. ROMBAUER & M. BECKER, *JOY OF COOKING* 316-18 (1964).

FN[FN162]. Barring edible art forms from protection because their recipe fixations are detailed contradicts the reasoning used on choreographic works. A fixation with sufficient detail to allow the reproduction of the work (clear directions) was considered necessary for choreographic works to enter the ranks of copyrightable subject matter. STAFF OF SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS. 103, 104 (Comm.Print 1961), reprinted in 2 G. GROSSMAN, *supra* note 74 (B. Varmer, Study 28. Copyright in Choreographic Works).

Varmer also thought a distinction between dances intended for performance before an audience and those done for personal enjoyment might be necessary. *Id.* at 100. Such a distinction would be awkward if applied to edible art forms; many recipes are intended for both home and professional use. No such differentiation was enacted. [17 U.S.C. § 102\(a\)\(4\)](#). Fair use, presumably, was considered a sufficient safety valve. 2 G. GROSSMAN, *supra*, at 107-08 (Agnes George DeMille proposing fair use in layman's terms). For a discussion of fair use and cakes, see *infra* note 171 and accompanying text.

FN[FN163]. An "edible art form" may be fixed in a recipe, which is a description of the method of creating a copy of that work. We commonly discuss "edible art forms" in terms of the methods of preparing them--raising the specter of copyright protection of unprotectable processes or operations. However, paintings, though commonly discussed in terms of their appearance, can also be discussed in preparation terms. Consider basic texts on how to paint, e.g., J. EVANS, *CHINESE BRUSH PAINTING* (1987); R. WELLING, *THE TECHNIQUE OF DRAWING BUILDINGS* (1971). Such books have illustrated verbal descriptions of how to reproduce included pictorial works line by line, brush stroke by brush stroke. If cakes are unprotectable because they are described by recipes, these pictures should be unprotectable because they are described by method of production. Two differences do, nonetheless, exist between the "instructions" for the cake and for the painting. First, the cake is more completely described than the picture, but this

may only prove that painting instructors are not as skilled as cookbook authors. Musical scores, furthermore, are arguably just as detailed descriptions of methods as are cookbooks, allowing for the skill level of the intended readers. Second, more people may be interested in or capable of executing an "edible art form" from a recipe than a painting from a manual. This difference does not support a fundamental incongruence between the treatment of the cake and the painting; it may, however, imply that protecting edible art forms could have unacceptable practical consequences. This is discussed more fully infra notes 166-77 and accompanying text. Clearly, however, we protect pictures even though they can be described by method of production. This Note merely suggests treating "edible art forms" similarly.

FN[FN164]. Our language habits affect our view of the construction of the universe. C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* 25-26 (1923) (construing the work of B. Malinowski); cf. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 750 (1917) (confused language creates court confusion about rights, duties, privileges). Consider the (to us) unnatural axioms of Huxley's *Brave New World*.

"But, my dear chap, you're welcome, I assure you. You're welcome." Henry Foster patted the Assistant Predestinator on the shoulder. "Every one belongs [sexually] to every one else, after all."

One hundred repetitions three nights a week for four years, thought Bernard Marx, who was a specialist on hypnopaedia [subliminal sleep teaching]. Sixty-two thousand four hundred repetitions make one truth. Idiots!

A. HUXLEY, *BRAVE NEW WORLD* 31 (1969).

George Orwell's *Big Brother* created a new language (Newspeak) whose purpose ... was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc [English Socialism], but to make all other modes of thought impossible.... [I]n Newspeak the expression of unorthodox opinions, above a

very low level, was well-nigh impossible. It was of course possible to utter heresies of a very crude kind, a species of blasphemy. It would have been possible, for example, to say Big Brother is ungood. But this statement, which to an orthodox ear merely conveyed a self-evident absurdity, could not have been sustained by reasoned argument, because the necessary words were not available. Ideas inimical to Ingsoc could only be entertained in a vague wordless form.... All mans are equal was a possible Newspeak sentence, but only in the same sense in which All men are redhaired is a possible Oldspeak sentence. It did not contain a grammatical error, but it expressed a palpable untruth, i.e., that all men are of equal size, weight, or strength.

G. ORWELL, 1984, at 246, 254-55 (1949).

Merlyn instructed King Arthur by transforming him into various animals so that he might live within their worlds. The Arthurian version of 1984 is an ant's nest.

The king watched the [other ant's] arrangements with ... dislike. He felt like asking why it did not think things out in advance.... Later he began to wish that he could put several other questions, such as, "Do you like being a sexton?" or "Are you a slave?" or even "Are you happy?"

But the extraordinary thing was that he could not ask such questions. In order to ask them, he would have had to put them into the ant language through his antennae: and he now discovered, with a helpless feeling, that there were no words for half the things he wanted to say. There were no words for happiness, for freedom, or for liking, nor were there any words for their opposites. He felt like a dumb man trying to shout "Fire!" The nearest he could get to Right and Wrong, even, was Done or Not-Done.

....

... Later on, he was to discover that there were only two qualifications in the language--Done and Not-Done--which applied to all questions of value. If the syrup which Merlyn left for [the ants] was sweet, it was a Done syrup: if he had left them some corrosive sublimate, it would have been a Not-Done syrup, and that was that.

T. WHITE, THE BOOK OF MERLYN 68-71.

The legal universe is not, however, ruled by such language-created prejudices.

FN[[FN165](#)]. This policy problem is ably addressed by existing legal doctrines such as fair use. See the extended discussion *infra* notes 168-77 and accompanying text.

Another possible distinction is luxury versus necessity, but the distinction will not stand. First, both visual stimuli and food are necessary in some form, but not necessarily in the particular form being protected. People will not starve to death if we copyright some food items. We copyright some music and art even though mental illness results from severe sensory deprivation. 3 ENCYCLOPEDIA OF PSYCHOLOGY, *supra* note 59, at 259 (experimental data); 2 ENCYCLOPEDIA OF PSYCHOLOGY, *supra*, at 89, 153, 196 (hallucinations, retardation); 1 ENCYCLOPEDIA OF PSYCHOLOGY, *supra*, at 108 (link to autism). Second, the copyright clause assumes that protection increases the supply of the protected object. See *supra* note 21 and accompanying text. Any danger of the scarcity of a necessity should, therefore, be ameliorated by its copyright protection. Third, the Constitution specifically targets protection of the "useful Arts". [U.S. CONST. art. I, § 8, cl. 8](#) (emphasis added).

FN[[FN166](#)]. The 1976 Copyright Act protects computer programs. [17 U.S.C. §§ 101, 102\(a\)\(1\), 117](#). Opponents of protecting computer programs raised arguments similar to those proposed by adversaries of protecting "edible art forms": the proposed protection involved processes, would stifle creativity, and should only be approached through patent law with its more stringent standards of novelty and shorter term. See, e.g., Hearings Pursuant to S. Res. 37 and S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 196-99 [hereinafter SH1], reprinted in 9 G. GROSSMAN, *supra* note 74 (statement of Arthur R. Miller, Professor of Law, University of Michigan, representing the Ad Hoc Comm. of Educational Institutions and Organizations). In response, the procomputer forces added [§ 102\(b\)](#), see *supra* note 158 and accompanying text; S.REP. NO. 983, 93d Cong., 2d Sess. 107-08

(1974), reprinted in 13 G. GROSSMAN, *supra* note 74; Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 2052 (1975) [hereinafter HH2], reprinted in 16 G. GROSSMAN, *supra* note 74 (Briefing Papers on Current Issues Raised by H.R. 2223, May 7, 1975, Register of Copyrights).

Computer programs are protected as literary expressions. See, e.g., [Apple Computer v. Franklin Computer Corp.](#), 714 F.2d 1240, 1249 (3d Cir.1983), cert. dismissed, 464 U.S. 1033 (1984). The current question is the extent of the protection. Compare [Whelan Assocs. v. Jaslow Dental Laboratory](#), 797 F.2d 1222 (3d Cir.1986) (protecting the sequence and organization of a computer program to organize a dental lab), cert. denied, 479 U.S. 1031 (1987) with [Plains Cotton Co-op. v. Goodpasture Computer Serv.](#), 807 F.2d 1256 (5th Cir.) (affirming denial of a preliminary injunction against a cotton marketing program alleged to have copied structure and arrangement; this may, however, have been a finding of merger), cert. denied, 484 U.S. 821 (1987). Some scholars have argued that the courts' copyright protection of computer software is over expansive and ignores the limitations of [§ 102\(b\)](#) by giving patent-like protection to "methods." Lundberg, Gates & Sumner, Baker v. Selden, Computer Programs, 17 U.S.C. Section 102(b) and Whelan Revisited, 13 HAMLIN L.REV. 221 (1990) (criticizing [Manufacturers Technologies v. CAMS, Inc.](#), 706 F.Supp. 984 (D.Conn.1989) and [Pearl Sys. v. Competition Elecs.](#), 8 U.S.P.Q.2d (BNA) 1520 (S.D.Fla.1988)).

FN[FN167]. [17 U.S.C. § 106 \(1988\)](#).

FN[FN168]. See discussion *supra* notes 18-22 and accompanying text.

FN[FN169]. See the model of copyright policy in Landes & Posner, An Economic Analysis of Copyright Law, 18 J.LEGAL STUD. 325 (1989) (doctrines such as fair use should be applied elastically by courts to control balance between protecting authors and protecting the public).

FN[FN170]. Compare [Bibbero Sys. v. Colwell Sys., 1988 Copyright L.Dec. \(CCH\) ¶ 26.270 \(N.D.Cal.1988\)](#) (no copyright in blank forms, medical superbill) with [Continental Casualty Co. v. Beardsley, 253 F.2d 702 \(2d Cir.\)](#) (thin copyright in blank insurance forms), cert. denied, [358 U.S. 816 \(1958\)](#).

FN[FN171]. Supra text accompanying notes 136-45.

FN[FN172]. [17 U.S.C. § 107](#). Noncommercial use is presumptively fair use. [Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 449 \(1984\)](#) (Betamax case). Potential economic harm is the most important factor in fair use analysis. [Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 566 \(1985\)](#) (unauthorized publication of excerpts of ex-President Ford's memoirs caused actual economic harm).

Home baking is only of potential economic harm if one considers the possibility that everyone may stop buying commercial products. This possibility seems too speculative to be taken seriously by the courts. The unauthorized copying of a retail bakery's cake by another competing retail bakery has obvious economic impact, as does copying between restaurateurs or food manufacturers. Procter & Gamble sued several competitors under patent law for marketing chewable cookies. Margolick, At the Bar, N.Y. Times, Sept. 22, 1989, at B20, col. 1.

FN[FN173]. [Walker v. Time Life Films, 615 F.Supp. 430, 435 \(S.D.N.Y.1985\)](#) (movie Fort Apache did not infringe book Fort Apache, similarities were in the common domain), aff'd, [784 F.2d 44 \(2d Cir.\)](#), cert. denied, [476 U.S. 1159 \(1986\)](#); cf., [Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 104 \(2d Cir.1951\)](#) (faced issue of copyrightability of mezzotints of public domain paintings).

Notice was a requirement for copyright protection of items created before March 1, 1988. [17 U.S.C. § 401\(a\)](#); Berne Convention Implementation Act of 1988, [Pub.L. No. 100-568, §§ 12, 13, 102 Stat. 2853, 2860-61 \(1988\)](#). Thus, any edible art form created before that date is in the public domain (unless it meets the limited cure provisions of [17 U.S.C. § 405\(a\)](#) or someone with ex-

traordinary foresight published--or baked--it with notice). This creates a gigantic reservoir of unprotectable works. (Le Montmorency Cake, *supra* note 129, is, therefore, in the public domain, but this Note ignores that complication for the purpose of discussion.)

One could argue that in the interest of justice to creative persons, they should not lose protection because they did not anticipate judicial reinterpretation of the Copyright Act. Such an argument would have to meet the overwhelming judicial reluctance to find persons liable without clear warning. See [McBoyle v. United States, 283 U.S. 25, 27 \(1931\)](#) (court should not construe federal statute intended to decrease automobile thefts to include airplane thefts). One could argue that this policy only covers the penal aspects of the copyright law, but courts are also reluctant to narrow the public domain without clear statutory language. E.g., [L. Batlin & Son v. Snyder, 536 F.2d 486, 492 \(2d Cir.\)](#) (protection of items similar to public domain works should not be granted as it would encourage harassment of persons using public domain works), cert. denied, [429 U.S. 857 \(1976\)](#). See generally Lange, Recognizing the Public Domain, 44: No. 4 LAW & CONTEMP.PROBS. 147 (1981) (policy argument against shrinking the public domain).

An intermediate position would hold that if the recipe for the cake had been properly copyrighted, the cake itself was protected. Compare (analogous computer rulings) [Whelan Assocs. v. Jaslow Dental Laboratory, 797 F.2d 1222, 1244 \(3d Cir.1986\)](#) (similarity of computer screens is indirect evidence that the program has been copied), cert. denied, [479 U.S. 1031 \(1987\)](#) and [Bronderbund Software v. Unison World, Inc., 648 F.Supp. 1127, 1133 \(N.D.Cal.1986\)](#) (input computer screen of graphics program is protected by copyright on the program, citing Whelan as authority) with [M. Kramer Mfg. v. Andrews, 783 F.2d 421, 442 \(4th Cir.1986\)](#) (computer program is protected by copyright on the visual display of a video-game since the program is a "copy" in the meaning of the Act, a tangible object from which the video display can be perceived) and [Digital Communications Assocs. v. Softclone Distrib. Corp., 659 F.Supp. 449, 456, 463 \(N.D.Ga.1987\)](#) (computer program enabling inter-computer communication and menu

screens generated by that program are both copyrightable, but as separate entities). The Copyright Office has decided that one registration will cover "all copyrightable expression owned by the same claimant and embodied in a computer program ... including [computer screen displays.](#)" [53 Fed.Reg. 21,817 \(1988\)](#) (clarifying coverage of [37 C.F.R. 202.3\(b\)\(3\)](#)).

FN[[FN174](#)]. See, e.g., [Batlin, 536 F.2d at 489](#) (plastic version of public-domain Uncle Sam bank lacks sufficient variation to be copyrightable). The extent of variation needed to support copyright is unclear; cases seem contradictory even within the same circuit. R. GORMAN & J. GINSBURG, *supra* note 45, at 153. See also the illustrations of protected and unprotected works. *Id.* at 154-57.

Courts could limit protection of edible art works by a stiff requirement for nontrivial variations. Coupled with the large number of works already in the public domain, see *supra* note 172, such a requirement would effectively minimize protectability.

FN[[FN175](#)]. *Nimmer*, *supra* note 23, § 13.01. Copying can be proven directly or by a showing of access and substantial similarity. *Id.* § 13.01[B]. Widespread dissemination of a work has been held sufficient to show access, and, even in the face of a showing of independent creation, such access coupled with sufficient similarity has been held to prove copying. [Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F.Supp. 177, 180-81 \(S.D.N.Y.1976\)](#) (composer who gave detailed account of independent creation infringed popular song which was so widely disseminated he could not have failed to hear it and which had strong similarity to his tune). Inferentially, claiming never to have heard of Fig Newtons, for instance, would not be accepted.

The courts could limit protection of edible art forms by manipulating the type of similarity needed to substitute for a strong showing of access, and the minimum amount of access necessary. For example, the similarity in *Bright Tunes* was a very unusual combination of two motifs and a grace note. [Bright Tunes, 420 F.Supp. at 180 n. 11](#). Courts

could also, as they have indeed done, manipulate the showing required to prove copying. Compare [Selle v. Gibb, 567 F.Supp. 1173, 1180-81 \(N.D.Ill.1983\)](#) (even complete identity between songs does not prove copying without reasonable evidence of availability of the allegedly infringed work to the defendant), aff'd, [741 F.2d 896 \(7th Cir.1984\)](#) with [Gaste v. Kaiserman, 863 F.2d 1061, 1068 \(2d Cir.1988\)](#) (jury may infer access from striking similarity between songs if evidence reasonably precludes independent creation). Thus, a court could find that a bakery owner in Appalachia had never read Simone Beck's cookbooks and had independently created a cake identical to the Montmorency, supra note 129.

FN[FN176]. See [Bright Tunes, 420 F.Supp. at 177](#); for a discussion of the case see supra note 174.

FN[FN177]. [Gaste, 863 F.2d at 1068-69](#) (similar popular songs derived from common sources are not infringing) (citing [Selle, 741 F.2d at 905](#)); [Walker, 615 F.Supp. at 435](#) (movie Fort Apache does not infringe book Fort Apache as both works have common sources); [Alexander v. Haley, 460 F.Supp. 40, 45 \(S.D.N.Y.1978\)](#) (novel Roots does not infringe plaintiff's novel as it uses common sources). If two persons independently created the same variation of the Montmorency, supra note 129, Simone Beck might have a case against both of them, but they would not have a case against each other (continuing to ignore that her cake is in the public domain).

FN[FN178]. [Alexander, 460 F.Supp. at 45](#) (standard elements of slave escape stories are not protectable); [Walker, 615 F.Supp. at 436](#) (common elements in book and movie Fort Apache are stock material for police stories). Similarly, certain combinations in edible art forms are stock material for chefs. Chocolate goes with cherries. Thus even a variation which cannot be traced to a specific common domain cake may be an unprotectable scene a faire, creating substantial latitude for courts wishing not to protect a specific edible art form.

FN[FN179]. [17 U.S.C. §§ 501-05, 509-10](#).

FN[FN180]. The court might do this directly in the case of an innocent infringer, [17 U.S.C. § 405\(b\)](#), or as part of a preliminary injunction. See [Gilliam v. ABC, 538 F.2d 14, 18 \(2d Cir.1976\)](#) (preliminary injunction to forbid broadcasting of allegedly infringing derivative work without disclaimer). Final injunctions in other cases may be granted by the court "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." [17 U.S.C. § 502\(a\)](#).

Unlike [§ 405\(b\)](#), the language of [§ 502\(a\)](#) does not allow judicial creation of mandatory licenses. The grant of an injunction would, however, allow the copyright owner to bargain with the infringer for payment in money and/or publicity. The courts would thus be creating an entitlement protected by a property rule. See generally [Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV.L.REV. 1089, 1118-19 \(1972\)](#) (advocating judicial use of property rules to create entitlements where transaction costs are low, using examples from pollution law).

FN[FN181]. [17 U.S.C. §§ 503\(b\), 504\(c\), 505, 506\(b\), 509](#).

FN[FN182]. Mrs. Davis was not paid for her ice cream flavors because she relied on an illusory promise. [Davis v. General Foods, 21 F.Supp. 445, 446 \(S.D.N.Y.1937\)](#). General Foods had offered to examine the recipes "with the understanding that ... the compensation, if any, to be paid therefor, ... [is] in our discretion." [Id. at 446](#). If she had created the flavor after March 1, 1988 and courts accept the proposal of this Note, she would have had copyright protection in the food item as a work of art from the date of fixation in written recipe or ice cream. General Foods would have been infringing her right of reproduction. [17 U.S.C. § 106\(1\)](#).

FN[FN183]. R. GORMAN & J. GINSBURG, *supra* note 45, at 5.

FN[FN184]. [U.S. CONST. art. I, § 8, cl. 8](#). Some commentators have suggested that Con-

gress could grant additional protection under the commerce clause. See, e.g., NIMMER, *supra* note 23, § 1.06.

FN[[FN185](#)]. This questions should be distinguished from the definition of "art" for the purposes of a federal program to fund the creation of art works, such as the National Endowment for the Arts (NEA). The copyright clause states the framers' policy rationale; "art" for the copyright clause must be defined according to that purpose. No such specific clause empowers the federal government to subsidize artists directly. E. BANFIELD, *THE DEMOCRATIC MUSE* 11- 12 (1984). The NEA must first address the threshold question of what purpose is constitutionally allowable. The answer chosen by the interpreter will then shape his definition of art, *id.* at 3-17, which may or may not match the definition compelled by the copyright clause.

The proper definition of art for the NEA has recently generated serious controversy due to a Congressional attempt to prevent government subsidy of obscenity. Masters, *Under Pressure From Critics, Arts Agency Rejects 4 Grants*, *Washington Post*, June 30, 1990, at A1, col. 3 (rejection of grants to Karen Findley, Holly Hughes, John Fleck, and Tim Miller). Public reaction to this "censorship" has predictably been extremely mixed. See, e.g., Bernstein, *PBS Will Back Producers on Obscenity Oath*, *Los Angeles Times*, July 25, 1990, at F1, col. 6; Briggs, *Lifeline*, *USA Today*, July 13, 1990, at 1D, col. 1 (Lewitzky Dance Company sues NEA over antiobscenity pledge it requires of grant recipients); Butterfield, *Disputed Art Show Opens Peacefully*, *N.Y. Times*, Aug. 2, 1990, at A10, col. 1 (a Boston museum is criticized and praised for showing the allegedly obscene photographs of Robert Mapplethorpe); Gussow, *Artist as Art, or, Sui Too Can Be Generis*, *N.Y. Times*, Aug. 1, 1990, at C11, col. 3 (mixed effect on public of the NEA's rejection of grants to several "performance artists"). Note that in performance art, artist, medium, and message merge, *id.*, at col. 2-3, in a way not reflected by the idea/expression dichotomy of copyright. See *supra* note 151.

FN[FN186]. In the words of James Madison, "[a]s a guide in expounding and applying the provisions of the Constitution ... the debates and incidental decisions of the Convention can have no authoritative character." Letter from James Madison to Thomas Ritchie, Sept. 15, 1821, quoted in L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 1 (1988). Later writers have expressed widely disparate views. See, e.g., Dworkin, The Forum of Principle, 56 N.Y.U.L.REV. 469, 490 (1981) (framers may have intended to delegate power to future generations to make decisions); Easterbook, Legal Interpretation and the Power of the Judiciary, 7 HARV.J.L. & PUB.POL'Y 87, 95 (1984) (courts should not add restrictions to the Constitution); Powell, The [Original Understanding of Original Intent](#), 98 HARV.L.REV. 885, 948 (1985) (by "framers' intent" the Framers meant the intention of the "sovereign parties to the constitutional compact," not of the writers of the Constitution); Tushnet, [Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles](#), 96 HARV.L.REV. 781 (1983) (interpretivism assumes an undemonstrable historical consensus). See generally, L. LEVY, supra (overview of opposing theories).

FN[FN187]. The copyright clause was submitted on September 5, 1787 by Brearley, for the Committee on Unfinished Business, in response to a suggestion by Madison "[t]o secure to literary authors their copyrights for a limited time," and to two suggestions by Pinckney, "[t]o grant patents for useful inventions" and "[t]o secure to authors exclusive rights for a certain time." A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 529 (1968) (a rearrangement of Madison's notes giving consecutive development of provisions). No debate is recorded. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (1987); R. GORMAN & J. GINSBURG, supra note 45, at 5.

Several rejected alternatives on the same general subject are known.

MADISON: It should be provided that the government have power to encourage by premiums and provisions the advancement of useful knowledge and discoveries.

PINCKNEY: Power should be given the government to establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades and manufactures.

PINCKNEY: The government should have power to establish seminaries for the promotion of literature and the arts and sciences.

MADISON: Congress should be enabled to establish a university in the place of the general government, and should possess exclusive jurisdiction over the institution. It should be specified that all persons might be admitted to the university and to its honors and emoluments, without any distinction of religion whatever.

J. MADISON, CONSTITUTIONAL CHAFF: REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787, WITH EXPLANATORY ARGUMENT 64 (J. Butzner comp. 1941).

Madison's later defense of the clause is not very helpful.

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.... The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

THE FEDERALIST NO. 43, at 186 (J. Madison) (THE ENDURING FEDERALIST, C. Beard ed. 1948). Elliot's compilation includes no indexed mention of discussions on this clause. J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1941).

FN[\[FN188\]](#).

[O]ur Constitution [does not] embalm[] ... inflexibility the habits of 1789.... Of course, the new subject-matter must have some relation to the grant; but we interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.

[Reiss v. National Quotation Bureau, 276 F. 717, 719 \(S.D.N.Y.1921\)](#) (protecting cable

code book).

FN[FN189]. [Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 \(1884\)](#).

FN[FN190]. [Goldstein v. California, 412 U.S. 546, 561 \(1973\)](#) (phonograph records are constitutionally protectable "writings").

FN[FN191]. *Id.*

Proponents of copyright protection for edible art forms could also point to the constitutional wording indicating what is targeted for protection: the "useful Arts." [U.S. CONST. art. I, § 8, cl. 8](#). Food is useful under the plain meaning of the Constitutional phrase, "useful Arts." "Original recipes on a label were protected because they ... promot[ed] the progress of useful art, i.e., the progress of culinary arts." STAFF OF SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STUDY 3 PURSUANT TO S. RES. 53, THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 88 (Comm.Print 1960) (Professor Derenberg and staff of N.Y.U.L.Rev. construing [Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823 \(8th Cir.1924\)](#), reprinted in 1 G. GROSSMAN, *supra* note 74; see *supra* text accompanying note 26 for case details). The argument, however, may be unnecessary. Recent cases hold that individual works do not have to be useful because the copyright system of protection is itself useful. See, e.g., [Pacific and S. Co. v. Duncan, 744 F.2d 1490, 1498-99 \(11th Cir.1984\)](#) (taped news broadcasts which are destroyed, rather than stored for public use, are protectable), cert. denied, [471 U.S. 1004 \(1985\)](#); [Jartech, Inc. v. Clancy, 666 F.2d 403, 405-06 \(9th Cir.\)](#) (obscene materials are constitutionally copyrightable), cert. denied, [459 U.S. 826 \(1982\)](#).

FN[FN192]. See detailed discussion *supra* notes 72-129 and accompanying text.

FN[FN193]. Congress has the power to decide the suitable definition of art for the pur-

poses of the Copyright Act. It does not, however, have the right to choose a content-based definition. L. TRIBE, *supra* note 64, § 12-2, at 790. Defining the "lower senses" out of "art" is arguably not content-neutral; it is equivalent to choosing sides between, for example, Beardsley and Quinet; see *supra* text accompanying notes 112-14. This philosophical dispute is especially problematical as it underlies the historical jockeying of putative craftsmen--such as painters--attempting to rise in the social order with corresponding financial benefits. The economic aspects of the definition are highlighted by Dickie's definition of the art object as a classification created by the art community. See *supra* notes 115-28 and accompanying text. Dickie's thesis invokes Sunstein's theory that the underlying thread in constitutional jurisprudence is a dislike for naked preferences. Sunstein, [Naked Preferences and the Constitution](#), 84 COLUM.L.REV. 1689 (1984). But the argument that choosing painters over chefs is a naked preference to support copyrightability and, therefore, barred by an equal protection or due process theory, would probably not convince a court, since both usually employ mere rational relations standards. [Id. at 1713-14, 1717-18](#). This Note makes a connected argument: preferences should not be adopted without examination. The distinction between chef and painter may be rationally related to copyright policies, but we should consider, not assume, that conclusion. Art raises more concrete first amendment concerns. See discussion *infra* note 194.

FN[FN194]. [Bleistein v. Donaldson Lithographing Co.](#), 188 U.S. 239, 251 (1903) (circus advertising pictures are copyrightable).

Courts have, however, weighted decisions with their own artistic beliefs. The Second Circuit refused to protect a plastic version of a common-domain antique metal Uncle Sam bank on the grounds that the deviations were too trivial and represented only mechanical, not artistic, ability. [L. Batlin & Son v. Snyder](#), 536 F.2d 486, 491 (2d Cir.), cert. denied, 429 U.S. 857 (1976). The court distinguished [Alva Studios v. Winninger](#), 177 F.Supp. 265 (S.D.N.Y.1959) (protecting a scale reproduction of Rodin's "Hand of God" sculpture) because the replication of the sculpture required great artistic skill and the original was " 'one of the most intricate pieces of sculpture

ever created.' " [Batlin, 536 F.2d at 491](#) (quoting Alva Studios, 117 F.Supp. at 267). This statement could be read to mean that because the original was so complex, great artistic skill was needed to create a smaller version. However, the court proves it is protecting a derivative object because of the merit they ascribe to the specific underlying work by adding:

Nor is the creativity in the underlying work of art of the same order of magnitude as in the case of the "Hand of God." Rodin's sculpture is, furthermore, so unique and rare, and adequate public access to it such a problem that a significant public benefit accrues from its precise, artistic reproduction.

Id. at 492.

FN[FN195]. [Ladd v. Law & Technology Press, 762 F.2d 809, 815 \(9th Cir.1985\)](#) (requirement of deposit is neither a taking protected by the fifth amendment, nor an unlawful tax on works protected by the first amendment), cert. denied, [475 U.S. 1045 \(1986\)](#). This holding cannot be used to deny first amendment protection in all copyright controversies, however, as the case deals only with a formality which rationally advances a related government purpose. "The Copyright Clause grants copyright protection for the purpose of promoting the public interest in the arts and sciences. Conditioning copyrights on a contribution to the Library of Congress furthers this overall purpose." [Id. at 814](#). The court carefully distinguishes this situation from a content-based condition which itself "trigger[s] first amendment concerns." [Id. at 815 n. 5](#).

The Supreme Court has allowed content-based restrictions on obscene material when inter alia "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." [Miller v. California, 413 U.S. 15, 24 \(1973\)](#). The definition of obscenity is not central to this Note's argument. What is central is the Court's insistence on the judiciary "remain[ing] sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.... [precisely because t]his is an area in which there are few eternal verities." [Id. at 23](#). The definition of "serious" is broad and not tied to the judgment of the majority in either a local community or the country as a whole. The test is "whether a

reasonable person would find such value in the material, taken as a whole." [Pope v. Illinois, 481 U.S. 497, 501 \(1987\)](#) (sale of allegedly obscene magazines). Against this background, Holmes's view, supra text accompanying note 193, on the incorrectness of judicial artistic decisions is revealed as an invocation of constitutional protections, and, thus, judicial bias against modern art and art forms becomes a major problem. See, [Kieselstein-Cord v. Accessories by Pearl, 632 F.2d 989, 994-96 \(2d Cir.1980\)](#) (Weinstein, J., dissenting) (belt buckle is not copyrightable because language of statute regrettably forces judges to deny protection to nonrepresentational works).

Opinions held by small groups or minorities meet the reasonable person test. [Pope, 481 U.S. at 501 n. 3](#). Even if the vast majority, or more cogently the vast majority of art critics, consider "edible art form" an oxymoron, the views of even one "reasonable" person to the contrary should invoke constitutional protection.

The legislative, judicial, and executive branches, all consider copyright the wrong tool for enforcing allowable content-based restrictions on free expression. Nor is the lack of such a limitation a mere oversight. While the federal trademark statute refuses registration to obscene material, [15 U.S.C. § 1052\(a\) \(1988\)](#), the Copyright Act does not and recent decisions refuse to inject morality into copyright. See [Jartech, 666 F.2d 403](#) (protecting allegedly obscene film); [Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 \(5th Cir.1979\)](#) (protecting allegedly obscene film), cert. denied, [445 U.S. 917 \(1980\)](#). One Second Circuit panel suggested in dicta, however, that morality be considered in fair-use balancing. [Warner Bros. v. ABC, 720 F.2d 231, 242 n. 8 \(2d Cir.1983\)](#) (parody is usually fair use but "limiting principle ... arises when ... parody take[s] the form of scatological humor"). Such considerations may have prompted a wide definition of market overlap resulting in a finding of infringement in [MCA v. Wilson, 677 F.2d 180, 183- 85 \(2d Cir.1981\)](#) ("Cunnilingus Champion of Company C" competes with "Boogie Woogie Bugle Boy" since both are exploited in similar media: recordings, stage shows, and sheet music). The dissent objected to the ruling as censorship. [Id. at 191](#), (Mansfield,

J., dissenting). Other courts have also rejected the relevance of morality to fair use. [Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. \(BNA\) 124, 131 \(N.D.Ga.1981\)](#) (picture resembling plaintiff's trade characters engaging in sexual acts is fair use); see also [Gucione v. Flynt, 1984 Copyright L.Dec. \(CCH\) ¶ 25,669 \(S.D.N.Y.1984\)](#) (fair use to reprint a photograph of fully clothed editor posing with nude model when criticizing him for that behavior). While the Attorney General has stated the copyright office may refuse to register obscene works, 41 OP.ATT'Y GEN. 395 (1963), the office will not "ordinarily" do so. Copyright Office, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 108.10 (1984).

FN[FN196]. Congress may not have the right to limit its intention in content-based fashion. See supra notes 192, 194.

FN[FN197]. [17 U.S.C. §§ 101, 102\(a\) \(1988\)](#). See supra note 53 and accompanying text.

FN[FN198]. H.R.REP. NO. 1476, supra note 81, at 51, reprinted in 1976 USCAN, supra note 81, at 5664.

This formulation rejected the Register of Copyright's original proposal that, in the absence of Congressional decision, expansion be limited to newly created forms. The Register wanted Congress, not the judiciary, to decide when a form which had existed when the Act was enacted had acquired enough importance to warrant copyright protection. STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, at v, 11 (Comm.Print 1961), reprinted in 3 G. GROSSMAN, supra note 74.

Critics argued that Congress was too unresponsive. STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 380-81 (Comm.Print 1963), reprinted in 3 G. GROSSMAN, supra note 74. The advisory

panel wished the catchall phrase in the new act, see *supra* note 53 and accompanying text, to be so clear that courts could not read the list as exclusive, and complained that courts had so read the 1909 Act despite an open-ended provision. The Copyright Act of 1909, ch. 320 § 5, 35 Stat. 1075, 1077 (1909) (current version at [17 U.S.C. § 408\(c\)\(1\) \(1988\)](#)) (final paragraph of registration categories); STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 58-59 (Comm.Print 1964), reprinted in 3 G. GROSSMAN, *supra* note 74, discussing [Capitol Records v. Mercury Records Corp., 221 F.2d 657, 660- 61 \(2d Cir.1955\)](#) (recorded performance not copyrightable since not specified by statutory language). The 1974 Senate report deleted a footnote which stated certain specific categories were not intended to be covered unless Congress enacted separate legislation. See discussion in REGISTER OF COPYRIGHTS, Subject Matter of Copyright, in DRAFT OF THE SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, OCT.-DEC. 1975, at 2-4 (available on microfiche as # 131, Kaminstein Legislative History Project: Copyright Act of 1976). Congress discussed and rejected closed categories for copyright. 113 CONG.REC. 8996- 97 (1967) (amendment proposed by Rep. Dingell). This redrafting may have succeeded. [Vermont Castings v. Evans Prods. Co., 215 U.S.P.Q. \(BNA\) 758, 762-64 & n. 2 \(D.Vt.1981\)](#) (defendant asserted that common-law unfair competition claim was preempted by 1976 Copyright Act; court said stove design at issue not covered by any listed category in [§ 102\(a\)](#), but implied in dicta that the attorney could have supplied an argument proving coverage outside these categories).

FN[\[FN199\]](#). B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 173 (1921).

FN[\[FN200\]](#). The legislative history is especially persuasive because it enforces the plain

meaning of the Act. Justice Scalia, who is well known for his insistence on the unimportance of legislative history, seems to confine his complaints to judicial use of legislative history to undermine the actual language of the statute in question. His position may be inconsistent. In the absence of clear legislative discussion, he has relied on historical background to support the plain meaning of the statute. [Stewart Org. v. Richoh Corp., 487 U.S. 22, 36 \(1988\)](#) (Scalia, J., dissenting) ([28 U.S.C. § 1404\(a\)](#) should not be read to preempt state control of contract interpretation without clear statutory language since issues of contract have nearly always been governed by state law). Scalia does, however, discuss existing legislative history on occasion. For example, he cites a speech by James Wilson at the Federal Constitutional Convention of 1787 to explicate the wording of the Constitution. [Sun Oil v. Wortman, 486 U.S. 717, 723 \(1988\)](#) (using records of the federal convention to explicate the meaning of "procedural" as a category unreached by the full faith and credit clause). Furthermore, Scalia allows the statutory language to be read broadly when the legislative history does not clearly show such a broad intent. See *Eli Lilly & Co. v. Medtronic, Inc.*, 58 U.S.L.W. 4838 (U.S. June 18, 1990) ([35 U.S.C. § 271\(e\)\(1\)](#) covers patented medical devices even though the legislative history only mentions patented drugs).

FN[\[FN201\]](#). For example:

Section 113 deals with the extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in [Mazer v. Stein, 347 U.S. 201 \(1954\)](#), and the first sentence of subsection (a) restates the basic principle established in that decision.

H.R.REP. NO. 1476, supra note 81, at 105, reprinted in 1976 USCAN, supra note 81, at 5720.

FN[\[FN202\]](#). Acknowledged by the Hon. Emanuel Celler, Chairman of the House Comm. on the Judiciary, 113 CONG.REC. 8585 (1967). See detailed discussion in Litman,

[Copyright, Compromise, and Legislative History, 72 CORNELL L.REV. 857 \(1987\).](#)

FN[\[FN203\]](#).

[The bill] provided specific, detailed [fair use] exemptions for those interests whose representatives had the bargaining power to negotiate them.... Because exploiters of yet-to-be-invented communications technology were the very parties who could not be present at the bargaining table, there was nobody to argue that the bill's basic structure gave them too little consideration.

Litman, *supra* note 201, at 883-84.

Composers, writers, record and music publishers, academics, librarians, broadcasters, computer companies, and typographers were among those represented. 1 A. LATMAN & J. LIGHTSTONE, *THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976*, at 17-21, 24-26, 32-34, 50-52 (1981).

FN[\[FN204\]](#). No one is listed in the legislative history as representing culinarians. (The author of this Note checked all persons listed as attending meetings, giving testimony, or sending written statements in the two cited authoritative compilations. 1-17 G. GROSSMAN, *supra* note 74. The affiliations were accepted as listed in the tables of contents (except for the authors of miscellaneous unlisted correspondence where all letters were skimmed). 1 A. LATMAN & J. LIGHTSTONE, *supra* note 202, at 1-56 ("persons and organizations" indexes for [§ 102](#)). In comparison, the first set of House hearings encompassed over 150 witnesses, 112 CONG.REC. 27,759 (1966) (remarks of Rep. Poff); the Senate hearings included over 200 witnesses, 120 CONG.REC. 3042 (1974) (remarks of Sen. McClellan); the second set of House hearings listened to 100 witnesses. H.R.REP. NO. 1476, *supra* note 81, at 49, reprinted in 1976 USCAN, *supra* note 81, at 5662.

The National Restaurant Association and the American Hotel and Motel Association sent letters. They only discussed, however, their members' possible liability for juke-

boxes, radios, or television sets located on their premises. Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Bills for the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 1882-84 (1965), reprinted in 7 G. GROSSMAN, *supra* note 74; SH1, *supra* note 165, at 1311-12, 1329-30, reprinted in 10 G. GROSSMAN, *supra* note 74. Neither Congress nor the public perceived culinarians to be among the highly interested parties. 111 CONG.REC. A1670 (1965) (remarks by Rep. St. Onge listing "authors, composers, book publishers, industrial designers, universities, and ... widows of writers" and entering into the record a newspaper article describing the combatants as writers, composers, publishers of books and music versus librarians, historians, newspapers, and the educational establishment).

FN[[FN205](#)]. This is an obvious corollary of the American system of adversarial justice where parties not present are usually not bound by the decision. In constitutional terms, this argument is representational reinforcement. See generally J. ELY, *DEMOCRACY AND DISTRUST* (1980) (judicial review of the Constitution should focus on the aggrieved group's participation in the political process). Of course, the lack of representation here does not rise to constitutional proportions.

FN[[FN206](#)]. See [17 U.S.C. §§ 101, 102\(a\)](#); *supra* note 53 and accompanying text.

FN[[FN207](#)]. See *supra* note 200 and accompanying text.

FN[[FN208](#)]. "[T]he committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field.... The bill does not intend ... to allow unlimited expansion into areas completely outside the present congressional intent." H.R.REP. NO. 1476, *supra* note 81, at 51, reprinted in 1976 USCAN, *supra* note 81, at 5664.

FN[[FN209](#)]. See *supra* notes 196-206 and accompanying text.

FN[FN210]. For text, see 122 CONG.REC. 3856 (1976).

FN[FN211]. "[S]eventy-odd design protection bills introduced in Congress since 1914 ha[ve] failed to be enacted." Lehrer, *supra* note 33, at 163.

FN[FN212]. Food, since it is not a "pictorial, graphic, [or] sculptural work," [17 U.S.C. § 102\(a\)\(5\) \(1988\)](#), may be protected without protecting other useful objects. See discussion *supra* notes 65, 72-128 and accompanying text.

FN[FN213]. Legislative intent while the legislature is deciding to pass a bill is obviously relevant.

FN[FN214]. BLACK'S LAW DICTIONARY 810 (5th ed. 1979).

FN[FN215]. *Id.*

FN[FN216]. Congress first authorized studies in 1955 and passed the Act in 1976. R. GORMAN & J. GINSBURG, *supra* note 45, at 10.

FN[FN217]. H.R.REP. NO. 1476, *supra* note 81, at 50, reprinted in 1976 USCAN, *supra* note 81, at 5663 (relying on the Justice Dept. testimony cited *infra*); H.R.CONF.REP. NO. 1733, 94th Cong., 2d Sess. 82, reprinted in 1976 USCAN, *supra* note 81, at 5810, 5823.

The committee heard testimony from broadcasters, writers, teachers, attorneys, actors, publishers, and members of various government departments, but not from culinarians. No one mentioned food items in relation to Title II. HH2, *supra* note 165, reprinted in 14-16 G. GROSSMAN, *supra* note 74. Products mentioned included furniture, appliances, linoleum, wall coverings, and household goods. *Id.* at 172 (testimony of Rene D. Tegtmeier, Ass't Comm'r for Patents, Commerce Dep't).

The Justice Department denied that proponents of Title II had shown that the putative benefits outweighed the burdens to the public. *Id.* at 158 (statement of Irwin Goldbloom,

Dept. Ass't Att'y Gen'l, Civil Div., Justice Dep't). This assertion was strongly disputed by both the Patent Division of the Commerce Department, *id.* at 161-62, 172 (statement of Rene D. Tegtmeyer, Ass't Comm'r for Patents, Commerce Dep't), and the Copyright Office, *id.* at 1858 (statement of Barbara Ringer, Register of Copyrights, Library of Congress). Witnesses pointed out that many foreign countries had design protection similar to Title II and had signed the Hague Agreement for the International Deposit of Industrial Designs. *Id.* at 171 (testimony of R.D. Tegtmeyer, *supra*).

The unacceptability of the law's current bias towards traditional, as opposed to modern, art was raised by Alan Latman who claimed Copyright Office agreement. *Id.* at 999 (statement of Alan Latman, copyright attorney with Cowan, Liebowitz & Latman).

Congress, furthermore, articulated two "fundamental concerns" which are totally irrelevant to "edible art forms": who would administer the design protection and whether typeface designs should be included. H.R.REP. NO. 1476, *supra* note 81, at 50, reprinted in 1976 USCAN, *supra* note 81, at 5663.

FN[[FN218](#)]. But "interested parties in ... the food and drug ... industries" were contacted unofficially by American Bar Association members to generate support for later design legislation. LIBOTT, Annual Report of Comm. on Industrial Designs, 1981 A.B.A. SEC.PATENT, TRADEMARK AND COPYRIGHT LAW 120.

FN[[FN219](#)]. See discussion of plaster cake, *supra* text accompanying note 145.

"Title II of the Senate bill proposed to establish a new form of protection for original ornamental designs of useful articles." H.R.CONF.REP. 1733, *supra* note 216, at 82, reprinted in 1976 USCAN, *supra* note 81, at 5823. "Design" was defined as "those aspects or elements of the article, including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article." 122 CONG.REC. 3856 (1976). Pending legislation is also limited to external appearances. H.R. 902, 101st Cong., 1st Sess. § 1001(b)(2) (1989); H.R. 3499, 101st Cong., 1st Sess. § 1(b)(2) (1989).

"Edible art forms" would not be infringed by look-alikes which were not taste-alikes.

FN[FN220]. See discussion *supra* notes 166-77 and accompanying text.

"[T]he Committee will have to examine further the assertion of the Department of Justice ... that Title II would create a new monopoly which has not been justified by a showing that its benefits will outweigh the disadvantages of removing such designs from free public use." H.R.REP. NO. 1476, *supra* note 81, at 50, reprinted in 1976 USCAN, *supra* note 81, at 5663.

The relationship between price and copyright has been hotly debated.

A lot of the same people who clamored for design protection originally have actually gotten protection under copyright. I am referring to the textile people and the jewelry people....

I do not think experience has shown that one pays more for a copyrighted textile design or a dress made from it than one would from an uncopied design. This parallels experience in the more traditional copyright areas. You don't pay, fortunately or unfortunately, more or less for a paperback of Dostoevsky than you do for other books.

HH2, *supra* note 165, at 996 (statement of Alan Latman, copyright attorney), reprinted in 15 G. GROSSMAN, *supra* note 74.

Furthermore, despite the constitutional mandate, see *supra* notes 21, 183 and accompanying text, Congress has not enacted a provision for price control. This exclusion is noteworthy because the drafters were choosing not to include a provision found in their model, the English Statute of Anne, 8 Anne C. 19 (1709), and in several Colonial statutes. R. GORMAN & J. GINSBURG, *supra* note 45, at 4. Twelve of the thirteen original states passed copyright statutes between 1783 and 1786. Crawford, Pre-Constitutional Copyright Statutes, 23 BULL.COPYRIGHT SOC'Y 11, 11 (1975). The copyright statutes of Connecticut, Georgia, New York, North Carolina, and South Carolina included some form of price regulation. *Id.* at 30-31.

FN[FN221]. R. GORMAN & J. GINSBURG, *supra* note 45, at 41.

FN[FN222]. *Id.* at 41. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF

COPYRIGHT OFFICE PRACTICES § 108. In case of doubt, the Copyright Office merely grants a registration certificate. Id. § 108.07.

FN[FN223]. [17 U.S.C. § 410\(c\) \(1988\)](#).

FN[FN224]. See, e.g., [Magic Mktg. v. Mailing Servs., 634 F.Supp. 769, 771 \(W.D.Pa.1986\)](#) (defense of invalid copyright; envelopes do not meet de minimis originality standard).

FN[FN225]. The Copyright Office may appear in court to support its position. [17 U.S.C. § 411\(a\)](#). Note that Berne works whose country of origin is not the United States are exempted.

FN[FN226]. See, e.g., [John Muller & Co. v. New York Arrows Soccer Team, 802 F.2d 989, 990 \(8th Cir.1986\)](#) (per curiam) (refusal of registration for soccer team logo is reviewed only for abuse of discretion).

FN[FN227]. [Miller v. California, 413 U.S. 15, 29 \(1973\)](#); [Jacobellis v. Ohio, 378 U.S. 184, 187-88 \(1964\)](#). In both cases, the Supreme Court asserted the inappropriateness of refusing to consider obscenity cases because of their case load.

FN[FN228]. Such groups include ASCAP, BMI, and SESAC. R. GORMAN & J. GINSBURG, *supra* note 45, at 573-76.

FN[FN229]. See *supra* notes 70, 192-94 and accompanying text.

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