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Just Desserts: Recipe Copyright and the Plagiarism of Edible Creations

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Writing Process
The theme of my ENG 200H class was "Remix Culture," which caused my classmates and me to explore the meanings of concepts such as creativity, authorship, originality, and plagiarism. My newfound interest in intellectual property law joined with my business major and a passion for food to create the topic of my research paper. The writing process was both fun and challenging, as I researched recipe copyright and came up with my own solutions to address this growing problem. As my paper evolved, I wrote and edited three drafts with the help of the constructive criticism of my professor and peers.

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Just Desserts:

Recipe Copyright and the Plagiarism of Edible Creations*

It is a human tendency to want to be recognized for one's work and accomplishments. From kindergarteners who proudly point to their finger-paintings on the fridge, to Nobel Prize winners receiving their awards, we all want to be recognized and have the ability to claim and protect our accomplishments. The same is true of recipe authors, who as of late, are still unrepresented by the Copyright Act. On the grounds that they are considered the inventors of original created works, chefs and restaurateurs deserve to have their recipes copyrighted; however, due to the scope and nature of the culinary environment, the copyright of recipes must be approached differently than that of other mediums, focusing on the attribution of a recipe to an author and less on the recipe's precise inflexible composition. In order to satisfy both the needs of the authors and the desires of the public, it would be simplest and most beneficial to add recipes under the "literary works" category of the copyright law while stipulating that recipe authors do not have derivative rights but maintain public presentation rights.

In order to fully understand copyright legislation, or lack thereof, as it pertains to recipes, it is imperative to first note that, as Meredith Lawrence recognizes in her article "Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age," "The Supreme Court has not directly addressed recipe copyrightability" (192). The 1976 Copyright Act as it stands, grants protection for:

> …original works of authorship fixed in any tangible medium of expression, now known or later developed. Such works include (1) *literary works*; (2) musical works, including any accompanying words; (3) dramatic works, including and accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. (Lawrence 194)

Although the Act does not explicitly mention recipes, it is conceivable that recipes could fall under a few of these mentioned categories. Some consider recipes to be literary or sculptural works or see parallels between recipes and musical works. In the article "Cooking and Copyright: When Chefs and Restaurants Should Receive Copyright Protection for Recipes and Aspects of Their Professional Repertoires," author Michael Goldman explains that Congress asserted that the word "include" in reference to the list of protected works connotes that the list is, "not exhaustive and is 'illustrative and not limitative'" (157). The changing interpretations of the Act and various court cases have proven that a more thorough decision needs to be made addressing the copyright of recipes.

One of the largest arguments against the legality of the copyright of recipes is the Idea-Expression Dichotomy. This interpretation of the Copyright Act states that a recipe is an idea or a process and therefore lacks originality, which is an essential component for a work to receive copyright protection (Lawrence 191). The Ideal-Expression Dichotomy also considers recipes to be a collection of facts, furthering its degree of unoriginality. In the case of *Publications International, Limited v. Meredith Corporation*, Meredith Corporation claimed that Publications International invaded the copyright for the Meredith Corporation's cookbook *Discover Dannon—50 Fabulous Recipes with Yogurt* (Lawrence 196-197). The court chose to rule in favor

of Publications Limited, who argued that the Meredith Corporation held copyrights only over the compilation of the cookbook as a whole. In this way the Meredith Corporation owned the rights to the order and arrangement of the parts of the book but not the individual parts. The Meredith Corporation countered that its collective work copyright over the book also extended to protect the individual recipes within the work (Goldman 161). As defined by the Copyright Act, compilation is, "a work formed by the collection 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" (Goldman 167). One could argue that a recipe itself is a compilation, made up of various foods and originally created via various methods; however, the court ruling on the case did not choose to see it this way. Instead the court ruled that the recipes that made up the cookbook were unable to be copyright protected due to the fact that they were unoriginal ideas and facts as decided by the Copyright Act (Goldman 162).

To many, a recipe is considered a procedure, process, or discovery because the contents of a recipe are determined largely by the functional purposes of the ingredients. Originality is negated, as many ingredients are required as opposed to being simply desired. When thought of in this way, the claimed lack of originality and categorization of a recipe as a procedure does not allow the recipe to be copyrighted. Others in favor of recipe copyright do not agree that recipes themselves should be considered procedures. As argued by Karla Ng Aspiras and Jose Justin T. Santos in their article "Copyrightability Of Recipes Under The Idea-Expression Dichotomy," "It is the basic techniques of cooking—such as grilling, baking and sous vide—that are the procedures and not the recipes. Thus, recipes, while composed of procedures, are not procedures themselves and may be copyrighted" (277). Again, this point of view shows the recipe as a compilation of many parts, including procedures, which makes up an entity in and of itself. The

chocolate chip cookie is not a procedure, instead it is a creation which requires procedures, such as baking, to come into existence. In this way, a cookie requiring an oven is no different than a piece of pottery requiring a kiln. Recipes may be copyrighted as they themselves are not procedures.

Five years after the ruling of *Publications International, Limited v. Meredith Corporation*, the court system faced another defining recipe copyright case: *Barbour v. Head*. In the suit, the plaintiff argued that recipes from her Texas-themed cookbook "Cowboy Chow" were copied. The plagiarism not only included the recipes themselves but the names of the recipes and facts and commentary as well. Because of this anecdotal information in the cookbook, the plaintiff won and the court ruled that "Cowboy Chow" could be classified as a literary work under the Copyright Act and was therefore subject to copyright law (Aspiras and Santos 272). This case makes the argument that a recipe can obtain copyright protection if the recipe is supplemented by the author "'with musing on the spiritual nature of cooking or reminiscences they associated with the wafting odors of dishes during preparation' or 'suggestions for presentation, advice in wines to go with the meal, or hints on place settings and appropriate music'" (qtd. in Aspiras and Santos 270). Although this supposed clarification of copyright law granted copyrights to the recipes in "Cowboy Chow," the recipes themselves were not the components of the work that mandated copyrights.

Recipes themselves do possess the merit to be copyrighted. Goldman believes, and rightfully so, that "food itself should be recognized as copyrightable" (172). He supports his claim with the idea that:

> …the recipe [is] the means by which a specific food can be "perceived, reproduced, or otherwise communicated." This would be similar to the manner in which musical works

> are copyrighted. Although a musical composition is fixed in a tangible medium like sheet music, the underlying musical work, not the sheet music is protected as a literary work. In a similar way, original food dishes could be considered the underlying protected expression, with the recipe being considered the fixed tangible medium. (qtd. in Goldman 172)

Following this logic, recipes are an "edible art form" of equal merit with musical scores, paintings, dramatic works, and literary masterpieces, and thus are subject to the same copyrights (Aspiras and Santos 276). Aspiras and Santos reiterate that the recipe is "a means for fixing the work into tangible medium of expression" and is, in this way, analogous to musical compositions (267-277). Unlike a painting or a novel, for example, musical works and culinary dishes do not exist continuously in and of themselves. Music does not simply continuously spout from instruments or speakers without interruption or direction. In the same way, culinary creations cannot just go on existing. Because of the nature of food, it will spoil or be consumed, and will only again come into being upon recreation. Due to this phenomenon, a means must exist to bring the dish back into existence, and this means is the dish's recipe, which following this logic must be protected by copyright laws just as any other created work.

The implementation and clarification of copyright laws which protect recipes have many practical values. Despite the fact that chefs and the culinary community have tended to "operate on an 'open source model' that encourages sharing, borrowing, and working off of each other's recipes," financial concerns, specifically regarding ownership of published works, have created the necessity for copyright awareness and legislative reform (Lawrence 204). One of the biggest problems facing chefs and restaurateurs in the digital age is the rise of food bloggers. These self-proclaimed "foodies" are lifting and posting recipes from other websites and cookbooks without

the authorization to do so. The blogging community is hurting websites such as Allrecipes and Epicurious which possess the right to allow viewers access to recipes from archives of food magazines such as Gourmet, Bon Appetit, and Self (Lawrence 202). Attributor Incorporation estimated that blogs and other such websites are responsible for an average loss of 400,000 to 800,000 views per month on Allrecipes and Epicurious. This means that Allrecipes lost about $3.1 million and Epicurious lost $1.6 million in the last year due to a significant decrease in site traffic (Lawrence 202-204).

Despite the push for a change in legislation, chefs maintain their desire to share recipes using outlets such as cookbooks, websites, and cooking shows. Chefs and restaurateurs are calling for a "uniform system that protects recipes, but has enough flexibility to maintain camaraderie in the cooking industry" (Lawrence 202). This new system would discourage stealing and prevent outside parties from publishing recipes that they do not own, with the possibility of making a profit (Lawrence 202). According to Louis Hendon, author of the article "The Definitive Guide to Copyrighting Recipes" featured in *Paleo Living Magazine*, more than anything, recipe authors are looking to be recognized, with proper attribution of recipes given to the respective authoring chef (Hendon 32). Within the cooking industry, codes and procedures have been put in place to respect the creations of others and curb the theft of intellectual property. The International Association of Culinary Professionals (IACP) put forth a Code of Ethics stating "its members shall 'Respect the intellectual property rights of others and not knowingly use or appropriate to [their] own financial or professional advantage any recipe or other intellectual property belonging to another without recognition'" (Goldman 179-180). Accomplished French chefs operate under a similar informal system of norms centering on morality, respect, and reputation. Three norms are obeyed ferociously by the majority of French

chefs, “First, a chef must not copy another chef’s recipe innovation exactly. Second, if a chef reveals a secret recipe to a colleague, that colleague must not reveal that information to others without permission. Third, chefs must credit the developer of a recipe or technique as the author of that creation” (Lawrence 208). Violation of any of these norms could result in a slandered reputation or excommunication from the culinary community. While these codes and norms prove sufficient in halting theft within the confines of an organization, these informal systems do not prevent recipe plagiarism among amateur chefs or on the internet (Lawrence 209-210).

For the average food blogger or home chef, rules must be established to prevent recipe plagiarism. The Food Blog Alliance has created their own rules for proper recipe attribution in order to be respectful of chefs and build amicability between recipe authors and the blogging community. The Food Blog Alliance outlines three rules as a means to properly attribute recipes, stating that bloggers should “(1) Use ‘adapted from’ if [they are] making a small modification to someone else’s recipe. (2) Use ‘inspired by’ if [they] are making a large modification to someone else’s recipe. (3) Call it [their] own if [they] change three or more ingredients (unless the original recipe was so unique that your recipe still looks pretty similar, in which case call it ‘inspired by’)” (qtd. in Hendon 35). If these rules are followed and perhaps website links or cookbook citations are included, and the blogger does not profit, then recipe authors are given credit for their creations. As Rebecca Butler points out in her article “Social Responsibility: Copyright and the Cookbook,” we must continue to be careful regarding the ownership of recipes. She takes the example of a community/school published cookbook made by compiling recipes from students (Butler 1-2). In this case the same rules should be followed as if the recipe were being blogged. If the recipe is not “an old family recipe” or is not an “original composition,” then the cookbook,

TV show, or chef from which it came must be properly attributed. This is simply a practice in morals and respect.

Morals and respect, however, only go so far; legislation must be created or altered to address recipe copyright in order to give chefs the credit that they deserve. According to Goldman, the easiest and most effective way to get the culinary arts out of the rain and under the umbrella of copyright protection is to recognize recipes as "literary works" (168). Under the current Copyright Act, "literary works" are defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or nonverbal symbols or indicia, regardless of the nature of the material, objects, such as books, periodicals, manuscripts, phone records, film, tapes, disks, or cards in which they are embodied" (qtd. in Goldman 168-169). Because recipes are works, expressed in words and numbers that are recorded and shared through print, websites and TV shows, they fall under the category of literary works as expressed by the qualifications of the "literary works" definition, and should therefore be treated as such.

Despite the fact that recipes can be adopted under the "literary works" category of the Copyright Act if it is agreed that they possess originality, due to the unique nature of the culinary environment, the laws for recipes must be edited and take into account a limited derivative right and the exclusive right to public performance. The restriction and incorporation of these rights will allow recipes to continue to be shared and built upon, while allowing chefs to be credited for their work. Aspiras and Santos argue that "Because of the saturated nature of the restaurant and food industry, independent creation is a highly likely occurrence, and distinctions are not to be made in terms of teaspoons or grains of salt" (264). It is for this reason that recipe authors would not be granted derivative rights to all manner of changes that could be made to their recipe. Due to the lack of this right the author would be protected "only against exact or almost exact copies

of his or her original work" (Goldman 180). In this way the author would be protected and the public or other chefs would still have the ability to create or change large portions of the recipe. The new author would even be able to claim ownership if they significantly changed their recipe to make it their own. The public performance right would also be beneficial to recipe authors and the culinary industry. The Copyright Act defines the terms of the public performance right clarifying that "to 'perform' is to recite, render, play, dance, or act it, either directly or by means of any device or process. To perform 'publicly' is to perform the work in a place open to the public or where a substantial number of people congregate" (Goldman 181). By this right, the author of a recipe would have the exclusive rights to present the recipe to an audience, in any way of his choosing, including cookbooks, websites, and TV programs. The public performance right clarifies that a recipe would belong to the author and the recipe would be conveyed to the public only in ways pleasing to the author. The Recipe Copyright system will work if these rights become part of copyright legislation, because the culinary industry will be able to maintain its integrity and chefs will receive recognition for their accomplishments.

In order to put this new recipe copyright law into place, a licensing system would have to be created and chefs would have to start applying to have their recipes copyrighted. The licensing system would work by charging a congressionally mandated, yet affordable fee for using a copyrighted recipe (Goldman 182). A performance-rights organization would be set up and would take responsibility for administering and collecting fees from chefs, restaurants, and other private organizations (Goldman 182). Some believe that this statutory license would end sharing among chefs; instead the industry's culture and creativity would increase and deepen as chefs push themselves to create their own recipes, when they would have otherwise borrowed from someone else without a second thought. As these licensing organizations are being created,

it is imperative that chefs "take seriously the possibility of protecting their recipes through legal copyright means" (Goldman 169). In order to protect their intellectual property, chefs would have to file registrations for their individual recipes and for their cookbooks as recipe compilations (Goldman 169). This process could at first be tedious as decades worth of recipes must be registered, but after the initial surge, this process will run smoothly and a large compilation of protected recipes will be created and maintained.

As is evidenced by past trials, the lack of legislation on recipe copyright is a growing problem, especially as the world delves further and further into the digital age. Recipe authors, more than anything, simply wish to be recognized for their creations and have no intention of halting the creative flow of ideas that is present within the culinary community. In order to satisfy both the needs of the authors and the desires of the public, it would be simplest and most beneficial to add recipes under the "literary works" category of the copyright law while stipulating that recipe authors do not have derivative rights while they may maintain public presentation rights.

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