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## 6. Copyright in culinary presentations

Cathay Y. N. Smith

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### 1. INTRODUCTION

The President's cake was a knock-off. After a turbulent election-season defined by personal attacks and character assassinations, the realization that the newly-elected President Trump's inaugural cake was an unauthorized exact duplicate of President Obama's inaugural cake was 'icing on the cake' for many people in the United States. Chef Duff Goldman, the original creator of President Obama's inaugural cake and star of the reality TV show *Ace of Cakes*, took to Twitter to vent his frustration. He posted a photo of the cake he created next to its copy (pictured below) with the caption, 'The cake on the left is the one I made for President Obama's inauguration 4 years ago. The one on the right is Trumps. I didn't make it' (Figure 6.1).<sup>1</sup>

Over six thousand people commented on Goldman's tweet, which was retweeted over 130,000 times, liked by over 280,000 people, and picked up by media outlets such as the Washington Post, Jezebel, Slate, Huffington Post, Fox News, CNN, USA Today, and People Magazine. According to media reports, Trump's staff members brought a photo of the cake Goldman created for President Obama's inauguration to Buttercream Bakeshop, a bakery in Washington D.C., and asked it to replicate the cake.<sup>2</sup> When the bakery asked whether it should use the photo as inspiration instead of creating an exact duplicate of the original cake, Trump's staff purportedly said that they 'want[ed] this exact cake'.<sup>3</sup> And the exact cake is what they got.

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<sup>1</sup> See Duff Goldman, Twitter (9:22 PM, January 20, 2017), <https://twitter.com/duffgoldman/status/822675780341641216>; both quote and image.

<sup>2</sup> Amy B Wang and Tim Carman, Trump's Inaugural Cake was Commissioned to Look Exactly like Obama's, Baker Says, *The Washington Post* (January 22, 2017), [https://www.washingtonpost.com/news/food/wp/2017/01/21/trump-had-a-huge-luxurious-inauguration-cake-was-it-plagiarized/?utm\\_term=.9933d6123809](https://www.washingtonpost.com/news/food/wp/2017/01/21/trump-had-a-huge-luxurious-inauguration-cake-was-it-plagiarized/?utm_term=.9933d6123809).

<sup>3</sup> Ibid.



Figure 6.1 Twitter post photo of original cake and inauguration cake

This is not the first time a chef has been caught ripping off another chef's creations, and it will not be the last time a chef copies or reuses another's culinary presentation.<sup>4</sup> The culinary industry has traditionally operated

<sup>4</sup> See, for instance, the publicized instance of Chef Robin Wickens of Interlude (Melbourne) copying culinary presentations created by Chefs Grant Achatz, Wylie

in a low-intellectual-property environment. This is the case not only because there are limited intellectual property protections available to chefs, but also because chefs have long adhered to and understood the culture of sharing and hospitality in the cuisine industry. Most chefs recognize that '[t]he world's culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks'.<sup>5</sup> For instance, when Christopher Buccafusco interviewed a number of celebrity chefs about borrowing each other's recipes, techniques, or even culinary presentations, many chefs expressed ease with the idea that their creations may be borrowed or used by other chefs,<sup>6</sup> and some chefs even noted that their own creations could have been inspired by other culinary creations of the past.<sup>7</sup> Nevertheless, this culture of sharing in the cuisine industry may be changing. In light of the recent U.S. Supreme Court decision, *Star Athletica, L.L.C. v. Varsity Brands, Inc.* (discussed more fully below), culinary presentations now may be eligible for copyright protection, giving chefs a colorable claim against each other for copying culinary creations. Additionally, because diners now have access to smart phone cameras and social media platforms, chefs' blatant copying of other chefs' culinary presentations, techniques, or recipes are much more easily detected, such as the incident with the Presidential Inaugural Cake recounted at the beginning of this chapter.

This chapter explores culinary presentations and copyright law. In the past, articles have explored intellectual property law in recipes, or surveyed intellectual property law in food plating, including trade dress,

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Dufresne, and Joe Andres: Sincerest Form, eGForums: a service of the soc'y of culinary arts and letters (March 20, 2006, 12:44 AM), at <http://forums.egullet.org/topic/84800-sincerest-form/>.

<sup>5</sup> Ferran Adria, Heston Bulmental, Thomas Keller and Harold McGee, Statement on the New Cookery, *The Guardian* (December 9, 2006), <https://www.theguardian.com/uk/2006/dec/10/foodanddrink.obsfoodmonthly>.

<sup>6</sup> Christopher J. Buccafusco, On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?, 24 *Cardozo Arts & Ent. L. J.* 1121, 1152 (2007) (interviewing a number of high-profile chefs: Thomas Keller: 'We're in the hospitality industry . . . We're innately hospitable, so why wouldn't you want to share? . . . I share my restaurant [and] my food'; Van Aken: 'Most chefs are sharing and caring individuals that tolerate quite a bit' and 'I write cook books and teach classes so folks will use my recipes').

<sup>7</sup> Buccafusco, *supra* note 6, at 1152 (Thomas Keller acknowledging that chefs are inspired by past creations: 'Look at the [salmon] cornets for example. Where did it really come from? . . . Did I really invent it? Did I create it? Or was it an inspiration from an ice cream cone that I just looked at differently? . . . Do I have the right to say that this is mine and nobody else's? I don't know . . .').

copyright, and design patents.<sup>8</sup> This chapter's focus is narrower. It will specifically examine copyright protection of culinary presentations, which are the creative designs, plating, or presentations of food to be eaten, with an up-to-date analysis of this issue in light of the recent U.S. Supreme Court's decision on copyright of useful articles in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*<sup>9</sup> To explore copyright in culinary presentations and illustrate the copyright hurdles for culinary presentations, this chapter uses examples of three different styles of culinary presentations as case studies: Goldman's presidential inaugural cake, Thomas Keller's famous Salmon Cornets, and a traditional bowl of Vietnamese Pho. These three culinary presentations are each described in more detail below. As the analyses below show, each of these culinary presentations face unique challenges under copyright law.

## 2. THE THREE CULINARY PRESENTATIONS

To illustrate copyright law's limitation on cuisine, this chapter analyzes three distinct categories of culinary presentations. The first is cake design. Gone are the simple cylindrical baked doughs covered in icing – cakes nowadays can be created to look like anything. There are cakes designed to look like fish tanks, cakes designed to look like buildings, cakes designed to look like animals, ships, flowers, footballs, and even characters from movies. Cake designs have become so creative and have so thoroughly captured the imagination of the public that there are more than a handful of reality television shows dedicated to cake design alone.<sup>10</sup> The cake design this chapter focuses on is Goldman's cake

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<sup>8</sup> See, e.g., Malla Pollack, Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal, 12 *Cardozo L. Rev.* 1477 (1991); Buccafusco, *supra* note 6; J. Austin Broussard, An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation, 10 *Vand. J. Ent. & Tech. L.* 691 (2008); Emmanuelle Fauchart and Eric von Hippel, Norms-based Intellectual Property Systems: The Case of French Chefs, MIT Sloan Research Paper No. 4576-06 (2006); Emily Cunningham, Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?, 9 *J. High Tech. L.* 21 (2009); Cathay Smith, Food Art: Protecting Food Presentation Under U.S. Intellectual Property Law, 14 *J. Marshall Rev. Intell. Prop. L.* 1 (2014).

<sup>9</sup> 137 S.Ct. 1002 (2017).

<sup>10</sup> See, e.g., *Ultimate Cake Off* on TLC, *Cake Boss* on TLC, *Cupcake Wars* on Food Network, *Ace of Cakes* on Food Network, *Amazing Wedding Cakes* on WE, *DC Cupcakes* on TLC, and *Last Cake Standing* on Food Network.

created for President Obama's inauguration (hereinafter, 'Goldman's Cake'). Goldman's Cake is designed with nine cylindrical tiers in a patriotic red, white, and blue theme. The bottom tier of the cake is the widest, and is decorated in red vertical stripes on a metallic background. The second tier is white and decorated with gold-leaf applique-like frosting, red, white, and blue bunting, and a circular seal of President of the United States. The third tier is thin, and created to look like a baby-blue cake stand emblazoned with silver stars. The cake has a thick fourth tier in sky-blue decorated with five silver coins engraved with military seals. Sitting on the fifth tier, which is another baby-blue, silver-star cake stand, is a thin white-silver sparkling tier, and a blue, unadorned, wider tier of cake. Two navy-blue tiers balance at the top of the cake adorned with sparkling silver five-point cut-out stars. These silver stars are secured on the cake by thin stems sticking out of the top two tiers to look like the stars are floating above the cake.

The second type of culinary presentation this chapter will analyze is artistic cuisine created by chefs for diners at celebrity or avant-garde restaurants.<sup>11</sup> These chefs design artistic dishes with elaborate color and texture combinations and creative layering and arrangement of ingredients.<sup>12</sup> These dishes are then prepared for diners with each ingredient placed on the plate with artistic precision and perfection. One of celebrity chef Thomas Keller's (The French Laundry, Per Se, and the Bouchan Franchise) most famous dishes is the salmon cornet (hereinafter, 'Keller's Salmon Cornets'). Keller's Salmon Cornets consist of a cone-shaped black sesame tuile filled with a pink scoop of salmon roe and sweet red onion cr me fraiche, topped with salmon tartare.<sup>13</sup> The cones are typically served in a standing rack, where each cone is fitted – pointy-side down – into perfectly-shaped holes to allow the cones to remain free-standing for serving.<sup>14</sup> Keller's Salmon Cornets, or at least knock-offs of them, have become a ubiquitous appetizer served at weddings or corporate functions.

Finally, the third type of culinary presentation this chapter will consider is a traditional food preparation – specifically, a bowl of Vietnamese Pho noodles ('Pho'). Pho is traditionally served in a large cylindrical bowl, and consists of off-white rice noodles and thinly sliced meat and meat balls served in light brown broth. The bowl of noodles is typically served with a

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<sup>11</sup> Traditionally defined by large plates with artistically styled miniscule amounts of food.

<sup>12</sup> Smith, *supra* note 8, at 5.

<sup>13</sup> See Smith, *supra* note 8, at 6–7.

<sup>14</sup> *Ibid.*

side plate of herbs and spices, such as basil leaves, bean sprouts, cilantro, and lime for diners to add to their noodles and broth. Although Pho originated in Vietnam, it has become quite popular outside of Vietnam, and is now served at trendy restaurants such as Pho Soho in London.

### 3. ARE CULINARY PRESENTATIONS PROTECTED UNDER COPYRIGHT LAW?

To determine whether copyright law would protect the presentation of Goldman's Cake, Keller's Salmon Cornets, or Pho, we must first look at what copyright law protects and what it means for a work to be protected by copyright. In the United States (U.S.), copyright law protects original works of authorship fixed in any tangible medium of expression.<sup>15</sup> Specifically, to be eligible for copyright, a work must be original, it must be a work of authorship, and it must be fixed. There is no requirement to register the work with the U.S. Copyright Office or to provide any notice of copyright (©) for protection. Once a piece of work is fixed, it is automatically protected under copyright law for the author's life plus 70 years. Even though it is easy for expressive works to qualify for copyright, copyright law does preclude certain works from protection. For instance, copyright law does not protect useful articles, which are 'object[s] having . . . intrinsic utilitarian function[s] that [are] not merely to portray the appearance of the article or to convey information', such as bicycle racks, clothing, furniture, or dinnerware.<sup>16</sup> In spite of this preclusion, copyright law may still protect the pictorial, graphic, or sculptural features on a useful article if those features may be 'identified separately from, and . . . exist independently of, the useful article'.<sup>17</sup> Once an author's work is protected under copyright law, that author may prevent anyone else from reproducing the work, preparing derivatives of the work, publicly distributing copies of the work, or displaying the work publicly. The sections below explore how U.S. copyright law treats culinary presentations, and specifically analyzes whether Goldman's Cake, Keller's Salmon Cornets, and Pho may qualify as copyrightable works.

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<sup>15</sup> 17 U.S.C. § 102.

<sup>16</sup> Definition of Useful Articles, U.S. Copyright Office, <https://www.copyright.gov/register/va-useful.html> (last visited September 30, 2017).

<sup>17</sup> *Ibid.*

### 3.1 The Work of Authorship Requirement

As a preliminary matter, to be eligible for copyright protection, a work must be a work of authorship. Copyright law does not protect ideas or concepts, nor does it protect inventions. Examples of works of authorship include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audio visual works, sound recordings, and architectural works.<sup>18</sup> Culinary presentations, technically, would qualify as sculptural works, which embody three-dimensional works of fine, graphic, and applied art. The Copyright Act does not dictate the medium necessary to create a sculptural work. Therefore, a sculpture carved from stone is not more entitled to be a sculpture than one carved from zucchini. Similarly, a sculpture created with cake and frosting is no less a sculpture than one created with ceramic. Indeed, several scholars have argued that chefs do, in fact, create legitimate ‘art’ with their design of culinary presentations where those presentations incorporate ‘patterns of harmonious or contrasting flavors, textures, colors and plating arrangements that are intended to stimulate [diners’] aesthetic sense’, just like traditional art.<sup>19</sup> And like museums visitors who view traditional artworks, diners in turn enjoy their meals by ‘act[ing] as art critics when they contemplate their dishes and appreciate them as visual and flavorful expressions of art’.<sup>20</sup> In fact, the U.S. Supreme Court has granted certiorari to hear a legal case on whether cake design is artistic expression, entitling a baker to claim that he has the freedom to create or not create custom cake designs for certain customers.<sup>21</sup> Regardless of whether culinary presentations could be considered art protected under the freedom of expression, culinary presentations have no problem meeting copyright law’s work of authorship requirement as a sculptural work.

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<sup>18</sup> 17 U.S.C. § 102.

<sup>19</sup> Broussard, *supra* note 8, at 718; see also Pollack, *supra* note 8; Elizabeth Telfer, Food as Art. In *Food for Thought: Philosophy and Food* (Routledge, 1996) 41–60; Jacquelyn Strycker, From Palate to Palette: Can Food be Art?, Createquity (January 7, 2013), <http://createquity.com/2013/01/from-palate-to-palette-can-food-be-art/>; Jason Farago, Chef Ferran Adria and the Problem of Calling Food Art, BBC Online (January 14, 2014) (The Drawing Center in Soho exhibited the work of Ferran Adria, chef of El Bulli).

<sup>20</sup> See Broussard, *supra* note 8, at 718.

<sup>21</sup> See Adam Liptak, Cake is His ‘Art.’ So Can He Deny One to a Gay Couple?, New York Times (September 16, 2017), <https://www.nytimes.com/2017/09/16/us/supreme-court-baker-same-sex-marriage.html>.

### 3.2 The Originality Requirement

A possible hurdle to protecting culinary presentations under copyright law is the originality requirement. Copyright law only protects original works of authorship, which means the work must be independently created and exhibit at least a modicum of creativity.<sup>22</sup> Even though the standard for originality is low, it does exist.<sup>23</sup>

Some culinary presentations may have difficulty meeting the originality standard because of the culinary industry's norms and ethos of sharing, re-using, and borrowing, which traditionally encouraged chefs to use other chefs' creations and even build upon them.<sup>24</sup> Many of the culinary creations chefs create today are based on or at least inspired by past creations. Because these culinary creations are often based on past creations or at least borrow elements from other chefs' creations, they may not be considered 'independently' created. For instance, when asked about his famous Salmon Cornets, Keller explained 'Look at the [salmon] cornets for example. Where did it really come from? . . . Did I really invent it? Did I create it? Or was it inspiration from an ice cream cone that I just looked at differently?'<sup>25</sup> Cake designs also borrow from past designs. For instance, the multi-tiered cylindrical cake has been around since medieval England, where small spiced buns of cake were stacked on top of each other, creating a towering pile of cake, challenging a new bride and groom to kiss over the tiers.<sup>26</sup>

The most obvious example of a culinary presentation that would likely fail to meet copyright's originality standard is the Pho. The current iteration of Pho – light brown broth served with off-white rice noodles, thinly sliced meat and meatballs, basil and garnishes – can be traced back to the late 1880s when the French colonized Vietnam.<sup>27</sup> Even though Pho has since evolved, its basic ingredients are typically retained.<sup>28</sup> Pho

<sup>22</sup> 17 U.S.C. § 102.

<sup>23</sup> *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 362 (1991).

<sup>24</sup> See Smith, *supra* note 8, at 23–4; Buccafusco, *supra* note 6, at 1151–6 (discussing the 'culture of sharing and non-legal norms' by chefs).

<sup>25</sup> Buccafusco, *supra* note 6, at 1152.

<sup>26</sup> Carol Wilson, *Wedding Cake: A Slice of History*, 5 *Gastronomica: The J. of Critical Food Studies* 2 (May 5, 2005), <https://gastronomica.org/2005/05/05/wedding-cake-a-slice-history/>.

<sup>27</sup> *The History and Evolution of Pho: A Hundred Years' Journey*, LovingPho.com (April 8, 2009), <http://www.lovingpho.com/pho-opinion-editorial/history-and-evolution-of-vietnamese-pho/>.

<sup>28</sup> *Ibid.*

served at trendy Pho Soho, for instance, is described as ‘an aromatic and delicious rice noodle soup served with a side plate of fresh herbs’ in a bowl with thinly sliced meat and beef meatballs.<sup>29</sup> Chefs may attempt to personalize their own offerings of Pho, such as by including novel ingredients like sliced peppers, roasted garlic, or mushrooms, but these incremental changes to the underlying Pho presentation are not likely to be independently copyrightable or create new copyrightable derivatives. Indeed, one of the few cases in the U.S. to analyze culinary presentations and copyright law was *Kim Seng Company v. J&A Importers, Inc.*, which found a traditional bowl of Asian noodles to lack originality and the minimal creativity threshold for copyright eligibility.<sup>30</sup> In *Kim Seng Company*, the plaintiff hired an employee to arrange a bowl of Asian noodles for a photograph that was placed on the plaintiff’s packaging materials. The employee created a bowl of noodles topped with egg rolls, grilled meat, and other garnishes.<sup>31</sup> To create the perfect presentation, the employee ‘chose the foods out of thousands of possibilities, and directed their arrangement to be in a certain fashion out of infinite possibilities’.<sup>32</sup> When defendant, a competing Chinese-Vietnamese food supply company, used a photograph of an almost identical bowl of Asian noodles on the packaging of its own product, the plaintiff sued the defendant for infringing the plaintiff’s copyright in the underlying bowl of food ‘sculpture’.<sup>33</sup> The court in *Kim Seng Company* was not persuaded that the combination of a common bowl with the contents of a common Asian dish met the originality requirement of copyright.<sup>34</sup> In fact, the court in *Kim Seng Company* went further to explain that, ‘regardless of which angle, quantity, or positioning of the various food items [the plaintiff] utilized, the unprotectable nature of the ingredients indicates a lack of originality’.<sup>35</sup>

Even if the individual elements in a culinary presentation – such as a common bowl, an ice cream cone, or a multi-tiered cake – may not satisfy the originality requirement for copyright, the original selection, arrangement, and combination of unprotectable elements could be

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<sup>29</sup> Pho Soho Menu, [http://www.phocafe.co.uk/wp-content/uploads/2017/06/Pho\\_Menu\\_Main\\_web.pdf](http://www.phocafe.co.uk/wp-content/uploads/2017/06/Pho_Menu_Main_web.pdf) (last visited September 26, 2017).

<sup>30</sup> 810 F. Supp.2d 1046, 1053-54 (C.D. Cal. 2011).

<sup>31</sup> *Ibid.* at 1050.

<sup>32</sup> *Ibid.* at 1053.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 1053.

eligible for copyright protection as a compilation.<sup>36</sup> In other words, if a chef selects and arranges the ingredients or elements of her cuisine in an original and creative way, that original and creative arrangement may be eligible for copyright protection as a compilation, even if the chef cannot prevent others from using the underlying ingredients or elements in their dishes. For instance, although Keller's Salmon Cornets may have been inspired by a common ice cream cone, his creative selection of the tuile cone combined with a scoop of salmon roe and sweet red onion crème fraiche topped with salmon tartare arranged on a standing rack may make the Salmon Cornets original enough that their compilation constitutes an original work of authorship. Keller would not be able to prevent anyone else from offering salmon tartare served in a bowl with crackers to dip or spread individually on crackers or even served in circular tuile cups. He may, however, be able to prevent another chef from copying his unique and original compilation under copyright law. Similarly, individual features of Goldman's Cake – such as the cylindrical tiers, the floating stars, the colorful stripes or bunting – may not be protectable under copyright law because they do not meet the originality standard. Goldman's unique arrangement of those unprotectable features could, as a whole, make his cake eligible for copyright protection as a compilation. On the other hand, if the selection, coordination, and arrangement of a culinary presentation is entirely typical, then it would not satisfy the originality standard. For instance, Pho is traditionally defined by thin off-white noodles in light-brown broth, topped by thinly sliced meat, meat balls, and herbal garnishes. These ingredients are almost always served and displayed in the same way. Regardless of the position of the ingredients, or the angle at which each ingredient is placed, there are only so many ways to arrange the same ingredients in a bowl, so that none of those ways would likely be original enough to constitute an original work of authorship.<sup>37</sup>

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<sup>36</sup> *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003); see also *Feist Publication, Inc.*, 499 U.S. at 362 (analyzing whether Rural selected, coordinated, or arranged uncopyrightable elements in an original way); *Belford v. Scribner*, 144 U.S. 488 (1892) (finding original compilations of unprotected recipes in *Common Sense in the Household: A Manual of Practical Housewifery*, by Marion Harland to be protected under copyright law).

<sup>37</sup> The 'merger doctrine' holds that 'if an idea and the expression of the idea are so tied together that the idea and its expression are one – there is only one conceivable way or a drastically limited number of ways to express and embody the idea in a work – then the expression of the idea is uncopyrightable because ideas may not be copyrighted'. Michael D. Murray, Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works, 58 *Baylor*

### 3.3 The Fixation Requirement

Copyright law requires a work to be fixed in a tangible medium to be eligible for protection.<sup>38</sup> Fixed in a tangible medium means that the work is ‘sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration’.<sup>39</sup> The U.S. Copyright Act (‘Act’) does not dictate the medium in which the work must be fixed, in fact, ‘any tangible medium of expression, now known or later developed’, may satisfy the fixation requirement.<sup>40</sup> This broad allowance helps to ‘avoid the artificial and largely unjustifiable distinctions . . . under which statutory copyrightability in certain cases [was] made to depend upon the form or medium in which the work is fixed’.<sup>41</sup>

One court has challenged food’s ability to be considered fixed in a tangible medium. Specifically, in *Kim Seng Company v. J&A Importers*, the court found the bowl of Asian noodles, which the plaintiff’s employee created with perishable food, to lack fixation for purposes of copyright law.<sup>42</sup> In coming to its decision, the court relied on the U.S. Court of Appeals for the Seventh Circuit’s decision in *Kelley v. Chicago Park District*.<sup>43</sup> In *Kelley*, the Seventh Circuit held that Kelley’s ‘artistically arranged garden’ did not meet copyright law’s fixation requirement because it was ‘not stable or permanent enough’ to be a work of fixed authorship.<sup>44</sup> Analogizing the living garden in *Kelley* to the perishable bowl of food in *Kim Seng Company*, the court stated, ‘[l]ike a garden, which is “inherently changeable,” a bowl of perishable food will, by its terms, ultimately perish. Indeed, if the fact that the Wildflower Works garden reviving itself each year was not sufficient to establish its fixed nature, a bowl of food which,

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L. Rev. 779 (2006); but see *Kim Seng Co.*, 810 F.Supp.2d at 1055 (acknowledging that the employee who selected and arranged the ingredients in the original bowl of food sculpture may have ‘demonstrate[d] sufficient creativity to surpass the low threshold established in *Feist*’, but denying copyright protection to the bowl-of-food sculpture because of failure to meet the originality and fixation requirements).

<sup>38</sup> 17 U.S.C. § 102.

<sup>39</sup> 17 U.S.C. § 101.

<sup>40</sup> 2 *Patry on Copyright* § 3:22.

<sup>41</sup> *Ibid.* (quoting *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 703 n. 18; H.R. Rep. No. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665).

<sup>42</sup> *Kim Seng Co.*, 810 F. Supp.2d at 1053–5.

<sup>43</sup> *Ibid.* at 1054; *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011).

<sup>44</sup> *Kim Seng Co.*, 810 F. Supp.2d. at 1054.

once it spoils is gone forever, cannot be considered ‘fixed’ for the purpose of [the Act].<sup>45</sup> This seemed to create a new standard for copyright law’s fixation requirement – that in order to be fixed, the work must not be perishable. This new standard, however, is not in the Act, nor has it been applied by many other courts. In fact, the *Kim Seng Company* court’s requirement that the work not be perishable seems to directly contradict the Act’s definition of ‘fixed’ in a tangible medium, which merely requires that the work be ‘sufficiently permanent or stable . . . for a period of more than transitory duration’.<sup>46</sup> The Act does not require the work to be permanent, or sufficiently permanent for the duration of the copyright, or even sufficiently stable for a full day (or two days if refrigerated). The *Kim Seng Company* court’s decision also seems to carve out one type of medium – perishable materials – from being considered a ‘tangible medium’ for copyright eligibility. This also contradicts the Act’s broad acceptance of ‘any tangible medium of expression, now known or later developed, which can be perceived, reproduced, or otherwise communicated’ to satisfy fixation.<sup>47</sup> Not surprisingly, scholars have criticized the *Kim Seng Company* decision. For instance, Zahr Said criticizes the court’s requirement for permanent fixation because, contrary to the court’s reasoning, ‘the fixation requirement does not require permanence, or even that a fixed work last very long’.<sup>48</sup> Megan Carpenter finds the *Kim Seng Company* decision and court’s reasoning inapt because ‘copyright protection does not degrade in conjunction with the degradation of its subject works’; in other words, even where a work is later destroyed, it is still subject to copyright protection and does not fall into the public domain merely because the physical embodiment is destroyed.<sup>49</sup>

On the other hand, there are complications with finding works to be fixed for copyright purposes when they are designed to be destroyed. For instance, artist Felix Gonzalez-Torres’s work, *Untitled (Portrait of Ross in L.A.)*, which has been exhibited in The Art Institute of Chicago and most recently at the Met Breuer, consists of a 175 pound pile of candy on the ground, from which museum visitors are encouraged to take pieces.<sup>50</sup> Torres’s work symbolizes the process by which the artist’s late partner

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<sup>45</sup> Ibid. at 1054.

<sup>46</sup> 17 USC § 101.

<sup>47</sup> 17 USC § 102.

<sup>48</sup> Zahr K. Said, *Copyright’s Illogical Exclusion of Conceptual Art*, 39 Colum. J.L. & Arts 335, 344 (2016).

<sup>49</sup> Megan Carpenter, *If It’s Broke, Fix It: Fixing Fixation*, 39 Colum. J.L. & Arts, 355, 360 (2016).

<sup>50</sup> Stephanie Eckardt, *The New Met Breuer Wants You to Take Candies*,

slowly faded away and died from complications from AIDS.<sup>51</sup> Torres's work could, theoretically, be considered one large culinary presentation. But is Torres's work fixed in a tangible medium? If so, when is it fixed? When the pile of candy is first displayed in a museum? When the first museum patron takes a piece? When the pile of candy is half-way gone? All of the above? Culinary presentations, which are created to be eaten or are destined to perish, suffer the same fixation questions. Nevertheless, in spite of the contrary case law on the issue, most culinary presentations – unless the presentation incorporates an unstable or impermanent performance – are fixed for at least a period more than transitory duration when they are first created, and would technically be considered fixed under current copyright standards.

### 3.4 Useful Articles Exception and Separability: *Pre-Star Athletica, L.L.C. v. Varsity Brands, Inc.*

The most difficult hurdle to protect culinary presentations under copyright law in the past has been the useful articles exception. Copyright law in the U.S. does not protect 'useful articles', which are articles 'having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information'.<sup>52</sup> Even though chefs may create art through their culinary presentations, the food they serve ultimately serves a utilitarian purpose. Some authors have claimed that this utilitarian purpose is caloric intake.<sup>53</sup> This chapter, however, takes a broader view of the utilitarian purpose of culinary creations – which is to be edible and eaten. In either case, whether the utilitarian purpose of culinary presentations is to be edible and eaten or purely for caloric intake, there is no dispute that culinary presentations are considered useful articles.

Useful articles themselves are not protected by copyright law, but pictorial, graphic, or sculptural features ('design features') that can be 'identified separately from, and that can exist independently of, the utilitarian article' may be eligible for copyright protection.<sup>54</sup> For instance, in the U.S. Supreme Court's decision *Mazer v. Stein*, the plaintiff designed

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Not Photos, W Magazine (March 13, 2016), <https://www.wmagazine.com/story/felix-gonzalez-torres-candy-the-met-breuer>.

<sup>51</sup> Ibid.

<sup>52</sup> 17 USC § 101.

<sup>53</sup> Buccafusco, supra note 6, at 1139 (finding food's utilitarian purpose to fulfill the 'basic need to provide calories').

<sup>54</sup> U.S. Copyright Office, supra note 16.

and created sculptures of dancing figures out of clay to use as table lamp bases. The plaintiff used these sculptures as molds to create ceramic table lamp bases by adding a lamp shade, electric wiring, and sockets to the sculptures.<sup>55</sup> The plaintiff sold the sculptures as lamp bases and separately and independently as sculptures.<sup>56</sup> The Court found the dancing figure sculptures had the ability to be separable from their utilitarian function, and the separable sculptures individually met all of the copyright requirements. Therefore, because the sculptures were protected by copyright law, the plaintiff in that case was able to enjoin a competitor from creating lamps with the same sculptural base.

For a long time, the test to determine separability had been one of the oldest circuit splits in copyright law. Courts struggled to articulate clear doctrines to determine when a useful article may have design features that are separable from the underlying useful article and, therefore, copyrightable. For instance, courts in the past held that there were two ways of determining whether design features are separable – physical separability and conceptual separability. If a pictorial, graphic, or sculptural feature may be physically separated from the underlying utilitarian article, and that separated design feature meets all of the copyright requirements, it is eligible for copyright protection if it leaves the underlying utilitarian aspects of the article intact. The classic example of physical separability is a decorative hood ornament on a car. Cars are useful articles. A decorative hood ornament, which is a sculptural feature, may be physically removed from the car without jeopardizing the underlying utilitarian aspects of the car. If that separated hood ornament independently meets the standards of copyright, it may be protected under copyright law.

Even if the design features of a useful article could not be physically separated from the underlying utilitarian article, if they could be conceptually separated, those features were still eligible for copyright protection. The test to determine conceptual separability, however, was confusing. Not only were there significant splits between different jurisdictions on how to determine when design features may be conceptually separable from an underlying useful article, sometimes courts in the same jurisdiction would apply different standards. For instance, the U.S. Court of Appeals for the Second Circuit alone articulated three different tests to determine conceptual separability: one examined whether design features on a useful article were primary and utilitarian features subsidiary; another examined

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<sup>55</sup> *Mazer v. Stein*, 347 U.S. 201, 202 (1954).

<sup>56</sup> *Ibid.* at 203.

whether the article ‘stimulated in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function’; and a third case applied Robert Denicola’s test, which examined whether the design features on the useful article were animated by functional considerations.<sup>57</sup> Other jurisdictions applied their own tests, including examining whether the useful article ‘would still be marketable to some significant segment of the community simply because of its aesthetic qualities’, or whether the design features of a useful article ‘can stand alone as a work of art traditionally conceived’.<sup>58</sup>

Under the tests recounted above, design features in culinary presentations would not likely be physically or conceptually separable from their underlying utilitarian purpose. As a preliminary matter, culinary presentations do not typically have design features that are physically separable from the underlying useful article. Even if certain design features may be physically separable, they may not be independently copyrightable, nor would protection of those separated features protect the culinary presentation as a whole – which would be the goal for chefs or creators of culinary presentations. For instance, in a bowl of Pho, all of the ingredients in the culinary presentation are created and chosen for their edible qualities, and none are physically separable from that utilitarian function. The only aesthetic feature of Pho that may be physically separated is the bowl containing the ingredients, but the bowl itself would also be a useful article not subject to protection.<sup>59</sup> Even if the bowl itself may be protected under copyright law, that would not achieve the goal of protecting the culinary presentation. Similarly, all of the features that make up Keller’s Salmon Cornets are also useful articles that are not separable from their underlying utility – which is to be edible and eaten. Even the inedible rack on which the salmon cornets are served is a useful article created to hold the cornets upright. Finally, certain aspects of Goldman’s Cake may be physically separable from the underlying edible cake, such as the inedible floating cut-out stars pinned on the cake. Nevertheless, the silver-colored

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<sup>57</sup> *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980); *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985); *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1143 (2d Cir. 1987).

<sup>58</sup> 1 *Nimmer on Copyright* § 2.08[B][3], at 2-101 (2004); 1 Paul Goldstein, *Copyright* § 2.5.3, at 2:67 (1996).

<sup>59</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (‘Of course, to qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot itself be a useful article or “[a]n article that is normally a part of a useful article” (which is itself considered a useful article)’).

five-pointed stars would not be independently copyrightable because they lack originality.

Similarly, culinary presentations would not meet any of the conceptual separability tests. They would not meet any of the Second Circuit's tests: the design features on culinary presentations are likely subsidiary to the utilitarian features – the taste and edibility of the ingredients; culinary presentations typically stimulate the utilitarian concepts of food and calories to consumers; and culinary presentations are necessarily animated by functional considerations – such as the flavors and tastes of the combination of ingredients.<sup>60</sup> They would not meet the other jurisdictions' tests either: if they are not edible, culinary presentations would not generally be 'marketable to some significant segment of the community'; and the design features of culinary presentations could not 'stand alone as a work of art traditionally conceived'. Indeed, the court in *Kim Seng Company* agreed that, at least in regards to a bowl of traditional Asian noodles, the sculptural features of the culinary presentation 'cannot be conceptually separated from their utilitarian function, which is to be eaten'.<sup>61</sup>

### 3.5 Useful Articles and Separability: *Post-Start Athletica, L.L.C v. Varsity Brands, Inc.*

Lower courts carried on with these various tests and standards to determine separability until March 22, 2017 when the U.S. Supreme Court issued its opinion in *Star Athletica, L.L.C. v. Varsity Brands, Inc.* The Court's opinion in *Star Athletica, L.L.C.* attempted 'to resolve widespread disagreement over the proper test' to determine separability by setting forth a two-part test for determining when design features of useful articles may be protected under copyright.<sup>62</sup> In its opinion, the Court first rejected the traditional distinction between 'physical' and 'conceptual' separability because, according to the Court, 'separability does not require

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<sup>60</sup> Some commentators would disagree with this analysis, including Buccafusco, *supra* note 6, at 1138 (arguing that 'in many dishes, the caloric content of the food is secondary to the chef's creative expression. The primary purpose of the chef creating the dish or the diner consuming it may have very little to do with filling the belly' and that 'consumers are readily able to consider a dish's taste and expressiveness separately from any nutrition that they may derive from it'); Naomi Straus, Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry, 60 UCLA L. Rev. 182, 212 (2012) ('courts should easily be able to conceptually separate plating from the functional content of the dish, as plating does not reveal or affect (significantly) the flavors or caloric content of the dish').

<sup>61</sup> *Kim Seng Company*, 810 F.Supp.2d at 1053.

<sup>62</sup> *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1007 (2017).

the underlying useful article to remain'.<sup>63</sup> In other words, the Court rejected the requirement that in order to find separability, once the design features of an article are separated from the underlying useful article, the underlying article must retain its utility. Instead, the Court articulated a two-prong test to determine when a design feature incorporated into a useful article may be eligible for copyright protection:

(1) if the [design] feature can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) if the [design] feature would qualify as a protectable pictorial, graphic, or sculptural work – either on its own or fixed in some other tangible medium of expression – if it were imagined separately from the useful article into which it is incorporated.<sup>64</sup>

In *Star Athletica, L.L.C.*, the designer and marketer of cheerleading uniforms, Varsity Brands, acquired copyright registrations for certain geometric designs appearing on its cheerleading uniforms, including combinations and arrangements of chevrons, curves, stripes, angles, diagonals, coloring, and shapes.<sup>65</sup> A competitor, Start Athletica, copied five of Varsity Brands's designs on its own cheerleading uniforms and Varsity Brands sued for copyright infringement.<sup>66</sup> The Court found cheerleading uniforms to be useful articles. However, because the combinations and arrangement of the design features on the uniforms had pictorial and graphic qualities and, according to the Court, those features could be eligible for copyright protection if they were applied to another medium, the Court found the combinations and arrangements of the designs to be separately protected by copyright law. The Court's new test has not yet been applied to culinary presentations, but its application could result in an increase in protection of culinary presentations under copyright law, albeit on a case-by-case basis.

Specifically, to satisfy the Court's first prong of its test, a 'decision maker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities'.<sup>67</sup> Take, for example, Keller's Salmon Cornets. Could a decision maker, looking at Keller's Salmon Cornets, spot some three-dimensional element that appears to have sculptural qualities? Certainly. To claim that there are no sculptural qualities in Keller's Salmon Cornets would likely run afoul of Justice Holmes's famous warning, that 'it would be a

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<sup>63</sup> Ibid. at 1014.

<sup>64</sup> Ibid. at 1007.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid. 1010.

dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [artistic merit].<sup>68</sup> This first prong of the Court's test, as the Court itself acknowledged, is 'not onerous' and is easy to meet.<sup>69</sup> In fact, it is so easily met that some argue that it does not create any hurdles for a creator to overcome. For instance, using Marcel Duchamp's 'readymades' art series as an example, in which Duchamp exhibited mass-produced, functional objects (such as an everyday wood and galvanized-iron shovel) as art, Justice Breyer argued in his dissenting opinion in *Star Athletica, L.L.C.* that 'virtually any industrial design can be thought of separately as a "work of art"', and there is nothing 'in the world that, viewed through an esthetic lens, cannot be seen as a good, bad, or indifferent work of art'.<sup>70</sup>

The second prong of the Court's test is more difficult to satisfy: that '[t]he decision maker must determine that the separately identified [design] feature has the capacity to exist apart from the utilitarian aspects of the article'.<sup>71</sup> According to the Court, in order to meet this element, the separately identified design feature must be eligible for copyright as a pictorial, graphic, or sculptural work on its own or when fixed in some other tangible medium.<sup>72</sup> In *Star Athletica, L.L.C.*, because the combination and arrangements of the designs on Varsity Brands's cheerleading uniforms could be eligible for copyright as pictorial or graphic works if they were applied to another medium, such as the cover of a notebook, the Court found those design features to be protected. While the test seems easy to apply to design features on cheerleading uniforms, attempting to apply the Court's logic and analysis in *Star Athletica, L.L.C.* to culinary presentations is a more difficult task. First, the Court's test seemed narrowly targeted to two-dimensional designs applied on the surface of useful articles, and did not necessarily help a decision-maker determine when three-dimensional sculptures could have separable design features. Of the three case studies examined in this chapter, the culinary presentation most likely to meet the Court's second-prong test by exhibiting design features that are separately eligible for copyright are the design features on Goldman's Cake. Even though the underlying stacked cylindrical

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<sup>68</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>69</sup> *Star Athletica, L.L.C.*, 137 S.Ct. at 1010.

<sup>70</sup> *Ibid.* at 1033–4; In Advance of the Broken Arm, MoMA Learning, [https://www.moma.org/learn/moma\\_learning/marcel-duchamp-in-advance-of-the-broken-arm-august-1964-fourth-version-after-lost-original-of-november-1915](https://www.moma.org/learn/moma_learning/marcel-duchamp-in-advance-of-the-broken-arm-august-1964-fourth-version-after-lost-original-of-november-1915) (last visited September 25, 2017).

<sup>71</sup> *Star Athletica, L.L.C.*, 137 S.Ct. at 1010.

<sup>72</sup> *Ibid.* at 1012.

layered cake in Goldman's Cake may not be protectable by copyright law because it is useful, the designs Goldman created and applied on the cake technically could be separable and protected, because those designs – if applied to another non-useful medium – could be eligible for copyright as pictorial or graphic works. For instance, if I were to decorate a cake by creating on it an impressionist painting out of edible frosting, the painting could, arguably, be eligible for copyright as a pictorial work on its own or if created on another medium such as a canvas. Indeed, cake artists argued in a recent brief that

a sufficiently original artistic design or structure on a cake would . . . be eligible for copyright protection as an artistic work if applied to a different medium of expression. . . . The fact that copyright law protects items like the uniform chevrons in *Star Athletica* as 'artistic works,' combined with the existence of copyrights on cake designs at a massive scale, demonstrate that cake-making is an artistic and expressive – rather than a purely mechanical or utilitarian – endeavor.<sup>73</sup>

There are two problems with that analysis. First, the designs on the face of the cake would necessarily be created with edible ingredients, such as frosting, so that the entire cake can be edible. Designs created with edible frosting serve both aesthetic and utilitarian purposes. Even though the painting would certainly be protected if it were created with oil or acrylic or even crayon, because the painting is created with edible frosting – the purpose of which is to be eaten – it may be considered a useful article itself requiring its own separability analysis. The Court specifically stated in *Star Athletica, L.L.C.* that, 'to qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot itself be a useful article'.<sup>74</sup> Furthermore, the Court rejected the argument that one could claim a copyright in a useful article 'merely by creating a replica of that article in some other medium – for example, a cardboard model of a car'.<sup>75</sup> Therefore, according to the Court's logic, even if the impressionist painting could be recreated with oil or acrylic, the fact that it was originally created with edible frosting might technically prevent it from being protected under copyright law. Second, even if edible design features on a cake could overcome their own utility, those design features on the cake may still fail to meet copyright law's originality requirement.

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<sup>73</sup> Brief for Cake Artists as Amici Curiae in Support of Neither Party, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, available at 2017 WL 4004524, at \*38–9 (2017).

<sup>74</sup> *Star Athletica, L.L.C.*, 137 S.Ct. at 1010.

<sup>75</sup> *Ibid.* at 1010.

Indeed, the specific design features on the Goldman Cake – stripes, bands of color, stars, coin-shapes, and bunting – have been used on many other forms of designs, even other cakes, and are not likely to meet copyright’s originality requirement. Even if their color combinations and design arrangements may be creative enough to qualify as an original compilation, the combination of red, white, and blue, stars, stripes, and bunting may be considered *scènes à faire* for a patriotic-themed cake.<sup>76</sup> Similarly, the presidential seal, and the seals of the army, navy, marines, air force, and coast guard that also appear on Goldman’s Cake are not independently created and, in fact, are designs that likely belong to the federal government.<sup>77</sup> Applying the second prong of the Court’s separability test would be even more difficult for Keller’s Salmon Cornets or traditional cuisine preparations, such as Pho. The Court in *Star Athletica, L.L.C.* did not discuss or provide any helpful examples on how to separate design features from useful articles that are, themselves, three-dimensional sculptural works. And, as discussed above, the Court explicitly rejected the replica approach to finding works copyrightable. It would likely be difficult for the Court to find any design features in Keller’s Salmon Cornets or Pho to be separable from their underlying utilitarian articles.

In spite of these hurdles, however, since the Court issued its decision in *Star Athletica, L.L.C.*, the cuisine industry has renewed its interests in the possibility of protecting culinary presentations under copyright law, and lower courts may use the Court’s reasoning and analysis in *Star Athletica, L.L.C.* to justify granting broader copyright protection to previously unprotected works, including culinary presentations.

#### 4. SHOULD CULINARY PRESENTATIONS BE PROTECTED BY COPYRIGHT LAW?

The culinary industry has traditionally operated in a low-intellectual-property environment. It has long been established that recipes and cooking techniques are not subject matters protected by copyright law.

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<sup>76</sup> Under the doctrine of *scènes à faire*, ‘courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a commonplace idea’, *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000).

<sup>77</sup> See, e.g., Baker Donelson, A Tale of Two Cakes: Can Copyright Law Protect this Cake Design?, Baker Donelson IP Watch (January 23, 2017), <http://www.jdsupra.com/legalnews/a-tale-of-two-cakes-can-copyright-law-49760/>.

Based on the discussion above, culinary presentations also face hurdles to copyright eligibility. Some may find this result inequitable. Many commentators and foodies might argue that chefs who create artistic culinary presentations are artists, and that their works transcend mere hospitality and should be contemplated as legitimate art worthy of intellectual property protection.<sup>78</sup> Chefs certainly spend time and effort coming up with new recipes and creative ways to present their cuisines to diners. It is indisputable that food creations are often just as creative, and sometimes even more creative today, than other works that are easily protected by copyright law such as photographs, paintings, or sculptures.

On the other hand, lowering the hurdles to allow culinary presentations to be protected by copyright law may harm – rather than help – the cuisine industry, chefs, and creators of food. In spite of not being able to protect recipes, techniques, or culinary presentations under copyright law, the cuisine industry has flourished. Projected sales for the restaurant industry in the U.S. are estimated to be \$799 billion in 2017, representing 4% of the country's entire GDP.<sup>79</sup> New restaurants continue to open and chefs continue to create new, artistic (and edible) cuisines. As many scholars have explored in the recent past, and as indicative in the cuisine industry, intellectual property – as a formal legal entitlement – may not motivate or incentivize the creation of new artistic work.<sup>80</sup> If the cuisine industry is functioning and thriving in a low-intellectual-property environment, why provide additional copyrights where such rights not only do not motivate new creation but are also inherently exclusionary?<sup>81</sup> Furthermore, inserting ownership and exclusivity into the cuisine industry might even undermine the industry's traditional norms and ethos of sharing, and thereby decrease creative output.<sup>82</sup> As Buccafusco, Emmanuelle Fauchart, and Eric von Hippel have explored, chefs tend to embrace the hospitality and sharing ethos of the industry and sometimes even encourage others to copy

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<sup>78</sup> See Smith, *supra* note 8, at 5; Jason Farago, Chef Ferran Adria and the Problem of Calling Food Art, BBC Online (Jan. 14, 2014), <http://www.bbc.com/culture/story/20140114-can-food-be-art>.

<sup>79</sup> Economic Engine, National Restaurant Association, <http://www.restaurant.org/Industry-Impact/Employing-America/Economic-Engine> (last visited September 25, 2017).

<sup>80</sup> See, e.g., Cathay Y.N. Smith, Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's 'Negative Space' Theory, 24 DePaul J. Art, Tech. & Intell. Prop. L. 259, 292 (2014) (and sources cited therein).

<sup>81</sup> See, e.g., Kal Raustiala and Christopher Sprigman, Response. The Piracy Paradox Revisited, 61 Stan. L. Rev. 1201, 1225 (2009).

<sup>82</sup> See, e.g., Buccafusco, *supra* note 6, at 1156; Cunningham, *supra* note 8, at 38.

their works.<sup>83</sup> Copyright's exclusivity could undermine an industry built upon this ability to share, use, and reuse prior creations. For instance, if culinary cuisines can now be protected by copyright law, this could create uncertainty in the cuisine industry where chefs may not know whether or not another chef would one day enforce her copyright in her culinary presentations. This uncertainty could cause chefs to hesitate about using prior works and may slow the innovation of new cuisine creations. Chefs may also be less willing to share their recipes or creations with others in order to maintain exclusivity. Furthermore, instead of being motivated to innovate and create new techniques or cuisines in order to stay competitive, chefs may instead rely on their copyright-imposed exclusivity. The U.S. Supreme Court has acknowledged that copying is not always bad, and that it can have beneficial effects to society.<sup>84</sup> At least in the culinary industry, this certainly seems true, and the traditional lack of copyright protection for culinary presentations has likely fostered more sharing, innovation, and creativity in the industry, which ultimately benefited society.

## 5. CONCLUSION

There are many challenges to protecting culinary presentations under copyright law. These challenges include whether culinary presentations may qualify as sculptural works of authorship, whether presentations are independently created, and whether food may be fixed in a tangible medium. The most significant hurdle to the protection of culinary presentations under copyright law has traditionally been copyright law's exclusion of useful articles. However, the U.S. Supreme Court's recent decision in *Star Athletica, L.L.C.* changed the standard for determining when design features of a useful article may be eligible for copyright protection, and its effect on the culinary industry remains to be seen. It is possible that, after this decision, we might be seeing a change in the legal environment as well as sharing attitudes and norms in the cuisine industry and other industries that have traditionally operated in a low-intellectual-property environment.

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<sup>83</sup> Buccafusco, *supra* note 6, at 1156; Emmanuelle Fauchart and Eric von Hippel, Norms-Based Intellectual Property Systems: The Case of French Chefs (MIT Sloan School of Management, Working Paper No. 4576-06), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881781](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781).

<sup>84</sup> *TrafFix Devices*, 532 U.S. 23, 29–30 (2001).