

## Copyright for culinary creations: a seven course tasting menu with accompanying wines

Prof. dr. Marie-Christine Janssens<sup>1</sup>

### A. Introduction: seven course tasting menu

*"To eat is a necessity, but to eat intelligently is an art"*<sup>2</sup>

1. This paper examines if, and to what extent, copyright affords protection to culinary creations, in particular recipes and dishes. I will proceed with this analysis in a way which is adapted to the topic, i.e. by serving the reader a menu. The different plates will focus on the particular issues of interest that relate to the subject of the paper. To avoid that this (non-edible<sup>3</sup>) paper upsets the reader's stomach, 'the dishes' will be prepared according to the nouvelle cuisine method which is characterized by lighter, more delicate dishes and an increased emphasis on presentation. Advancing through the menu, I will demonstrate that affording copyright protection to recipes and dishes is not evident, safe for some obvious forms of appearance. As a desert, I will develop some arguments that question whether copyright is the proper instrument to protect (some forms of) culinary creations. Enjoy the food!



#### **Seven course tasting menu with accompanying wines**

- ✿ **'Amuse-gueules'** – "Prime time superstars"
  - The explosion of interest in cookery programs, books, ... & interest in copyright
- ✿ **Starter** - "Choice of tapas in the form of Russian Matryoshka dolls"
  - in search of the appropriate subject matter
- ✿ **Soup** – "Grandmother's onion soup"
  - The specific nature of culinary creations
- ✿ **First course** – "Asparagus à la Flamande"
  - The issue of recipes
- ✿ **Molecular Sorbet** – "Instant ice cream, fast-frozen using liquid nitrogen"
  - Alternative forms of protection for culinary creations
- ✿ **Second course** – "Fish sensation Van Gogh"
  - The visual, olfactory & gustatory perceptions of dishes
- ✿ **Desert** – "Papaya slices" to aid digestion
  - Should the copyright system 'digest' all forms of culinary creations?
- ✿ **Accompanying wines** – choice between
  - French red wine 'rewarding creativity'
  - Californian white wine 'incentive to creativity'

<sup>1</sup> Professor at the University of Leuven (KU Leuven), Belgium – Head of unit Centre for Intellectual Property Rights. The present paper is based on a lecture held at the 2011 ALAI conference in Dublin on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies* and was finalized in January 2013.

<sup>2</sup> François de La Rochefoucauld, French writer (1613-1680).

<sup>3</sup> In a paper dealing with intellectual property rights, it is interesting to point out that a patent has already been taken for 'edible paper' (see, *infra*, footnote 105).

## **B. Amuse-gueules: the explosion of interest in cookery programs, books, ... & interest in copyright**

### *“Prime time superstars”*

2. The explosion of interest in culinary creations that we witness today commenced by the mid-20<sup>th</sup> century. From that time on, literally thousands of flashy cookery and recipe books became available. The introduction of TV cooks and TV cookery programs brought the attention for recipes and for the whole culinary world to an unprecedented level. Today, television networks fight for the most popular chefs and cooks who are given prime time for their performances at cooking shows or reality shows. We are witnessing the phenomenon of the ‘superstar’ chef<sup>4</sup>.

In the wake of this growing success of cookery programs, books, magazines and websites many chefs, as well as their reviewers, customers and fans, look today upon cooking as ‘an art’. Chefs whose goal in life is to skillfully design recipes and dishes that are as pleasing to the palate as to the eye are typified as ‘culinary artists’. Why should such chefs be treated differently from Tolstoy or Van Gogh? Do they not also draw, compose, imagine and present a great succession of (taste) sensations which are comparable to the sensations one feels when reading or admiring the two aforementioned illustrious men<sup>5</sup>?

3. I do not want to engage in the debate whether or not cooking is a form of art<sup>6</sup>. Copyright is, anyhow, not concerned with ‘art’ but with original creations which belong to the broadly defined ‘literary, scientific and artistic domain’. There is no requirement of any sort of aesthetic experience that a copyrighted work should impart. Hence, the questions whether eating and drinking are such aesthetic experiences – and I would be the last to dispute such a proposition! – and, more generally, whether something as functional as food and drink could be perceived as works of art are not really relevant. Neither artistic nor aesthetic value is a relevant criterion to determine whether a work can be protected by copyright<sup>7</sup>.

4. On the other hand, it can be argued that for many chefs the act of cooking involves an intellectual effort as well as a personal way of expressing themselves both of which are copyright relevant characteristics<sup>8</sup>. Having come to this conclusion, it is then easy to jump to the open end

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<sup>4</sup> E. Cerea and A. Rurale, “Haute cuisine system and its cultural dimension: when chefs are the new artists”, [www.ssrn.com](http://www.ssrn.com), October 2010, 1.

<sup>5</sup> Ibid.

<sup>6</sup> For a plea in this respect, see Su Li Cheng, “Copyright protection of haute cuisine: Recipe for disaster?”, *E.I.P.R.* 2008, (93) 97.

<sup>7</sup> S. Ricketson and J. Ginsburg, *International Copyright and neighbouring rights – The Berne Convention and beyond*, Oxford Univ. Press, 2<sup>ème</sup> ed., 2006, para 8.04 ; A. Strowel, “L’originalité en droit d’auteur: un critère à géométrie variable”, *J.T.* 1991 (513), 514-515 ; D. Gervais, *La notion de l’œuvre dans la Convention de Berne et en droit comparé*, Genève, Libr. Droz, 1998, 51-55.

<sup>8</sup> Hugenholtz, “Recept, Gerecht en auteursrecht”, in Verkade & Visser (ed), *Intellectuele eigenaardigheden. Opstellen aangeboden aan Mr Theo R. Bremer*, Deventer, Kluwer, 1998, 175; Cerea/Rurale, *l.c.* 2010, 1; in this latter paper the authors distinguish between the ‘cook for cooking’s sake Chef’, whose first aim is anything but their self-expression, the ‘Restaurant Chef’, who conceive their jog as an opportunity to self-emancipate themselves from the personal and economical perspective, the ‘Media Chef’, who are not interested in experimenting and finding new cooking techniques but whose aspiration is to become amateurs’ and housewives’ favorites and the ‘restaurateurs-businessmen’, who do not care a lot about fine

definition of ‘artistic work’ provided for in article 2(1) of the Berne Convention<sup>9</sup>. Not surprisingly, the unprecedented popularity for the entire world of gastronomy has raised - or rather revived<sup>10</sup> - this issue of how to protect culinary creations, and, in particular the question in what way the system of copyright can be used<sup>11</sup>.

### C. Starter: in search of the appropriate subject matter

#### “Choice of tapas in the form of Russian Matryoshka dolls”

5. Can culinary creations be protected by copyright law? This question is more sophisticated than initially meets the eye. Clearly the possibility of copyright protection will differ depending on the form of expression of the culinary creation<sup>12</sup>. A culinary creation – or ‘*oeuvre gastronomique*’ – indeed contains different layers which remind us of ‘Matryoshka dolls’<sup>13</sup>. In our case, the different dolls would represent:

- The recipe as such/per se;
- The expression of an individual recipe in textual or other form (publication in cooking book or on website, oral recitation on radio or television or before a live audience), typically consisting of the name of the dish, a listing of the required ingredients along with their quantities or proportions, an ordered set of instructions for preparing the dish, and possibly also the time it will take to prepare the dish, the number of servings that the recipe will provide, and/or equipment and environment needed to prepare the dish;
- A collection of recipes (e.g. in a cookbook, on a website, on a DVD, ...);
- The act of preparing the recipe (i.e. use of the recipe) in private, before a live audience or as part of a television show or other audio-visual work;

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haute cuisine techniques or fine menus and whose customers are not fine food experts, but common people.

<sup>9</sup> However, not every creation that would show the abovementioned characteristics is automatically protected by copyright. As Hugenholtz rightly observes, the creation of a new shower gel might also involve an intellectual effort and bear the imprint of its creator, but this doesn’t make the gel copyrightable subject matter (P.B. Hugenholtz, “Auteursrecht op (de geur van een) parfum. Annotatie bij HR 16 juni 2006 (Kecofa/Lancôme)”, *Ars Aequi* 2006, (821), 823).

<sup>10</sup> I note in passing that this question was already raised in Ancient Greece, and in particular in the colony ‘Sybaris’ (Magna Graecia in Italy) whose inhabitants were reputed as “slaves of their bellies and lovers of luxury”, hence the word *sybaritic*. The city has the reputation that it enacted one of the first intellectual property protection acts in history in relation with ... dishes! In particular, chefs were granted a one year monopoly on the preparation of an unusual or outstanding dish (O. Granstrand, *The Economics and Management of Intellectual Property*, Edw. Elgar Publ., 1999, 28; M. Franzosi, “Protection of culinary recipes ; reaction on article of N. Mout-Bouwman”, *E.I.P.R.* 1989, vol. 11, 35).

<sup>11</sup> Cf. Ch. Buccafusco, “On the legal consequences of sauces: should Thomas Keller’s recipes be per se copyrightable?”, *24 Cardozo Arts & Ent. L.J.*, 1121 (2007); E. Cunningham, “Protecting Cuisine under the rubric of intellectual property law: Should the law play a bigger role in the kitchen?”, *Journal of High Technology Law* 2009, vol. IX, n° 1, 2009, 22-23.

<sup>12</sup> Cf. Ch. Barrère and V. Chossat, “Intellectual Property Rights and Cultural Heritage: the case of non-cumulative and non-degenerative creation”, *Review of Economic Research on Copyright Issues*, 2004, vol. 1(2), (97) 109 (available at [ssrn.com](http://ssrn.com)).

<sup>13</sup> The Matryoshka doll (or Babushka doll) is a typical Russian doll consisting of a set of wooden dolls of increasing size placed one inside the other. Each time you open a doll, there is another one waiting.

- The dish as the end-product of the recipe as can be perceived by the human senses (as it looks, smells and tastes);
- The description (in adapted form) on a menu (card), including a common or original name;
- Recipe management software that enables passionate recipe collectors to store and arrange their favorite recipes.

6. For a start, it may be said that the question of copyrighting culinary creations remains unclear today. True, the majority of scholars – and courts – seem to agree that *recipes do not qualify for protection* either because they are non-protectable subject matter (ideas and methods), or because they lack the required originality, or because of both reasons<sup>14</sup>. However, much of this literature and case law throws the reader into confusion because it fails to make a clear distinction as regards the subject matter for which protection is (or can be) sought.

Some commentators propose to grant copyright protection to *the recipe* and consider the dish – the end-product of the recipe – as a form of communication of the recipe<sup>15</sup>. Others take the opposite view and argue that *the dish* is the appropriate subject of copyright analysis and not the recipe and look upon the former as the fixation of the latter<sup>16</sup>. Yet others consider the recipe to constitute the fixation of the dish<sup>17</sup>. Finally, some authors do not seek the solution in traditional copyright law but advocate to protect chefs of an original culinary creation as ‘performers’ under the scheme of the neighboring rights<sup>18</sup>.

The sparse case law further shows that the decision to qualify a recipe as a work is very case-specific and, hence, caution is called for when relying on precedents. Also, Courts often seem to mix up the essential questions. In some cases copyright protection for recipes was denied because of lack of original character, whereby the court neglected or refused to answer<sup>19</sup> the underlying question to know whether the subject matter for which copyright protection is claimed constitutes protectable subject matter.

While all the above propositions and decisions have undoubtedly their merits, they do not provide us with a consistent or transparent answer to the question whether copyright affords protection to recipes or dishes or both. In this paper I will make a new attempt<sup>20</sup> to come up with an - hopefully ‘digestible’ - answer.

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<sup>14</sup> See more references, *infra*, para 13 ff.

<sup>15</sup> Mout-Bouwman, “De auteursrechtelijke bescherming van culinaire recepten”, *AMI* 1989, 53; Dommering, note to decision Court Breda 18 December 1990, *Informatierecht/AMI*, 1992, 17.

<sup>16</sup> See, e.g., the *Belgian Beer Recipes* case, discussed *infra*, para 17. In this case, the plaintiff had failed, however, to claim copyright protection for the dish.

<sup>17</sup> *Buccafusco, l.c.* 2007, 1121 ff (see in particular footnote 1).

<sup>18</sup> See, e.g., Piredda, obs. In *RIDA* 1998 n° 177, 273 ff.; A. Bertrand, *Le droit d'auteur et les droits voisins*, Dalloz, 2e éd., 1999, 187.

<sup>19</sup> E.g. *Publications International v Meredith Corp.*, 88 F.3d 473 (7th Cir., 1996): “We do not express any opinion whether recipes are or are not per se amenable to copyright protection, for it would be inappropriate to do so. The prerequisites for copyright protection necessitate case-specific inquiries, and the doctrine is not suited to broadly generalized prescriptive rules”, at n° 39.

<sup>20</sup> For earlier attempts – apart from the literature mentioned in this paper – see the conference organized in the Netherlands in 1987 that exclusively concentrated on this topic (conference ‘Recht en Gerecht’ (Law and Dishes), organized by the Stichting Auteursrechtmanifestaties; see *Informatierecht/AMI* 1988, 14). Also

7. In the search for the appropriate subject, *article 2 (1) of the Berne Convention* provides for the logical starting point. Copyright affords protection to a creation in the form of (1) an expression that belongs to the literary, scientific and artistic domain<sup>21</sup> and which does, moreover (2) comply with the requirement of originality<sup>22</sup>.

The first copyright axiom - only expressions, not ideas qualify for copyright protection<sup>23</sup> – is one of the most researched, but still least understood and clarified issues and this paper does not aim at dispersing the ‘haze’ that surrounds the line to be drawn between the unprotectable idea and the protectable expression<sup>24</sup>. For the purposes of this paper it is important to understand that, where copyright will only grant protection to the expression, this does not mean that the underlying idea shall be protected through its expression. Rather, it is the form which is by itself protected. This form requires the organization of a substance<sup>25</sup>.

8. Hence, the appropriate subject of our copyright analysis should be limited to subject matter that constitutes ‘an expression’. While article 2(1) BC has taken a technology neutral approach as to how the work is expressed<sup>26</sup>, both recipes and dishes may fulfill this requirement, even in countries that have taken advantage of article 2(2) BC. This provision allows Members States to impose the requirement that the expression should include a fixation in some material form<sup>27</sup>. A recipe may be expressed in writing or fixed at the occasion of a broadcast. A dish (on a

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on the internet, the issue gets ample attention. See, e.g., the blog “The Intellectable. Blog about food and intellectual property: copyright, trademark, patent and trade secret”, <http://theintellectable.blogspot.com/>

<sup>21</sup> The Berne Convention - grandmother of copyright conventions - describes protectable subject matter in a very broad way; not even a proper definition is given. Rather article 2 (1) describes the works protected as ‘literary and artistic works’ by providing a quite long, but still non-exhaustive (‘such as’) list of categories of works. “*The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ....*”.

<sup>22</sup> Although the Berne Convention does not explicitly mention nor define this requirement as a condition for protection, its implied existence – not its precise content! – is generally agreed upon with reference to the preparatory documents (Ricketson/Ginsburg, *o.c.* 2006, para 8.03). To justify this conclusion, reference is also made to article 2 (5) BC (Gervais, *o.c.* 1998, 45-49).

<sup>23</sup> See article 2 WCT: “Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”. In the same sense, see article 9.2 TRIPs.

<sup>24</sup> See e.g. A. Latreille, “From idea to fixation: a view of protected works”, in E. Derclaye (ed), *Research Handbook on the Future of EU Copyright*, Edw. Elgar Publ., 2009, 133; A. Strowel, *Droit d’auteur et Copyright*, Bruylant Brussel, 1993, n° 312 ; I. Cherpillod, *L’objet du droit d’auteur*, 2<sup>e</sup> ed., Bruxelles Larquier, 2008, 24 ff.; G. Karnell, “The idea/expression dichotomy : a conceptual fallacy”, *Copyright World* 1989, N° 7, 16; H. Desbois, *Le droit d’auteur en France*, 2<sup>e</sup> ed. Dalloz Paris, 1966, 11 ff. This so-called ‘idea-expression dichotomy’ has also already been the main theme of earlier ALAI conferences (see, e.g., conference in Sitges in 1992).

<sup>25</sup> Latreille, *l.c.* 2009, 134 ; Ph. Gaudrat, “Réflexion sur la forme des œuvres de l’esprit”, in *Mélanges en l’honneur d’André Françon*, Dalloz, Paris, 1995, 196.

<sup>26</sup> T. Aplin, “Subject matter”, in Derclaye, E. (ed), *The Future of Copyright Law*, Series Research Handbooks in Intellectual Property, Edw. Elgar Publ., 2009, (49) 50.

<sup>27</sup> This option to make copyright protection dependent on first fixation, leaving orally communicated works unprotected, has been introduced in most common law countries. However, as was pointed out by Y. Gendreau, there are not many divergences between the two systems for classical works because of the implementation in most common law countries of a very accessible definition of fixation (“Le critère de fixation en droit d’auteur”, *RIDA* 1994, vol. 159, 111).

plate) can be considered a tangible fixation, at least in its visual aspects. It can thus be concluded that both recipes and dishes *may*, subject to being an original expression that belongs to the literary or artistic domain, be copyrightable as a matter of principle. The latter proposition does, however, not include a finding that recipes and dishes – in all their possible forms of appearance<sup>28</sup> - *actually do* constitute copyrightable subject matter. Nor does it lead to the conclusion that they *desirably should* be part of the realm of copyright, but this latter part of the discussion is left as dessert.

In the following sections the paper will successively zoom in on the possible protection of *recipes*, on the one hand, and *dishes*, on the other hand. For each layer of appearance of these creations, the two crucial copyright questions will be answered: does it constitute protectable subject matter? If so, does it constitute an original creation? This analysis is preceded (section D) and interrupted (section F) by some pertinent side considerations.

#### **D. Soup: the specific nature of culinary creations**

##### ***“Grandmother’s onion soup”***

9. For our further study, it is important to take the particular ‘collective’ nature of recipes – and the same applies to dishes – into account.

Recipes exist for ages<sup>29</sup>. For instance the onion soup which is served in this section has been popular at least as far back as Roman times. It was, throughout history, seen as food for poor people, as onions were plentiful and easy to grow. The modern version of this soup originates in France in the 18th century. Although ancient in origin, this dish underwent a resurgence of popularity in the 1960s in the United States due to an increased popularity for French cuisine. Over all these years its typical ingredients have remained the same: an onion and beef broth based soup, using caramelized onions, to be finished by placing it under a broiler with croutons and gruyere melted on top.

10. Safe for some exceptional cases, the large majority of dishes are based on old recipes improved, altered or presented in a different form to suit current palates<sup>30</sup>. They came into existence as a result of ‘trial and error’, borrowing or expanding on already existing recipes. It is therefore said that culinary creations are collective creations and that the culinary world consists of a heritage created by hundreds of generations of cooks<sup>31</sup>. Sure, some chefs invest heavily in new creations and there exists value in the creative way to combine and prepare ingredients in order to come up with an innovative dish. However, as I will demonstrate towards the end, even these chefs continue to recognize the collective nature of recipes and dishes and seem to endorse the idea about sharing and hospitality as an alternative to exclusive ownership.

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<sup>28</sup> See, *supra*, para 5.

<sup>29</sup> The earliest known recipe should date from approximately 1600 BC and come from an Akkadian tablet from southern Babylonia. Many more remnants have been found in the legacy of Egyptian, Greek and Roman antiquity with an even more or less complete surviving cookbook from the classical world “*De re Coquinaria*” attributed to Marcus Gavius Apicius (C. Biagio Conte & J.B. Solodow, *Latin Literature: A History*, JHU Press, 1999, 392).

<sup>30</sup> Su Li Cheng, *l.c.* 2008, 94; P.B. Hugenholtz, *l.c.* 1998, 177.

<sup>31</sup> Buccafusco, *l.c.* 2007, 1148 (“cuisine seems to have held on to a process of “serial collaboration” (where copying is the rule rather than the exception”); Cunningham, *l.c.* 2009, 24.

## E. First course: the issue of recipes

### *“Asparagus à la Flamande”*

11. For the purpose of this paper, the notion ‘recipe’ will be understood as a listing of ingredients accompanied by instructions and a method on how to make a certain dish. This notion also covers recipes that merely consist of a list of ingredients (as can be found, e.g., on food labels or in the more historic cookbooks).

In line with this definition, the recipe of the dish served to the reader would read as follows:

*Ingredients:* 3 1/2 lb Asparagus -- white, trimmed, 3 tb Butter, 3 tb Water, 1/2 Lemon – juiced, Salt, pepper, Nutmeg, 1/2 bn Italian parsley – chopped.

*Directions:* Boil the asparagus during 12 - 18 min. depending on their size. Drain. Melt the butter with the water and the lemon juice. Season with salt, pepper and nutmeg. Add the parsley. Serve the asparagus on individual plates with 1 tbsp sauce. Serve the remaining sauce in a sauceboat<sup>32</sup>.

Does this recipe – or for my part a more ingenious one – qualify for copyright protection?

12. A comprehensive answer cannot be derived from the simple example of the recipe given above. As was said before, the broader notion ‘recipe’ covers a wide spectrum of appearances<sup>33</sup>. At one end of this spectrum is the unprotectable idea of the recipe (i.e. the non-expressed content of the recipe). At the other end is the protectable highly creative individual expression of this recipe. In-between, various other forms of expression of the recipe are conceivable. Their copyright status will mainly be dependent on the assessment of the originality requirement. Lacking a uniform interpretation of the latter condition on the international level, the conclusions as regards these intermediate categories of recipes will differ from country to country and, anyway, be very case specific.

#### a. **The non-expressed content of the recipe or ‘recipe per se’: mere ideas, methods and/or processes**

13. Every creation normally starts with an idea. This premise is equally true in relation with recipes. At the basis of every recipe that is written (or otherwise communicated) are ideas on which ingredients to be used and how to (best) process them.

It can fairly be said that the mere information to include certain spices or sweeteners, to use a smidge more cinnamon, to substitute mango chunks for peaches or to mix or add ingredients in certain manners to come up with an alternative, slightly modified or completely new dish, constitutes mere ideas and, hence, non-protectable subject matter. E.g. “stockpiling vegetable purees for covert use in children's food is an idea that cannot be copyrighted”<sup>34</sup>.

<sup>32</sup> Source: <http://www.platinumrecipescollection.com/asparagus-recipes/064.html>.

<sup>33</sup> See, *supra*, para 5.

<sup>34</sup> *Missy Lapine, The Sneaky Chef Inc. v. Jessica Seinfeld, Jerry Seinfeld, Harper Collins Publ., Inc, Departure Productions LLC*, 375 Fed Appx 81, 83-84 [2d Cir2010], affg 2009 WL 2902584 [SD N.Y.2009] (hereafter ‘*The Sneaky Chef* case’).

14. This conclusion clearly accords with the basic rule of copyright that precludes protection for ideas<sup>35</sup>. Copyright should not be available even where the combination of ingredients contained in a recipe may be “original in a noncopyright sense”<sup>36</sup>. It is said that “one of the most ingenious recipes ever created was using crackers as a substitute for apples in ‘Mock Apple Pie’”<sup>37</sup>. No one knows who came up with this idea first but, clearly, the first time it found its reflection in a recipe - in contrast to being kept secret<sup>38</sup> - it should continue to be treated as an unprotectable idea.

In the same line of reasoning underlying the exclusion of ideas – and, in general, mental concepts whether abstract or concrete - copyright also denies protection to *bare facts, raw information and mere formulas*. Although the BC does not contain any explicit statement in this respect, such interpretation is clearly implied in the definition of ‘literary and artistic works’. Further confirmation is, moreover to be found in article 2 (8) BC<sup>39</sup>. The identification of ingredients necessary for the preparation of a dish can certainly be looked upon as a statement of facts<sup>40</sup> and, hence, subject matter which goes beyond the scope of the protection prescribed by article 2 (1) BC.

15. The above conclusions denying copyright to recipes because they constitute excluded subject matter is endorsed by many commentators and scholars<sup>41/42</sup> even though some express doubts<sup>43</sup> or defend the opposite position<sup>44</sup>. The majority opinion confirms that, unless and until

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<sup>35</sup> H. Desbois, *o.c.* 1966, 20 (“Les idées sont par essence et par destination de libre parcours”); C. Colombet, *Grands principes du droit d’auteur et des droits voisins dans le monde – Approche de droit compare*, Paris Litec, Unesco, 1990, 10 ; Gervais, *o.c.* 1998, 44-45. See also, *supra*, para 7.

<sup>36</sup> Melville, Nimmer & Nimmer, *Nimmer on copyright* § 2.18[1], (2005).

<sup>37</sup> G. Hander Lyons, *A taste of memories. Comforting foods from our Past*, Blue Sage Press, 2009, 27.

<sup>38</sup> See *infra*, Section F.

<sup>39</sup> Ricketson/Ginsburg, *o.c.* 2006, paras 8.07 & 8.105.

<sup>40</sup> *Publications International v. Meredith Corp.*, 88 F.3d 473 (7th Cir., 1996), at n° 40. See on this case more in para 16.

<sup>41</sup> Hugenholtz, *l.c.*, 1998, 175; A. Kéréver, annotation in *RIDA* 1998, 147; R. Dreyfuss, “Does IP need IP? Accommodating intellectual production outside the intellectual property paradigm”, Public Law & Legal theory research paper series; working paper No 10-43, 2010, 1450 (available at [ssrn.com](http://ssrn.com)); Nimmer, *o.c.* 2005, § 2.18[1]; J.C. Fromer, “Trade secrecy in Willy Wonka’s Chocolate Factory”, in R. Dreyfuss en K. Strandburg (ed), *The Law and Theory of Trade Secrecy*, Edw. Elgar Publ., 2011, (3) 13.

<sup>42</sup> The same conclusion, but because recipes are, in essence, ‘methods of operation’, is reached at by Y. Cherpillod, *L’objet du droit d’auteur*, Cédidac, Lausanne, 1985, 141-142; A. Troller, *Immateriälgüterrecht*, Part I, 3<sup>rd</sup> ed., Basel/Frankfurt am Main, 1983, 356-360; U. Loewenheim in G. Schricker (ed), *Urheberrecht. Kommentar*, München 1987, 122.

<sup>43</sup> See, e.g. A. Lucas et H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Litec, 1994, n° 67, note 9 (The authors question what would be the point of invoking a monopoly on a dish that “may not be reproduced in the strict sense but only recreated from the recipe”, if the latter is in the public domain?); see also Gablin et Sardin, *l.c.* 2000, 76 (If one considers that the protection of the dish is subordinate to that of the recipe, denying protection to the latter level would deprive culinary dishes from any protection) and F. De Visscher & B. Michaux, *Précis de droit d’auteur et des droit voisins*, Bruylant, Brussels, 2000, 5.

<sup>44</sup> Mout-Bouwman, *l.c.* 1989, 53; id., “Protection of Culinary Recipes by Copyright, Trade Mark and Design Copyright”, *E.I.P.R.* 1988, 234-235; L. Van Reepinghen, “Les recettes de cuisine, non protégées en droit d’auteur?”, 3 March 2011, <http://ip-web-law-blog.eu> (this author admits that such a conclusion might raise problems in practice but these should not influence the possibility of protection of recipes as a matter of principle).



ideas or methods are made perceptible or expressed in a certain mode or form, copyright law does not come into play. And even if they are made perceptible, protection will not extend to the underlying ideas, processes or methods. Protection for ideas or processes is the purview of patent law.

16. Also the majority of the few court decisions that have been decided in relation with the protection of recipes is in line with this viewpoint<sup>45</sup>.

In the US the *Meredith* case<sup>46</sup> provides a good illustration. This case dealt with the question whether copyright affords protection to the constituent recipes contained in a cookbook that enjoys a registered compilation copyright in the US. The recipes at stake prescribe an assortment of edible derivatives of Dannon yogurt. In contrast to the district court, the 7<sup>th</sup> circuit court denied copyright protection to the several individual recipes - comprising the lists of required ingredients and the directions for combining them to achieve the final products - quoting § 102 (b) of the US Copyright act: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work".<sup>47</sup> This statutory provision is invoked in relation to the two components of the recipe, i.e. the list of instructions which are qualified as ideas, on the one hand, and the directions for combining these ingredients because they are excluded as "procedure, process, [or] system", on the other hand<sup>48/49</sup>.

17. Turning to the continent, a striking similarity with the *Meredith* reasoning can be found in a ruling by the Court of Appeal in Liège (Belgium)<sup>50</sup> as well as in some decisions by the Paris TGI. According to the latter "to the extent that the recipes were borrowed from the pool of the culinary arts, they are a compilation and, insofar as they are unpublished, they resemble a course or presentation of a method; the ways to perform which is described in the recipe are simple ideas, which are not subject to the protection of the 1959 Act"<sup>51</sup>. In the *Belgian Beer Recipes*

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<sup>45</sup> Some rare decisions that come to the opposite conclusion, include Court Breda 18 December 1990, *Informatierecht/AMI* 1992, 16, note Dommering (recipe of 'Autodrop' which is a sort of liquorice; the issue has, however, only be summarily dealt with); Pres. Amsterdam, 9 August 2001, *Informatierecht/AMI*, 2001, 157, note Hugenholtz (recipe of a 'bonbon'); see also a very old German decision from the Reichsgericht of 1912 discussed by Mout-Bouwman, *l.c.* 1988, 236.

<sup>46</sup> *Publications International v. Meredith Corp.*, 88 F.3d 473 (7th Cir., 1996) (hereafter '*Meredith* case').

<sup>47</sup> *Ibid.*, at n° 31.

<sup>48</sup> *Ibid.*, at n° 46-47. Regarding the claim for copyright infringement, it was then concluded that, where recipes have the same titles but display certain differences in the listing of ingredients, directions for preparation, and nutritional information but will produce substantially the same final products as many of those described in existing recipes, such claim fails.

<sup>49</sup> Recipes were also held not to be copyrightable in *Lambing v. Godiva Chocolatier*, 142 F.3d 434 (6<sup>th</sup> Cir. 1998). This case involved the alleged copying of the recipe and design of a chocolate truffle known as 'David's Trinidad'. The court was brief in its rejection of this claim, citing *Meredith*.

<sup>50</sup> Court of Appeal Liège, 10 June 2011, *Intellectuele Rechten-Droits Intellectuels (IRDI)* 2012, 80 (hereafter referred to as '*Belgian Beer Recipes* case'); the case involved the publication of a cookbook ("52 recettes aux bières de Wallonie") which included in nearly identical wordings 5 recipes contained in the plaintiff's earlier published cookbooks.

<sup>51</sup> TGI Paris, 10 July 1974, *D.* 1974, Somm. 40 (free translation from the decision). See also TGI Paris, 30 September 1997, *RIDA* 1998, 273, obs. Piredda and Kérever (at 147).

case, the court ruled that “a recipe is in the first place an idea” and that in the case at issue “because the idea to associate beer with other foods is relatively common, the intellectual approach of the applicant is not eligible for protection by copyright”<sup>52</sup>.

**b. The expression of the recipe ‘in some mode or form’<sup>53</sup>**

18. While recipes per se are idea’s (ingredients) or methods (directions to prepare), and thus not copyrightable, the words used to describe them possibly are. Most recipes will be expressed in written form. Clearly, the description and/or publication of the recipe in a book, on a website or its presentation during a broadcast or live demonstration at a cook club<sup>54</sup> will upgrade the recipe from the non-protectable layer of mere ideas or processes to the protectable layer of expressions. It is conceivable that such forms of expression (not the content of recipe) may qualify as a production ‘in the literary domain’ or even ‘artistic domain’ which opens the possibility of copyright protection as a *literary work* (e.g. in a cookery book) or possibly an *audiovisual work* (e.g. in a broadcast)<sup>55</sup>.

19. To be allowed to enter the gates of the realm of copyright, the expression of the recipe should, however, take a further hurdle. Its author should ‘transcend’ an elaboration of mere factual statements or information by transforming the recipe into a ‘literary or artistic work’. In short, this means that the recipe should comply with the originality test. Even though this test is, in general, looked upon as a rather low threshold, its compliance in relation with recipes is far from evident. For the majority of the every day’s recipes, it seems even unlikely that they will meet the two-prong test of an ‘authors own intellectual creation’ included in the requirement of originality.

**b.1. Non-protectable expression**

20. I would submit that the recipe of ‘Asparagus à la Flamande’ cited above constitutes an example of non-copyrightable subject matter, as there is no expressive element in the listings of ingredients and instructions to prepare them. In general, listings of the ingredients in common (pre-existing) expressions and sayings and a basic functional description of the steps to be

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<sup>52</sup> *Supra*, footnote 50.

<sup>53</sup> Wording of article 2(1) BC. As will become clear further in this paper, I do not consider that a dish constitutes ‘an expression of a recipe in some mode or form’ but rather an independent creation. Hence, a dish which is the mere transformation of a recipe will not amount to copyright infringement; see, *infra*, paras 40-41.

<sup>54</sup> We observe that the latter form may constitute a problem for the ‘fixation-countries’ lacking any first material fixation (recording).

<sup>55</sup> Cf. Court of Appeal Paris, 17 March 1999, *RIDA* 1998 n° 182, 203, obs. Kéréver at 121; *R.T.D.Com.*, 2000, 94, obs. Françon. In this case the plaintiff (the renowned chef M. Duribreux) invoked copyright infringement of his culinary dishes which, after the filming of his performance, were further broadcasted without his consent. In his plea, the chef merely invoked the protection as co-author of the audiovisual work rather than copyright for the recipes or dishes that were used during the filming. The decision of the court of appeal that the chef indeed contributed to the writing of the scenario and the dialogues while demonstrating his cooking was, however, reversed by Cass. 5 February 2002, *Comm.com.électr.* March 2002, n° 35, p. 21, obs. C. Caron because “l’objet de l’enregistrement était l’activité professionnelle de M. Duribreux, (lequel n’établit) aucunement sa contribution aux opérations intellectuelles de conception, tournage et montage de l’œuvre audiovisuelle elle-même”.

performed to make asparagus or pancakes would constitute a writing but not a literary work in the sense of the Berne Convention. "In other words, the author who wrote down the ingredients for "Curried Turkey and Peanut Salad" was not giving literary expression to his individual creative labors. Instead, he was writing down an idea, namely, the ingredients necessary to the preparation of a particular dish (... which cannot be deemed) as original within the meaning of the Copyright Act"<sup>56</sup>. The majority, if not all of the uncountable number of recipes that can be found on websites as 'epicurious.com', 'rachelraymag.com' or 'allrecipes.com' would probably fall within this category<sup>57</sup>. This conclusion accords with the statement in the Code of Federal Regulations that lists "mere listing of ingredients or contents" amongst the "examples of works not subject to copyright"<sup>58</sup>.

21. Doctrine<sup>59</sup> and case law underpin the above conclusion that recipes expressed in bare and mundane language, will not qualify for copyright protection. In the *Meredith* case, the court indeed refused protection because "the recipes contain no expressive elaboration upon either of (the) functional components" (at 39). And in the *Belgian Beer Recipes* case the court held that "the disputed recipes merely state in brief and banal words the list of ingredients, their quantity and the culinary acts to be performed (peeling, cutting, splitting, chopping, cooking, etc.), in a form which is common since at least a century and which is now in the public domain". Accordingly, and in line with the two mentioned decisions, it is permissible to state that reproducing the wordings of the directions to prepare a recipe in identical or similar wording (*verbatim* or *quasi-verbatim*) does not amount to copyright infringement.

22. For the sake of completeness, I should add that certain countries may still grant protection for such non-original recipes under copyright law on the basis of a special provision for *non-original creations*. One of the best examples can be found in the Netherlands with its protection for 'non-original writings'<sup>60</sup>. A scholar has argued that even under UK law, copyright protection might be possible because listing ingredients in a recipe is not "automatic and requires painstaking accuracy". It is then argued that in compliance with the 'labour, skill and effort' standard to measure originality such writings may be considered protectable works, albeit the fact that they do not possess any literary merit<sup>61</sup>.

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<sup>56</sup> *Meredith* case., at n° 40.

<sup>57</sup> When a search conducted in 2007 by content tracking company 'attributor' found more than 10.000 copies of the recipes on the internet that originate on these three sites, copyright lawyers should wisely decide not to come in action (Guevin, "Pirates in the kitchen: Recipe copying 'rampant' online", [www.cnet.com](http://www.cnet.com), 2007).

<sup>58</sup> 37 C.F.R. § 202.1 (2006). The same clarification is repeated on the website of the US Copyright Office.

<sup>59</sup> L. Van Reepinghen, *l.c.* 2011; Melville, Nimmer & Nimmer, *Nimmer on copyright* § 2.18[I], (2005).

<sup>60</sup> See Article 10 (1) sub b Dutch Copyright Act. For more information on this provision, see the Dutch national report; see, in relation with non-original recipes, Hugenholtz, *l.c.* 1998, 175. Exceptionally also the catalogue rule recognized in the Nordic countries might afford protection; this specific provision protects non-original compilations of data, such as catalogues, tables and similar compilations, provided they comprise "a large number" of items.

<sup>61</sup> Su Li Cheng, *l.c.* 2008, 94 (referring to UK case law relating to football polls coupons, television program listings and legal directories).

However, a recent decision from the ECJ has cast doubt on these possibilities<sup>62</sup>. As regards alternative protection schemes the court held – in relation to databases – that European copyright directives preclude national legislation to grant protection under conditions which are different to those set out in the harmonized rules. In the same case, the court specified that the significant ‘labour and skill’ required for setting up a database cannot as such justify copyright protection if they do not express any originality in the selection or arrangement of the data which that database contains. This decision is in line with the earlier *Infopaq*-decision wherein the court pursued a harmonized interpretation of the originality test as condition for copyright protection in general, leaving no room for alternative protection criteria<sup>63</sup>.

## **b.2. Original expression**

### - *Single recipes*

23. The above conclusion denying copyright protection applies to the many recipes that are drafted without any particular expressive content and may not be interpreted as an outright denial of possible copyright protection for recipes as a general rule. There certainly exist recipes that merit copyright protection which “may extend to substantial literary expression—a description, explanation, or illustration, for example—that accompanies a recipe or formula or to a combination of recipes, as in a cookbook”<sup>64</sup>.

In their recipes authors may lace their directions for producing dishes with musings about the spiritual nature of cooking or reminiscences they associate with the wafting odors of certain dishes in various stages of preparation. Cooking experts may include in a recipe suggestions for presentation, advice on wines to go with the meal, or hints on place settings and appropriate music. In other cases, recipes may be accompanied by tales of their historical or ethnic origin<sup>65</sup>. In sum, a non-obvious combination of words, the play of words, a specific layout, pictures, adding a story etc. may enhance the chances that the recipe as it is described - and thus as opposed to its content<sup>66</sup> - is protected by copyright as ‘a literary work’<sup>67</sup>. This conclusion is hardly disputed<sup>68</sup> and based on the assumption that such recipes meet the substantive requirement for copyright, i.e. originality.

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<sup>62</sup> ECJ 1 March 2012, case C-604/10, *Football Dataco Ltd, Football Association Premier League Ltd, Football League Limited, Scottish Premier League Ltd, Scottish Football League and PA Sport UK Ltd v Yahoo! UK Limited and others*.

<sup>63</sup> ECJ 16 July 2009, case C-5/08, *Infopaq/Danske Dagblades Forening*, at n° 45.

<sup>64</sup> <http://www.copyright.gov/fls/fl122.html> (version November 2010; accessed on June 15, 2011). See, e.g., *Barbour v. Head*, 178 F.Supp. 2d 758 (S.D. Tex. 2001): “the recipes in (plaintiff’s cookbook) Cowboy Chow are infused with light-hearted or helpful commentary”.

<sup>65</sup> *Meredith* case, at 50.

<sup>66</sup> This means that the recipe as such – that is, the food itself – can be freely made despite copyright protection for the recipe as expressed; see also J. Fromer, *l.c.* 2011, 13.

<sup>67</sup> See, e.g., TGI Paris, 10 July 1974, *D.* 1975, som., 40; TGI Paris, 30 September 1997, *RIDA* 1998 n° 177, 273, note Piredda; see on this latter case also comm. F. Gablin and F. Sardain in *La Semaine Juridique Entreprise et Affaires*, n° 3, 20 Janvier 2000, 76. Cf. Court of Appeal Paris 27 May 1992, *RIDA* n° 154, 157.

<sup>68</sup> See, e.g., Buccafusco, *l.c.* 2007, 1121 ff (see in particular footnote 1); Hugenholtz, *l.c.* 1998, 176.

24. What exactly is required to meet this prerequisite for copyright protection, however, differs widely amongst BC Member States<sup>69</sup>. In the EU, it is settled case law that a work should be the author's own intellectual creation in the sense that it reflects the author's personality (i.e. where the author stamps the work with his 'personal touch')<sup>70</sup>. Originality can lie "in the form, the manner in which the subject is presented and the linguistic expression; (...) it is only through the choice, sequence and combination of those words (which considered in isolation, are not as such an intellectual creation) that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."<sup>71</sup>

25. As was pointed out in *The Belgian Beer Recipes Case*, measuring originality in the case of recipes might involve a particular approach because of their functional character. Nevertheless, even if they could be qualified as 'borderline works' or functional works where it is accepted that the level of originality is a rather relative or marginal, a minimal proof of originality remains a condition sine qua non<sup>72</sup>. "The plaintiff could have showed originality by adopting a different tone or style, embellishing every recipe with personal comments or anecdotes, with unusual suggestions on accompanying supplements (... or) with advices on ways to arrange the plates, decorate the table, by using an unusual layout, etc." None of this could be established in this case<sup>73</sup>.

In line with the above, it seems reasonable to conclude that for most originally written recipes, the protection will often remain 'thin'<sup>74</sup>. Hence, to establish a claim of copyright infringement one must prove copying of "constituent elements of the work that are original"<sup>75</sup> or "the elements (which) are the expression of the intellectual creation of their author"<sup>76</sup>.

<sup>69</sup> Th. Dreier, *Concise European Copyright Law*, Dreier/Hugenholtz (ed), Kluwer Law Intern., 2006, 13.

<sup>70</sup> ECJ 1 December 2011, case C-145/10 *Eva-Maria Painer v. Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*, at 88-92. Cf., in the US, Harper & Row, 471 U.S. at 547, 105 S.Ct. at 2223: "Copyright is indeed limited to those aspects of the work – termed 'expression' - that display the stamp of the author's originality".

<sup>71</sup> ECJ 16 July 2009, case C-5/08, *Infopaq/Danske Dagblades Forening*, at 37 and 44-46.

<sup>72</sup> Court of Appeal Liège, 10 June 2011, *Intellectuele Rechten-Droits Intellectuels (IRDI) 2012*, 80, with reference to the works of Ricketson and Ginsburg *o.c.*, 403; M. Buydens, "Le génie, l'effort et l'exposition ou les limites du concept d'originalité en droit d'auteur", *Rev.dr.U.L.B.* 2007, 92 and M. Buydens, "Quelques réflexions sur le contenu de condition d'originalité", *Auteurs&Média* 1996, 386.

<sup>73</sup> *Ibid.* The court added that, while "the act of selecting one beer over another or to change an ingredient definitely includes a personal choice of the plaintiff, (it) does not appear sufficient to grant copyright protection to the recipes".

<sup>74</sup> Hugenholtz, *l.c.* 1998, 178-179; W.D. Brown, "The Sneaky Chef Cookbook Gets "Thin" Copyright Protection", [www.natlawreview.com](http://www.natlawreview.com).

<sup>75</sup> Feist, 499 U.S. at 361, 111 S.Ct. at 1296. Applying this holding to recipes published in a cookbook, the Second Circuit in *The Sneaky Chef* case held that when "a work incorporates unprotected elements from the public domain, we apply a "more discerning observer" test, which requires "substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed [work]." The court subsequently dismissed a claim for infringement considering that the similarities between the two cookbooks at issue in the expression of a same idea (such as their instructions for preparing dishes or language about children's healthy eating), constituted "unprotectable elements that flow naturally from the work's theme rather than the author's creativity"; 375 Fed Appx 81, 83-84 [2d Cir2010]

<sup>76</sup> *Infopaq* decision, at 51.

- *A collection of recipes*

26. Cookbooks can come in many forms going from basic kitchen cookbooks (the 'kitchen bibles'), over instructional cookbooks, ethnic cookbooks, professional cookbooks, single-subject cookbooks (e.g. pizza's, barbecue, ...) to cookbooks written by or for a specific (often popular) chef. It goes without saying that such cookbooks consisting of a collection of several recipes – and which may also take the format of a website or a DVD – are copyrightable, subject to the limitations outlined in the previous sections. It seems even very likely that cookbooks will in general qualify for copyright protection as works of literature.

A further question that may arise, is whether a cookbook may benefit from the specific protection scheme for databases or collections?

27. As a result of the database directive<sup>77</sup>, authors *in the EU countries* have the possibility of cumulating two protection schemes for works that comply with the definition contained in said directive: traditional copyright and the specific *sui generis* right<sup>78</sup>. This will, of course, be dependent on the form of the collection. In the hypothesis of copyright, it has to be demonstrated that the selection or the arrangement of the recipes was done in an original way<sup>79</sup>. For the *sui generis* right to apply, evidence of a substantial investment in the obtaining, verification or presentation of the contents of the database is required<sup>80</sup>. It is not the purpose of this paper to discuss the database regime and its possible application to collections of recipes in more detail. Either way, protection will only be given to the structure and/or the collection and not to the individual recipes of the cookery book<sup>81</sup>. Protection as a database does indeed not affect the copyright status of components of which it is constituted<sup>82</sup>.

28. While refusing to adopt a similar extended protection scheme for databases, the US recognize the concept of a 'compilation copyright' which is regulated in 17 U.S.C. § 103. Clearly cookbooks may be subject to such a protection<sup>83</sup>. A compilation copyright protects the order and manner of the presentation of the compilation's elements, but does not necessarily embrace those elements<sup>84</sup>. In a situation where individual recipes are not themselves copyrightable "[t]he only conceivable expression is the manner in which the compiler has selected and arranged the facts."<sup>85</sup> Hence, it can be concluded that the creative energies that someone may independently devote to the arrangement or compilation of recipes may warrant copyright protection for that

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<sup>77</sup> Council Directive 96/9 of March 11, 1996 on the legal protection of databases *OJ L77/20* of 27 March 1996.

<sup>78</sup> Hugenholtz, *l.c.* 1998, 175. For more details on this protection scheme in general, see E. Derclaye, *The Legal Protection of Databases. A Comparative Analysis*, Edw. Elgar Publ., 2008.

<sup>79</sup> Courts have to apply the same originality standard as in respect of other works; see, *supra*, decisions of the ECJ mentioned in paras 21 and 23.

<sup>80</sup> See articles 3.1 and 7.1 EU Database Directive. Cf. S. Shenk, "A recipe for a non-traditional intellectual property protection", *Communication, Culture and Technology* 2009, 4.

<sup>81</sup> Cf. Court of Appeal in the *Belgium Beer* case.

<sup>82</sup> See article 3.2 EU Database Directive.

<sup>83</sup> *Buccafusco, l.c.* 2007, 1123 (note 9 with further references to US literature and case law).

<sup>84</sup> 17 U.S.C. § 101; see also *Feist*, 499 U.S. at 348, 111 S.Ct. at 1289.

<sup>85</sup> *Feist*, 499 U.S. at 349, 111 S.Ct. at 1289.

particular compilation. Such copyright for a collection of recipes was granted in *Roth v. Pritikin*<sup>86</sup>. But, as was recalled in *Meredith*, such protection does not extend to the content of the underlying recipes<sup>87</sup>.

- *The description on the menu card*

29. Although it is unlikely for a recipe to be reproduced in its entirety on a menu, I have added this 'layer' to make some considerations in relation with the description of recipes and dishes on menu cards.

In many cases such description will be limited to a short *title* with elementary explanations regarding the ingredients (e.g. 'Sour Chicken' or 'macaroni with broccoli'). Such titles or short phrases will not be protected. Some chefs will, however, use this opportunity to distinguish their cuisine from others' by using poetic language (e.g. "a menu of small grazing dishes, each a model of simplicity, clarity and flavor ... a cauliflower soup with a single tortellini of truffled butter in the middle; a foie gras parfait presented as a perfect oblong on a white plate"<sup>88</sup>). In such a case the qualification as an original literary work might be conceivable, in particular in view of the easiness with which courts seem to accept copyright protection for newspaper titles and headlines<sup>89</sup>. In the EU, courts<sup>90</sup> will henceforth refer to the earlier mentioned *Infopaq* decision where the European Court of Justice accepted the possibility of copyright protection for a text consisting of 11 words<sup>91</sup>. In line with this case law, not only an original textual description of the dish on the menu card but also its elaborated title might be afforded protection.

30. In the hypothesis that the title would include the *name of the chef* – which is not at all uncommon<sup>92</sup> – the chef-author could possibly rely on an additional legal system, allowing for protection of his or her personality.

31. Finally, it goes without saying that *the menu card as a whole* may, because of its original lay-out, illustrations and/or wording, often qualify as a literary work that merits copyright protection. In the past, protection has even been given to original compositions of labels<sup>93</sup>.

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<sup>86</sup> *Roth v. Pritikin*, 710 F.2d 934, 936-38 (2d Cir.), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 337 (1983); this case involved the duplication of an entire book that contained recipes.

<sup>87</sup> *Meredith* case, at n° 41

<sup>88</sup> Taken from a review of a restaurant in 'The Observer's Flood Magazine', cited by Su Li Cheng, *l.c.* 2008, 97.

<sup>89</sup> More information about the situation in individual countries is given in the national reports (answer to question 1.2 of the Questionnaire).

<sup>90</sup> See, e.g., *The Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2010] EWHC 3099 (Ch), 26 November 2010.

<sup>91</sup> ECJ 16 July 2009, *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, ECR 2009, I, 6569. See, in particular, para 49: "the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of InfoSoc Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination".

<sup>92</sup> E.g. the 'Rose Kennedy's Chocolate Souffle'; the recipe – which we would qualify as a non-original writing – can be found at [http://restaurant-hospitality.com/recipes/rh\\_imp\\_9716/](http://restaurant-hospitality.com/recipes/rh_imp_9716/).

## F. Molecular Sorbet: alternative forms of protection for culinary creations

*“Instant ice cream, fast-frozen using liquid nitrogen”*

32. A sorbet is typically served between two courses as a way to cleanse the palate before the main course. For the purposes of this paper, the ‘molecular sorbet’ will serve as an interlude to allow for some side observations. Indeed, irrespective of my conclusions as regards possible copyright protection, it is important to keep in mind that culinary creations may benefit from alternative forms of protection.

### a. Trade secrets law

33. For a start, chefs can freely decide to keep their recipes secret and rely on the protection of trade secrets law<sup>94</sup>. In this way, recipes that are carefully developed and/or cooking procedures and dish concepts that are unique to a particular kind of restaurant may qualify as trade secrets. For many decades, companies as Coca Cola and Kentucky Fried Chicken rely on this legal mechanism to protect the mystique and the unique taste of their core products that feed millions of consumers a year<sup>95</sup>. Candy companies seem no less secretive about, e.g. the special cacao bean at the base of their chocolate bars, and will not even disclose how many cacao beans they buy, regarding that as a proprietary secret<sup>96</sup>. True, one can read the ingredients on the product ... but to actually make it, one has to know a lot more. Pursuing such a secrecy policy, companies ensure - and take elaborate measures to maintain - exclusive control over the content of the underlying recipe as well as - implicitly - over the taste and smell of the resulting drink/dish. Protection for these different ‘layers’ of a culinary creation are, as we will see hereafter, problematic from a copyright perspective. Here lies indeed an important distinction between copyright law and trade secrets law: “[c]opyright does not protect an idea itself, only its particular expression. By contrast, trade secrets law protects the author's very ideas if they possess some novelty and are undisclosed or disclosed only on the basis of confidentiality”<sup>97</sup>. Secrecy may, moreover be combined with *contract law* as the object of a contract (e.g. a non-disclosure agreements<sup>98</sup>) can

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<sup>93</sup> See, e.g., *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir.1924) granting protection to labels for bottles and cartons with recipes for fruit drinks.

<sup>94</sup> Cunningham, *l.c.* 2009, 20; Fromer, *l.c.* 2011, 13. For a definition of a ‘trade secret’, see art. 39.2 TRIPs.

<sup>95</sup> The original paper containing the recipe for Coca-Cola is thought to lie deep within the SunTrust Bank’s main vault in Atlanta. As to the recipe of 11 herbs and spices used to make KFC’s Original Recipe fried chicken, portions of the secret spice mix are made at different locations in the US and the only complete, handwritten copy of the recipe is hidden away in a vault in corporate headquarters Louisville, Kentucky.

<sup>96</sup> Fromer, *l.c.* 2011, 9-10 (further reporting that companies such as Mars and Hershey also shield their recipes in alarmed safes).

<sup>97</sup> *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 738 P.2d 665 (1987), at 674. For a critical analysis on overlaps between copyrighted expression and trade secrets, see D.L. Zimmerman, “Trade secrets and the ‘philosophy’ of copyright: a case of culture crash”, in R. Dreyfuss en K. Strandburg (ed), *The Law and Theory of Trade Secrecy*, Edw. Elgar Publ., 2011, 299.

<sup>98</sup> The reputed chef Homaro Cantu mentioned elsewhere in the footnotes, is reputed to require almost everyone who enters his kitchen to sign a four-page nondisclosure agreement (P. Wells, “New Era of the Recipe Burglar”, 2006, www.foodandwine.com).



include a broad variety of items, including ideas, procedures, methods and other subject matter that copyright does not want to protect.

34. Admittedly, it will be far from easy for chefs and restaurateurs to keep their unique recipes secret<sup>99</sup>. Furthermore, the information comprising the secret might always be revealed through inadvertence, independent discovery or reverse engineering. Finally, where recipes are little more than typical fare and readily ascertainable, they will off course not be entitled to trade secrets protection<sup>100</sup>.

## **b. Patent law**

35. Secondly, gastronomic technologies can be protected through the patent system. This would seem conceivable in relation with new styles, such as the so-called 'molecular gastronomy'. For some years, it is fashionable for chefs to offer their customers fake caviar made from sodium alginate and calcium, burning sherbets, spaghetti made from vegetables, and instant ice cream, fast-frozen using liquid nitrogen. Molecular gastronomy is practiced by both scientists and food professionals who study the physical and chemical processes that occur while cooking<sup>101</sup>.

But also in a more general way, patent law can be used to protect new production methods or machinery used in gastronomic technology<sup>102</sup>. This is, e.g., evidenced by the patents taken by Georges Pralus and Joël Robuchon to protect their inventions of 'vacuum cooking' and 'low temperature cooking', respectively<sup>103</sup>. In the Netherlands, there is the 'legendary' patent granted for a method to prepare 'tomatenpruimenjam' (tomato-prune-jam)<sup>104</sup>.

36. However, even though some chefs seem to have a reputation to file for patent protection<sup>105</sup>, the stringent requirements of novelty and inventive step are likely to raise insurmountable hurdles for the majority of individual culinary creations that are the subject of this paper<sup>106</sup>. This form of protection is clearly a better match for companies that are active in the

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<sup>99</sup> P. Diaz & D. Rutherford, "Restaurant Espionage: When Recipes Are Not Trade Secrets", *Cornell Hotel and Restaurant Administration Quarterly*, February 1997 38, 43. In this article, the authors suggest steps that restaurateurs can take to build a wall of confidentiality around their recipes and operations' methods.

<sup>100</sup> *Buffets Inc. v. Klinke*, 73 F.3d 965 (9<sup>th</sup> Cir. 1996), 37 U.S.P.Q.2d 1449 (*Old Country Buffet case*).

<sup>101</sup> Hervé This, "Food for tomorrow? How the scientific discipline of molecular gastronomy could change the way we eat", *EMBO Reports* (European Molecular Biology Organization), 7 November 2006, 1062 (available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1679779/?tool=pmcentrez>).

<sup>102</sup> C.J.J.C. van Nispen, "De octrooieerbaarheid van een estetisch effect", *BIE* 1992, 175.

<sup>103</sup> Examples mentioned by Barrère/Chossat, *l.c.* 2004, 106.

<sup>104</sup> Patent Office (Appeal division) 9 January 1947, *BIE* 1947, 41; on this decision, see Hugenholtz, *l.c.* 1998, 176-177 and *id.*, *l.c.* 2001, 157.

<sup>105</sup> E.g. Homaro Cantu, executive chef and founder of Chicago's Moto Restaurant, should presumably have at least 12 patents in his name (e.g. in relation with his 'edible menus' and the techniques to produce such paper); J. Krause, "When Can Chefs Sue Other Chefs? Defining legitimate legal claims in the restaurant world", [www.chow.com](http://www.chow.com), 2007; Wells, *l.c.* 2006. See, e.g., US patent 7690294 (cooking and serving system and methods) and US patent 7307249 (system and methods for preparing substitute food items).

<sup>106</sup> Cf. A. De Bleckere and P. Maeyaert, "Cookery and rights protection: a recipe for disaster?", [www.internationallawoffice.com](http://www.internationallawoffice.com), 11 February 2011. It should moreover be born in mind that, under the

'food industry'<sup>107</sup> and which have, indeed, already obtained countless patents in relation with e.g., food additives<sup>108</sup>, micro & macro molecular food supplements, edible alternatives, calorie intake, etc.<sup>109</sup> Some of these patents even relate to single 'recipes'<sup>110</sup> and single food products<sup>111</sup>. It is nevertheless assumed that the food industry tends to rely on trade secrets rather than patents<sup>112</sup>. Getting a patent would indeed mean disclosing to the public the innovation. Moreover, the protection would last only for about twenty years, while a secret might be eternally durable if properly protected<sup>113</sup>. Alternatively, in some legal systems, chefs or companies can avail themselves of the protection of a *design patent* which will, however, only secure protection for the look of the product<sup>114</sup>.

### c. Trade mark law

37. Chefs – but in practice more likely restaurants – have the possibility to trademark their names or the name of a typical menu item. Also the possibility to register *shapes* as three dimensional trademarks may lead to protection for the visual appearance of food items or dishes<sup>115</sup>. Trademark law does, however, not allow for protection of signs consisting of a shape which gives substantial value to the goods (also called 'aesthetic functionality')<sup>116</sup>. Hence the shape of a food product will be refused if it is the aesthetic shape that gives the value to this product. In 1984 the President of the Amsterdam Court considered that this refusal ground applied to a small savory cocktail snack ('Wokkelzoutje') but the Court of Appeal reversed this decision ruling that the intrinsic value of this snack lies in the flavor and crispness of the snack, and not in its shape<sup>117</sup>. Registering the *smell or taste* of dishes as a trademark seems even more

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EPC system, patent law requires a technical effect (art. 52 EPC), as opposed to countries where it suffices that the invention is new and useful (e.g. USA).

<sup>107</sup> The International Patent Classification system has its own number (and many more sub-sections) for "foods or foodstuffs and their treatment", which is A23.

<sup>108</sup> See, e.g., US Patent 5658606 issued on 19 August 1997 (Rye extract bread-making additives and method of use thereof).

<sup>109</sup> Interestingly, also in this field, issues of questionable borrowing from the collective heritage occasionally arise; see, e.g., the massive protest from Indian and Pakistani farmers' and civil society organizations against a patent for 'Basmati Rice Lines and Grains' granted in 1997 to the Texas-based company RiceTec; the latter voluntarily withdrew the patent some years later.

<sup>110</sup> E.g. US Patent 6,288,179 (e.g. patent for ingredients replacing egg whites to reduce toughness of batter coatings). In Belgium a patent was obtained for the recipe of biscuit-spread ('speculaaspasta') but the registration was later overturned on the basis of lack of novelty (Commercial Court Ghent, 20 January 2011, *IRDI - Intellectuele Rechten-Droits Intellectuels* 2011, 61).

<sup>111</sup> E.g. US Patent 5,690,989, issued November 25, 1997 (meat steak) and EP 639863 B1, issued on 10 October 2007 (microwave cooking process for (goulash) croquettes).

<sup>112</sup> E. Richard Gold, Matthew Herder and Michel Trommetter, *The Role of Biotechnology Intellectual Property Rights in the Bioeconomy of 2030*, report prepared in the framework of the OECD multi-disciplinary issues international futures programme, December 2007, 6 (footnote 8) (accessible at [www.oecd.org](http://www.oecd.org)).

<sup>113</sup> Fromer, *l.c.* 2011, 12.

<sup>114</sup> See, e.g. US Patent D565,827S issued April 8, 2008 to the Mars Company.

<sup>115</sup> See, e.g., the renowned shape of the Toblerone chocolate bar, registered as international trademark n° 615.994 since 1948.

<sup>116</sup> For EU member states, see article 3 para 1(e)(iii) Trademark Directive 2008/95/EG.

<sup>117</sup> This decision was confirmed by the Netherlands Supreme Court on 11 November 1983, *Nederlandse Jurisprudentie* 1984, 203.

problematic. For a start, trademark protection for smells and tastes is currently not possible in the EU in view of the current wording of the Trademark Directive and Regulation<sup>118</sup> and its interpretation by the ECJ in the case *Sieckmann*<sup>119</sup>. But even in the US where the USPTO seems to adopt a more liberal policy towards olfactory signs<sup>120</sup> there would be a problem. Indeed "functional" scents or smells, that are inherent in the product itself, cannot fulfill the essential trademark function of distinguishing such goods from similar goods of competitors and should for that reason alone be rejected.

#### d. Other forms of protection

38. In some legislations, such as the US, the possibility of protection as *trade dress* can be considered<sup>121</sup>. In landmark case *Two Pesos v. Taco Cabana* from 1992, which went all the way to the Supreme Court, the plaintiff successfully claimed as its trade dress the concept of serving Mexican food in a 'festive eating atmosphere'<sup>122</sup>. While this type of litigation is typically used by chain restaurants, also independent chefs have availed themselves of this protection scheme to protect their restaurant concept<sup>123</sup>. Talking about 'dresses', I mention in the margin the decision of a Dutch court to afford copyright protection to the designer of a 'chefs-Fashion' collection of clothing for chefs<sup>124</sup>.

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<sup>118</sup> In identical wording, both legal instruments impose the filing of a graphical representation of the smell as a condition for its registration as national or community trademark.

<sup>119</sup> ECJ 12 December 2002, *Dr. Ralf Sieckmann v. Deutsches Patent- und Markenamt*, case C-273/00. The case involved a 'methyl cinnamate' scent, which the applicant had described "as balsamically fruity with a slight hint of cinnamon". The ECJ ruled that (a) a chemical formula depicting this scent did not represent the odor of a substance, was not sufficiently intelligible, nor sufficiently clear and precise; (b) a written description was not sufficiently clear, precise and objective; and (c) a physical deposit of a sample of the scent did not constitute a graphic representation, and was not sufficiently stable or durable. Cf. the recent rejection by the Swiss Federal Administrative Court (May 23, 2011) of the application to register 'the smell of candied almonds'. In both cases, the registration did not cover food goods but various other goods (furniture, jewelry, games, etc.).

<sup>120</sup> See the statement of the United States Trademark Association in "Trademark Review Commission Report and Recommendations to USTA President and Board of Directors", 1987, 77 TMR 375. See, e.g. U.S. trademark n° 1,639,128 registered in 1991 for "a high impact, fresh floral fragrance reminiscent of plumeria blossoms" for the goods: "sewing thread and embroidery yarn" (upon the decision of the TTAB Patent and Trademark Office of 19 September 1990, n° 758, 429).

<sup>121</sup> Dreyfuss, *l.c.* 2010, 1450.

<sup>122</sup> This specific atmosphere consisted of stores built on two levels with a step between them and with pink, orange and yellow stripes painted around the tops of the buildings (505 U.S. 763 (1992)). See also *Fuddrucker's, Inc v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 4 U.S.P.Q.2d 1026 (9th Circ. 1987), in which the typical design elements of a national chain of "upscale" hamburger restaurants was claimed as trade dress.

<sup>123</sup> See, e.g. the case brought in 2007 by Rebecca Charles of Pearl Oyster Bar in New York against Ed McFarland of Ed's Lobster Bar for plagiarizing her restaurant concept. The lawsuit, which included a claim for the stealing of her recipes – e.g. to use English muffin croutons in Caesar salad (sic) - was settled out in court in 2008. See more details in P. Wells, "Chef's Lawsuit Against a Former Assistant Is Settled Out of Court", *NYTimes* 19 April 2008.

<sup>124</sup> Pres. Zwolle-Lelystad, 22 March 2010, case 167427/KG ZA 10-55, *Bi-Wear Clothing v. De Culinaire Makelaar*.

39. Finally, some jurisdictions - in particular in systems where trade secrets law is less solidly elaborated - may provide relief through the *laws of unfair competition*<sup>125</sup>. And why not making an attempt in obtaining registration as a *protected geographical indication* for a typical food product? On the condition that an agreement can be reached on its typical ingredients, the specific EU regime for geographical indications (PGI) and designations of origin (PDO), may afford protection for even the content of the recipe, albeit not in favour of an individual person or company<sup>126</sup>.

## **G. Main course: the visual, olfactory & gustatory perception of dishes** ***“Fish sensation Van Gogh”***

### **a. Protection for dishes - defining the subject matter**

40. In this paper, the notion ‘dish’ is to be understood as the food as it is served on a plate, i.e. in a form that one can normally see, smell and taste. Such a dish will necessarily be the result of a recipe. However, in preparing a dish different situations might occur between two extremes. At the one end stands the chef who prepares dishes using ‘the inspiration of the moment’ combined with the culinary experience he has gained from earlier recipes (‘trial and error’); at the other end, are the dishes that result from the faithful translation of a (written) recipe, using the prescribed ingredients according to the instructions contained therein. I do not, however, consider these circumstances relevant for the further analysis of the copyrightability of dishes. I take indeed the position that, even in the case where use is made of a copyright protected recipe, such protection will only extend to preventing the unauthorized use of the recipe as a literary work (i.e. in the manner in which it is expressed) and not to the use of its content<sup>127</sup>.

41. In other words, the literary copyright in a recipe is not infringed by cooking a meal or baking a cake<sup>128</sup>. This view is supported by many scholars in various legal systems<sup>129</sup> as well as in case law<sup>130</sup>. As Hugenholtz observes, when a recipe is transformed into a dish “the protected

<sup>125</sup> See, e.g., M. Buydens, “La protection des idées originales: droit d’auteur, responsabilité civile ou droit de la personnalité?”, *Ing.Cons.* 1993, 61.

<sup>126</sup> On this protection scheme, see more details at <http://ec.europa.eu/agriculture/quality/>.

<sup>127</sup> See also the comparison with computer programs, *infra*, footnote 161.

<sup>128</sup> One should, however, be careful with such a reasoning as it is indeed possible to infringe a literary work in a different context or medium (e.g. the construction of a building or a life performance of a musical composition are quite different from the expression of the written architectural plan or musical score; both would nevertheless constitute an infringing use). In the case of a recipe, however, the expression which is discernable in the form of a dish significantly differs from the expression in a written text.

<sup>129</sup> Hugenholtz, l.c. 1998, 178; A. Ohly, “Economic Rights”, in Derclaye, E. (ed), *The Future of Copyright Law*, Series Research Handbooks in Intellectual Property, Edw. Elgar Publ., 2009, 218; L. Bently & B. Sherman, *Intellectual Property Law*, 2nd ed., Oxford Univ. Press, 134; W. Cornish & D. Llewelyn, *Intellectual Property*, 6th ed., Sweet&Maxwell, London, para 11 ff; Nimmer, o.c. 2005, § 2.18[I]; F. De Visscher & B. Michaux, *Précis de droit d’auteur et des droit voisins*, Bruylant, Brussels, 2000, 5.

<sup>130</sup> See, e.g., the UK decision *Plix Product Ltd v Frank Michael Winston* [1986] F.S.R. 63 where it was held that making a pudding by following a recipe cannot infringe the literary copyright in the recipe, as the pudding itself is not objectively similar to the literary expression of the written recipe.

elements of the recipe will not be recognizable in the dish” because the recipe ‘dissolves’ into the dish<sup>131</sup>.

Hence, I do not share the belief of some scholars<sup>132</sup> that a dish constitutes a reproduction or communication to the public<sup>133</sup> of a recipe in the copyright sense. This would mean that each time the 82 members of the ‘Westchester Women’s Cooking Club’ would meet to try out a recipe in the kitchen of one of the members, they might infringe copyright. Quod non. When transforming a recipe into a dish these members make (a licit) use of the layer of non-protected ideas of the recipe, not of its protected layer.

42. Consequently, the only issue at stake here concerns the possible copyright status of the dish itself, irrespective of its source or genesis. Similar questions as in respect of recipes will have to be examined: do dishes constitute protected subject matter and, if so, can they meet the prerequisite for protection, i.e. the criterion of originality? I will mainly be concerned with the first question because, should there be a positive answer, the normal originality standard set forth in each legislation will have to be applied<sup>134</sup>.

#### **b. The requirement of an expression – the issue of perceptibility**

43. Taking again article 2 (1) BC as starting point, its definition seems to leave open the door for the protection of dishes as ‘artistic works’<sup>135</sup>. This is even so in countries that have taken advantage of article 2.2 of the BC and impose the extra requirement of a fixation in some material form. It seems reasonable to assume that a dish constitutes a tangible fixation of an idea, at least in its visual aspects<sup>136</sup>.

44. There is, however, more about a dish. The fact is that it is perceptible with (at least) three of the five recognized senses, i.e. sight (ophthalmoception), taste (gustaoception) and smell (olfaoception)<sup>137</sup>. Whereas taste and smell are classified amongst the so-called ‘chemical senses’, sight and hearing are called the ‘mechanical’ ones.

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<sup>131</sup> Hugenholtz, *l.c.* 1998, 178. This scholar makes a comparison with the Coca Cola drink which does not ‘unveil’ the formula or ingredients on the basis of which it is made or a ‘bomb’ which is no communication of the brochure on ‘how to make a bomb’.

<sup>132</sup> Dommering, *l.c.* 1992, 17; Mout-Bouman, *l.c.* 1988, 236. Both commentators hold that, without the author’s permission you may not use the recipe in public by cooking the dish in a restaurant or at private cookery classes. See also Su Li Cheng, *l.c.* 2008, 95-96.

<sup>133</sup> In the EU, the right of communication to the public only includes acts of exploitation in an ‘immaterial form’ (see article 3 InfoSoc Directive 2001/29). I would submit (and hope) that the act of preparing dishes is everything but immaterial ...

<sup>134</sup> See, *supra*, para 23 ff.

<sup>135</sup> In contrast to the expression of a recipe in written form which has been qualified above as a ‘literary work’ (*supra*, para 23 ff).

<sup>136</sup> In US law the work must be “sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period more than transitory duration”. Although the term ‘transitory’ is not defined in the law, courts consider it to be a relative term that must be interpreted and applied in context (*Triad Systems Corp. v. Southeastern Express Co.*,<sup>164</sup> F.3d 1330, 36 U.S.P.Q.2d (BNA) 1028 (9th Cir. 1995).

<sup>137</sup> The other two senses being hearing (audioception) and touch (tactioception). One might possibly consider the possibility to perceive a dish through the latter sense (e.g. jelly pudding), but that seems rather exceptional and too far-reaching.

As it has elsewhere been noted, the Berne Convention embraces “every production ... whatever may be the mode or form of its expression”. This open wording has recently brought about the question whether the scope of application of copyright also extends to expressions which can (only) be perceived by the chemical senses. Certainly, they were not on the mind of the drafters of the convention<sup>138</sup>. On the other hand, we all know that, over the last decades, copyright has given proof – for the good or for the worse<sup>139</sup> – of much flexibility when it comes to welcoming new types of creations such as software and, in some jurisdictions<sup>140</sup>, perfumes<sup>141</sup>.

45. The proposition that it is sufficient for the required expression to be perceptible by any one of the human senses, including taste and smell, is clearly not accepted in all jurisdictions as can be concluded from some national reports<sup>142</sup>. E.g. in the report of the Hellenic group it is observed that “according to the academic opinion expressed on this issue, the fixation material of a copyright protected work should be available to the senses of sight and hearing, and not to the senses of smell, taste or feel”<sup>143</sup>. I would also assume that in the common law countries that impose the fixation requirement, only material forms which allow for a visual or an oral perception or recording will be regarded as protectable subject matter<sup>144</sup>. Other reports take a different view. In the French national report the possibility of a perception by other senses is as a matter of principle accepted<sup>145</sup>. The author of the Swiss report observes that excluding such creations on the basis of the mere argument that smells are imprecise and subjective would be too short sided<sup>146</sup>. Some scholars<sup>147</sup> and courts<sup>148</sup> seem to adhere to this broader view that it is sufficient for a creation to be made ‘perceptible in some form’ or ‘perceptible to any of the senses’.

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<sup>138</sup> Cohen Jehoram, *I.c.* 2006, 1624.

<sup>139</sup> See, Malla Pollack, “Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal” 12 *Cardozo L. Rev.* 1477 (1991); this 86 pages long article was drafted as a *reductio ad absurdum* of the standard argument for extending copyright protection.

<sup>140</sup> See more, *infra*, para 50.

<sup>141</sup> Mout-Bouwman actually argues that the recognition of recipes (not dishes!) fits in with this development and the purpose of the Berne definition to be open minded as regards any form of creativity (*I.c.* 1988, 234). The problem I have with this reasoning is that the issues of recipes and dishes were far from new and perfectly known by the drafters of the Berne convention.

<sup>142</sup> See answer to question 1.5 of the Questionnaire: “Are there any judicial decisions/academic opinions on other forms of expression, whether protected or not (e.g. perfumes)?”

<sup>143</sup> National report of the Hellenic group, p. 11, with reference to Marinos, M., *Copyright Law*, 70.

<sup>144</sup> The relevant national reports were not explicit on this issue.

<sup>145</sup> French national report, 6-7: “à partir du moment où il existe une forme sensible et que cette forme est originale, la création peut accéder au statut d’œuvre. Et on ne peut tirer argument ni du fait que les œuvres citées à l’article L. 112-2 du CPI sont perceptibles par la vue et par l’ouïe, ni du caractère éphémère, fugace de la fragrance, la fixation sur un support n’étant pas une condition d’accès au droit d’auteur.”

<sup>146</sup> Swiss national report, 1.

<sup>147</sup> E.g., Su Li Cheng, *I.c.* 2008, 99; R.J. Prins, “De geest uit de fles. Over de bescherming van geuren in Frankrijk”, *B.I.E.* 2006, 470 ff.; Latreille, *I.c.* 2009, 139 (“the expression means an external form that can be sensed in one way or another”) & 142 (olfactory forms).

<sup>148</sup> See point 5.4 of the opinion of the advocate-general of 16 December 2005 in the *Kecofa* case discussed below (para 50): “there is no principle reason why creations that are perceptible through the other senses (of taste, touch and smell) should not be able to qualify as a protectable work”.

46. Clearly no consensus exists – and legal uncertainty reigns – as regards the manner in which a creation should be perceptible in order to qualify as an artistic or literary work. The Berne Convention nor other international treaties – and not even the European directives – provide any guidance in this respect<sup>149</sup>. Hence, different solutions on the national level are to be expected should litigation over dishes be initiated<sup>150</sup>, depending on the subject matter of the protection sought: the visual, olfactory and/or gustatory expression of the dish.

### c. The dish in its visual appearance

47. The question of granting copyright protection to a dish will be the least difficult to answer in relation with its visually perceptible features. A positive answer would in fact be in line with traditional copyright which is used to deal with the mechanical senses, i.e. visually and orally perceptible works<sup>151</sup>.

48. There are indeed chefs who compose their dishes in such a way that they appeal to the aesthetic impulses of their customers<sup>152</sup>. Their primary purpose is to put the saying ‘also the eye wants something’ rather than ‘filling the belly’ into practice. The way the dish is arranged and decorated on the plate may clearly constitute an *expression*. The ‘sculptural-like’ compositions that some chefs serve<sup>153</sup> or the sometimes remarkable or unique designs of pastries that are offered in bakeries<sup>154</sup> may furthermore satisfy the two prongs of the *originality* test: an intellectual creation which bears the stamp of the personality of its author<sup>155</sup>. Accordingly, the qualification of an artistic work deserving downright copyright protection may seem justified<sup>156</sup>. In fact, dealing with these aesthetic components of dishes, is comparable to assessing a graphic design with which copyright law is already familiar. The fact that a dish creation is transient and

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<sup>149</sup> Cf. Ricketson/Ginsburg, *o.c.* 2006, para 8.12 arguing that differing interpretations as regards the works that come within the scope of art. 2(1) “will be the exception and will usually only occur at the margin”. It seems that, with our research question, we are indeed balancing on such ‘a margin’.

<sup>150</sup> In fact, this is exactly what happened in relation with the perfume cases in the Netherlands and France (see *infra*, para 50).

<sup>151</sup> S. Martin and Y. Brutsaert, “La cuisine en quête d’agents conservateurs: la protection des créations culinaires », *Cahiers de Propriété Intellectuelle*, 2007, vol. 19, 512.

<sup>152</sup> Although it is hazardous to generalize, this paragraph will most likely not apply to the majority of dishes and, in particular not to deep-frozen products, ready-to-eat dishes, servings in fast-food restaurants or dishes served in the many medium-ranged restaurants.

<sup>153</sup> E.g. Chef Alexandre Dionisio, who was awarded a Michelin star only seven months after opening restaurant ‘Alexandre’ in Brussels, has a background of four years of studies in the graphical arts.

<sup>154</sup> Such protection for the shape of pastries was the subject of a dispute before the District Court of Dordrecht; because the defendant had already signed a settlement recognizing the copyright claims, the court declined to rule on this question (Court Dordrecht 25 November 2010, case 89672/KG ZA 10-253).. Also in the Netherlands, a court decided that the design of ‘an erotic cake’ of a bakery in the village Pulmerend was copyrightable; similar cakes offered for sale by a competitor were, however, not deemed an infringement (Court of Appeals Amsterdam 11 November 1999, *Informatierecht/AMI* 2000, 62, note J.F. Haeck). See also S. Fontaine Godwin, “Delectable intellectual property: are cake designs copyrightable?”, [www.copyrightcommunity.com/delectable-intellectual-property-cake-designs-copyrightable](http://www.copyrightcommunity.com/delectable-intellectual-property-cake-designs-copyrightable) (answering the question in the affirmative).

<sup>155</sup> *Supra*, para 24. Abstraction should thereby be made of certain ‘style’ features which cannot be subject of copyright protection (e.g. nouvelle cuisine, Asian or French cuisine, etc..).

<sup>156</sup> Hugenholtz, *l.c.* 1998, 178; *Id.*, 2001, 157. Cf. W. Walravens, *L’œuvre d’art en droit d’auteur. Forme et originalité des œuvres d’art contemporaines*, Economica, coll. Patrimoine, Paris, 2005, 78.

will (normally) only exist during a very short period – i.e. the time between it is served on the plate and its eating – should not be problematic from the perspective of copyright<sup>157</sup>. Graffiti, ice and sand sculptures are also only granted a (very) short life during which they enjoy, nevertheless, full copyright protection. Such ephemeral works may possibly create difficulties in proving the reality of the work and, consequently, in enforcing copyright but these seem surmountable<sup>158</sup> because, as a judicial fact, evidence is free.

But then again, such protection shall not extend to the content of the dish or the recipe, at least not under the copyright regime<sup>159</sup>. In other words, chefs should not be able to prevent someone trying to emulate their dish using the same recipe or ingredients but serving it in a visually different composition.

49. Concluding to copyright protection for original dishes will imply that, e.g., taking pictures of the dish (I make pass over the possibility of granting copyright to the photographer<sup>160</sup>) and publishing or showing them in magazines or TV programs would – theoretically - amount to violations of the reproduction and/or public communication rights of the author. Also the act of emulating an original design of the dish after only having looked at it and without having had access to the recipe, might involve liability for copyright infringement, unless an exception would apply (e.g. private use)<sup>161</sup>. Copyright protection would furthermore attribute moral rights to chefs but it would go beyond the scope of this paper to dwell on possible problems to enforce such rights (e.g. right of integrity?) and be given actual relief (reasonableness?).

#### **d. The dish as can be perceived by its taste and smell**

##### ***d.1. The comparison with perfumes***

50. I realize that, by raising the question whether copyright protects smells and tastes, I proceed on sandy grounds. What convincing arguments can be put forward to justify that

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<sup>157</sup> Also in the “fixation” countries, dishes will usually exist long enough to be considered “fixed” for purposes of copyright. “A fixation is considered even if the support is ephemeral. The fixation should be stable enough so that the work is accessible to the senses” (Latreille, *l.c.* 2009, 144).

<sup>158</sup> E.g. by taking photographs or making visual recordings.

<sup>159</sup> See, *supra*, Section F on other possible protection regimes.

<sup>160</sup> See, e.g., decision of the Brussels Court of Appeal to uphold copyright protection for a series of photos taken from a variety of dishes (Brussels, 6 November 1991, *Ingenieur Conseil* 1992, 54). In the EU, the copyright status of photographs is clearly confirmed in ECJ 1 December 2011, case 145/10, *Eva-Maria Painer v. Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*.

<sup>161</sup> Conversely, emulating the dish in a different shape after having understood the recipe by merely looking, smelling and eating the dish, would not involve any liability. A comparison can be made with computer programs where article 6 of the Software Directive allows the lawful user (ordering a dish in a restaurant would certainly make you one) to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program while performing acts of normal use (i.e. looking, smelling and eating the dish).



creations which are only perceptible to other senses than the mechanical ones (sight and hearing) should be treated differently or be excluded from copyright protection<sup>162</sup>?

The delicate nature of our question has recently been demonstrated by the conflicting case law and commentaries in relation with the protection of *perfumes*. In the same year (2006) the Dutch Supreme Court decided in its *Kecofa* decision that the scent of a perfume can be a work and explicitly allowed for a perception of a work by the olfactory organ<sup>163/164</sup> while the French Supreme Court, in its *Bsiri-Barbir* case, held that “(a fragrance) does not constitute a tangible form of expression and therefore is not subject to copyright protection”<sup>165</sup>. It is then tempting to pursue a comparison between perfumes and dishes which have in common that they are the end-result of a ‘recipe’ and are both perceptible by the chemical senses.

51. On the other hand, one can point to some notable differences between smell and taste. Firstly, the olfactory perception – which is the essence for perfumes and which was deemed by the Dutch court to constitute protectable subject matter<sup>166</sup> – is of less significance in the case of dishes where the visual and gustatory perceptions are predominant and the olfactory features only of secondary importance. Secondly, there exist physiological differences between the senses of smell and taste. While the latter involves only four receptors to detect sweet, salty, sour and bitter, there are hundreds of olfactory receptors (388 according to some sources), each binding to a particular molecular feature, at work in the case of perfumes<sup>167</sup>. Of course, this argument is grist to the mill of those who argue in favour of extending copyright to all mechanical senses indifferently. However, while it is likely that all bottles of ‘Chanel n° 5’ produce the same scent

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<sup>162</sup> This discussion on the possibility of copyright protection for works that are only perceptible through the chemical senses will probably not be relevant for countries that have taken advantage of article 2 (2) BC, by imposing ‘a fixation’ as requirement for protection; see, *supra*, para 8.

<sup>163</sup> Hoge Raad (Supreme Court) 16 June 2006, *Lancome Parfums et Beaute et cie S.N.C. v. Kecofa BV*, *Nederlandse Jurisprudentie* 2006, 585, note Spoor; *Propriétés Intellectuels* 2007, 7, note H. Cohen Jehoram. See on this decision also Van Eechoud, Van Gompel, Guibault, Van der Sloot, Hugenholtz, “Answers by the Dutch ALAI Group to the Questionnaire”, *Boundaries and Interfaces*, ALAI Study Days 2011, Dublin, 7; A. Quaedvlieg, in *AMI Auteurs-, Media- en Informatierecht* 2006, 168; Hugenholtz, *l.c.* 2006, 822.

<sup>164</sup> The court explicitly held that a scent can be protected if it is perceptible to the human senses (i.e. olfactory senses), (...) irrespective of the fact that the human olfactory organs have a limited ability to distinguish scents, that the degree to which separate scents can be distinguished differs from one person to the other and that, due to the specific nature of scents, not all provisions and restrictions of the Copyright Act can apply (...); see Answers Dutch ALAI Group, *supra*.

<sup>165</sup> Cour de Cassation 13 June 2006, *Bsiri-Barbir v. Haarmann & Reimer*, *RIDA* October 2006, 349; *R.T.D.C.* 2006, 587. This Court reaffirmed its position in a decision of 1 July 2008, *Beaute Prestige Int’l v. Senteur Mazal*, case 07-13.952 and 22 January 2009, *Argeville v. Lancome Parfums et Beaute*, case 08-11.404 (available at [www.legimobile.fr](http://www.legimobile.fr)). It should be observed, however, that some first instance courts and appeal courts in France continue to admit the protection of a fragrance as a work. For comments on this French case law see, e.g., Latreille, *o.c.* 2009, 142 (with references in footnotes 31 and 32); J. Aittouares, “Droit d’auteur : les parfums refoulés”, *R.L.D.I.* 2008, 14; D. Galan, “Fragrances: la passation du flambeau de la résistance”, *R.L.D.I.* 2009, 12; A. Lucas, in *Propriétés intellectuelles* 2006, n° 21, 442; B. Edelman, note on Cass. 1 juillet 2008, *D.* 2009, 1182.

<sup>166</sup> In its opinion (which was followed by the court), the advocate-general stressed that not the visually perceptible material (liquid / ‘de reukstof’) that gives off the scent (qualified as the *corpus mechanicum*) but only the scent (‘geur’) (qualified as the *corpus mysticum*) merits protection (see nr. 3.3.2 of the decision).

<sup>167</sup> Source: Wikipedia.

this result seems rather improbable in relation with dishes, even assuming that they would be prepared by the same chef and on the basis of the same recipe. Finally, it is likely that the incentive function included in the copyright system might indeed produce beneficial effects in the perfume industry, but such an outcome is much less evident in the case of culinary creations. This latter argument will be further developed in the last section.

52. Despite these differences, I would not advocate a different treatment for smells and tastes. However, as will become clear in the next section, this proposition should not be understood as a plea in favor of their copyright protection.

### ***d.2. Smell and taste should not be afforded copyright protection***

53. There are a number of justifications which persuade me to argue against copyright protection for creations which are solely perceptible through the chemical senses, despite certain fierce voices to the contrary<sup>168</sup>. The reasons do not so much relate to the transient character of such creations or to the fact that the perception through smell and taste may not be objective or stable. Also the visual or aural perception of some works of art has these characteristics<sup>169</sup>. Anyhow, neither durability nor objectivity constitutes requirements for copyright protection<sup>170</sup>.

54. For one thing, there is a scientific argument - to be further explored, however - holding that the mechanical senses allow for *a more* objective perception than the chemical senses<sup>171</sup>. Summarizing the beliefs of Plato and Aristotle, Korsmeyer writes in a chapter on 'The Hierarchy of the Senses' that "sight and hearing are sources for 'objective' information; that is to say, what is learned concerns the world external to the body of the percipient"<sup>172</sup>. Furthermore, the perception by the olfactory or gustatory senses lacks clear contours<sup>173</sup>. Smell and taste are "fleeting, variable and depending on the environment". Quite interesting, the Dutch Supreme Court did not have a problem with the latter characteristics which I quoted from its *Kecova* decision. I nevertheless share the opinion of critics reasoning that mere (chemical) perceptions do

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<sup>168</sup> See the supporters of copyright protection for perfumes, mentioned in the previous section. See also S. Balana, "L'industrie du parfum à l'assaut du droit d'auteur ... fumus boni juris?", *Propriétés Intellectuelles*, July 2005, n° 16, 254; and Pres. Amsterdam, 9 August 2001, *Informatierecht/AMI*, 2001, 157, note Hugenholtz (recipe of a 'bonbon'), who seemed not unwilling to grant protection to the taste of this culinary creation.

<sup>169</sup> Cf. C. Sappa, "Non-conventional Copyright Subject Matter: Fragrances and Gastronomy", Theme 5 WIPO International Convention on Intellectual Property and Competitiveness of micro, small and medium-sized enterprises, 9 December 2010, [www.wipo.int](http://www.wipo.int).

<sup>170</sup> Lucas/Lucas, *o.c.* 1994, n° 59.

<sup>171</sup> See the Section 'Taste in Western Philosophy and Culture' in Buccafusco, *l.c.* 2007, 1140 ff; cf., in relation with the scent of perfumes, F. Pollaud-Dullian, "La fragrance d'un parfum n'est pas protégée par le droit d'auteur", *JCP* 2006, 1597. It is interesting to note that the Dutch term 'gewaarwording' is differently translated in English depending on the senses involved; in case of viewing and hearing the dictionary proposes 'perception'; in case of the use of the other senses, the translation 'sensation, feeling, experience' is given.

<sup>172</sup> C. Korsmeyer, *Making Sense of Taste: Food & Philosophy*, Cornell Univ. Press, 1999, 25. See also at p. 3: "Philosophers who study perception have concluded that the cognitive developments made possible by sight and hearing are so superior to the other senses that both may be labeled the 'cognitive' or 'intellectual' senses – or in short, the 'higher' senses".

<sup>173</sup> Cf. Hugenholtz, 2006, 824 (in relation with perfumes).

not allow to clearly delineate the protectable subject matter<sup>174</sup> and, consequently, may harm the copyright system by hauling in its protection scheme a ‘box of pandora’<sup>175</sup> or by creating gateways for the protection of subject matter that copyright may not want to protect<sup>176</sup>. Relatedly, the negative effect on legal certainty, which a broad interpretation of what can constitute copyrightable *expression* might produce, should be of particular concern. Protecting smells and tastes would indeed increase the problem of ‘vagueness’ that copyright is currently already suffering from. Also, the justification – and even feasibility – to protect the smell and taste of dishes during 70 years following the death of their creator seems to verge on the ridiculous. Finally, if one should conclude that the smell and taste of dishes constitutes protectable subject matter, the requirement of originality will come to the surface the assessment of which may prove highly problematic.

The above arguments may support a conclusion that, from a doctrinal viewpoint creations which are merely perceptible through the senses of taste and smell do not constitute an artistic (and clearly not a literary) work and, therefore, do not fall within the ‘domain of copyright’ as it is delineated by the Berne Convention<sup>177</sup>. There is maybe a reason why the enumeration in article 2(1) BC only includes creations which are visually or aurally perceptible ...

## H. **Desert: should the copyright system ‘digest’ all forms of culinary creations?**

### *“Papaya slices as digestive”*

55. So far, our findings confirm that recipes and dishes may be afforded copyright protection in certain circumstances. The latter cases would include recipes that are expressed as a literary work (e.g. original presentation in cookbook) and dishes which could qualify as an artistic work (e.g. original arrangement on a plate). I have concluded against copyright protection in relation with the content of recipes as can be understood from their reading as well as with respect to the non-traditional forms by which dishes can be perceived (smell and taste).

56. In this last section, I would submit that copyright, even where doctrinally feasible, is not a suitable form of protection for dishes or - for those who would advocate such protection – for recipes as such<sup>178</sup>. I do realize that refusing culinary creations admittance to the realm of copyright is a daring proposition but I am not the first to suggest it<sup>179</sup>. To underpin such

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<sup>174</sup> Spoor, 2006, 585 (in relation with perfumes). It is interesting to note that this same problem also constituted one of the arguments at the basis of the refusal to register a smell as a trademark (see, *supra*, para 37).

<sup>175</sup> Cohen Jehoram, *l.c.* 2006, 1624.

<sup>176</sup> See more, *infra*, Section H.

<sup>177</sup> Cf. Hugenholtz, *l.c.* 1998, 178. In relation with perfumes, the same proposition has been made by Cohen-Jehoram, *l.c.* 2006, 1624; Hugenholtz, *l.c.* 2006, 821; Van Bunnem, *l.c.* 2007, 632, and seems to be in line with the decision of the French Supreme Court in the *Bsiri-Barbir* case (*supra*, para 50). This court stated that perfumes do not constitute the creation of a form of expression that can be copyrighted under the heading ‘work of mind’ as set out in Articles L.112-1 and L.112-2 French IP Code.

<sup>178</sup> This plea is without prejudice to possible protection for an original literary expression of the recipe as was discussed in Section IV.b.2.

<sup>179</sup> See, most prominently, Buccafusco, *l.c.* 2007, 1121 considering copyright protection to be “neither necessary nor appropriate”. See also references in the following footnotes.

proposition, we need to lift up the reasoning from the doctrinal to the teleological level. The proper question would then run as follows: *should* creations of the culinary art - recipes and dishes - belong 'to the literary, scientific and artistic domain' that was envisaged by the drafters of the Berne convention? What follows is a far from comprehensive account of issues that can be considered to answer this question (in the negative).

#### a. Goals of copyright

57. Several scholars have argued that affording copyright protection to recipes and/or dishes would not be in compliance with the goals of copyright and, to the contrary, achieve the opposite result<sup>180</sup>. One may rightly observe that most of these authors have a common law background which looks upon the goals of copyright in a different manner than continental systems. While this is certainly true - and explains for the choice of the accompanying wines which I put on the menu card (*French red wine 'rewarding creativity' & Californian white wine 'incentive to creativity'*) - I consider that the arguments these scholars put forward are valuable for both systems.

58. It would, of course, exceed the limits of this paper to enter into the details of the different nature, justification and interests at stake between the copyright system, on the one hand and the 'droit d'auteur' system, on the other hand<sup>181</sup>. In a nutshell, and overlooking the subtle distinctions between the major systems, copyright law aims at encouraging new creations in the broad literary and artistic domain by providing their authors with exclusive rights which are temporary in nature so as to ultimately enrich the public domain<sup>182</sup>. On both sides of the ocean, this 'economic-utilitarian' justification of copyright - consisting at providing for an *incentive* - is widely accepted<sup>183</sup>. Yet, in the continental systems, also a second '*personalistic*' justification is upheld which consists of providing a *reward* for the authors' efforts<sup>184</sup>.

59. It is then argued that granting copyright to chefs in their culinary creations would not result in more creations and, ultimately, the growth of the public domain after termination of the statutory period. While recognizing that dishes<sup>185</sup> constitute an original and copyrightable expression, Buccafusco empathically steps back from this legal conclusion to argue against

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<sup>180</sup> See further references to Buccafusco, Dreyfuss, Barrère/Chossat and Fauchart/Van Hippel, hereafter.

<sup>181</sup> I refer in this respect to excellent studies that have been performed by other scholars. See, in particular, the thesis of A. Strowel, *Droit d'auteur et Copyright*, Bruylant Brussel, 1993.

<sup>182</sup> See, e.g. the US constitution, which is very specific about the purpose of copyright providing that Congress shall have the 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" (Article I, section 8, clause 8).

<sup>183</sup> Strowel, *o.c.* 1993, 151; Grosheide, *Auteursrecht op maat*, Kluwer, Deventer, 1986, 135: see also A.A. Quaadvlieg, "The Economic Analysis of Intellectual Property Law", in Korthals Altes/Dommering/Hugenholtz/Kabel (eds.), *Information law towards the 21st century*, The Hague/London/Boston, 1992, 379; more references from other countries are provided in Strowel, *o.c.* 1993, 153 ff.; this scholar, however, warns about a too general application of this theory ("elle est valable aussi longtemps qu'elle n'est pas poussée trop loin", p. 163)

<sup>184</sup> Strowel, *o.c.* 1993, 177 ff. This author nevertheless considers that this personalistic justification is more proper to explain for the existence rather than for the goals of copyright.

<sup>185</sup> This scholar argues that the recipe is merely the material fixation of the dish. In his view not the recipe but the dish constitutes a work of authorship.

allowing for such protection. Creating monopolies in dishes would, according to this author, “not substantially reward innovators, promote knowledge, or enlarge the public domain”<sup>186</sup>. Likewise Dreyfuss<sup>187</sup> and Barrère/Chossat<sup>188</sup> express serious doubts as to whether granting exclusive rights is the best way to generate the incentives that encourage intellectual production in the culinary world. It is added by Fauchart/Van Hippel that the goals of personal rewarding that copyright pursues, are currently achieved by norms existing outside the world of copyright and applied within the culinary world<sup>189</sup> (see also section c hereafter). It is finally submitted by these authors that affording copyright protection to culinary creations would probably produce the opposite effect from what copyright pursues. It is indeed conceivable that, should copyright protection be available, innovation would actually decrease because it would dissuade other chefs from experimenting with the dish for fear of running afoul of the law<sup>190</sup>. And, more in general, locking away recipes and dishes from the public domain during the lifetime of the chef + seventy years would stifle rather than encourage the creation of delightful culinary creations.

#### **b. Particular nature of culinary creations as ‘collective heritage assets’**

60. While enjoying ‘Grandmother’s onion soup’, attention has been drawn in Section D to the particular nature of recipes and dishes. Of course, the fact that the majority of recipes builds upon already existing recipes is in itself not convincing to afford a different treatment. Most copyrighted works are indeed “precooked by the cultural heritage”<sup>191</sup>. Yet cultural factors which are unique to the culinary world argue against monopolies in food<sup>192</sup>.

61. Notions of sharing recipes are common in the culinary world. Even in respect of dishes that could be considered ‘original expressions’, it appears that in practice chefs - even very reputed ones<sup>193</sup> - do not treat them as their exclusive property and concede their public domain origin. It seems widely - albeit not unanimously - accepted that recipes and dishes constitute cultural heritage assets which do not belong to any identified craftsman but to the people who have made up the gastronomic profession for many years<sup>194</sup>. Chefs seem to endorse the idea about sharing and hospitality which is in conflict with the idea of exclusive ownership of dishes, as long as they are given credit and are acknowledged in some way<sup>195</sup>. Because of this particular

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<sup>186</sup> Buccafusco, *l.c.* 2007, 1149 ff & 1156.

<sup>187</sup> R.C. Dreyfuss, *l.c.* 2010, 1437. This author makes the same observation in relation with other creative endeavors that are flourishing without strong intellectual property protection such as fashion, stand-up comedy, magic and (open) software.

<sup>188</sup> Barrère/Chossat, *l.c.* 2004, 109.

<sup>189</sup> E. Fauchart and E. Von Hippel, “Norms-based intellectual property systems: the case of French chefs”, 19 *Organization Science* 187 (2008).

<sup>190</sup> Buccafusco, *l.c.* 2007, 1150.

<sup>191</sup> Hugenholtz, *l.c.* 1998, 175.

<sup>192</sup> Buccafusco, *l.c.* 2007, 1151.

<sup>193</sup> Ferran Adria, Heston Blumenthal, Thomas Keller and Harold McGee, “Statement on the new cookery”, *The Observer*, December 10, 2006: “culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks”.

<sup>194</sup> Barrère/Chossat, *l.c.* 2004, 109.

<sup>195</sup> Buccafusco, *l.c.* 2007, 1152.

nature as ‘common heritage goods’, the argument is put forward both by scholars and chefs<sup>196</sup>, that culinary creations should be left outside the copyright system, notwithstanding the undeniable creative and cultural dimension of some of them.

### c. The availability of efficient (non IP) norms

62. Chefs do insist on respect of the (informal norms) of attribution<sup>197</sup>. But empirical studies have demonstrated that norms currently existing and applied within the culinary world actually achieve this goal of ‘personal rewarding’ in practice<sup>198</sup>.

Research conducted by Fauchart and von Hippel has, in particular, established that ‘norm-based intellectual property systems’ are able to provide a substitute for ‘law-based’ IP systems. These scholars conclude to the existence of at least three social norms that protect chefs’ IP interest, with or without a copyright system in place: i) a chef must not copy another chef’s recipe innovation exactly, ii) if a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission and iii) colleagues must credit developers of significant recipes (or techniques) as the authors of that information<sup>199</sup>. These scholars have also found out that chefs actually do adhere to these norms (violators are punished by a refusal to provide further information and by lowered reputation in the community)<sup>200</sup>. Barrère/Chossat even observe that allowing copyright to be introduced into gastronomy would even give rise to “entropy problems” in the culinary world<sup>201</sup>.

63. Hence, it is felt that the status of individual chefs would not be improved were they to receive copyrights in their culinary creations<sup>202</sup>. Chefs may for that matter invoke copyright protection today but they hardly seem to do so. A look at the case law discussed in this paper, confirms this assumption, as most of the published decisions involve suits which were brought by cookbook publishing houses rather than individual chefs<sup>203</sup>. Clearly the former would benefit from extended copyright protection rather than the latter.

64. In addition, we should not forget that chefs are not entirely left without legal protection. As was explained above, they can decide to keep their recipes secret. Reputed chefs will

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<sup>196</sup> It is said that chefs don’t like the idea of a copyright system for food; Wells, *I.c.* 2006. (“Can you imagine Thomas Keller calling me and saying, ‘Grant, I need to license your Black Truffle Explosion so I can put that on my menu?’”).

<sup>197</sup> Dreyfuss observes that many of the areas where innovation is ‘free’, are based on a strong norm of attribution (*I.c.* 2010, 1449 & 1468).

<sup>198</sup> Fauchart/Van Hippel, *I.c.* 2008, 187; see also Buccafusco, *I.c.* 2007, 1156 (“the goals of copyright law will be best achieved through the system of informal professional norms already in place and not through an extension of the copyright statute”) and paper of A.A. King, “Kitchen Confidential? Knowledge Transfer and Social Norms in Gourmet Cuisine”, May, 2011, available at papers.ssrn.com.

<sup>199</sup> Fauchart/Van Hippel, *I.c.* 2008, 188; these findings are confirmed by the research conducted by Buccafusco, *I.c.* 2007, 1154. See in this respect also the Code of Ethics imposed by the International Association of Culinary Professionals on its members ([www.iacp.com](http://www.iacp.com)).

<sup>200</sup> Fauchart/Van Hippel, *I.c.* 2008, 194.

<sup>201</sup> Barrère/Chossat, *I.c.* 2004, 109.

<sup>202</sup> Buccafusco, *I.c.* 2007, 1150-1151.

<sup>203</sup> *Ibid.*, at 1151; see also the *Meredith* case and the *Belgian Beer Recipes* case which we have discussed in Section E. decision;

undoubtedly have their own secrets as regards the composition of their sauces or the perfect timing for the caisson of meat. As many recipes rely on gastronomic precedents belonging to the culinary public domain – to be distinguished from the public domain in the copyright sense – most cooks or chefs that take reputation seriously will attempt to add some sort of ‘secret ingredient’ or ‘secret combination of ingredients’ to their version of a popular recipe. As long as they (can) keep this information ‘top secret’ they will be able to maintain a culinary edge over their competitors. Revealing this secret orally or in writing will add this innovative idea to the culinary public domain.

It is therefore even doubtful whether the few chefs who currently rely on secrecy – in most of the known cases, rather companies than individuals in the food industry apply the latter scheme<sup>204</sup> – would indeed be persuaded to divulgate their recipes in return for copyright protection. And, this latter form of protection can anyhow be acquired through an original publication of the recipe, albeit only for the literary expression as such.

#### **d. To conclude**

65. This paper is not a plea to abolish the traditional copyright regime to all manifestations of culinary art. However, scholars should not show themselves unresponsive to the question whether and when copyright – and the same would apply to other intellectual property rights<sup>205</sup> – is needed or desirable. Such an attitude is, in particular, justifiable in view of the increasing criticism that the copyright system had to swallow in recent years. As Dreyfuss points out, since knowledge is cumulative, exclusive rights have always had the paradoxical effect of slowing progress in the name of promoting it<sup>206</sup>. Where the latter effect becomes dominant in certain creative sectors in the sense that their development is sparked by other factors than proprietary norms or, rather, by the possibility of nonproprietary development, there are grounds to question the appropriateness of the IP system<sup>207</sup>. Hence, where it appears that the protection of copyright is counterproductive to the interests of creators and society at large, the correctness of copyright might be questioned. Raustiala and Sprigman show how industries as fashion, furniture, perfume and hair styling benefit from what these authors call “copyright’s negative space”<sup>208</sup>. I have attempted to demonstrate in this paper that similar dynamics seem to be at play with respect to recipes and dishes<sup>209</sup> but I do realize that further study is needed.

For now, I hope that I will be able to serve to my friends a Bloody Mary for many years to come, despite the fact that the creators of the underlying recipe have not died long enough ago ....

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<sup>204</sup> See, *supra*, para 33.

<sup>205</sup> See, e.g., in relation with the patentability of genes, G. Van Overwalle, “Turning Patent Swords into Shares”, 330 *Science*, December 17 2010 (issue 6011), 1630-163.

<sup>206</sup> Dreyfuss, *l.c.* 2010, 1441.

<sup>207</sup> This reasoning is also backed up from an economic standpoint. See W. M. Landes and R.A. Posner, “An Economic Analysis of Copyright Law”, 18 *J. Leg. Stud.* 325, 325-33 (1989).

<sup>208</sup> K. Raustiala & Ch. Sprigman, “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design”, 92 *Va.L.Rev.* 1687, 1762 (2006).

<sup>209</sup> This is also recognized by Dreyfuss, *l.c.* 2010, 1445.