KNEAD TO KNOW: CRACKING RECIPES AND TRADE SECRET LAW

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Introduction

Recipes are lists of ingredients and directions for making or preparing something, especially food.[1] Recipes can be complicated formulas that chefs, restaurants, and corporations have relied on for generations.[2] Other forms of intellectual property law, such as copyright law, offer little protection,[3] and thus cooks have had to rely on

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[1] *Recipe*, Dictionary.com, http://dictionary.reference.com/browse/recipe?s=t (last visited Sept. 22, 2015).

[2] *See infra* Part I.

[3] *See infra* Part II.

trade secrecy to protect their recipes. But what does this application suggest about applying trade secrecy in general? To examine this question, it is useful to look at how chefs have protected their recipes in order to determine what, if any, standard has emerged for using trade secrecy to protect recipes.

This article is divided into four parts. Part I depicts the evolution of the cooking industry's standards regarding sharing recipes and challenges that the culinary world is currently facing. Part II describes how much protection copyright, patent, and trademark law provide to recipes, the difficulties this has created, and the protection trade secrecy offers. Part III provides an overview of the types of actions chefs have taken that have led courts to view their recipes as trade secrets. Finally, in Part IV, the article concludes with a discussion of the impact on trade secrecy as a whole.

Part I: The Evolution of Culinary Standards

Since ancient Greece, Westerners have generally held that there are five senses: sight, hearing, touch, smell, and taste.[4] Humanity has historically valued sight and hearing as senses that offer philosophic insight and objective appreciation of the world. However, society has viewed the latter three as senses that result in moral degradation by tempting and distracting people with overindulgence and gluttony.[5] In particular, taste has been viewed as animalistic and low, and thus has been generally excluded from discussions of aesthetics or philosophy.[6] Because of this and the general religious connection made between taste and the sin of gluttony, Western attitudes have traditionally held that eating food, and therefore taste, is a practical necessity at best and a source of corruption at worst.[7] Chefs do not share this view. Instead, chefs describe cooking as an expressive art that allows them to evoke emotions and connections in a diner.[8]

Nevertheless, this negative cultural attitude about eating has influenced the traditional view of chefs themselves.[9] Cooks did not receive much recognition until French cooks began to establish themselves in

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[4] Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 Cardozo Arts & Ent. L. J. 1121, 1140 (2007).

[5] *Id.* at 1141.

[6] *Id.*

[7] *Id.* at 1143.

[8] *Id.* at 1134–38.

[9] *Id.* at 1144–48.

the 1800s.[10] Like the musicians of the time, cooks were viewed as performers or backroom servants who were required to prepare meals at a moment's notice and to use their spare time inventing new dishes to glorify their patrons.[11] Such cooks only began to receive fame with the advent of cookbooks. Even then, they faced difficulties since early cookbooks emphasized practicality and "domestic economy," as they were geared toward housewives and female domestic servants.[12] This emphasis resulted in two general trends in writing cookbooks: "[(1)] use your preface to vigorously assert your own originality and creativity; and [(2)] steal like mad from your predecessors!"[13]

This tension between cooking as an expressive act of creativity and as an act of mimicry that functioned only to feed the masses continues today as the issue underlying the application of trade secrecy to recipes. Today's cuisine, consisting of everything from food blogs to high-end restaurant chains, operates in a "low-IP" world where cuisine is developed in an "open source" model and training is achieved through apprenticeships, both of which have led to the creation of a shared background for classic dishes and flavor profiles.[14] Such a shared background is important because chefs and cooks frequently move between restaurants for employment opportunities and to increase their capacity for innovation through exposure to different styles of cooking.[15] This background has also led to a culture among chefs that emphasizes acknowledging the innovator of a dish and sharing recipes as a means of creating bases for further cooking experimentation.[16]

Research indicates that there are at least three social norms in Western culture that allow chefs to protect their interests in their recipes: "[(1)] 'a chef must not copy another chef's recipe innovation exactly;' [(2)] 'if a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission;' and [(3)] 'colleagues must credit developers of signif-

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[10] *Id.* at 1144.
[11] *Id.* at 1145.
[12] *Id.* at 1145–46.
[13] *Id.* at 1146.
[14] Naomi Straus, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry,* 60 UCLA L. Rev. 182, 192 (2012).
[15] *Id.*
[16] Buccafusco, *supra* note 4, at 1152.

icant recipes (or techniques) as the author's true innovation.'"[17] These norms also serve as sanctions since most chefs highly value the admiration and respect of their fellow chefs. One chef noted that a person who copies a recipe exactly would face rage and shunning from his peers.[18] However, such sanctioning appears only to apply to the few chefs who work in high-end restaurants and small geographic areas since both of these groups frequently interact with one another and share a similar pool of customers, making sanctions easy to enforce.[19] What about in other circumstances?

Unfortunately, this is where issues arise. For example, while most food bloggers object to the outright copying of recipes without some attribution and the Food Blog Alliance has published guidelines on how to provide proper attribution, the general consensus among many food bloggers is that basic recipe instructions do not need attribution either because they are commonly known methods or because anything on the Internet is in the public domain, both of which mean that the recipe is not the secret information of a particular chef.[20] This has resulted in recipes being formally published without the permission of or any attribution to the original chef, as well as publishers finding bloggers copying recipes wholesale and claiming it as their own.[21] One study of three popular food blog sites found "rampant" copying, meaning that over half of the recipes were unattributed, copies were often more readily available than the original, and there was a loss of traffic, all of which resulted in millions of dollars in lost profits.[22] This confusion is further exacerbated by the fact that chefs following the norms also disagree on what is appropriate. Some chefs are hesitant to claim any intellectual property rights, and others state that recipes should be reprinted with minimal changes and proper attribution.[23]

Thus, the world of cooking is in an interesting place. On the one hand, it is attempting to balance two long-held values: (1) recipes are a chef's personal expressions and thus the chef should be given some

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[17] Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* 3 (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06, rev. July 2007).

[18] Meredith G. Lawrence, *Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age*, 14 VAND. J. ENT. & TECH. L. 187, 209 (2011).

[19] Straus, *supra* note 14, at 199.

[20] Lawrence, *supra* note 18, at 210–11.

[21] *Id.* at 203–04, 210–11.

[22] *Id.* at 203–04.

[23] *Id.* at 206–08.

recognition or control over the use of their recipes; and (2) cooks rely so heavily on one another's recipes to develop their skills that giving chefs such recognition or control would prove damaging to future innovation.[24] Alternatively, cooks are also attempting to balance two social views of cooking: (1) the traditional view that cooking is a practical necessity undeserving of protection; and (2) the alternative view that cooking is an expressive art that deserves protection.[25]

Part II: Methods of Protecting Recipes Currently

Given the evolution of conflicting views of cooking, it is unsurprising that cooks have had to develop ways to protect recipes among themselves, resulting in few formalized protections outside of cooks' general social norms. However, some protections have emerged under intellectual property law.

Copyright

There seemed to be no question about whether recipes could be copyrighted until 1963.[26] Courts rarely heard cases on this issue, and the few cases that emerged focused more on a recipe's inclusion as a part of a label or a cookbook than on the recipe itself.[27] Then, in 1963, before courts could rule on this matter, Melville Nimmer effectively answered the question of whether recipes could be copyrighted in his *Treatise on Copyright Law*.[28] According to Nimmer, recipes were unlikely to be copyrightable because "the content of recipes are [sic] clearly dictated by functional considerations, and therefore may be said to lack the required element of originality, even though the combination of ingredients contained in the recipes may be original in a non-copyright sense."[29] Relying on section 102(b) of the Copyright Act, Nimmer went on to note that this lack of originality meant that anyone could produce the same dish and therefore offering copyright protection would be pointless.[30] This definition was relied on in *Publications*

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[24] *Id.*

[25] These two conflicts—which can be described as a conflict between: (1) artistry v. skillset; and (2) creativity v. instruction—will be discussed in more detail in Part IV. *See infra* Part IV.

[26] *See* Lawrence, *supra* note 18, and text accompanying note 30 (explaining that the idea is from the original 1963 edition of *Nimmer on Copyright* at § 37.9).

[27] Buccafusco, *supra* note 4, at 1126.

[28] Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.18[I] (2015).

[29] *Id.*

[30] *Id.*

International, Ltd. v. Meredith Corp., where the United States Court of Appeals for the Seventh Circuit held that the *Discover Dannon: 50 Fabulous Recipes With Yogurt* cookbook was not copyrightable because the recipes did not manifest "even a bare modicum of the creative expression—i.e., the originality—that is the 'sine qua non of copyright.'"[31]

This view has prevailed ever since, and *Meredith* has since been cited in two other cases that are on point: (1) *Barbour v. Head*, where the court denied a motion to dismiss on the grounds that there was a genuine issue as to whether recipes were protected expressions;[32] and (2) *Lambing v. Godiva Chocolatier*, where the court held that recipes were not copyrightable since they were exempt and were "functional directions for achieving a result."[33] The difficulty of this outright rejection has recently arisen again in a series of three high-profile cases: (1) *Lapine v. Seinfeld*, where the court ruled against the plaintiff on the ground that "[s]tockpiling vegetable purees for covert use in children's food is an idea that cannot be copyrighted;"[34] (2) *Lambing v. Godiva Chocolatier*, where the plaintiff sued the defendant for stealing her restaurant's concept and menu for his own restaurant,[35] and the parties ultimately settled out of court;[36] and (3) the case of Robin Wickens, who was forced to stop serving exact replicas of dishes made by famous American chefs by the sheer negative backlash of his peers.[37] Thus, recipes are not protected under copyright, and recent attempts by chefs to use copyright as a means of protecting their recipes have resulted in courts holding against them or in chefs being forced to settle outside of court.

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[31] Publ'n Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 475, 482 (7th Cir. 1996) (quoting Feist Publ'n Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

[32] Barbour v. Head, 178 F. Supp. 2d 758, 762–64 (S.D. Tex. 2001).

[33] Lambing v. Godiva Chocolatier, No. 97-5697, 1998 U.S. App. LEXIS 1983, at *3 (6th Cir. Feb. 6, 1998).

[34] Lapine v. Seinfeld, 375 F. App'x 81, 83 (2d Cir. 2010).

[35] Jason Krause, *When Can Chefs Sue Other Chefs?*, CHOW (Sept. 4, 2007), http://www.chow.com/food-news/54101/when-can-chefssue-other-chefs; Ed Levine, *Is Imitation Always the Sincerest Form of Flattery?*, SERIOUS EATS (June 4, 2007, 2:00 PM), http://www.seriouseats.com/2007/06/sometimes-imitation-is-not-fla.html.

[36] Pete Wells, *Chef's Lawsuit Against a Former Assistant Is Settled Out of Court*, N.Y. TIMES (Apr. 19, 2008), http://www.nytimes.com/2008/04/19/nyregion/19suit.html?_r=0.

[37] Fauchart & von Hippel, *supra* note 17, at 26–28; Pete Wells, *New Era of the Recipe Burglar*, FOOD & WINE (Nov. 2006), http://www.foodandwine.com/articles/new-era-of-the-recipe-burglar.

Patent

There is also a general disuse of patents. Utility patents are patents that protect processes, machines, articles of manufacture, and compositions of matter.[38] These are the types of patents that would be applicable to recipes. However, in order to patent an invention, an applicant must meet the patentability requirements of utility, novelty, and non-obviousness.[39] Since recipes are generally viewed as lacking invention,[40] the U.S. Patent Office rarely grants utility patents for recipes.[41]

The issues of being novel and non-obvious have become critical inquiries for the patent protection of recipes.[42] For example, Procter & Gamble® (hereinafter "P&G") sued Keebler®, Nabisco®, and Frito Lay® for infringing on P&G's patent for the recipe and process for making a dual textured cookie that was "crispy on the outside and chewy on the inside."[43] The defendants argued that the patent was invalid because it was anticipated by a recipe published in a 1968 cookbook.[44] Although the parties ultimately settled,[45] the district court held on a pretrial partial summary judgment motion that P&G's novelty claim regarding the recipe and process was indeed invalid because of the publication.[46] The Board of Patent Appeals and Interferences later used similar reasoning in *Ex Parte Kretchman* to hold that Smucker's® patent for crustless peanut butter and jelly sandwiches was partially invalid because of obviousness, meaning that those of ordinary skill know

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[38] Aaron Larson, *Patent Law*, EXPERTLAW.COM (Sept. 2003), http://www.expertlaw.com/library/intellectual_property/patent_law.html.

[39] 35 U.S.C. §§ 101–103 (2012).

[40] *See* John Gladstone Mills, III et al., *Patent Law Fundamentals*, 1 PAT. L. FUNDAMENTALS § 1:24 (2d ed. West 2015).

[41] *See Protecting Your Recipes: Trade Secrets & Patents*, WEBSTAURANTSTORE (June 20, 2015), http://www.webstaurantstore.com/article/57/protecting-your-recipes-trade-secrets-and-patents.html.

[42] *See* Gene Quinn, *Patentability Overview: When can an Invention be Patented?*, IPWATCHDOG.COM (June 2, 2012), http://www.ipwatchdog.com/2012/06/02/patentability-overview-when-can-an-invention-be-patented/id=23863/; *see also* Gene Quinn, *Patentability Overview: Obviousness and Adequate Description*, IPWATCHDOG.COM (June 9, 2012), http://www.ipwatchdog.com/2012/06/09/patentability-overview-obviousness-and-adequate-description/id=25191/.

[43] Procter & Gamble Co. v. Nabisco Brands, 711 F. Supp. 759, 760 (D. Del. 1989).

[44] *Id.* at 760–61.

[45] Martha Groves, *P&G Will Get $125 Million in Cookie Fight: 3 Rivals Settle Suit on Chewy Snack Patent*, L.A. TIMES (Sept. 13, 1989), http://articles.latimes.com/1989-09-13/business/fi-2042_1_cookie-business.

[46] *Procter & Gamble Co.*, 711 F. Supp. at 773.

how to put peanut butter on both sides of the bread to prevent sogginess and to keep jelly from leaking out.[47]

This does not mean that patents have never been granted. Examples of patented culinary inventions include the process for making a "fruit ganache," yogurt cream cheese, microwaveable sponge cake, and sugarless baked goods.[48] In fact, many industrial food companies and restaurant chains have successfully used patents to protect their edible creations, but the cost of enforcement and proving novelty has nevertheless resulted in patents having only a limited use.[49]

Trademark and Trade Dress

Trademarks are any word, name, symbol, device, or combination thereof that a producer uses to distinguish its goods from those of other manufacturers or sellers and to indicate the source of those goods by placing a mark somewhere on the good.[50] Trade dress is a subset of trademark law that traditionally applied to the overall appearance of labels, wrapping, or containers in which a producer packaged, but it has been broadened to include a combination of any elements in which a product or service is presented to a consumer.[51] Trade dress laws only protect the presentation of the product.[52]

Chefs have had difficulties in attempting to use trademark or trade dress as a way of protecting particular dishes since both only protect the dish's presentation, not the recipe itself, and a cuisine cannot be a restaurant's "symbol" because of its function of satisfying consumers.[53] While chefs have been able to trademark their names, the names of dishes, or the names of restaurants as a means of protection, they have not been able to do so with recipes themselves.[54] Likewise, in a

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[47] *Ex Parte* Kretchman, No. 2003-1754, 2003 WL 23507730, at *7–8 (B.P.A.I. Dec. 10, 2003).

[48] U.S. Patent No. 5,958,503 (filed Feb. 21, 1997) (issued Sept. 28, 1999); U.S. Patent No. 7,258,886 (filed Mar. 18, 2005) (issued Aug. 21, 2007); U.S. Patent No. 6,410,074 (filed Feb. 9, 2001) (issued June 25, 2002); and U.S. Patent No. 5,804,242 (filed Nov. 5, 1997) (issued Sept. 8, 1998).

[49] *See* Krause, *supra* note 35; *see also* Fauchart & von Hippel, *supra* note 17, at 14.

[50] 74 Am. Jur. 2d *Trademarks and Tradenames* § 1 (2d ed. 2007) (citing HBP, Inc. v. Am. Marine Holdings, Inc., 290 F. Supp. 2d 1320 (M.D. Fla. 2003)).

[51] *See id.* at § 36; *see* Straus, *supra* note 14, at 196.

[52] 87 C.J.S. *Trademarks, Etc.* § 54 (2010).

[53] Michael Atkins, *Can a Restaurant Protect Its Décor? Its Recipe? Bob Cumbow Tells All*, Seattle Trademark Lawyer (June 28, 2007), http://seattletrademarklawyer.com/blog/2007/6/29/can-a-restaurant-protect-its-decor-its-recipes-bob-cumbow-te.html.

[54] *See* Straus, *supra* note 14, at 195.

recent case on trade dress, *Taco Cabana International, Inc. v. Two Pesos, Inc.*, the United States Court of Appeals for the Fifth Circuit held that a restaurant's "festive eating atmosphere," including its physical layout, decorations, colors, and menu was akin to product packaging, and thus was protected as an inherently distinctive trade dress that required no proof of a secondary meaning.[55] However, the court only addressed the similarity between the menus and did not address the individual recipes.[56]

Subsequent cases have limited this holding by requiring a layout to have gained a secondary meaning in order to be distinctive enough to be trade dress.[57] It is unclear whether trade dress could cover a recipe itself. In two recent cases, the difficulty of applying trademark or trade dress has prompted parties to settle, instead of going to court.[58] Therefore, trademark and trade dress offer, at best, protection of the presentation of the end result of cooking and not the recipe itself.

Trade Secrecy

A trade secret is:

> [i]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by others who can obtain economic value from its disclosure or us, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[59]

To obtain relief under trade secret misappropriation, a plaintiff must show that the information is a trade secret and that it has been misappropriated.[60] Once a trade secret is lost, it is lost forever.[61] Recipes will qualify for trade secret protection as long as chefs take reasonably sufficient steps to keep the recipes confidential and to derive a monetary benefit from others' lack of knowledge about the recipes.[62]

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[55] Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1117 (5th Cir. 1991).

[56] *Id.* at 1118.

[57] Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 211 (2000).

[58] *See* Straus, *supra* note 14, at 218–19.

[59] Uniform Trade Secrets Act § 1.4, 14 U.L.A. 537 (1985).

[60] *See, e.g.*, CAL. CIV. CODE § 3426.1 (West 2012); FLA. STAT. ANN. § 688.002 (West 1997); N.J. STAT. ANN. § 56:15-2 (West 2012); 12 PA. STAT. AND CONS. STAT. ANN. § 5302 (West 2014); Ashland Mgmt., Inc. v. Janien, 624 N.E.2d 1007, 1008 (N.Y. 1993).

[61] North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 49 (2d Cir. 1999).

[62] *See, e.g.*, Magistro v. J. Lou, Inc., 703 N.W.2d 887, 890 (Neb. 2005) (citing Nebraska Trade Secrets Act, NEB. REV. STAT. ANN. § 87-502(4) (West 2015)) (holding that pizza

Many chefs utilize non-disclosure agreements to prevent misappropriation.[63] The ethical guidelines of the International Association of Culinary Professionals maintain that restaurants and chefs should provide written contracts explicitly spelling out an employee's responsibilities upon their departure from the business, particularly with respect to an employee's use of proprietary information.[64] This guideline demonstrates that many chefs have already begun taking measures to keep recipes confidential by preventing former employees from duplicating recipes or revealing ingredients that may otherwise go untasted or unseen.[65]

Chefs have successfully protected cuisine and the underlying recipes through trade secret law.[66] Many recipes, including the formulas for Coca-Cola®, Kentucky Fried Chicken®, and traditional pizza recipes, exemplify recipes that have benefited from trade secret protection.[67]

In conclusion, there is currently little protection for recipes. Copyright offers no protection, and the cost of enforcement often renders the use of patent and trademark law ineffective. This has resulted in trade secrecy becoming a method to ensure that chefs can protect their recipes. Trade secrecy is effective because in order to establish a recipe as a trade secret, chefs only have to demonstrate that they are taking sufficient steps to keep recipes confidential and that they derive a financial benefit from others not knowing the recipe. Chefs can demonstrate these through the actions they take to keep recipes a se-

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dough recipe was a trade secret where pizzeria owner's father had created the recipe in Sicily prior to coming to the United States, only family members knew the recipe, owner put ingredients in unmarked, sealed packets himself prior to use in kitchen, and recipe was superior because it was an old, personal Sicilian recipe).

[63] Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 J. High Tech. L. 21, 49–50 (2009).

[64] *IACP Code of Ethics*, Int'l Ass'n Culinary Prof. (2011), http://www.iacp.com/join/more/iacp_code_of_ethics.

[65] *Id.*

[66] *See, e.g.*, *Magistro*, 703 N.W.2d at 890–91 (holding that a pizza restaurant's recipes were trade secrets because the "recipes derived independent economic value from not being known to other[s,]" and the restaurant took reasonable steps to maintain the recipes' secrecy).

[67] *See id.* at 888–90; Sabra Chartrand, *Patents; Many Companies Will Forgo Patents in an Effort To Safeguard Their Trade Secrets*, N.Y. Times (Feb. 5, 2001), http://www.nytimes.com/2001/02/05/business/patents-many-companies-will-forgo-patents-effort-safeguard-their-trade-secrets.html?ref=sabrachartrand.

cret and through changes in profit—for themselves or their competitors—brought about by a recipe's use.

Part III: Attempts at Protecting Recipes that Qualify as Trade Secrets

Trade secrecy has a lot to offer recipes, especially given the lack of protection from other means of protection. However, the question remains as to what exactly chefs have to demonstrate in order to protect their recipes and thus begin to qualify the recipe for trade secret protection.[68] What are the minimal actions needed to demonstrate protection? Case law and anecdotal evidence reveal that a standard has emerged as to what these actions are.

One method is to lock the recipe in a vault, thereby limiting access solely to those who have the key. Companies that do this include Coca-Cola®, which has locked its original recipe in a vault since 1925, and has the current vault on display at the Coca-Cola Museum in Atlanta, Georgia.[69] Kentucky Fried Chicken® (hereinafter "KFC") has locked the "secret recipe of eleven herbs and spices" for its chicken in a 770 pound high-tech safe that is located within a vault with two feet thick concrete walls in Louisville, Kentucky.[70] Once when the KFC recipe was moved, the company locked the recipe in a briefcase that was handcuffed to a security guard.[71]

Another means of protection is limiting the number of people who have knowledge about the recipe. This is done in addition to confidentiality agreements.[72] For example, Coca-Cola® is believed to limit knowledge about its recipe to a few corporate executives who are bound to secrecy by oath, must travel separately, and must approve a successor in the event that one of them dies.[73] In actuality, the com-

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[68] R. M. Halligan & David A. Haas, *The Secret of Trade Secret Success*, Forbes (Feb. 19, 2010), http://www.forbes.com/2010/02/19/protecting-trade-secrets-leadership-managing-halligan-haas.html.

[69] *Coca-Cola Moves Its Secret Formula to The World of Coca-Cola*, Coca-Cola Journey (Dec. 8, 2011), http://www.coca-colacompany.com/press-center/press-releases/coca-cola-moves-its-secret-formula-to-the-world-of-coca-cola#TCCC.

[70] Diane Brady, *KFC's Big Game of Chicken*, Bloomberg Bus. (Mar. 29, 2012), http://www.bloomberg.com/bw/articles/2012-03-29/kfcs-big-game-of-chicken.

[71] *Colonel's Secret Recipe Gets Bodyguards*, CNBC (Sept. 9, 2008, 5:17 AM), http://m.cnbc.com/us_news/26618866.

[72] Uniform Trade Secrets Act § 1.1, 14 U.L.A. 537 (1985).

[73] *Original Recipes-How Big Corporations Protect Trade Secrets*, Sumo Nova (May 30, 2007), http://sumonova.com/original-recipes-how-big-corporations-protect-trade-secrets/.

pany merely limits knowledge about the recipe to an unknown few.[74] KFC likewise limits knowledge to a handful of individuals,[75] as does Krispy Kreme®.[76] Even McDonalds® used this method as a way to protect the original recipe for its "special sauce," a move that almost backfired when they supposedly lost the original recipe and had to ask a former supplier to check its records in order to find the recipe.[77]

Finally, one last method of protection is to limit the ability of people to reproduce the recipe by limiting their access to ingredients. KFC, for example, has half of its recipe mixed by one company and the other half mixed by another company before sending the mixture to be fully combined in a separate location by a computer processing system.[78]

Courts have looked at all of these methods of protection as favorable evidence that the recipe in question is a trade secret.[79] In *Peggy Lawton Kitchens, Inc. v. Hogan*, the Massachusetts Appeals Court found that the plaintiff's recipe was a trade secret because of evidence that the plaintiff locked the cookie recipe in question in a safe and a desk, limited knowledge about the recipe to "long-time trusted employees," and broke the recipe into its ingredients by writing each ingredient on separate cards that only contained their gross weight.[80] In fact, the court found that the combination of these methods used by the plaintiff mitigated the fact that the plaintiff had not emphasized secrecy in its employment contracts.[81] Likewise, in *Magistro*, the court recognized the plaintiff's trade secret based on the plaintiff inheriting the recipe from his father who had created the recipe in Sicily, limiting

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[74] Karl Smallwood, *Is the Recipe for Coca-Cola Really Only Known by Two People?*, TODAY I FOUND OUT (Oct. 28, 2014), http://www.todayifoundout.com/index.php/2014/10/formula-coca-cola-know-two-people/.

[75] *'Secret' Recipe to KFC's Success Is Locked Away*, USA TODAY (July 22, 2005, 3:21 PM), http://usatoday30.usatoday.com/money/industries/food/2005-07-22-kfc-secret-recipe_x.htm.

[76] DEBORAH BOUCHOUX, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS AND TRADE SECRETS 458 (Cengage Learning, 3d ed. 2009).

[77] *Id.*

[78] Rob Crossan, *On a Wing and a Prayer; Our High Streets Are Swamped with KFC Imitators. Rob Crossan Spent a Week Working His Way Through the Entire A to Z*, THE TIMES (Apr. 26, 2012), http://www.thetimes.co.uk/tto/life/food/article3395315.ece.

[79] *See, e.g.*, Peggy Lawton Kitchens, Inc. v. Hogan, 466 N.E.2d 138, 139–41 (Mass. App. Ct. 1984) (holding that a recipe for chocolate chip cookies constituted a trade secret); Magistro v. J. Lou, Inc., 703 N.W.2d 887, 888, 890–91 (Neb. 2005) (holding that a pizza restaurant's recipes constituted trade secrets).

[80] *Peggy Lawton Kitchens*, 466 N.E.2d at 139, 141.

[81] *Id.* at 140 (discussing concerns about whether the trade secrets had been misused).

both knowledge and preparation of the recipe to his family, and individually sealing the ingredients for recipes into packets where employees only needed to add water.[82]

Given the court's reception to these methods, it is unsurprising that doing some combination of the seemingly opposite approaches has been found to indicate that a recipe is definitively not a trade secret.[83] For example, McDonald's® "secret sauce" is no longer considered a trade secret because, as part of a public relations stunt to show consumers how McDonald's® makes its hamburgers, the chain's executive chef, Dan Coudreaut, posted a tutorial on YouTube® explaining how to make the sauce and stated that it was not a secret since the ingredients were always available in stores and online.[84] Likewise, the United States District Court for the Northern District of Georgia held that Dippin' Dots'® process of making flash frozen novelty ice cream was not a trade secret because Dippin' Dots® openly discussed the process for four years with companies working for their competitors and disclosed information regarding the process in writing during plant "roll-outs" and "general unrestricted observance."[85] Likewise, the United States Court of Appeals for the Ninth Circuit held that recipes are not trade secrets if their origins are in the public domain and they have not been sufficiently reinvented to prevent easy reproduction.[86]

This makes it clear that, in the case of recipes, a standard has emerged exemplifying which practices must be demonstrated in order to warrant trade secret protection. Specifically, companies can likely prove that a recipe is a trade secret if they have done some combination of limiting the number of people who have access to the recipe or its ingredients, limiting knowledge about the recipe through confidentiality agreements, having different parts of the recipe mixed by differ-

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[82] *Magistro*, 703 N.W.2d at 890.

[83] *See, e.g.*, Buffets, Inc. v. Klinke, 73 F.3d 965, 968 (9th Cir. 1996); *In re* Dippin' Dots Pat. Litig., 249 F. Supp. 2d 1346, 1375–76 (N.D. Ga. 2003); The Daily Mail, *Make a Big Mac at Home! McDonald's Top Chef Explains the Secret to Chain's Burger (But Why Doesn't It Look Quite Like What You Get at the Counter?)*, DailyMail.com (July 10, 2012), http://www.dailymail.co.uk/news/article-2171302/How-make-Big-Mac-home-McDonalds-chef-explains-secret.html.

[84] The Daily Mail, *supra* note 83.

[85] *In re Dippin' Dots Pat. Litig.*, 249 F. Supp. 2d at 1375–76.

[86] *Buffets, Inc.*, 73 F.3d at 968 (holding that plaintiff's recipes were basic American dishes that are served in buffets across the United States and had not been refashioned or made novel enough to be an original product that was not easily reproducible).

ent companies before having them combined at a separate location by a computer processing system, or locking the recipe away.

Part IV: Conclusion—What Protecting Recipes Means for Trade Secrecy as a Whole

As noted in Parts I and II, cooking has traditionally been a low intellectual property realm. As a result, chefs use trade secrecy to protect recipes because it is easier to prove that a recipe is a trade secret than it is to prove that the recipe is novel or distinct enough to be copyrighted, patented, or trademarked.[87] However, the world of cooking is currently undergoing great change. It is attempting to balance its values of cooking as an expressive art with cooking as a method of instruction while simultaneously balancing a shift in social views of cooking from cooking as merely a practical skill to cooking as artistry.[88] Given this ongoing paradigm shift, it remains to be seen whether trade secrecy will continue to be applied, or if copyright, patent, or trademark law will adapt and become the more preferable means of protection. This unique application of trade secrecy to recipes provides a helpful case study for the more general application of trade secrecy as a whole. But what do these ongoing shifts suggest about applying trade secrecy?

There are three implications for trade secrecy, which can be viewed as three types of conflicts: (1) creativity v. instruction; (2) skill-set v. artistry; and (3) secrecy v. openness. As noted in Part I, these conflicts emerge from attempts by chefs to balance these shifting views. Attempts to resolve these conflicts suggest potential ways for trade secrecy to develop, including developing a "fair use" exception for trade secrets, establishing other ways of determining what is valuable, such as utility of the data, and creating a public registry of trade secretes.

Creativity v. Instruction

Again, as noted in Part I, creativity v. instruction is a conflict of traditional values for the cooking field, as the end dish is the chef's primary expression and cooking with a chef is the only way of training other chefs.[89] This conflict is present in other arenas as well. Many

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[87] *See supra* Parts I, II.

[88] *See* Martha Rosler, *The Art of Cooking: A Dialogue Between Julia Child and Craig Claiborne*, Remai Modern (May 7, 2015), http://remaimodern.org/prelaunch/the-art-of-cooking/; Buccafusco, *supra* note 4, at 1131–33.

[89] *See supra* Part I.

craftsmen, such as carpenters, shoemakers, and locksmiths, create products of their labor as their primary product and can only be trained by working with others in the field.[90] This is also true for blue-collar workers, such as custodians, mechanics, and operators, whose ability to labor is their primary product and who can only be trained by others in the field (e.g., at a vocational center, the teacher who is training future electricians is likely to have worked as an electrician).[91] This even applies to some areas of white-collar work, such as information technology and research and design, where workers' ability to interpret and combine information is viewed as their primary product, and they sometimes can only learn from others in their field (e.g., a person learning a particular form of code can only learn how to code from someone else's written instructions or through in-person training by a person who has coded before using that particular coding form).[92]

Due to this similarity, the implication of this conflict in terms of trade secrecy also applies to other areas. Painters can protect certain paint formulas under trade secret law,[93] and engineers can protect their blueprints under trade secret law.[94] But for every carpenter and locksmith who believes that their own individually made cabinet or lock is a personal expression of them, the reality is that anyone who trains with them can, and in some cases must, learn the methods that they use in order to practice. The way in which this conflict is resolved can have wide repercussions on the application of trade secrecy, and it is worthwhile to note that chefs have currently resolved this conflict by using some system of attribution, whereby a chef is given verbal recognition for his or her role in the dish.[95] This allows a chef to keep his or her individual recipe a secret while allowing other chefs to benefit from making variations of it. Other fields could likely do the same, and thus a wider application of trade secrecy could mean having to create something similar to the "fair use" exemption of copyright law

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[90] *See generally* Jim Buss et al., *Lessons on Market Revolution: What's a Body to Do? A Series of Personal Dilemmas*, OAH MAGAZINE OF HISTORY, May 2005, at 27–28.

[91] *See* Sherrie Scott, *What Is a Blue-Collar Worker and a White-Collar Worker?*, HOUS. CHRON. http://smallbusiness.chron.com/bluecollar-worker-whitecollar-worker-11074.html (last visited Sept. 20, 2015).

[92] *See generally* Marisa Taylor, *A Career in Information Technology*, WALL ST. J. (Sept. 13, 2010, 12:01 AM), http://www.wsj.com/articles/SB10001424052748704358904575478133397664058.

[93] *See* Rohm and Haas Co. v. Adco Chemical Co., 689 F.2d 424, 433 (3d Cir. 1982).

[94] *See* Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 (7th Cir. 1991).

[95] *See* Lawrence, *supra* note 18, at 207–08.

that would allow the entire recipe, formula, or process to be covered as a trade secret while allowing for publication or licensing of a part of it.

In order to imagine what this might resemble, consider a chef who has a trade secret on a chili recipe that includes forty types of spices. If there were a "fair use" exemption, the chef could grant other chefs, and therefore the public at large, knowledge of thirty of the spices, but keep secret the ten spices that uniquely make it his recipe and thus make up the "core" of the recipe. This would allow burgeoning cooks to practice recipes or to develop their own recipes using these thirty spices as a base, which would further creativity in the field through experimentation and still allow the chef to protect his recipe as a trade secret since he has protected the "core" of the recipe from disclosure. Another example could be a medicinal corporation that creates some sort of fast-acting cough syrup that is comprised of sixty ingredients and happens to taste like strawberries. The corporation could share forty of the ingredients that give the syrup its taste, thereby furthering innovation of the recipe and other medicines by giving chemists the ability to try out different flavor combinations while also keeping secret the twenty ingredients that make the cough syrup valuable for being fast acting.

Such an exception could allow companies to be innovative by allowing them to share parts of secret recipes that they wish to share without losing their trade secret since the vital "core" of the recipe would not be disclosed. While there could be challenges in actual application (e.g., how does a company define the "core" of the recipe?), these challenges could be easily addressed through case law, drafting legislation, the creation of a four-part fair use test, etc., and thus are unlikely to outweigh the benefits of innovation that such an exception could bring.

Skillset v. Artistry

Similar to the conflict between creativity and instruction, the conflict between skills and artistry is also one that is present in the field of cooking due in large part to society's views about the meaningfulness of cooking.[96] Again, this is not unique to cooking. Both craftsmen and blue-collar workers have faced the issue of having their labor viewed only as a practical necessity for maintenance, and therefore of low eco-

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[96] *See* Caroline M. Reebs, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DePaul J. Art, Tech. & Intell. Prop. L. 41, 48–49 (2011).

nomic worth, and as a form of artwork, and therefore of high economic worth.[97] In fact, for craftsmen in particular, this conflict is exemplified by the use of the term "artisan" to differentiate between those who craft as a form of employment and those who do not.[98] This is also true for some white-collar and knowledge workers, who are defined by their skills and thus are more often viewed as practical necessities than as artists who take pride in their work, regardless of whether they feel that they should be viewed as artists.

Because of this similarity, this conflict could also be applied to other areas where trade secrecy is applicable. The way in which society solves this conflict could indicate whether a particular field is considered economically valuable enough to deserve the protection of trade secrecy. The results of highly skilled and economically valuable labor, such as a particular type of key, electrical grid, or the list of ingredients in a medicine that is being tested by researchers, is likely to be viewed as the product of labor skilled enough to necessitate trade secrecy in order to ensure profits.[99] On the other hand, products of less valued labor, such as a musician's or mime's performance, a taxi driver's transportation services, or a farmer's particular methodology of bundling hay, may not be covered by trade secrets simply because society does not deem them economically valuable enough regardless of whether the workers successfully show that they have kept and protected their methodology or product as a secret.[100]

In this sense, the change in how cooking is viewed bodes well for the application of trade secrecy in other fields. Again, the social value of cooking has shifted from a position of little worth to greater worth. It is likely that social value of other occupations that have historically been viewed as having little economic value (e.g., musicians) could also undergo this shift as the occupations become increasingly more

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[97] *See generally* Jeremy Anderberg, *Reviving Blue Collar Work: 5 Benefits of Working in the Skilled Trades*, The Art of Manliness (Nov. 24, 2014), http://www.artofmanliness.com/2014/11/24/reviving-blue-collar-work-5-benefits-of-working-in-the-skilled-trades/.

[98] *Artisan*, Black's Law Dictionary (10th ed. 2014) ("an artist; esp., a skilled crafter"); *Artisan*, Ballentine's Law Dictionary (3d ed. 2015) ("a mechanic; a skilled worker in a trade involving work with the hands").

[99] *See* Uniform Trade Secrets Act § 1.4, 14 U.L.A. 537 (1985) (defining Trade Secret).

[100] For a poetic example of what this could look like, consider, Robert Frost, *Death of a Hired Man*, Poetry Foundation, http://www.poetryfoundation.org/poem/173525 (last visited Sept. 6, 2015) (telling a story about a character who creates a method of bundling and tagging hay that reduces the strain on the worker trying to lift it, which he considers a secret practice particular to his trade).

technical and require greater training due to technological changes. However, this potentially broader application suggests that trade secrecy may have to create a broader method of establishing economic value. For example, value may have to be determined by how easily a recipe or product could be utilized, which is akin to the process of deciding whether something is eligible as patent subject matter. This would allow companies to seek trade secrecy protection for a greater range of material, such as so-called "negative" data, which, like failed test results, may have little economic value but be of great utility.

Secrecy v. Openness

Finally, there is the conflict between secrecy and openness. As noted in Part I, this conflict is currently at the heart of the issues in the world of cooking. Chefs need to share information as part of training, especially considering the high flow of kitchen workers between kitchens, but chefs may find some recipes and dishes to be either so personal or so valuable that they do not wish to share them with others.[101] This conflict is further exacerbated by the existence of food blogs and Internet cooking sites that copy and share recipes without checking to see how their innovator chefs view such sharing.[102] While this may seem to be unique to cooking, it is nonetheless applicable to other areas as a result of the changes brought about by the Internet, the labor impact of the Great Recession, and the rise of the so-called "sharing" economy. Many fields, whether populated by craftsmen, blue-collar, white-collar, or knowledge workers, now face having to share information because of how quickly workers move between jobs and the fact that the Internet seeks to make easily available any information that workers in those fields or those who opt to "do it themselves" may need for the task at hand.

The reality that many fields are undergoing this sort of paradigm shift means that this conflict applies to those fields as well. The way in which cooks address this issue could forecast how other groups will choose to address it. A field that chooses to place an emphasis on a greater free flow of information between parties, such as artists or menial workers, could opt to reject secrecy and limit the use of trade secrets because they find it hinders their ability to develop the skills or

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[101] *See supra* Part I.

[102] *See, e.g.*, Lawrence, *supra* note 18, at 198–99; Edward Champion, *The Cooks Source Scandal: How a Magazine Profits on Theft*, RELUCTANT HABITS (Nov. 2, 2010), http://www.edrants.com/the-cooks-source-scandal-how-a-magazine-profits-on-theft/.

products necessary for being profitable. In contrast, those fields that choose to place an emphasis on secrecy, such as pharmaceutical researchers, could opt to embrace a greater degree of secrecy as a way to ensure their profitability by not allowing others to copy or innovate what they create.

In this regard, the current use of attribution by people in the cooking world becomes critical. The things that cooks seem to desire to keep secret are not all the recipes or techniques that they use, but only a particular few recipes or techniques that they view as being particularly identifiable with them and thus demand some form of acknowledgement. Other fields could easily duplicate this approach. It is unlikely that every minute aspect of an individual's labor would be protected by a trade secret, but only those secrets that are particularly identifiable with that individual. For example, a jazz musician may not seek trade secret protection for every method of performing, but only for those styles that he identifies with. Further, a company may not seek protection for every result from a research and design trial, but only for a particular few that it feels could establish its reputation in the market. This differentiation between anything that could be an identifier and what is subjectively desired as an identifier suggests that trade secrecy may have to adopt some form of registry where individuals could list something as being trade secreted and thus protected by trade secrecy. This proposed registry would be similar to the registry used in trademark law.

It could be difficult to create such a register. For example, would putting the public on notice that a secret exists tempt people to misappropriate, and how much information could be listed without disclosing the entire trade secret itself? These difficulties are similar to the difficulties in creating a "fair use" exemption. As noted above, such difficulties are potentially easy to address either through case law, legislation, or the adoption of tests by courts (e.g., stronger enforcement could deter tempting misappropriation, the registry could list only the name of the corporation and the name of the secret itself or whatever parts do not make up its "core," a test could be created to see if the trade secret has been defined enough without becoming too public, etc.).[103]

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[103] *See* Rich Stim, *What Is Fair Use?*, STANFORD UNIV. LIBR., http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/ (explaining the fair use exemption); Karl F. Jorda, *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best*

Conclusion and a Response to an Initial Concern

The similarity between the three conflicts present in cooking and other areas that could seek trade secrecy protection suggests a number of possible implications for trade secrecy as a whole. In particular, with respect to cooking, the emphasis on sharing information in recipes and cooking techniques while still creating some means to protect those recipes and techniques that are of great value to cooks suggests that trade secrecy will have to find or adopt some method of allowing greater control over what is being trade secreted. As noted above, these could include developing a "fair use" exception for trade secrets, establishing other ways of determining what is valuable, such as utility of the data, and the creation of a public listing of what is trade secreted.

However, it could be argued that suggesting that trade secret law may have to adopt features of other forms of intellectual property suggests that trade secret protection is not appropriate. That is, if the protections of patent, copyright, or trademark are what cooks are looking for, would it not be better or easier to further develop these protections in the area of cooking rather than developing trade secret law, which is intended to protect other, higher intellectual property fields? Indeed, many have argued just this and proposed various ways that these protections might be so developed.[104] However, the reality is that trade secrecy, by its very formation, confers some benefits that these other areas do not.

First, trade secrecy is unlimited in time, meaning that as long as the information in question can be kept secret, then it remains protected, but the protection is gone forever once the information is made public.[105] This is unlike patent, copyright, and trademark law, which all have varying time limits and procedures to renew protection.[106] Second, trade secrecy does not mandate disclosure of information since it requires that the information be kept secret.[107] Further, information could continue to be kept secret even if trade secret law

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Practices, CONCEPT FOUNDATION ch. 11.5 (2007), http://www.iphandbook.org/handbook/ch11/p05/ (explaining the current trade secret law).

[104] *See* Buccafusco, *supra* note 4, at 1149–55; Cunningham, *supra* note 63, at 35–51; Lawrence, *supra* note 18, at 218–22; Straus, *supra* note 14, at 208–53.

[105] North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 49 (2d Cir. 1999).

[106] *See* 15 U.S.C. §§ 1058–1059 (2002); 17 U.S.C. §§ 301–305 (1998); 35 U.S.C. §§ 154(a), (c), 365(c) (2013).

[107] Uniform Trade Secrets Act § 1.1, 14 U.L.A. 537 (1985).

adopted some form of public listing, whereas patent, trademark, and copyright law require some form of disclosure of the information that they protect.[108]

Finally, trade secrecy is simply easier to establish. As noted in Part II, copyright, patent, and trademark all require some heightened degree of creation or originality, and the difficulty of proving such originality has prevented these three areas from expanding.[109] However, none of these areas are likely to suddenly drop or relax this requirement solely for the sake of cooking, especially since it is a well-established element in other areas. In contrast, trade secrecy does not emphasize novelty as much, as demonstrated by recipes such as Coca-Cola® or *Magistro*'s pizza recipe, which have been inherited. Instead, trade secrecy emphasizes demonstrating that the information for which trade secret protection is being sought has been protected as such. The standard of protection that has emerged in cooking indicates that this is not a difficult burden to meet.[110] The standard of protection that must be demonstrated involves limiting access to the information by others, ideally by locking it away, swearing all those who could access it to secrecy, and taking measures such as having different parts of the recipe mixed by different companies to prevent anyone from being able to reproduce it. This would not be greatly hindered by the adoption of other methods to establish which part of the information is being kept secret or who knows that it is a secret, and the increased utility such adoptions could bring make it very desirable to develop trade secrecy law instead.

Therefore, the way in which trade secrecy has been used to protect recipes and the standard of showing protection that has emerged as a result suggests that trade secrecy could readily grow and be applied more expansively in other areas as well. This could be done in part by adopting some aspects of other forms of intellectual property law. Nevertheless, how trade secrecy will evolve remains unknown. It is important to continue observing how the world of cooking applies its standards of protection. In the end, trade secrecy's next evolution might well depend entirely on how the cookie crumbles.

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[108] *See* Magistro v. J. Lou, Inc., 703 N.W.2d 887, 890 (Neb. 2005).
[109] *See supra* Part II.
[110] *See supra* Part III.