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Addressing the Negative Space in the Food Entertainment Industry: The Pathway to Copyright Dishes

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This intervention examines the persistent “negative space” surrounding culinary creations within Anglo-American copyright law and advocates for formally recognising dishes as protectable works, considering their increasing entertainment value. Part I demonstrates how the purpose of food has evolved from merely satisfying hunger to entertaining audiences, and establishes cooking and recipes as expanding areas within the entertainment industry. Part II discusses the lack of copyright protection for dishes, the inadequacy of legal protections such as trade marks, trade secrets and patents, and explains the resulting negative space within the food entertainment industry. It draws insights from Anglo-American jurisprudence on extending copyright to fashion items and argues for similar protection for food. Part III critiques current Anglo-American laws regarding copyright protection for recipes, highlighting flaws in the legal stance adopted by lawmakers and judges. It also examines the informal laws governing the culinary field. Finally, Part IV discusses the requirements for copyright protection and explores how dishes might be brought within its scope, using examples from the music industry to support attribution to chefs and licensing of dishes. This intervention concludes that recognising food’s entertainment potential and extending copyright protection to original dishes will benefit the food industry.

Keywords: Intellectual Property; Copyright; Food Entertainment Industry; Negative Space; Dishes; Recipes

Introduction

The innovative and financial success of the core creative or entertainment industries, be it literary, music or film, appears to be closely intertwined with intellectual property protection (Brown & Waelde 2018: xi & 1). However, similar protection is not extended to the food industry despite its transformation into a promising avenue for entertainment through fine dining restaurants, celebrity chefs, cooking shows, culinary competitions, as well as food television channels and magazines. Recipes are viewed as mere statements of fact, and consequently, culinary works fall into the negative space of intellectual property protection with the argument that the food industry benefits from the existing lack of copyright protection (Buccafusco 2007: 1156). It is popularly contended that growth and innovation within the food industry depend directly on the free exchange of recipes, and the extension of copyright protection to food will stifle creativity within the industry (Buccafusco 2007: 1156). This intervention aims to disabuse these notions and chart a pathway for copyright protection of novel dishes.

Food as Entertainment

Food is understood as a nutritious substance necessary for human survival.¹ In considering its value, academic scholars have often prioritised this utilitarian aspect over any creative potential that it may possess (Nimmer 2024: vol 1, § 2.18). While buttered toast or oatmeal may fit into this definition, emphasising functionality, it would be difficult to describe iconic dishes such as Heston Blumenthal’s Snail Porridge or Egg and Bacon Ice Cream (Jenkins 2017) as simply functional. Accordingly, when the preparation of a dish involves a variety of carefully curated ingredients, which are brought together with multiple steps and innovative methods, the recipe can be argued to have crossed over into the realm of creativity. Such food, which may be served in fine dining restaurants or depicted in cooking shows and competitions, encapsulates a gastronomic experience and becomes a work of art with aesthetic appeal (Telfer 1996: 41–60). These attributes appear to lend food its entertainment value.

The intersection of the food industry with entertainment manifests in numerous instances. One of the prime examples, as mentioned previously, is fine dining restaurants, which celebrities or celebrity chefs often own. Nobu, a

renowned chain of fine dining restaurants, is owned by Japanese celebrity chef Nobu Matsuhisa and the actor Robert De Niro² and serves iconic dishes such as the Beef Toban Yaki featuring the 'Nobu style', which offers a captivating blend of traditional Japanese and Peruvian flavours.³ Another example is Restaurant Gordon Ramsay, owned by the British celebrity chef Gordon Ramsay.⁴ Such restaurants are often featured in leading hospitality guides such as the Michelin Guide⁵ and Condé Nast (Bannerman 2022), which constitute another ancillary food entertainment business avenue. The growth of the fine dining restaurant business and, consequently, the growth of the food entertainment business in the United Kingdom (UK) can be signified by the increase in the number of Michelin-starred restaurants from 185 to 220 from the year 2021 to 2025 (Statista 2025).

Cooking literature such as cookbooks, food magazines and food columns in newspapers are additional sources of food entertainment, which are both informative and pleasurable for their consumers. Nigella Lawson is a prominent English food writer who has not only authored multiple cookbooks⁶ but was also featured in an episode of the popular sitcom *Modern Family*, where she can be heard giving cooking instructions to one of the characters, Phil Dunphy.⁷ This example especially depicts the crossover of food and entertainment. Additionally, some popular food magazines include *goodFood*⁸ and *Olive*,⁹ and *The Guardian*¹⁰ and *The Telegraph*¹¹ feature food columns where they deal with interesting recipes and review restaurants. All of these highlight the pervasiveness of the food entertainment industry.

Other key examples of the food entertainment industry include instructional cooking shows, cooking competitions and celebrity cooking series. Saturday Kitchen Live is a British food programme broadcast by BBC One that offers a blend of instructional cooking, guest celebrities and a friendly cooking competition.¹² Shows like *The Great British Bake Off*¹³ and *MasterChef*¹⁴ present amateur chefs with the opportunity to display their unique style and create creative dishes, while offering viewers yet another food entertainment avenue. Celebrity cooking series such as *Selena + Chef*, which features Selena Gomez cooking in her kitchen with the help of well-known chefs,¹⁵ and *Meghan Markle's With Love, Meghan*, who can be seen sharing her fresh perspective on cooking,¹⁶ combine celebrity status with the art of cooking to further expand the food entertainment industry. The popularity of this industry is also reinforced by the presence of television channels dedicated entirely to food, recipes and cooking. The Food Network is a leading food television channel aired globally, including in the UK.¹⁷ The above-mentioned examples indicate that the value of food has far surpassed nourishment to become a popular consumer good in the entertainment economy.

The Negative Space in the Food Entertainment Industry

As discussed in Section 'Food as Entertainment', food and cooking have metamorphosed from perfunctory activities to ones performed also for entertainment and leisure. Highly acclaimed fine dining restaurants often feature creative menus to offer aesthetically pleasing experiences to their patrons. In such instances, chefs act as artists when they create innovative dishes, and patrons serve as art connoisseurs who contemplate those dishes (Smith 2014: 5). Despite this, the chefs are not afforded similar copyright protection over their dishes as other artists, such as painters or sculptors, receive for their works of art. One may ask if such differentiation is fair. Consider the example of a celebrity chef who relies on their signature original dishes to generate revenue and maintain their brand, but that dish is copied by competing restaurateurs, leading to a potential loss of market share and income, as well as a possible blow to the chef's reputation and exclusivity (Mell 2025: 84). One may also consider the vulnerability of an emerging chef or amateur home cook who presents their original dish in a televised cooking competition, only to have it copied. Should these creators not be provided with appropriate legal means to protect their dishes?

To answer this question, the insufficiency of the available legal remedies against copying of culinary preparations such as trade marks, trade secrets and patents should be considered. Firstly, the application of trade marks to food would be limited to protecting the name of the dish or the name of the creator, but not the dish itself (Reebs 2011: 55). One may also consider the utilisation of non-traditional marks such as shape or smell marks. However, establishing the shape or smell of a dish as a source-indicating rather than an appealing characteristic can prove to be difficult (Khuong 2024: 60). Furthermore, although these may protect an individual aspect of the dish, such as its shape or smell, they would not cover the dish in its entirety. Secondly, while considering protection through trade secrets with the help of non-disclosure agreements, it may be remembered that these are only effective when the secret or confidential matter has been divulged in breach of the agreement and not when the recipe has been discovered by reverse engineering or the same dish has been developed independently (Saunders & Flugge 2021: 163). Additionally, chefs relying on trade secrets to protect their recipes will be precluded from publishing them (Pollack 1990: 1486), thereby restricting their financial gains. Thirdly, patents also fail to offer a practical solution to chefs, as culinary creations rarely meet the high standards of technological innovation required to secure a patent (Lawrence 2011: 202). On the other hand, copyright protection would allow chefs to publish their creations, allowing them to make a profit from such publications. Moreover, the prerequisites of copyright protection (discussed in Section 'The Anglo-American Law on the Copyright Protection of Recipes') are not as rigid as those of patents, thereby enabling a greater availability of protection for a chef's original works.

Various other arguments have also been made to support the low intellectual property equilibrium and the maintenance of the negative space in the food entertainment industry. Although recognising the creative potential of dishes, academic scholars such as Buccafusco (2007: 1139–1140, 1156) have argued that advancing copyright protection to culinary preparations would stifle creativity by hampering the public domain of recipes. However, the above-mentioned

line of reasoning does not seem to be a fair standard, especially since similar arguments are not extended to other forms of art, despite the many parallels between the food entertainment industry and the art industry (Mell 2025: 83). Additionally, is a vast public domain, where recipes are freely available to be copied, the only driver of creativity and innovation in the food industry? Upon consideration, the answer may be no. An ambitious chef's goal of achieving recognition, remuneration and the status of a celebrity chef may serve as their motivation to innovate and contribute original recipes to the culinary domain (Broussard 2008: 700). Additionally, a food-enthusiast home cook may experiment with different ingredients and techniques to come up with a new, innovative dish. For example, the Lane Cake was created by Mrs. Emma Rylander Lane, a home baker in the late 19th century (Hammonds 2022). Further, the extension of copyright protection to dishes would enable emerging chefs or amateur home cooks on cooking shows as well as celebrity chefs to profit from publishing their original recipes, thereby encouraging them to share their recipes (Lawrence 2011: 190), which at the end of the copyright period would serve to enlarge the public domain.

Supplementary support for extending copyright protection to dishes can also be drawn by borrowing insights from Anglo-American jurisprudence for the extension of copyright protection to fashion articles. Traditionally, the negative space of intellectual property protection extended to fashion articles. Academic scholars Kal Raustiala and Christopher Sprigman (2006: 1726) contended that the lack of intellectual property protection promoted innovation by forcing designers to be more creative to stay ahead of copycats and termed this phenomenon the 'piracy paradox'. Nonetheless, recent academic literature argues in favour of intellectual property protection by suggesting that while the piracy paradox may cover established fashion designers and fast fashion knockoffs, it fails to consider the scenario where a less established designer's creations are picked up and ripped off by established fashion houses (Nagel 2020: 651). Similarly, the goal of extending copyright protection to the food entertainment industry is to protect the dishes of celebrity chefs and the original creations of amateur chefs or home cooks, which may be presented in cooking competitions or published in a food magazine.

In light of the above discussions, the need to award copyright protection to novel dishes is clear. Any residual concerns with the extension of copyright protection to culinary preparations can be addressed by relying upon the fair use doctrine (Broussard 2008: 724–726). Under the protection of this provision, food makers may freely reproduce copyrighted dishes at home, teach them at cooking schools and draw inspiration from them to advance the culinary art. Therefore, original culinary creations should be made copyrightable. This would not only help chefs protect their works but also enhance the commercial opportunities available to them, including branding, advertising and franchising (Broussard 2008: 700), which is likely to lead to the overall growth of the food entertainment industry.

The Anglo-American Law on the Copyright Protection of Recipes

Now that the issue of the lack of copyright protection of dishes and the need for such protection has been discussed, it would be apposite to understand the existing Anglo-American law on the copyrightability of recipes. The English legislation dealing with copyright is the Copyright, Designs and Patents Act 1988. Section 1(1)(a) enumerates the copyrightable works, which include original literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and typographical arrangements. The law dealing with copyright in the United States is the Copyright Act of 1976, 17 USC ss. 101–1511. As per s. 102 (a) of this Act, copyrightable subject matters include original literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual and architectural works of authorship. Therefore, the Anglo-American law follows a closed list system approach (Bonadio & Lucchi 2019: 119–120), and food is not delineated as a copyrightable work.¹⁸ American law goes as far as to specifically exclude recipes from being copyrightable. The Code of Federal Regulations, 37 CFR s. 202.1(a) (2025), specifically excludes 'mere listing of ingredients or contents' from the scope of copyright protection. This is also confirmed by the US Copyright Office in its guidance note stating that recipes are statements of ingredients and procedures, which are not copyrightable.¹⁹

One of the landmark cases, when it comes to the copyrightability of recipes, is *Publ'ns Int'l, Ltd v Meredith Corp* 88 F.3d 473, 480 (7th Cir 1996), where it was held that while copyright may subsist in the manner and order of presenting recipes in a cookbook, it does not extend to the individual recipes themselves. Similarly, in the case of *Lambing v Godiva Chocolatier* 142 F.3d 434 (6th Cir 1998), recipes were held to lack originality for copyrightability, being mere statements of fact. However, the first fallacy with this line of reasoning is that only existing dishes are taken into account instead of focusing on novel creations (Buccafusco 2007: 1130). The dishes that should ideally be considered for copyright protection would be the ones that are new creations, as those would be products of creativity and innovation.

The second fallacy is the lawmakers' and judges' supposition that the recipe for a dish, instead of the dish itself, is the appropriate subject matter for copyright protection (Broussard 2008: 703). With this logic, a choreography or a musical composition should have been denied protection by focusing on the schematic rendering of dance steps or the required instruments and notes for a tune. Since this is not the case, the recipe should be seen as a means of fixing the dish in a tangible medium in line with the prerequisites of copyright protection.

In addition to the formal Anglo-American law discussed above, the culinary sphere is also regulated by an informal norms-based system (Fauchart & Hippel 2008: 188). Such norms usually restrict copying other chefs' innovations and revealing confidential recipes and mandate attribution when another chef's recipe or technique is used (Fauchart & Hippel 2008: 192–193). An example of a norms-based system in the UK is the Association of Professional Chefs (APC)'s Code of Ethics.²⁰ Article 23 of the Code protects against plagiarism and promotes compliance with copyright law. It is

argued that chefs are likely to adhere to these codes to maintain membership in the desired associations (Broussard 2008: 709), which are often prestigious.²¹ However, while culinary norms may be enforceable within communities or small geographic areas, the task becomes more difficult on a larger scale (Straus 2012: 199). Additionally, these norms are only effective if the members are committed to remaining in the organisation and, in any case, may not be able to protect against copying by non-members (Mell 2025: 85). Accordingly, the informal norms-based system does not appear to be well equipped to address the issue of copying of dishes. It is especially not inclusive of standalone chefs. Thus, an amateur chef or home cook in a cooking competition, for example, yet to consider becoming a part of any culinary association, would not fall under the protection offered by codes of ethics.

The Pathway to Copyright Dishes

To determine the pathway for copyright protection of dishes, the prerequisites of copyrightability may be examined. This would include an analysis of copyrightable subject matter, originality, fixation and functionality.

As discussed in Section 'The Anglo-American Law on the Copyright Protection of Recipes', the Anglo-American law does not consider food a copyrightable subject matter. Nonetheless, to bring dishes under the scope of copyright protection, we may look at the category of artistic works, which statutorily includes a 'work of artistic craftsmanship' under s. 4(1)(c) of the Copyright, Designs and Patents Act 1988. In *Merlet v Mothercare Public Limited* [1985] EWCA Civ 19, the English court interpreted that to fall under this category, the subject matter must be a work of art. The artistic quality of culinary preparations has already been extensively discussed in Section 'Food as Entertainment'. Further, English cases such as *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64 and *WaterRower (UK) Ltd v Liking Ltd (t/a Topiom)* [2024] EWHC 2806 (IPEC) have also laid down that a work may only qualify as a 'work of artistic craftsmanship' if the maker intended the work to have aesthetic appeal beyond mere visual appeal for commercial reasons. Innovative original dishes by home cooks or amateur chefs may meet this requirement comfortably. However, in the context of celebrity chefs, the absence of commerciality may be harder to establish and would depend on a case-by-case analysis. Additionally, guidance may be drawn from *Response Clothing Ltd v Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC), where the court relied on the creator's exercise of skill and creative choices over the work's aesthetic appeal to hold mass-produced wave-patterned jacquard fabric as a 'work of artistic craftsmanship'. Similarly, a celebrity chef may rely on their use of skill and creative choices to create a novel, innovative dish. Accordingly, it follows that creative dishes possessing artistic value may fall within the scope of copyrightable subject matter.

The next requirement to be considered is originality. The standard for originality used in the UK is the 'intellectual creation' test as laid down in *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch), which was developed in the European Union in *Case C-5/08 Infopaq Int'l A/S v Danske Dagblades Forening* [2009] ECR I-6569. Under this standard, the object seeking copyright protection must be an intellectual creation of the author and revolve around the author's exercise of creative choices. Therefore, dishes in the food entertainment industry that are new creations, as a result of the chefs' creativity and innovation, would meet the threshold of originality.

Fixation is yet another prerequisite to be examined. As seen in *Craig Wright v BTC Core* [2023] EWCA Civ 868, the English jurisprudence asserts that the work in which copyright subsistence is claimed must not be confused with the recording or medium within which it is fixed. Accordingly, dishes, which are the appropriate subject matter for copyright protection, should not be confused with recipes, which offer a medium to fix the said dishes. Additionally, the duration of fixation is another supplementary consideration. American jurisprudence suggests that temporary fixation is not sufficient to meet the copyrightability threshold. In *Kim Seng Co v J&A Importers* 810 F.Supp.2d 1046, 1053 (CD Cal 2011), a bowl of Asian noodles was held to be perishable since once it is eaten, it is gone. Nevertheless, courts in the UK have been more lenient. In the case of *Metix (UK) Ltd v GH Maughan (Plastics)* [1997] FSR 718 Ch D, it was suggested that an ice sculpture could be protected by copyright, despite its transient nature. Based on this discussion, it follows that a dish, even though prepared for consumption, may be fixed through its recipe and meets the fixation requirement.

The last tenet for copyrightability to be analysed is functionality. The case that innovative recipes surpass limitations of functionality has already been made in Section 'Food as Entertainment'. This argument can be further emboldened by looking at the example of a computer program. Although highly functional, computer programs are considered copyrightable works under s. 3(1)(b) of the Copyright, Designs and Patents Act 1988 due to the acknowledgement that the same functions can be coded differently and entail a fresh creative expression (Mell 2025: 80). Likewise, the base ingredients can be combined in different novel and innovative ways to create a new dish. Inferences may also be drawn from the fashion industry. In the case of *Varsity Brands, Inc v Star Athletica, LLC* 580 U.S. 405, it was held that the pictorial aspects of cheerleaders' uniforms could be conceptually separated from the uniforms themselves and therefore could be protected by copyright. Similarly, the functional component of food, that is, nourishment, can be conceptually separated from the expressive, creative elements, as they are not present in the dish for nourishment but for aesthetic appeal, rendering the dish copyrightable.

Now that a possible pathway to extend copyright protection to culinary creations has been charted, the workings of attribution and licensing may be extrapolated to the food entertainment industry by looking towards the music industry. There have been instances in the music industry where a simple attribution has worked for the artist. In 2024, the K-pop singer Lisa of Blackpink released the song 'Moonlit Floor', which interpolated Sixpence None the Richer's

1998 song 'Kiss Me' (Iasimone 2024). In the credits to the song, Matt Slocum, the Sixpence None the Richer member who wrote 'Kiss Me', is mentioned as a songwriter (Iasimone 2024). Similarly, attribution may be used to credit the chef whose recipe has been adapted into a new recipe to avoid infringement. This may also indirectly benefit the credited chef if the adapted dish is well received by the patrons, who may then seek out that chef's additional creations, thereby generating revenue for the chef (Walo 2016: 577). Additionally, when a chef's original dish, that is, copyrightable subject matter, is to be reproduced, this would require a licence, similar to licensing in the music industry (Mell 2025: 91). Arguments have also been made to formalise the copyright system for recipes to the extent of an industry licensing organisation, which may collect royalties (Lawrence 2011: 220). Given the possibility that the dishes eligible for copyright protection may not constitute an overwhelming number due to considerations of originality, a licensing organisation for the food entertainment industry seems feasible. Accordingly, not only do dishes possess the potential to be copyrighted, but insights can also be drawn from the music industry to chart the path for nuances of such copyright applicability.

Conclusion

Creative menus at fine dining restaurants, iconic dishes by celebrity chefs and innovative preparations by home cooks or amateur chefs in cooking competitions depict the entertainment value of food. Thus, dishes in the food entertainment industry have the potential to entail creative expressions. Nonetheless, there exists a negative space in the intellectual property regime, whereby copyright is not extended to dishes. One of the arguments favouring the low intellectual property equilibrium is that copyright protection would stifle creativity by restricting the public domain. However, extending copyright to the culinary sphere would enable chefs to profit from publishing their original works, thus incentivising them to share their recipes, which would eventually enlarge the public domain post the copyright period. Moreover, the fair use doctrine may be employed to limit any undesirable effects of monopolising dishes.

The Anglo-American law on the copyrightability of recipes excludes food from the list of copyrightable subject matter. An analysis of case law suggests that this denial of copyright protection hinges on the faulty treatment of recipes as copyrightable subject matter instead of dishes and the focus on dishes in the public domain instead of novel creations. It appears that the existing laws in the UK, without the need for statutory amendments, may be interpreted differently as well as broadly to bring dishes within the ambit of copyright protection. By doing so, there is potential for a boost of creativity and innovation in the food industry as well as an increase in commercial opportunities for both celebrity and emerging chefs, ultimately leading to the advancement of the food entertainment industry.

Notes

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- ¹⁸ See also Copyright Act of 1976, 17 USC s. 102 (b) (specifically excluding inter alia, procedure, process and system from the scope of copyright protection).

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Competing Interests

The author has no competing interests to declare.

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