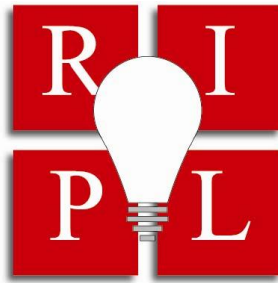


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THE ART OF FOOD PLACEMENT: WILL THE U.S. FOLLOW GERMANY'S LEAD IN COPYRIGHTING ARTISTIC FOOD PLACEMENT?

JULIANNA WALO

ABSTRACT

Recently, German courts created groundbreaking precedent allowing copyright protection for the artistic placement of food on a plate. The rulings allow chefs to prohibit people from taking pictures of the copyrighted food placement. While Germany's moral-based legal system allows for such copyright protections, this comment compares the U.S. legal system to that of Germany and examines if and how such copyright protection could extend to food placement in the U.S.

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I. INTRODUCTION.....	566
II. BACKGROUND.....	567
A. American Copyright Law.....	567
1. Original Work of Authorship.....	569
2. Fixed in a Tangible Medium	570
3. Sufficient Creativity	570
B. German Copyright Law, Das Urheberrecht	571
III. ANALYSIS	574
A. How American Economic Based Copyright Law Fits With German Moral Based Copyright Law	574
B. VARA, America's Only Hope For A Possible Future Granting American Artists Moral Rights To Their Work	575
C. Utilitarian Purpose And Aesthetically Pleasing Elements, A Hurdle Many Artists Must Overcome in Both America and Germany	578
IV. PROPOSAL.....	580
V. CONCLUSION.....	583

THE ART OF FOOD PLACEMENT: WILL THE U.S. FOLLOW GERMANY'S LEAD IN COPYRIGHTING ARTISTIC FOOD PLACEMENT?

JULIANNA WALO*

I. INTRODUCTION

Is an Instagram photo art? The Circle City Squared recently held an art show competition amongst Instagrammers of Indianapolis, Indiana.¹ Instead of showing art created by professional photographers, as originally planned, the gallery decided to do a show entirely of Instagram photos. The photographers were a range of daytime professionals, such as historians and doctors.² Similar to Instagram's growing success, arranged food has been taking the spotlight in contemporary culture.

In the spring of 2015, a Dutch Newspaper commissioned artists Lernert and Sander to create a food artwork highlighting the Dutch people's trendy obsession with the health and quality of their food.³ The pair took 98 different foods and cut them into 98 identical 2.5-centimeter cubes, creating a symmetrical and captivating image titled *Cubes*.⁴ Prints of this arrangement sell at €500.⁵

Can this mesmerizing arrangement of food be considered art? Under the current copyright laws in the United States, the answer would be no. However, in Germany, this inventive food placement would be awarded copyright protection.⁶ Furthermore, under Germany's law, Lernert and Sander could prohibit art viewers from photographing their cubes. Under Germany's law, if a culinary artist creates a truly remarkable and original placement of food, she can seek copyright protection for her

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¹ Emily Taylor, *Instagram as art?*, NUVO (Indianapolis), <http://www.nuvo.net/indianapolis/instagram-as-art/Content?oid=3509936> (last visited Sept. 26, 2015).

² *Id.* The gallery originally had professional photographer Matt LaFary lined up as its main art exhibit focus. However, the gallery decided to cancel the artist and instead have a showing composed entirely of contemporary Instagram art. The gallery director reasoned that art should not be so high-brow, art should be something average people can relate to and enjoy. As a result, the director and a committee chose several incredible pieces to exhibit from a vast number of submissions.

³ Elyssa Goldberg, *How these 98 Identical Food Cubes Were Made*, BON APPETITE.COM (MAY 18, 2005), <http://www.bonappetit.com/entertaining-style/trends-news/article/food-cubes-art>.

⁴ *Id.*

⁵ Lernert & Sander, X de Volkskrant, *Cubes*, <http://lernertandsander.com/cubes/> (last visited Sept. 27, 2015).

⁶ Katie Amey, *"Food porn" censored: Why it's ILLEGAL to upload pictures of meals to Instagram in Germany*, DAILYMAIL.COM (AUG. 18, 2015), http://www.dailymail.co.uk/travel/travel_news/article-3202031/Food-porn-censored-s-ILLEGAL-upload-pictures-meals-Instagram-Germany.html (last visited April 10, 2016).

masterpiece.⁷ The groundbreaking law came from a case called *Geburtstagszug* (“The Birthday Train”).⁸ The German Federal Court ruled the standard for applied arts is no stricter than “purpose-free” art.⁹

Burgers and fries are not copyrightable. Conversely, Michelin-starred restaurant chefs who, like artists in other domains, strive to create something unprecedented, receive protection akin to traditional artists.¹⁰

This comment suggests that exceptional chefs in the United States should receive copyright protection for their food placement. Food placement does not qualify for copyright protection under current case law mainly because its utilitarian aspects are closely intertwined with its aesthetic aspects. Usually, the courts find this relationship to bar copyright protection. In Germany, the courts lowered the necessary creativity threshold of an object to be eligible for copyright protection. A change exactly like the German Law would not be possible because the two legal systems are fundamentally different in their approach to creative objects. However, following Germany’s lead, this comment proposes an amendment to the U.S. Copyright Statute.

Part II examines current copyright law surrounding food placement, looking at both American and German copyright law. Part III analyzes the similarities that copyright American law has to German law, focusing on moral rights and statutes such as the Visual Arts Rights Act. Part IV proposes that the U.S. incorporate protection of food placement through an amendment of the Copyright Statute.

II. BACKGROUND

A. American Copyright Law

The courts in the United States have not been generous with extending copyright protection to food sculptures, and to an even greater extent, food placement. The current U.S. Copyright Statute, 17 U.S.C. § 102, covers “traditional” forms of art, which include: literary works; musical works; dramatic works; pantomimes and choreographies; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.¹¹ The list is lengthy and inclusive of many forms of art, including sculptures. However, neither food sculptures nor food placement are covered by these laws.

Noticeably, there is no mention of any category concerning food, no matter how creative the food arrangement may be. In *Lorenzana v. South American Restaurant*

⁷ Juliano Dario, *Instagram #FoodPorn Is Illegal According To German Law*, FOODWORLDNEWS.COM (Aug. 14, 2015), <http://www.foodworldnews.com/articles/32296/20150814/instagram-foodporn-is-illegal-according-to-german-law.htm> (last visited Oct. 1, 2015).

⁸ Bardehle Pagenberg, *German Federal Supreme Court: Relationship between National Copyright Law and National and/or European Design Law (decision of November 13, 2013 – Case I ZR 143/12 - Geburtstagszug/Birthday Train)*, LEXOLOGY.COM, <http://www.lexology.com/library/detail.aspx?g=347fb9e3-0348-4af9-b7cf-ed1d7449dbf0> (last visited Oct. 9, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 17 U.S.C. § 102 (2012) (referring to subject matter of copyrights in general).

Corps., a Puerto Rican man sued fast food franchise Church's Chicken for misappropriating his rights to the Pechu sandwich, a sandwich he claimed he created and named while he was an employee of the Puerto Rican location of the franchise.¹² He initially brought a claim of trademark infringement that would ultimately evolve into a copyright claim.¹³ Judge Howard of the First Circuit found that the chicken sandwich did not fit into any of the aforementioned categories, and therefore was not afforded copyright protection.¹⁴

In 2011, a different case challenged the current copyright laws by claiming that a particular placement of food was a food sculpture.¹⁵ In *Kim Seng Co. v. J&A Importers, Inc.*, an employee of a Chinese-American food supply company, named Kim Seng, created a bowl of food consisting of rice sticks, egg rolls, grilled meat, and various garnishes, and claimed this bowl of food was a food sculpture.¹⁶ A competitor used photos of the bowl of food in its advertisement.¹⁷ Kim Seng sued alleging copyright infringement, trade dress infringement, and unfair competition.¹⁸ As to the copyright infringement claim for the bowl of food, the court held in favor of the defendant.¹⁹

In reaching this decision, the court looked to the copyright statute because sculptures are one of the protected categories under 17 U.S.C. § 102. The court applied the relevant test under U.S. copyright law.²⁰ This three-part test requires the work to: 1) be an innovative work of authorship; 2) be set in tangible medium; and 3) include artistic expressions that are independent from its practical purposes.²¹

¹² Bill Donahue, *Chicken Sandwich Can't be Copyrighted, 1st Cir. Says*, LAW360.COM (Aug. 25, 2015), <http://www.law360.com/articles/695016> (last visited Oct. 5, 2015).

¹³ *Lorenzana v. S. American Rests. Corp.*, 799 F.3d 31 (1st Cir. 2015). In *Lorenzo*, plaintiff worked for Church's Chicken franchise in Puerto Rico. *Id.* Plaintiff suggested a new idea to his superiors for a chicken sandwich. *Id.* After a series of tests were performed, the sandwich was put on the menu and plaintiff named it. *Id.* Afterwards, Church's Chicken trademark registered the sandwich with both Puerto Rico's Department of State and with the United States Patent and Trademark Office. *Id.* Plaintiff sued Church's Chicken claiming he should receive a percentage of the profits. *Id.* Originally, plaintiff sued alleging claims under the Lanham Act. *Id.* The court ruled for defendant. *Id.* However, the district court gleaned that plaintiff had a claim for violations of the copyright act. *Id.* On appeal, plaintiff claimed his chicken sandwich was copyrightable. *Id.*

¹⁴ *Id.* at 34.

¹⁵ *Kim Seng Co. v. J & A Importers, Inc.*, 810 F. Supp. 2d 1046, 1053 (C.D. Cal. 2011).

¹⁶ *Id.* at 1050. The employee, Yiyong Tsai, of the company, Kim Seng, prepared the bowl of food sculpture to be used as an advertisement for the Chinese-Vietnamese food supply company. *Id.* The employee intended for photographs to be taken of this food sculpture as well. *Id.* The photographs were used for packaging of food and contained a yellow background with red trimming. *Id.* The packaging also had various Chinese, Vietnamese, and English words. *Id.* The defendant used a similar packaging that also contained a picture of a rice bowl sculpture containing rice sticks, egg roll, grilled meat, and garnish. *Id.* The background also was yellow with red trimming and contained words in Chinese, Vietnamese, and English. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1056. The court agreed that Kim Seng's food choices were dictated by the meaning of the words on the package. *Id.* However, the bowl itself was not so mechanical or routine as to require no creativity at all. *Id.* The court agreed with Kim Seng that the necessary threshold, set out by *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) had been met. Nevertheless, the court found that the copyright infringement claim for the bowl of food statue must fail because it is not an original authorship fixed in a tangible medium of expression. *Id.*

²⁰ *Kim Seng Co. v. J&A Importers, Inc.*, 810 F. Supp. 2d at 1056.

²¹ *Id.*

1. *Original Work of Authorship*

For a work to be copyrightable, it must be an original work of authorship.²² What defines an original work of authorship? “The phrase ‘original work of authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the [1909] copyright statute.”²³ Since 1909, courts have found ways to define originality. They have stated that the amount of creative input from the author is low, but it is not negligible.²⁴

Facts are not copyrightable, but their arrangement can constitute an original work of authorship.²⁵ Unlike the facts themselves, the arrangement can be copyrightable.²⁶ Arrangements of other non-copyrightable elements can be copyrightable if there is sufficient creativity.²⁷ In *Kim Seng Company v. J&A Importers, Inc.*, the court determined that food ingredients, like facts, are not copyrightable.²⁸

²² U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (“[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”).

²³ Vol. 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 201 (2015); *see also* *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. N.Y. 1980).

²⁴ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991). In *Feist*, respondent publisher produced white pages and yellow pages for a smaller geographic area than petitioner. *Id.* Petitioner wanted to license respondent’s white pages, but respondent refused. *Id.* Petitioner copied the information anyway, and created directory consisting of 11 different service areas. *Id.* Petitioner altered many of these listings and several were identical to the original white pages. *Id.*

The court examined whether a publisher’s compilation of names and addresses from its white pages phonebook contained enough creativity to be copyrightable material. *Id.* The court determined that the requisite level of creativity, under the test, is particularly low. *Id.* It is so low that that a minimal level of creativity will suffice, no matter how obvious or crude it may be. The court found that the white pages did not contain enough creativity. *Id.*

²⁵ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340. The court held that facts alone do not owe their origin to an act of authorship, and are not original. *Id.* For facts to be copyrightable, they may be assorted in a compilation, because the author then chooses what facts to include, in what order, how to arrange them. *Id.* The author can choose the arrangement of facts in a way that the reader can use them effectively. *Id.* The copyright protection extends to the components of the author’s input, not the facts themselves. *Id.*

²⁶ *Id.*

²⁷ *Lamps, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1146 (9th Cir. Wash. 2003). A combination of unprotectable elements is copyrightable only if those elements are numerous enough and their selection and arrangement are original enough that together, their combination suggests an original work of authorship. *Id.*

²⁸ *Kim Seng.*, 810 F. Supp. 2d at 1053. Plaintiff argued its composition met a level of original authorship because there was a wide variety of possibilities. *Id.* For example, there were 360 different angles the artist could have positioned the eggroll, and the artist chose a specific angle out of the creativity of the author. *Id.* The court was persuaded by the argument but determined that—regardless of the angle, quantity, or positioning of the food items—the ingredients were unprotectable, and therefore the bowl of food was unprotectable. *Id.*

2. Fixed in a Tangible Medium

The second requirement under copyright law is for the work to be fixed in a tangible medium.²⁹ The statute describes the requirement as being “sufficiently stable or permanent so that the work can be perceived, reproduced, or otherwise communicated for longer than a transitory period of time.”³⁰

In *Kelley v. Chicago Park District*, the City of Chicago wanted to modify the artist-plaintiff’s wildflower garden, so plaintiff sued the City of Chicago.³¹ The court held for defendant, finding the garden did not fit within the basic requirements of the copyright statute.³² The court emphasized that the importance of fixation serves two primary purposes, the first being proof of creation against infringement actions, and the second is providing a distinction between state and federal copyright law because some state copyright law allows for protection without a tangible medium.³³

3. Sufficient Creativity

The third and final requirement for copyright protection under American Law is sufficient creativity.³⁴ Although the standard for creativity is low, it is not negligible.³⁵ In *Satava v. Lowry*, the court determined that a glass-in-glass jellyfish

²⁹ *Id.* at 1054; 17 U.S.C. § 101.

³⁰ *Kim Seng.*, 810 F. Supp. 2d at 1055; *see also* 17 U.S.C. § 101 (2011).

³¹ *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (2011). In this case, an artist sued a park district alleging a violation of the Visual Artists Rights Act (“VARA”). *Id.* The court found that the VARA claim failed because the garden was neither an original work of authorship nor fixed in a tangible medium as required for basic copyright protection. *Id.*

³² *Id.*

³³ *Id.* at 304. The court explained in detail the importance of tangibility, quoting William Patry: Fixation serves two basic roles: (1) easing problems of proof of creation and infringement, and (2) providing the dividing line between state common law protection and protection under the federal Copyright Act, since works that are not fixed are ineligible for federal protection but may be protected under state law. The distinction between the intangible intellectual property (the work of authorship) and its fixation in a tangible medium of expression (the copy) is an old and fundamental and important one. The distinction may be understood by examples of multiple fixations of the same work: A musical composition may be embodied in sheet music, on audio-tape, on a compact disc, on a computer hard drive or server, or as part of a motion picture soundtrack. In each of the fixations, the intangible property remains a musical composition.

See also 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2015).

³⁴ *Kelley v. Chicago Park Dist.*, 635 F.3d at 304; 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2015).

³⁵ *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. Cal. 2003). Both plaintiff and defendant were artists that made sculptures of glass. *Id.* Plaintiff put a jellyfish in glass. *Id.* Afterwards, the plaintiff created an exterior sculpture that followed the natural physiology of the jellyfish within, molding the sculpture around the natural shapes of the jellyfish within. *Id.* Defendant began making similar sculptures, and plaintiff sued. *Id.* The court found the natural physiology of the jellyfish was not copyrightable and belonged to the public domain. *Id.* Since so much of plaintiff’s art depended on the natural physiology of the jellyfish, and little of the sculpture was plaintiff’s own artist input, the court awarded plaintiff protection, but only through a thin copyright. *Id.* The court reasoned there were too many unprotectable elements, such as the natural physiology of the

statue did not contain enough creativity because elements that arose from the natural form of the jellyfish cannot be protected.³⁶ In other words, nature cannot be copyrighted.

Additionally, when determining the requisite level of creativity, the purely functional, utilitarian, or mechanical aspects of the object must be taken out.³⁷ Elements that could not stand independently from the utilitarian aspects could not be copyrighted.³⁸

The *Kim Seng* court looked to the combination of protectable and un-protectable elements of the bowl of food sculpture and decided that many of the elements within the bowl of food were un-protectable, such as the eggroll and grilled meat.³⁹ These ingredients are found in traditional Vietnamese cuisine.⁴⁰ The lack of originality was determined by the un-protectable nature of the ingredients and a finding that the utility of the ingredients—which were to be eaten—cannot be detached.⁴¹ The court found it was a typical and unoriginal dish. Could the result have been different if it were more creative?

B. German Copyright Law, *Das Urheberrecht*

The Federal Republic of Germany, as it is now, has been in place since the 1990s.⁴² Similar to the United States, the German government is organized into three separate branches: the legislative branch, the executive branch, and the judicial branch.⁴³ The judicial branch is divided into two separate groups: the courts for the Lander (similar to States in the United States) and a federal court system.⁴⁴

jellyfish, to classify the sculpture as original. *Id.* There was not enough independent creative input from the plaintiff to justify greater protection. *Id.*

³⁶ *Satava v. Lowry*, 323 F.3d at 811. In making this determination, the court looked to elements such as the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form. *Id.* These things considered together lacked the minimal level of originality to qualify for copyright protection. *Id.*

³⁷ *Lamps, Inc.* 345 F.3d at 1146. While determining what parts of a lamp should receive copyright protection, the court quoted 17 U.S.C. § 101, which states that copyright protection will be afforded:

inssofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article [ordinarily not copyrightable] . . . shall be considered a pictorial, graphic, or sculptural work only if, and to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

Id.

³⁸ *Id.*

³⁹ *Kim Seng*, 810 F.Supp.2d at 1054.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Foreign Law Guide, Germany--Introduction*, BRILLONLINE, http://referenceworks.brillonline.com/entries/foreign-law-guide/germany-introduction-COM_080300# (last visited Oct. 8, 2015).

⁴³ *Foreign Law Guide, Germany-Legislation and the Judicial System*, BRILLONLINE, http://referenceworks.brillonline.com/entries/foreign-law-guide/germany-legislation-and-the-judicial-system-COM_080302# (last visited Oct. 8, 2015).

⁴⁴ *Id.* The Lander courts were created by the federal court system.

The German legal system follows a *droit d'auteur* system of copyright law, which, when translated from French to English, simply means copyright.⁴⁵ The implication of the *droit d'auteur* system of law is that moral and economic rights of the author are seen as incredibly important and inseparable.⁴⁶ Essentially, the policy supporting this system of law is to ensure the authors reap the fruits of their creations.⁴⁷ For example, work for hire is not recognized in Germany.⁴⁸ The copyright protection seeks to protect the author's personal and intellectual relationship to his work, as well as the further use of his work by others.⁴⁹ The reasoning behind the moral system is that these rights are chronological and systematically primordial.⁵⁰

As in the United States, Germany also has a copyright statute that dictates power; this Copyright Act is titled "Urheberrechtsgesetz (UrhG)."⁵¹ This statute is broken up into five sections: 1) copyright; 2) neighboring rights; 3) special provisions on films; 4) common provisions on copyrights and neighboring rights; and 5) scope of application, transitional and final provisions.⁵² The first section states that literary, scientific, and artistic works may receive copyright protection.⁵³ The second section describes a list of categories of copyrightable works that is remarkably similar to the list of copyrightable works under the current U.S. copyright statute.⁵⁴

⁴⁵ SILKE VON LEWINSKI, DOROTHY THUM, ET AL., *COPYRIGHT THROUGHOUT THE WORLD* vol. 1, Ch. 16: 1 (Thompson West, 2014).

⁴⁶ *Id.* Under the *droit d'auteur* system of law, the moral and economic rights of a natural person that created the work, cannot be alienated during the author's lifetime.

⁴⁷ Reto M. Hilty & Alexander Pueket, *Equitable Remuneration in Copyright Law: The Amended German Copyright Act as a Trap For The Entertainment Industry in The U.S.?*, 22 *CARDOZO ARTS & ENT. L.J.* 401, 406 (2004), (comparing American copyright law to German copyright law [hereinafter "*Equitable Remuneration in Copyright Law*"]. The authors explain the policy differences between American copyright law, which follows an Anglo-Saxon system of law and German copyright law, which follows the *droit d'auteur* system of law. "The *droit d'auteur* system is based on the rights of authors to reap the fruits of their creations. Justification of copyright is, according to the classic copyright doctrine, primarily based on these arguments, which focus on the protection of the author. Promotion of the progress of science and arts or the incentive to stimulate artistic and scientific creativity for the public good are also cited as justifications for copyright law, but only with secondary significance.")

⁴⁸ *Id.* Any person who creates the work shall be deemed the author. Germany does not recognize the work for hire doctrine. This rule applies even in situations when an employee creates a work for his employer, and was hired to do just that, such as a commissioned work. The original author maintains the rights to his or her the work.

⁴⁹ Adolf Deitz, *Alai Congress: Antwerp 1993 The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 *COLUMBIA-VLA JOURNAL OF LAW & THE ARTS* 199, 207-208 (1995) (explaining the difference between European copyright law, including Germany, France, Spain, and Italy, and how these foundations of these copyright law differ from the United States).

⁵⁰ *Id.*

⁵¹ Hilty and Pueket, *supra* note 47.

⁵² Hilty and Pueket, *supra* note 47.

⁵³ 2-GER Dr. Adolf Dietz, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 2:b (2015).

⁵⁴ *Id.* The types of protected works includes literary works, computer games, musical works, works of pantomime, choreographic works, artistic works (including architectural works and works of applied art), plans and sketches of works, photographic works (includes processes analogous to photography), cinematic works (includes processes analogous to cinematographic works), and illustrations of a scientific or technical nature, such as sketches, drawings, plastic representations, tables, plans, and maps. *Compare* 17 U.S.C. § 102 (2012).

The German statute does not set out a defined level of creativity, therefore the distinction between eligible works of art and what standard of creativity must be met to receive copyright protection is derived from case law.⁵⁵ In a recent landmark decision, *Geburtstagszug* (“The Birthday Train”), decided on November 13, 2013, the Federal Court ruled the standard for applied arts is no stricter than “purpose-free” art.⁵⁶ In German law, protection for designs demanded a higher standard of creativity than applied arts that are eligible for copyright protection.⁵⁷

In this decision, a designer of a children’s toy birthday train sued for further compensation from his employer and manufacturer.⁵⁸ The court overturned a previous decision of the *Schleswig* Appeals Court, finding for the designer and lowering the creativity threshold for copyright protection.⁵⁹ Previously, visual arts, such as fine arts and literature, had a lower threshold of creativity to fulfill than applied arts, such as those made for a commercial purpose.⁶⁰ This was because purpose-free arts are presumed to be creative, but applied arts are not.⁶¹ In other words, the decision extended copyright protection for food placement.⁶²

⁵⁵ 2-GER Dr. Adolf Dietz, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2:b (2015).

⁵⁶ *Id.*

⁵⁷ Bardehle Pagenberg, *German Federal Supreme Court: Relationship between National Copyright Law and National and/or European Design Law (decision of November 13, 2013 – Case I ZR 143/12 - Geburtstagszug/Birthday Train)*, LEXOLOGY.COM, <http://www.lexology.com/library/detail.aspx?g=347fb9e3-0348-4af9-b7cf-ed1d7449dbf0> (last visited Oct. 9, 2015). The author explains the distinction between design law and copyright law in Germany. *Id.* Copyright law had a much higher standard of creativity. *Id.* Designs had a higher threshold under the German design law of 2004. *Id.*

The new decision held that first, the design law of 2004 had created a new IP right and removed its close relation to copyright law, second, design law would no longer require a specific degree of creativity but rather focus on similarities and dissimilarities, and third, since design and copyright law would not conflict but co-exist, then a design could be protected under both laws without requiring a higher standard of creativity under copyright law. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* See also Bundesgerichtshof [BGHZ] [Federal Court of Justice], *geburtstagszug* [BVerwG] I ZR (143/12) (Ger.) (Nov. 13, 2013), <https://openjur.de/u/657147.html> (last visited Oct. 9, 2015). While overturning the previous courts decision, the Federal Court of Justice emphasized the author’s own intellectual creation and his room for discretion in assessing his creativity and expression.

⁶⁰ Peter Schramm, The “Birthday Train” case—strengthening of copyrighted design protection in Germany, MIL-LEGAL.COM, <http://www.mll-legal.com/news-events/legal-tax-update/newsletter/legal-tax-update/june-2014/the-birthday-train-case-strengthening-of-copyrighted-design-protection-in-germany/> (last visited Oct. 9, 2015). The author discusses the “Stufentheorie” that made the creativity bar for commercial works of art extremely high in order to receive protection. Now that the court has departed from that legal theory, the question still remains as to the threshold the German courts will use to determine whether a product’s design is dictated by its purpose of use and function. If the product’s features are rather utilitarian in nature, then the remaining question to be answered by the courts is if its utilitarian aspects leave it as having a sufficient level of individual character. However, this Court instructed that the issues of whether a product can be considered an artwork and whether a sufficient degree of intrinsic creativity exists in a work is a matter to be left to the trial courts to determine.

⁶¹ *Id.*

⁶² Eustacia Huen, *Why Instagramming a Dish Could Get You into a Lawsuit in Germany*, FORBES.COM (AUG. 21, 2015), <http://www.forbes.com/sites/eustaciahuen/2015/08/21/instagramming-a-dish-could-get-you-into-a-lawsuit-in-germany> (last visited Oct. 9, 2015).

The United States can follow Germany's lead by focusing on expanding copyright protection as society's artistic and technological capabilities widen. The United States already has a fairly low level for creativity; however, in order to protect innovative arts such as food placement, the copyright statute would have to be amended. To understand how and why, Germany's legal foundation of moral rights for artists must first be understood because this is a threshold for understanding why a heightened degree of protection is necessary. This comment will then look to how the laws in the United States have expanded in the past to incorporate more categories of protectable works. The analysis of the two topics will help clarify the means to the creation of copyright protection for chefs.

III. ANALYSIS

A. How American Economic Based Copyright Law Fits With German Moral Based Copyright Law

The most significant difference between German and American copyright law is the moral-based system of law. The moral-based system looks to the integrity of the author.⁶³ The most fundamental aspects of moral rights are the artist's right to be recognized as an author, and the right to prevent against mutilation or destruction of her work.⁶⁴ The policy supporting moral rights is the importance of understanding the nature of creativity and the subsequent product; artistic creation is a personal experience that comes from within the creator.⁶⁵

Although few, there have been some attempts by litigants to argue German moral-based copyright law rights in American Courts. In 1971, a director of a German film, *Kamasutra—Perfection of Love*, sued an American film distributor and alleged copyright infringement, because he claimed the distributor had pornographically altered his film.⁶⁶ The court held for the defendant.⁶⁷ The court

⁶³ Karen Y. Crabbs, *The Future of Authors' and Artists' Moral Rights in America*, 26 BEVERLY HILLS B. ASS'N J. 167 (1992). The author discusses America's motivations to expand intellectual property law. *Id.* There have been many benefits of this expansion, all economic. *Id.* More specifically, copyright law has expanded a great deal in the last century. *Id.* The United States has become a signatory to several international treaties, including the General Agreement on Trade and Tariffs (GATT) and the Berne Convention for the Protection of Literary and Artistic Work (BCIA). *Id.* Each of these international treaties provides international intellectual property protection, such as against piracy and misappropriation, while promoting free trade among signatory countries. Although these additions have a positive effect on America's economy, there is still the issue of artist's moral rights being overlooked. *Id.*

⁶⁴ *Id.* The Berne Convention recognizes both of these moral rights. France and Germany both provide further moral protection for artistic works. *Id.*

⁶⁵ *Id.*

⁶⁶ *Jaeger v. American International Pictures, Inc.*, 330 F. Supp. 274, 275 (S.D.N.Y. 1971). Plaintiff Jaeger, citizen of Israel and a resident of New York, was a scenario author, producer, and director. *Id.* For the film that was at issue in this litigation, "Kamasutra Vollendung der Liebe," Jaeger alleges he co-authored the script and directed it. *Id.* Conti Films, a German Corporation that Jaeger was a part owner in, produced the film. *Id.* Defendant American International Pictures, Inc. had distribution right to the film.

stated that in order for Jaeger to recover nominal damages, he would have to prove that the insertions of the erotic film were inferior to his own creation and that those portions did not fit into the movie as an artistic whole.⁶⁸ Ultimately, the *Jaeger* Court found only economic injuries to be relevant to recovery.⁶⁹

Perhaps if Jaeger had had the chance to argue his case in an American court twenty-something years later, he would have prevailed thanks to the Visual Artists Rights Act (VARA). VARA may be the window to a new generation of appreciation for the arts, in all their various and diverse forms. Moreover, VARA may be the seedling law that eventually grows and blossoms into a tree, and maybe one day grows a new branch, so a chef's creation can be understood by the legal system as an artistic creation.

B. VARA, America's Only Hope For A Possible Future Granting American Artists Moral Rights To Their Work

The time came when the United States sought to join the Berne Convention, an international treaty that allows an adhering country to apply domestic law to any qualifying work, if the domestic law extended protection to the work.⁷⁰ However, not having any moral rights laws frustrated the chances of the United States successfully joining. In 1990, The United States Congress passed the Visual Artists Rights Act in order to protect the moral rights of artists in their work.⁷¹ Yet Congress made its antipathy of embracing moral rights quite clear, stating it was merely to join the Berne Convention.⁷²

Since then, U.S. courts have characterized moral rights as those that protect an artist's interest in the appropriate use of the artist's name, reputation, and also in

⁶⁷ *Id.* To argue his claim, Jaeger argued that his film had been mutilated and pornographically altered, which violated his rights of literary property. *Id.* The distributors had taken out portions of the original film and instead inserted 25 minutes of erotic film. *Id.* The distributor argued that these changes were necessary in order to make the film more appealing to the American market. *Id.*

Jaeger found these changes unnecessary and highly offensive, so to make his argument, the director relied on theories of German moral rights to intellectual property. *Id.* The court was unwilling to find an American law that is a square counterpart of moral rights assigned to artists in Europe. *Id.* The court stated that "these rights, as they are recognized in American decisions, are similar, but not identical, to the 'moral rights' of authors that are, plaintiff asserts, 'widely recognized in Civil Law countries.'" *Id.* The court concluded that Jaeger might have a feasible claim under the Lanham Act since the distributor misrepresented Jaeger's product. *Id.*

⁶⁸ *Jaeger v. American International Pictures, Inc.*, 330 F. Supp. at 280. In making its conclusion, the Court looked to the cases Jaeger presented which argued that false attribution is *per se* an enjoined violation of an author's right. *Id.* Jaeger's argument to his rights to preserving his artistic vision and subsequent creation were quickly thrown out the window. *Id.* The only possible outlet he could have had to prove harm to his artistic vision was ruled out as a means for claiming economic loss. *Id.*

⁶⁹ *Id.* at 281. The Court looked to costs incurred by the distributor, which were \$150,000 by the commencement of lawsuit, and another \$95,000 during litigation. *Id.* The film was booked in 135 theaters. *Id.*

⁷⁰ 1-INT Paul Edward Gellar, *How Much Protection May be Available?* International Copyright Law and Practice INT § 5. 1[A] (2015).

⁷¹ Patrick Flynn, *Validity, Construction, and Application of Visual Artists Rights Act*, 138 A.L.R. FED. 239 (1997).

⁷² 3-SD MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06 [A][1](2015).

maintaining the physical integrity of their creation.⁷³ There have been instances of limited protection granted.

In *Lilley v. Stout*, a photographer sued his ex-girlfriend for taking the credit of his work as her own.⁷⁴ The court characterized moral rights as those that are:

Protections . . . enumerated in the individual rights of “attribution” and “integrity,” known collectively as “moral rights” . . . the former ensures that artists are correctly identified with the works of art they create, and that they are not identified with works created by others. The latter allows artists to protect their works against modifications and destructions that are prejudicial to their honors or reputations.⁷⁵

Moral rights cannot be assigned or transferred.⁷⁶ These rights can exist without a valid copyright, and can also co-exist with a valid copyright.⁷⁷ The requirements under VARA are somewhat similar to what Germany has created for its design requirement.⁷⁸

VARA and the Copyright Act can co-exist, and a work can be eligible for protection under one and not the other or vice versa. The good news is that VARA adds some diversity to the current stringent Copyright Act. Moreover, VARA honors the artist’s reputation and protects the artist from others mutilating his or her work. The bad news is that VARA is incredibly limited.

⁷³ Patrick Flynn, *Validity, Construction, and Application of Visual Artists Rights Act*, 138 A.L.R. FED. 239 (1997). See also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d. Cir. N.Y. 1995).

⁷⁴ *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005).

⁷⁵ *Id.* Photographer Lilley took photos of a red room so his one-time girlfriend, Stout, could later use those photos for studies, and subsequently, paint paintings based on the photos. Subsequently, Lilley sued Stout alleging a VARA claim and a copyright claim. *Id.* Lilley claims the lack of recognition for his creativity and input amounted to improper attribution of his work under VARA, and selling his photographs as Stout’s own work violates the copyright acts. See also Roberta Rosenthal Kwall and Ray P. Niro, *How Fine Art Fares Post VARA*, SL077 ALI-ABA 687 (2006). The authors discuss how VARA has been litigated since its inception in 1990. Discussing the *Lilley* case, the authors discuss that the court determine the photographers “intent when clicking the shutter of his camera and creating the negatives is irrelevant to his claim” and instead it was relevant that that “his probably different purpose in developing the negatives to produce prints.” *Id.* In other words, what mattered was what his purpose was in taking the pictures. *Id.* Since in this case it was to assist his at the time girlfriend, whom he did by giving her the photos, his VARA claim was dismissed. *Id.*

⁷⁶ Roberta Rosenthal Kwall and Ray P. Niro, *How Fine Art Fares Post VARA*, SL077 ALI-ABA 687 (2006). The rights under VARA are independent of the exclusive rights granted under the Copyright Act.

⁷⁷ *Id.*

⁷⁸ *Equitable Remuneration in Copyright Law*, *supra* note 47. The author discusses the roots of the droit d’auteur system of law, the benefits, and the implications for authors. The droit d’auteur allows authors to be rewarded for their creations and contributions to society, as well as maintaining the integrity of their work. Exploitation of their work is a secondary and less important right, and authors have the authority to choose how to proceed in financial gain. See also Pagenberg, *supra* note 57. The author discusses the recent Birthday Train decision that extended the protection of design law, while lowering the creativity threshold for copyright law. Design and copyright law co-exist and a design could be protected under both laws without requiring a higher standard of creativity under copyright law. A design could also coexist without a copyright, or vice-versa.

VARA covers “works of visual art.”⁷⁹ A work of visual art, under the statutory definition, covers sculptures.⁸⁰ For a chef—a food artist, so to speak—this broader definition offers hope. After all, food art can most closely resemble a statue under the requirements of the statutory language of the Copyright Act as well as VARA.

However, VARA has restrictions that could bar a chef from protection. For example, VARA has a cap on the amount of copies that can be made of the reproduction; there can be no more than 200 copies of the artwork.⁸¹ Most likely, a chef would recreate his plate more than 200 times. Further, these copies must be signed by the author and consecutively numbered.⁸² A chef cannot sign his dish, at least easily, nor is it practical for her to consecutively number them.

Another bar to recovery under VARA is that if the work was made as a work for hire, then it cannot be eligible.⁸³ There are also some other disqualifying factors for works of visual art: for instance, posters, books, and maps do not qualify under VARA.⁸⁴ The categories of ineligible works also include works of applied art.⁸⁵

⁷⁹ 3-SD MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §8 D.06 [A][1] (2015). Works that may meet this requirement include paintings, drawings, prints, and or sculptures. The work must exist in an original medium to qualify for protection under VARA.

⁸⁰ *Id.*

⁸¹ H.R. REP. NO. 101-514, 101st Cong., 2d Sess. 12 (1990).

⁸² *Id.* This requirement applies only to multiple copies. In other words, if the artist creates only one work, then that one does not need to be signed. If there are two copies, or more, then all the copies must be signed. These copies must also have a consecutive number placed on them in order to qualify as a work of visual art. This restriction also applies to sculptures when more than one original exists, as long as they are in limited edition. All the originals of these sculptures must be signed and bear the author’s signature. Other identifying marks, other than the signature, of the author may suffice for the statutory requirements.

⁸³ *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994). Plaintiffs were several artists that all focused the majority of their work on sculptures. *Id.* The commissioner of the artwork was an owner of a building in New York used for business offices. *Id.* Plaintiffs were sought to design, create and install sculptures for the lobby of the building, and other public areas of the building as well. *Id.* The terms of the contract gave plaintiffs full artistic authority but the owner of the building retained the authority to decide the location of the installments. *Id.* The contract also stated that plaintiffs would receive design credit and own the copyright for their sculptures and installations. *Id.* Afterwards, the owner of the building changed. Roughly about a year later, the new managing partners of the building filed for bankruptcy. *Id.* Plaintiffs were led to believe that the art work in the lobby was to be removed. *Id.* Plaintiffs no longer were allowed on the premises and were told they would be considered trespassers if they did attempt to access their artwork. *Id.* Afterwards, plaintiffs filed this action and argued their rights under VARA. *Id.* Defendants argued the sculptures and installments were barred from recovery under VARA because they were work-for-hire. *Id.* The court applied the Reid factors and determined the sculptures and installments were not works made for hire and therefore eligible for protection under VARA.

⁸⁴ 3-SD MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §8D.06 [A][1] (2015). Specifically, according to the statute, other types of ineligible works are any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication. The statute also excludes any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container. If any part of a work includes any one of the aforementioned categories, then the work cannot qualify for protection under VARA.

⁸⁵ *Id.*

Courts have defined applied arts to include all original pictorial, graphic, and sculptural works that are somehow incorporated into useful articles.⁸⁶ These works are considered art regardless of factors such as the availability of mass production, commercial exploitation, and the prospective accessibility of design patent protection.⁸⁷ However, objects of industrial design, regardless of how artistic, visually appealing, or valuable they are, will not receive protection.⁸⁸

The rejected category of applied arts is perhaps the greatest bar for recovery for chefs. No matter how difficult to make, no matter how thoughtful, creative, and provocative a dish may be, it will always contain inherently useful articles: its ingredients.

C. Utilitarian Purpose And Aesthetically Pleasing Elements, A Hurdle Many Artists Must Overcome in Both America and Germany

Over the years, many artists have suffered the sting of their work not receiving copyright protection simply because it contains utilitarian aspects. The Supreme Court has allowed some useful objects to be copyrightable, such as belt buckles.⁸⁹ Electric table lamps of statuettes of male and female ballerina dancers are also copyrightable, even though the lamp is a utilitarian object.⁹⁰ These holdings have left the question open on how to separate the artistic aspects from the practical functions of an object.⁹¹ Some toys have been held to be copyrightable, because “toys do not have an intrinsic function other than the portrayal of the real item,” and as a

⁸⁶ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. N.Y. 1980). In this case, there were belts at issue that were ornamental. *Id.* Normally, belts did not qualify for copyright protection because of their inherent utilitarian function. *Id.* Utilitarian objects are not copyrightable. *Id.* However, these belts were exceptionally artistic. *Id.* The designer based the collections of buckles from her inspiration after reading a book on the design of the art nouveau school and, afterwards, an architectural trip to Spain. *Id.* The other collection was ornamental and sold for up to \$6,000 wholesale. *Id.* Copyright protection for these belts was registered under jewelry. One belt from each of the collections was accepted by the Metropolitan Museum of Art for its permanent collection. *Id.* The Court held that the belts could be copyrighted if the ornamental aspects of the belt were conceptually separate from their utilitarian function. *Id.*

⁸⁷ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d at 989.

⁸⁸ *Id.* In making its decision, the court made a clear distinction between copyrightable works of applied art and uncopyrightable works of industrial design. The court made it clear protection is available to ornamental objects when they are applied to articles containing utilitarian aspects. Conversely, industrial objects may contain aesthetically pleasing objects, and they may be valuable, but will not receive copyright protection.

⁸⁹ See *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d at 989 (concluding the belt buckle was sufficiently ornamental to stand alone as a copyrightable object).

⁹⁰ See *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (concluding that the lamp was a work of art for the purposes of the copyright act).

⁹¹ See Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful articles*, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 342-345 (1990) (The author discusses the change of the utilitarian requirement in the Copyright Act over the last century. Specifically, she discusses that at the turn of the century, the United States Copyright Office allowed many useful objects to be copyrighted, such as clocks, candlesticks, ashtrays and saltshakers. It was during the second half of the century that the Copyright Office began holding works closer to a standard of fine art.).

result, they do not fit into the definition of a useful article.⁹² Remarkably, it was a child's toy that was the center of the *Geburtstagszug* decision and that eventually led to the landmark decision that expanded copyright protection to include food placement by chefs.

German courts allow protection for useful objects.⁹³ In the past, German courts had a higher standard of creativity for works of applied art.⁹⁴ Under this standard, computer programs, maps, and technical drawing were included.⁹⁵ The growing trend in Germany is to lower the threshold for copyright eligibility in order to allow room for the free flow of information and allow room for innovation.⁹⁶ The recent German decision, *Geburtstagszug*, lowered the threshold even more so that now, applied arts such as food prepared by chefs can receive protection.⁹⁷

However, one of the prevailing counter-arguments in the U.S. to the copyrightability of utilitarian aspects is Professor Denicola's theory, which is the Denicola Test of conceptual separability that is often used by courts.⁹⁸ Professor Denicola states the test should be contingent upon the extent to which the work at issue reflects artistic expression unrestrained by functional considerations.⁹⁹ In *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, the artist sought protection for a modified bike rack that was a minimalist sculpture.¹⁰⁰ Applying the Denicola Test, the court found it was not copyrightable.¹⁰¹ The court reasoned that utilitarian aspects influenced most of the bicycle rack and any aesthetic elements were not conceptually separable from the utilitarian ones.¹⁰²

U.S. courts have since followed this strict reasoning. The benefit of this cut-and-dry rule is that it helps separate art from aesthetically pleasing objects without artistic purpose. However, food placement can rise to the level of true art. It

⁹² See 1-2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, §2.18 [H][1] (2015) (discussing the limitations on copyrightability due to utilitarian functions).

⁹³ Dr. Dana Beldiman, *Utilitarian Information Works—Is Originality the Proper Lens?*, 14 MARQ. INTELL. PROP. L. REV. 1, 13-16 (2010). The author discusses how utilitarian innovations are expanding at a faster pace than ever before. *Id.* The innovations are wealth producing. *Id.* However, the Copyright Office still focuses on originality as a sole standard for evaluating Copyrightability protection. *Id.* The author examines Germany's standards for copyright eligibility and how the standard is low to allow more room for innovation. *Id.*

⁹⁴ Dr. Dana Beldiman, *Utilitarian Information Works—Is Originality the Proper Lens?*, 14 MARQ. INTELL. PROP. L. REV. 1, 13-16 (2010).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Pagenberg, *supra* note 57. In the *Geburtstagszug* decision, the court lowered the necessary creativity threshold in order to receive copyright protection. *Id.*

⁹⁸ Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach To Copyright in Useful Articles*, 67 MINN. L. REV. 707, 720-22 (1983).

⁹⁹ *Id.* at 741.

¹⁰⁰ *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F. 2d 1142 (2d Cir. N.Y. 1987). The case involved a bike rack made out of bent tubing which was said to originate from a wire sculpture. *Id.* The court's intent was to determine the fine line between copyrightable works of art and uncopyrighted works of industrial design. *Id.* The court applied the Denicola test and explained the line the test draws is if the design elements reflects a merger of aesthetic and functional elements, then the aesthetic aspects of the work cannot be separated from the utilitarian elements. *Id.* However, if the creator's artistic judgment is reflected in the work space of the functional influences, then conceptual separability exists. *Id.*

¹⁰¹ *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F. 2d at 1143.

¹⁰² *Id.* at 1143.

can be an everyday object with utilitarian purposes, but there are also incredible chefs out there that go above and beyond creating food for utilitarian purposes. They put their soul into their work just like any other artist. Therefore, the cut-and-dry Denicola test should allow room to recognize the difference between art and non-art.

In contrast, by making the decision to lower the necessary threshold in order to receive copyright protection, the German courts have allowed room for innovation in the globally expanding economy. Moral rights benefit artists, whereas broader copyright protection benefits society. Laws such as VARA are important because they honor the artist's intimate expression through his work.

IV. PROPOSAL

Around the world, there are chefs that consider themselves true food artists and have the credentials to back it up. In Modena, Italy there is a three-Michelin-starred chef named Massimo Bottura who has been revered for having an equal degree of creative propensity to that of Picasso.¹⁰³

Bottura describes his dishes as breaking the rules by “juxtaposing tradition with a dose of irreverence,” whilst encouraged by art, music, literature, and pop culture.¹⁰⁴ Since 2002, Bottura's popularity has grown worldwide, from simple awards such as “Performance of the Year” and “Chef of the Year,” to being named the “Second Best Restaurant in the World” for several years straight.¹⁰⁵

As successful as Bottura's imagination may be, receiving worldwide recognition for his creative genius, an artist of his capacity cannot receive copyright protection for his masterpieces under U.S. Copyright Law. After all, can he truly be an artist if his masterpieces have a utilitarian function? Culinary history has not allowed dishes to receive any philosophical reflection.¹⁰⁶

This comment proposes that exceptional chefs such as Bottura should receive some copyright protection for their masterpieces. Society has evolved from the nineteenth century when, despite slaving away in subterranean dungeons called kitchens, chefs' talents were unknown to fame.¹⁰⁷ Painters, poets, and musical

¹⁰³ Jane Kramer, *Post-Modena, Italy's food is bound by tradition. Its most famous chef isn't*. NEWYORKER.COM (Nov. 4, 2013), <http://www.newyorker.com/magazine/2013/11/04/post-modena> (last visited Nov. 16, 2015). The author, Kramer, discusses Bottura's dish comprised of squid ink, katsubushi, and black cod as influenced by Thelonious Monk. *Id.* Another dish called camouflage is inspired by a conversation between Picasso and Gertrude Stein, during which a camouflage truck passed by the two and Picasso exclaimed his joy that cubism is present and that the two had created it. *Id.* This dish, camouflage, is comprised of wild hare hiding in a custard under a blanket of herbs. *Id.*

¹⁰⁴ *Massimo Bottura*, OSTERIA FRANCESCANA, <http://www.osteriafrancescana.it/bottura.html> (Last visited Nov. 16, 2015).

¹⁰⁵ *Biography*, OSTERIA FRANCESCANA, <http://www.osteriafrancescana.it/biography.html> (Last visited Nov. 16, 2015).

¹⁰⁶ 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, 1142 (2007).

¹⁰⁷ *Id.* at 1144. Buccafusco's article examines the Anglo-American cultural history of cooking. *Id.* He begins by looking into a brief history of taste, cooks, and cooking and determines that western culture has viewed cooking as merely necessary for survival, but not a respectable art such as music or poetry. *Id.* This functional component of food detracts from the aesthetic and expressive characteristics of food. *Id.* Of the five senses, vision and sight have always been

composers have established themselves as artists under the law, yet chefs “remain faceless” in dark kitchens.¹⁰⁸

There are some theories that attempt to explain why chefs have not received protection. One theory is that they have been viewed as servants belonging in the kitchen, not in the spotlight such as other artists.¹⁰⁹ It was not until chefs like Auguste Escoffier emerged that the general public began to respect them.¹¹⁰ This leads to the next theory, which is: even though chefs such as Escoffier wrote cookbooks, the people who generally carried out the recipes were housewives.¹¹¹ In other words, it was a woman’s work.¹¹² A chef’s reputation has suffered from both classism and sexism.

In order for chefs to obtain legal protection under the Copyright Act, society must overcome these attitudes. Modern twenty-first century culture has stopped treating chefs as behind-the-scenes pot-stirrers and instead as culinary rock stars.¹¹³ It is time the law does as well.

The easiest way to do this would be for Congress to create a new category of protectable works under the copyright statute. When architects sought protection for their work, Congress enacted the Architectural Works Copyright Protection Act (AWCPA) within the Judicial Improvements Act of 1990.¹¹⁴

Clearly, the congressional intent in passing this new act was to expand protection for architectural works.¹¹⁵ Afterwards, the Copyright Act was expanded to include architectural works, adding an eighth category.¹¹⁶ The Copyright Act, 17 U.S.C. § 102(a), now has architectural works listed as the last category of protectable works of authorship.¹¹⁷

regarded as more valuable, and taste as less valuable. *Id.* This attitude dates back to the times of Plato. *Id.* Buccafusco then looks to the status of and attitudes towards cooks in Anglo-American society. *Id.*

¹⁰⁸ 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, 1142 (2007). Buccafusco discusses Launcelot Sturgeon’s observations of cooks, such as they received plenty of scorn and little praise. *Id.* Launcelot Sturgeon was a nineteenth century gourmand. *Id.*

¹⁰⁹ *Id.* Throughout the eighteenth century, cooks had a low status in society, and rarely had their name placed beside a dish or praised for their work. *Id.* They were often anonymous. *Id.*

¹¹⁰ 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, 1142 (2007).

¹¹¹ *Id.*

¹¹² *Id.* at 1145. The most popular cookbooks of the nineteenth century were written for women to positively affect the domestic economy. *Id.* These domestic activities would have highly offended a lot of Victorian’s romantic notions of art and creation worthy of copyright. *Id.*

¹¹³ Ron Rosenbaum, *Anthony Bourdain’s Theory on the Foodie Revolution*, SMITHSONIAN.COM (July 2014), <http://www.smithsonianmag.com/arts-culture/anthony-bourdains-theory-foodie-revolution-180951848/?no-ist> (Last visited Nov. 18, 2015). Rosenbaum discusses the fetishization of food in our modern day society, such as cooking, eating, and watching other people cook and eat. *Id.*

¹¹⁴ Architectural Works Copyright Protection Act, Pub. L. No 101-655, 104. Stat. 5089, 5133 (1990).

¹¹⁵ H.R. REP. NO. 101-735, at 6944, (1990). In coming to its decision, Congress quoted poet Ada Louise Huxtable, “poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects; the architectural world is an endless source of symbols with unique ramifications in time and space.” *Id.* The committee concluded that an architectural work is a writing under the constitution and therefore eligible for protection. *Id.*

¹¹⁶ 17 U.S.C. § 102(a)(8) (2012).

¹¹⁷ *Id.*

A statute similar to the AWCPA needs to be enacted for chefs to receive protection. It would need to be in the spirit of moral rights in order to counterbalance the historical prejudice created by American copyright law's economic focus. Although a pure moral-rights doctrine is probably not necessary, understanding these rights is an important foundation towards understanding the depth of legal protection an artist should receive.

Like architectural works, food placement would need to be added to the Copyright Act as a new category for the same reasons architectural works were added as a new category: to avoid confusion of being treated as the already existing and established law of statues. Additionally, it is crucial that a law of food placement have the opportunity to be developed by the courts, just as every other artistic category of copyright has had.

When deciding to add architectural works to the list of protectable material, Congress naturally had to deliberate how broad the protection should extend.¹¹⁸ Should it be extended to dwellings within buildings? How about parking lots? Since the AWCPA has been passed, courts have struggled with these questions and determined the proper limits of the extension of copyright protection to architectural works.¹¹⁹ Similarly, the broadness and narrowness of food placement protection will need to be developed.

Several years prior to the passing of the AWCPA, Professor David Shipley wrote an article arguing in favor of architectural works receiving copyright protection.¹²⁰ After the AWCPA was enacted, he revisited the topic.¹²¹ He proposes a test to determine the scope of protection: first, determine whether there are protectable elements, including all overall elements, and then second, if there are functional elements, determine whether they are functionally required.¹²² Only the non-functional requirements can be protected, without regard to their conceptual separability.¹²³

¹¹⁸ David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?* 18 J. INTEL. PROP. L. 1, 12-14 (2010).

¹¹⁹ *Id.* Several years prior, Shipley wrote an article proposing extension of the Copyright Act to include architectural works under its category of protectable works. *Id.* Since he wrote the article, the AWCPA was passed. *Id.* He discusses, in part, what defines an architectural work worthy of copyright protection. *Id.* He discusses how the courts have tackled different issues of defining architecture, such as what is a building. *Id.* Some of the cases include *Yankee Candle Co. v. New England Co.*, 14 F. Supp. 2d 154 (D. Mass. 1998), for protected pieces of architecture, *Viad Corp. v. Stak Design, Inc.*, 2005 U.S. Dist. LEXIS 6572 (E.D. Tex. Apr. 14, 2005), and *Moser Pilon Nelson Architects, LLC v. HNTB Copr.*, 2006 U.S. Dist. LEXIS 58334 (D. Conn. Aug. 7, 2006). *Id.* Shipley disagrees with the decision in *Yankee Candle Co.* that a structure within a structure is not protectable, but generally most cases he discusses were protected structures. *Id.* The court later vacated the judgment in *Yankee Candle, Inc.*, in light of settlement between the parties. *See also Yankee Candle Co. v. New England Co.*, 29 F. Supp. 2d 44 (D. Mass. 1998).

¹²⁰ *Id.* at 3. *See also* David Shipley, *Copyright Protection for Architectural Works*, 37 S.C.L. 393, 395 (1986). Shipley argued for both judicial recognition and of architect's rights to control the use of their plan, as well as an expansive definition of what should be covered under the copyrightable attributes of functional structures. *Id.* Shipley believed the architectural works should receive protection that was comparable to the protection received by other artistic and structural works. *Id.*

¹²¹ *Id.*

¹²² David Shipley, *Copyright Protection for Architectural Works*, 37 S.C.L. 393, 395 (1986). Shipley states Congress envisioned this test, implying it may have been Congressional intent. *Id.*

¹²³ *Id.*

In other words, only the overall aesthetically pleasing shape of the work can be protected.¹²⁴ This is different than traditional works under copyright, because under those, you conceptually separate the functional from the purely aesthetic.¹²⁵

Similarly, this approach would harvest great success for food placement. Ingredients of food themselves should not be copyrightable, however, the artistic placement of them should be protected. Just as the overall form of a building is copyrightable without dissecting each window and doorway for its originality and utilitarian function, a beautifully plated dish should be protectable in the same fashion.

Although the sharing culture of chefs is seen as another blockade to the copyrightability of food placement, many would warmly greet the effects of a statute.¹²⁶ Rather than chefs blatantly stealing from one another, this new statute would encourage creativity.¹²⁷

V. CONCLUSION

In short, given the changing attitudes of today's modern society and the emergence of foodie culture, the law should react to these changing customs. Chefs were once seen as servants and food was seen as necessary for survival.

Today, food art has transformed these outdated views. The culinary arts are doing what traditional arts always have: "Comfort the disturbed and disturb the comfortable."¹²⁸ Following Germany's innovative lead, the U.S. should enact a statute giving protection to the fruits of this ever-so-quickly expanding art. The idea is not to protect a fast food chicken sandwich, but to protect true artistic genius and creativity.

¹²⁴ *Id.*

¹²⁵ *Lamps, Inc.* 345 F.3d at 1146; *Kieselstein-Cord v. Accessories by Pearl, Inc.*, *supra* note 86. See also *Carol Barnhart Inc. v. Econ. Cover Copr.*, 773 F.2d 411, 420 (2d Cir. N.Y. 1985). Plaintiff sued over copyright infringement of its display signs it sold to stores. *Id.* The court ruled in favor of defendant concluding that artistic features were inseparable from utilitarian aspects. *Id.* The dissent revisits the conceptual separability test, and states it should be more carefully applied because a minority of deserving works will have inseparable utilitarian aspects. *Id.* Applying the test as the majority did will result in harm to those deserving works because they will be without protection. *Id.*

¹²⁶ Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?* 24 CARDOZO ARTS & ENT. L.J. at 1149. Buccafusco discusses the costs of obtaining IP rights and chef's inherent desire to be hospitable, which he states may be contrary to enforcing IP rights. *Id.* He says chefs share by serving their dishes and that is contrary to ownership. *Id.*

¹²⁷ Complaint for Plaintiff at 3, *Powerful Katinka, Inc. v. Edward McFarland*, 2007 WL 2064059 (S.D.N.Y.) (No. 07 CV 6036).

¹²⁸ Cesar A. Cruz, *To Comfort The Disturbed, and to Disturb the Comfortable: Onward children of the sun*, (1997), available at <http://www.hartford-hwp.com/archives/41/335.html> (last visited April 12, 2016).