

# PROTECTING YOUR CULINARY CREATION AND EATING IT TOO: AN EXPLORATION INTO HOW AUSTRALIAN COPYRIGHT LAW CAN AND SHOULD EXPAND ITS MENU TO EMBRACE CULINARY WORKS

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*In a modern gastronomic culture driven by multi-dimensional sensory creativity, chefs who invest significant intellectual effort into creating aesthetically stimulating works should no longer be excluded from formal intellectual property protection. Culinary professionals who produce original culinary works should find protection in Australia under the Copyright Act 1968 (Cth) ('Act'). Specifically, the visual creative expression of a culinary work might be considered an 'artistic work' for the purposes of the Act. Little attempt has been made by scholars at a comprehensive assessment of whether copyright law is capable of accommodating art forms consisting of inevitably ephemeral food, and neither has this been considered in Australian case law. However, there is abundant precedent for encompassing new works in the Act in response to cultural and technological change. This article addresses the challenge of incorporating contemporary art forms into Australian copyright law but asserts that there is scope for, and social value in, protecting artistic culinary creations from unauthorised exploitation.*

## CONTENTS

I	Introduction .....	152
II	Rationalising Copyright for Culinary Works .....	158
III	Can a Culinary Work Satisfy the Legislative Requirements to be a Copyright Work? .....	166
IV	Food for Thought: Should Culinary Works Receive Copyright Protection? .....	187
V	Conclusion .....	201

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<sup>1</sup> *Copyright Act 1968* (Cth) s 10(1) 'artistic work' means: '(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; (b) a building or a model of a building, whether the building or model is of artistic quality or not; or (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b)'.

## I INTRODUCTION

The booming interest in the culinary industry has intensified a collective appetite amongst chefs and consumers alike for novelty and creativity in the kitchen.<sup>2</sup> Dining out has become a leisure activity<sup>3</sup> and cuisine-centric television shows have achieved nationwide popularity.<sup>4</sup> In efforts to garner commercial success and enhance reputational esteem in what has become a highly competitive environment, culinary professionals are being encouraged to consider protecting their intellectual property rights in their culinary creations.<sup>5</sup> Copyright in the culinary industry has recently encountered a wealth of attention,<sup>6</sup> but recognition of a possible symbiotic relationship between culinary works and intellectual property rights dates back to ancient Greece, where exclusivity in dishes was awarded on the premise that it would encourage

<sup>2</sup> J Austin Broussard, 'An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 703 (asserting that the growth of the food industry is due in part to the rise in popularity of competitive cooking television shows and celebrity chefs); Hannah Brown, 'Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design' (2016) 56(1) *IDEA – The Journal of the Franklin Pierce Center for Intellectual Property* 31, 37-45; Marie-Christine Janssens, 'Copyright for culinary creations: a seven course tasting menu with accompanying wines' (Paper presented at *Association Littéraire et Artistique Internationale* conference on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies*, Dublin, Ireland, 30 June 2011) 2-3.

<sup>3</sup> J Austin Broussard, 'An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 696-698; Elizabeth Telfer, *Food for Thought: Philosophy and Food* (Taylor & Francis Routledge, 2002) 1-3.

<sup>4</sup> *Masterchef Australia* is a Logie-award winning cooking competition and has proven to be a ratings winner. The 2010 finale had a peak audience of over 5.7 million viewers in Australia, making it the most watched non-sporting event since Australian TV ratings began, and ratings have been consistently high over eight seasons: *Masterchef smashes ratings record* (26 July 2010) Australian Broadcast Corporation <<http://www.abc.net.au/news/2010-07-26/masterchef-smashes-ratings-record/918950>>.

<sup>5</sup> For example, in the United States, the molecular gastronomist chef Homaro Cantu was issued a culinary patent for his edible flavoured paper (U.S.Pat.7,307,249, available at <http://patft.uspto.gov/>).

<sup>6</sup> See, eg, Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121; Tania Su Li Cheng, 'Copyright protection of haute cuisine: recipe for disaster?' (2008) 30(3) *European Intellectual Property Review* 93; Jacopo Ciani, 'Intellectual Property Rights and the Growing Interest in Legal Protection for Culinary Creations' in Nobile M (eds), *World Food Trends and the Future of Food* (Ledizioni, 2015) 15-32; Amelia Fitzhardinge, 'Out of the frying pan into the court? Dishes and copyright protection' (2008) 21(5) *Intellectual Property Law Bulletin* 70.

creative competition.<sup>7</sup> Recipes may be copyrighted as ‘literary works’,<sup>8</sup> but little attention has been paid to whether the three-dimensional creative expression of the culinary creation may itself be a copyrighted work. Several commentators<sup>9</sup> argue that misguided focus on the method of construction of a dish, rather than the final creation, has led to a gap in how the law should handle ‘edible works of art’.<sup>10</sup> Christopher Buccafusco claims that courts in the United States (‘US’) have mistaken the recipe for the work of authorship, resulting in a lack of judicial analysis of the conceptual difficulties associated with protecting the dish as a means of expression itself.<sup>11</sup> The chef’s stamp of originality is usually evident in the final creative output, and is what makes the work worthy of protection.

Evidence of culinary plagiarism has invited an intellectual property discourse into the realm of cuisine and reinforced the contemporary relevance and importance of considering the legal protection available for culinary creations. In 2006, chef Robin Wickens was accused of almost identically reproducing dishes from top-end American restaurants Alinea and WD-50 at

<sup>7</sup> Kal Raustiala and Christopher Sprigman, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) 92(8) *Virginia Law Review* 1687, 1768: ‘sixth century inhabitants of Sybaris, the largest of the ancient Greek city-states enforced short-term exclusivity in recipes: “[i]f any caterer or cook invented a dish of his own which was especially choice, it was his privilege that no one else but the inventor himself should adopt the use of it before the lapse of a year in order that the first man to invent a dish might possess the right of manufacture during that period, so as to encourage others to excel in eager competition with similar inventions”’.

<sup>8</sup> Australian Copyright Council, *Recipes: Legal Protection*, Information Sheet G019v10 (2014); *Skybase Nominees Pty Ltd (as trustee for the Barcza Family Trust) And Another v Fortuity Pty Ltd* (1996) 36 IPR 529 (finding that a compilation of recipes and menu plans was protectable as a literary work).

<sup>9</sup> Caroline M Reeb, ‘Sweet or Sour: Extending Copyright Protection to Food Art’ (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 54; J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 715; Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1130-1131.

<sup>10</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1486.

<sup>11</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1131.

his own critically acclaimed restaurant in Melbourne.<sup>12</sup> Similarly, a chef who previously worked at a restaurant in Washington D.C. was recently exposed on a culinary community online forum for copying and reproducing the exact menu at a tapas bar in Tokyo.<sup>13</sup> Culinary imitation is not rare, and is in fact openly accepted by some chefs,<sup>14</sup> but direct duplication of the visual handiwork of another, without attribution, is a disconcerting threat to continued creativity and imagination in an increasingly competitive industry.<sup>15</sup>

In delineating simplified categories of protectable subject matter,<sup>16</sup> the *Act* presents challenges for accommodating contemporary products of creative intellectual effort. In 2011, a report from the World Intellectual Property Organisation considered whether the non-conventional subject matter of gastronomy was agreeable with copyright protection.<sup>17</sup> The report addressed the question of whether works perceivable through the chemical senses of taste and smell could be protected through copyright. Doctrinal hurdles such as originality and functionality were not seen to be damaging to the case for protecting culinary works, nor was the fixation of the dish considered to be an

<sup>12</sup> Rachel Gibson, 'Is copying a fancy dish flattery?', *The Age* (online), 1 April 2006 <<http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html>>;

Kenneth Nguyen, 'The good feud guide', *The Age* (online), 26 March 2006 <<http://www.theage.com.au/articles/2006/03/25/1143084055425.html>>.

<sup>13</sup> Emily Cunningham, 'Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?' (2009) 9 *Journal of High Technology Law* 21, 23.

<sup>14</sup> Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1152-1153: 'As Chef Keller said: ... "There's a hospitality gene that we have as chefs that makes us want to share what we do"'; 'Chef Van Aken claims: ... "I am quite happy when a layperson uses my recipes ... provided that they give credit in some way shape or form"'.  
<sup>15</sup> Emily Cunningham, 'Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?' (2009) 9 *Journal of High Technology Law* 21, 23; Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1153: 'Chef Dufresne ... is pleased to see his culinary ideas gaining circulation, as long as others do not merely copy him'.

<sup>16</sup> Copyright subsists in original literary, dramatic, musical and artistic works (*Copyright Act 1968* (Cth) Part III) and subject matter other than works (sound recordings, cinematograph films, broadcasts and published editions) (*Copyright Act 1968* (Cth) Part IV).

<sup>17</sup> Cristiana Sappa, 'Non-Conventional Copyright Subject Matter: Fragrances and Gastronomy' (Paper presented at World Intellectual Property Organisation-Italy International Convention on Intellectual Property and Competitiveness of Micro, Small and Medium-Sized Enterprises, Rome, Italy, 10-11 December 2009).

obstacle for protecting the taste of the dish, which could be expressed in a written recipe.<sup>18</sup> However, by focusing attention on the taste of the dish, rather than its artistic appearance, the report largely dismissed a valuable opportunity to comment on the increasing tendency of chefs to produce visual art forms. Works capable of perception by the senses of sight and hearing were the very kinds of intellectual effort envisaged by the framers of the *Berne Convention*,<sup>19</sup> but discussion of chefs' artistic abilities tends to have been overshadowed by an evaluation of the chemical, functional sense of taste. The lack of copyright protection for chefs stems in part from beliefs about the gustatory sense's inferiority to the visual,<sup>20</sup> and the outdated assumption that works which appeal to the gustatory sense only serve functional purposes.<sup>21</sup> Determining the extent to which chefs may now be considered visual artists, and whether their culinary creations may be categorised as artistic works under Australian copyright law, is therefore largely uncharted territory.

This article limits analysis to the copyright domain as lack of space prevents exploration into other intellectual property rights. Copyright is suitable for application to culinary works as it has the potential to fulfil the desire of chefs to achieve recognition and attribution for their work, as well as to prevent direct appropriation of their signature dishes. Copyright offers exclusive economic rights in works,<sup>22</sup> as well as moral rights of attribution and integrity.<sup>23</sup> Moral rights are, since 2000,<sup>24</sup> legally recognised rights afforded to an author that honour their wish to be identified for their work and bolster

<sup>18</sup> Cristiana Sappa, 'Non-Conventional Copyright Subject Matter: Fragrances and Gastronomy' (Paper presented at World Intellectual Property Organisation-Italy International Convention on Intellectual Property and Competitiveness of Micro, Small and Medium-Sized Enterprises, Rome, Italy, 10-11 December 2009), 2-3.

<sup>19</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887), art 2(1).

<sup>20</sup> Caroline M Reeb, 'Sweet or Sour: Extending Copyright Protection to Food Art' (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 69; Leon Calleja, 'Why Copyright Law Lacks Taste and Scents' (2013) 21(1) *University of Georgia Journal of Intellectual Property Law* 1, 22-25.

<sup>21</sup> Leon Calleja, 'Why Copyright Law Lacks Taste and Scents' (2013) 21(1) *University of Georgia Journal of Intellectual Property Law* 1, 4.

<sup>22</sup> *Copyright Act 1968* (Cth) s 31.

<sup>23</sup> *Copyright Act 1968* (Cth) Part IX.

<sup>24</sup> *Copyright Amendment (Moral Rights) Act 2000* (Cth).

their reputation.<sup>25</sup> Copyright would also complement the current informal industry norms that encourage moral behaviour by legally ensuring due and proper attribution of copyrighted works, without jeopardizing the collaborative premise of the culinary community. A comparative assessment of copyright law in other jurisdictions elucidates how an expansion of the ambit of copyright in some respects benefits creators and, by affording them monopolies, society at large.

In Part II, a deeper exploration of the legislative history of categorisation of subject matter in the *Act* is taken. It highlights the flexibility of the *Act* while at the same time recognising that deserving works have been arbitrarily excluded from the copyright scheme. It proceeds by outlining how the rise of the culinary industry has thrown the artistic works of chefs into the intellectual property spotlight and calls for reconsideration of culinary professionals' legal rights in the modern competitive industry.

Part III delves into the current state of Australian copyright law and addresses three main obstacles that culinary works meet in satisfying the legislative requirements to become a copyright work: categorisation, fixation and originality. Incorporated into this discussion is analysis of other legislative schemes where appropriate to draw guidance as to how Australian copyright law can accommodate modern creative expression. It is suggested that a culinary work is most suitably categorised as a 'work of artistic craftsmanship' or otherwise as a 'sculpture' and so qualify as a protectable artistic work. The functional quality of a culinary dish is not found to be a bar to categorisation in light of the growing inclination of chefs to invest concentrated effort in artistic presentation and largely cast aside considerations of nourishment. The ephemeral nature of most culinary works presents a particularly challenging problem yet, drawing on UK and US case law, as well as academic opinion, it is suggested that a dish made of a distinct and stable composition, albeit for relatively transitory duration, may satisfy the material form requirement. Finally, the requirement that a work be original is confronted with the immutable fact that the culinary industry is predicated on a culture of sharing and copying ideas. As copyright only protects the form of expression, and not

<sup>25</sup> *Copyright Act 1968* (Cth) ss 193, 195AC, 195AI (moral rights in works).

ideas or concepts, a chef's personal artistic expression will be original where they have not directly appropriated the presentation of another.

After realising that there is scope for protecting culinary works in Australian copyright law, Part IV addresses the policy-based question of whether culinary works should be copyrightable. Intellectual property theory is briefly explored to highlight how justification for the protection of culinary works may find a theoretical basis, and how copyright is most suitable. It is then contended that a more formal mechanism for upholding chefs' rights in their creative works is required to maintain their personal integrity and economic value, and to enrich the current norms-based system. It is submitted that informal social norms are no longer sufficient on their own, but may operate in conjunction with formal copyright to ensure chefs receive legal protection where it is desired. Three central concerns about introducing copyright into the culinary field are then refuted: the possibility of a degradation of collaboration; the threat to creativity and willingness to experiment; and inescapable problems of enforcement. After contesting each of these apprehensions, the benefits that copyright can bring to the culinary community are reinforced.

This article ultimately invites the gastronomic world into the copyright discourse and provokes conversation about the adequacy of the Australian copyright framework to adapt to, and offer protection for, contemporary means of aesthetic expression. It is submitted that legal protection for original culinary creations does not diametrically oppose the advancement of a collaborative culture. Instead, affording copyright to chefs for their culinary works may encourage further innovation and risk-taking, in the knowledge that their economic and moral rights would be legally protectable and enforceable. This article aims to highlight the contemporary pertinence of considering the intellectual property rights available to chefs in an industry that has become exponentially competitive.

## II RATIONALISING COPYRIGHT FOR CULINARY WORKS

The scope of copyrightable subject matter under the *Act* is neither clear nor consistent. A work must be able to be subsumed into one of the recognised categories of protected subject matter in the *Act* if it is to be protected as copyright, but the range of creative expression that may be protected is not exhaustively demarcated. Additionally, the *Act* has been subject to significant legislative developments<sup>26</sup> to account for technological advances and cultural shifts in forms of expression of intellectual effort.<sup>27</sup> While some flexibility has been tolerated in classification, the current categorical framework has been criticised for failing to accommodate arguably deserving contemporary creative expression.<sup>28</sup> In a review of the categorisation of subject matter under the *Act* in 1999,<sup>29</sup> the Copyright Law Review Committee ('CLRC') recognised the problematic consequences of delimiting the categories of copyright works in 'a relatively narrow and often technologically specific way',<sup>30</sup> suggesting that the *Act* treated subject matter differentially in unjustified ways<sup>31</sup> and excluded a number of modern creative works for illogical reasons.<sup>32</sup> Commentators such as Lily Ericsson<sup>33</sup> and Jennifer Kwong<sup>34</sup> have also expressed concern about fitting

<sup>26</sup> For example, *Copyright Amendment (Computer Programs) Act 1999* (Cth); *Copyright Amendment (Digital Agenda) Act 2000* (Cth); *Copyright Amendment (Moral Rights) Act 2000* (Cth); *US Free Trade Agreement Implementation Act 2004* (Cth); *Copyright Amendment Act 2006* (Cth).

<sup>27</sup> Explanatory Memorandum, *Copyright Amendment Bill 2006* (Cth): 'The reforms in the Bill have been guided by the following principles: the need for copyright to keep pace with developments in technology and rapidly changing consumer behaviour'.

<sup>28</sup> Andrew Christie, 'Simplifying Australian Copyright Law – the Why and the How' (2000) 11 *Australian Intellectual Property Journal* 40, 43-44; Zahr K Said, 'Copyright's Illogical Exclusion of Conceptual Art' (2016) 39(3) *Columbia Journal of Law & The Arts* 335.

<sup>29</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999).

<sup>30</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.04.

<sup>31</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.04.

<sup>32</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.08, for example 'multimedia entities'.

<sup>33</sup> Lily Ericsson, 'Creative Quandary: The State of Copyrightability for Organic Works of Art' (2013) 23(2) *Seton Hall Journal of Sports and Entertainment Law* 359.

<sup>34</sup> Jennifer Kwong, 'Fixation and Originality in Copyright Law and the Challenges Posed by Postmodern Art' (2014) 19 *Media and Arts Law Review* 30.



products of contemporary artistic movements, such as environmental art and body art, within the categorical brackets of copyright.

This Part explores the historical omission of the artistic expression of a culinary dish from the realm of copyright protection and provokes debate into the feasibility of culinary works attracting protection in the future. The explosion of interest in the culinary industry, and an increased appreciation for the visual attractiveness of food, has sparked discussion about the intellectual property rights that chefs may acquire in their creations. A lack of protection for culinary works has stemmed from classist views about the role of chefs in society and an unwillingness to accept the production of edible creations, their consumption being so inextricably linked to human survival, as involving a significant degree of creative intellectual thought. The time, money and skill that chefs invest into their culinary works suggests that they are just as deserving as other traditionally protected artists at having their intellectual effort protected from exploitation.

#### A *Copyright Categorisation: A History of Dissatisfaction and Incremental Expansion*

The *Act* is a compilation of piecemeal and incremental amendments that have been implemented in order to expand protectable subject matter and reflect dynamic technological developments and cultural interests.<sup>35</sup> In response to public policy demands,<sup>36</sup> as well as to uphold international obligations,<sup>37</sup> legislative amendment has attempted to clarify and enhance the scope of creative expression that can be afforded copyright protection. In part, the

<sup>35</sup> Brian Bandey, 'Over-categorisation in copyright law: computer and internet programming perspectives' (2007) 29(11) *European Intellectual Property Review* 461.

<sup>36</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 3.18.

<sup>37</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887); *WIPO Copyright Treaty*, opened for signature 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002); *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C 'Agreement on Trade-Related Aspects of Intellectual Property Rights' ('TRIPS').

categorical approach<sup>38</sup> to protectable subject matter under the *Act* has occasioned frustration and confusion as to the boundaries of protectable unique creations.<sup>39</sup> The *Act* protects a substantial range of creative expression, yet an arguably over-simplified legislative categorisation has favoured some forms of expression over others in a largely unjustified manner.<sup>40</sup>

The residue of subject matter falling outside the recognised categories has led to indisputable gaps in protection that call into question the suitability of pigeonholing creative expression into arbitrary genres. Indeed, other jurisdictions promote a notably more inclusive approach to copyrightable subject matter, in a way that fosters ease and flexibility in adapting to the rapidly evolving creative world. The Dutch *Copyright Act 1912* encompasses ‘generally any creation in the literary, scientific or artistic areas’,<sup>41</sup> while the French Intellectual Property Code protects ‘all works of the mind, whatever their kind, form of expression, merit or purpose’.<sup>42</sup> The CLRC addressed these underlying concerns in their 1999 report and ultimately recommended that the distinction between ‘Works’ and ‘Subject Matter Other Than Works’ be abandoned in favour of two broad, non-exhaustive categories envisaged as ‘Creations’ and ‘Productions’.<sup>43</sup> In recommending that the *Act* encompass ‘all

<sup>38</sup> The *Copyright Act 1968* (Cth) protects literary, artistic, dramatic and musical works in Part III and subject matter other than works in Part IV (sound recordings, films, broadcasts and published editions).

<sup>39</sup> Alexandra George, ‘Reforming Australia’s Copyright Law: An Opportunity to Address the Issues of Authorship and Originality’ (2014) 37(3) *UNSW Law Journal* 939, 963-964 (commenting on, and questioning, the artificiality of fitting computer programs within the ‘literary works’ category, although acknowledging the specification in *TRIPS* art 10(1) that computer programs are to be protected as such); Sarah Bellingham, ‘Explosive drama: Exploring the boundaries of copyright subsistence in dramatic works’ (2011) 22 *Australian Intellectual Property Journal* 106, 118 (questioning whether copyright could subsist in a fireworks display as a ‘dramatic work’ and concluding that ‘form requirements must be interpreted broadly to account for evolving practices of expression’); Brian Bandey, ‘Over-categorisation in copyright law: computer and internet programming perspectives’ (2007) 29(11) *European Intellectual Property Review* 461 (addressing the struggles of categorising 21<sup>st</sup>-century creative works in English copyright law, upon which Australian legislation is based).

<sup>40</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.06.

<sup>41</sup> *Copyright Act 1912* (Netherlands) art 10.

<sup>42</sup> *Code de la propriété intellectuelle* (France) art L.112-1.

<sup>43</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.33.

embodiments of material within the literary and artistic domain',<sup>44</sup> the CLRC emphasised the need to embrace non-traditional forms of creative expression, so as to cultivate an attitude of inclusive celebration of significant intellectual effort.<sup>45</sup>

While the CLRC's recommendations in this respect have not been implemented, the growth of industries within which individuals have begun to express their creativity, including the culinary industry, calls for reconsideration of the extent to which current copyright law adequately protects creative expression. The CLRC's report highlighted the unsatisfactory way in which boundaries for copyright protection have been drawn based on arbitrary discrimination amongst forms of creative expression, and the unwieldy approach to fitting creative works into these categories that has resulted.<sup>46</sup> The US follows a similar categorical approach to copyrightable subject matter,<sup>47</sup> with a legislative history that 'has been one of gradual expansion in the types of works accorded protection'.<sup>48</sup> Indeed, the lobbying of architects for protection of their architectural works precipitated the incorporation of an additional category into the US *Copyright Act 1976* to accommodate these works.<sup>49</sup> Similarly, increasing agitation in the US to utilise intellectual property rights to protect culinary efforts<sup>50</sup> highlights the need for a

<sup>44</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.02.

<sup>45</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.34.

<sup>46</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.04 – 5.13.

<sup>47</sup> 17 USC § 102.

<sup>48</sup> Caroline M Reeb, 'Sweet or Sour: Extending Copyright Protection to Food Art' (2011) 22 *DePaul Journal of Art, Technology and IP Law* 41, 50, quoting the United States House of Representatives House Report No 94-1476.

<sup>49</sup> 17 USC § 102(a)(8).

<sup>50</sup> Homaro Cantu has successfully acquired a patent over his edible flavoured paper (U.S.Pat.7,307,249, available at <http://patft.uspto.gov/>); New York baker Dominique Ansel has trademarked the name 'Cronut' for his pastry creations (Reg. No. 4,788,108); Pete Wells, 'Chef Sues Over Intellectual Property (the Menu)', *The New York Times* (online), 27 June 2007 <[http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?\\_r=0](http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?_r=0)>:

'Charles Valauskas, a lawyer in Chicago who represents a number of restaurants and chefs in intellectual property matters, called their discovery of intellectual property law "long overdue" and attributed it to greater competition as well as the high cost of opening a restaurant'.

reevaluation of the way in which copyright law in jurisdictions with category-based frameworks may safeguard culinary works.

Assimilating modern creative expressions into existing categories has been perpetuated in legislative history,<sup>51</sup> but such endeavours have not been without difficulty. Courts have recognised that determining the boundaries of protectable works intrudes into areas of philosophical and psychological debates, as such a task necessarily suggests that some creative works are more deserving than others.<sup>52</sup> Malla Pollack has suggested that it is dangerous to let the courts alone decide how worthy various modern art forms are of receiving copyright protection.<sup>53</sup> Blurred boundaries have undoubtedly benefited innovators in many areas, yet they have also occasioned a haphazard exclusion of arguably deserving intellectual efforts from the realm of copyright protection.<sup>54</sup> Kwong has argued that the category of ‘artistic works’ needs to be updated to reflect cultural shifts and contemporary attitudes towards postmodern art.<sup>55</sup> Marina Markellou has expressed related concern about the challenges that current European copyright formats pose to the works of contemporary artists.<sup>56</sup> It is in a similar way that Pollack advocates for the protection of ‘edible art forms’ (referring to artistic culinary creations or

<sup>51</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 248-249.

<sup>52</sup> Megan M Carpenter, ‘If It’s Broke, Fix It: Fixing Fixation’ (2016) 39(3) *Columbia Journal of Law and the Arts* 355, 357.

<sup>53</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1515.

<sup>54</sup> For example, computer generated materials: Anne Fitzgerald and Tim Seidenspinner, ‘Copyright and Computer-Generated Materials – Is it Time to Reboot the Discussion about Authorship?’ (2013) 3 *Victoria University Law and Justice Journal* 47, 63–64 (suggesting that copyright law should ‘align with the realities of how materials are created’ in the modern environment, and finding that ‘the exclusion of computer generated materials from copyright protection appears arbitrary and is difficult to justify’); Sarah Bellingham, ‘Explosive drama: Exploring the boundaries of copyright subsistence in dramatic works’ (2011) 22 *Australian Intellectual Property Journal* 106 (fireworks displays).

<sup>55</sup> Jennifer Kwong, ‘Fixation and Originality in Copyright Law and the Challenges Posed by Postmodern Art’ (2014) 10 *Media and Arts Law Review* 30, 45.

<sup>56</sup> Marina P Markellou, ‘Rejecting the works of Dan Flavin and Bill Viola: revisiting the boundaries of copyright protection for post-modern art’ (2012) 2(2) *Queen Mary Journal of Intellectual Property* 175, 180.

restaurant dishes) by drawing attention to the troubling implications of a discriminative framework that neglects modern art.<sup>57</sup>

In light of the legislative history of copyright law in Australia and its gradual expansion in the face of cultural change, it is neither nonsensical nor unfeasible that culinary works could be digested as ‘artistic works’.

### B      *Food Frenzy: The Rise of the Culinary Industry*

The culinary industry is in the midst of a cultural transformation. Once viewed as a job for servants, the culinary profession has evolved in public perception to be a complex and creative part of the entertainment economy.<sup>58</sup> Cooks were traditionally bestowed with the monotonous task of preparing daily meals, a job that subjected them to classist and sexist treatment<sup>59</sup> and afforded them low socio-economic status.<sup>60</sup> The 19<sup>th</sup> century saw a development in public acknowledgement of the creative potential of chefs,<sup>61</sup> yet it wasn’t until mid-20<sup>th</sup> century that gastronomy became more widely recognised as an innovative industry.<sup>62</sup> In a commercial environment with a market increasingly driven by creativity and originality, the *Nouvelle Cuisine* movement led French chefs to trade tradition in favour of experimental flavours and textures.<sup>63</sup> The shift in public opinion from food as a necessity to food as a provocative, enjoyable experience has led chefs and consumers alike to draw comparisons between gastronomy and art, equating Pablo Picasso’s creativity to that of the three

<sup>57</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1486.

<sup>58</sup> J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment & Technology Law* 691, 696-697.

<sup>59</sup> Julianna Walo, ‘The Art of Food Placement: Will the US Follow Germany’s Lead in Copyrighting Artistic Food Placement?’ (2016) 15 *The John Marshall Review of Intellectual Property Law* 566, 581.

<sup>60</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1144.

<sup>61</sup> *Ibid.*

<sup>62</sup> Véronique Chossat, ‘Questioning the author’s right protection for gastronomic creations: Opportunities versus possibilities of implementation’ (2009) 2(2) *Creative Industries Journal* 129, 130.

<sup>63</sup> Véronique Chossat, ‘Questioning the author’s right protection for gastronomic creations: Opportunities versus possibilities of implementation’ (2009) 2(2) *Creative Industries Journal* 129, 130.

Michelin-star chef, Massimo Bottura.<sup>64</sup> Many chefs now view themselves as creators of modern art<sup>65</sup> and are encouraged in their pursuit for culinary ingenuity by sophisticated consumers with incessant appetites for novel creations. Historically held cultural biases towards chefs should not, it is submitted, limit the extent to which they may now be considered modern day artists.

In contrast, traditionally recognised artists, such as painters and musicians, have been revered for their artistic abilities for centuries and have historically enjoyed higher social status.<sup>66</sup> Famous 19<sup>th</sup> century French chef Georges Auguste Escoffier, known for his unique, artistic style of cooking, lamented the fact that ‘while artists, writers, musicians and inventors were protected by law, the chef had absolutely no redress for [the plagiarism] of his work’.<sup>67</sup> Some commentators contend that the ‘hierarchy of the senses’<sup>68</sup> has relegated the works of chefs lower on the ladder of aesthetic appreciation, a concept that dates back to ancient Greece.<sup>69</sup> The senses of sight and hearing were thought to be more advantageous for establishing knowledge about the world, and more partial to objective analysis, than taste.<sup>70</sup> Food’s innate link to the sense of taste,

<sup>64</sup> Julianna Walo, ‘The Art of Food Placement: Will the US Follow Germany’s Lead in Copyrighting Artistic Food Placement?’ (2016) 15 *The John Marshall Review of Intellectual Property Law* 566, 580.

<sup>65</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1133-1136; Véronique Chossat, ‘Questioning the author’s right protection for gastronomic creations: Opportunities versus possibilities of implementation’ (2009) 2(2) *Creative Industries Journal* 129, 130; Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 209.

<sup>66</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1489-1490.

<sup>67</sup> J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment & Technology Law* 691, 697, citing Stephen Mennell, *All Manners of Food* (University of Illinois Press, 2<sup>nd</sup> ed, 1996) 134, 162.

<sup>68</sup> J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment & Technology Law* 691, 718-720; Christopher Buccafusco, ‘Making Sense of Intellectual Property Law’ (2012) 97 *Cornell Law Review* 501, 527-531.

<sup>69</sup> Elizabeth Telfer, *Food for Thought: Philosophy and Food* (Routledge, 1996) 41-42.

<sup>70</sup> J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment & Technology Law* 691, 718.

Buccafusco contends,<sup>71</sup> is what could account for the denigration of the work of chefs to something thought of as intrinsically less aesthetically pleasing than other forms of art, or at least less worthy of formal legal protection.

The increasing tendency to appreciate the visual qualities of food has been proliferated by a modern day preoccupation with the photography of attractive dishes, to post on social media platforms or for the purposes of review and comment.<sup>72</sup> The discerning diner has become just as concerned with the immediate aesthetic appeal of a dish as they are with flavour.<sup>73</sup> Equally, chefs and restaurant owners have become reliant on the digital dissemination of photographs of their dishes, luring customers not through smell or taste, but through their dishes' visual appeal.<sup>74</sup> Justifications for excluding the works of chefs from a discussion of modern art, based on philosophical and outdated assumptions about the senses involved in consuming a culinary dish, do not hold as much sway in the modern era.<sup>75</sup> Buccafusco suggests that 'historical ideas related to taste and food could have hindered the law's recognition of cuisine as an expressive work of authorship',<sup>76</sup> but it is clear that the contemporary dining experience indulges much more than the gustatory sense. Modern gastronomic creations are intended to give rise to an aesthetic experience that fundamentally entices the consumer through their visual appeal.

<sup>71</sup> Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1143.

<sup>72</sup> See Lauren Markham, 'The Meringue War: Claiming Culinary Turf on Instagram' (2015) 91(2) *Virginia Quarterly Review* 56.

<sup>73</sup> Debra A Zellner et al., 'Neatness counts. How plating affects liking for the taste of food' (2011) 57 *Appetite* 642-648.

<sup>74</sup> Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 207.

<sup>75</sup> Carolyn Korsmeyer attributes the philosophical framework for viewing the senses in a hierarchical manner to the works of Plato and Aristotle and notes how these views have persisted in Christian theory. Justifications for denigrating the gustatory sense were based on assumptions that some senses would offer more insight and knowledge than others: 'The senses of hearing and vision ... may also be sensory aids in the development of wisdom, while the proximal, bodily senses tempt one to detours of pleasure that impede progress toward knowledge' (at 18):

Carolyn Korsmeyer, *Making Sense of Taste: Food and Philosophy* (Cornell University Press, 2002).

<sup>76</sup> Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1143.

With the availability of modern technology, the capacity for chefs to leave a novel imprint on the culinary world shows no sign of saturation. Chefs are increasingly creating unique dishes that are aesthetically stimulating and capable of ardent artistic contemplation.<sup>77</sup> Cooking has developed from something required to meet basic human needs, to something capable of forming a meaningful experience for the diner.<sup>78</sup> Indeed, cooking has become a 21<sup>st</sup> century cultural phenomenon that has led to the recognition of ‘celebrity chefs’, the popularity of cooking shows and competitions and the rise of food blogging.<sup>79</sup> Some celebrity chefs have utilised their influential platform to radically redefine the way consumers think about food.<sup>80</sup> The result is that the competitive restaurant industry has become reliant, at least in large part, on visual presentation for attracting percipient consumers. Chefs inject increasing individuality into their creations and personify their dishes in ways that have led to (some might say overdue<sup>81</sup>) recognition of the significant intellectual process that forms the creation of culinary ‘works of art’.<sup>82</sup>

### III CAN A CULINARY WORK SATISFY THE LEGISLATIVE REQUIREMENTS TO BE A COPYRIGHT WORK?

The *Act* presents at least three challenges to the viability of protecting culinary works. This Part tests some doctrinal difficulties involved in classifying a culinary work as an ‘artistic work’. Inescapably, culinary dishes are designed to

<sup>77</sup> See Marc Stierand and Paul Lynch, ‘The art of creating culinary innovations’ (2008) 8(4) *Tourism and Hospitality Research* 337.

<sup>78</sup> Christopher Buccafusco, ‘Making Sense of Intellectual Property Law’ (2012) 97 *Cornell Law Review* 501, 508, 540.

<sup>79</sup> See generally, Marcia Zoladz, ‘Blogs about Food on the Internet or How Everyone has Something to Say about what we Eat’ in Richard Hosking (ed) *Food and Language* (Prospect Books, 2010) 378-384; Meredith Lawrence, ‘Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age’ (2011) 14 *Vanderbilt Journal of Entertainment and Technology Law* 187, 202-205.

<sup>80</sup> Véronique Chossat, ‘Questioning the author’s right protection for gastronomic creations: Opportunities versus possibilities of implementation’ (2009) 2(2) *Creative Industries Journal* 129, 130: ‘This is illustrated by Joël Robuchon and his potato purée with white truffles, Ferran Adrià and his bikini pizza with sun-dried tomatoes, or Heston Blumenthal and his cauliflower risotto’.

<sup>81</sup> See Véronique Chossat, ‘Questioning the author’s right protection for gastronomic creations: Opportunities versus possibilities of implementation’ (2009) 2(2) *Creative Industries Journal* 129.

<sup>82</sup> Cathy K Kaufman, ‘Recipes and Dishes: What Should be Copyrightable?’ in Richard Hosking (ed) *Food and Language* (Prospect Books, 2010) 189, 192.



be eaten, in most cases, leading to questions about whether food's utilitarian nature detracts from its aesthetic qualities. A related issue is that of fixation and whether a culinary dish can ever satisfy material form requirements, given food's intrinsically ephemeral nature. In a collaborative culture that encourages and assumes an open exchange of creative ideas, issues of originality also create difficulties in determining a chef's unique contribution to society. Ultimately, it is proposed that these hurdles can, in the appropriate circumstances, feasibly be overcome so that Australian copyright law can accommodate the artistic works of chefs.

#### A      *Categorisation: Art is Not a Static Concept*<sup>83</sup>

A culinary dish has the potential to qualify as an 'artistic work' for the purposes of the Act.<sup>84</sup> Debate over when and whether food can ever satisfactorily be considered a work of art is ongoing, but aesthetic merit is not necessarily of concern to an assessment under the first two limbs of 'artistic work'.<sup>85</sup> Specifically, a culinary dish may be classified as a 'sculpture', a subset that is open to a broad and expansive interpretation, due to its inclusive definition.<sup>86</sup> There are, however, many commentators who contend that food has the potential to become an art form, in exceptional situations.<sup>87</sup> It is arguably therefore possible that a 'work of artistic craftsmanship'<sup>88</sup> is broad enough to

<sup>83</sup> Malla Pollack, 'Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal' (1991) 12 *Cardozo Law Review* 1477, 1489.

<sup>84</sup> *Copyright Act 1968* (Cth) s 10(1) '*artistic work*' means: '(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; (b) a building or a model of a building, whether the building or model is of artistic quality or not; or (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b)'.

<sup>85</sup> *Copyright Act 1968* (Cth) s 10(1) '*artistic work*' (a)-(b): 'whether ... of artistic quality or not'.

<sup>86</sup> *Copyright Act 1968* (Cth) s 10(1) '*sculpture*': 'includes a cast or model made for purposes of sculpture'.

<sup>87</sup> Cathy K Kaufman, 'Recipes and Dishes: What Should be Copyrightable?' in Richard Hosking (ed) *Food and Language* (Prospect Books, 2010) 189; Marianne L Quinet, 'Food as Art: The Problem of Function' (1981) 21(2) *British Journal of Aesthetics* 159; J Austin Broussard, 'An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation' (2008) 10 *Vanderbilt Journal of Entertainment & Technology Law* 691; Tania Su Li Cheng, 'Copyright protection of haute cuisine: recipe for disaster?' (2008) 30(3) *European Intellectual Property Review* 93; Jacopo Ciani, 'Intellectual Property Rights and the Growing Interest in Legal Protection for Culinary Creations' in Nobile M (eds), *World Food Trends and the Future of Food* (Ledizioni, 2015) 15-32.

<sup>88</sup> 'Work of artistic craftsmanship' is not further defined in the Act.

protect culinary creations that inherently have some artistic quality. Notably, since 2004, a work can be both a sculpture and a work of artistic craftsmanship, as the limbs are no longer mutually exclusive.<sup>89</sup> It is submitted that a culinary dish is most suitably categorised under the *Act* as a ‘work of artistic craftsmanship’, but may also be considered a sculpture in its overall form.

### 1 *Work of Artistic Craftsmanship*

The composite phrase, ‘work of artistic craftsmanship’ (‘WOAC’), has its provenance in British legislation,<sup>90</sup> upon which Australian copyright law is based. Introduced as a type of protectable artistic work, the category was designed to extend copyright protection to industrially applied works of real artistic quality.<sup>91</sup> Notably, WOACs were exempted from the copyright/design overlap provisions<sup>92</sup> in recognition of the desire to give greater protection to those works into which pronounced artistic effort was expended.<sup>93</sup> A report undertaken by the Gregory Committee in the UK<sup>94</sup> reinforced the need for the category, emphasising that it is neither feasible nor practicable to statutorily or judicially define a list of protectable artistic works.<sup>95</sup> The report underlined the clear legislative intent to create a category flexible enough to encompass potentially unforeseeable works of art.<sup>96</sup>

<sup>89</sup> *Copyright Act 1968* (Cth) s 10(1) ‘artistic work’ (c): ‘whether or not mentioned in paragraph (a) or (b)’, cf pre-2004 *Copyright Act 1968* (Cth) s 10(1) ‘artistic work’ (c): ‘to which neither of the last two preceding paragraphs applies’.

<sup>90</sup> The phrase ‘work of artistic craftsmanship’ was included in the definition of ‘artistic work’ in *Copyright Act 1911* (UK) s 35(1) and *Copyright Act 1956* (UK) s 3(1)(c), and was incorporated into Australian legislation in the *Copyright Amendment Act 1989* (Cth).

<sup>91</sup> LexisNexis, *Copyright & Designs* (at Service 142) [6130]; Justine Pila, ‘Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work’ (2008) 36 *Federal Law Review* 363, 367.

<sup>92</sup> *Copyright Act 1968* (Cth) ss 74-77: the provisions effectively remove copyright in artistic works that are the foundation for a three-dimensional product that is industrially applied, or has been registered as a design; *Copyright Act 1968* (Cth) s 77(1)(a): ‘This section applies where: (a) copyright subsists in an artistic work (other than a building or a model of a building, or a work of artistic craftsmanship)’.

<sup>93</sup> Justine Pila, ‘Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work’ (2008) 36 *Federal Law Review* 363, 367.

<sup>94</sup> Copyright Committee, *Gregory Committee Report*, Cmnd 8662 (1951).

<sup>95</sup> Copyright Committee, *Gregory Committee Report*, Cmnd 8662 (1951) § 260.

<sup>96</sup> LexisNexis, *Copyright & Designs* (at Service 142) [6125].

The push to widen the legislative inclusivity of the category was especially spurred by the Arts and Crafts movement which sought formal protection for the works of ‘artist-craftsmen’.<sup>97</sup> In the leading case in Australia on WOACs, *Burge v Swarbrick*,<sup>98</sup> the High Court noted that an interpretation of the phrase necessarily required consideration of its social and legal background,<sup>99</sup> reinforcing the sentiment that any attempt at an exhaustive definition would be impossible.<sup>100</sup> The High Court favoured Lord Simon’s constructive approach in *George Hensher v Restawhile Upholstery*<sup>101</sup> and confirmed that it should include works of ‘artist-craftsmen’.<sup>102</sup> Not every craftsman will produce artistic works, but the court acknowledged that there are exceptional times when craftsmen may exercise something more than mere craftsmanship such that it might edge into artistic craftsmanship.<sup>103</sup>

The WOAC category must be contemplated in light of its purpose in widening the range of copyrightable artistic works, as well as in operating immune from the copyright/design exclusionary provisions. In both respects, a WOAC has its place in the *Act* as a discrete copyrightable subject matter necessarily requiring evidence of some artistic quality.<sup>104</sup> Indeed, the High Court in *Burge v Swarbrick* made it unequivocally clear that the encouragement of ‘real artistic effort’ in industrial design was the ultimate goal of extending protection, and should be a point of reference in assessing whether a work qualifies as a WOAC.<sup>105</sup> Some ‘real or substantial artistic element’ is required, a

<sup>97</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 221.

<sup>98</sup> (2007) 234 ALR 204.

<sup>99</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 219-220.

<sup>100</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 225.

<sup>101</sup> *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1974] 2 All ER 420.

<sup>102</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 220-221.

<sup>103</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 225; *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1974] 2 All ER 420, 434-435 per Lord Simon: ‘makers of stained glass windows ... blacksmiths ... woodworkers ... some of their work would be generally accepted as artistic craftsmanship ... but it would be a misuse of language to describe the bulk of their products as such’.

<sup>104</sup> LexisNexis, *Copyright & Designs* (at Service 142) [6130]; Justine Pila, ‘Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work’ (2008) 36 *Federal Law Review* 363, 368.

<sup>105</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 218.

determination made objectively on the basis of admissible evidence,<sup>106</sup> and it is the effort directed towards achieving this that is worthy of protection.<sup>107</sup>

(a) *Are Culinary Works Products of Artistic Effort?*

Despite these pieces of guidance, the boundaries of a WOAC were left largely open by the High Court such that it may provide the suitable cloak of protection for works of modern ‘artist-craftsmen’. Among many contemporary craftsmen, chefs have become increasingly recognised as worthy of legal protection for their unique creations. The imagination, research and conceptual effort that is employed in the creation of dishes produced in high-end restaurants has led to the intensifying tendency to consider cuisine as a type of art.<sup>108</sup> Like other forms of traditionally protected art, culinary dishes may be appreciated as expressive mediums with the potential to evoke sensations and convey meaning.<sup>109</sup> In endorsing Lord Simon’s construction of ‘craftsmanship’ in *George Hensher v Restawhile Upholstery*, the High Court in *Burge v Swarbrick* approved of the implication of ‘a manifestation of pride in sound workmanship – a rejection of the shoddy, the meretricious, the facile’, and the idea that it ‘presupposes special training, skill and knowledge’.<sup>110</sup> The artistic precision with which many chefs create culinary compositions has been recognised as akin to the process involved in making more conventional art

<sup>106</sup> Justine Pila, ‘Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work’ (2008) 36 *Federal Law Review* 363, 371.

<sup>107</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 225.

<sup>108</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1489-1497; Marie-Christine Janssens, ‘Copyright for culinary creations: a seven course tasting menu with accompanying wines’ (Paper presented at *Association Littéraire et Artistique Internationale* conference on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies*, Dublin, Ireland, 30 June 2011) 2.

<sup>109</sup> Jacopo Ciani, ‘Intellectual Property Rights and the Growing Interest in Legal Protection for Culinary Creations’ in Nobile M (eds), *World Food Trends and the Future of Food* (Ledizioni, 2015) 15, 24; J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 717-721.

<sup>110</sup> *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1974] 2 All ER 420, 434-435, cited in *Burge v Swarbrick* (2007) 234 ALR 204, 221.

works.<sup>111</sup> The result is that a significant proportion of contemporary society is starting to embrace at least ‘haute cuisine’<sup>112</sup> as involving substantial artistic elements.<sup>113</sup>

It is intrinsic to the concept of art that it evolves with cultural and social shifts in perception and admiration.<sup>114</sup> At its heart, art is a means of aesthetic expression,<sup>115</sup> appreciation for which depends on societal values and cultural biases.<sup>116</sup> Presumptions prevail from the idea that some forms of creative expression, such as music, have greater impact on society in more meaningful ways.<sup>117</sup> However, food has been described as an equivalent expressive medium<sup>118</sup> through which chefs artistically translate their inspiration into a dish.<sup>119</sup> Psychological studies suggest that, at its core, to construct art is to

<sup>111</sup> Tania Su Li Cheng, ‘Copyright protection of haute cuisine: recipe for disaster?’ (2008) 30(3) *European Intellectual Property Review* 93, 100; Marie-Christine Janssens, ‘Copyright for culinary creations: a seven course tasting menu with accompanying wines’ (Paper presented at *Association Littéraire et Artistique Internationale* conference on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies*, Dublin, Ireland, 30 June 2011) 2; Janssens questions, ‘Why should such chefs be treated differently from Tolstoy or Van Gogh? Do they not also draw, compose, imagine and present a great succession of sensations which are comparable to the sensations one feels when reading or admiring the two aforementioned illustrious men?’.

<sup>112</sup> Caroline M Reeb, ‘Sweet or Sour: Extending Copyright Protection to Food Art’ (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 45: ‘haute cuisine is ... distinguished ... primarily as “artful”’.

<sup>113</sup> Marie-Christine Janssens, ‘Copyright for culinary creations: a seven course tasting menu with accompanying wines’ (Paper presented at *Association Littéraire et Artistique Internationale* conference on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies*, Dublin, Ireland, 30 June 2011) 23.

<sup>114</sup> Megan M Carpenter, ‘If It’s Broke, Fix It: Fixing Fixation’ (2016) 39(3) *Columbia Journal of Law and the Arts* 355, 356-357.

<sup>115</sup> See generally Marianne L Quinet, ‘Food as Art: The Problem of Function’ (1981) 21(2) *British Journal of Aesthetics* 159.

<sup>116</sup> George Dickie, *Art and the aesthetic: an institutional analysis* (Cornell University Press, 1974) 177-179, cited in Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1495-1496.

<sup>117</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1133.

<sup>118</sup> Caroline M Reeb, ‘Sweet or Sour: Extending Copyright Protection to Food Art’ (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 46-47.

<sup>119</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1133-1136.

emotively communicate feelings and sensations,<sup>120</sup> and Elizabeth Telfer has reasoned that food is capable of aesthetic reaction.<sup>121</sup> J Austin Broussard reiterates that ‘the aesthetic expressiveness of a particular culinary dish is in many ways no less communicative than a ... jazz piece or the vibrant colours of a ... painting’.<sup>122</sup>

It is contended that it is the final artistic composition of a culinary work that is deserving of copyright protection, rather than its individual components. Analogously, it was the unique fragrance of a perfume, rather than its ingredients, that was found to be capable of copyright protection under Dutch copyright law in 2006 in *Lancôme v Kecofa*,<sup>123</sup> so that an imitator that had a similar ‘olfactory architecture’ infringed copyright in the perfume.<sup>124</sup> Tania Su Li Cheng has suggested that, in a similar way that creativity was found to lie in the resulting scent, ‘true artistic value in a culinary dish lies in the end-product’.<sup>125</sup> Contrastingly, a French Court of Cassation decision only three days earlier held that the scent of a perfume arises ‘out of the mere implementation of know-how’ and did not constitute a form of copyrightable expression,<sup>126</sup> overturning the Court of Appeal’s finding that the perfume could be categorised as a work under the French Intellectual Property Code.<sup>127</sup> The outcome was criticised by perfume designers who mourned the loss of a

<sup>120</sup> Charles Michel et al, ‘A taste of Kadinsky: assessing the influence of the artistic visual presentation of food on the dining experience’ (2014) 3(7) *Flavour Journal* 1, 5.

<sup>121</sup> Elizabeth Telfer, ‘Food as Art’ in Alex Neill and Aaron Ridley (eds) *Arguing About Art: Contemporary Philosophical Debates* (Routledge, 2<sup>nd</sup> ed, 2002) 11-12.

<sup>122</sup> J Austin Broussard, ‘An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation’ (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 719.

<sup>123</sup> *Lancôme Parfums et Beauté et cie SNC v Kecofa BV* (16 June 2006) Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], AMI 2006/5.

<sup>124</sup> Nicholas Tyacke and Tara Walker, ‘Wake up and smell the copyright: copyright protection of perfumes and fragrances’ (2006) 19(4) *Australian Intellectual Property Law Bulletin* 83.

<sup>125</sup> Tania Su Li Cheng, ‘Copyright protection of haute cuisine: recipe for disaster?’ (2008) 30(3) *European Intellectual Property Review* 93, 99.

<sup>126</sup> *Bellure v L’Oréal et al*, Cour de cassation [French Court of Cassation], n° 02-44718, 13 June 2006 reported in (2006) Bull n° 307 (a sentiment that has been affirmed by the French Supreme Court in subsequent cases: Cour de cassation [French Court of Cassation], 07-13952, 1 July 2008 reported in (2008) Bull n° 136; Cour de cassation [French Court of Cassation], 11-19872, 10 December 2013, unreported).

<sup>127</sup> *L’Oréal et al v Bellure*, Cour d’appel de Paris, 25 January 2006.

possibility to protect the extensive time and money expended in the development of unique fragrances.<sup>128</sup>

Leon Calleja has rationalised that scent and taste should not be copyrightable, being too inherently variable and subject to indeterminate extraneous factors.<sup>129</sup> Indeed, this article does not propose to suggest that it is the taste of the dish that is capable of protection. Rather, when it is posited that it is the final visual impression of the culinary dish that can be appreciated for its artistic desirability, opposing arguments about food's subjectivity lose their bite. That a culinary creation may appeal more favourably to some consumers than others should not bar considerations of its ability to be appreciated as an artistic work, just as impressions formed from viewing other art forms differ depending on the observer and their environment.<sup>130</sup>

*(b) Eating with Your Eyes: Getting Around the Problem of Function*

The effort involved in pursuing an aesthetically pleasing, rather than functional, work is what makes it worthy of protection as a WOAC.<sup>131</sup> It is food's inescapable function as a source of human nourishment and survival that has led some commentators to question whether its utilitarian nature detracts from its aesthetic qualities.<sup>132</sup> The High Court in *Burge v Swarbrick* proposed that a work's artistic expression must be assessed 'unconstrained by functional considerations'.<sup>133</sup> Such an evaluation turns on how much the creator's design choices and artistic input are constrained by the function the work is to

<sup>128</sup> Nicholas Tyacke and Tara Walker, 'Wake up and smell the copyright: copyright protection of perfumes and fragrances' (2006) 19(4) *Australian Intellectual Property Law Bulletin* 83, 84.

<sup>129</sup> Leon Calleja, 'Why Copyright Law Lacks Taste and Scents' (2013) 21(1) *University of Georgia Journal of Intellectual Property Law* 1, 30.

<sup>130</sup> Tania Su Li Cheng, 'Copyright protection of haute cuisine: recipe for disaster?' (2008) 30(3) *European Intellectual Property Review* 93, 99.

<sup>131</sup> See generally Craig Smith, 'Still all at sea? Works of artistic craftsmanship after *Burge v Swarbrick*' (2007) 20(3) *Australian Intellectual Property Law Bulletin* 37.

<sup>132</sup> Tania Su Li Cheng, 'Copyright protection of haute cuisine: recipe for disaster?' (2008) 30(3) *European Intellectual Property Review* 93, 97; Leon Calleja, 'Why Copyright Law Lacks Taste and Scents' (2013) 21(1) *University of Georgia Journal of Intellectual Property Law* 1, 14-15.

<sup>133</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 225.

perform.<sup>134</sup> Unavoidably, the edible components of the dish often serve a nourishing purpose and the choice of elements will usually be based on functional considerations, such as taste and nutrition.<sup>135</sup>

Increasingly, however, culinary advances have meant that artistically appealing culinary works, such as intricate desserts and elaborate pastries, are often highly non-nutritional.<sup>136</sup> In an effort to gain commercial success and recognition, some chefs are foregoing nutrients for innovative appearance.<sup>137</sup> Indeed, even in early 19<sup>th</sup> century, renowned French pastry chef Antonin Carême frequently sold complex pastry works for thousands of francs without the intention that they ever be eaten.<sup>138</sup> Carême injected ‘real or substantial artistic effort’<sup>139</sup> into his works with the primary objective that they be appreciated as works of art. Notably, Carême gained recognition for his classification of art into five branches: ‘painting, sculpture, poetry, music and architecture – the main branch of which is pastry-making’.<sup>140</sup>

Even for those chefs who still purport to plate up nutritious dishes, some intellectual and creative effort is invariably expended into their design appeal. Buccafusco contends that ‘the aspects of culinary creations that are added to the basic nutritional components of food products will often constitute separable efforts to communicate ideas, emotions, or pleasures to diners’.<sup>141</sup> Aesthetic appeal is at the forefront of the modern chef’s mind and has become necessary for commercial success. The importance of presentation is empirically grounded in psychological research that explored the effect of a dish’s

<sup>134</sup> Craig Smith, ‘Still all at sea? Works of artistic craftsmanship after *Burge v Swarbrick*’ (2007) 20(3) *Australian Intellectual Property Law Bulletin* 37, 39.

<sup>135</sup> Cathay N Smith, ‘Food Art: Protecting “Food Presentation” Under US Intellectual Property Law’ (2014) 14(1) *The John Marshall Review of Intellectual Property Law* 2, 12.

<sup>136</sup> Marianne L Quinet, ‘Food as Art: The Problem of Function’ (1981) 21(2) *British Journal of Aesthetics* 159, 165.

<sup>137</sup> Amelia Fitzhardinge, ‘Out of the frying pan into the court? Dishes and copyright protection’ (2008) 21(5) *Intellectual Property Law Bulletin* 70, 71.

<sup>138</sup> Marianne L Quinet, ‘Food as Art: The Problem of Function’ (1981) 21(2) *British Journal of Aesthetics* 159, 164.

<sup>139</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 225.

<sup>140</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1491.

<sup>141</sup> Christopher Buccafusco, ‘Making Sense of Intellectual Property Law’ (2012) 97 *Cornell Law Review* 501, 548.



appearance on a consumer's overall enjoyment of the meal.<sup>142</sup> Zellner et al (2010) found colour and balance of the dish to influence the degree to which consumers wanted to try the food, acknowledging that culinary works depend on artistic composition for consumer appeal in much the same way as a painted still life.<sup>143</sup> The degree to which commercial prosperity depends on an instantaneous aesthetic judgment was elucidated further in Zellner et al (2011), where results suggested that presentation positively influenced the participants' evaluation of the taste of the food.<sup>144</sup> This finding was supported in a later study by Michel et al (2014) in which plates of food presented in a manner akin to abstract art were rated higher in taste than their non-appealing counterparts containing the same combination of ingredients.<sup>145</sup> Significantly, participants said they would be willing to pay more for the artistically plated dishes.<sup>146</sup>

The studies illustrate how in the modern commercial kitchen, aesthetic appeal is, and apparently should be, a salient feature of culinary invention. Exerting substantial artistic effort into a culinary creation has become a contemporary necessity for commercial success, independent of functional considerations of nutrition or balanced flavours. Diners continue to pay exorbitant amounts for unique dishes in the quest for something more than just caloric nourishment, and indeed more than taste.<sup>147</sup> This is not to suggest that chefs are not concerned with the appeal of the dish as a whole to all of the senses as, usually, culinary creations are crafted with the intention that they be consumed. Rather, 'questions of fact and degree [will] inevitably arise'<sup>148</sup> such that the degree of artistic effort injected into a culinary creation, unconstrained

<sup>142</sup> Charles Michel et al, 'A taste of Kadinsky: assessing the influence of the artistic visual presentation of food on the dining experience' (2014) 3(7) *Flavour Journal* 1; Debra A Zellner et al, 'Art on the plate: Effect of balance and color on attractiveness of, willingness to try and liking for food' (2010) 21 *Food Quality and Preference* 575-578; Debra A Zellner et al, 'Neatness counts. How plating affects liking for the taste of food' (2011) 57 *Appetite* 642-648.

<sup>143</sup> Debra A Zellner et al, 'Art on the plate: Effect of balance and color on attractiveness of, willingness to try and liking for food' (2010) 21 *Food Quality and Preference* 575.

<sup>144</sup> Debra A Zellner et al, 'Neatness counts. How plating affects liking for the taste of food' (2011) 57 *Appetite* 642.

<sup>145</sup> Charles Michel et al, 'A taste of Kadinsky: assessing the influence of the artistic visual presentation of food on the dining experience' (2014) 3(7) *Flavour Journal* 1, 8.

<sup>146</sup> *Ibid*, 6.

<sup>147</sup> Christopher Buccafusco, 'Making Sense of Intellectual Property Law' (2012) 97 *Cornell Law Review* 501, 539.

<sup>148</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 225.

by utilitarian requirements, must be judged on an individual basis. The finesse and extreme precision that is infused into the aesthetic appeal of works of Michelin-star chefs<sup>149</sup> or prominent pastry chefs,<sup>150</sup> for example, creates a gastronomic experience that is essential to continued success, recognition and reputation in the modern competitive industry.

It can be questioned whether food's taste detracts from the aesthetic quality of the dish in any case, and whether taste is entirely functional. Philosophical suppositions about the 'hierarchy of the senses' have contributed to a dichotomy in intellectual property law between those creations capable of perception by sight and sound, and those by the senses of touch, taste and smell.<sup>151</sup> While works appealing to the visual and aural faculties are typically deemed more apt to aesthetic appreciation, the 'lower senses'<sup>152</sup> are subjected to assumptions that they are merely functional.<sup>153</sup> However, Buccafusco has drawn on research that undermines the idea that these 'lower' senses are incapable of aesthetic and expressive capacity.<sup>154</sup> Tastes may harmonise to create an experience that is 'delicious as well as playful, novel, and meaningful'.<sup>155</sup> In fact, in attacking the distinction between the artistic capacities of the senses,

<sup>149</sup> For example, Joël Rubuchon, Alain Ducasse, Gordon Ramsay, Thomas Keller, Heston Blumenthal; Hugh Thomas, *The World's Most Decorated Michelin Star Chefs* (11 March 2015) Truly Experiences <<https://trulyexperiences.com/blog/2015/03/decorated-michelin-star-chefs-still-business/>>.

<sup>150</sup> For example, Albert Adrià, Pierre Hermé, Park Chan Hee, Karen Krasne, Christophe Michalak; Eva du Monteil, *6 Amazing Pastry Chefs From Around the World* (12 August 2015) <<http://xpatnation.com/amazing-pastry-chefs-from-around-the-world>>.

<sup>151</sup> Christopher Buccafusco, 'Making Sense of Intellectual Property Law' (2012) 97 *Cornell Law Review* 501, 527-531; the kinds of works contemplated by the *Berne Convention* as worthy of protection are limited to those perceptible by sight or sound: *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887) art 2.

<sup>152</sup> J Austin Broussard, 'An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 720; Elizabeth Telfer, 'Food as Art' in Alex Neill and Aaron Ridley (eds) *Arguing About Art: Contemporary Philosophical Debates* (Routledge, 2<sup>nd</sup> ed, 2002) 9, 19.

<sup>153</sup> Christopher Buccafusco, 'Making Sense of Intellectual Property Law' (2012) 97 *Cornell Law Review* 501, 507.

<sup>154</sup> *Ibid*, 539-540.

<sup>155</sup> *Ibid*, 540.

Marianne Quinet argues that any functionalism involved in a culinary work only increases its artistic quality.<sup>156</sup>

That an object has an inherently functional purpose has not denied it copyright protection in the past.<sup>157</sup> A tapestry, Quinet argues, is recognised as a work of art while also serving the purpose of decorating a large expanse of wall.<sup>158</sup> In the US, useful articles that serve both aesthetic and utilitarian functions, which can be separately identifiable, find protection under the classification of ‘applied art’.<sup>159</sup> However, the High Court in *Burge v Swarbrick* expressly rejected any adoption of a similar conceptual separability test in Australia,<sup>160</sup> approving instead of Lord Simon’s postulation that the ‘antithesis between utility and beauty, between function and art, is a false one’.<sup>161</sup> Artistic and utilitarian purposes may operate conjunctively so long as utilitarian considerations don’t dictate choices to the extent that they ‘render the designer’s task quite unlike that confronting the painter or sculptor’.<sup>162</sup> An artistically plated culinary creation which lends itself to considerable aesthetic appreciation, and which is crafted with artistic effort relatively unconstrained by functional contemplations, may therefore be suitably classified as a work of artistic craftsmanship.

## 2 *Sculpture*

Alternatively, or indeed conjunctively,<sup>163</sup> a culinary creation may be labeled as a sculpture for the purpose of being considered an artistic work under the *Act*. An examination of whether a culinary work could be a sculpture is much more

<sup>156</sup> Marianne L Quinet, ‘Food as Art: The Problem of Function’ (1981) 21(2) *British Journal of Aesthetics* 159, 169.

<sup>157</sup> *Ibid*, 160.

<sup>158</sup> *Ibid*, 161.

<sup>159</sup> *Copyright Act 1976* 17 USC §101.

<sup>160</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 221.

<sup>161</sup> *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1974] 2 All ER 420, 435-436 per Lord Simon.

<sup>162</sup> Robert C Denicola, ‘Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles’ (1983) 67 *Minnesota Law Review* 707, 740, cited in *Burge v Swarbrick* (2007) 234 ALR 204, 224.

<sup>163</sup> The types of artistic works defined in *Copyright Act 1968* (Cth) s 10 are no longer mutually exclusive, ie a work may be classified as ‘a work of artistic craftsmanship’ despite also satisfying the definition in (a) or (b).

of a subjective analysis than it is for a WOAC, as it necessarily inquires into the creative purpose.<sup>164</sup> Little Australian judicial opinion has been given on the meaning of ‘sculpture’ as it appears in the *Act*, and the category has been left largely open, although it is clear that construction must start with its orthodox meaning.<sup>165</sup> Justice Mann in the English case of *Lucasfilm Ltd v Ainsworth* suggested that the parameters of what a sculpture may be are relatively undefined, and likened the enquiry to the ‘unanswerable question: “what is art?”’.<sup>166</sup> In the New Zealand Court of Appeal case of *Wham-O Manufacturing Co v Lincoln Industries Ltd*,<sup>167</sup> former Chief Justice Davidson referred to an article in the Encyclopedia Britannica written by Leonard Rogers, which emphasised the unpredictable future of artistic expression, and consequently, forms of sculpture.<sup>168</sup> Modern day sculptures, Rogers contended, are no longer confined to traditional materials or methods, indicating that sculpture is an evolving art only limited by the tools of the time.<sup>169</sup> One constant appears though: ‘The art of sculpture is the branch of the visual arts that is especially concerned with the creation of expressive form in three dimensions’.<sup>170</sup> This sentiment drove Davidson CJ to find that a wooden model for a toy Frisbee was a sculpture, as it expressed ‘an idea of the sculptor’,<sup>171</sup> despite its ultimate utilitarian function.

An assessment of the subjective intention propelling the creation of a sculpture has been seen as a necessary consideration. Justice Mann in *Lucasfilm Ltd v Ainsworth* made the comparison between a pile of bricks on display in a museum and a pile of bricks at the end of a driveway<sup>172</sup> to illustrate how purposive inquiries can radically transform the way the public perceives an

<sup>164</sup> *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch) 315, 355-358.

<sup>165</sup> *Greenfield Products Pty Ltd v Rover-Scott Bonnar Ltd* (1990) 95 ALR 275, 284 per Pincus J; affirmed by Angel J in *Wildash v Klein* (2004) 61 IPR 324.

<sup>166</sup> *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch) 315, 357.

<sup>167</sup> (1984) 3 IPR 115.

<sup>168</sup> Leonard R Rogers, *Sculpture*, Encyclopaedia Britannica <<https://www.britannica.com/art/sculpture>>, referred to by Davidson CJ in *Wham-O Manufacturing Co v Lincoln Industries Ltd* (1984) 3 IPR 115, 130.

<sup>169</sup> Leonard R Rogers, *Sculpture*, Encyclopaedia Britannica <<https://www.britannica.com/art/sculpture>>.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Wham-O Manufacturing Co v Lincoln Industries Ltd* (1984) 3 IPR 115, 131.

<sup>172</sup> *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch) 315, 357.

object. Inherent in this assessment is an inquiry into whether the sculptors themselves believe they are constructing, or are intending to construct, aesthetically appealing works. In *Metix (UK) Ltd v GH Maughan (Plastics) Ltd*,<sup>173</sup> a claim that copyright subsisted in moulds of cartridges as works of sculpture failed. In rejecting the claim, Justice Laddie placed extensive weight on the fact that the manufacturers did not view themselves as artists, nor did they worry about the appearance or visual appeal of their designs.<sup>174</sup> In direct contradistinction, an increasing amount of chefs view themselves as culinary artists<sup>175</sup> who take great care and precision in their culinary works. At least in part, the purpose behind creating an aesthetically appealing plate of food is to be visually admired, critiqued, photographed and documented. A piece of culinary handiwork is designed to not only attract consumers, but also to showcase a chef's creative expression and artistic ability.

In *Wildash v Klein*, Justice Angel posited that functional qualities of a work do not disqualify it from being a sculpture.<sup>176</sup> Justice Mann in *Lucasfilm Ltd v Ainsworth* also indicated that the paramount consideration was whether the object was intended to be enjoyed for its visual appeal in its own right, whether or not it had some other utilitarian function.<sup>177</sup> A culinary creation has the potential to be appreciated as a visual attraction, especially in light of collective judicial opinion that traditional notions of art should not delineate the boundaries of modern sculpture.<sup>178</sup> This is especially apparent where intricate cake designs and pastry constructions are intended as centerpieces or points of admiration at celebratory occasions. However, 'not everything which has design appeal is necessarily a sculpture'.<sup>179</sup> Some view a dish to be too intrinsically

<sup>173</sup> [1997] FSR 718.

<sup>174</sup> *Metix (UK) Ltd v GH Maughan (Plastics) Ltd* [1997] FSR 718, 722.

<sup>175</sup> Marie-Christine Janssens, 'Copyright for culinary creations: a seven course tasting menu with accompanying wines' (Paper presented at *Association Littéraire et Artistique Internationale* conference on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies*, Dublin, Ireland, 30 June 2011) 2; Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 209.

<sup>176</sup> *Wildash v Klein* (2004) 61 IPR 324, 327 (in assessing wire-crafted animals).

<sup>177</sup> *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch) 315, 356-357.

<sup>178</sup> *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch) 315, 357 (offering a number of guiding points as to what constitutes a sculpture, after summarising and considering relevant case law).

<sup>179</sup> *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch) 315, 358.

ephemeral to satisfy the definition of sculpture.<sup>180</sup> The transitory nature of food is a problematic issue in itself that will be explored in Part B. Ultimately, until further Australian judicial guidance is given, the bulk of judicial opinion indicates that meritorious intention behind the creation of a work is a prominent consideration in finding a work to be a sculpture, a hurdle that many contemporary chefs would easily surmount.

The classification of a culinary work as a sculpture exposes other concerns, however. As considerations of a sculpture's artistic quality are irrelevant under the *Act*,<sup>181</sup> undertaking subjective inquiries into the chef's artistic intention may provoke concern that the floodgates will be unduly opened. In *Burge v Swarbrick*, the High Court was at pains to note that a creator's legitimate intention may never actually eventuate, cautioning that few inventors would readily admit a lack of artistry in their creations.<sup>182</sup> Potentially, apprehensions could be dispelled through demanding a higher originality requirement,<sup>183</sup> yet this is a largely idealistic proposition, as the originality threshold in Australia is non-demanding.<sup>184</sup> To quell these concerns, it is submitted that culinary works would be most suitably classified as works of artistic craftsmanship.

### B *Fixation: The Ephemeral Nature of Food*

Indirectly, the *Act* requires a work to be in 'material form',<sup>185</sup> defined to include 'any form (whether visible or not) of storage of the work ...'.<sup>186</sup> While it serves a

<sup>180</sup> Catherine Logan and Calvin Lau, 'First world fine food frenzy – IP tricks and traps' (2014) 27(9) *Australian Intellectual Property Law Bulletin* 249, 250.

<sup>181</sup> *Copyright Act 1968* (Cth) s 10(1) 'artistic work': 'means (a) ... sculpture ... whether the work is of artistic quality or not'.

<sup>182</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 222.

<sup>183</sup> Tania Su Li Cheng, 'Copyright protection of haute cuisine: recipe for disaster?' (2008) 30(3) *European Intellectual Property Review* 93, 100.

<sup>184</sup> See Part C for discussion on originality.

<sup>185</sup> *Copyright Act 1968* (Cth) s 32(1): 'copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author: (a) was a qualified person at the time when the work was made'; s 22(1): 'A reference in this Act to the time when, or the period during which, a literary, dramatic, musical or artistic work was made shall be read as a reference to the time when, or the period during which, as the case may be, the work was first reduced to writing or to some other material form'.

<sup>186</sup> *Copyright Act 1968* (Cth) s 10(1) 'material form': 'in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part

valuable purpose in ensuring that copyright is only awarded to those who reduce ideas into an expressed form,<sup>187</sup> the requirement increasingly poses many challenges for postmodern and conceptual art.<sup>188</sup> The *Berne Convention* largely gives freedom to individual member countries to decide whether to include a requirement for material form in their legislative framework.<sup>189</sup> Indeed, ‘fixation’ is not a universal requirement, and many civil law countries do not require a work to be similarly embodied in material form for duration.<sup>190</sup> In Germany, for instance, the requirement is for a work to take a ‘perceptible form’, an arguably less stringent prerequisite that has the potential to accommodate works that are stable enough in time to be adequately perceived.<sup>191</sup> Debate in Australia over the need for a material form requirement led the CLRC to recommend, in 1999, that there be ‘no requirement for a subject matter to be in any particular, or indeed any, form of tangible embodiment for it to be protected’.<sup>192</sup> The CLRC struggled to justify this precondition to protection, pointing to presently protected subject matter like broadcasts that do not take a tangible form,<sup>193</sup> yet the requirement persists under current Australian law. Scope for protecting culinary works under copyright is therefore especially threatened by the ephemerality of food and the perishable nature of a dish.

of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)’.

<sup>187</sup> *Donoghue v Allied Newspapers Ltd* [1937] 3 All ER 503.

<sup>188</sup> See generally Jennifer Kwong, ‘Fixation and Originality in Copyright Law and the Challenges Posed by Postmodern Art’ (2014) 19 *Media and Arts Law Review* 30.

<sup>189</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887) art 2(2): ‘It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form’.

<sup>190</sup> Megan Carpenter and Steven Hetcher, ‘Function over Form: Bringing the Fixation Requirement into the Modern Era’ (2014) 82(5) *Fordham Law Review* 2221, 2258.

<sup>191</sup> Megan Carpenter and Steven Hetcher, ‘Function over Form: Bringing the Fixation Requirement into the Modern Era’ (2014) 82(5) *Fordham Law Review* 2221, 2259; Elizabeth Adeney, ‘Authorship and Fixation in Copyright Law: A Comparative Comment’ (2011) 35 *Melbourne University Law Review* 677, 682.

<sup>192</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.02.

<sup>193</sup> Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.52; broadcasts have no material form requirement under the *Copyright Act 1968* (Cth).

The impermanence of culinary dishes is comparable to other ephemeral art such as living gardens,<sup>194</sup> sand sculptures<sup>195</sup> and ice sculptures,<sup>196</sup> yet the current US pronouncement on the copyrightable nature of transitory art has had unfortunate ramifications for the way similar situations are now dealt with across the world. The US Seventh Circuit court in *Kelley v Chicago Park District* deemed a garden created by artist Chapman Kelley to be too changeable to be a fixed work of authorship,<sup>197</sup> despite popular claims that Kelley's work should be promoted as 'living art'.<sup>198</sup> Outraged art admirers were displeased with the way Kelley's artistic effort was undermined and with how his work was equated to that of a gardener.<sup>199</sup> Commentators<sup>200</sup> have criticised the reasoning of the *Kelley* court for its somewhat contradictory judgment, as the court went on to say that it was 'not suggesting that copyright attaches *only* to works that are static or fully permanent'.<sup>201</sup> Zahr Said has also cautioned against 'lumping together' all works that have some inherently variable quality,<sup>202</sup> and noted that this is particularly important at a time where conceptual art has gained a relatively mainstream appreciation.<sup>203</sup> Furthermore, it has been accepted by English courts that transient existence does not automatically disqualify a work from being copyrightable.<sup>204</sup>

<sup>194</sup> *Kelley v Chicago Park District*, 635 F 3d 290 (7<sup>th</sup> Cir, 2011).

<sup>195</sup> *Komesaroff v Mickle and others* (1986) 77 ALR 502.

<sup>196</sup> For example, the work of British sculptor and environmental artist Andy Goldsworthy: Megan Carpenter and Steven Hetcher, 'Function over Form: Bringing the Fixation Requirement into the Modern Era' (2014) 82(5) *Fordham Law Review* 2221, 2228-2229.

<sup>197</sup> *Kelley v Chicago Park District*, 635 F 3d 290, 303 (7<sup>th</sup> Cir, 2011).

<sup>198</sup> *Kelley v Chicago Park District*, 635 F 3d 290, 291 (7<sup>th</sup> Cir, 2011).

<sup>199</sup> Lily Ericsson, 'Creative Quandary: The State of Copyrightability for Organic Works of Art' (2013) 23(2) *Seton Hall Journal of Sports and Entertainment Law* 359, 370.

<sup>200</sup> Megan Carpenter and Steven Hetcher, 'Function over Form: Bringing the Fixation Requirement into the Modern Era' (2014) 82(5) *Fordham Law Review* 2221, 2234; Zahr K Said, 'Copyright's Illogical Exclusion of Conceptual Art' (2016) 39(3) *Columbia Journal of Law & The Arts* 335, 353.

<sup>201</sup> *Kelley v Chicago Park District*, 635 F 3d 290, 305 (7<sup>th</sup> Cir, 2011); note, though, that the US legislation differs in its material form requirement, as it defines a work as 'fixed' when it is 'sufficiently permanent or stable to permit it to be perceived ... for a period of more than transitory duration': 17 USC §101.

<sup>202</sup> Zahr K Said, 'Copyright's Illogical Exclusion of Conceptual Art' (2016) 39(3) *Columbia Journal of Law & The Arts* 335, 344.

<sup>203</sup> *Ibid*, 345.

<sup>204</sup> *Metix (UK) Ltd v GH Maughan (Plastics) Ltd* [1997] FSR 718, 722 (Laddie J).



Unlike inherently kinetic sculptures,<sup>205</sup> or those affected by forces of nature outside the author's control,<sup>206</sup> a culinary work has an essentially static appearance. A chef necessarily has greater control over the final appearance of the dish. It is the fleeting duration of some culinary works that could hinder the extent to which they satisfy the fixation requirement. Some pastry creations may be held in shape for a few days, while other fine dining dishes are destined to be eaten within minutes. How long a work must remain in material form is far from a settled question in Australia and the somewhat unwieldy way in which material form has been dealt with is reflected in the cumbersome composition of the *Act*.<sup>207</sup> The UK High Court in *Creation Records Ltd v News Group Newspapers Ltd* held that a composition of items existing only for a few hours was too intrinsically ephemeral to take the required material form.<sup>208</sup> However, commentators like Megan Carpenter and Steven Hetcher advocate that those creations designed to be enjoyed in the moment, although posing evidentiary problems of existence, are no less deserving of copyright protection.<sup>209</sup> Indeed, the level of creative thought, research and preparation involved in creating a culinary work, in spite of its ephemeral nature, contributes to an appreciation of the author's craftsmanship.

In *Kim Seng Company v J&A Importers Inc*, the Central District Court of California compared a 'bowl-of-food' sculpture to the living garden in *Kelley v Chicago Park District*, concluding that as food is ultimately perishable, it should not be eligible for copyright protection.<sup>210</sup> However, the destruction of a copyrightable work after it has been created, Carpenter suggests, does not deny

<sup>205</sup> *Komesaroff v Mickle and others* (1986) 77 ALR 502, 509.

<sup>206</sup> *Kelley v Chicago Park District*, 635 F 3d 290 (7<sup>th</sup> Cir, 2011).

<sup>207</sup> For example, the CLRC noted that protection is not available to literary, dramatic, musical or artistic material that does not have tangible embodiment, while broadcasts are protected even though not in tangible embodiment: Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act: Part 2* (1999) 5.48-5.49; Elizabeth Adeney, 'Unfixed works, performers' protection, and beyond: does the Australian Copyright Act always require material form?' (2009) 1 *Intellectual Property Quarterly* 77, 95; in exploring the state of copyright in performances, Adeney also recognises that 'the preponderance of evidence points towards a recognition in Australian law of the concept of an unfixed work'.

<sup>208</sup> *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 450.

<sup>209</sup> See generally Megan Carpenter and Steven Hetcher, 'Function over Form: Bringing the Fixation Requirement into the Modern Era' (2014) 82(5) *Fordham Law Review* 2221.

<sup>210</sup> *Kim Seng Company v J&A Importers Inc*, 810 F Supp 2d 1046, 1053 (CD Cal, 2011).

copyright subsistence in the original work.<sup>211</sup> Said is of the opinion that it is illogical to exclude ephemeral art that is destined to deteriorate (for culinary purposes, destined to be eaten), as doing so would be patently disregarding technological and cultural advances in the concept of modern art.<sup>212</sup> Kwong has also argued that a material form requirement is at odds with postmodern art forms, such as land art, body art and performance art.<sup>213</sup> It is not too outlandish to suggest that ‘food art’ may become a similar unique movement in Australia, and indeed worldwide,<sup>214</sup> to the point that these unique works demand attention and a reconsideration of the substance and meaning of the material form requirement.

Commenting on the *Act* prior to the introduction of the definition of ‘material form’ in 1984,<sup>215</sup> Justice Brennan suggested that a material form is a form that can be ‘perceived by the senses’.<sup>216</sup> The legislative intention behind developing the definition was to account for developments in computer software to allow for those creations not taking a perceptible form or structure to obtain copyright status.<sup>217</sup> In doing so, Parliament introduced a disconcerting implication of permanence, by proposing that a work is in material form when it is ‘stored’. ‘Storage’ is not further defined in the *Act*, but has been suggested to evoke a more enduring connotation than a ‘momentary materialization’.<sup>218</sup> Yet, the protection of performances of works under the *Act*, for example, appears to ignore questions of permanence. Performers of dramatic works are afforded rights and protections<sup>219</sup> despite the

<sup>211</sup> Megan M Carpenter, ‘If It’s Broke, Fix It: Fixing Fixation’ (2016) 39(3) *Columbia Journal of Law and the Arts* 355, 360; see also *Kevlacat Pty Ltd v Trailcraft Marine Pty Ltd* (1987) 79 ALR 534, 543.

<sup>212</sup> Zahr K Said, ‘Copyright’s Illogical Exclusion of Conceptual Art’ (2016) 39(3) *Columbia Journal of Law & The Arts* 335, 351-353.

<sup>213</sup> Jennifer Kwong, ‘Fixation and Originality in Copyright Law and the Challenges Posed by Postmodern Art’ (2014) 19 *Media and Arts Law Review* 30, 31.

<sup>214</sup> Part II reinforced this possibility.

<sup>215</sup> *Copyright Amendment Act 1984* (Cth).

<sup>216</sup> *Computer Edge Pty Ltd v Apple Computer Inc (Wombat Case)* (1986) 161 CLR 171, 202-203.

<sup>217</sup> Explanatory Memorandum, *Copyright Amendment Bill 1984* (Cth): ‘The definition of “material form” is new and makes it clear that material form includes such methods of fixation as storage or reproduction on magnetic tape, read only or random access computer memory, magnetic or laser disks, bubble memories and other forms of storage which will doubtless be developed’.

<sup>218</sup> Elizabeth Adeney, ‘Unfixed works, performers’ protection, and beyond: does the Australian Copyright Act always require material form?’ (2009) 1 *Intellectual Property Quarterly* 77, 81.

<sup>219</sup> *Copyright Act 1968* (Cth) Part XIA.

predominantly fleeting nature of their performances. Further, preoccupations with the meaning of ‘storage’ have tended to distract from the fact that ‘material form’ is defined inclusively. Thus, those works comprised in a form not logically recognised as being ‘stored’ may arguably still satisfy this requirement where reliance is placed instead on evidence of sensory perception and less on arbitrary evaluations of their degree of stability.

### C      *Originality*

Previous academic discussion has revolved around the issue of originality in recipes,<sup>220</sup> a problem that diminishes when the subject matter is the creative dish itself. While a ‘mere listing of ingredients’ will be unlikely to satisfy the originality requirement,<sup>221</sup> the artistic presentation of edible materials on a plate lends itself much more favourably to a positive finding of originality. However, the requirement that a work be original may be problematic in the context of culinary creation, as the industry accepts a degree of information sharing.<sup>222</sup> Chefs operate in an open-source model and thrive under the collaborative scheme of freely shared ideas,<sup>223</sup> making it potentially more difficult to decipher if a work has been indirectly or unconsciously derived from another.

If culinary works are to plausibly receive legal protection, the competitive culinary industry necessarily demands that they be original, un-copied, expressions of ideas. For the purposes of the *Act*, originality does not require any form of novel contribution to the artistic public domain, rather that the

<sup>220</sup> See, eg, Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1124-1140; Tania Su Li Cheng, ‘Copyright protection of haute cuisine: recipe for disaster?’ (2008) 30(3) *European Intellectual Property Review* 93, 94-96; Michael Goldman, ‘Cooking and Copyright: When Chefs and Restaurateurs Should Receive Copyright Protection for Recipes and Aspects of Their Professional Repertoires’ (2013) 23(1) *Seton Hall Journal of Sports and Entertainment Law* 153; Cathy K Kaufman, ‘Recipes and Dishes: What Should be Copyrightable?’ in Richard Hosking (ed) *Food and Language* (Prospect Books, 2010) 189; Meredith Lawrence, ‘Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age’ (2011) 14 *Vanderbilt Journal of Entertainment and Technology Law* 187.

<sup>221</sup> *Publications International v Meredith Corp*, 88 F 3d 473, 480 (7<sup>th</sup> Cir, 1996).

<sup>222</sup> Caroline M Reeb, ‘Sweet or Sour: Extending Copyright Protection to Food Art’ (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 46.

<sup>223</sup> Emily Cunningham, ‘Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?’ (2009) 9 *Journal of High Technology Law* 21, 24.

work not be wholly copied from another source.<sup>224</sup> To be original, chefs' creations must not directly or indirectly derive from another copyright work,<sup>225</sup> and must be qualitatively substantially dissimilar from other copyright works.<sup>226</sup> The 'innovation threshold'<sup>227</sup> is low, but chefs must unequivocally exceed this margin if they are to gain the attention of the culinary world. Ideas may be inspired and influenced by other chefs, so long as the individual's interpretation and personalised expression is sufficiently substantially dissimilar.

Evidence of originality hinges on the exercise of independent intellectual effort.<sup>228</sup> Dishes that are crafted in Michelin-star restaurants or high-end patisseries are worthy of protection, it is suggested, because they are invested with original creative effort and have no 'gastronomic [artistic] precedent'.<sup>229</sup> The increasing tendency of chefs to mark their works with a signature technique or artistic flourish transports the dish from the 'culinary public domain'<sup>230</sup> into a personal creative expression. The modern day calibre of skill in haute cuisine, coupled with advances in technology and methods of food production, suggest that the ability of chefs to create fundamentally distinct expressions, despite using similar ingredients, stamps out fears that expressive possibilities will be reduced. Some chefs have begun to make use of advances in food science by incorporating elements of molecular gastronomy into their creations to construct creative textures and methods of preparation which produce highly innovative overall appearances.<sup>231</sup> The culinary phenomenon

<sup>224</sup> *University of London Press Limited v University Tutorial Press Limited* [1916] 2 Ch 601, 608-609.

<sup>225</sup> *Francis Day & Hunter Ltd v Bron* (1963) 1A IPR 331, 342.

<sup>226</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386.

<sup>227</sup> *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) 119 FCR 491, 572 (Sackville J).

<sup>228</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386, 395.

<sup>229</sup> Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1131.

<sup>230</sup> J Austin Broussard, 'An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691, 716; Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1130.

<sup>231</sup> Morgan P Arons, 'A Chef's Guide to Patent Protections Available for Cooking Techniques and Recipes in the Era of Postmodern Cuisine and Molecular Gastronomy' (2014) 10 *Journal of Business and Technology Law* 137, 146: for example, chef Wylie Dufresne 'is known for molecular gastronomy techniques including serving pizza in pebble form, deep frying mayonnaise, and making noodles out of only shrimp and "meat glue"'.

has introduced new techniques into a once traditional industry that have served to enhance the artistic aspects of a dish in novel ways, and ensured that originality in postmodern cuisine shows no signs of saturation.<sup>232</sup>

#### IV FOOD FOR THOUGHT: SHOULD CULINARY WORKS RECEIVE COPYRIGHT PROTECTION

Culinary creations feasibly satisfy the legislative requirements to be protected under the *Act* as artistic works. Whether culinary art is deserving of the extensive protection that copyright offers, however, is an entirely different question to the degree of flexibility and expansion that the *Act* can withstand. This Part explores the overarching policy question of whether formal protection is needed in the culinary industry and whether protection for culinary works finds some theoretical basis. It is recognised that norms-based systems have effectively regulated the sharing culture of cuisine, but is argued that they will increasingly be seen to fall short of the protection that can, and should, be awarded to a chef's artistic expression in the modern dining culture. As copyright is predicated on originality, it offers chefs assurance that their intellectual effort will not be exploited to their detriment. Furthermore, since the introduction of moral rights into the *Act* in 2000,<sup>233</sup> chefs' desires for recognition and attribution would be satiated. Ultimately, the benefits of including a legislative protective scheme in the culinary sphere are substantial and would develop and enrich contemporary attitudes towards postmodern art forms.

##### A *Justifying Copyright Protection for Culinary Works: A Brief Venture Into Intellectual Property Theory*

Copyright is grounded in a utilitarian theory of intellectual property by awarding monopolies over original works in exchange for the benefit that the

<sup>232</sup> Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 193.

<sup>233</sup> *Copyright Amendment (Moral Rights) Act 2000* (Cth).

creative expression brings to society.<sup>234</sup> Through an award of exclusivity, copyright aims to foster creative endeavours by incentivizing the production of original works.<sup>235</sup> In this way, copyright over certain artistic signature dishes of elite restaurants would provide assurance to chefs that their works could not be exploited elsewhere for commercial gain, in turn propelling efforts to showcase further innovative ideas to consumers and the culinary world.

When individuals create without monopolistic incentives, justification for the protection of their works is found outside the scope of utilitarian theories. The culinary industry has historically operated within intellectual property's 'negative space', a term fittingly derived from art theory.<sup>236</sup> The industry has flourished and chefs have become celebrities, without the need for legal interference. However, the dynamic nature of copyright in the face of cultural and social developments demonstrates a collective desire to respond to progressive variance in expression of human creativity.<sup>237</sup> The application of copyright to the sphere of culinary creative expression can be grounded in non-utilitarian theories.<sup>238</sup> Personality theory importantly recognises the personhood injected into creative artistic works and suggests that intellectual property rights are justified where a creation is a manifestation of the self.<sup>239</sup> Increasingly, culinary creations personify their makers; food provides a forum for chefs to express their individuality. The creation becomes a product of a personal philosophy and flair that is as idiosyncratic as the creator him or herself. More generally, personality theory supports creation as an act of human

<sup>234</sup> Peter S Menell, 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit de Geest (eds) *Encyclopedia of Law & Economics: Volume II* (Edward Elgar, 2000) 129, 130; Adam D Moore, 'Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments' (2003) 26(3) *Hamline Law Review* 602, 607; Susan Scafidi, 'Intellectual Property and Cultural Products' (2001) 81 *Boston University Law Review* 793, 803.

<sup>235</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441, 453.

<sup>236</sup> Elizabeth L Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34(3) *Columbia Journal of Law & the Arts* 317, 319.

<sup>237</sup> Megan M Carpenter, 'If It's Broke, Fix It: Fixing Fixation' (2016) 39(3) *Columbia Journal of Law and the Arts* 355, 356-357.

<sup>238</sup> Peter S Menell, 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit de Geest (eds) *Encyclopedia of Law & Economics: Volume II* (Edward Elgar, 2000) 129, 156.

<sup>239</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441, 456-457.

flourishing that benefits society as whole.<sup>240</sup> Recognition of copyright owners' moral rights in works is also based in personality theory, which asserts an author's moral claim over those works that are an expression of their individuality.<sup>241</sup>

Notions of distributive justice invite critique into this discussion. Labour-desert theory is premised upon the idea that inventors, utilizing tools and materials from the commons, are deserving of reward for their creative labour.<sup>242</sup> In this way, the theory subscribes to the idea that authors have a right to own their work and, equally, consumers have rights to experience the work and become creators themselves.<sup>243</sup> That is, labour-desert theory requires balance between exclusive rights and an open public domain from which society can draw ideas. An open-source model, such as the culinary industry, is seen to embody this theory, as exclusivity is not endorsed at the cost of creation. This presents a challenge for finding justification for extending the protection of culinary creations into the formal realm.

Each theory of intellectual property supports a discerning evaluation of the costs and benefits that would flow from positioning culinary works within the sphere of copyright protection. The contemporary suitability of cuisine's position in intellectual property's negative space, and the norms-based system under which the industry currently operates, will be explored in Part B. What is clear is that copyright protection for culinary creations finds justification in at least some of the theories of intellectual property and should not be quickly dismissed.

<sup>240</sup> Ibid, 456.

<sup>241</sup> Rikki Sapolich, 'When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art' (2007) 47 *IDEA – The Intellectual Property Law Review* 453, 477.

<sup>242</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441, 454-455.

<sup>243</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441, 462.

B *Too Many Cooks Spoil the Broth: Does the Culinary Industry Need Intellectual Property Rights?*

Despite the absence of legal intrusion into the culinary community, chefs have not failed to deliver exceedingly innovative dishes and develop commercial success. Their creative efforts have not been impeded by the prospect of industry copycats; on the contrary, chefs appear to embrace a culture of open intellectual exchange.<sup>244</sup> Chefs pride themselves on their adherence to self-imposed community norms that regulate the particulars of sharing and developing ideas, and must necessarily display their internal sense of morality if they do not wish to be shunned by the gastronomic elite.<sup>245</sup> Emmanuelle Fauchart and Eric von Hippel, in a study of a community of accomplished French chefs, identified three social norms that the chefs imposed within their community,<sup>246</sup> which ultimately operate to encourage author attribution and dishonour plagiarism. Elsewhere, alternative means of holding chefs accountable have effectively delimited the extent to which chefs can exploit others' ideas. The International Association of Culinary Professionals, based in the US, has developed a Code of Ethics to which members, including chefs, restaurateurs and academia, must pledge their observance.<sup>247</sup> Significantly, one commitment is to 'respect the intellectual property rights of others and not knowingly use or appropriate to my own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition'.<sup>248</sup> Further, Michelin Guides encourage supreme creativity

<sup>244</sup> Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1152, quoting Chef Thomas Keller: 'There's a hospitality gene that we have as chefs that makes us want to share what we do'; Emmanuelle Fauchart and Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19(2) *Organisation Science* 187.

<sup>245</sup> Meredith Lawrence, 'Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age' (2011) 14 *Vanderbilt Journal of Entertainment and Technology Law* 187, 206-210.

<sup>246</sup> Emmanuelle Fauchart and Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19(2) *Organisation Science* 187, 188: first, a chef must not copy another chef's recipe innovation exactly; secondly, a chef must not pass on recipe-related secret information to others without permission; thirdly, colleagues must credit developers of significant recipes as the authors of that information.

<sup>247</sup> International Association of Culinary Professionals, *IACP Code of Ethics*, <[http://www.iacp.com/join/more/iacp\\_code\\_of\\_ethics](http://www.iacp.com/join/more/iacp_code_of_ethics)>.

<sup>248</sup> International Association of Culinary Professionals, *IACP Code of Ethics*, <[http://www.iacp.com/join/more/iacp\\_code\\_of\\_ethics](http://www.iacp.com/join/more/iacp_code_of_ethics)>.



and innovation by awarding ‘Michelin stars’ to the most outstanding fine dining establishments.<sup>249</sup> That an award is not permanent, and restaurants are repeatedly reviewed to test their ability to produce creative and original dishes, has meant that the intellectual effort that is expounded into the creation of intricately planned and plated dishes has exponentially increased.<sup>250</sup>

Norms-based systems have acted as substitutes for law-based systems in the culinary industry. However, while sharing is tolerated, direct copying is not.<sup>251</sup> Artists are perpetually influenced by others’ ideas, in all forms of artistic endeavours, and their inspiration may often be reflected in their creations.<sup>252</sup> Unlike many other artists, though, chefs do not currently receive the same legal protection from the exploitation of their work. Social norms are fragile and are dependent on small communities of chefs who rely on each other for support.<sup>253</sup> As long as they are credited for their work, most chefs are content to rely on self-regulatory practices,<sup>254</sup> yet as the restaurant culture blossoms, it is likely that the informal institutional structure will become increasingly less effective at honouring and attributing authorship of culinary creations. Indeed, it is not difficult to already find evidence of a simmering frustration amongst chefs whose works have been appropriated without credit.<sup>255</sup>

<sup>249</sup> International Culinary Center, *What Are Michelin Stars?*, <<http://www.internationalculinarycenter.com/culinary-topics/michelin-stars/>>.

<sup>250</sup> Emmanuelle Fauchart and Eric von Hippel, ‘Norms-Based Intellectual Property Systems: The Case of French Chefs’ (2008) 19(2) *Organisation Science* 187, 192.

<sup>251</sup> Rachel Gibson, ‘Is copying a fancy dish flattery?’, *The Age* (online), 1 April 2006 <<http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html>>, quoting chef Guy Grossi: ‘copying is morally questionable’.

<sup>252</sup> Caroline M Reeb, ‘Sweet or Sour: Extending Copyright Protection to Food Art’ (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 46.

<sup>253</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 199.

<sup>254</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1152-1155.

<sup>255</sup> See, eg, Rachel Gibson, ‘Is copying a fancy dish flattery?’, *The Age* (online), 1 April 2006 <<http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html>>: chef Stephanie Alexander had to point out to another chef that a particularly unique dish of hers appeared on his menu, resulting in the chef immediately adding an acknowledgment on his menu.

Rochelle Dreyfuss believes that ‘any system that depends on norms is vulnerable to their breakdown’<sup>256</sup> and Naomi Straus is doubtful of a norms-based system operating on a scale larger than a small cooperative community.<sup>257</sup> Fauchart and von Hippel’s analysis of the power of social norms is diluted when it is realised that data was only acquired from a small group of highly respected chefs working within the same community.<sup>258</sup> Further empirical research conducted by Lea Salvadori also focused on Italian Michelin-star chefs,<sup>259</sup> a collective that is not reflective of the wider community. Enforcing and policing norms, Straus contends, becomes impracticable on a nation-wide scale, where the threat of spurn from the local community loses its sting.<sup>260</sup>

A system that is no longer affording chefs the stable attribution and acknowledgement that they desire as culinary artists is in need of a comprehensive response. It is feasible, and indeed favourable, that a law-based system such as copyright operates alongside norms-based traditions of sharing. Non-legal regulatory frameworks are good complements to law-based systems but are not complete substitutes. Notably, the ethics of culinary plagiarism do not appear to form part of the common syllabus of chef training<sup>261</sup> yet it is expected that young chefs abide by informal social norms of attribution. Fauchart and von Hippel also noted that, paradoxically, even in the face of norm violation, few chefs would be willing to act as whistleblowers for fear of

<sup>256</sup> Rochelle Cooper Dreyfuss, ‘Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm’ (2010) 31 *Cardozo Law Review* 1437, 1458.

<sup>257</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 199.

<sup>258</sup> Sarah Segal, ‘Keeping It In The Kitchen: An Analysis of Intellectual Property Protection Through Trade Secrets in the Restaurant Industry’ (2016) 37 *Cardozo Law Review* 1523, 1561.

<sup>259</sup> Lea Gesuà sive Salvadori, *Do Creative Dishes Need Intellectual Property Law? An Italian Perspective* (LLM Thesis, London School of Economics, 2012/13) 24-46: Salvadori interviewed 10 Michelin star Italian chefs, finding that industry copycats did not bother them and did not impede their creativity or innovation in the kitchen.

<sup>260</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 199-200.

<sup>261</sup> Rachel Gibson, ‘Is copying a fancy dish flattery?’, *The Age* (online), 1 April 2006 <<http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html>>: ‘Steven Pallett, a cookery teacher at the William Angliss Institute who trains third-year apprentices, says the subject of plagiarism had never come up in his course’.

negative stigma.<sup>262</sup> A study conducted by Di Stefano, King and Verona substantiated this phenomenon, finding a reluctance of chefs to expose those who violate unwritten norms to which they ostensibly adhere.<sup>263</sup> Codification of unwritten norms would serve to enhance certainty and clarity of a chef's ethical and legal responsibilities.

Incorporating intellectual property rights into a chef's inventory would not be unduly intrusive or disruptive. In the majority of cases, a chef's moral integrity restrains them from blatantly copying another's work,<sup>264</sup> but where informal industry norms fail to uphold accountability, culinary creations are left vulnerable to appropriation. In the event of dispute, copyright would afford chefs some recourse and proffer the sanctions that norms-based systems are unequipped to provide.<sup>265</sup>

### C *Too Hard To Swallow? Addressing Apprehensions Of Introducing Copyright Into The Culinary Landscape*

#### 1 *Degradation of a Collaborative Culture*

Not only do some commentators believe that culinary works should remain in intellectual property's negative space, they also advocate that this arena actually enhances the capability of the industry to thrive.<sup>266</sup> Involving intellectual

<sup>262</sup> Emmanuelle Fauchart and Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19(2) *Organisation Science* 187, 198.

<sup>263</sup> Giada Di Stefano, Andrew A King and Gianmario Verona, 'Kitchen Confidential? Knowledge Transfer and Social Norms in Gourmet Cuisine' (2014) 35(11) *Strategic Management Journal* 1645, 1645-1646.

<sup>264</sup> Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 200.

<sup>265</sup> *Copyright Act 1968* (Cth) s 195AZA(1): 'the relief that a court may grant in an action for an infringement of any of an author's moral rights ... includes ... (a) an injunction (subject to any terms that the court thinks fit); (b) damages for loss resulting from the infringement; (c) a declaration that a moral right of the author has been infringed; (d) an order that the defendant make a public apology for the infringement; (e) an order that any false attribution of authorship, or derogatory treatment, of the work be removed or reversed'.

<sup>266</sup> Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) *Virginia Law Review* 1687, 1765-1768; Kal Raustiala and

property rights would introduce, they argue, an unfortunate limitation on the free circulation of creative ideas amongst culinary professionals,<sup>267</sup> and may have an anticompetitive effect on the restaurant industry.<sup>268</sup> These arguments find support in the premise that personality theory favours the use of negative spaces where creators are engaged in a sharing culture with one another.<sup>269</sup> However, copyright does not protect ideas, rather the particular expression of ideas.<sup>270</sup> Copyright could be afforded to individual artistic expression, while contemporaneously maintaining an open exchange of creative ideas and communal spirit.<sup>271</sup> This proposition finds support in evidence of the collaborative nature of other artists who already enjoy protection over their works.<sup>272</sup> Acknowledging copyright in a work would not impinge upon an individual's capacity to build upon shared industry knowledge, flavour combinations and culinary techniques to create an original expression. The purpose of increased legal protection, it is contended, is not to degrade the collaborative culture, but rather to afford recognition to chefs who exert as much creative expression as other traditionally protected artists.

## 2 *Threat to Creativity*

As with other creative areas within intellectual property's negative space, commentators believe that the introduction of intellectual property rights

Christopher John Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford University Press, New York, 2012) 8-10.

<sup>267</sup> Lea Gesuà sive Salvadori, *Do Creative Dishes Need Intellectual Property Law? An Italian Perspective* (LLM Thesis, London School of Economics, 2012/13) 29.

<sup>268</sup> Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 255.

<sup>269</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441, 470-471.

<sup>270</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C 'Agreement on Trade-Related Aspects of Intellectual Property Rights' ('TRIPS') art 9(2): 'copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'.

<sup>271</sup> Meredith Lawrence, 'Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age' (2011) 14 *Vanderbilt Journal of Entertainment and Technology Law* 187, 219.

<sup>272</sup> Caroline M Reeb, 'Sweet or Sour: Extending Copyright Protection to Food Art' (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 46: 'all art forms rely on this norm of sharing'.

would have a ‘chilling effect’ on an otherwise thriving innovative industry.<sup>273</sup> Rather than fostering chefs’ creativity and innovation, legal protection may jeopardize the very objective that copyright protection purports to achieve.<sup>274</sup> The prospect of stifling invention in the industry is what some scholars believe is the reason why there has been little attempt to afford chefs intellectual property rights in the past.<sup>275</sup> In response, it is proffered that chefs may be incentivized to extend their creative prowess when their efforts and investment in time and money are rewarded.<sup>276</sup> While the quantity of creative dishes may remain relatively constant, the reassurance of legal protection may raise chefs’ confidence levels and promote an escalation in the quality and variety of culinary creation.<sup>277</sup> Pollack also discovered several chefs who were willing to be recognised as supporting the idea that legal protection for culinary dishes would encourage creativity.<sup>278</sup> Further, the threat of litigation that accompanies a dialogue of legal rights may prompt chefs to consider ways they could personalise their dish to avoid infringement claims, in effect spurring, rather than deterring, creation.<sup>279</sup>

Concerns that copyright would unduly stifle culinary experimentation and innovation are in part quelled by the fair dealing defences in the *Act*, which

<sup>273</sup> See especially Emily Meyers, ‘Art on Ice: The Chilling Effect of Copyright on Artistic Expression’ (2007) 30(2) *Columbia Journal of Law & The Arts* 219; Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1152.

<sup>274</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1150.

<sup>275</sup> Amelia Fitzhardinge, ‘Out of the frying pan into the court? Dishes and copyright protection’ (2008) 21(5) *Intellectual Property Law Bulletin* 70, 72; Meredith Lawrence, ‘Edible Plagiarism: Reconsidering Recipe Copyright in the Digital Age’ (2011) 14 *Vanderbilt Journal of Entertainment and Technology Law* 187, 221; Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 213.

<sup>276</sup> Jacopo Ciani, ‘Intellectual Property Rights and the Growing Interest in Legal Protection for Culinary Creations’ in Nobile M (eds), *World Food Trends and the Future of Food* (Ledizioni, 2015) 15, 27.

<sup>277</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 256.

<sup>278</sup> Malla Pollack, ‘Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal’ (1991) 12 *Cardozo Law Review* 1477, 1480.

<sup>279</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 255.

operate as appropriate restrictions on the powerful right of copyright.<sup>280</sup> The reproduction of culinary works for research or study,<sup>281</sup> for instance in schools or public classes, will be unlikely to constitute an infringement where there is no commercial motivation or appropriation of the copyright owner's market.<sup>282</sup> As training chefs learn from imitating and experimenting with recipes, presentation and techniques of professional chefs,<sup>283</sup> this exception is especially welcome in the culinary industry. Copyright legislation is equipped to exempt individuals from infringement where copyrighted culinary works are sensibly reproduced for a public purpose and where, having regard to the matters in s 40(2) of the *Act*,<sup>284</sup> it is fair in all the circumstances.

### 3 *Enforcement Problems*

Critics have argued that the cost of establishing a copyright infringement claim, if and when an infringing work is uncovered, outweighs the loss suffered by the appropriation of the dish.<sup>285</sup> Protection may be rendered effectively redundant if the pursuit of copycats is too costly for creators. Where the cost of enforcement exceeds the benefit in exclusivity, Elizabeth Rosenblatt claims that

<sup>280</sup> See *Copyright Act 1968* (Cth) ss 40-42; also see *Copyright Act 1968* (Cth) ss 43-44F (other acts not constituting infringements of copyright in works).

<sup>281</sup> *Copyright Act 1968* (Cth) s 40.

<sup>282</sup> Note: Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014) recommended that a fair use exception also be enacted (recommendation 5), but failing this, that the fair dealing defence be extended to include (f) quotation; (g) non-commercial private use; (h) incidental or technical use; (i) library or archive use; (j) education; and (k) access for people with disability (recommendation 6). If enacted, these exceptions would allow for the recreation of culinary works in a further variety of settings without infringement.

<sup>283</sup> Sarah Segal, 'Keeping It In The Kitchen: An Analysis of Intellectual Property Protection Through Trade Secrets in the Restaurant Industry' (2016) 37 *Cardozo Law Review* 1523, 1532-1534.

<sup>284</sup> *Copyright Act 1968* (Cth) s 40(2): matters to which regard shall be had when determining whether a dealing constitutes a fair dealing include: '(a) the purpose and character of the dealing; (b) the nature of the work or adaptation; (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in a case where part only of the work or adaptation is reproduced--the amount and substantiality of the part copied taken in relation to the whole work or adaptation'.

<sup>285</sup> Amelia Fitzhardinge, 'Out of the frying pan into the court? Dishes and copyright protection' (2008) 21(5) *Intellectual Property Law Bulletin* 70, 72; Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 249.

the work belongs in intellectual property's negative space.<sup>286</sup> However, the cost of bringing copyright infringement claims is not a unique impediment for culinary creators.

As industry competition increases, enforcing legal rights over valuable culinary creations can be economically and personally powerful. The question of enforcement has been the main argument in support of the unsuitability of copyright in the culinary context.<sup>287</sup> Pollack admits that the question becomes complicated when dealing with edible art forms<sup>288</sup> but asserts that the courts have become accustomed to dealing with new media, and that the problematic practicalities of enforcement do not justify barring protection in the first place.<sup>289</sup> Linked to this is the issue of fixation of the dish for evidentiary purposes. In the same way that chef Robin Wickens was exposed, it is envisaged that, while copyright would subsist in the culinary creation itself at the time of its fixation, photographs or other pictorial representations of the artistic work could be reproduced to satisfy evidentiary burdens.

It is possible that, in a similar way to the operation of norms-based systems, chefs functioning in a 'culture of hospitality'<sup>290</sup> would be reluctant to enforce their legal rights out of fear of disrupting the status quo. Mixed feelings amongst chefs will undoubtedly arise as a result of individual preferences for enforcing legal rights. It is submitted, though, that copyright could be enforced alongside current industry sharing norms. While chefs accept and encourage the sharing of innovative ideas and recipes, they are not as tolerant of direct

<sup>286</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441, 460; Elizabeth L Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34(3) *Columbia Journal of Law & the Arts* 317, 336.

<sup>287</sup> Emily Cunningham, 'Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?' (2009) 9 *Journal of High Technology Law* 21, 22; Cristiana Sappa, 'Non-Conventional Copyright Subject Matter: Fragrances and Gastronomy' (Paper presented at World Intellectual Property Organisation-Italy International Convention on Intellectual Property and Competitiveness of Micro, Small and Medium-Sized Enterprises, Rome, Italy, 10-11 December 2009) 5.

<sup>288</sup> Malla Pollack, 'Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal' (1991) 12 *Cardozo Law Review* 1477, 1501.

<sup>289</sup> Malla Pollack, 'Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal' (1991) 12 *Cardozo Law Review* 1477, 1523.

<sup>290</sup> Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1152.

appropriation of the visual personal expression of their signature dishes, especially those who regard themselves and their colleagues as culinary artists. Based on this, it is likely that the hospitable culinary community will be more willing to respect and support the legal right of a chef to enforce their copyright in their creation where appropriation without due attribution has occurred. It is expected that, where norms of attribution fail or are not operating within a community, chefs will respect the right of the copyright owner to pursue a claim in circumstances where the copying of their culinary 'artwork' has had a commercial or reputational detrimental effect. This is grounded in the exhibition of the outrage in the gastronomic community when 'copycats', like Wickens, are exposed.

D *A Hunger for Recognition: How Moral Rights Can Benefit The Contemporary Culinary Industry*

Importantly, the ideals of chefs must be a paramount consideration in a discussion of whether culinary creations should receive copyright protection. This exploration is largely unnecessary if chefs themselves are not interested in claiming copyright over their creations. It is evident, though, that chefs are increasingly becoming concerned about the legal rights in their dishes, especially in circumstances in which investors inject millions of dollars into their business.<sup>291</sup> In the US, intellectual property rights have come to the forefront of culinary professionals' minds in the blossoming, competitive gastronomic environment. The late Michelin-star chef Homaro Cantu,<sup>292</sup> for example, applied for a patent for flavoured edible paper,<sup>293</sup> while Dominique Ansel, creator of the 'cronut', applied to trademark the name of his pastry

<sup>291</sup> Pete Wells, 'Chef Sues Over Intellectual Property (the Menu)', *The New York Times* (online), 27 June 2007 <[http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?\\_r=0](http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?_r=0)>.

<sup>292</sup> *Rising Star Chef Homaro Cantu of Moto - Biography* (September 2015) Star Chefs <<http://www.starchefs.com/cook/node/5254>>: 'Cantu modestly explained, "Gastronomy has to catch up to the evolution in technology, and I'm just helping that process along ... At Moto, we strip away the rules, stretch the imagination, and entice guests with never-before seen dishes. It's about being open-minded and having a lot of fun with food"'.

<sup>293</sup> Pete Wells, 'Chef Sues Over Intellectual Property (the Menu)', *The New York Times* (online), 27 June 2007 <[http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?\\_r=0](http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?_r=0)>.



invention to signify the source of the creation.<sup>294</sup> Chefs are becoming cognisant of the fact that their time and money is legally vulnerable to exploitation if they do not assert their rights.

Australia entered into an international obligation to ‘protect, in as effective and uniform a manner as possible, the rights of authors in their ... artistic works’.<sup>295</sup> Since 2000, this has included an author’s moral rights, which encompass rights of attribution and integrity.<sup>296</sup> The *Act* was amended to reflect an author’s rights in the *Berne Convention* to ‘claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation’.<sup>297</sup> Moral rights are personal and non-assignable, as they are intended to protect the expression of an author’s personality and maintain an author’s integrity.<sup>298</sup> Moral rights provide valuable supplementation to economic rights of exclusivity but also stimulate creativity in ways that economic rights do not.<sup>299</sup> Primarily, chefs desire credit and respect where it is due, as reputation and esteem in the industry are significant career enhancers.<sup>300</sup> Particularly, chefs are becoming more interested in receiving acknowledgement for their creations to enhance their culinary identity.<sup>301</sup>

<sup>294</sup> Jack Ellis, *Rapid rise of the ‘cronut’ gives pointers for early-stage trademark strategy* (9 July 2013) World Trademark Review <<http://www.worldtrademarkreview.com/Blog>>.

<sup>295</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887).

<sup>296</sup> *Copyright Act 1968* (Cth) Part IX.

<sup>297</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887) art 6bis.

<sup>298</sup> Rikki Sapolich, ‘When Less Isn’t More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art’ (2007) 47 *IDEA – The Intellectual Property Law Review* 453, 477.

<sup>299</sup> Megan Carpenter and Steven Hetcher, ‘Function over Form: Bringing the Fixation Requirement into the Modern Era’ (2014) 82(5) *Fordham Law Review* 2221, 2267.

<sup>300</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 253-255; Chris Nuttall-Smith, ‘Sincerest form of culinary flattery or theft?’, *The Globe and Mail* (Toronto), 7 September 2011, L5.

<sup>301</sup> Cathy K Kaufman, ‘Recipes and Dishes: What Should be Copyrightable?’ in Richard Hosking (ed) *Food and Language* (Prospect Books, 2010) 189, 196.

‘Signature dishes’<sup>302</sup> exemplify this desire for attribution, a yearning to imprint one’s name on the culinary world through the creative expression of a dish.<sup>303</sup>

While chefs are hopeful that a collaborative, information-sharing culture can be maintained,<sup>304</sup> this aspiration is realistically meaningless if they cannot maintain personal or economic profit. Attribution has the powerful potential to indirectly financially benefit a culinary creator, by attracting consumers who seek out restaurants and signature dishes that have enjoyed favourable community comment.<sup>305</sup> Pertinently, moral rights would be especially invaluable to chefs whose terms of employment confer all ownership of their creations to their employer, as individual chefs would retain their right to be acknowledged for their work and the right to not have their work subjected to derogatory treatment.<sup>306</sup>

Moral rights reflect the moral guidelines already in place in the culinary community. An internal sense of morality and pride restrains most chefs from directly poaching another’s creation for their commercial benefit.<sup>307</sup> Legal rights would supplement this moral behaviour, while also providing redress in cases where attribution is misplaced or forgotten, or where corporate conglomerations appropriate dish designs for use in their restaurants without familiarity with normative behaviour of culinary professionals.<sup>308</sup> Quite apart

<sup>302</sup> Jacopo Ciani, ‘Intellectual Property Rights and the Growing Interest in Legal Protection for Culinary Creations’ in Nobile M (eds), *World Food Trends and the Future of Food* (Ledizioni, 2015) 15, 24: ‘A “signature dish” is representative of the chef or the restaurant’s style, as a painting is representative of the painter’s style or movement’; Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 204: ‘Some signature dishes are a chef’s personal take on one of the classics, while others showcase the chef’s innovative cooking techniques’.

<sup>303</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 205: ‘Establishing a signature dish is an important part of a chef’s brand creation ...’.

<sup>304</sup> Christopher J Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be *Per Se* Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1152-1155.

<sup>305</sup> Caroline M Rees, ‘Sweet or Sour: Extending Copyright Protection to Food Art’ (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41, 72.

<sup>306</sup> *Copyright Act 1968* (Cth) s 193 & s 195AI.

<sup>307</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 200.

<sup>308</sup> Naomi Straus, ‘Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry’ (2012) 60 *UCLA Law Review* 182, 200.

from the economic benefits of copyright, moral rights offer discrete advantages to chefs, by protecting the reputation they have worked tirelessly to cultivate, and by providing the acknowledgment desired to spur a continued investment of time, money and creativity.

## V CONCLUSION

While the premise of this article has been relatively unexplored by Australian scholars or courts, it does not lack encouragement from commentators across the world, both within the legal sphere and the culinary community.<sup>309</sup> Intensifying agitation to protect novel forms of artistic expression through copyright may forecast a collective desire to explore the boundaries of copyright protection for culinary masterpieces. This article submits that it is both possible and desirable for chefs to find protection for their artistic culinary works under the *Act*.

Australian copyright legislation has substantially evolved to necessarily maintain congruence between technological advancements and the law.<sup>310</sup> Regrettably, this ad hoc amendment has resulted in a structural complexity to the *Act* and a perpetual grapple with the bounds of protected subject matter.<sup>311</sup> Confusion and concern have arisen from the fundamental reality that the assimilation of works into simplified categories has inevitably led to gaps in protection for arguably deserving creative efforts. Culinary creations have

<sup>309</sup> See, eg, Hannah Brown, 'Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design' (2016) 56(1) *IDEA – The Journal of the Franklin Pierce Center for Intellectual Property* 31; J Austin Broussard, 'An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 691; Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121; Marie-Christine Janssens, 'Copyright for culinary creations: a seven course tasting menu with accompanying wines' (Paper presented at *Association Littéraire et Artistique Internationale* conference on *Expansion and Contraction of Copyright: Subject Matter, Scope, Remedies*, Dublin, Ireland, 30 June 2011); Malla Pollack, 'Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal' (1991) 12 *Cardozo Law Review* 1477; Caroline M Reeb, 'Sweet or Sour: Extending Copyright Protection to Food Art' (2011) 22 *DePaul Journal of Art, Technology and Intellectual Property Law* 41.

<sup>310</sup> Andrew Christie, 'Simplifying Australian Copyright Law – the Why and the How' (2000) 11 *Australian Intellectual Property Journal* 40, 46.

<sup>311</sup> *Ibid*, 41-42.

traditionally been swept to the margins of the legal discourse, not *prima facie* fitting comfortably into one of the four-fold categories of ‘works’. However, the last few decades have seen a substantial escalation in the interest and competitiveness of the culinary industry, which has invited an intellectual property dialogue into the gastronomic realm.<sup>312</sup> The visual acuity of many culinary professionals has attracted a keen appreciation amongst colleagues and consumers.<sup>313</sup> The works of modern chefs have become comparable to those produced by traditionally-recognised artists, such that it calls into question whether chefs should be more formally recognised for their artistic and valuable contributions.

Classifying culinary creations as works of copyright encounters several legislative hurdles, although none are insurmountable. A culinary work is capable of categorisation as an ‘artistic work’, specifically as a work of artistic craftsmanship, or alternatively but less persuasively, as a sculpture. In certain circumstances, the creations of chefs are invested with real artistic effort<sup>314</sup> and engineered to produce a multi-faceted sensory indulgence. The functional quality of culinary works bears less importance in a contemporary gastronomic culture that celebrates the visual aesthetic of food and applauds innovation in presentation. The gastronomic experience in many fine-dining establishments is now far from just a gustatory pleasure, as chefs strive to allure discerning consumers with powerful design appeal. Perhaps the most fundamental challenge to a culinary creation’s ability to be afforded protection as a copyright work is its intended destiny to be consumed and disappear within a relatively transient frame of time. Uncertainty as to the extent of fixation that a work is required to maintain has bedeviled creators of ephemeral art,<sup>315</sup> but this article

<sup>312</sup> Michael Goldman, ‘Cooking and Copyright: When Chefs and Restaurateurs Should Receive Copyright Protection for Recipes and Aspects of Their Professional Repertoires’ (2013) 23(1) *Seton Hall Journal of Sports and Entertainment Law* 153, 155: ‘This proliferation of “food entertainment” necessitates an understanding of the laws that play a role in the industry’.

<sup>313</sup> Tania Su Li Cheng, ‘Copyright protection of haute cuisine: recipe for disaster?’ (2008) 30(3) *European Intellectual Property Review* 93, 97: a restaurant reviewer revered the artistic and ‘architectural’ nature of the dishes, describing one as ‘a foie gras parfait presented as a perfect oblong on a white plate’.

<sup>314</sup> *Burge v Swarbrick* (2007) 234 ALR 204, 218.

<sup>315</sup> See, eg, Megan M Carpenter, ‘If It’s Broke, Fix It: Fixing Fixation’ (2016) 39(3) *Columbia Journal of Law and the Arts* 355; Megan Carpenter and Steven Hetcher, ‘Function over Form: Bringing the Fixation Requirement into the Modern Era’ (2014) 82(5) *Fordham Law Review* 2221; Elizabeth

proposes that, despite its short-lived nature, a dish that remains stable and perceptible to the senses for a not insubstantial duration of time will overcome this obstacle. Advances in molecular gastronomy and accumulative culinary knowledge have also meant that chefs are well-equipped to develop unique creative expressions that are sufficiently original products of individual intellectual effort.

Conservative reluctance to introduce copyright into a discussion of culinary creation is steeped in the traditional discourse that the works of chefs belong in intellectual property's 'negative space'.<sup>316</sup> Self-regulation and collaboration are tenets of the culinary community,<sup>317</sup> and have spurred innovation, counter-intuitively to economic theory and without legal interference. However, as the industry continues to blossom, reliance on norms to regulate ethical behaviour amongst chefs has become insufficient.<sup>318</sup> A system of formal economic and moral rights of attribution would introduce a degree of certainty and confidence into the culinary community when norms-based behaviour results in a failure of, or misplaced, attribution or a chef's reputation is tarnished by derogatory treatment of their signature works. The moral rights that would be afforded to creators of culinary works are especially invaluable and amplify the desirability of introducing copyright into the culinary landscape.

Adeney, 'Unfixed works, performers' protection, and beyond: does the Australian Copyright Act always require material form?' (2009) 1 *Intellectual Property Quarterly* 77.

<sup>316</sup> Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 *Florida State University Law Review* 441; Elizabeth L Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34(3) *Columbia Journal of Law & the Arts* 317; Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) *Virginia Law Review* 1687.

<sup>317</sup> See, eg, Emmanuelle Fauchart and Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19(2) *Organisation Science* 187; Naomi Straus, 'Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry' (2012) 60 *UCLA Law Review* 182, 198-201; Christopher J Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment Journal* 1121, 1151-1155; Giada Di Stefano, Andrew A King and Gianmario Verona, 'Kitchen Confidential? Knowledge Transfer and Social Norms in Gourmet Cuisine' (2014) 35(11) *Strategic Management Journal* 1645.

<sup>318</sup> See, eg, Rachel Gibson, 'Is copying a fancy dish flattery?', *The Age* (online), 1 April 2006 <<http://www.theage.com.au/news/epicure/is-copying-a-fancy-dish-flattery/2006/03/31/1143441339484.html>>.

Modern day chefs have become revered for their ‘culinary masterpieces’, their unwavering attention to detail and their passion for the pursuit of a harmonious aesthetic experience. Copyright law is flexible, as is the concept of art and its medium of expression. The exclusion of chefs from access to the field of copyright to protect their artistic creative expression is outdated and deserves reappraisal. The law must adapt to honour the significant time, skill and effort that is invested in the creation of culinary works. This article illuminates the merits of accommodating culinary works under the copyright framework and expands the dialogue in Australia for further deliberation.