Copyrightability of Recipes Under the Idea-Expression Dichotomy

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I. INTRODUCTION

Along with the gentrification of Metropolitan Manila and other urban areas in the Philippines[1] came a spurt of fine dining restaurants — concept dining

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1. John Francis Lagman, *Anatomy of the Nation's Housing Problem*, IN FOCUS, Jan.-Dec. 2010, at 121, *available at* http://philrights.org/wp-content/uploads/

and pop-up shops that cater to the wide palate of Filipinos. While some restaurants have dishes that are more in the nature of molecular gastronomy, others restaurants have dishes that are similar in taste, although described differently on the menu and referred to with a different name.

On the one hand, the imitation of a chef's recipe can be viewed as a compliment. If this were the case, the author of a recipe would not think of the act of copying as an infringement of his or her work. The author would not even think of a lawsuit. On the other hand, considering that only a handful of chefs are blessed with the opportunity to write cookbooks during their culinary career, some chefs who are able to publish a recipe or two in magazines, trade publications, or as part of a compilation might not be as generous with persons who copy the recipe; especially if the copying is in the nature of an overt misappropriation of the recipe.

This Article aims to provide a legal framework to assess whether a recipe, standing alone, merits copyright protection. The Article will present United States (U.S.) Copyright Law, including some recent New York case law, as the basis for a suggested framework in determining whether a standalone recipe is protected by copyright and whether the author of a recipe has any recourse available to them in case their recipe is infringed upon. The Article will also look into the Philippine law on copyright which, as will be presented in Part III, is somewhat ambiguous when it comes to the copyrightability of recipes. Since the respective laws in the above-mentioned jurisdictions adhere to the Berne Convention, it is hoped that the New York court's interpretation of the law can serve as a guide in interpreting Philippine Law and as well as serve as a clarification for the uncertainty of copyrightability for treasured, published, and independent recipes written by chefs, home cooks, and foodies alike.

A caveat must be made in that, although the presented U.S. law suggests that a single recipe may be entitled to copyright protection, this protection is very thin. The Authors of this Article recognize that because of the saturated nature of the restaurant and food industry, independent creation is a highly likely occurrence, and distinctions are not to be made in terms of teaspoons or grains of salt.

II. U.S. LAW

In New York, the ingenious idea of masquerading vegetables in children's food to get them to eat healthy, nutritious food is as common as a yellow cab.

2011/07/Anatomy-of-the-nations-housing-problems.pdf (last accessed May 28, 2012).

Six months after Missy Chase Lapine, based in Irvington, New York and a mother of two daughters,[2] published her first cookbook — "The Sneaky Chef: Simple Strategies for Hiding Healthy Food in Kids' Favorite Meals"[3] — in April 2007, Jessica Seinfeld's "Deceptively Delicious: Simple Secrets to Get Your Kids Eating Good Food"[4] was released.[5] Both cookbooks had the basic premise that kids generally dislike vegetables and nutritious foods, hence, certain strategies in the kitchen must be employed to get the kids to eat healthier.[6] After Seinfeld appeared as a guest on The Oprah Winfrey Show to promote her book, sales skyrocketed but attention led many readers to comment on the similarity of her book to Lapine's.[7] Speculations abounded that Seinfeld may have gotten the idea for "Deceptively Delicious" from Lapine's "Sneaky Chef," and reports revealed that Lapine actually submitted her manuscript twice to HarperCollins, Seinfeld's publisher.[8] Lapine's proposals were rejected by HarperCollins and she eventually entered into a publishing agreement with Running Press.[9]

On 7 January 2008, Lapine filed a lawsuit against Jessica Seinfeld, alleging copyright infringement, trademark violation, and unfair competition.[10] On 10 September 2009, the district court for the southern district of New York issued an order holding that there was no copyright infringement,[11] largely because "the overlapping subject matter of the two books — hiding healthy foods in dishes children enjoy" is insufficient to sustain a copyright violation.[12] The court also considered the alleged similarities and the "total

2. Motoko Rich, *How to Get Junior to Eat His Veggies Turns Out to be (Too) Common Knowledge*, N.Y. TIMES, Oct. 19, 2007, *available at* http://www.nytimes.com/2007/10/19/nyregion/19seinfeld.html?_r=1 (last accessed May 28, 2012).

3. MISSY CHASE LAPINE, THE SNEAKY CHEF: SIMPLE STRATEGIES FOR HIDING HEALTHY FOOD IN KIDS' FAVORITE MEALS (2007).

4. JESSICA SEINFELD, DECEPTIVELY DELICIOUS: SIMPLE SECRETS TO GET YOUR KIDS EATING GOOD FOOD (2007).

5. Rich, *supra* note 2.

6. *Id.*

7. *Id.*

8. Kate Stone Lombardi, *In Kids' Stealth Foods, Similar Strategies Dished*, N.Y. TIMES, Nov. 25, 2007, *available at* http://www.nytimes.com/2007/11/25/nyregion/nyregionspecial2/25colwe.html (last accessed May 28, 2012).

9. *Id.*

10. *See generally* Complaint, Lapine v. Seinfeld, No. 08 Civ. 128, 2009 U.S. Dist. LEXIS 82304 (S.D.N.Y. Sep. 10, 2009), *available at* news.findlaw.com/hdocs/docs/ent/lapvsein10708cmp.pdf (last accessed May 28, 2012).

11. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *34.

12. *Id.* at *23-*24.

concept and feel"[13] of the two books and found that neither support "a finding of substantial similarity of copyrighted material" between the two books.[14] Lapine appealed this decision and, on 28 April 2010, the Appellate Division affirmed the finding that there is no copyright infringement.[15]

A. Idea-Expression Dichotomy

What seems to be a big consideration in the district court's decision denying relief to Lapine is the impression that the similarities pointed out by the plaintiff, which are many, consist simply of an idea.[16] Though the complaint alleges numerous instances of similarity between the two books, the court still found that these similarities do not involve copying of copyrighted expression.[17] The district court described the heart of the cause of action as a theft of the idea to hide vegetables to unsuspecting children whose diets are nutritionally wanting.[18] Indeed, what the copyright law in the U.S. protects are the expressions of an idea and expressly excludes mere ideas by themselves.[19] As stated in *Attia v. Society of the N.Y. Hosp.*,[20] "it is a fundamental principle of our copyright doctrine that ideas, concepts, and processes are not protected from copying."[21]

Plaintiff, perhaps to its detriment, also made many concessions and admissions in the district court. These concessions probably convinced the court that it was a question of who thought of it first, making it a case of idea theft, which does not have any recourse under copyright law. *First*, plaintiff agreed that individual recipes do not necessarily qualify for copyright protection.[22] *Second*, they also agree that Seinfeld's book does not lift exact lines from the text of "Sneaky Chef."[23] *Third*, recognizing that ideas are not copyrightable, they behooved the court to find that the Sneaky Chef constitutes Lapine's copyrightable expression of the idea of hiding vegetables "by giving instructions for making vegetable purees in advance, storing them

13. *Id.* at *16-*18.

14. *Id.* at *33-*34.

15. Lapine v. Seinfeld, 37 Fed. Appx. 81, 82 (2d Cir. 2010) (U.S.).

16. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *25-*26.

17. *Id.* at *25-*28.

18. *Id.* at *28.

19. 17 U.S.C. § 102 (b) (2011).

20. Attia v. Society of the N.Y. Hosp., 201 F.3d 50 (2d Cir. 1999) (U.S.).

21. *Id.* at 51 (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (U.S.)).

22. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *20 (citing Publications Int'l v. Meredith Corp., 88 F.3d 473, 481 (7th Cir. 1996)).

23. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *20.

for future use, and then using them in specially created recipes which include the pre-made purees as ingredients, and that Deceptively Delicious infringes that expression."[24] In stating that the expression consists of "instructions," the plaintiff may have given up on their slightest chance of a victory. U.S. copyright law explicitly excludes from its coverage, among others, processes[25] — and a set of instructions is a process. They also argue that the cookbook is subject to copyright protection as a compilation evidencing some originality.[26]

In affirming the lower court, the Appellate Division observed that "[s]tockpiling vegetable purees for covert use in children's food is an idea that cannot be copyrighted."[27] They went further and declared the similarities between the two books as *scenes a faire* but quickly pointed out that "[l]abeling certain stock elements as *scenes a faire* is not tantamount to declaring them uncopyrightable,"[28] but simply means that the similarities between plaintiff's and defendant's work are *hackneyed elements* that cannot be sufficient basis for a finding of substantial similarity.[29]

B. The Issue to Be Addressed

The larger issue is not about expressions of an idea versus mere idea, but about whether a recipe can, in and of itself, satisfy the requirements of Copyright Law: authorship, originality, and fixation.[30] True, the lawsuit in question deals with a cookbook, an amalgam of various recipes (a compilation), and not a single recipe. However, what this Article seeks to explore is the whether recipes, standing alone, can obtain copyright protection. In the *Lapine v. Seinfeld*,[31] certain recipes by Lapine had unusual ingredients, or rather, common ingredients that are unusual when used in a particular dish — say, spinach in brownies or avocado in chocolate pudding — and the very same ingredients also appear in the same dish in Seinfeld's book.[32] Independent creation is a possible occurrence, even in musical works, but the offense taken which spurred the lawsuit is the thought that someone else has stolen one's work without permission. Missy Lapine, a

24. *Id.* at *21.

25. 17 U.S.C. § 102 (b).

26. *Lapine*, 2009 U.S. Dist. LEXIS 82304, at *20-*21.

27. *Lapine*, 37 Fed. Appx. at 82.

28. *Id.*

29. *Id.* (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03 [B] [4] (2009)).

30. 17 U.S.C. § 102 (a).

31. *Lapine*, 2009 U.S. Dist. LEXIS 82304.

32. Rich, *supra* note 2.

former editor of Eating Well Magazine who took two years to complete this book,[33] was initially right about what the dispute was or should be about —

> 'I have no idea how this happened,' Miss Lapine said. 'But there were a number of *strikingly similar recipes* that other people noticed between the two books, because it's hard not to notice things like avocado in chocolate pudding or spinach in brownies. Those are not your everyday combinations.'[34]

The case got lost amidst theatrics and the media surrounding it; Missy Lapine having been called a "wacko" and likened to an assassin by Jerry Seinfeld when he appeared on the Late Night Show with David Letterman.[35] The usual salve for a bruised ego is winning a copyright infringement suit or settling and getting a license for the defendant to create a derivative work or use a portion of the original for purposes which would otherwise be an exclusive right of the copyright owner, if not for the license. Thus, the battle is more than just the idea of creating a cookbook of a certain theme; in this case, the theme is stealth vegetables for children. The real battle is whether an author of a recipe can look to Copyright Law for protection and redress.

C. Independent Recipes as Mechanical Processes; Not Proper Subjects of Copyright Law

The Copyright Act of 1976[36] protects original literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural works of authorship.[37] Food, per se, does not squarely fit among the mentioned categories, and neither does a recipe at first glance. The closest category that a recipe can fall under is either a pictorial work, covering the pictures accompanying the recipes. Even so, The Copyright Act explicitly excludes from protection "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work,"[38] and a recipe is arguably a procedure or a process.

The Copyright treatise by Professor Nimmer also expressed its doubts as to whether recipes can be copyrighted. The treatise opines that copyright protection for recipes "seems doubtful because the content of recipes are clearly dictated by functional considerations, and therefore may be said to

33. Lombardi, *supra* note 8.

34. *Id.* (emphasis supplied).

35. *Id.*

36. The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2011).

37. 17 U.S.C. § 102 (a).

38. 17 U.S.C. § 102 (b).

lack the required element of originality, even though the combination of ingredients ... may be original in a non copyright sense"[39] and recounts that traditionally, recipes have been treated as a statement of facts and hence, not within the province of Copyright Law.[40]

Even the U.S. Copyright Office states that "Copyright [L]aw does not protect recipes that are mere listings of ingredients. Nor does it protect other mere listings of ingredients such as those found in formulas, compounds, or prescriptions."[41] It does, however provide a limited exception to that harsh rule: "[c]opyright protection may, however, extend to substantial literary expression ... that accompanies a recipe or formula or to a combination of recipes, as in a cookbook."[42]

This line of thinking was followed and adopted by the Seventh Circuit in *Publications Int'l v. Meredith Corp.*[43] In finding that there was no copyright infringement by the plaintiff, as asserted by defendant in its counterclaim, the court held that a recipe is "a set of instructions for making something ... a formula for cooking or preparing something to be eaten or drunk."[44] *Publications Int'l* looked at the recipes in "Discover Dannon — 50 Fabulous Recipes with Yogurt," published and copyrighted by Meredith Corporation.[45] "Discover Dannon" involved a compilation of recipes using Dannon brand yogurt, alleged to be infringed by 12 publications by Publications International, which contained "poached" recipes from "Discover Dannon."[46] The Seventh Circuit described two kinds of recipes: the first kind of recipes "comprise the lists of required ingredients and the directions for combining them to achieve the final products"[47] and "contain no expressive elaboration upon either of these functional components."[48] The second kind of recipes "spice up functional directives by weaving in creative narrative."[49] The second kind of recipes refer to the Seventh Circuit's view that "certain recipes may be copyrightable,"[50] such as when

39. NIMMER & NIMMER, *supra* note 29, § 2.18 [I].

40. *See generally* NIMMER & NIMMER, *supra* note 29,, § 2.18 [I].

41. U.S. Copyright Office, Recipes, *available at* http://www.copyright.gov/fls/fl122.html (last accessed May 28, 2012).

42. *Id.*

43. *Publications Int'l*, 88 F.3d 473.

44. *Id.*, at 481 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986)).

45. *Publications Int'l*, 88 F.3d at 475.

46. *Id.*

47. *Id.* at 480.

48. *Id.*

49. *Id.*

authors lace the recipe "with musing on the spiritual nature of cooking or reminiscences they associated with the wafting odors of dishes during preparation"[51] or "suggestions for presentation, advice on wines to go with the meal, or hints on place settings and appropriate music."[52]

The Seventh Circuit pointed to two other cases, where the recipes involved were found eligible for copyright protection. The first was the Supreme Court case of *Belford v. Scribner*,[53] decided in 1892, clearly before the Copyright Act of 1976. *Belford* held that there was copyright infringement where there was verbatim copying of entire sections of the cookbook, with the alleged infringer copying even the selection and arrangement of recipes within the cookbook.[54] The *Publications Int'l* court noted that the 170 recipes copied in *Belford* were also accompanied with instructive and valuable matter and information for household and family purposes.[55] Using the *Belford* case to buttress its two different categories of recipes, *Publications Int'l* stated that "nothing in *Belford* directly supports a rule of per se recipe copyrightability; in fact, it illustrates the important difference between barebones recipes like Meredith's and recipes that convey more than simply the directions for producing a certain dish."[56] The second case was the Ninth Circuit case of *Marcus v. Rowley*,[57] where the *Publications Int'l* court observed that *Marcus* suggests "that recipes may in certain forms merit the protection of copyright."[58]

The defendant in *Publications Int'l* cited the 1924 case of *Fargo Mercantile Co. v. Brechet & Richter Co.*[59] to support their claim that recipes may be afforded copyright protection, but the *Publications Int'l* court thought that this did not support a per se rule of copyrightability of recipes.[60] In *Fargo*, recipes found on a label were found to be protected.[61] *Fargo* held that "[i]f printed on a single sheet or as a booklet, these recipes could undoubtedly be copyrighted, and we see no reason why this protection should be denied,

50. *Id.* at 481.

51. *Publications Int'l*, 88 F.3d at 481.

52. *Id.*

53. Belford v. Scribner, 144 U.S. 488 (1892).

54. *Id.* at 490 & 492–94.

55. *Publications Int'l*, 88 F.3d at 481 (citing *Belford*, 144 U.S. at 490).

56. *Id.* (emphasis supplied).

57. Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983).

58. *Publications Int'l*, 88 F.3d at 481.

59. Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823 (8th Cir. 1924).

60. *Publications Int'l*, 88 F.3d at 481.

61. *Fargo*, 295 F. at 828.

simply because they are printed and used as a label."[62] *Publications Int'l* interpreted this ruling from *Fargo* as merely stating that recipes may be copyrighted as part of a compilation.[63] However, what the *Publications Int'l* court failed to consider, probably because this case was brought up only in the defendant's pleadings, was that this case held that recipes printed on a label, though primarily for an advertising purpose, may be copyrighted if "the label has literary or artistic merit and is not a mere advertisement, if it has some value as a composition, at least to the extent of serving some purpose other than mere advertising."[64] Thus, with this pronouncement, it would seem that the *Fargo* court shares the same view as the *Publications Int'l* court with respect to the second kind of recipes, those that are copyrightable, because they have something extra: reminiscence, artistic quips, or prose.

Publications Int'l was the first of its kind that it gained recognition and was followed by the Sixth Circuit in 1998 in *Lambing v. Godiva Chocolatier*[65] which cited *Publications Int'l* and held that recipes are not copyrightable where the alleged copy merely listed ingredients, that "there is no expressive element deserving copyright protection."[66]

Five years after *Publications Int'l* was decided, the Fifth Circuit case of *Barbour v. Head*[67] was decided partly based on Meredith, further refining case law on the copyrightability of recipes. The suit was about the copying of a handful of recipes from the plaintiff's "Cowboy Chow," a Texas-themed cookbook, with "larapin recipes, entertainin' ideas, historical information, and other cowboy fun."[68] Approximately 20 recipes were copied by the defendant, containing a similar title and sometimes having identical language.[69] A few samples of the recipes copied are: Armadillo Eggs, Cattle Baron Cheese Dollars, Gringo Gulch Grog, and Frito Pie.[70]

In denying the defendant's motion for summary judgment (as to infringement, but not as to federal preemption),[71] the court found that the Seventh Circuit in *Publication Int'l* considered the "particular characteristics

62. *Id.*

63. *Publications Int'l*, 88 F.3d at 482.

64. *Fargo*, 295 F. at 828.

65. Lambing v. Godiva Chocolatier, No. 97-5697, 1998 U.S. App. LEXIS 1983 (6th Cir. Feb. 6, 1998), *cert. denied* 524 U.S. 954 (1998).

66. *Id.* at *3.

67. Barbour v. Head, 178 F.Supp.2d 758 (5th Cir. 2001).

68. *Id.* at 759-60.

69. *Id.* at 760.

70. *Id.*

71. *Id.* at 766.

and integrity of the copied material[ ] and ... determined that the copied recipes consisted of nothing more than rote recitations of cooking ingredients and instructions that were therefore not sufficiently expressive to warrant copyright protection."[72] *Barbour* notes that the facts therein are distinguishable from *Publication Int'l* and categorizes the copied recipes in "Cowboy Chow" as belonging to the class of recipes which *Publication Int'l* recognized to be eligible for copyright protection.[73] In *Barbour*, the court found that "the recipes in Cowboy Chow are infused with light-hearted or helpful commentary, some of which appears verbatim in [the defendant's book,] 'License to Cook Texas Style.'"[74]

III. PHILIPPINE COPYRIGHT

In the Philippines, the question of whether a recipe can be the subject of a copyright is not quite as clear. The Philippine law on copyright is found under Part IV of Republic Act No. 8293,[75] otherwise known as the Intellectual Property Code of the Philippines. Section 172 thereof provides that "[l]iterary and artistic works, hereinafter referred to as 'works', are original intellectual creations in the literary and artistic domain protected from the moment of their creation."[76] The Intellectual Property Code itself does not define what a "work" has to be in order to fall under the law on copyright, other than by an enumeration of what falls under the term.[77] These include, in particular:

(a) Books, pamphlets, articles and other writings;

(b) Periodicals and newspapers;

(c) Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;

(d) Letters;

(e) Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;

(f) Musical compositions, with or without words;

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72. *Id.* at 763.

73. *Barbour*, 178 F.Supp. at 764.

74. *Id.* at 764.

75. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293 (1997).

76. *Id.* § 172.1.

77. *Id.*

(g) Works of drawing, painting, architecture, sculpture, engraving, lithography or other workds of art; models or designs for works of art;

(h) Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;

(i) Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;

(j) Drawings or plastic works of a scientific or technical character;

(k) Photographic works including works produced by a process analogous to photography; lantern slides;

(l) Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;

(m) Pictorial illustrations and advertisements;

(n) Computer programs; and

(o) Other literary, scholarly, scientific and artistic works.[78]

Compared to the copyright law in the U.S., the law in the Philippines is more restrictive in the sense that more items are particularly included in the list of copyrightable works.[79] Not only are more items particularly included in Section 172 compared to U.S. law, the items are also more specific.[80]

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78. *Id.*

79. *Compare* INTELLECTUAL PROPERTY CODE, § 172.1 *with* 17 U.S.C. § 102 (a). Section 102 (a) of the U.S. Code provides —

> §102. Subject matter of copyright: In general
>
> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works.

17 U.S.C. § 102 (a).

80. *Id.*

While this precision in the law is good in that it provides a better guide in knowing if a "work" is copyrightable, it also allows courts less leeway in applying copyright protection to instances where the "work" does not fall squarely into any one of the enumerated items. The Section is careful to add, though, that "[o]ther literary, scholarly, scientific[,] and artistic works" can be covered by a copyright.[81]

Still, the question remains: can a recipe be considered literary, scholarly, scientific, or artistic work which may be covered by copyright protection under Philippine law? Unfortunately, the answer appears to be in the negative. Section 175 of the Code provides that, "no protection shall extend, under this law, to an idea, procedure, system, method or operation, concept, principle, discovery or mere data as such, even if they are expressed, explained, illustrated or embodied in a work."[82] This Section of the Intellectual Property Code is almost the same as Section 102 (b) of the U.S. Code, and the rule in the U.S. is the same in the Philippines; the Intellectual Property Code "adopts the longstanding rule that copyright does not attach to the building blocks of creative expression."[83]

In the Philippines, as in the U.S., the "idea and expression dichotomy has been reiterated by recent jurisprudence."[84] In *Joaquin, Jr. v. Drilon*,[85] the petitioners asserted that the format and presentation of a television show is entitled to copyright protection as a product of their skill and ingenuity.[86] In rejecting this claim, the Court held that —

> P.D. No. 49, § 2 [now § 172.1 of the Intellectual Property Code], in enumerating what are subject to copyright, refers to finished works and not to concepts. The copyright does not extend to an idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[87]

But the Court in *Joaquin, Jr.* goes one step further by essentially holding that the enumeration in Section 172 of the Intellectual Property Code is exclusive. The Court held —

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81. INTELLECTUAL PROPERTY CODE, § 171 (o).

82. *Id.* § 175.

83. VICENTE B. AMADOR, COPYRIGHT UNDER THE INTELLECTUAL PROPERTY CODE 27 (1998).

84. Ranilo Callangan Aquino, Intellectual Property Rights: Protecting Economic Interests (A Paper Submitted to the Center for Business and Economic Research and Development) 2, *available at* http://www.dlsu.edu.ph/research/centers/cberd/conferences/ipr.pdf (last accessed May 28, 2012).

85. Joaquin, Jr. v. Drilon, 302 SCRA 225 (1999).

86. *Id.* at 236.

87. *Id.* at 239 (citing NEIL BOORSTYN, COPYRIGHT LAW 25 (1981)).

> The format or mechanics of a television show is not included in the list of protected works in § 2 of P.D. No. 49 [now § 172.1 of the Intellectual Property Code]. For this reason, the protection afforded by the law cannot be extended to cover them.
>
> Copyright, in the strict sense of the term, is purely a statutory right. It is a new or independent right granted by the statute, and not simply a pre-existing right regulated by the statute. Being a statutory grant, the rights are only such as the statute confers, and may be obtained and enjoyed only with respect to the subjects and by the persons, and on terms and conditions specified in the statute.
>
> Since ... copyright in published works is purely a statutory creation, a copyright may be obtained only for a work falling within the statutory enumeration or description.[88]

By this declaration, the Supreme Court has limited the scope of copyright protection to those expressly enumerated in Section 172.1 of the Intellectual Property Code. Recipes are not included in this enumeration and, an evaluation of recipes in their pure form indicates that they fall under definition of what is unprotected subject matter under Section 175. A recipe, on its own can be considered a procedure, system, method or operation, or concept and thus unprotected by the Intellectual Property Code.[89] Thus, a *prima facie* analysis would yield to the conclusion that recipes on their own are not protected by copyright in the Philippines. However, there has yet to be a test case on the subject and the Court has yet to reject any assertion of copyright on single recipes.

As mentioned in the Introduction, the Authors of this Article recognize that for a work to claim copyright protection, it must be original; "that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[90] Hardly anything in the culinary world can be considered "new;" many chefs take from classic recipes that they learned in culinary school or other inspirations but it would be difficult to claim that the recipe is truly innovative unless it takes the form of molecular gastronomy.[91] At this juncture, recipes clearly do not even satisfy the originality requirement for copyright protection. However, it is possible for a recipe author to be more creative and innovative in the presentation of the recipe. There still appears to be room for the possibility that a certain class of recipes be entitled to copyright protection. Similar to one of the two kinds of recipes alluded to in Part II (C), recipes that provide a mere listing of ingredients are not

88. *Joaquin, Jr.*, 302 SCRA at 237-38 (citing 18 C.J.S. 161 & 165).

89. INTELLECTUAL PROPERTY CODE, § 175.

90. AMADOR, *supra* note 83, at 28.

91. Interview with Ameera Capay, Chef of Q Bistro, in Ortigas, Philippines.

protected. Meanwhile, recipes that infuse an *expression* may be entitled to copyright protection.

While the ideas of a recipe's author may not be necessarily new, such as the ingredients and the technique, "the form, be it literary or artistic, in which they are expressed must be an original creation of the author[,] ... independent of the quality or the value attaching to the work,"[92] and this must show in the way the recipe is presented. It is the idea *plus* creative expression that merits copyright protection. While recipes by themselves, as a mere method or process of creating a dish, are not protected, "expressions of this idea, procedure, etc. may be protected by copyright."[93]

IV. SUGGESTED FRAMEWORK FOR COPYRIGHTABILITY OF RECIPES

Professor Malla Pollack, in a Nathan Burkan ASCAP writing competition-winning work, suggests that a cake can be copyrighted by paralleling a cake to music; it is copyrightable as an "edible art form."[94] Where the sheet music of a concerto is the fixation, the written recipe is the fixation of a cake; anyone performing the concerto from the sheet music infringed by public performance and anyone who creates the same cake using the recipe infringed the cake.[95] However, this work focuses on copyrightability of dishes, not of recipes; "[a] written recipe is a physical transcription from which a chef could reproduce the edible art form with the aid of various kitchen devices."[96] She also suggests in the alternative that "printing of the recipe is contributory infringement because readers are expected to create infringing copies of the edible art form."[97]

Professor Christopher J. Buccafusco of Chicago-Kent College of Law suggests that a recipe satisfies the requirements of copyrightability under U.S. Law. By analogy to musical compositions, written recipes work to satisfy the fixation requirement of copyright law, just as musical notation does for compositions.[98] The "dish" is the final work of authorship, the recipe is the fixation medium, and the various cooking techniques — braising, grilling,

92. AMADOR, *supra* note 83, at 27.

93. ERNESTO C. SALAO, ESSENTIALS OF INTELLECTUAL PROPERTY LAW 233 (2008).

94. Malla Pollack, *Intellectual Property Protection For The Creative Chef, Or How To Copyright A Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1486 (1991).

95. *Id.* at 1499.

96. *Id.* at 1500.

97. *Id.* at n. 143.

98. Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1130-140 (2007).

sous vide — are the potentially patentable processes.[99] He critiques the Nimmer treatise's view that a recipe cannot be copyrighted because it lacks the element of originality and because it is dictated by functional considerations by citing a conceptual flaw: this Nimmer pronouncement only considers well-established dishes like apple pie or coq au vin.[100] Another conceptual flaw he cites is that the treatise (and the *Publication Int'l* court) confuses the work of authorship with the instructions to perform it — the recipe, akin to a musical notation is simply a means for fixing the work into a tangible medium of expression.[101] He claims that "culinary dishes are not proscribed 'descriptions of an art' but instead are particular creative expressions 'addressed to the taste' and produced using the techniques of the art of cooking."[102] Citing *Baker v. Selden*,[103] Buccafusca explains that while processes are not copyrightable, the fact that recipes are composed of processes does not mean they are not copyrightable.[104] It is the basic techniques of cooking — such as grilling, baking, and sous vide — that are the procedures and not the recipes.[105] Thus, recipes, while composed of procedures, are not procedures themselves and may be copyrighted. Ultimately, it seems that the focus is on the *dish*, and not on the recipe, similar to Professor Pollack.

V. CONCLUSION

We come back full circle to the initial question then of whether standalone recipes are entitled to Copyright protection.

The U.S. Copyright Office recognizes that recipes may be copyrighted if they are sufficiently expressive. On the other hand, case law in the Seventh Circuit tells us that there are two classes or kinds of recipes. One class is not subject to copyright because they are just mere listings of ingredients and instructions. The other class of recipes, which are copyrightable, contains more than mere listings, but contain expressions such as wine pairing recommendations, anecdotes, reminiscences and the like. While the Seventh Circuit is cautious of declaring per se copyrightability of recipes, the Fifth Circuit found no bar to declaring copyright protection for a cookbook with a character, "Cowboy Chow."

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99. *Id.*

100. *Id.* at 1130.

101. *Id.* at 1131.

102. *Id.* at 1132.

103. Baker v. Selden, 101 U.S. 99 (1879).

104. Buccafusco, *supra* note 98, at 1132 (citing *Baker*, 101 U.S. at 102).

105. *Id.*

Meanwhile, under Philippine law, a recipe is not included in the list of works that are considered as "literary or artistic works" under Section 172.[106] In addition, a traditional no-frills recipe, which merely lists ingredients and the mechanical instructions for carrying out the recipe, is considered as unprotected under Section 175: it is a *procedure, system, method or operation.*[107]

Hence, in order to meet U.S. Copyright Law's requirement of originality, and to escape the Philippine Law's exclusions for Copyright protection, the work must be expressive and fall under the second class of recipes detailed by *Publication Int'l.* It must be more than just a rote listing of ingredients or instructions, and must "spice up" the functional elements of a recipe by weaving in narrative. Taken as such, a recipe may per se be copyrighted *provided* that it meets the requirement of having a narrative, expressive component.

Both laws in the two different jurisdictions agree on the idea versus expression dichotomy and recognize that expressions are entitled to copyright protection (provided they satisfy other requirements under their respective laws). While U.S. jurisprudence already has a number of cases to evince that the way for recipes to be entitled to protection is for the recipe to take on a more expressive, rather than a mechanical, robotic form, Philippine jurisprudence is still waiting for a dispute on this subject for the Philippine Court to definitely state that they echo the interpretation taken by U.S. courts.

In sum, this Article advocates that the interpretation of copyright law as applied to single recipes in U.S. courts is an adaptable interpretation of U.S. law. Both laws adhere to the idea versus expression resolution: expressions are protected while ideas are not. A word of advice for home cooks and chefs alike — try and be poetic cooks when writing down your recipe, or else stand to lose copyright eligibility.

106. INTELLECTUAL PROPERTY CODE, § 172.

107. *Id.* § 175.