

KEEPING IT IN THE KITCHEN: AN ANALYSIS OF INTELLECTUAL PROPERTY PROTECTION THROUGH TRADE SECRETS IN THE RESTAURANT INDUSTRY

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INTRODUCTION

The children's novel *Charlie and the Chocolate Factory* tells the story of a penniless little boy named Charlie Bucket, who won a ticket to enter world-famous chocolatier Willy Wonka's chocolate factory.¹ Before the big day arrived, Charlie was approached by Mr. Wonka's archrival candy maker,² Mr. Slugworth.³ Attempting to gain a competitive advantage, Mr. Slugworth offered Charlie a hefty reward in exchange for stealing Mr. Wonka's secret recipes, which Charlie could access while inside the factory.⁴ In other words, Mr. Slugworth asked Charlie to "misappropriate" Mr. Wonka's secrets; the term is generally

¹ ROALD DAHL, *CHARLIE AND THE CHOCOLATE FACTORY* (Puffin Books 2007) (1964).

² This scene does not appear in the novel, but rather takes place in the 1971 film rendition of the book. WILLY WONKA & THE CHOCOLATE FACTORY (Warner Brothers 1971).

³ See DAHL, *supra* note 1, at 16 (naming Mr. Slugworth as one of Mr. Wonka's direct competitors).

⁴ See WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2.

defined as using a business's or organization's confidential information to unfairly compete against that business or organization.⁵ In the end, Charlie remained loyal to Mr. Wonka and refused to disclose information to Mr. Slugworth.⁶ However, had he succumbed to Mr. Slugworth's request, Charlie could have been liable for trade secret misappropriation.⁷

Trade secrets fall under the general category of intellectual property (IP) law.⁸ IP refers to "commercially valuable products of the human intellect" that are primarily protected under trademark, copyright, and patent law.⁹ Trade secrets and rights against unfair competition are also governed by IP law.¹⁰ From an economic perspective, intellectual property is legally protected because creative works are expensive to invent, yet relatively easy to copy.¹¹ To offset the

⁵ INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WORLD INTELLECTUAL PROP. ORG. [WIPO], WIPO DOC. WIPO/GRTKF/IC/22/INF/8, GLOSSARY OF KEY TERMS RELATED TO INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 27 (2012), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_inf_8.pdf (defining "misappropriation" in the field of intellectual property as "the common-law tort of using the noncopyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization, or copying a work whose creator has not yet claimed or been granted exclusive rights in the work. [. . .] The elements of misappropriation are: (1) the plaintiff must have invested time, money, or effort to extract the information, (2) the defendant must have taken the information with no similar investment, and (3) the plaintiff must have suffered a competitive injury because of the taking" (alteration in original) (quoting *Misappropriation*, BLACK'S LAW DICTIONARY (9th ed. 2009))). For further discussion on how misappropriation is defined under federal and state trade secret laws, see *infra* Part III.

⁶ In one of the film's final scenes, Charlie earns Mr. Wonka's trust by returning the Everlasting Gobstopper to Mr. Wonka instead of bringing it outside of the factory to Mr. Slugworth. See WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2.

⁷ See Jeanne C. Fromer, *Trade Secrecy in Willy Wonka's Chocolate Factory*, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH 3, 3-8 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011) (discussing methods that Willy Wonka employed to maintain secrecy, implying the existence of trade secrets). For further discussion of trade secrets, see *infra* Part III.

⁸ "IP" and "intellectual property" will be used interchangeably for stylistic purposes.

⁹ *Intellectual Property*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining intellectual property as a "category of intangible rights protecting commercially valuable products of the human intellect . . . primarily trademark, copyright, and patent rights, but also includ[ing] trade-secret rights . . . and rights against unfair competition.").

¹⁰ *Id.*

¹¹ See Giovanni B. Ramello, *Intellectual Property, Social Justice and Economic Efficiency: Insights from Law and Economics*, in INTELLECTUAL PROPERTY LAW: ECONOMIC AND SOCIAL JUSTICE PERSPECTIVES 1, 3-4 (Anne Flanagan & Maria Lilla Montagnani eds., 2010) ("[W]hich one man has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price." (quoting JEREMY BENTHAM, *A Manual of Political Economy*, in 3 WORKS OF JEREMY BENTHAM 71 (Russell & Russell 1962) (1839))); see also Peter S. Menell, *Intellectual Property:*

high up-front costs and risks associated with inventing, IP laws allow inventors to have monopolies over their works, thus incentivizing future creation.¹² These monopolies are limited,¹³ however, to ensure eventual disclosure of new ideas, which ultimately benefits the public at large.¹⁴ Thus, IP laws strive to find a balance between the innovators' interests and society's interests, thereby promoting creativity and innovation at large.¹⁵

Although doubtful that corporations keep Oompa Loompas¹⁶ as live-in employees to protect their valuable information, businesses have found other ways to successfully safeguard their IP. For example, Coca-Cola and KFC are notorious for keeping their recipes locked inside a vault.¹⁷ These recipes remain unbeknownst to the public, and thus, they are classified as trade secrets.¹⁸

General Theories, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 129, 131 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

¹² See INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 7 (Mario Cimoli et al. eds., 2014).

¹³ For example, patents expire twenty years from the date the patent is first issued. 35 U.S.C. § 154(a)(2) (2012). Copyright for works created after January 1, 1978, span for the author's life, plus an additional seventy years from the author's death. 17 U.S.C. § 302(a) (2012). Trademarks remain in effect for ten years following registration on the federal register, with an option to renew registration for additional ten-year term periods following the conclusion of the previous term. 15 U.S.C. §§ 1058–1059 (2012). However, registration may be canceled at any time for failure to comply with an enumerated set of statutory provisions, which ensure that the trademark remains in use; otherwise, the mark is released for public use. 15 U.S.C. § 1058.

¹⁴ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 316 (1988) (“As long as complete exclusion cannot or does not happen, ideas will be available to people in their own thoughts even though these ideas already have become someone else's property. Through this availability, one idea can lead to still more ideas. In other words, once a ‘new’ idea has been put into intellectual commerce, once people know about it, it leads to an ‘expansion’ of the common, or of the accessible common.”).

¹⁵ WIPO, WIPO PUB. NO. 450(E), WHAT IS INTELLECTUAL PROPERTY?, http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf (last visited Mar. 22, 2016) (“The intellectual property system helps strike a balance between the interests of innovators and the public interest, providing an environment in which creativity and invention can flourish, for the benefit of all.”); see also Menell, *supra* note 11, at 144 (“Others [sic] scholars emphasize, however, that intellectual property rewards are needed to diffuse academic and medical discoveries beyond the research community. [One scholar] highlights the social and economic importance of a rich public domain to the creation of literary and artistic works.” (citation omitted)).

¹⁶ See DAHL, *supra* note 1, at 68–71 (characterizing Oompa Loompas as “tiny [people] . . . no larger than medium-sized dolls” who happily live and work in Wonka's factory in exchange for beloved cacao beans); see also Fromer, *supra* note 7, at 4 (describing Oompa Loompas as “tiny song-loving people from Loompaland”).

¹⁷ See Candice Choi, *Myth of Secret Coke Formula, Twinkies Recipe Helps Drive Sales*, TOPEKA CAP.-J. (Aug. 26, 2013, 10:50 AM), <http://cjonline.com/news/2013-08-26/myth-secret-coke-formula-twinkies-recipe-helps-drive-sales> (discussing the lengths that Coca-Cola and KFC go to protect their secret recipes); Ivana Kottasova, *Does Formula Mystery Help Keep Coke Afloat?*, CNN (Feb. 19, 2014, 12:55 PM), <http://edition.cnn.com/2014/02/18/business/coca-cola-secret-formula/>; see also Bill Hadley, *Safeguarded in the Vault: How Trade Secrets Work*,

Restaurants, on the other hand, face significant challenges in protecting their IP,¹⁹ in part because the industry promotes apprenticeship and idea sharing rather than exclusion.²⁰ Furthermore, cuisine generally receives fairly limited amounts of court-awarded protection under IP laws,²¹ especially compared to other creative works.²² While certain aspects of a restaurant may be protected under trademark (such as the name)²³ or trade dress (such as the décor),²⁴ recipes themselves usually do not receive legal protection under the traditional IP theories of trademark, copyright, or patent law.²⁵ Therefore, restaurant owners frequently struggle to assert property rights over creative dishes served in their establishments, which are often key to the restaurant's goodwill²⁶ and success.²⁷

UNEMED BLOG (Aug. 28, 2012), <http://www.unemed.com/blog/how-trade-secrets-work> (noting that the recipes for Twinkies and Coca-Cola remain protected under trade secret law). Coca-Cola's recipe is so highly protected that conspirators received federal conviction charges under the Federal Economic Espionage Act of 1996 for offering to sell Coke's trade secret to Pepsi. ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 103–04 (2013).

¹⁸ See Choi, *supra* note 17. For further discussion of trade secrets and trade secret laws, see *infra* Part III.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part II.

²¹ Compare Naomi Straus, Comment, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. REV. 182 (2012) (encouraging an increase in IP protection through trade dress given the low level of IP protection available to cuisine and fine dining), with Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1765 (2006) (arguing that cuisine exists in a “low-IP equilibri[um]” that fosters innovation despite the lack of legal recourse).

²² Gregory J. Battersby, *Intellectual Property Under the Bright Lights of Broadway*, 67 N.Y. ST. B.J. 28 (1995) (analyzing the types of IP protection available to certain creative industries and works, such as Broadway plays and films).

²³ See Straus, *supra* note 21, at 195.

²⁴ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

²⁵ See generally 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, 1124–30 (2007) (critiquing prior court decisions that held recipes as uncopyrightable).

²⁶ Although the Lanham Act recognizes loss of goodwill as actionable grounds for relief, see, e.g., 15 U.S.C. §§ 1114–1117, 1125, 1127 (2012), the concept of goodwill has not been clearly defined, see Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006) (discussing the elasticity of the concept of goodwill and the lack of a statutorily defined definition). Generally, however, “goodwill” is understood as the benefit acquired through general public recognition of a mark. See *Smith v. Davidson*, 31 S.E.2d 477, 479–80 (Ga. 1944) (defining goodwill as “not corporeal property; but . . . [an] advantage or benefit acquired by an establishment, beyond the mere value of property employed in a business, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or for other reasons”); accord *Armstrong v. Atl. Ice & Coal Corp.*, 81 S.E. 212, 213 (Ga. 1914) (“Good will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers.” (quoting 4 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 3128 (1904))).

Beyond recipes, some restaurants collect data on their customers' personal needs and preferences to create a better customer experience, which gives them a competitive edge.²⁸ While perfected techniques or internal data would likely be protected from employee misappropriation in other high-IP fields, such as biotechnology,²⁹ restaurants are not afforded such security.

This Note argues that restaurants should have access to court-awarded IP protection to incentivize innovation and prevent misappropriation of proprietary information—information that can be easily copied by former kitchen staff.³⁰ This Note further contends that judicial intervention will provide better safeguards against unfair competition than nonlegal deterrents, such as social norms.³¹ Part I provides a general overview of the restaurant industry. Part II discusses why the three foundational forms of IP protection—patent, copyright, and trademark—are not well suited for the restaurant industry. This Part also analyzes how contracts interfere with restaurants' protection of proprietary information. In sum, traditional IP laws are inadequate because the industry practice of staging³² allows visiting chefs to gain exposure to the hosting restaurant's proprietary information.³³ Furthermore, most chefs do not require employees to sign nondisclosure agreements;³⁴ for those who do, issues can still arise when

²⁷ See Straus, *supra* note 21, at 205.

²⁸ See *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4, 27 (S.D.N.Y. 2012) (holding that a genuine issue of material fact exists as to whether departing executive chef had used only menu, or instead, proprietary information in developing new menus, thereby precluding summary judgment on breach of contract claim); see also Amanda Kooser, *Big Data Arrives*, RESTAURANT BUS. (Aug. 27, 2013), <http://www.restaurantbusinessonline.com/ideas/innovations/big-data-arrives#.UjOg4bI7xzQ.twitter> (commenting that restaurants use data, such as through conducting menu analysis, to improve their businesses, reduce labor costs, and create personalized customer profiles).

²⁹ See *Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Mar. 22, 2016). Specifically, the World Trade Organization (WTO) recognizes medicine and other high-technology products, as well as creative items, such as films and music, as protectable under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). *Id.* The WTO explains that TRIPS serves to protect ideas and knowledge, which are important to trade. The article further states that “[m]ost of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved.” *Id.* Moreover, the WTO identifies that the value of “[f]ilms, music recordings, books, computer software and on-line services” is derived from the “information and creativity they contain” rather than the material used to make these products. *Id.*

³⁰ See *supra* note 11 and accompanying text.

³¹ See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008) (arguing that the social stigma against unlawful copying adequately protects the industry); see also *infra* Section IV.B.2.

³² See *infra* note 58 and accompanying text.

³³ See *infra* Section II.A.

³⁴ See Straus, *supra* note 21, at 197.

these agreements have been poorly drafted. Previously, courts have denied legal recourse for harm caused by former employees in cases where the parties either failed to sign a contract, or where an agreement was signed but the language was flawed.³⁵ If courts continue to rule based on the existence (or absence) of an employment contract, and further base their decisions on the language contained in those agreements, restaurants will likely remain unprotected, unless another method of legal analysis is implemented.

Part III provides detailed background information on trade secret law. This Part also discusses restaurant-related lawsuits where trade secret claims were both accepted and denied because of strict adherence to contractual deficiencies.³⁶ Finally, Part IV proposes trade secret law as a way to increase IP protection in the restaurant industry when other types of law fail.

Ultimately, this Note concludes that trade secret law provides the best protection against unfair competition in the restaurant industry. Restaurants frequently rely on proprietary information to provide them with a competitive edge—information to which the staff has unfettered access. However, because employee turnover is high, and because apprenticeship is commonplace, disclosure of secret information to competitors can easily occur in the absence of legal consequences. Additionally, many of the working relationships are formed without entering into formal employment contracts. Trade secret laws seek to protect the information shared in the workplace because these laws focus on the parties' relationships and the nature of the disclosure, even in the absence of a contract. Finally, trade secrecy protects information valued by restaurants—such as recipes or cooking techniques—which are not subject to other forms of intellectual property safeguards.

Protection of trade secrets is necessary because it allows apprenticeship and idea sharing to continue as fundamental industry customs, while providing legal recourse against abuse of these practices.

³⁵ See *infra* Section III.B.2.b.i.

³⁶ See, e.g., *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4 (S.D.N.Y. 2012) (suit by BLT Restaurant Group against its former executive chef, Laurent Tourondel); Complaint at 1–3, *Powerful Katinka, Inc. v. McFarland*, No. 07 CV 6036 (S.D.N.Y. June 26, 2007), 2007 WL 2064059 (complaint filed by Rebecca Charles against her former sous chef at Pearl Oyster Bar); accord Pete Wells, *Chef Sues Over Intellectual Property (the Menu)*, N.Y. TIMES (June 27, 2007), http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?pagewanted=all&_r=0 (providing additional information on the Pearl Oyster Bar case); see also Dana Sauchelli, Reuven Fenton & Lia Eustachewich, *Rival Manager Denies Smoke-Bomb Attack on West Village Eatery*, N.Y. POST (Oct. 14, 2014, 2:36 AM), <http://nypost.com/2014/10/14/manager-says-his-eatery-isnt-behind-west-village-smoke-bomb> (mentioning a lawsuit that involves misappropriation of a meatball recipe—between neighboring restaurants Da Silvano and Bar Pitti—as a possible cause of a smoke bombing incident).

In turn, patrons are provided with better dining experiences.³⁷ Moreover, court-awarded protection of trade secrets reduces unfair competition, which further permits IP to thrive.³⁸ For the foregoing reasons, courts should implement trade secret principles when analyzing restaurant-related employment disputes, rather than adhering to strict contract interpretation principles.

I. BOILING DOWN THE BASICS: AN OVERVIEW OF THE RESTAURANT INDUSTRY

A. *A Dash of Background Information*

The restaurant industry is divided into three main categories: full service, quick service, and fast casual. Full-service restaurants, classified as either “fine dining”³⁹ or “casual dining,”⁴⁰ cater to customers who are served by waitstaff while seated at tables.⁴¹ Full-service restaurants often employ individuals to fulfill a range of different positions, including bartenders, hosts and hostesses, servers, and various kitchen personnel.⁴² In the next category, quick-service restaurants are geared towards speed and convenience, and offer the least expensive meal options of all three categories.⁴³ Food preparation is centralized and highly regulated, as customers expect menu items to be uniform across multiple locations.⁴⁴ Finally, fast-casual restaurants fall somewhere in

³⁷ See generally George Hill, *The Key Drivers that Have Led to the Decline of the Technical Chef*, CULINARY WATCHDOG (2015), <http://salonculinaire.com/Stn/StnStoryPDF.pdf> (discussing the importance of proper training through apprenticeships, which leads to adherence to core culinary values and increases customer satisfaction).

³⁸ See WIPO, *supra* note 15, at 3.

³⁹ See *Fine Dining*, CAMBRIDGE DICTIONARIES ONLINE, <http://dictionary.cambridge.org/us/dictionary/english/fine-dining> (last visited Mar. 22, 2016) (defining “fine dining” as “a style of eating that usually takes place in expensive restaurants, where especially good food is served to people, often in a formal way”).

⁴⁰ Monica Parpal, *An Overview of Different Restaurant Types*, FOODSERVICEWAREHOUSE.COM (July 14, 2015), <http://www.foodservicewarehouse.com/blog/overview-different-restaurant-types> (“Another type of full service eatery is casual dining restaurants. They are typically more affordable and often geared toward families. Casual dining restaurants offer full table service but the décor, food and service are usually less remarkable than a fine dining establishment.”).

⁴¹ See *id.* In addition to servers and various kitchen employees, full-service restaurants almost always provide bartenders and hosts or hostesses. *Id.*; see also NAICS 722511: *Full-Service Restaurants*, SICCODE.COM, <http://siccode.com/en/naicscodes/722511/fullservice-restaurants> (last visited Mar. 22, 2016) (defining full-service restaurants as “establishments primarily engaged in providing food services to patrons who order and are served while seated (i.e., waiter/waitress service) and pay after eating.”).

⁴² See Parpal, *supra* note 40.

⁴³ *Id.*

⁴⁴ *Id.*

the middle between full-service and quick-service restaurants. These types of establishments are perceived to have a higher quality of food than quick-service restaurants, yet at a cheaper price than full-service restaurants.⁴⁵ Customers order their food at a service window or choose from options along an assembly line, rather than place their order with a server.⁴⁶

Each of these types of restaurants may seek to protect IP; for example, quick-service restaurant KFC has taken extensive measures to safeguard its secret spice recipe.⁴⁷ However, this Note addresses how courts should analyze claims where employees disclose proprietary information to competitors—a scenario that arguably occurs most frequently in full-service restaurants. This is because apprenticeships are common, creativity is high, and diners are generally removed from the cooking process in full-service dining establishments.⁴⁸ In this context, proliferation of proprietary information is likely to occur when a former employee uses secret information to compete against a former employer, rather than when a competitor commits corporate espionage to steal a recipe,⁴⁹ or when a competitor reverse engineers a dish without having first-hand knowledge of its preparation.⁵⁰

B. *Sifting Through Varying Degrees of Creativity Across Full-Service Business Models*

Full-service restaurants can follow different types of ownership models, each involving varying levels of creativity.⁵¹ Restaurant groups, which own and open several restaurants and franchises throughout the country,⁵² arguably fall on the least creative end of the spectrum.⁵³ On the more creative end are chefs who become famous because of their

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Erin Hayes, *KFC Drops Suit Over Original Recipe*, ABC NEWS (Jan. 29, 2001) <http://abcnews.go.com/US/story?id=94260&page=1> (“KFC . . . is fervent in its efforts to keep the recipe secret The company buys spices from different vendors, so no one vendor can ever add it all up. KFC officials make the few employees who do know the recipe sign confidentiality agreements, and the company goes to court when the safety of the secret is threatened.”).

⁴⁸ See Straus, *supra* note 21, at 190–91.

⁴⁹ See LOBEL, *supra* note 17, at 104–05.

⁵⁰ For a discussion on reverse engineering, see *infra* Section III.A.

⁵¹ Straus, *supra* note 21, at 190–91 (detailing the basic types of business models for full-service restaurants).

⁵² Darden Restaurants Inc. is an example of a restaurant group that owns seven different restaurant brands. See *Our Brands*, DARDEN, <http://www.darden.com/restaurants> (last visited Mar. 22, 2016). Darden raked in approximately \$8.46 billion in 2012, making it the nation’s top restaurant group for that year. See *FSR 50: Top 10 Restaurant Groups*, FSR MAG. (July 2013), <http://www.fsrmagazine.com/fsr50/2013/restaurant-groups>.

⁵³ Straus, *supra* note 21, at 190–91.

expertise and originality; these chefs often come to control various business and culinary aspects of their own restaurants.⁵⁴ The final ownership model is comprised of individual restaurants. Compared to national franchises, these restaurants are only known within the particular areas they serve, and thus must distinguish themselves from local competitors.⁵⁵ While IP issues may arise in each of these types of models, IP concerns are arguably the highest when chefs are personally involved in the creation and conception process for restaurants or their personal brands.⁵⁶

II. MIXING INTELLECTUAL PROPERTY PROTECTION WITH CUISINE

A. *Apprenticeships in the Kitchen: Cooking Up a Challenge to IP Protection*

Apprenticeships play an interesting role with respect to protecting intellectual property in cuisine. In the restaurant industry, apprenticeships are commonplace and are recognized as a central feature of a chef's culinary education.⁵⁷ Officially, this type of professional experience is called a *stagiaire*,⁵⁸ and it is considered to be a crucial part of a chef's training.⁵⁹ When *staging*,⁶⁰ chefs—from novice to

⁵⁴ *Id.* at 190 n.34 (listing famous chef restaurant owners); see also Corby Kummer, *Tyranny—It's What's for Dinner*, VANITY FAIR, Feb. 2013, <http://www.vanityfair.com/culture/2013/02/top-chefs-totalitarian-restaurants> (discussing how Chef Charlie Trotter followed the traditional French model of building his reputation through naming his restaurant after himself, as well as owning his personal brand name and the restaurant premises). For example, Wolfgang Puck earned sixteen million dollars in revenue from his name-branded empire in 2008. Straus, *supra* note 21, at 190 n.35.

⁵⁵ *Id.* at 191.

⁵⁶ *Id.*

⁵⁷ See Emily Cunningham, Note, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 J. HIGH TECH. L. 21, 25 (2009); see also Straus, *supra* note 21, at 192–93.

⁵⁸ See *Stagiaire*, OXFORD BUS. FRENCH DICTIONARY: FRENCH–ENGLISH (2002), (translating the term *stagiaire* to mean “trainee” in English). Also known as *staging* or a *stage* (pronounced “staahj”), these generally unpaid internships allow amateur chefs to gain experience by practicing in the kitchens of experts in the industry. Devra First, *When the Chef Becomes the Apprentice*, BOS. GLOBE (June 26, 2012), <http://www.bostonglobe.com/lifestyle/food-dining/2012/06/26/when-chef-becomes-apprentice/UokkVcC9YDPAlcYZDJoJAN/story.html>.

⁵⁹ In an article detailing the *stagiaire* process, George Mendes, Executive Chef of Michelin-starred Aldea Restaurant, states that “[s]taging is integral for young or old cooks in training so they can continue learning and expanding their knowledge of a certain cuisine.” Sarah LeTrent, *All the Kitchen's a Stage*, CNN: EATOCRACY (May 3, 2011, 6:00 PM) (italics added) (quoting George Mendes), <http://eatocracy.cnn.com/2011/05/03/all-the-kitchens-a-stage>; see also Cunningham, *supra* note 57, at 25 (referencing the process of the *stagiaire* to support her argument that cooking is a “shared art”); First, *supra* note 58 (“[Staging is] priceless. It cannot be measured.” (quoting Tim Wiechmann, owner of T.W. Food in Cambridge)); Amy

expert—travel into their mentors’ kitchens to perfect their skills and share their own techniques with others.⁶¹ *Staging* is important to the industry because it allows chefs to learn from one another;⁶² many new dishes are often inspired from classics that are passed down and transformed over time.⁶³

Generally, chefs seem to support the idea that their apprentices will use the techniques learned in the *stage* after the apprenticeship has ended. For example, esteemed Chef Thomas Keller prides himself on teaching his staff the proper cooking techniques, and advocates for continued use of these techniques in the future.⁶⁴ However, acceptance often declines when the “inspired” dishes begin to look more like exact copies of the original.⁶⁵

Staging also raises questions over which rights should be protected under IP law, if any at all. Scholars have debated the issues of whether and when IP law should intervene to protect a chef’s individual rights; some argue for increased legal protection,⁶⁶ while others argue against

Scattergood, *Is It Time to Trade Culinary Schools for an Apprentice System?*, LA WEEKLY (June 20, 2013), <http://www.laweekly.com/squidink/2013/06/20/is-it-time-to-trade-culinary-schools-for-an-apprentice-system>.

⁶⁰ *Staging*, pronounced “staah-jing” is the gerund form of *stagiaire*. See *supra* note 58.

⁶¹ See Scattergood, *supra* note 59 (discussing how Chef Ludo Lefebvre left home at the age of fourteen to begin his culinary career as an apprentice for French chef Marc Meneau, and admitting that he “learned from A to Z, how to peel and clean . . . It was very difficult. [He] cried in [his] room at night—but [he] would do it again”).

⁶² See First, *supra* note 58; cf. Nichole Aksamit, *Chefs Guard Secret Ingredients of Success: The Fruits of Labor Must Be Protected in the Restaurant Trade as in Any Other, a Patent Attorney Says*, OMAHA WORLD-HERALD, Sept. 19, 2007, at 1D (“[A] person is allowed to carry his or her tools of the trade from job to job. So if everyone knows how to cut a carrot or bake bread or season a dish, and all chefs are trained that way, you can’t prevent that person from using that skill in a new job.” (quoting Chicago patent attorney Charles Valauskas)).

⁶³ See First, *supra* note 58 (“[O]ccasionally [*stages*] offer direct inspiration for dishes. A mussels preparation at Noma led [Chef Alex] Crabb to come up with his own take, where saffron-tinged mussels are served in squid ink pasta ‘shells’ to stunning effect.”).

⁶⁴ See Straus, *supra* note 21, at 192 (referencing Thomas Keller’s view on the importance of teaching his staff the proper techniques, and encouraging them to use those techniques in their careers to improve upon the skills he taught them). Moreover, former L’Espalier Sous Chef Alex Crabb revealed that he learned how to make *foie gras torchon* during his *stage* under Thomas Keller, and continues to think about Chef Keller every time he prepares the dish. See First, *supra* note 58 (“I still do it his way—tying the knot for the *torchon*, specifically. He said to hold the *torchon* like you’re shaking its hand. I use that line whenever I teach kids. You disseminate the information that way almost verbatim.” (italicization added) (quoting Chef Alex Crabb)).

⁶⁵ See Buccafusco, *supra* note 25, at 1152–53 (“I write cookbooks and teach classes so folks will use my recipes. I am quite happy when a layperson uses my recipes and I would also be just as happy, maybe more so, if a professional were to, *provided* that they gave credit in some way shape or form.” (quoting Chef Norman Van Aken)).

⁶⁶ See generally Straus, *supra* note 21 (arguing for increased legal protection of restaurant dishes through trademark law). It seems that Chef Rebecca Charles of Pearl Oyster Bar did not feel the same sense of sharing in the industry as Chef Keller. Chef Charles filed a claim against her former sous chef Ed McFarland, seeking damages for Mr. McFarland’s alleged plagiarism of

it.⁶⁷ Similarly, courts vary in terms of how much protection they are willing to provide, which frequently depends on the facts of each case as well as the jurisdiction.⁶⁸ Therefore, restaurant-related IP issues seem to be relatively unresolved in the current legal landscape.

B. *Existing Protection Through Copyright and Trademark: Reduced to a Slow Simmer*

Primarily, intellectual property rights are applied under three doctrines: copyright, trademark, and patent law.⁶⁹ Although copyright and trademark do not fully safeguard all types of IP found in the restaurant industry,⁷⁰ courts have used both to find limited protection.⁷¹ On the other hand, patent law provides the least amount of protection to the restaurant industry because inventions must meet very strict requirements to receive a patent, such as novelty⁷² and nonobviousness;⁷³ the application process is also very costly.⁷⁴ As such, the remainder of this Note will not address patent law in the context of cuisine.

“each and every element” of Pearl Oyster Bar after McFarland left to open his own restaurant, Ed’s Lobster Bar. Wells, *supra* note 36 (quoting the complaint); see also Pete Wells, *Chef’s Lawsuit Against a Former Assistant Is Settled Out of Court*, N.Y. TIMES (Apr. 19, 2008), <http://www.nytimes.com/2008/04/19/nyregion/19suit.html>.

⁶⁷ Emily Cunningham argues that apprenticeship further demonstrates that cuisine is made for sharing, and thus IP law should not be extended to this industry. See generally Cunningham, *supra* note 57; accord Chris Sherman, Commentary, *Hey! that Seafood Joint Was My Idea*, TAMPA BAY TIMES (July 11, 2007), http://www.sptimes.com/2007/07/11/Food/Hey_That_seafood_join.shtml (“No matter who invented the oyster bar or the retro oyster bar, originality in restaurants is overrated and nigh impossible. . . . [C]ooking is a craft, art and science best handed down by one cook to another, in the home, restaurant or market.”). For example, Christopher Buccafusco supports the sharing of ideas and cites to Chef Thomas Keller’s response in an interview. See Buccafusco, *supra* note 25, at 1152. Keller states, “We’re in the hospitality industry We’re innately hospitable, so why wouldn’t you want to share? . . . I share my restaurant [and] my food.” *Id.* (alterations in original) (quoting Telephone Interview with Thomas Keller, Chef-Owner, The French Laundry, Per Se, and Bouchon (Mar. 20, 2006)).

⁶⁸ See *infra* Section IV.A.2.

⁶⁹ Straus, *supra* note 21, at 193.

⁷⁰ See *infra* Sections II.B.1–2.

⁷¹ See *infra* Sections II.B.1–2.

⁷² 35 U.S.C. § 102 (2012).

⁷³ *Id.* § 103.

⁷⁴ For further discussion regarding the difficulties in applying patent law to cuisine, see Cunningham, *supra* note 57, at 28–34. Also see Fauchart & von Hippel, *supra* note 31, at 189 (“[N]ovel haute cuisine recipes today seldom fulfill the three criteria necessary for claiming a patent: usefulness, novelty, and nonobviousness.”), and *Can Recipes be Patented?*, INVENTORS EYE, June 2013, <http://www.uspto.gov/custom-page/inventors-eye-advice-1>.

1. Copyright

Under the Copyright Act of 1976, copyright law seeks to protect “original works of authorship” that have been “fixed in any tangible medium of expression.”⁷⁵ Section 102(b) explicitly excludes any “idea, procedure, process, system, method of operation, concept, principle, or discovery” from copyright protection.⁷⁶ In applying copyright to the restaurant industry and cuisine, courts have held that cookbooks can be considered original compilations, and thus, they can constitute copyrightable works.⁷⁷ The court in *Vasquez v. Ybarra*⁷⁸ also extended thin copyright over dishes that show a degree of creativity; however, this protection was only applied to the particular menu items, not to the menu as a whole.⁷⁹ While the *Vasquez* court held that menu *designs* were copyrightable on one hand,⁸⁰ it conversely held that descriptions of the menu items were uncopyrightable⁸¹ because they were functional in nature.⁸² Other elements of restaurants, such as recipes, which courts

⁷⁵ 17 U.S.C. § 102(a) (2012).

⁷⁶ *Id.* § 102(b).

⁷⁷ Cookbooks are considered compilations, which are protected under the Copyright Act, 17 U.S.C. § 101 (2012). See *Branch v. Ogilvy & Mather, Inc.*, No. 89 CIV. 2440 LLS, 1990 WL 74540, at *7 (S.D.N.Y. May 30, 1990) (allowing plaintiff to pursue copyright claim of the “total concept and feel” of her cookbook because “[c]opyrightable expression may be found in the arrangement of elements that individually are not subject to copyright protection”); cf. *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 479–80 (7th Cir. 1996) (holding that individual recipes contained in cookbook were not subject to copyright protection even though the cookbook itself enjoyed registered compilation copyright protection).

⁷⁸ 150 F. Supp. 2d 1157, 1168 (D. Kan. 2001).

⁷⁹ *Id.* at 1168–69 (finding a protectable copyright interest in the dishes that demonstrated a “creative spark”). However, the *Vasquez* court denied extending these rights to cover all of the menu items to avoid granting the plaintiff exclusive rights over this type of cuisine. *Id.* at 1171.

⁸⁰ *Id.* at 1170–71 (affirming that a menu as a whole may be subject to copyright, as to be determined by a trier of fact).

⁸¹ *Id.* at 1169.

⁸² Under the Copyright Act, functional items are precluded from copyright protection under the “useful articles” doctrine. This doctrine is defined in section 113(b) of the Copyright Act, which states:

This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

17 U.S.C. § 113(b) (2012). A “useful article” is defined as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article.’” *Id.* § 101; see also *Vasquez*, 150 F. Supp. 2d at 1169.

have classified as “processes,”⁸³ have also gone unprotected under copyright law.⁸⁴

Although a limited number of restaurant owners have successfully argued their copyright claims,⁸⁵ copyright law does not fully protect IP in the restaurant industry. Unlike other industries that receive high levels of copyright protection, such as motion pictures⁸⁶ or music,⁸⁷ cuisine encompasses its own set of distinct issues that hinder copyright protection. For one, Professor Nimmer argues that recipes fail to meet the originality requirement of copyright law because they resemble facts rather than “original works of authorship.”⁸⁸ Others have argued that food does not meet copyright’s “fixation” requirement⁸⁹ because it only remains in a fixed medium for a limited amount of time—that is, until it

⁸³ See, e.g., *Lambing v. Godiva Chocolatier*, No. 97-5697, 1998 WL 58050 (6th Cir. Feb. 6, 1998) (finding the appellant’s recipes uncopyrightable for lack of requisite expressive element necessary for copyright protection); *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996) (defining a recipe as “a set of instructions for making something . . . a formula for cooking or preparing something to be eaten or drunk: a list of ingredients and a statement of the procedure to be followed in making an item of food or drink . . . a method of procedure for doing or attaining something” (alterations in original) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1895 (1986))); see also 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to 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.”). But see *Barbour v. Head*, 178 F. Supp. 2d 758, 762–63 (denying the defendant’s defense that recipes are per se uncopyrightable and remanding the issue to be determined on the merits).

⁸⁴ *Publ’ns Int’l*, 88 F.3d at 480 (holding that individual elements of a compilation are not necessarily copyrightable, even if the compilation as a whole is eligible for copyright protection); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). But see *Recipes*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/fls/fl122.html> (last updated Feb. 6, 2012) (“Copyright protection may, however, extend to substantial literary expression—a description, explanation, or illustration, for example—that accompanies a recipe or formula or to a combination of recipes, as in a cookbook.”); see also *Barbour*, 178 F. Supp. 2d, at 764 (finding that sufficient expressive elements or anecdotal accompaniments may entitle a recipe to copyright protection).

⁸⁵ See *Vasquez*, 150 F. Supp. 2d at 1169; see also *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 548 (S.D.N.Y. 2001) (holding that while Chinese restaurant plaintiff’s photographs lacked requisite originality for copyright protection, the “graphic design” of the menu arrangement as a whole may be subject to copyright protection).

⁸⁶ ECON. & STATISTIC ADMIN. & U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS (2012), http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf (identifying IP-intensive industries and their effect on the U.S. economy).

⁸⁷ *Raustiala & Sprigman*, *supra* note 21, at 1763 (identifying the music industry as operating in a high-IP regime).

⁸⁸ 17 U.S.C. § 102(a); see also *Buccafusco*, *supra* note 25, at 1127 (commenting on Melville Nimmer’s rejection of recipes as copyrightable material); *accord Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991); *id.* at 345 (“Original, as the term is used in copyright, means only 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.”).

⁸⁹ 17 U.S.C. § 101 (requiring a work to be in a state that is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” in order to be considered a copy).

is consumed.⁹⁰ Finally, one scholar argues that dishes do not receive copyright protection because they are not enumerated in the list of copyrightable works of authorship under section 102(a) of the Copyright Act.⁹¹ For the foregoing reasons, copyright does not provide adequate coverage to the restaurant industry.

2. Trademark

Trademark law protects words, symbols, names, or devices that are used as source identifiers to distinguish one source's goods from another.⁹² Trademark rights seek to prevent deceptive use and unfair competition from competitors looking to capitalize on another's mark.⁹³ In the restaurant industry, trademark law has successfully protected the names of select menu items⁹⁴ that meet the necessary requirements for registration.⁹⁵ However, beyond words and symbols,⁹⁶ restaurants are comprised of other visual components that owners may want to protect against unfair competition, such as the décor and theme.⁹⁷ In these

⁹⁰ See Raustiala & Sprigman, *supra* note 21, at 1767 (identifying the evanescent nature of food, which runs counter to copyright protection).

⁹¹ See Buccafusco, *supra* note 25, at 1124–25 (“The [Copyright] Act then enumerates a list of copyrightable works of authorship, including: ‘(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.’ Recipes are not included in the list.”) (footnote omitted) (quoting 17 U.S.C. § 102(a)).

⁹² A trademark signifies “any word, name, symbol, or device, or any combination thereof—used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127 (2012).

⁹³ The central purpose of the U.S. Trademark (Lanham) Act is to “regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce . . . [and] to protect persons engaged in such commerce against unfair competition” through “prevent[ing] fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks.” *Id.*

⁹⁴ For example, Liza Krizman notes that certain menu items, such as “WHOPPER” (arbitrary) and “BLOOMIN’ ONION” (suggestive) have been afforded trademark protection by the Trademark Trial and Appeal Board, while other terms have been held as merely descriptive and thus unentitled to trademark protection. Lisa K. Krizman, *Trademark Protection for Restaurant Owners: Having Your Cake and Trademarking It, Too*, 99 TRADEMARK REP. 1004, 1013–14 (2009).

⁹⁵ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976) (holding that words considered to be “suggestive,” “arbitrary,” or “fanciful” are fully eligible for trademark protection, while “descriptive” words may invoke eligibility only through showing secondary meaning, and generic words are never eligible for trademark protection).

⁹⁶ Straus, *supra* note 21, at 195 (identifying the restaurant’s name, the naming of individual menu items, and the restaurant’s slogan as protected under trademark law).

⁹⁷ See *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1117 (5th Cir. 1991).

cases, courts have looked to section 43(a) of the Lanham Act⁹⁸ to determine whether there are any available remedies under trade dress law, rather than limiting the scope of protection to words and symbols alone.⁹⁹

Trade dress, a subdivision of trademark, refers to the overall look and feel of a product, which, in turn, acts as a source identifier in the marketplace.¹⁰⁰ Some courts have found protectable trade dress in a restaurant setting, such as when the combination of visual elements represents the restaurant's overall image.¹⁰¹ However, other courts have rejected restaurants' trade dress claims.¹⁰² Therefore, trade dress law seems to bring with it a sense of uncertainty rather than a well-settled, bright-line rule.

Ultimately, trade dress and trademark are particularly challenging areas of law to apply to the restaurant industry. First, plaintiffs must prove that their restaurant names or food names are distinctive, either inherently or through secondary meaning,¹⁰³ and not merely

⁹⁸ 15 U.S.C. § 1125(a) (2012). Specifically, section 43(a)(3) of the Lanham Act provides remedial action for trade dress infringement, as long as the asserting party can demonstrate that its trade dress is nonfunctional. *Id.* § 1125(a)(3). For example, the *Taco Cabana* court held that the plaintiffs trade dress was both distinctive and nonfunctional, and thus issued compensatory and injunctive relief against Two Pesos for trade dress infringement. *Taco Cabana Int'l*, 932 F.2d at 1126–27.

⁹⁹ See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) (holding that trade dress may be inherently distinct, thus requiring no secondary meaning); *Taco Cabana Int'l*, 932 F.2d at 1128 (finding that a unique compilation of visual elements enjoys protection under the Lanham Trademark Act); *Vasquez v. Ybarra*, 150 F. Supp. 2d 1157 (D. Kan. 2001) (holding that the restaurant menu as a whole was protectable under trade dress law).

¹⁰⁰ Specifically, the International Trademark Association defines trade dress as “the overall commercial image (look and feel) of a product that indicates or identifies the source of the product and distinguishes it from those of others. It may include . . . the décor or environment in which services are provided.” *Fact Sheets: Types of Protection: Trade Dress*, INT'L TRADEMARK ASS'N, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/Trade-Dress.aspx> (last updated Nov. 2015); see, e.g., *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001) (“The design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source; and a design or package which acquires this secondary meaning . . . is a trade dress which may not be used in a manner likely to cause confusion as to the origin, sponsorship, or approval of the goods.”); *Two Pesos*, 505 U.S. at 774, 776 (denying the requisite of secondary meaning if a trade dress is found to be inherently distinctive, and holding that *Taco Cabana's* trade dress was, in fact, inherently distinctive).

¹⁰¹ *Two Pesos*, 505 U.S. at 776; *Vasquez*, 150 F. Supp. 2d at 1176.

¹⁰² See *Krizman*, *supra* note 94, at 1008–09 (discussing examples of trade dress rejections, such as particular features of *Hooters* restaurants for being too generic or functional, and certain features of a Puerto Rican restaurant for lacking the requisite uniqueness).

¹⁰³ As explained by the *Two Pesos* court, if a mark intrinsically identifies its source, then it will be considered “inherently distinctive” and can receive trademark protection without needing to meet any further requirements. *Two Pesos*, 505 U.S. at 768 (citing *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976)). If a mark is deemed merely descriptive of a product, it will not be subject to trademark protection unless it has acquired secondary meaning. *Id.* at 769. Secondary meaning generally refers to acquired meaning when

descriptive.¹⁰⁴ Second, certain elements of food, such as flavors, cannot be classified as trademarks.¹⁰⁵ In general, food is often considered “functional,”¹⁰⁶ which is an absolute bar to trademark protection.¹⁰⁷ For the foregoing reasons, trademark law does not provide adequate coverage to the restaurant industry.

C. Contract Law: An Attempted Substitution

1. Background Information on Restrictive Covenants and Nondisclosure Agreements

Intellectual property protection can also come in the form of restrictive covenants (i.e., noncompetition or noncompete agreements)¹⁰⁸ and nondisclosure agreements.¹⁰⁹ Restrictive covenants

the descriptive mark “has become distinctive of the applicant’s goods in commerce.” *Id.* (quoting 15 U.S.C. § 1052(f)).

¹⁰⁴ Krizman, *supra* note 94, at 1013–14. Krizman cites the following cases as examples of the Trademark Trial and Appeal Board (TTAB)’s rejection of a trademark because the mark was deemed merely descriptive: *In re RFA Inc.*, 2004 WL 2619567 (T.T.A.B. 2004) (“Rain Forest Tilapia” as merely descriptive of a fish), *In re China Grill, Inc.*, 1999 WL 590701 (T.T.A.B. 1999) (“China Grill” as invalid mark for a Chinese restaurant), and *In re Eden Foods, Inc.*, 24 U.S.P.Q.2d 1757 (T.T.A.B. 1992) (“Double Certified Organic” as merely descriptive of pasta). Krizman, *supra* note 94, at 1013–14.

¹⁰⁵ *In re N.V. Organon*, 79 U.S.P.Q.2d 1639, 2006 WL 1723556, at *1 (T.T.A.B. 2006) (denying applicant’s trademark registration request for the orange flavor used in its pharmaceuticals). “Unlike color, sound and smell, there generally is no way for consumers routinely to distinguish products by sampling them before they decide which one to purchase.” *Id.* at *15.

¹⁰⁶ Section 52(e)(5) of the Lanham Act states that “[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of a mark which . . . comprises any matter that, as a whole, is functional.” 15 U.S.C. § 1052(e)(5). Similarly, Lanham Act § 43(a)(3) requires that parties asserting trade dress infringement claims over unregistered marks must bear the “burden of proving that the matter sought to be protected is not functional.” 15 U.S.C. § 1125(a)(3).

¹⁰⁷ *E.g.*, *N.Y. Pizzeria, Inc. v. Syal*, 56 F. Supp. 3d 875, 882 (S.D. Tex. 2014) (denying pizzeria’s trademark infringement claim over food flavor because of functionality, explaining that “[p]eople eat, of course, to prevent hunger. But the other main attribute of food is its flavor, especially restaurant food for which customers are paying a premium beyond what it would take to simply satisfy their basic hunger needs. The flavor of food undoubtedly affects its quality, and is therefore a functional element of the product.”); *cf. Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996) (finding that food in the context of recipe ingredients served a functional purpose). *But see Frito-Lay N. Am., Inc. v. Medallion Foods, Inc.*, No. 4:12cv74, 2013 WL 74605, at *11 (E.D. Tex. Jan. 4, 2013) (holding that the trade dress of Tostitos SCOOPS! tortilla chips contained both functional and nonfunctional elements, thus allowing a jury to decide whether the design as a whole could be protected).

¹⁰⁸ The terms “restrictive covenant” and “noncompetition agreement” are interchangeable. *See Covenant Not to Compete*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “covenant not to compete” as “[a] promise, usu[ally] in a sale-of-business, partnership, or employment

are generally defined as agreements that limit former employees' future working activities,¹¹⁰ while nondisclosure agreements seek to prevent employees from using or disclosing their former employer's confidential information.¹¹¹ Under some circumstances, courts have been willing to uphold noncompete agreements.¹¹² However, public policy generally disfavors restrictive covenants as inhibitors of free competition in the marketplace,¹¹³ mainly because they are seen as barriers to maintaining one's personal livelihood.¹¹⁴ Moreover, restrictive covenants are disfavored because there is an assumed disparity in bargaining power between the employers who draft these agreements and the employees who sign them.¹¹⁵ Thus, restrictive covenants must meet a high standard

contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer. Noncompetition covenants are valid to protect business goodwill in the sale of a company. In employment contexts, requiring the employee, after leaving the employment, not to do a particular type of work, they are disfavored as restraints of trade. Courts generally enforce them for the duration of the relationship, but provisions that extend beyond that relationship must be reasonable in scope, time, and territory. — Also termed *noncompetition agreement*; *noncompete covenant*; *noncompetition covenant*; *restrictive covenant*; *covenant in restraint of trade*; *promise not to compete*; *contract not to compete*.”); see also Adam Schneid, Note, *Assignability of Covenants Not to Compete: When Can a Successor Firm Enforce a Noncompete Agreement?*, 27 CARDOZO L. REV. 1485, 1485 (2006).

¹⁰⁹ For a discussion of nondisclosure agreements, see *infra* note 120 and accompanying text.

¹¹⁰ RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 8.06 cmt. a (AM. LAW INST., Proposed Final Draft 2014) (defining restrictive covenants as “[c]ontractual restrictions on former employees’ working activities”).

¹¹¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d (AM. LAW INST. 1995) (generally defining a nondisclosure agreement as “a promise by the recipient not to compete with the trade secret owner, a general promise to refrain from disclosing or using any confidential information acquired within the context of a particular relationship or transaction, or a promise to refrain from using or disclosing particular information specified in the agreement”).

¹¹² See *Becher v. Peress*, 490 N.Y.S.2d 600 (App. Div. 1985) (holding that restrictive covenants preventing a physician from competing with a former employer or associate are generally acceptable and enforceable). Furthermore, once the reasonableness standard is met, courts are more willing to uphold these agreements where an employee’s skills are “unique or extraordinary.” *Reed, Roberts Assocs., Inc. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976); *Karpinski v. Ingrassi*, 268 N.E.2d 751 (N.Y. 1971).

¹¹³ See *Am. Broad. Cos. v. Wolf*, 420 N.E.2d 363, 368 (N.Y. 1981) (“Underlying the strict approach to enforcement of these [restrictive] covenants is the notion that, once the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition.”); see also 13A SHARON P. STILLER, N.Y. PRACTICE SERIES: EMPLOYMENT LAW IN NEW YORK § 2:182 (2d ed. 2015).

¹¹⁴ *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 369 N.E.2d 4, 6 (N.Y. 1977) (“Since there are ‘powerful considerations of public policy which militate against sanctioning the loss of a man’s livelihood,’ restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law.” (citation omitted) (quoting *Purchasing Assocs., Inc. v. Weitz*, 196 N.E.2d 245, 272 (N.Y. 1963))).

¹¹⁵ See *infra* note 183 and accompanying text.

of reasonableness to be upheld.¹¹⁶ In assessing the reasonableness of these types of agreements, courts have utilized a three-pronged test,¹¹⁷ and have also examined the scope of an agreement.¹¹⁸ Noncompetition agreements have been upheld to the extent that they adequately protect an employer's trade secrets.¹¹⁹ As such, restrictive covenants present one viable method of IP protection.

In contrast, nondisclosure agreements are derived from the basic duty of loyalty that employees owe to their employers.¹²⁰ Unlike noncompetition agreements, which require explicit language prohibiting an employee from working for competitors,¹²¹

¹¹⁶ *Reed, Roberts Assocs.*, 353 N.E.2d at 592 (“Generally negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness.”); *Legal Recording & Research Bureau Ltd. v. Wicka*, 405 N.Y.S.2d 526 (App. Div. 1978). While some states—such as California—have passed laws to invalidate all noncompete clauses, the majority of states still recognize restrictive covenants, as long as they meet the states’ definition of reasonableness. See LOBEL, *supra* note 17, at 53.

¹¹⁷ Under common law, a restrictive covenant will be deemed reasonable to the extent that it: “(1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.” *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999).

¹¹⁸ See *Reed, Roberts Assocs.*, 353 N.E.2d at 592–93 (considering noncompete agreements to be enforceable only if “reasonable in time, scope and extent. . . . In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.”); see also *Riccardi v. Modern Silver Linen Supply Co., Inc.*, 356 N.Y.S.2d 872, 879 (App. Div. 1974) (“It is axiomatic that a negative covenant against competition by an employee following the termination of his employment is generally enforceable, provided it is reasonably necessary for the protection of the employer and is reasonably limited as to time and place.” (quoting *Bates Chevrolet v. Haven Chevrolet*, 213 N.Y.S.2d 557, 580 (App. Div. 1961))).

¹¹⁹ *Ecolab Inc. v. Paolo*, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) (holding that “restrictive covenants will be enforceable [to] the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information” (quoting *Reed, Roberts Assocs.*, 353 N.E.2d at 593)); cf. *Becher v. Peress*, 490 N.Y.S.2d 600 (App. Div. 1985) (holding that restrictive covenants preventing a physician from competing with a former employer or associate are generally acceptable and enforceable).

¹²⁰ See *Island Sports Physical Therapy v. Kane*, 923 N.Y.S.2d 158, 159 (App. Div. 2011) (recognizing the employee’s duty of good faith and loyalty). For further discussions of employees’ duties of confidence, see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 (AM. LAW. INST. 1995), RESTATEMENT (SECOND) OF AGENCY § 396(b) (AM. LAW. INST. 1958), and RESTATEMENT (FIRST) OF TORTS § 757 cmt. a (AM. LAW. INST. 1939).

¹²¹ *U.S. Re Cos., Inc. v. Scheerer*, 838 N.Y.S.2d 37, 40 (App. Div. 2007) (finding that although an employee signed a confidentiality agreement, there was no express language in the confidentiality agreement that prohibited him from working with competitors; therefore, he was not bound by a noncompetition agreement). Compare RESTATEMENT (SECOND) OF AGENCY § 396(a) (AM. LAW. INST. 1958) (“Unless otherwise agreed, after the termination of the agency, the agent: (a) has no duty not to compete with the principal”), with *id.* § 396(b) (“Unless otherwise agreed, after the termination of the agency, the agent: . . . (b) has a duty to the principal not to use or to disclose to third persons . . . in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal’s use or acquired by the agent in violation of duty.”).

nondisclosure agreements can either be express¹²² or implied from the circumstances surrounding the case.¹²³ For this reason, employees may be prevented from disclosing proprietary information simply because of the type of relationship they have with their employers, even in the absence of a contract.¹²⁴ Therefore, nondisclosure agreements provide another form of IP protection.

2. The Use of Noncompetes and Nondisclosures in the Restaurant Industry

Nondisclosure and noncompete agreements in employment contracts have become increasingly popular in the restaurant industry.¹²⁵ This may be because there is a stronger impetus to require noncompetition and nondisclosure agreements when food becomes more akin to art,¹²⁶ and when chefs create dishes that are inspired by

¹²² New York courts have enforced nondisclosure agreements even in the absence of an explicit list of what information was considered secret, as long as the employee agreed not to disclose or use any confidential or proprietary information of a former employer. *See* *Anacom, Inc. v. Shell Knob Servs., Inc.*, No. 93 CIV. 4003 (PKL), 1994 WL 9681, at *12 (S.D.N.Y. Jan. 10, 1994); *see also* *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 172 (2d Cir. 1990); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d (AM. LAW. INST. 1995) (discussing several types of valid, express nondisclosure agreements).

¹²³ *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1216 (E.D.N.Y. 1981) (“Absent an express agreement, the conduct of the parties may indicate that use of the idea is governed by an agreement implied-in-fact.”).

¹²⁴ *See* *Riteoff Inc. v. Contact Indus., Inc.*, 350 N.Y.S.2d 690, 692 (App. Div. 1973) (holding that the defendant had an absolute duty, implicit from the parties’ employment relationship, not to use employer’s confidential information to compete with the employer); *see also* RESTATEMENT (SECOND) OF AGENCY § 396(b) (AM. LAW. INST. 1958) (noting a duty not to disclose trade secrets unless prior agreement allows for such disclosure); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 828 (2015) (“An effective noncompete contract does not need to be labeled or entitled as such. Restrictions over the use of human capital do not have to explicitly use the language of noncompetes to reach the result of restricting employee mobility postemployment. . . . [W]ith regard to trailer clauses, trade secrets, and the doctrine of assignor estoppel, imposing a postemployment penalty on a former employee is tantamount in its economic effect to noncompetes.”).

¹²⁵ *See, e.g.*, *KatiRoll Co., Inc. v. Kati Junction, Inc.*, No. 14-cv-1750 (SAS), 2015 WL 5671881, at *1 (S.D.N.Y. Sept. 25, 2015) (denying defendant employees’ motion for summary judgment for trademark and trade dress infringement, unfair competition, and trade secret misappropriation claims, and holding that plaintiff restaurant’s recipes may constitute unique trade secrets); *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4 (S.D.N.Y. 2012) (debating ambiguous terms in head chef’s nondisclosure agreement); *see also* Martha Neil, *Mixing IP with Mmmmm*, AM. B. ASS’N J., May 2007, at 15.

¹²⁶ *See, e.g.*, *Trendspotting: The New Food Artists*, FOOD & WINE MAG., Sept. 2011, <http://www.foodandwine.com/articles/trendspotting-the-new-food-artists> (featuring various food artists under the section titled “Food Artists: Edible Art”).

their personal experiences;¹²⁷ these types of dishes may constitute valuable intellectual property.¹²⁸

As a prominent example, Chef Homaro Cantu was famously—or infamously—known for requiring all visitors to sign a nondisclosure agreement before entering his kitchen at Moto in Chicago, Illinois.¹²⁹ In doing so, Cantu sought to prevent misappropriation of his molecular gastronomy inventions¹³⁰ and restaurant management processes, which he considered proprietary material.¹³¹ Because these techniques and business practices were not publicly available, and because business practices have been upheld as trade secrets in other industries,¹³² courts would likely find that they are protectable forms of trade secrets in the restaurant industry.¹³³

Other chefs have also admitted to using nondisclosure and noncompete agreements in their hiring processes.¹³⁴ However, these types of agreements can be problematic, especially when poorly drafted,¹³⁵ as seen in several restaurant-related disputes.¹³⁶ The following Parts address issues that can arise in litigation over ambiguities in

¹²⁷ See Straus *supra* note 21, at 205. For example, David Chang admits that he created his signature dish by drawing from his Korean cultural background, prior travel experiences, personal experimentation efforts, techniques implemented at his previous restaurants, and veneration for other highly respected chefs. *Id.*

¹²⁸ See generally Krizman, *supra* note 94, at 1013 (analyzing how trademark can be applied to signature dishes); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1482 (1991) (proposing the extension of copyright to food itself through the medium of “edible art”); Straus, *supra* note 21 (arguing for trade dress protection for creative cuisine plating). Issues can arise as to whether the chef creator or the restaurant employer owns the rights to these dishes. For example, the issue in *BLT Restaurant Group* was whether Executive Chef Laurent Tourondel violated his employment contract by using some of the recipes he created while at BLT, as well as other types of “proprietary” information, in opening a competing restaurant. *BLT Rest. Grp.*, 855 F. Supp. 2d at 7–8. This suggests that IP may belong to a party other than the original creator, if prescribed by an employment contract. See *id.*

¹²⁹ Neil, *supra* note 125.

¹³⁰ “Molecular gastronomy” generally refers to incorporating scientific techniques in the food creation process. Cunningham, *supra* note 57, at 25.

¹³¹ Neil, *supra* note 125.

¹³² *Dorset Indus., Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395, 411 (E.D.N.Y. 2012) (finding that information used in running the business is protected under trade secret law, thus upholding the plaintiff’s claim that its business model should be considered a confidential trade secret).

¹³³ For further discussion of protectable trade secrets in the restaurant industry, see *infra* Section III.A.

¹³⁴ Straus, *supra* note 21, at 197 n.82 (discussing Chef Kenneth Boxer’s use of noncompete agreements amongst his employees).

¹³⁵ See, e.g., *Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp.*, 369 N.E.2d 4, 6 (N.Y. 1977) (noting that covenants with “broad-sweeping language” are seen as “baldly restrain[ing] competition”). If the contractual language is not limited to specific geographic or temporal parameters, it will be held as overly broad, and thus, unenforceable.

¹³⁶ See *infra* Sections III.B.2, III.B.3.b.i.

employment contracts, and subsequently propose a solution to the problem.

III. ANALYSIS: BEEF OVER RESTAURANTS' TRADE SECRETS

A. *Trade Secret Deconstructed: The Necessary Ingredients*

A trade secret is confidential information that is valuable both in its subject matter and in its limited public availability, thus providing the owners with a competitive advantage over nonprivy parties.¹³⁷ Trade secret law grants property rights to individuals for inventions and information that they keep secret, regardless of whether patent, copyright, or trademark laws apply.¹³⁸ Trade secret law is also important because it encourages ethical business practices and promotes innovation,¹³⁹ which in turn supports commercial enterprise in society.¹⁴⁰

As implied by the name “trade secrets,” these must be kept somewhat “secret” to receive legal protection. Therefore, trade secret law does not protect information that is considered general public knowledge.¹⁴¹ Furthermore, even if unavailable to the general public, information that is widely accepted or known by industry professionals also remains unprotected under trade secret law.¹⁴² However, absolute secrecy is not required¹⁴³—limited disclosure, particularly among employees, does not necessarily relinquish the information’s trade secret

¹³⁷ See LOBEL, *supra* note 17, at 99 (defining trade secrets as “confidential information vital enough to afford economic advantage”); see also *Softel, Inc. v. Dragon Med. & Sci. Commc’ns, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997); *KatiRoll Co. v. Kati Junction, Inc.*, No. 14-cv-1750 (SAS), 2015 WL 5671881, at *5 (S.D.N.Y. Sept. 25, 2015); *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 15 (App. Div. 1998); *What Is a Trade Secret?*, WIPO, http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm (last visited Mar. 22, 2016) (“Broadly speaking, any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets.”).

¹³⁸ *Peabody v. Norfolk*, 98 Mass. 452, 452 (1868) (“One who invents or discovers, and keeps secret, a process of manufacture, whether proper for a patent or not, has a property therein which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use or disclose it to third persons.”).

¹³⁹ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

¹⁴⁰ *Peabody*, 98 Mass. at 452.

¹⁴¹ RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939) (“The subject matter of a trade secret must be secret.”). Trade secret law does not extend to items that are of public or general knowledge in an industry, or information acquired through selling goods in a particular area. *Fast Food Gourmet, Inc. v. Little Lady Foods, Inc.*, 542 F. Supp. 2d 849 (N.D. Ill. 2008).

¹⁴² *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 722 (7th Cir. 2003).

¹⁴³ RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

status.¹⁴⁴ As such, if an employee were to gain access to confidential information and later disclose it to a third party, his employer could seek legal recourse for misappropriation of trade secrets.¹⁴⁵

In the United States, trade secrets are adjudicated as a matter of state rather than federal law.¹⁴⁶ Most states¹⁴⁷ abide by the Uniform Trade Secrets Act (UTSA).¹⁴⁸ Congress passed the UTSA in 1979 as a remedy for patent holders whose patents were invalidated before the seventeen-year expiration date, thereby exposing the once-patented information to exploitation.¹⁴⁹ The UTSA primarily seeks to unify trade secret laws among several states, as well as provide both equitable¹⁵⁰ and compensatory¹⁵¹ relief for actual or threatened misappropriation of trade secrets.

While most states have adopted the UTSA in some form, New York and Massachusetts are the only two states that have not accepted the UTSA as the governing doctrine.¹⁵² Instead, New York, for example,¹⁵³ adheres to common law principles, which primarily follow

¹⁴⁴ *Id.* (“Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that *only* the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. . . . Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.” (emphasis added)).

¹⁴⁵ *Harry R. Defler Corp. v. Kleeman*, 243 N.Y.S.2d 930, 935 (App. Div. 1963) (“It has been well-established that an employee, who has had entrusted to him confidential information pertaining to the conduct and clientele of his employer’s business which he would not have obtained were it not for his status as a trusted employee and which affords him an advantage over other competitors to whom the information is not available, may not subsequently use that information to further his own ends.”). For further discussion of trade secret misappropriation, see *supra* note 7, Parts I–II, and *infra* Sections III.A, III.B.3.

¹⁴⁶ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) (holding that state trade secret law supersedes the Patent Clause of the United States, thus barring federal law preemption in trade secret law cases).

¹⁴⁷ Currently, forty-eight states have adopted versions of the Uniform Trade Secrets Act (UTSA) to form their own state laws. The few states that do not follow the UTSA’s guidelines (New York and Massachusetts) are governed by common law. *Legislative Fact Sheet—Trade Secrets Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act> (last visited Feb. 3, 2016).

¹⁴⁸ UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 438 (1986).

¹⁴⁹ Legislative history suggests that the UTSA was enacted to remedy the shortage of legal protection available to inventors who disclosed proprietary information prior to their patent’s seventeen-year expiration date. Primarily, the UTSA was adopted to reduce uncertainty regarding the purviews of trade secret law, codify common law, distinguish trade secret from patent law, and increase uniformity among the states with respect to trade secrets. *Id.* at Prefatory Note.

¹⁵⁰ *Id.* § 2(a) (providing injunctive relief as a remedy for trade secret misappropriation).

¹⁵¹ *Id.* § 3(a) (entitling a plaintiff to recover damages for trade secret misappropriation).

¹⁵² See *Legislative Fact Sheet—Trade Secrets Act*, *supra* note 147.

¹⁵³ Massachusetts is also currently governed by common law principles regarding trade secret misappropriation. See, e.g., *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1354 (Mass. 1979) (analyzing trade secret misappropriation) (citing *E.I. du Pont de Nemours*

the Restatement (First) of Torts.¹⁵⁴ Although New York common law and the UTSA are similar, there are also differences between the two doctrines' approach to trade secrets.¹⁵⁵ For instance, the Restatement provides a narrower definition, such that a trade secret is a "process or device for continuous use in the operation of [a] business."¹⁵⁶ Furthermore, while New York law has not established a bright-line rule as to what constitutes a trade secret,¹⁵⁷ courts generally use a six-factor balancing test, which analyzes, among other factors, the extent that the information was known outside of the business; the extent the information was known by inside employees; and the extent of the owner's protective measures.¹⁵⁸ The UTSA, on the other hand, rejects the "continuous use in the operation of [a] business"¹⁵⁹ requirement, and instead broadly defines a trade secret as any type of information

Powder Co. v. Masland, 244 U.S. 100, 102 (1917); Junker v. Plummer, 67 N.E.2d 667, 670 (Mass. 1946)); RESTATEMENT (FIRST) OF TORTS § 757 (AM. LAW INST. 1939); *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 948–949 (1964)). However, this Section of this Note focuses on New York law because New York has a particularly robust restaurant industry where several IP-related lawsuits have arisen, thus illustrating the types of issues that may arise in future litigation. See *supra* note 36.

¹⁵⁴ RESTATEMENT (FIRST) OF TORTS § 757 (AM. LAW INST. 1939); see *AIN Leasing Corp. v. Peat, Marwick, Mitchell & Co.*, 636 N.Y.S.2d 584, 585 (Sup. Ct. 1995) (identifying the Restatement (First) of Torts as the governing body of New York's trade secret law); *Ferranti Elec., Inc. v. Harwood*, 251 N.Y.S.2d 612, 617–18 (Sup. Ct. 1964).

¹⁵⁵ See generally Jeff Danley, Note, *Cadence v. Avant!: The UTSA and California Trade Secret Law*, 19 BERKELEY TECH. L.J. 289 (2004) (discussing the difference between the UTSA and common law).

¹⁵⁶ RESTATEMENT (FIRST) OF TORTS § 757 cmt. b. The Restatement (First) of Torts classifies a trade secret as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . It differs from other secret information in a business (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business.

Id.

¹⁵⁷ See *Ferranti Elec., Inc.*, 251 N.Y.S.2d at 617 (recognizing the difficulty in prescribing an exact definition of a trade secret, and turning to the Restatement (First) of Torts to guide the court's decision).

¹⁵⁸ See *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 15 (App. Div. 1998). The Restatement (First) of Torts identifies the following factors in considering whether information should be considered one's trade secret:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT (FIRST) OF TORTS § 757 cmt. b; see also *AIN Leasing Corp.*, 636 N.Y.S.2d at 586.

¹⁵⁹ RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

that (1) provides an economic value, and (2) has been the subject of reasonable efforts to maintain its secrecy.¹⁶⁰

The UTSA and common law also differ in the way they define misappropriation. To successfully argue a trade secret misappropriation claim under New York common law, plaintiffs must first prove that they possess a valid trade secret.¹⁶¹ Second, they must demonstrate that in using the confidential information, the defendants breached an agreement or confidential relationship between the parties, or otherwise acquired the information through improper means.¹⁶² The Restatement primarily seeks to protect the relationship between the two parties rather than the information itself;¹⁶³ as such, the Restatement focuses on the element of bad faith.¹⁶⁴ On the other hand, the UTSA places more emphasis on the acquisition of the trade secret through improper

¹⁶⁰ Section 1 of the UTSA defines a “trade secret” as follows:

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

UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 438 (1986).

¹⁶¹ Specifically, the Restatement (First) of Torts classifies liability for misappropriation as follows:

One who discloses or uses another’s trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person’s disclosure of it was otherwise a breach of his duty to the other, or (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

RESTATEMENT (FIRST) OF TORTS § 757.

¹⁶² *Id.* § 757(b); *see also* KatiRoll Co. v. Kati Junction, Inc., No. 14-cv-1750 (SAS), 2015 WL 5671881, at *5 (S.D.N.Y. Sept. 25, 2015) (“To state a claim for misappropriation of trade secrets under New York law, a plaintiff must demonstrate ‘(1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.’” (quoting Faiveley Transp. Malmö AB v. Wabtec Corp., 559 F.3d 110, 117 (2d Cir. 2009)). For further discussion of the definition of “improper means,” *see infra* note 169.

¹⁶³ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. a (AM. LAW INST. 1995) (“The owner of a trade secret does not have an exclusive right to possession or use of the secret information. Protection is available only against a wrongful acquisition, use, or disclosure of the trade secret.”); *see also* Danley, *supra* note 155, at 291.

¹⁶⁴ *KatiRoll*, 2015 WL 5671881, at *5; *see also* Ritani, LLC v. Aghjayan, 880 F. Supp. 2d 425, 450–51 (S.D.N.Y. 2012) (using evidence of defendants’ scheme to collect jewelry store owner’s trade secrets to find evidence of bad faith, and thus, misappropriation of trade secrets).

means.¹⁶⁵ For this reason, under the UTSA, a party can be liable for trade secret misappropriation as soon as that party knows or has reason to know that the learned information is improper.¹⁶⁶ Because New York and Massachusetts are slated as “2016 Introductions” to the UTSA,¹⁶⁷ it seems that all fifty states will soon adopt the UTSA’s broader definition of both trade secrets and trade secret misappropriation.¹⁶⁸

It is important to note that trade secret protection does not extend to independent discovery or reverse engineering of publicly available information.¹⁶⁹ These methods are considered lawful means of information gathering, and do not give rise to a cause of action under trade secret law.¹⁷⁰ Therefore, competitors theoretically may reverse engineer dishes, which would leave the original creator without any legal recourse. However, reverse engineering can be time consuming,¹⁷¹

¹⁶⁵ Under the UTSA, “misappropriation” is defined as follows:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

UNIF. TRADE SECRETS ACT § 1(2) (alteration in original).

¹⁶⁶ *Id.*; see also Danley, *supra* note 155, at 292.

¹⁶⁷ See *Legislative Fact Sheet—Trade Secrets Act*, *supra* note 147.

¹⁶⁸ See *supra* notes 156–66 and accompanying text.

¹⁶⁹ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974) (“A trade secret law, however, does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering . . .”). The definition of misappropriation focuses on acquisition through *improper* means, because acquisition through proper means—such as independent invention, reverse engineering, or observation through public display—is nonactionable under the UTSA. UNIF. TRADE SECRETS ACT § 1 cmt. Specifically, “[i]mproper means’ includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” *Id.* § 1(1); see also Danley, *supra* note 155, at 291–92.

¹⁷⁰ See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160–61 (1989) (striking down a Florida statute that prohibited reverse engineering, as the courts found the statute to be an unlawful hindrance of fair competition); *Roessel Cine Photo Tech Inc. v. Kapsalis*, No. 109251/96, 1997 WL 377981, at *1, *4 (N.Y. Sup. Ct. May 7, 1997) (recognizing the right of the public to copy unpatented designer goods in the absence of deception or consumer confusion).

¹⁷¹ Todd Wilbur, author of *Top Secret Recipes* and TV host of *Top Secret Recipe*, describes the process he uses to reverse engineer dishes, including cutting the food up into tiny pieces, smearing the food on a plate, using a microscope to examine the ingredients, and consulting with a food scientist. Joyce Slaton, *6 Steps to Reverse-Engineer Any Restaurant Dish*, CHOWHOUND (Oct. 19, 2011), <http://www.chowhound.com/food-news/93995/how-to-reverse-engineer-any-restaurant-dish>.

costly,¹⁷² and may not truly capture the essence of the original dish.¹⁷³ Thus, it is unlikely that reverse engineering would pose a conceivable threat to the restaurant industry.

On the other hand, employees who have left one restaurant to join the ranks of a competing restaurant do threaten the industry. The next Section discusses situations where employees received first-hand exposure to confidential information, and subsequently used this information to compete against former employers.

B. *Contract Interpretation Theory: Serving Up Trouble for Trade Secret*

1. Propensities to Construe the Contract Against the Drafter

Fundamentally, contracts are interpreted in light of the original intent of the parties,¹⁷⁴ and terms are given their plain meaning, so long as the language is facially unambiguous.¹⁷⁵ When disputes arise over the language of a contract, courts can decide as a matter of law whether the contract is ambiguous.¹⁷⁶ In these situations, courts may incorporate extrinsic evidence to determine the intent of the parties.¹⁷⁷ However, when extrinsic evidence fails to shed light on the parties' intent, courts may next turn to the doctrine of *contra proferentem*—interpreting the contract against the drafting party.¹⁷⁸

¹⁷² *Id.* (identifying one method of reverse engineering that requires cooking the dish “over and over again,” which can be a “very expensive process . . . because this is where you just eat up ingredients” (quoting Todd Wilbur)).

¹⁷³ *See id.* (“In the end, you’ve either copied the dish or died trying.”).

¹⁷⁴ *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002); *Slatt v. Slatt*, 477 N.E.2d 1099, 1100 (N.Y. 1985).

¹⁷⁵ *Greenfield*, 780 N.E.2d at 170 (“The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent. . . . Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”); *R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002).

¹⁷⁶ *See Nappy v. Nappy*, 836 N.Y.S.2d 256, 257 (App. Div. 2007) (defining a contract as ambiguous when the agreement on its face is reasonably susceptible of more than one interpretation).

¹⁷⁷ *Greenfield*, 780 N.E.2d at 170 (“Extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.”).

¹⁷⁸ *See Taylor v. U.S. Cas. Co.*, 199 N.E. 620, 622 (N.Y. 1936) (“[T]he one who draws the contract and offers it should have the ambiguity resolved against him.”). The Supreme Court also upheld this doctrine, reasoning that “as between two reasonable and practical constructions of an ambiguous contractual provision . . . the provision should be construed less favorably to that party which selected the contractual language.” *United States v. Seckinger*, 397 U.S. 203, 216 (1970); *accord Naftalin v. John Wood Co.*, 116 N.W.2d 91, 97 (Minn. 1962) (“It is a well-established rule of construction that where a contract is open to two interpretations, the one more favorable to the party who did not draft the instrument should be adopted in the

As a matter of policy, courts implement *contra proferentem* to discourage unlawful drafting behavior and promote proper conduct between parties. Specifically, courts are likely to impose sanctions on the drafting party for using ambiguous language in the contract;¹⁷⁹ this encourages drafters to improve contractual forms,¹⁸⁰ and deters drafters from deceiving the nondrafting party through hidden traps in the agreement.¹⁸¹ Courts are also more likely to interpret the contract against the drafting party who has the stronger bargaining position,¹⁸² which is usually the employer rather than the employee.¹⁸³ Ultimately, contract interpretation plays an integral role in the courts' evaluation of employment agreements, and affects whether noncompetition and nondisclosure provisions adequately protect intellectual property.

absence of a clear showing that a contrary meaning was intended by the parties at the time of its execution.”); *Lemon v. Gressman*, No. C7-98-2119, 1999 WL 451165, at *2 (Minn. Ct. App. July 6, 1999) (“An ambiguous contract is construed against the party who drafted it absent a clear showing that it should be interpreted to the contrary.”); *Cheng v. Modansky Leasing Co., Inc.*, 539 N.E.2d 570, 573 (N.Y. 1989); 151 W. Assocs. v. Printsiplis Fabric Corp., 460 N.E.2d 1344, 1345 (N.Y. 1984) (“It has long been the rule that ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it.”); RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

¹⁷⁹ See *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 274 S.E.2d 423, 426 (S.C. 1981) (supporting the principle of holding the drafting party responsible for the ambiguity and reasoning that “[a]mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage” (quoting 17A C.J.S. *Contracts* § 324)).

¹⁸⁰ *Horn & Assocs., Inc. v. United States*, 104 Fed. Cl. 121, 132–33 (2012).

¹⁸¹ *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a.

¹⁸² See *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1226 (N.Y. 1999); see also *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1207 (2d Cir. 1970); RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a.

¹⁸³ For example, courts analyze the potential for abuse of bargaining power between employers and employees, especially with respect to restrictive covenants. See *BDO Seidman*, 712 N.E.2d at 1226. Specifically, the *BDO Seidman* court addresses one of the criticisms of allowing overbroad restrictive covenants, which “fear[s] that employers will use their superior bargaining position to impose unreasonable anti-competitive restrictions, uninhibited by the risk that a court will void the entire agreement, leaving the employee free of any restraint.” *Id.* However, the court proceeds to adopt a more flexible stance, which holds that “if the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing, partial enforcement [of the restrictive covenant] may be justified.” *Id.*

2. The Negative Influence of Contract Construction on IP Protection

Because judicial policy favors *contra proferentem*, the existence of a nondisclosure or noncompete agreement does not ensure automatic protection of an employer's IP. For example, if a dispute arises over the particular terms in an employment contract,¹⁸⁴ *contra proferentem* dictates that unless the intent of the parties was entirely clear, the contract should be construed against the drafting party—likely, the employer.¹⁸⁵ Additionally, courts are more likely to enforce *contra proferentem* to protect employees, even if this means sacrificing the employer's IP protection.¹⁸⁶ For example, in *Ecolab, Inc. v. Gartland*,¹⁸⁷ the court invalidated a contract's noncompete provision due to its ambiguity, despite acknowledging that the provision was intended to safeguard the employer's intellectual property.¹⁸⁸ This case thus illustrates how noncompete agreements may not completely shield an employer's IP from misappropriation.

In a recent restaurant-related example, *BLT Restaurant Group v. Tourondel*,¹⁸⁹ the court held that the contract's language regarding "Confidential Information"¹⁹⁰ and "Proprietary Material"¹⁹¹ was

¹⁸⁴ See, e.g., *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4, 8–9 (S.D.N.Y. 2012).

¹⁸⁵ See *supra* Section III.B.

¹⁸⁶ See *supra* Section II.C.1.

¹⁸⁷ 537 N.W.2d 291, 296 (Minn. Ct. App. 1995).

¹⁸⁸ See *id.* at 296 (recognizing that although the intent of the agreement was to prevent the plaintiff's employees from "using the training, confidential information, and good will developed while at [the plaintiff's company] to compete directly with [the plaintiff]," this intent was insufficient to uphold the ambiguous restrictive covenant contained in the employee's contract).

¹⁸⁹ 855 F. Supp. 2d at 7. In this case, BLT Restaurant Group sued BLT's former head chef, Laurent Tourondel, for allegedly breaching his employment contract. BLT brought claims against Tourondel for, *inter alia*, breach of contract, unfair competition under the Lanham Act, "deceptive acts and practices" in violation of New York General Business Law, unjust enrichment, and breach of fiduciary duty. *Id.* at 8–9.

¹⁹⁰ *Id.* at 23. Specifically, section 8.11(a) of Tourondel's contract regarding "Confidential Information" included the following terms:

Each Employee Member . . . has and will have access to and participate in the development of or be acquainted with confidential or proprietary information and trade secrets related to the business of the Company . . . , including but not limited to (i) business plans, operating plans, marketing plans, bid strategies, bid proposals, financial reports, operating data, budgets, wage and salary rates, pricing strategies and information, terms of agreements with suppliers or customers and others, customer lists, formulas, patents, devices, software programs, reports, correspondence, tapes, discs, tangible property and specifications owned by or used in the Companies ['] businesses, operating strengths and weaknesses of the Companies' Members, shareholders, officers, directors, employees, agents, suppliers and customers, and/or (ii) information pertaining to future developments such as, but not limited to, research and development, future marketing, distribution, delivery or merchandising plans or ideas, and potential new distribution or business

ambiguous,¹⁹² and ordered further proceedings to resolve whether the employee (Chef Laurent Tourondel) was free to use this type of information.¹⁹³ Although Tourondel's contract contained nondisclosure and noncompete agreements, inclusion of these provisions did not guarantee a victory for the employer.

In sum, employment contracts do not provide complete legal safeguards for IP in the restaurant industry. Noncompetition agreements are often disfavored as a matter of public policy,¹⁹⁴ and thus must meet a heavy burden of reasonableness to be upheld.¹⁹⁵ Furthermore, nondisclosure agreements, while beneficial in some respects, also present their own shortcomings. On the one hand, nondisclosure agreements can cut in favor of the employer because they give notice to an employee that a trade secret exists; therefore, courts are more likely to find in favor of the employer in misappropriation cases.¹⁹⁶

locations, and (iii) other tangible and intangible property, which is used in the business and operations of the Companies, but not made publicly available (the "Confidential Information").

Id. (alterations in original) (quoting § 8.11(a) of the contract).

¹⁹¹ *Id.* Section 8.11(b) of the contract defined "Proprietary Materials" as follows:

All discoveries made, inventions created, and all ideas, concepts, designs, formulas, proposals, projects, programs, products, processes, systems, techniques, and improvements of whatever kind related to the Company's business, products or research and development, whether or not patentable or registrable under copyright or similar laws, conceived or developed by the [Employee Manager] directly or indirectly, alone or jointly with others, in each case, in the course of holding Membership Interests of the Company ("Proprietary Materials"), shall be and remain the sole and exclusive property of the Company. . . . [T]he [Employee Member] hereby assigns to the Company all of [that person's] right, title and interest in and to any such Proprietary Materials. The [Employee Member] further acknowledges and agrees that all original works of authorship which are made by him (solely or jointly with others) within the scope and during the period of his holding Membership Interests of the Company and which are protectible [sic] by copyright are "works made for hire," as that term is defined in the U.S. Copyright Act.

Id. (alterations in original) (quoting § 8.11(b)(ii) of the contract).

¹⁹² The dispute concerned the interpretation of sections 8.11(a)–(b) with respect to a final provision outlined in section 8.11(c), which stated that "[t]he [Employee Member] shall not, directly or indirectly, disclose, use or make known for his or another's benefit any Confidential Information of the Companies or use such Confidential Information in any way except in the best interests of the Companies in the performance of [his] duties under this Agreement." *Id.* at 24 (alterations in original) (quoting § 8.11(c)).

¹⁹³ See *id.* at 18, 25–28. Specifically, the defendants argued that the "Proprietary Material" section simply provided that this type of proprietary information was the property of BLT, but did not explicitly prevent Tourondel's use of such material. *Id.* at 25.

¹⁹⁴ See *supra* notes 113–14 and accompanying text.

¹⁹⁵ See *supra* note 116 and accompanying text.

¹⁹⁶ Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc., 732 F. Supp. 370, 377 (S.D.N.Y. 1989); Aries Info. Sys., Inc. v. Pac. Mgmt. Sys. Corp., 366 N.W.2d 366, 369 (Minn. Ct. App. 1985).

On the other hand, express nondisclosure agreements only apply to signatories of the contract,¹⁹⁷ and as such, they do not prevent nonsignatories from disseminating proprietary information. Additionally, poorly drafted nondisclosure agreements are likely to be interpreted in favor of the employee,¹⁹⁸ which may leave the employer's property exposed to dissemination. Therefore, something else is needed to ensure intellectual property protection in the restaurant industry. Enter, trade secret law.

3. Restaurant Case Law Involving Trade Secrets and Contracts

The restaurant industry is no stranger to litigation involving trade secret misappropriation claims.¹⁹⁹ In some cases, restaurants have received trade secret protection over various types of proprietary information, such as cooking techniques,²⁰⁰ supplier lists,²⁰¹ operational manuals,²⁰² nonpublic marketing research,²⁰³ and architectural plans—including kitchen design.²⁰⁴ Courts have also recognized protectable

¹⁹⁷ See, e.g., *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150–51 (S.D.N.Y. 1989) (holding that a corporation could not be held liable for franchisor's violation of nondisclosure agreement that was signed before the corporation purchased franchisor's assets); Caroline M. Reebbs, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 41, 57 (2011).

¹⁹⁸ See, e.g., *T.G.I. Friday's, Inc. v. Int'l Rest. Grp., Inc.*, 569 F.2d 895 (5th Cir. 1978) (holding that because the contractual provisions were ambiguous, and because the agreement prohibited use of all other weekdays except for "Saturday," the contract would be construed against the drafting party; therefore, the defendant was allowed to use the word "Saturday" in naming its competitor restaurant).

¹⁹⁹ See generally *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4 (S.D.N.Y. 2012) (evaluating a restaurateur's trade secret infringement claims, along with unfair competition, trademark infringement, trade dress infringement, and false designation of origin, among others); *Vasquez v. Ybarra*, 150 F. Supp. 2d 1157, 1158–59 (D. Kan. 2001) (addressing buyer of Mexican restaurant's trade secret claims in addition to copyright, trademark, and trade dress claims); *205 Corp. v. Brandow* 517 N.W.2d 548, 551 (Iowa 1994) (incorporating trade secret claim into breach of duty claim).

²⁰⁰ *Fast Food Gourmet, Inc. v. Little Lady Foods, Inc.*, 542 F. Supp. 2d 849 (N.D. Ill. 2008) (finding that questions of material fact existed as to whether plaintiff's pizza production process constituted a trade secret, thus denying defendants' motion for summary judgment).

²⁰¹ *Morton v. Rank Am., Inc.*, 812 F. Supp. 1062, 1073 (C.D. Cal. 1993).

²⁰² *McDonald's Corp. v. Moore*, 243 F. Supp. 255, 258 (S.D. Ala. 1965) ("The Court finds that the defendants' improper acquisition and copying of the operational manual was such misconduct that it amounts to unfair competition. . . . 'Even where it cannot be said that the parties stand in confidential relations, improper acquisition of another's business information or trade secrets subjects the perpetrator to liability in damages.'" (quoting *Seismograph Serv. Corp. v. Offshore Raydist, Inc.*, 135 F. Supp. 342, 354 (E.D. La. 1955)).

²⁰³ *BLT Rest. Grp.*, 855 F. Supp. 2d at 27.

²⁰⁴ *Taco Cabana Int'l Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991) (recognizing that architectural plans and kitchen equipment layouts and design drawings may be protected under trade secret law if "sufficient and continuous secrecy [is] attached to these particular plans and drawings to preserve their status as trade secrets").

trade secrets where the restaurateur spent considerable time and effort in developing confidential recipes, as demonstrated by the cases below.

a. Trade Secrets Upheld

i. *KatiRoll*

Recently, the District Court for the Southern District of New York held in favor of a restaurant employer by denying former employees' motion to dismiss²⁰⁵ and subsequent motion for summary judgment²⁰⁶ on trademark and trade dress infringement claims, as well as trade secret misappropriation and unfair competition claims.²⁰⁷ Plaintiff KatiRoll filed a complaint in March 2014²⁰⁸ after a competing restaurant, Kati Junction, opened three blocks away from a KatiRoll location in February 2014.²⁰⁹ KatiRoll alleged, *inter alia*, that seven former employees misappropriated KatiRoll's secret recipes for sauces, fillings, and breads after they began working for competitor Kati Junction.²¹⁰ The court noted that while trade secret claims for general Indian cooking techniques or general recipes would fail, KatiRoll's recipes may constitute trade secrets if the specific ingredients and proportions were unique to KatiRoll.²¹¹ Furthermore, the court held that the proportions themselves could render the recipes as trade secrets, even if the individual ingredients were in the public domain.²¹² Thus, in finding genuine issues of material fact regarding the uniqueness of KatiRoll's recipes, as well as issues as to whether the defendants used these recipes in creating competitor Kati Junction's menu, the court denied the defendants' motion for summary judgment for trade secret misappropriation.²¹³

ii. *205 Corp. v. Brandow*

In *205 Corp. v. Brandow*,²¹⁴ the Iowa Supreme Court upheld the trial court's jury verdict, which awarded damages and a permanent

²⁰⁵ *KatiRoll Co., Inc. v. Kati Junction, Inc. (KatiRoll I)*, 33 F. Supp. 3d 359 (S.D.N.Y. 2014).

²⁰⁶ *KatiRoll Co., Inc. v. Kati Junction, Inc. (KatiRoll II)*, No. 14-cv-1750 (SAS), 2015 WL 5671881, at *1 (S.D.N.Y. Sept. 25, 2015).

²⁰⁷ *Id.*

²⁰⁸ Complaint, *KatiRoll II*, No.14-cv-1750 (SAS), 2014 WL 986833.

²⁰⁹ *KatiRoll I*, 33 F. Supp. 3d at 364.

²¹⁰ *Id.* at 372.

²¹¹ *KatiRoll II*, 2015 WL 5671881, at *7 ("If KatiRoll were arguing that the general recipes for its various foods were protected trade secrets, KatiRoll would surely fail—as those general recipes are readily available online. . . . This does not address the uniqueness of the specific ingredient and proportion lists provided by KatiRoll, which may well be unique trade secrets.").

²¹² *Id.*

²¹³ *Id.* at *8.

²¹⁴ 517 N.W.2d 548 (Iowa 1994).

injunction to the plaintiff restaurant owner after the restaurant's former manager disclosed secret pizza sauce, pizza crust, and "grinder"²¹⁵ sandwich recipes to his new employer.²¹⁶ The court found that 205 Corporation presented sufficient evidence of the confidential recipes' economic value,²¹⁷ as well as sufficient evidence that the restaurant had taken adequate measures to maintain the recipes' secrecy.²¹⁸ Therefore, these recipes constituted protectable trade secrets.²¹⁹ The court considered various testimonies describing the difficult process that a nonemployee would have to undertake to ascertain the recipes' contents,²²⁰ as well as numerous awards the restaurant won for its cuisine, and held that the recipes were independently economically valuable.²²¹ Furthermore, the court found that limited disclosure of some of the recipes was necessary to their preparation;²²² therefore, the Iowa Supreme Court agreed with the lower court's ruling that the restaurant had taken reasonable steps to ensure the recipes' confidentiality.²²³

b. Trade Secrets Denied

i. *Vasquez v. Ybarra*

Other courts, however, have held that ambiguities in contractual agreements, or lack of such agreements, prevent the restaurant from seeking relief for trade secret misappropriation, even though valid trade secrets may have been protected had there been a nonambiguous agreement. For example, the *Vasquez*²²⁴ court found that the original restaurant's recipes, preparation methods, supplies and supplier information, as well as information regarding the clients' needs and wants, could constitute legitimate trade secrets.²²⁵ However, the court ultimately rejected the plaintiffs' trade secret misappropriation claims because the restaurant failed to provide the employees with a restrictive

²¹⁵ A "grinder" is a term used mainly in New England to describe a type of sandwich, also called a "sub" or "hoagie" in other parts of the United States. Sam Dean, *The Origin of Hoagies, Grinders, Subs, Heroes, and Spuckies*, BON APPÉTIT (Feb. 1, 2013), <http://www.bonappetit.com/test-kitchen/ingredients/article/the-origin-of-hoagies-grinders-subs-heroes-and-spuckies>.

²¹⁶ *205 Corp.*, 517 N.W.2d 548.

²¹⁷ *Id.* at 550.

²¹⁸ *Id.* at 550–51.

²¹⁹ *See id.*

²²⁰ *Id.* at 550 (citing to testimony of both the restaurant's owner and an expert witness from the Culinary Institute of America).

²²¹ *Id.*

²²² *Id.* at 551.

²²³ *Id.*

²²⁴ 150 F. Supp. 2d 1157 (D. Kan. 2001).

²²⁵ *Id.* at 1172.

covenant, confidentiality agreement, or noncompete agreement.²²⁶ The *Vasquez* court distinguished its facts from those in *Koch Engineering Co. v. Faulconer*.²²⁷ In *Koch Engineering*, employees were held liable for trade secret misappropriation because they had signed nondisclosure agreements before they began working, and information was clearly marked “confidential.”²²⁸ The *Vasquez* plaintiffs, on the other hand, never required their employees to sign an employment contract, and only attempted to notify the employees of the existence of trade secrets after the employees had left.²²⁹ Therefore, the *Vasquez* court held that the plaintiffs failed to demonstrate the “improper means” element necessary to successfully argue trade secret misappropriation.²³⁰

The *Vasquez* case demonstrates how courts have applied contract law to deny property rights over restaurants’ trade secrets. However, because restaurants frequently rely on proprietary information to maintain their competitive edge, this court should have analyzed the facts broadly under trade secret law, rather than narrowly under contract law. If the *Vasquez* court had given more weight to the existence of trade secrets instead of the plaintiffs’ failure to enter into a contract with their employees, the plaintiffs would have had a better chance of protecting their IP.

IV. THE SOLUTION: PROTECTION A LA²³¹ TRADE SECRET

A. *Proposing Trade Secret Over Contract Reliance in the Restaurant Industry: A Recipe for Success*

Trade secret law is particularly well suited to protect employers’ intellectual property in the restaurant industry. As such, courts should implement trade secrecy principles when analyzing employment disputes in this field. After all, the UTSA was created to provide a solution to the dearth of legal protection available to innovators who lost their patent rights prior to the seventeen-year time limit.²³²

²²⁶ *Id.*

²²⁷ 610 P.2d 1094 (Kan. 1980).

²²⁸ *Vasquez*, 150 F. Supp. 2d at 1172–73 (“The employer, Koch, even circulated a conflict of interest memorandum stating specifically that the employees’ duty to not disclose confidential information was an express condition of continued employment. The agreement between the employer and employee was obviously a key component of the claim.” (citation omitted)).

²²⁹ *Id.*

²³⁰ *Id.* at 1172.

²³¹ The French terms “a la,” “au,” and “aux,” mean “served with” or “served in the manner of.” *Food Lover’s Glossary of Culinary Terms*, CULINARY SOFTWARE SERVICES, <http://www.culinarysoftware.com/glossA.htm> (last visited Feb. 17, 2016).

²³² See *supra* note 149 and accompanying text.

Therefore, at least in the legislative context, trade secret law has been recognized as a means to safeguard information that would be unprotected under other forms of IP law.²³³

Empirical data suggests that trade secrets are especially important tools for businesses in protecting their IP.²³⁴ Trade secrecy is often used to retain control over proprietary information in industries that experience high employee mobility.²³⁵ This is because employers risk losing valuable information once employees terminate their employment, which can be especially costly if the employees helped create or were intimately familiar with the details of the business's secrets.²³⁶ Employers in the restaurant industry face this type of threat because employee turnover is frequent,²³⁷ and individuals customarily move from kitchen to kitchen in their culinary trainings (i.e., *staging*).²³⁸ As such, trade secret law provides an appropriate remedy to limit employee disclosure of a restaurant's proprietary material.

Trade secrecy has been used to protect information acquired through expenditure of time, money, and resources, which ultimately constitute part of a business's goodwill.²³⁹ Similarly, restaurants put forth significant efforts to develop their own goodwill, such as through aggregating customer lists and consumer data.²⁴⁰ This type of

²³³ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 482 (1974) ("As we noted earlier, trade secret law protects items which would not be proper subjects for consideration for patent protection under 35 U.S.C. § 101.").

²³⁴ See Menell, *supra* note 11, at 151.

²³⁵ See Andrew J. Kopko, Note, *Protection of Trade Secrets in the Employer-Employee Relationship*, 39 NOTRE DAME L. REV. 200, 200 (1964) ("In recent years, the trend toward greater mobility, especially in changing jobs, has created a perplexing problem for the American businessman. To survive competitively in our increasingly complex economy, it is almost essential for each business to develop its own 'bag of tricks' which gives it a competitive advantage. To protect this 'bag of tricks' the businessman usually must rely [on] . . . the law of trade secrets. . . . when [he] does not wish to secure a patent or when a patent is unobtainable." (footnote omitted)).

²³⁶ See *id.* ("[An employer] faces the possible loss of his trade secrets each time a trusted employee who either has helped develop, or has dealt with the employer's trade secrets in the regular course of business, terminates his employment.").

²³⁷ See Linda Ray, *Employee Turnover Statistics in Restaurants*, HOUS. CHRON., <http://smallbusiness.chron.com/employee-turnover-statistics-restaurants-16744.html> (last visited Nov. 29, 2014); see also Alicia Kelso, *How One QSR Maintains a Low Employee Turnover Rate*, QSRWEB.COM (Sept. 7, 2012), <http://www.qsrweb.com/articles/how-one-qsr-maintains-a-low-employee-turnover-rate>; Josh Sanburn, *Fast Food Strikes: Unable to Unionize, Workers Borrow Tactics from 'Occupy'*, TIME (July 30, 2013), <http://business.time.com/2013/07/30/fast-food-strikes-unable-to-unionize-workers-borrow-tactics-from-occupy> (proposing that three quarters of the industry workers are completely new each year).

²³⁸ See *supra* Section II.A.

²³⁹ *Town & Country House & Home Serv., Inc. v. Newbery*, 147 N.E.2d 724, 726 (N.Y. 1958).

²⁴⁰ See *supra* note 28 and accompanying text.

information has been recognized as a trade secret in other fields,²⁴¹ and thus, it should receive comparable treatment in restaurant-related litigation. Restaurants also depend on other types of industry-specific IP, which have received judicial protection under trade secret law. For example, while recipes are not subject to patent²⁴² or copyright,²⁴³ courts have afforded IP protection to recipes under trade secrecy principles.²⁴⁴

Restaurants need to distinguish themselves in the marketplace, especially in areas where rivalry among competing restaurants is high.²⁴⁵ To do so, restaurants rely on proprietary information, whether it is in the form of secret recipes,²⁴⁶ novel cooking techniques,²⁴⁷ tailored menus,²⁴⁸ or a combination of elements that make a restaurant unique. However, as demonstrated by previous case law,²⁴⁹ insiders can easily disseminate this information to competitors. Nonetheless, trade secret law directly addresses the threat posed by this type of unfair competition by seeking to deter unlawful employee disclosure. First, by definition, a

²⁴¹ See, e.g., *Webcraft Techs., Inc. v. McCaw*, 674 F. Supp. 1039, 1046 (S.D.N.Y. 1987) (finding that a printing material manufacturer's customer list constituted a valuable trade secret because the manufacture expended "enormous time and effort" to develop it); *Town & Country*, 147 N.E.2d at 726–28 (holding that a cleaning service's customer list was a protectable trade secret and enjoining former employees from further soliciting cleaning service's customers).

²⁴² See *supra* note 74 and accompanying text.

²⁴³ See *supra* notes 83–84 and accompanying text.

²⁴⁴ See *supra* Section III.B.3.a (giving examples of cases where recipes were afforded trade secret protection); *accord* *Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997) (recognizing formulas as protectable under trade secret law, which supports the inference that recipes can be considered formulas as well).

²⁴⁵ For example, success in New York's restaurant scene is exceptionally difficult to achieve, especially because of the high levels of competition. See, e.g., Sierra Tishgart, *Why It's Become More Tempting than Ever for Chefs to Leave New York*, N.Y. MAG.: GRUBSTREET (June 25, 2014, 2:45 PM), <http://www.grubstreet.com/2014/06/chefs-discuss-appeal-of-opening-outside-new-york.html> ("Any chef who dreamed of seeing their name emblazoned on a cookbook cover knew that doing so meant first making that name in New York. Chefs who dreamed of making it big—really big—had to build a reputation for him or herself in NYC."); see also Rebecca Flint Marx, *Chefs Move Beyond New York*, N.Y. TIMES (July 28, 2014), <http://www.nytimes.com/2014/07/30/dining/ny-chefs-discover-america.html> ("[M]aking it in New York was viewed as the ultimate measure of success . . ."); Sierra Tishgart, *Always Sunny: How Big-Name New York Chefs Found a New Platform For Success in Philly*, N.Y. MAG.: GRUBSTREET (Jan. 21, 2014, 12:25 PM), <http://www.grubstreet.com/2014/01/serpico-eli-kulp-new-york-philly.html> (describing New York City's restaurant environment as "cutthroat").

²⁴⁶ See, e.g., Straus *supra* note 21, at 205 (analyzing Executive Chef David Chang's recipe creating process that draws from his cultural heritage and personal experiences); Sauchelli, Fenton, & Eustachewich, *supra* note 36 (discussing two restaurants' dispute over a secret meatball recipe).

²⁴⁷ See *supra* note 131 and accompanying text (describing Chef Homaro Cantu's desire to protect his molecular gastronomy inventions).

²⁴⁸ See Kooser, *supra* note 28 (analyzing the ways restaurants use consumer data to restructure their business practices).

²⁴⁹ See *supra* Section III.B.3.

“trade secret” is information unknown by *competitors*,²⁵⁰ thus speaking to the law’s concern with competition. Second, individuals can only be liable for trade secret misappropriation if confidential information is disclosed in bad faith.²⁵¹ Therefore, trade secrecy provides legal recourse for restaurant owners or chefs against insiders who reveal their competitive secrets.

Trade secret law is a natural choice of law in disputes among restaurant employers and employees; it is often analyzed in other industries where disputes arise among parties who had a prior relationship, especially because one party divulged the secret information belonging to the other party.²⁵² Courts will frequently look to an employee’s duty of loyalty to determine whether the employee disclosed the proprietary information in bad faith,²⁵³ thus constituting trade secret misappropriation. Trade secret misappropriation does not require an express agreement to find misconduct.²⁵⁴ Instead, courts can look to the totality of the circumstances to determine whether the employee knew or should have known that the information was intended to remain secret.²⁵⁵ This is particularly beneficial to the restaurant industry, as formal employment agreements are often absent or lacking.²⁵⁶

Trade secret law seeks to encourage invention and innovation,²⁵⁷ which are necessary to a restaurant’s success.²⁵⁸ For the foregoing

²⁵⁰ See UNIF. TRADE SECRETS ACT § 1(4)(i) (amended 1985), 14 U.L.A. 438 (1986) (“Trade secret’ means information . . . that (i) derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use”); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995) (“A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”).

²⁵¹ See *supra* note 165 and accompanying text.

²⁵² See *supra* Section III.A.

²⁵³ RESTATEMENT (SECOND) OF AGENCY § 396(b) (AM. LAW INST. 1958); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. b (recognizing a former employee’s duty of loyalty includes nondisclosure of the employer’s confidential information to others).

²⁵⁴ *Omega Optical, Inc. v. Chroma Tech. Corp.*, 800 A.2d 1064, 1066 (Vt. 2002).

²⁵⁵ *Id.* (“Whether an employee knows or should know certain information obtained from the employer is confidential can be implied from the totality of the circumstances; no explicit notice to the employee is necessarily required.”).

²⁵⁶ See *supra* Section II.C.2.

²⁵⁷ See WIPO, *supra* note 15, at 3.

²⁵⁸ See Stan Mack, *How to Gain Competitive Advantage in the Restaurant Business*, HOUS. CHRON., <http://smallbusiness.chron.com/gain-competitive-advantage-restaurant-business-24162.html> (last visited Feb. 16, 2016) (“The restaurant industry is highly competitive. Unless you have a star chef or a novel cuisine, chances are you will have trouble standing out from the crowd.”); Laura Woods, *How to Gain a Competitive Advantage as a Restaurant Owner*, GINSBERG’S (Dec. 2013), <http://www.ginsbergs.com/owner-center/food-service-management/gain-competitive-advantage-restaurant-owner> (“It’s important to constantly come up with

reasons, IP in the restaurant industry is best protected by trade secret law. Given the benefits that IP protection provides through encouraging growth and creativity, and because trade secret law is well suited to address the unique characteristics of the industry, courts should interpret the facts of restaurant-related litigation pursuant to trade secret theory, and imply a duty of confidentiality even in the absence of an express agreement.

B. *Critiques: Reviews Given by Tough Critics*

1. Concerns Over the Overregulation of Human Capital

One counterargument to this proposed solution is that trade secrets can overregulate cognitive capital.²⁵⁹ Thus, critics contend that trade secrets can negatively affect growth and improvement rather than promote creativity through IP protection.²⁶⁰ However, given the current dearth of IP protection available to restaurants, the industry may never receive property rights in the absence of trade secret law.²⁶¹ Arguably, this can have an even greater negative effect on innovation than potential overregulation.²⁶²

This Note proposes that trade secret law should guide the courts' reasoning in litigation over a former employee's misuse of proprietary information; it does not suggest that all restaurant employers should require employees to sign nondisclosure agreements. In other words, courts should look to the facts of each case to determine whether a protectable trade secret existed between the parties, and whether that secret was disclosed in bad faith, instead of focusing on the

fresh ideas to gain a competitive advantage over other restaurants competing for business from the same customers.”).

²⁵⁹ See generally Lobel, *supra* note 124, at 806 (“[W]hile trade secret law, like other pillars of IP, is designed to promote innovation, it functions to regulate the relationship between firms and individuals.”); Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853 (2002) (critiquing the criminalization of trade secrets for its likelihood of decreasing employee mobility).

²⁶⁰ See Lobel, *supra* note 124, at 793 (“[T]he rise in cognitive controls should be understood as the Third Enclosure Movement, turning human capital and intangibles of the mind—knowledge, experience, skill, creativity, and network—into property, with detrimental effects on the public domain.”).

²⁶¹ See generally *supra* Section II.C.

²⁶² See Lara J. Glasgow & Alicia N. Vaz, Foreword, *Beyond Microsoft: Antitrust, Technology, and Intellectual Property*, 16 BERKELEY TECH. L.J. 525, 525 (2001); see also *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (“One of the primary goals of intellectual property law is to maximize creative expression. . . . Underprotection of intellectual property reduces the incentive to create . . .”).

nondisclosure agreement—or lack thereof. This would create a greater incentive for employees to act in good faith and customize their learned techniques with their own creativity, thus fulfilling the ultimate goal of the apprenticeship experience. Therefore, the courts' application of trade secret law will likely not have a negative effect on the industry's growth and innovation, but will instead encourage it.

2. Social Norms Supersede Legal Norms

Other critics argue that laws are unnecessary to protect intellectual property in the restaurant industry.²⁶³ These scholars contend that social norms²⁶⁴ adequately prevent misappropriation of proprietary information without any further need to turn to legal safeguards.²⁶⁵ For example, Emmanuelle Fauchart and Eric von Hippel identify three implicit social norms,²⁶⁶ which they argue effectively protect IP without legal intervention. In a norms-based model, chefs fear negative social repercussions, such as loss of reputation²⁶⁷ and exclusion from the community.²⁶⁸ This creates an incentive to avoid unauthorized copying, one which is strong enough to protect IP in the industry.

However, Fauchart and von Hippel's analysis is arguably flawed. The study only surveyed a small group of highly respected chefs working within the greater Paris region; therefore, the response pool was significantly limited and not necessarily representative of restaurant industries elsewhere.²⁶⁹ Because all of the chefs operated within the same community, they could easily impose social sanctions on one another

²⁶³ Buccafusco, *supra* note 25, at 1149–55.

²⁶⁴ Emmanuelle Fauchart and Eric von Hippel identify social norms as “pervasive and powerful structural characteristics of groups that summarize and simplify group influence processes. They are enforced by a group among its members and generally are developed only for behaviors that are viewed as important by most group members.” Fauchart & von Hippel, *supra* note 31, at 188.

²⁶⁵ Buccafusco, *supra* note 25, at 1151–55. Emmanuelle Fauchart and Eric von Hippel also extensively discuss law-based IP systems in comparison to norms-based IP systems through their study of accomplished French chefs. See Fauchart & von Hippel, *supra* note 31, at 189–90.

²⁶⁶ The first norm prohibits a chef from copying “another chef's recipe innovation exactly.” The second norm states that if one chef does reveal “recipe-related secret information” to another member in the kitchen, that information shall not be passed along without the original chef's permission. The third norm dictates that chefs “must credit developers of significant recipes as the authors of that information.” Fauchart & von Hippel, *supra* note 31, at 188.

²⁶⁷ *Id.* at 193.

²⁶⁸ See *id.* at 193–94 (noting that transgressors of social norms are “punished . . . by a decreased likelihood that additional requests for information will be answered by community members”).

²⁶⁹ *Id.* at 192.

for improper behavior.²⁷⁰ However, this study's results are unrealistic, as a substantial proportion of chefs do not operate in such a tight-knit community, which ultimately reduces the power and effectiveness of social norms.²⁷¹ Other critics of Fauchart and von Hippel's argument have recognized that members outside of the inner community do not experience the same level of social repercussions as members within the community; thus, a norms-based system is ineffective in adequately reprimanding the unacceptable behavior of noncommunity members.²⁷²

Fauchart and von Hippel attempt to defend their proposal by highlighting the case of a chef in Australia, Chef Robin Wickens, who succumbed to social pressure after being accused of misappropriation. Specifically, Chef Robin removed photos from his restaurant's website and issued apologies after receiving harsh online criticism for copying dishes from two prominent U.S. restaurants.²⁷³ However, it is unclear whether he actually stopped serving the dishes, or if he simply removed the pictures from the website while continuing to profit from the misappropriated material. Furthermore, even if social norms were successful in deterring Chef Robin's bad behavior, this case may serve as an outlier: he was exposed serendipitously by another Australian chef living in New York City who recognized the similarities among the copied dishes and the originals.²⁷⁴ It is unlikely that future violators will be caught in such a manner.

²⁷⁰ See Straus, *supra* note 21, at 199 (commenting on the surveyed chefs' reliance on one another).

²⁷¹ See Straus, *supra* note 21, at 200–01 (concluding that a norms-based system would be ineffective across a broad geographic region, such as the United States).

²⁷² Cf. Jeremy A. Schachter, *That's My Joke . . . Art . . . Trick!: How the Internal Norms of IP Communities Are Ineffective Against Extra-Community Misappropriation*, 12 VA. SPORTS & ENT. L.J. 63, 63 (2012) (examining the relative ineffectiveness of social norms on noncommunity members of standup comedians).

²⁷³ Specifically, Fauchart and von Hippel's article mentioned the case of Chef Robin Wickens, owner and executive chef of Interlude restaurant in Australia. Photos from the restaurant's website sparked controversy on the "foodie" website, eGullet.com, where Chef Robin was lambasted for copying dishes from WD-50 in New York and Alinea in Chicago. After implying that his menu items were imitations of dishes he saw while *staging* at both restaurants, he eventually removed the pictures and issued apology letters to Wylie Dufresne (head chef at WD-50) and Grant Achatz (head chef at Alinea). Fauchart & von Hippel, *supra* note 31, at 197–98. For pictures of the similar dishes and follow-up community commentary on Chef Robin's behavior, see *Sincerest Form*, EGFORUMS: DAILY GULLET (Mar. 20, 2006), <http://forums.egullet.org/topic/84800-sincerest-form>.

²⁷⁴ Fauchart and von Hippel recount the sequence of events as follows:

On March [20], 2006, Forum participant tb86 reported apparent recipe copying by "Chef Robin" (March 14, 2006, 4:02 PM). "I am an Australian Chef in NY and was looking at the Interlude [a Sydney restaurant] website and realized that a lot of the food has been copied identically from some of the top chefs here." In his message, tb86 provided links to Interlude restaurant food photos, and also those of famous U.S. restaurants showing apparently identical presentations of identical recipes.

Fauchart & von Hippel, *supra* note 31, at 197.

Finally, even Fauchart and von Hippel highlighted significant disadvantages to a norms-based system. Whistleblowers may fear that they also will be shunned along with the violators, which reduces the incentive to expose copying behavior.²⁷⁵ Furthermore, communities cannot provide the same monetary compensation to injured parties that a court order could provide.²⁷⁶ Finally, a norms-based system depends on people wanting to conform to socially acceptable behavior,²⁷⁷ whereas in reality, many people are not influenced by society's approval of their behavior. Law, on the other hand, can provide both equitable and monetary relief,²⁷⁸ and can impose strict guidelines that apply to all people in a jurisdiction, regardless of personal opinion or values.²⁷⁹ Although social norms may afford limited protection against IP misappropriation, for the foregoing reasons, a law-based system is superior.

CONCLUSION: THE FINAL COURSE

The restaurant industry is a unique sector filled with highly creative individuals who draw inspiration from their own histories, backgrounds, and experiences. While high levels of creativity are also found in other enterprises, the restaurant industry is distinct because it values idea sharing and apprenticeships as a form of learning. However, although apprenticeships benefit the industry by promoting creativity, they also prevent right holders from seeking protection through traditional forms of IP law—namely copyright, trademark, and patent. Notwithstanding the barriers imposed by each of these doctrines, individuals in the restaurant industry should receive IP protection through legal intervention to encourage innovation and growth. Therefore, courts should apply a liberal interpretation of nondisclosure agreements—or alternatively, read confidentiality into the employment relationship in the absence of such agreements—to maximize the restaurant industry's intellectual property protection under trade secret law.

²⁷⁵ *Id.* at 198.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See generally *supra* Part III.

²⁷⁹ See generally *supra* Sections II.B, IV.A (providing examples of strict parameters of IP laws).