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Why Copyright Law Lacks Taste and Scents

Leon Calleja

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WHY COPYRIGHT LAW LACKS TASTE AND SCENTS

Leon Calleja*

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INTRODUCTION

I see roughly this—there is a realm of utterance of delight, when you taste pleasant food or smell a pleasant smell, etc. . . . Then there is the realm of Art which is quite different, though often you may make the same face when you hear a piece of music as when you taste good food.

Ludwig Wittgenstein

Though not exhaustive, the list of works included in § 102 of the Copyright Act is generally accepted to provide boundaries for copyrightable subject matter. While visual and audio sensations make the list, scents and tastes do not. However, the past decade has seen an increased discussion regarding whether copyright should be expanded to cover works which have aesthetic value that lie in our sense of taste and smell. In the United States, few cases exist that touch on the issue of whether tastes and scents are copyrightable. For tastes, the most prominent recent case occurred in the Seventh Circuit, wherein Publications International, Ltd. v. Meredith Corp., the Court held that an author’s “compilation copyright [in a cookbook] . . . may not extend to cover the individual recipes themselves, but only the manner and order in which they are presented.” As for scents, whether or not a perfume can be copyrighted has never been addressed. Some have attributed this to the traditionally lower status that Western society has given to smell and taste as “lower” sensations. Such status, in turn, has led to society’s dismissal of the culinary arts and the art of perfumery as not real art, or at least, merely “minor arts.” Another viewpoint might suggest that this lack of attention is due to scents and tastes

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1 Ludwig Wittgenstein, Lectures and Conversations on Aesthetics, Psychology, and Religious Belief.
4 88 F.3d 473, 482 (7th Cir. 1996).
6 Broussard, supra note 3, at 724.
being functional—rather than aesthetic—expressions.8 Still others maintain that the inability to be fixed in a tangible medium undercuts the viability of scents and tastes as proper copyrightable subject matter.9

Yet, given advances in the modern scientific understanding of gustatory and olfactory sensations, as well as the large popularity of celebrity chefs and fine dining as entertainment, some have argued that the above reasons are not compelling and that, instead, copyright protection should be expanded to include scents and tastes.10 For one thing, the physicality of scents and tastes do not appear any less real, substantial, or fleeting than the case of live musical performances or words written in the sand, yet even these experiences may enjoy some level of copyright protection.11 Moreover, the expressions of the world’s finest chefs and perfume makers in their dishes and perfumes, respectively, seem no less original, creative, or deserving of respect than that of visual artists, writers, or composers. As one commentator put it, “[t]he aesthetic expressiveness of a particular culinary dish is in many ways no less communicative than a Miles Davis jazz piece or the vibrant colors of a Mark Rothko painting, even if the description of the dish cannot be easily couched in traditional emotional idiom.”12

This Article explores the reason for the law’s resistance to extending copyright protection to scents and tastes. Specifically, it views the originality and expression requirements of copyright protection as limiting copyrightable subject matter to expressions that engage both author and audience—artist and beholder—in a way that requires reflection upon the work. This requirement of reflection—or the capacity for reflection—poses a demand for intersubjective communicability that I call the work’s “public dimension.” This Article argues that the sensations of taste and smell are inescapably immediate and private,

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8 See, e.g., Robert Kry, The Copyright Law, 111 YALE L.J. 761 (2001) (“When a recipe consists of nothing more than a list of ingredients, it is uncopyrightable, because that list of ingredients is essential to expressing the method of preparing the dish. A list of ingredients has functional substitutes (there are many different recipes for chocolate cake). But since it has no descriptive substitutes, the merger doctrine bars copyright.”).

9 Einhorn & Pormoy, supra note 5, at 8 (“[T]he scent [of a perfume] itself is too fleeting and variable and dependent on the environment . . . [but the] material [liquid] that gives off the scent can be perceived through the senses and is sufficiently concrete and stable to be considered a ‘work’ under the Copyright Act.”) (quoting from a translation of the Dutch lower court of appeals decision in HR 16 juni 2006, NJ 2006, 585 m. nt. J.H. Spoor (kecofa/Lancome) (Neth.)).

10 Broussard, supra note 3, passim.

11 See 17 U.S.C. § 1101 (2012) (on the “Unauthorized fixation and trafficking in sound recordings and music videos”); see also 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02[B][2], at 8–33 (2010) (“Writing in sand is tangible in form even if the next wave will erase it forever.”).

12 Broussard, supra note 3, at 719.
suggesting that they lack the kind of public dimension that visual and audio works exhibit. Indeed, this creates an ineffability characterized by a lack of the sort of originality and expressiveness that underlie copyright protection under both the “moral rights” and “progress of the arts and sciences” rationales, though more so for the second rationale, which is the basis for U.S. copyright law. The latter disconnect is particularly suggestive: because taste and scent’s desired artistic effects on us are ineluctably connected with private interests of pleasure, works of taste and scent cannot escape the utilitarian function that limits copyright protection in the United States. This Article will argue that the reason this utilitarian function does not also subsume the pleasures one experiences from visual and audio works of art is because these works engage our capacity for reflection in a necessarily communicable way—one that makes a public claim for an explanation, even if none is forthcoming.

Part I begins with an examination of some of the cases, legal principles, and policies behind why tastes and scents are generally not considered copyrightable subject matter. This section focuses on the originality and expression requirements for copyright protection in the United States and explores how various courts have used these requirements to articulate the extent of protection for tastes and scents. Part I also examines arguments both for and against copyright protection for tastes and scents, with the general thrust of this section being to isolate and articulate three key questions that the originality and expression requirements ask of copyrightable material: (1) What is the nature of the work—its original expressiveness—to be copyrighted?; (2) What is the work’s purpose to the public?; and (3) Is the work discovered or created?

Part II elucidates how the concepts of originality and expression parallel philosophical analyses of aesthetic judgments and subjective taste in their legal justifications. Guided by philosopher Carolyn Korsmeyer’s central insight that the arts of taste and smell hold a necessary relation to the immediate sensory pleasure which they are intended to incite, this Part will argue that these arts are subsumed by the utilitarian function that limits copyright protection. Paralleling Korsmeyer’s distinction between the “lower” (or base) senses and the “higher” (or aesthetic) ones is a distinction found in Immanuel Kant’s aesthetic theory between private judgments of the “agreeable” and “normative” judgments of beauty. The “agreeable” senses concern sensations that Kant associated with what he called the “taste of sense.” These are contrasted with judgments originating from the “taste of reflection,” which are described as judgments that

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14 Id. at 57.
are likewise subjective in nature, but have a normative component to them, which prompts Kant to call these “judgments of the beautiful.” Applying this distinction to the topic of what constitutes copyrightable subject matter is not meant to suggest that only beautiful works are copyrightable. Rather, the distinction reinforces the private validity of judgments about works of taste and smell. This private validity coincides with their incommunicability as private objects of immediate bodily sensations, a feature that thwarts the core purposes of copyright.

I. CONSIDERING TASTES AND SCENTS AS COPYRIGHTABLE SUBJECT MATTER

The U.S. Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Copyright law pertains specifically to “securing... to Authors... the exclusive Right to their respective Writings.” Though ultimately traced back to this Constitutional provision, the three requirements for copyrightability—originality, expression, and fixation—are articulated in § 102 of the U.S. Copyright Act, which states that “Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression... from which they can be perceived...”

A. THE ORIGINALITY AND EXPRESSION REQUIREMENTS

In the landmark case of Feist Publications, Inc. v. Rural Telephone Service Co., the Supreme Court stated that, “[t]he sine qua non of copyright is originality.” The originality requirement calls for “the work [to be] independently created by the author (as opposed to being copied from other works), and that it possess[ ] at least some minimal degree of creativity.” Moreover, it requires only a modicum of creativity, where unless “the creative spark is utterly lacking or so trivial as to be virtually nonexistent,” the requirement will be fulfilled. The justification for having such a minimal creative requirement has been

15 Id.
16 U.S. CONST. art. 1, § 8, cl. 8.
17 Id.
18 With particular emphasis on the words “Authors” and “Writings.”
21 Id. (citing 1 NIMMER & NIMMER, supra note 11, §§ 2.01[A]–[B], at 2-7 to -18).
22 Id. at 359.
uncontroversial ever since Justice Oliver Wendell Holmes’s stern reminder in *Bleistein v. Donaldson Lithographing Co.*:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.23

To prevent judges from being “final judges of the [artistic] worth” of a given work of art, *Bleistein* views the originality requirement as imposing minimum limits based on copyright’s constitutional purpose of promoting the arts.24 In practice, judges look to the § 102(a) categories that, while “illustrative and not limitative,”25 act as a gatekeeper to whether a work is protected under copyright.26 Though scents and tastes are not included under the § 102(a) categories, the arguments advanced below explore the conceptual, policy-based reasons for this—reasons that ultimately concern copyright’s originality and expression requirements.

The Supreme Court in *Feist* held that the alphabetical arrangement and selection of numbers and information for a telephone directory “lack[ ] the modicum of creativity necessary to transform mere selection into copyrightable expression.”27 For one thing, the data being collected in the matter at issue were facts, which are not copyrightable: “It is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and

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23 188 U.S. 239, 251–52 (1903).
24 *Id*.; Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951) (examining *Bleistein* to conclude that “nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. . . . All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘mere trivial’ variation, something recognizably ‘his own.’ Originality in this context ‘means little more than a prohibition of actual copying.’ No matter how poor artistically the ‘author’s’ addition, it is enough if it be his own.”).
26 *See,* e.g., Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970, 972 (6th Cir. 1983) (determining that a toy airplane is copyrightable by first looking to see if it fits under § 102(a)(5)).
27 *Feist,* 499 U.S. at 362.
factual compilations. 'No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship." While one can copyright a compilation, the originality and expression requirements mandate that only the manner and method of selection are protected:

Copyright protection may extend only to those components of a work that are original to the author. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. [But where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive.]

This inevitably means that the copyright in a factual compilation is limited. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.

The problem in *Feist* was that the selections and arrangements were either too mechanistic or too essential to the works in question. In particular, alphabetical arrangement was said to be a nearly ineluctable format when the element components are phone numbers and addresses. This rationale parallels a principle expressed in *Baker v. Selden*, where the Supreme Court held that blank account books were not deserving of copyright protection, in part because of the necessity of blank components to the usefulness of the class of works in question:

[W]here the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works

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28 *Id.* at 347 (internal citation omitted).
29 *Id.* at 348–49 (internal citation omitted).
30 *Id.*
explanatory of the art, but for the purpose of practical application.\textsuperscript{31}

Thus, the Court in \textit{Baker} concluded that the functional necessity that blank pages have with account books resulted in this expressive element “given therewith to the public.”\textsuperscript{32} \textit{Feist} might similarly be viewed as turning upon the functional necessity of an alphabetical arrangement, given the Court’s comments on the practical necessity of an alphabetical telephone directory.\textsuperscript{33} In other words, the expressive element of alphabetizing is—for all practical purposes—a functional necessity when it comes to a telephone directory. \textit{Feist} and \textit{Baker} thus show how the originality requirement speaks to the fundamentally utilitarian public principle embedded in the constitutional provision for copyright, i.e., “[t]o promote the Progress of Science and useful Arts.”\textsuperscript{34} In \textit{Feist}, Justice Sandra Day O’Connor put this point in terms of the idea/expression dichotomy:

The primary objective of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.\textsuperscript{35}

The idea/expression dichotomy can help to determine what constitutes copyrightable subject matter when analyzed closely in conjunction with the originality requirement. Statutorily, this dichotomy is embodied in § 102(b) of the Copyright Act, which provides that, “[i]n 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.” Though often criticized for its lack of clarity and ease, the idea/expression dichotomy and its relationship to originality achieve their best articulation in Feist:

The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from Burrow-Giles, one who discovers a fact is not its “maker” or “originator.” “The discoverer merely finds and records.”

Though the discovery/creation dichotomy tracks the idea/expression dichotomy imperfectly, it provides paradigms that are, for the most part, clear. One discovers a mathematical formula, but creates a poem (though both might be called elegant or beautiful).

Applying these lessons from the fact/compilation distinction and the idea/expression dichotomy to scents and tastes, the following three questions emerge:

(1) **For Original Expressiveness of the Work:** What is the work to be copyrighted in the case of a scent or a taste, and does its original expressiveness lie in the elements of the work themselves or in its selection and arrangement?

(2) **For Purpose of the Work:** Is the work functionally necessary in that it is “for the purpose of practical application” and thus “given therewith to the public,” or is it instead “given for the purpose of publication in other works explanatory of the art”?

(3) **For Source of the Work:** Related to (1), was the work discovered or created?

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38 *Feist*, 499 U.S. at 347 (internal citations omitted).
39 *Baker*, 101 U.S. at 103.
40 Id.
41 Id.
In answering question (1), if only the selection and arrangement are what constitute the original expressiveness of the author, then only that will be copyrightable, subject to the further limitation posed in (2), that the selection and arrangement not be functionally necessary. Question (3) serves as a rough guide for the idea/expression dichotomy. These background questions will guide our analysis of how courts have dealt with the copyrightability of tastes and scents.

B. THE COURTS' TREATMENT OF TASTES AS INTELLECTUAL PROPERTY

The issue of the copyrightability of tastes has generally been examined by evaluating recipes. Looking to the statute, gourmet chefs in the United States have had to make do with copyrights in their recipes qua compilations or collective works, where what is being compiled and collected are presentations of the ingredients and the methods used to combine them together to make a culinary dish. This protection, however, is severely attenuated because the fact/compilation distinction denotes the listing of ingredients as simple statements of fact and thus non-copyrightable material. The Copyright Office reflects this exclusion by explicitly stating that "mere listing[s] of ingredients or contents" are among the materials not subject to copyright protection. Melville Nimmer also reinforces the exclusion of perfume formulas and recipes from copyright protection, though he does leave open the possibility for copyrighting recipes:

Mere listings of ingredients as in recipes, formulas, compounds, or prescriptions are not subject to copyright protection. However, when a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook, there may be a basis for copyright protection .... Copyright protection may extend to a description, explanation, or illustration, assuming that the requirements of the copyright law are met.


43 Material Not Subject to Copyright, 37 C.F.R. § 202.1(a) (2012).

44 5 NIMMER & NIMMER, supra note 11, § 21.08[C], at 21-343.
In many ways, Nimmer’s guidance here is unhelpful to the question of whether recipes are copyrightable: no one would seek simply to copyright a laundry list of ingredients, since every recipe is accompanied by “an explanation or directions” on how to cook the dish.\textsuperscript{45} In fact, the qualification in the last sentence above shows just how much the question is being punted.

Elsewhere, however, Nimmer writes more definitively: “[E]xtending copyright protection to recipes ... seems doubtful because the content of recipes are clearly dictated by functional considerations, and therefore may be said to lack the required element of originality, even though the combination of ingredients contained in the recipes may be original in a noncopyright sense.”\textsuperscript{46}

Just how much protection recipes can get when they are “accompanied by substantial literary expression”\textsuperscript{47} or “when there is a combination of recipes”\textsuperscript{48} was explored in \textit{Meredith}.\textsuperscript{49} In that case, the Seventh Circuit held that although the plaintiff had obtained copyright protection over the compilation of recipes involving Dannon Yogurt, the individual recipes themselves were excluded from copyright protection, partly because they “contain no expressive elaboration upon either of the [ir] functional components, as opposed to recipes that might spice up functional directives by weaving in creative narrative.”\textsuperscript{50}

What constitutes “expressive elaboration” in \textit{Meredith} is hinted at when the court suggests that copyright protection over recipes may be permissible if “authors lace their directions for producing dishes with musings about the spiritual nature of cooking or reminiscences they associate with the wafting odors of certain dishes in various stages of preparation.”\textsuperscript{51} By comparison, in \textit{Barbour v. Head}, the Southern District of Texas refused to grant summary judgment in favor of a defendant who argued that recipes are uncopyrightable, in part because “[u]nlike its counterparts in [\textit{Meredith}], the recipes [here] are infused with light-hearted or helpful commentary, some of which also appears verbatim in [the allegedly infringing work].”\textsuperscript{52} \textit{Barbour} further pointed to a mimicked parenthetical in one of the recipes—which stated, “This is the secret to the unique taste!”—and called it “arguably expressive language.”\textsuperscript{53}

\begin{footnotes}
\item[45] Id.
\item[46] Id. § 2.18[I], at 2-208 to -209.
\item[47] Id. § 21.08[C], at 21-343.
\item[48] Id.
\item[49] Publ’ns Int’l, Ltd. v. Meredith Corp., 88 F.3d 473 (7th Cir. 1996).
\item[50] \textit{Meredith}, 88 F.3d at 480.
\item[51] Id. at 481.
\item[53] Id.
\end{footnotes}
What these cases show is that when recipes are considered the original expression to be copyrighted, scant protection is offered over what one wants to call the artistic expression of the gourmet chef, i.e., the dish itself. This much is indicated in Nimmer’s remark that “copyright for a recipe clearly will not prevent others from creating culinary ‘dishes’ based upon such a recipe, even if it could prevent the word for word reproduction of the recipe.” Protection extends not to the recipe as much as to the literary embellishments upon it. Yet, certainly the creations that a gourmet chef like Emeril LaGasse wants to take credit for are not the expressions, “Bam!” and “Kick It Up a Notch!,” but instead, his culinary dishes. Because of this, J. Austin Broussard suggests that these cases rest on “the faulty assumption that the recipe for a dish, rather than the dish itself, is the proper subject matter of copyright protection. The courts have unfortunately ‘confuse[d] the [copyrightable] work of authorship with the instructions about how to perform it.’” Broussard advocates instead for the culinary dish to be the copyrightable work. Because he sees the chief difficulty behind this proposal as one of fixation (a dish is perishable and thus an “ephemeral subject”), he further posits that the recipe exists merely to fix the dish into “a convenient and lasting form of expression.”

Separating the copyrightable work from the medium that fixes it, however, does present some conceptual difficulties that Broussard leaves unexamined. First, such a proposal seems to ignore Nimmer’s remark that “copyright for a recipe clearly will not prevent others from creating culinary ‘dishes’ based upon such a recipe.” Presumably, this is because recipes cannot help acting as instructions for how to create a culinary dish, not just as a written expression of the dish. This point will be discussed more fully in Part II. However, even supposing that it is not problematic to separate the culinary dish from the recipe that fixes it, a bigger problem becomes apparent when thinking of the culinary dish as the underlying copyrightable work. With all due respect to Broussard, this problem has little to do with the history of culinary dishes not being considered as “works of art.” While a dish might be construed to represent the expression of the chef’s authorship and originality, it cannot avoid the simple fact that it is a work that functions to be consumed. This is in stark

54 1 NIMMER & NIMMER, supra note 11, § 2.18[I], at 2-208 to -209.
55 Broussard, supra note 3, at 715 (citations omitted) (quoting Buccafusco, supra note 42, at 1131).
56 Id. at 716.
57 Id. at 715.
58 Id.
59 1 NIMMER & NIMMER, supra note 11, § 2.18[I], at 2-208 to -209.
60 See Broussard, supra note 3, at 717–21 (discussing the role of the history of culinary dishes in their categorization as not copyrightable).
contrast to audio and visual works, which are, in some robust sense, contemplated; in principle, at least, these works strive to be “inexhaustible to meditation” (literary critic I.A. Richards’s famous phrase). Moreover, if we treat the dish as the copyrightable subject matter and the recipe as its fixing medium, then the original expressiveness must lie in the chef’s “selection and arrangement” of ingredients that create the dish, rather than in the ingredients themselves; but here, it is impossible to see how the selection and arrangement are not part of the “practical application” of making the dish—and thus “given therewith to the public.” In other words, art that is constituted by the chef’s selection and arrangement of ingredients so as to make a dish “cannot be used without employing” those precise choices in selection and arrangement. Consequently, the utilitarian aspects associated with works derived from taste necessarily subsume their artistic expressiveness.

This last point, I believe, is one that Broussard does not adequately address when he states that:

Conceptually and legally, the dish itself should be considered the “work of authorship” under §102(a), with the recipe for the dish existing only to satisfy the statutory requirement of fixation. Viewed in this way, a recipe ceases to be impermissibly functional or utilitarian under the doctrines of Meredith and Baker because the recipe exists not merely as an instruction for the creation of the dish, but as the necessary legal expression of the dish in a copy fixed in a tangible and lasting medium of expression.

Broussard’s declarations fail to appreciate how little a recipe expresses if it is exempted from expressing instructions on how to create the dish. Not only does this suggestion undermine the ordinary meaning of a recipe, it also departs significantly from how other expressive representations (e.g., blueprints, architectural plans, musical scores) relate to their underlying copyrightable works. Broussard, as it were, wants to have his cake and eat it too, but it is an unwarranted stretch to stipulate that a recipe should be treated as a legal fiction solely to fix the expressive aspects of a culinary dish. If a dish is to be

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61 I.A. Richards, Coleridge on Imagination 171 (2d ed. 1950); see infra Part II.
64 Id.
65 Id.
66 Broussard, supra note 3, at 716.
67 See infra Part II.
considered copyrightable, its original expressiveness must reside in the dish itself, not the recipe. But whether we treat the recipe or dish as the work at issue, this cannot survive the utilitarian considerations which urge that a dish is made to be consumed and a recipe is made to instruct.68

C. SCENTS AS COPYRIGHTABLE?

As noted earlier, the issue of the copyrightability of perfumes or other scents has never been broached in the United States. Nevertheless, perfume makers have looked to other areas of intellectual property for protection over their creations. While patent law can offer protection over ingredients so as to include perfume formulas,69 the numerous obstacles and costs associated with obtaining a patent make this avenue extremely onerous.70 Moreover, for larger perfume companies that can afford the costs associated with obtaining a patent, the subsequent disclosure of a particular perfume’s formula makes the twenty years of patent protection unattractive.71 Instead, these perfume companies have relied on trade secret or looked to trademark law for protection, where successful suits based on using a brand name in the selling of “copycat” fragrances are quite rare.72

68 See infra Part II.
71 Field, supra note 3, at 29.
72 See, e.g., Prestonettes, Inc. v. Coty, 264 U.S. 359, 368–69 (1924) (holding that rebottling and repackaging Coty perfume and selling it as such does not constitute trademark infringement); Smith v. Chanel, Inc., 402 F.2d 562, 568 (9th Cir. 1968) (reversing the district court’s ruling and holding that a copier of an unpatented, but trademarked product could use such trademarks in advertising to identify the copied product). But see Saxony Prods., Inc. v. Guerlain, Inc., 513 F.2d 716, 722 (9th Cir. 1975) (holding that the issue of whether two fragrances were similar in the context of an unfair competition claim was a disputed issue of fact, and thus not subject to summary judgment); Charles of the Ritz Group Ltd. v. Quality King Distribs., Inc., 636 F. Supp. 433, 433 (S.D.N.Y. 1986) (enjoining the defendant perfume manufacturer from using in its packaging the plaintiff's registered trademark in a perfume). Perhaps the most successful trademark scent case involved not perfume, but a scent associated with yarn. In re Clarke, 17 U.S.P.Q.2d (BNA) 1238 (TTAB 1990). In that case, the Trademark Trial and Appeal Board (TTAB) granted a fragrance trademark over “a high impact, fresh, floral fragrance reminiscent of Plumeria blossoms” associated with the plaintiff’s embroidery yarn:

Upon careful review of this record, we believe that applicant has demonstrated that the scented fragrance does function as a trademark for her thread and embroidery yarn. Under the circumstances of this case, we see no reason why a
Outside the United States, two cases from Europe in 2006 were decided within days of each other and came to opposite conclusions concerning the copyrightability of perfumes. In *Bsiri-Barbir v. Ste Haarmann et Reimer*, the Court of Cassation (France’s Supreme Court) analyzed copyright protection under Article L.112-1 of the French Intellectual Property code, which provides protection over “the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.” That Court held that “the fragrance of a perfume, which arises out of the mere implementation of know-how, does not constitute the creation of a form of expression capable of being protected by copyright as a work of the mind.” 73 By contrast, the Dutch Supreme Court held in *Lancôme v. Keoafa* that a perfume can be copyrightable subject matter based on a “subjective” rather than an “objective” analysis of the originality requirement; in other words, we are to look at authorship “from the perspective of the creator.” 74 This holding was handed down despite the Court’s acknowledgement that “not all the copyright act’s provisions would apply to scents, e.g., a consumer’s undeniable right to use a perfume will inevitably lead to ‘distribution’ of the work.” 75 In addition, “[r]egarding infringement, the Dutch [S]upreme [C]ourt said that infringement of the copyright in a scent can be evidenced by laboratory tests and ‘scent panels’ ... [such that] judges will not be required to smell the scents themselves.” 76

These cases show that copyrighting scents faces the same conceptual challenges and flawed solutions that mire the issue of copyrighting tastes. In...
particular, attempts to copyright the formula of a scent result in the copyright being subsumed by utilitarian constraints. Furthermore, the proposed solution to this dilemma is to posit that the copyrightable work is not the formula (or recipe), but rather the scent itself. This parallels Broussard's suggestion that the copyrightable work for tastes is the culinary dish, rather than the recipe.

In considering the Dutch Court's case, Professor Kamiel Koelman at the Vrije Universiteit in the Netherlands has offered several policy-based reasons for why copyrighting perfumes might have a problematic impact. First, because most people lack the sort of sophisticated sense of smell required to distinguish subtle differences between scents, "different perfumes may readily be held to be alike, and infringements quickly [and inappropriately] found." This, in turn, could create "undue monopolies" that "undermine competition ... [by] allowing only a few perfumes to exist lawfully side-by-side." Second,

[ ]ust as similarity could easily be found between a claimant's and an allegedly infringing smell, so too could similarity [be held to exist] between a claimant's and pre-existing scents. This in fact could render the protection of smells meaningless in practice, as most manufactured scents would be deemed not original anyway.

This point is particularly poignant when one reconsiders the scent that won copyright protection in the Dutch case, Lancôme's "Trésor." As Catherine Seville has pointed out, while Lancôme "cries loudly for protection[, it] has a tendency to forget its own debts[, for TRÉSOR itself owes much to two earlier perfumes: Calvin Klein's ETERNITY and Sophia Grosjman's EXCLAMATION." Seville additionally provides two other policy reasons to think the Dutch Court's decision was problematic:

It will require considerable creativity to apply certain acts of copyright infringement (e.g., distribution, making available to the public) to fragrance, whose fundamental purpose is [to be] perceived not only by the wearer, but also by those in the vicinity.

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78 Id.
79 Id.
80 Id.
81 Catherine Seville, Copyright in Perfumes: Smelling a Rat, 66 CAMBRIDGE L.J. 49, 51 (2007).
Furthermore, [because the Dutch Court's ruling is out of step with other European Union (EU) countries,] the ruling creates an unacceptable impediment to the free movement of goods within the EU.\textsuperscript{82}

While this last point may seem to apply only to the European Union, the global nature of the perfume market substantiates Seville's worry and advocates for greater harmony in copyright law between many different countries, including the United States.

The policy arguments against copyrighting scents differ from those posited against tastes primarily in two ways. First, the subjectivity of smell is seen to pose a bigger problem for infringement disputes; second, fragrances are meant not simply to be smelled by the consumer, but by the public that is within the consumer's vicinity.\textsuperscript{83} Nonetheless, the chief difficulties are still shared insofar as both products are meant to be consumed and are not aesthetically appreciated in a sustainable way. Moreover, what is posited as the original expression in each case—the dish or the perfume—makes the underlying purpose for copyright protection coincide too closely with its utilitarian function. These difficulties depart significantly from the fundamental purpose of copyright protection: to grant legal monopolies over non-utilitarian expressions in order to facilitate the introduction of the ideas into the public domain. This last point will be explored in the next section.

II. BECAUSE OF THEIR STATUS AS PRIVATE SENSATIONS, TASTES AND SCENTS LACK THE PUBLIC AND COMMUNICATIVE COMPONENTS THAT ALIGN WITH A FUNDAMENTAL PURPOSE OF COPYRIGHT

In his article advocating the copyrighting of culinary dishes, Broussard attempts to explain away the philosophical difficulties by first pointing to the traditionally lower status that our senses of smell and taste have had in comparison to the higher senses of hearing and vision, and second, by claiming that culinary artists have had the short shift in copyright law's historical protection of "works of art."\textsuperscript{84} The argument would be applicable to perfume makers as well. This bias against the lower senses can be seen in the § 102(a) categories; the enumerated works are expressions that appeal to our eyes and

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Broussard, supra note 3, at 717–21.
ears. In "On the 'Aesthetic Senses' and the Development of Fine Arts," philosopher Carolyn Korsmeyer writes:

It has long been a commonplace in the field of aesthetics to speak of the eyes and the ears as the "aesthetic" senses. Objects of the other senses, it is generally agreed, are not properly called "beautiful," nor are they the raw material out of which a "fine art" can be developed.\footnote{Korsmeyer, supra note 7, at 67.}

After Bleistein,\footnote{Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).} one should (rightly) be wary of any attempt to carve copyrightable subject matter out of classifications as to what constitutes "fine art" or what might "properly [be] called 'beautiful.'"\footnote{Korsmeyer, supra note 7, at 67.} Indeed, under the U.S. Copyright Office's definition of "literary works," copyright protection extends to such banal objects as directories, catalogs, and law school textbooks.\footnote{U.S. COPYRIGHT OFFICE, FL 109, COPYRIGHT REGISTRATION OF BOOKS, MANUSCRIPTS, AND SPEECHES (2011).} Nevertheless, while Bleistein may stand for the proposition that judges are poor arbiters of what counts as art, this shortcoming is one from within a particular field of art: we are to be wary of judges as evaluators of art. In particular, this does not exclude determinations of law made on non-evaluative bases that speak to the fundamental purposes of copyright protection. My contention is not that culinary dishes and fragrances are incapable of containing any originality or of being called art, but only that they fail to possess an originality that copyright law was meant to protect.

A. A FUNDAMENTAL PURPOSE OF COPYRIGHT IS TO BRING IDEAS INTO THE PUBLIC DOMAIN FOR OTHERS TO EVALUATE, UNDERSTAND, USE, AND BUILD UPON

Commenting on the idea/expression dichotomy, Melville Nimmer points out that copyright "encroaches upon the author's right to control his works in that it renders his 'ideas' [as] per se unprotectible [sic] . . . ."\footnote{Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180, 1192 (1970).} This fundamental consequence of copyright law is often overlooked, but it is what drives the idea/expression dichotomy. It is also what makes the ideal expression dichotomy so controversial as a tool to be used in determining what constitutes
copyright infringement from within a particular art form. As Jane Ginsburg has put it, "elucidating what constitutes an unprotectable idea... and what comprises protectable expression... is one of the hardest tasks in traditional copyright analysis." Consider Learned Hand's abstraction test. When Hand writes, "there is a point... where [abstractions] are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended," he means to underscore a fundamental, yet underappreciated, utility that copyright law helps generate: the putting forth of one's ideas into the public domain for others to evaluate, understand, use, and build upon. These ideas were never "protectable" in a legal sense, but they lay dormant to the public until the author arguably offered them up in exchange for protection over his or her expression of them.

The Supreme Court has also intimated that one of the fundamental purposes of copyright is to encourage the dissemination of ideas that were never protectable in the first place: "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." Returning to Nimmer:

Ideas to be meaningful must be expressed in words or by some other objective manifestation. The point is not that ideas are useful without expression, but rather that while public enlightenment may require the copying of ideas from others, it remains perfectly possible for the speaker (or writer) who copies ideas from another, to supply his own expression of such ideas. True, it would often be easier to copy the expression as well as the idea, but the value of such labor-saving utility is far outweighed by the copyright interest in encouraging creation by protecting expression.

90 See, e.g., Cohen, supra note 37; Kurtz, supra note 37.
92 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (1930).
93 Id.
95 Nimmer, supra note 89, at 1202.
In the case of culinary dishes and perfumes, however, it simply is not the case that it is “easier to copy the expression as well as the idea” in a “labor-saving” way, since the would-be infringer in the case of culinary dishes, for example, would still end up having to go through the process of purchasing the ingredients and making the dish. More significantly, to place copyright protection in the dish or perfume is to foreclose any such “public enlightenment [that] require[s] the copying of ideas from others,” since it would leave no idea unprotected—thus leaving no idea would to be freely disseminated to the public.

B. IDEAS ASSOCIATED WITH TASTE AND SMELL ARE IMMEDIATE AND PRIVATE SENSATIONS OR OBJECTS OF THE MIND INSEPARABLE FROM THEIR EXPRESSIONS

How does this purpose of copyright relate to considering tastes and scents as copyrightable subject matter? Recall that Broussard suggests that the historical dichotomy of the aesthetic and lower senses has been an unnecessary barrier to expanding copyright protection to tastes and, by extension, to scents as well. *Pace* Broussard, I suggest that this dichotomy not only helps explain why tastes and scents face difficulty in gaining copyright protection, but also focuses our attention on the nature of these sensations and how that nature is problematic to the public dimension and purpose underlying copyright. While chefs and perfume makers are full of inventiveness and personality, the nature of their art (or craft) contains a sensory immediacy that at once makes the idea that they wish to express inextricably tied to its expression in a private way. While we might agree with Broussard that the dish is the appropriate “expression” of the artist, it is also true that the idea he or she wishes to express is also the dish itself. This is problematic since ideas purport to “enlighten” in ways that are necessarily free to the public.

Broussard argues that the dichotomy of the lower and higher senses is an outdated relic of old philosophical and scientific thinking. However, modern studies in the perception and cognition of art and aesthetic judgment by Nobel laureate and neuroscientist Eric Kandel seem to support the traditional

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96 *Id.*
97 *Id.*
98 Many defenders of food and perfume as art put the blame on the distinction between “art” and “craft,” suggesting that convention makes us think of the latter as, perhaps, purely utilitarian (and thus not aesthetic) in nature. While I have my own doubts on the use of these words as delineating tools in the ontology of aesthetics—I consider poets as both artists and masters of their craft without seeing any substantive difference between them—disabusing society of this dichotomy does little to save food and perfume from being engulfed by their utilitarian functions.
dichotomy by showing how the cognitive mechanisms underlying the “higher” senses function. At the beginning of his chapter on “The Biological Response to Beauty and Ugliness in Art” in The Age of Insight, Kandel writes: “In addition to instinctive sensory pleasures, we experience higher-order aesthetic and social pleasures: artistic, musical, altruistic, even transcendental. These higher pleasures are in part inborn, as in our estimation of beauty or ugliness, and in part acquired, as in our response to visual art and music.”99 While Kandel focuses on visual sensations to demonstrate how the brain “assigns different degrees of meaning to the various shapes, colors, and movements we see,”100 our brain’s complex assignation of meaning presumably applies to sound sensations of music as well. This explains the classical division between lower and higher sensations:

This assignment of meaning, or visual aesthetics, illustrates that aesthetic pleasure is not an elementary sensation like the feeling of hot or cold, or the taste of bitter or sweet. Instead, it represents a higher-order evaluation of sensory information processed along specialized pathways in the brain that estimate the potential for reward from a stimulus in the environment—in this case, from the work of art that we view.101

That our brain imparts meaning to visual and audio sensations in its actual perceptions demonstrates the inherent communicability of the “higher senses,” a communicability that—at least to this point in our human brain development—is lacking in the cases of taste and smell.

Consider the following summation of how smell sensations work by Doug Churovich:

[C]olors and sounds transmit their sensory message by means of transfer mechanisms very different from scents. While the physiochemical interactions necessary to detect scents require direct physical contact between nasal receptors and molecules emitted from the source, the energy-encoded information bearing an object’s colors are transmitted in the medium of light, and energy-encoded information from a sound source travel through a wave of transmitted energy across molecules bridging the

100 Id.
101 Id.
distance between the source and the observer. As a result, there is a physical segregation between the source and the observer for colors and sounds, but not for scents. The energy-based transfer mechanisms for colors and sounds, limited primarily by energy transfer mechanics as opposed to molecular dispersion, not only enable colors and sounds to travel far greater distances than scents, but also facilitate the transmission of their energy-encoded information through cables and over the airwaves, unlike scents.\(^\text{102}\)

Philosopher Carolyn Korsmeyer offers a similar account for taste sensations:

> While sight and hearing operate at a distance from their objects, food and drink are taken into the body, providing it life-sustaining nutrition. Indeed, the chief purpose of food is to nourish, and this heavily functional role is another factor that commonly excludes eating from the intellectual interest of the philosopher.\(^\text{103}\)

In distinguishing tastes and scents from sights and sounds, the key notion is one of distance from the perceiver, or, more precisely, immediacy to the perceiver; it is necessarily through immediate bodily contact that we experience tastes and scents.\(^\text{104}\) The same is not true with visual and auditory works. This is not to deny that one can “imagine” what it is like to taste or smell an object, but the idea that is associated with them (and any originality that is tied with its expression) cannot be communicated to another person in an objective and verifiable way.

This lack of communicability, I suggest, poses a conceptual difficulty with the very idea of copyrighting a scent or a taste, and it is related to the earlier point made in Part I.B about how dishes and perfumes are consumed rather than contemplated. Sensory immediacy makes contemplation of these works appear inseparable from the sensation of eating or smelling them. This forecloses the possibility of the work ever becoming “inexhaustible to

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\(^\text{103}\) Carolyn Korsmeyer, Delightful, Delicious, Disgusting, 60 J. AESTHETICS & ART CRITICISM 217, 217 (2002).

\(^\text{104}\) Korsmeyer, supra note 7, at 70–71.
meditation" because to contemplate the work is always to consume it and exhaust its pleasure. This is not to say that all works eligible for copyright need to be "inexhaustible to meditation." Rather, that works can be contemplated repeatedly reveals the kind of communicability that adds to the "public enlightenment" of copying ideas and thus generates the need for copyright protection.

A similar point about the difference between lower and higher senses was also made by the twentieth century American philosopher George Santayana:

The senses of touch, taste, and smell, although capable no doubt of a great development, have not served in man for the purposes of intelligence so much as those of sight and hearing. It is natural that as they remain normally in the background of consciousness, and furnish the least part of our objectified ideas, the pleasures connected with them should remain also detached... They have been called the unaesthetic, as well as the lower, senses; but the propriety of these epithets... is due... to the function which they happen to have in our experience.

Where Santayana here speaks of "objectifying ideas," he means to point out the kind of contemplative distance that comes more naturally to the senses of sight and hearing. Part of this, Santayana suggests, is due to the non-spatial aspects of these sensations: "Smell and taste, like hearing, have the great disadvantage of not being intrinsically spatial." Although sounds share this non-spatial limitation, "[t]he objectification of musical forms is [nonetheless possible] due to their fixity and complexity: like words, they are thought of as existing in a social medium and can be beautiful without being spatial." This idea of "existing in a social medium," I suggest, is part and parcel with Nimmer's concept of "public enlightenment" discussed above in Part II.A. And while one might cite "social dining" and "eating for entertainment" as instances of tastes "existing in a social medium," what makes them social is the

105 Richards, supra note 61, at 171.
106 Id.
107 Nimmer, supra note 89, at 1202.
109 Id.
110 Id.
111 Id. at 45.
sharing of interpersonal experiences—the conversations and observations with others through language and sight—not the act of eating.

Korsmeyer also points out another interesting facet of the dichotomy between lower and higher senses:

The arts of the taste and the smell aim, and indeed must aim, at pleasing—at immediate, sensuous gratification. Their counterparts to the grotesque, the painful, or the horrifying would be something like the poisonous, the nauseating, the indigestible, or the foul; and, practically speaking, any artist attempting to utilize such a range of taste or smell would sacrifice both the quality of the product and the audience.

These built[-]in limitations are the basis for the fact that there is no range of expression available to the taste and the smell, nor can any such range be developed which is at all usable; and with the limitation on expression goes a related limitation on intellectual content.112

The fact that the arts of taste and smell must necessarily concern immediate sensuous gratification reveals their expressive limitations, and these limitations in turn reveal the conceptual difficulty in copyrighting these arts. Contemplation of a taste or scent is too tightly bound to the sensation, resulting in an inability to detach the idea of a taste or scent from its expression. However, because a fundamental purpose in granting a person a copyright over his or her work is to relinquish the idea freely to the public as something to which (in Hand’s words) “property is never extended,”113 one cannot grant a copyright over a culinary dish or a perfume without at the same time closing off all access to the idea itself.


Because of the sensory immediacy and lack of distance involved in taste and smell sensations, they are what we might call purely private sensations, forever

112 Korsmeyer, supra note 7, at 70.
113 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (1930).
mired in their subjectivity. Santayana, in part, suggests that this is due to their non-representational aspects:

[T]astes have never been so accurately or universally classified and distinguished; [its] instrument of sensation does not allow such nice and stable discriminations as does the ear. The art of combining dishes and wines, although one which everybody practi[c]es with more or less skill and attention, deals with a material far too unrepresentable to be called beautiful. The art remains in the sphere of the pleasant . . .

By “sphere of the pleasant,” Santayana seems to draw on a classification that Immanuel Kant had earlier espoused in Critique of Judgment when advocating for a distinction between two types of aesthetic judgments based on our sensations, “judgments of the agreeable” and “judgments of taste (of the beautiful).” Here, it should be noted that by “taste,” Kant is not referring to the sense (or sensation) as we have been discussing it, but rather to a power to judge based on sensations. Kant defines the “agreeable” as “what the senses like in sensation.” Discussing them further, he writes:

As regards the agreeable everyone acknowledges that his judgment, which he bases on a private feeling and by which he says that he likes some object, is by the same token confined to his own person. Hence, if he says that canary wine is agreeable he is quite

114 Cf. Korsmeyer, supra note 7, at 71 (“‘Distance’ is not important as a criterion for aesthetic experience and, by extension, for works of art. But it is important because it points out the built-in limitations of the arts of the senses of touch, taste, and smell.”).
115 SANTAYANA, supra note 108, at 45.
116 KANT, supra note 13, at 55–60.
117 Id. at 53. Kant uses the term “taste” ambiguously, sometimes to exclude judgments of the agreeable and other times to include them. (He always means, however, to include judgments of beauty as judgments of taste.) For example, in the section cited here, Kant actually defines “taste” as “the ability to judge an object, or a way of presenting it, by means of a liking or disliking devoid of all interest. The object of such a liking is called beautiful.” Id. This would suggest an exclusion of taste’s association with judgments of the agreeable. Yet he also speaks of a “taste of sense,” which he clearly means to associate with judgments of the agreeable. Id. at 57. Above, I have adopted the more inclusive meaning so as to use Kant’s distinction between the “taste of sense” and the “taste of reflection” to illuminate this Article’s discussion of the conceptual differences between the higher (or aesthetic) senses (of vision and hearing) and the lower senses (of taste and smell).
118 Id. at 47.
content if someone else corrects his terms and reminds him to say instead: It is agreeable to me.119

For Kant, a judgment of the agreeable regards only a subject’s immediate liking and concerns only and always the subject’s own sensations. No matter how intense our feeling of pleasure is in the agreeable, or how widespread other people’s likings may be assimilated to our own, the value in a judgment of the agreeable only ever concerns the perceiving subject’s own sensations, such that one can always take a modest approach to one’s liking and say that it merely has “private validity.” To mark this out further, Kant associates judgments of the agreeable with what he calls the “taste of sense.”120

By contrast, a judgment of taste (of the beautiful) makes a necessarily intersubjective claim, marked by its rejection of any recourse to modesty on the part of the subject:

It is quite different (exactly the other way round) with the beautiful. It would be ridiculous if someone who prided himself on his taste tried to justify [it] by saying: This object (the building we are looking at, the garment that man is wearing, the concert we are listening to, the poem put up to be judged) is beautiful for me. For he must not call it beautiful if [he means] only [that] he likes it.121

Of these sorts of judgments, “we cannot say that everyone has his own particular taste”;122 Kant thus associates judgments of taste (of the beautiful) with what he calls the “taste of reflection” to reveal their public aspect in contrast to the inherent privacy of the agreeable:

Insofar as judgments about the agreeable are merely private, whereas judgments about the beautiful are put forward as having general validity (as being public), taste regarding the agreeable can be called taste of sense, and taste regarding the beautiful can be called taste of reflection, though the judgments of both are aesthetic (rather than practical) judgments about an object . . . .123

119 Id. at 55.
120 Id. at 57.
121 Id.
122 Id. at 56.
123 Id. at 57–58 (emphasis added).
This public/private distinction also signifies a difference in their communicative capacities. Consider how Kant discusses the inherent lack of communicability of a judgment generated by the taste of sense (what Kant calls a "sensory sensation"):

If sensation, as the real in perception, is related to cognition, it is called sensory sensation; and its specific quality can be represented as completely communicable in the same way only if one assumes that everyone has a sense that is the same as our own — but this absolutely cannot be presupposed in the case of a sensory sensation. Thus, to someone who lacks the sense of smell, this kind of sensation cannot be communicated; and, even if he does not lack this sense, one still cannot be sure that he has exactly the same sensation from a flower that we have from it. Still more, however, we must represent people as differing with regard to the agreeableness or disagreeableness of the sensation of one and the same object of the sensations . . . .

By contrast, "one who judges with [the] taste [of reflection] . . . may assume his feeling to be universally communicable . . . ." While we do not have to go so far as Kant to posit aesthetic judgments as capable of universal communicability (an intersubjective communicability will suffice), the key point is that the agreeable cannot be considered a communicable expression because it can never be "represented as completely communicable."

Moreover, while Kant somewhat paradoxically associated a feeling of disinterested pleasure with these judgments, the point of this association was to emphasize how these judgments concerned works in a way that was devoid of all interest in the perceiver. This mirrors the principle in copyright where works that inherently and necessarily appeal to the subjective interests of a perceiver are inescapably driven by their utilitarian function.

124 IMMANUEL KANT, CRITIQUE OF THE POWER OF JUDGMENT 171 (Paul Guyer ed. & Eric Matthews, trans., Cambridge Univ. Press 2000) (footnotes omitted). (I use a different translation here for the sake of clarity.)
125 Id. at 173.
126 Id.
127 KANT, supra note 13, at 44-51.
128 Id.
D. THE PRIVATE AND INCOMMUNICABLE LIMITATIONS OF TASTE AND SMELL MAKE THEM INCAPABLE OF COPYRIGHT PROTECTION

The upshot of the Kantian distinctions explored in the last section is this: the essential privacy and incommunicability of the agreeable senses demonstrate that any ideas associated with them are likewise private and incommunicable. This is precisely the predicament we have with the ideas that underlie the works of taste and smell, with the consequence being that they are incapable of copyright protection.

Recall Korsmeyer's observation that the very nature of how we experience tastes and scents—i.e., via immediate bodily contact—creates built-in limitations to the arts of taste and smell.129 These limitations show that "there is no range of expression available to the taste and the smell, nor can any such range be developed which is at all usable; and with the limitation on expression goes a related limitation on intellectual content."130 Adding Kant's insights, we can postulate that this lack of expressiveness or incommunicability is due to the fact that any idea of a taste or a smell is never anything more than a private sensation or object of the mind. The privacy of a scent or taste implicates the lack of a public sense, or the lack of an inherent communicative claim that visual and auditory works, by contrast, do possess.

In his dissenting opinion from International News Service v. Associated Press, Justice Louis Brandeis wrote:

An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property.131

Brandeis might have also added that if the idea or expression is inherently private, then the "right of exclusion" is necessarily absolute; thus, it makes no sense to give it the "legal attribute of property."132 In the case of a taste or a scent, the private nature of the idea or expression already guarantees its exclusivity. Moreover, because access to this idea requires immediate and

129 Korsmeyer, supra note 7, at 71.
130 Id. at 70.
131 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).
132 Id.
bodily contact, the idea or expression can never be separated from its aim of immediate sensuous gratification. Therefore, utilitarian and functional aspects are ineluctable constituents of the ideas themselves. Here, we might bring in some lessons from *Carol Barnhart Inc. v. Economy Cover Corp.* and say that either the idea of a given taste/smell is not “conceptually separable from [its] subsidiary utilitarian function”\(^{133}\) or that the work does not “stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.”\(^{134}\) Finally, if the idea is private and thus its exclusivity is built-in, guaranteed, and absolute, then there is no sense in which extending copyright protection over its expression would be accompanied with adding the complementary idea to the public domain as a per se unprotectable idea. None of this means that chefs and perfume makers cannot be considered artists, but rather that the inherent limitations of taste and smell make their works incapable of copyright protection. Copying them in a way that generates a free public good in the idea simply is not possible.

**CONCLUSION**

Both Broussard’s suggestion that a copyrightable work is severable from the medium that fixes it and the Dutch Supreme Court’s ruling that copyrightability may be determined through a subject analysis fail to take into account the substantial conceptual difficulties that the nature of taste and smell pose to calling a chef’s culinary dish and a perfume maker’s fragrance eligible for copyright protection. Because both the dish and the perfume necessarily require immediate bodily contact with these works to access the artist’s expression, neither can escape the inherent privacy and incommunicable aspects attached to the perceiver’s contemplation of the work. As such, they both lack a “public enlightenment” component that justifies the need to extend copyright protection to these works. Moreover, neither a culinary dish nor a fragrance can avoid their inherent utilitarian functions of pleasing the palate or olfactory senses of their perceivers.

The problem is not so much that the function is one of pleasing the senses; certainly visual and auditory works can and do aim to please the eyes and ears of their perceivers. But when this gratification function coincides exactly with any contemplation of the work, the privacy of the idea and expression is revealed. Perhaps most importantly, because both the idea and expression associated with a culinary dish or a fragrance already guarantees its exclusivity,

\(^{133}\) 773 F.2d 411, 419 (2d Cir. 1985).

\(^{134}\) *Id.* at 422.
there is no sense in which the dish or fragrance can be protected, and the idea of the dish or fragrance be given to the public as something that is per se unprotectable. If the culinary dish or perfume is considered the copyrightable work, there would be no way for another artist to build on the ideas that underlie these works. This is anathema to a fundamental purpose of copyright as an engine of free expression and a catalyst to facilitating a freer flow of ideas in the marketplace.