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# A Bourbon Pecan Pie Fest of Plant Patents, Copyright "Originality" and Soiled Chef Brands

"Earth & Table" Law Reporter



Pecans are a microcosm of Americana. “As the Stuart Pecan Company would brag in 1893: ‘We [Americans] have rightfully a monopoly upon the nut.’”[1]

Wild pecan trees proliferate in riverine ecosystems coursing through the southern United States. Their domesticated, often patented counterparts now satisfy huge consumer demand for these indigenous nuts, once vital to tribal commerce. Indeed, the name *pecan* is derived "from an Algonquin word meaning, loosely translated, 'a nut too hard to crack by hand.'"

Close scrutiny of my favorite bourbon pecan pie recipe offers some unusual insights regarding the importance of plant patents, what copyright *originality* means as applied to classic recipes, and chef brands tarnished by the #MeToo social movement. This post cracks open these peculiarly American socio-legal issues.

### *Wild versus Patented Pecan Trees*

To delve into a pecan pie, one must understand its progenitors. Wild pecan trees tower over other trees as a "climax tree species." In record time, this wild hickory plant (*Carya illinoensis*) morphed into pecan cultivar orchards that dominate landscapes in Georgia, New Mexico, and other non-native states.

The pecan, however, remained "a wild plant for a much longer time than any other commodified fruit or nut primarily because its wild variety happened to bear fruit that tasted supremely domesticated."

From the commercial grower's perspective, applying orchard techniques to cultivate pecans in ecosystems far removed from their natural habitat creates a host of profound production issues.

- Pecans do not grow true to seed, so grafting trees is the only way to ensure nut quality and consistency.
- Pecans do not "mast" (*i.e.*, bear nuts) every year, or even every other year sometimes. In addition, an orchard of cultivated pecan trees can take at least eight years to begin masting "at full throttle and as many as fifteen years before they reach peak production."
- Domesticated pecan cultivars are susceptible to a host of plant viruses and pests that their *wild* counterparts can avoid in their natural habitats.

Many of these grower issues can only be solved through inventing or discovering pecan tree varieties with new attributes. In this regard, one inventor rules this market space: Dr. Darrell Sparks, who is associated with the University of Georgia. His book, *Pecan Cultivars: The Orchard's Foundation* (1992), is the leading authority in this field of commerce.

Sparks' latest discovery, a pecan tree named '*Tanner*,' will soon issue in 2018 as his seventh U.S. patent. He describes its novel contribution:

'Tanner' is distinguished from other pecan varieties known to the inventor due to the following unique combination of characteristics: Consistent and acceptable fruit production, small fruit cluster, early nut maturity, large nut producing mammoth kernels with excellent color and high resistance to scab fungus . . . and moderate resistance to black aphid . . . . 'Tanner' will fill in a niche for large nuts similar in size to 'Desirable' but with the advantage of earlier maturity and high resistance to scab.

Plant patents tend to have long gestation times, and 'Tanner' is no exception. It originated in 1995 through crossing a 'Desirable' pecan tree cultivar as the seed parent with a 'Pawnee' cultivar as the pollen parent.

### ***Pecan Pie Craze of the Mid 20th Century***

As a foodstuff, pecans became a mainstream part of the American diet primarily as a result of WWII food deprivations.

In 1942, a USDA program deemed pecans "a Victory Food Special." And in 1948, the USDA placed pecans on its hit list of "plentiful foods," thereby encouraging Americans to consume them as an expression of postwar national pride. With federal assistance, [WWII] was good to the pecan.

Creative cooks found many novel ways to introduce pecans into their desserts, salads and main entrées. Introducing pecans to the American "sweet tooth" began with sending care packages of pecan caramel rolls to

military personnel living overseas. Pecans soon found their way into many varied American desserts.

Of trademark branding interest, "with the invention of Karo Corn Syrup [in the 1930s], the pecan pie became a staple of southern tables around the Thanksgiving holiday, hot on the heels of the pecan harvest." The addition of Karo corn syrup is credited with giving the pecan pie its "ooey, gooey consistency."

With pecan production surpluses converging with a popular Karo label recipe, the pecan pie became not just a regional favorite, but a national dish—with nostalgic, patriotic overtones such as those portrayed by Norman Rockwell's famous painting, *Freedom from Want*. "By 1959, the most popular dessert at the Coach House, a famous Manhattan eatery off Washington Square Park, was pecan pie."

### ***Enter John Besh's Tainted Recipe for Bourbon Pecan Pie***

With its Creole heritage and abundant pecan resources, New Orleans became known for its *pralines*, a mixture of pecans, sugar, cream and sometimes vanilla, molasses, caramel or maple syrup. It is a short leap from pralines to the iconic pecan pie, which some claim the French invented after settling in New Orleans. The first published pecan pie recipes emerged in the late 19th century.

John Besh's *My New Orleans: The Cookbook* (2009) is—or at least was—a workhorse in my cookbook library. Being a newbie to, but enamored by Creole cooking, I purchased his cookbook shortly after it was published. It's been my bible for *Big Easy* dinner parties. The page with my favorite bourbon pecan pie recipe is dog-eared; and the cookbook opens naturally to it.

So, chagrin set in when I learned that my favorite NOLA cookbook author/restaurateur had been accused of sexual harassment by employees working at his various restaurants. He confirmed some allegations and resigned from the company he founded. The company website quickly scrubbed references to him. Seemingly overnight, Besh went from great, inspiring chef/mentor to a social media *persona non grata*.

A practical conundrum arises for cookbook owners. What do we do with chef cookbooks with soiled #MeToo author reputations? Do we keep them on our bookshelves as "art for art's sake" objects, like the novels of 19th century authors whose conduct contravened rigid Victorian moralism? Or do we expunge them?

To approach this moral quandary, I chose two differing vantage points: copyright law and an ancient Indian healing system known as

*Ayurveda*. These bodies of knowledge can address this roiling topic from oblique angles—far removed from the stale social media ritual of florid allegations, formulaic denials and assurances of future probity.

### *Copyright "Originality" of Recipes*

Copyright law protects "original" works of authorship. *Original* works of authorship need not be novel or unique; rather, the protectable expression must *originate* with author. Further, copyright protection does not 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." 17 U.S.C. 102(b).

Besh's *My New Orleans* recipe for a bourbon pecan pie consists of two parts: (1) a headnote explaining its historical derivation; and (2) a listing of ingredients and preparation instructions. The headnote features Besh's mother and grandmother:

My grandmother Grace used pure molasses in her pecan pie, and my mother, Imelda, uses only corn syrup. It may be good family politics, but I happen to like using both in my pecan pie. In fact, you may substitute either syrup for the other.

This headnote constitutes *original* copyright expression. It originates from the author's voice. On the other hand, the listing of bourbon pecan pie ingredients and the instructions that follow are *prima facie* uncopyrightable subject matter as a procedure, process or method of operation.

From a copyright law perspective, Besh does not "own" the recipe instructions for a bourbon pecan pie in a legal sense, any more than his mother Imelda or grandmother Grace did with their variations on a molasses/corn syrup theme. The recipe resides in the public domain, for all to share.

Every classic recipe involves a lineage of influences. Besh's copyrightable headnote highlights its matriarchal influences. Removing Besh's cookbook from use would silence female voices animating his bourbon pecan pie recipe (and all others). That would be a sociologically untoward result.

Another copyright reason crops up to justify holding on to your printed cookbooks. I *own* my hard copy, indelible food stains and all. Were this an e-book, I only possess an evanescent *license* to read it (while being tracked and monitored). Unlike e-books, my tangible copy cannot be revoked or erased by Soviet-style corporate minders tasked with revising history.

## *Ayurvedic Food for Thought*

*Ayurveda* "is a Sanskrit word which, accurately translated, means "the knowledge of longevity." Ayurvedic medicine is "considered to be the oldest natural healing system extant, pre-dating even the Chinese system of medicine." It is more than a medical science though, and "this knowledge contains the secrets of why people need to cooperate with Nature completely in order to ensure their well-being."[\[2\]](#)

*Ayurvedic* teachings provide guidance about the nature of food intake and the responsibility of those involved in cooking for others. One central tenet holds that every "substance that you take into your body exerts some effect on your mind once it has been digested and assimilated."

One's role as a family *cook* takes on an ayurvedic cast:

The cook plays an important part in the nourishability of food. Meals which are lovingly prepared with a profound desire for the welfare of the eater always benefit the body and mind more than do meals which are commercially prepared, or which have been prepared by someone who is indifferent to or dislikes the proposed eater. No one should cook when in a state of indifference, agitation, sorrow or anger.

As applied to Besh's cookbook, these ayurvedic teachings furnish a mixed bag of guidance. On the one hand, meals already prepared using *My New Orleans* cookbook resulted in enjoyable dinner parties where I could tout my source of recipes. These family meals did benefit the mind, body and soul of everyone around the table.

On the other hand, I can no longer heartily recommend Besh's cookbook as I did before October 2017—when news broke substantiating his workplace conduct. *My New Orleans* lost major karmic *mojo* through the #MeToo revelations. Following *ayurvedic* advice, if you do not feel good about cooking and serving something to others, you should not engage in that activity.

## *Pecan Pie Takeaway*

My kitchen shelf space formerly reserved for *My New Orleans* cookbook is now vacant. But a new entrant is emerging in the wings: Poppy Tooker's *Tujague's Cookbook: Creole Recipes and Lore in the New Orleans Grand Tradition* (2015). Soon, its pages will no doubt be spattered with the likes of blackstrap molasses, roux and shrimp 'n grits.

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[\[1\]](#) For pecan aficionados desiring an in-depth analysis of this fascinating nut and its history, James McWilliams' book, *The Pecan: A History of*

*America's Native Nut* (2013) is an excellent resource. The quoted material in this post is generally from his book, unless otherwise indicated.

[2] The quoted material regarding ayurveda is from Dr. Robert Svoboda's wonderful introduction to this subject matter, *The Hidden Secret of Ayurveda* (1994).