CJEU rules that taste of a food product is not protectable by copyright

Levola Hengelo BV v. Smilde Foods BV, C-310/17, ECLI:EU:C:2018:899

In its ruling in *Levola*, the Court of Justice of the European Union (CJEU) held that the taste of a food product cannot be protected by copyright because it is not identifiable with sufficient precision and objectivity.

Legal context and facts

Levola is a Dutch distributor of food products. One of its most popular products is a spreadable dip that contains cream cheese and fresh herbs, which is sold under the name *Heks'nkaas* or *Heksenkaas* ("Witches' cheese"). Levola brought suit against Smilde after it started marketing a competing product, alleging that Smilde's product infringed its copyright in the taste of Heksenkaas.

At first instance, the District Court Gelderland dismissed Levola's claims without having to decide on the question whether copyright protection can vest in the taste of a food product (Rechtbank Gelderland 10 June 2015, ECLI:NL:RBGEL:2015:4674). The District Court held that Levola had failed to state which elements or combination of elements in the taste of Heksenkaas constituted the work it claimed was entitled to copyright protection.

The Court of Appeal Arnhem-Leeuwarden observed that it remained an open question whether the taste of a food product is subject to copyright protection (Gerechtshof Arnhem-Leeuwarden 23 May 2017, ECLI:NL:GHARL:2017:6697). In this regard, it noted that there were diverging views among several national supreme courts on the copyright protection of smell. Whereas the Dutch Supreme Court held that the scent of a perfume can, in principle, be protected by copyright (Hoge Raad 16 June 2006, NL:HR:2006:AU8940), the French Court of Cassation came to the opposite conclusion (Cour de Cassation 10 December 2013, ECLI:FR:CCASS:2013:CO01205). It decided to request clarification from the CJEU on whether the taste of a food product may be protected by copyright under Directive 2001/29 (the InfoSoc Directive).

Analysis

The CJEU confirmed that the taste of a food product cannot be granted copyright protection and, therefore, did not have to address the referring court's second question, which related to the specific requirements for copyright protection in the taste of food. In so doing, it followed the A-G Wathelet (Opinion of 25 July 2018, ECLI:EU:C:2018:618).

After deciding the referral was admissible – the alleged failure to identify the elements of Heksenkaas' taste in which the copyright subsists, which stranded Levola's action in first instance, did not defeat the presumption of relevance that the CJEU employs for referrals – the CJEU turned to the InfoSoc Directive. The CJEU called to mind its decision in *Infopaq International A/S v. Danske Dagblades Forening* (CJEU 16 July 2009, C-5/08, ECLI:EU:C:2009:465), where it held that the provisions of this Directive must be given an autonomous and uniform interpretation throughout the European Union. The issue, then, was whether the taste of a food product can be classified as a "work" within the meaning of the InfoSoc Directive (par. 34).

The CJEU started its analysis by referencing its earlier case law on the concept of a work in the InfoSoc Directive, which established criteria relating to the originality of the work but contains no guidance for the required medium of expression. However, it found inspiration in

Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and Article 2 of the WIPO Copyright Treaty, which bind the EU. These provisions establish, first, that literary and artistic works include every production in the literary, scientific and artistic domain, whatever their mode of expression; and, second, that copyright may be granted to expressions, but not to ideas as such (par. 37-38).

The CJEU deduced from these provisions that "*the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form*" (par. 40). The CJEU's reasoning in this respect remains somewhat nebulous: after all, the phrase "*whatever their mode of expression*" in Article 2(1) of the Berne Convention does not suggest restrictions such as those now identified by the CJEU. The A-G offered a convincing alternative by suggesting, in par. 56 of his Opinion, that sufficiently objective and precise identification of the subject matter is simply an inherent requirement when seeking intellectual property protection. In this context, he referred to the CJEU's decision in *Ralf Sieckmann* (CJEU 12 December 2002, C-273/00, ECLI:EU:C:2002:748), where a comparable requirement was laid down for trademarks that are incapable of being perceived visually. In my view, a requirement that a copyrightable work be objectively identifiable is certainly sensible, but it is doubtful whether this requirement as such can be read into the Berne Convention or the WIPO Copyright Treaty.

The CJEU then explained the rationale for its holding, which in my view is persuasive (par. 41). It stated, first, that relevant authorities and third parties alike must be able to identify, clearly and precisely, the protected subject matter. Secondly, there should be no subjectivity involved in the process of identifying the protected subject matter. These are certainly commendable objectives for the copyright system, even if it is in the nature of copyright that the precise scope of protection of a work cannot always reliably be predicted. It will be interesting to see what bearing this decision will have on works that consist of an original combination of known elements – protectable, for instance, under Dutch copyright law: Hoge Raad 31 May 2013, ECLI:NL:HR:2013:CA1601 – the discernment of which can be a notoriously subjective exercise.

In the final part of the decision the CJEU finds that the taste of a food cannot be expressed with the required degree of precision and objectivity and, therefore, cannot be classified as a work within the meaning of the InfoSoc Directive (par. 44). This is because the taste of food will be perceived on the basis of subjective sensations and experiences, which depend not only on the consumer but also on the environment or context in which the food is consumed (par. 42). It is not possible, in the current state of scientific development, to otherwise achieve an objective fixation of the taste to be protected (par. 43).

Practical relevance

The decision may be bad news for producers of hit edibles that are easy to copy, such as Levola. It may also come as a disappointment to European chefs, who work day and night to stay ahead in the cutthroat business of haute cuisine. Then again, it may also come as a relief to them—after all, their trade was built on inspiration and imitation. That might be true of the food industry more generally, as a visit to the local supermarket shows: consumers have several competing options to choose from for virtually any product. The generally low threshold for copyright protection might have opened the floodgates for copyright litigation over many more of these products which would likely have led to a reduction in choice for consumers. In that sense, the CJEU's decision is to be welcomed.

Does it spell the end also for copyright in odours? The CJEU's referral to the diverging French and Dutch decisions as the backdrop to this legal question may tempt us to think so. But the holding is expressly limited to the taste of a food product and is based on the inability to precisely and objectively identify the taste of food. That reasoning might not apply equally to smell. For instance, developing a sense of smell in robots is farther advanced than developing their sense of taste, which suggests that it is easier to digitally render smells. Moreover, reading *Levola* to mean copyright in smell is also precluded may fit uneasily with *Sieckmann* where the CJEU, by all accounts, left open the possibility of trade mark protection for smells using a criterion that overlaps with the criterion of sufficiently objective and precise identification. This suggests the CJEU believes that smell might satisfy this criterion, making it still too early to give up copyright protection for smells altogether.

As is often the case, the CJEU displayed a preference for pragmatism over dogmatism in its decision. Apart from the concerns about reduced consumer choice discussed above, litigation over copyrighted tastes would pose serious challenges to litigants and courts. How to justify the inherently subjective valuation that a specific taste is "original", or that another taste is too similar? In my opinion, the CJEU did well to close the door on such cases, even if I wonder if the basis for the decision can be found where the CJEU seeks it. It reminds one of the CJEU's case law on the "new public" criterion as first formulated in *SGAE v. Rafael Hoteles SA* (CJEU 7 December 2006, C-306/05, ECLI:EU:C:2006:764). Critics argue this criterion is hard to reconcile with the Berne Convention. Perhaps, but we should not forget that the Berne Convention was signed in 1886 and deliberately left signatory states much leeway. The CJEU can be lauded for its persistent efforts to translate its standards into workable rules for the 21st century.

Léon Dijkman
European University Institute

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