Current Developments – Europe

EUROPEAN UNION

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The Court of Justice of the European Union finds that copyright does not subsist in the taste of cheese spread (*Levola Hengelo BV v Smilde Foods BV* (Case C-310/17))

Introduction

The Court of Justice of the European Union (CJEU) has recently provided its verdict about the question whether taste could be susceptible to copyright protection. Copyright in the European Union (EU) is not fully harmonised though there are a set of EU Directives which harmonise certain aspects of copyright law. The most far reaching Directive with regard to copyright law is Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (so-called InfoSoc Directive). Within its Articles 2, 3 & 4, the Directive stipulates that the exclusive rights of reproduction, communication to the public and distribution enjoyed by authors relate to their works. Unlike the UK which has a so-called closed list system of copyright protected works, the InfoSoc Directive leaves this question open as to what constitutes a work. This then leads to the question whether untraditional creations – in the copyright sense – could fall within the canon of copyright protected works. The protectability of taste or smell through copyright then inevitably comes to mind. And copyright law seems to be an attractive solution for IP protection since trade mark protection still remains practically impossible for such unconventional marks.

Background

"Heksenkaas'" is a spreadable dip with cream cheese and fresh herbs produced by the Dutch cheese manufacturer Levola Hengelo BV ("Levola"). Smilde Foods BV ("Smilde") produced and sold a cheese spread called "Witte Wieven" since 2014. Levola considered its competitors product to taste like "Heksenkaas" and subsequently filed a suit for copyright infringement before the Rechtbank Gelderland (Gelderland District Court). Levola argued that the taste of "Heksenkaas'" was its manufacturer's own intellectual creation and would constitute a 'work' in the meaning of Article 1 of the Dutch Copyright Act. The company "defined copyright in a taste as being 'the overall impression on the sense of taste caused by the consumption of a food product, including the sensation in the mouth perceived through the sense of touch.'"[1] In addition, Levola asked the court to rule that the taste of Smilde's product was a reproduction of the taste of "Heksenkaas".

The District Court rejected this claim which made Levola appeal this decision. The Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden) noted the diametrically opinions of the parties in relation to the protectability of taste through copyright. On the one hand, the appellant Levola argued that taste could constitute "a literary, scientific or artistic work that is eligible for copyright protection"[2] through an analogy to scent and relied, *inter alia*, on a judgment of the Supreme Court of the Netherlands (Hoge Raad) from 2006. In this decision the court held that the

scent of a perfume may, in principle, be susceptible for copyright protection.[3] Smilde, on the other hand, submitted that taste would fall outside the usual categories of copyright protected works which would relate to visual and aural creations. In addition, "the instability of a food product and the subjective nature of the taste experience preclude the taste of a food product qualifying for copyright protection as a work."[4] Furthermore, Smilde submitted that the exclusive rights of copyright and its exceptions are practically inapplicable in the case of taste. To support its submission, Smilde that the Cour de cassation (Court of Cassation, France) has held that rejected the possibility of scent being protected by copyright.[5] The Arnhem-Leeuwarden Court of Appeal noted the divergence in the jurisprudence with regard to the protectability of scent as a copyright protected work in national supreme courts within the EU and decided to stay the proceedings. Since the definition of protectable subject matter of copyright law was now up to the CJEU due to the InfoSoc Directive it submitted the following questions to the CJEU for a preliminary ruling:

> *1(a) Does EU law preclude the taste of a food product — as the author's own intellectual creation — being granted copyright protection? In particular:*
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> > *(b) Is copyright protection precluded by the fact that the expression "literary and artistic works" in Article 2(1) of the Berne Convention, which is binding on all the Member States of the European Union, includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression", but that the examples cited in that provision relate only to creations which can be perceived by sight and/or by hearing?*
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> > *(c) Does the (possible) instability of a food product and/or the subjective nature of the taste experience preclude the taste of a food product being eligible for copyright protection?*
> >
> > *(d) Does the system of exclusive rights and limitations, as governed by Articles 2 to 5 of Directive [2001/29], preclude the copyright protection of the taste of a food product?*
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> *(2) If the answer to question 1(a) is in the negative:*
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> > *(a) What are the requirements for the copyright protection of the taste of a food product?*
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> > *(b) Is the copyright protection of a taste based solely on the taste as such or (also) on the recipe of the food product?*
> >
> > *(c) What evidence should a party who, in infringement proceedings, claims to have created a copyright-protected taste of a food product, put forward? Is it sufficient for that party to present the food product involved in the proceedings to the court so that the court, by tasting and smelling, can form its own opinion as to whether the taste of the food product meets the requirements for copyright protection? Or should the applicant (also) provide a description of the creative choices involved in the taste composition and/or the recipe on the basis of which the taste can be considered to be the author's own intellectual creation?*
> >
> > *(d) How should the court in infringement proceedings determine whether the taste of the defendant's food product corresponds to such an extent with the taste of the applicant's food product that it constitutes an infringement of copyright? Is a determining factor here that the overall impressions of the two tastes are the same?'*[6]

Opinion by the Advocate General

In his opinion from 25 July 2018, Advocate General (AG) Whatelet submitted that the concept of a 'work' was not defined within the InfoSoc Directive. Hence, the need for a uniform application of EU

law would require an autonomous definition of a 'work' which would preclude Member States from providing different or additional standards.[7] The AG then provided an interesting point on the relationship between the concept of a 'work' and the requirement for an intellectual creation – the standard for originality in the EU. The question was whether a work may be protected by copyright within the InfoSoc where only the criterion of originality (i.e. the author's own intellectual creation) is met. The AG, however, held that both these concepts would need to be satisfied.[8]

By referring to Article 2(1) of the Berne Convention which states that literary and artistic works that are eligible for copyright protection, the AG deduced that this would only relate to "works which are perceived visually or aurally."[9] The AG added that where doubts remained as to whether certain creations could be protected by copyright, the Berne Convention was amended or new multilateral agreements adopted.[10] Additionally, the AG referred to the idea/expression dichotomy whereby only expressions of ideas were protected not the idea as such and likened a recipe to being an unprotected idea. Finally, the AG elaborated on more practical matters by stating that original expressions protected by copyright would have to be identifiable with sufficient precision and objectivity.[11] Here, the AG links the discussion to that held within EU trade mark law. In the *Siekmann* decision, the CJEU[12] held that a non-traditional mark (there a scent) would have to be " clear, precise, self-contained, easily accessible, intelligible, durable and objective" in order to fulfil the criterion of graphical representation.[13] The AG stated that with "today's technology, the precise and objective identification of a taste or scent is currently impossible."[14] Hence, the AG found that taste of a food product is precluded from copyright protection.

The decision

After discussing the admissibility of the proceedings, the Court engaged with the first question by the Arnhem-Leeuwarden Court and distilled it into whether "(i) the taste of a food product from being protected by copyright under that directive and (ii) national legislation from being interpreted in such a way that it grants copyright protection to such a taste."[15] In order to respond to the question, the court found that while Articles 2-5 of the InfoSoc Directive refer to the works of authors that encompass the exclusive rights or may be subject to exceptions or limitations, there is no reference to national law of what constitutes a work. In such case, an autonomous and uniform definition would need to be applied.[16]

The Court then held that two cumulative conditions must be met for there to be a work in the meaning of the Infosoc Directive: First, the subject matter in question must be the author's own intellectual creation and secondly that this expression may be classified as a work. The Court reiterated the findings of the AG with regard to the EU's obligation to adhere to the provisions of the Berne Convention albeit not being a party to it. Article 2(1) of the Berne Convention would protect literary and artistic works which would include "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression may be." In addition, the idea-expression dichotomy enshrined within Article 2 WIPO Copyright Treaty and Article 9(2) of the TRIPS Agreement would be part of the EU legal order.[17]

Based on these reiterations, the court held that a work in the meaning of the InfoSoc Directive "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."[18] It explained that authorities must be able to clearly and precisely identify the subject matter of the exclusive rights in order to protect it. Such considerations would also apply to third parties, such as competitors. Additionally, the Court emphasised the necessity of legal certainty which would prohibit any form of subjectivity which

would mandate that "the protected subject matter […] must be capable of being expressed in a precise and objective manner."[19]

In relating this to the question at hand, the Court held that the taste of food could not be established with precision and objectivity. Food, would, unlike literary, pictorial, cinematographic or musical works, be based essentially on taste sensations and experiences which would be subjective and variable. Much would depend "on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed."[20] The Court added that a precise and objective identification of the subject matter in order to distinguish it from other products would not be possible with current state of scientific development.[21] Consequently, the Court held that the taste of food could not be regarded as a work within the meaning of the InfoSoc Directive.[22] The uniform definition of the concept of work which the Court established also precludes EU Member States from granting copyright protection for the taste of food.[23]

Comment

The CJEU's decision was eagerly awaited and its decision not all too surprising. The case further develops the autonomous concept of what may constitute the subject matter protectable by copyright. The way in which the Court excluded taste as copyright protectable subject matter may lead to some doctrinal "hiccups". Even if the Court did not apply the rationale derived from the *Siekmann* criteria with regard to trade mark law *expressis verbis*, it appears that the Court was inspired by them. This can be seen where the Court requires that the subject matter must be clear, precise and objective. The question then arises whether traditional works, such as musical works, are always perceived objectively or are rather subject to the age, experience of the listener as well as to other circumstances. Another issue that the decision creates is for the closed list systems of the UK and Ireland. The CJEU's decision could mean that such system would not be tenable anymore[24] even though the Court denied protection for taste in this particular case. But the general definition which the Court provided applies now in all EU Member States. To a certain degree it appears that the Court was led by the goal of excluding taste from the canon of copyright protected works for practical reasons – a valid goal, especially when one tries to imagine how close tastes must be to be an infringement of copyright. But the means to reach this goal could have been placed on doctrinally more sound arguments.

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[1] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 22.
[2] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 27.
[3] *Kekova BV v Lancôme Parfums et Beauté & Cie* SNC NL:HR:2006: AU8940.
[4] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 23.
[5] Cour de cassation, chambre commerciale (Court of Cassation, Commercial Division), 10 December 2013, No 11-19.872, not published in the Bulletin, (FR:CCASS:2013:CO01205).
[6] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 25.
[7] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 40.
[8] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 47.
[9] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 51.
[10] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 52.
[11] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV*, Opinion of AG Whatalet, 25 July 2018, para 56.
[12]Case C-273/00 *Ralf Sieckmann*, Judgement of the Court, 12 December 2002.

[13] Note that this criterion was replaced recently by the EU trade mark which was noted by the AG within footnote 29 of the opinion. The new criterion now requires "that signs must be capable of being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor." (see for instance Article 3(b) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1) Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015, amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OJ 2015 L 341, p. 21)). This stipulates that the change was not that substantive and would not alter the considerations given by the AG.

[14] Case C-310/17 Levola Hengelo BV v Smilde Foods BV, Opinion of AG Whatalet, 25 July 2018, para 57.

[15] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 32.

[16] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para [39].

[17] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 39.

[18] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 40.

[19] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 41.

[20] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 42.

[21] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 43.

[22] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 44.

[23] Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, Judgment of the Court (Grand Chamber), 13 November 2018, para 45.

[24] Eleonora Rosati, 'Why the CJEU cheese copyright case is anything but cheesy' (2017) 12 *Journal of Intellectual Property Law and Practice* 813.