

# European Copyright Society

## Opinion on the pending reference before the CJEU in Case 310/17 (copyright protection of tastes)

19 February 2018

### **Introduction**

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law<sup>1</sup>. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders.

On 23 May 2017, the Court of Appeal of Arnhem-Leeuwarden, Netherlands ("CoA") sought a preliminary ruling from the CJEU on several questions<sup>2</sup>. These questions have been referred to the CJEU in a dispute revolving around possible copyright protection for the taste of a food product (a cheese spread). The questions thus touch upon a fundamental legal issue; whether tastes – and the same line of reasoning should be applied to smells – can be the subject of copyright protection.

As a group of academics concerned about the interpretation and development of copyright law in the European Union, the ECS takes this opportunity to share its view on this legal issue. In a nutshell, the ECS is of the opinion that the copyright system should not embrace protection for tastes (e.g. of food products) nor for smells (e.g. of perfumes) *per se*. An alternative interpretation of European Union copyright law would disrupt the objectives and balance of copyright protection and should be rejected for the reasons set out below.

### **Arguments of the ECS**

1. All the questions referred to the CJEU concern the possibility of copyright protection for the *taste* of a food product (in this case, cheese). This opinion will, however, take the broader perspective of possible copyright protection for smells and scents as well as tastes. It is argued that tastes and smells *per se* (I.) do not qualify as copyrightable works from a conceptual-legal viewpoint and (II.) moreover should not be afforded copyright protection from a pragmatic viewpoint.

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<sup>1</sup> All opinions of the European Copyright Society are available on its website, <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>.

<sup>2</sup> Reference in Case 310/17 *Levola Hengolo* ("Levola case")

2. At the outset, the ECS emphasizes that its opinion does not prejudice the possibility of protection for works that include sensory perceptions (taste/smell/touch) as part of a work<sup>3</sup> in the same manner as letters, colours, textures, forms, stones, sounds or other materials can be used during the creative process and be incorporated in the final version of an original work.

## I. Conceptual / legal arguments

### a. *At the outset*

3. This case invites the CJEU to consider whether a taste can be considered to *constitute a work* for the purpose of copyright law. The Court's answer to this question ought to apply equally well to a smell<sup>4</sup>.

4. It is established case law that only works that fulfil the condition of being the result of a maker's own intellectual creation benefit from copyright protection. While this condition for copyright protection has been harmonised to a large extent by the CJEU, most notably in its decisions, *Infopaq*<sup>5</sup> and *Painer*<sup>6</sup>, the Court has not been given the opportunity to reflect upon *the definition of a work* that constitutes the sole 'object' of traditional copyright protection as covered by the Berne Convention.

Some decisions, such as *Infopaq*, *BSA* and *FAPL*,<sup>7</sup> contain hints of what constitutes 'a work', but they do not provide a clear definition. In that string of cases, the CJEU held that, under EU law, copyright protection should arise whenever a work is original, i.e. 'the author's own intellectual creation'. For example, in *FAPL*, the CJEU considered whether football matches as such can be eligible for copyright protection. The Court answered this question in the negative, considering that football matches "cannot be classified as works. To be so classified, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation." (paras 96 and 97).

5. This reasoning defines the object of protection by referring to the criteria for protection. It would, however, be more logical first to clarify the boundaries of the 'object' (i.e. the concept of the work) before identifying further thresholds for copyright protection, so as to avoid the conflation of the notions of 'originality' and 'work'. In other words, a distinction should be made between the question of what constitutes a work in the meaning of copyright law, on the one hand, and the requirements for protection, on the other hand.

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<sup>3</sup> Such as, e.g. the art installation OSNI (Object Sentant Non Identifié), a glass cube placed on top of the Palais de Tokyo where visitors were able to go up a staircase through a cloud of one of Cartier's perfumes (2017) or a work that consists of an installation in the dark where the public perceives the work by touching it.

<sup>4</sup> The facts of this case indicate that the *Kecova* decision of the Dutch Supreme Court (Hoge Raad 16 June 2006, case Lancôme/Kecofa) dealing with the protection of scents has been often referred to as precedent.

<sup>5</sup> *Infopaq International* of 16 July 2009, C-5/08.

<sup>6</sup> *Painer* of 1 December 2011, C-145/10. See, in particular, para 94: a work "is protected by copyright if, which it is for the national court to determine in each case, such (work) is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that (work)".

<sup>7</sup> *BSA* of 22 December 2011, C-393/09; *Football Association Premier League c.s.* of 4 October 2011, C-403/08 and C-429/08.

6. Contrary to the questions referred in the earlier cases mentioned above, which led to a modest clarification of the meaning of originality in respect of the particular subject matters at issue (parts of press articles, portrait photographs, the graphic user interface of computer games), the focus of the questions in the current *Levola* case are primarily aiming at a definition of the notion of 'work'. The Court thus ought to be able to provide more legal certainty on the delineation of the perimeter of copyright.

7. Clarification would, *inter alia*, be appropriate to deal with the divergence of approach between two of the highest national courts in the EU on the issue of copyright protection of olfactory creations. Indeed, in the same year (2006), the Dutch Supreme Court decided in its *Kecofa* decision that the scent of a perfume can be a work and explicitly allowed for perception of a work by the olfactory organ,<sup>89</sup> while, in its *Bsiri-Barbir* case, the French Supreme Court held that “(a fragrance) does not constitute a tangible form of expression and therefore is not subject to copyright protection”<sup>10</sup>.

- In the Netherlands, the Supreme Court held that under the Dutch Copyright Act, due to the general definition of the types of works, *a scent* being a product susceptible to human perception and having its own and original character and carrying the personal stamp of the creator can be a copyright protected work, irrespective of the fact that the human olfactory organs have a limited ability to distinguish scents, that the degree to which separate scents can be distinguished significantly differs from one person to the other and that, due to the specific nature of scents, not all provisions and restrictions of the Copyright Act can apply. Under the Supreme Court’s approach, it is the scent itself that is the subject of copyright protection, and not the recipe or the substances that are detected by the olfactory system (the nose).
- Unlike the Dutch Supreme Court, the French Supreme Court has categorically rejected the protection of scents and held that the smell of Dior's Dune fragrance was not eligible for copyright protection. The court argued that “the fragrance of a perfume, which comes from the simple implementation of expertise, is not the creation of a form of expression that can benefit from the protection of works by copyright.” The view that perfumes are not copyrightable under French copyright law was more recently confirmed by the same court in a decision of 10 December 2013<sup>11</sup>.

The ECS observes that the decisions of 2006 of the French Supreme Court and the Dutch Supreme Court predate the case law of the CJEU establishing harmonized criteria for

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<sup>8</sup> Hoge Raad (Supreme Court) 16 June 2006, *Lancôme Parfums et Beauté et cie S.N.C. v. Kecofa BV*.

<sup>9</sup> (...); see Answers Dutch ALAI Group, *supra*.

<sup>10</sup> Cour de Cassation 13 June 2006, *Bsiri-Barbir v. Haarmann & Reimer*, RIDA October 2006, 349; R.T.D.C. 2006, 587. This Court reaffirmed its position in a decision of 1 July 2008, *Beauté Prestige Int'l v. Senteur Mazal*, case 07-13.952 and 22 January 2009, *Argeville v. Lancôme Parfums et Beauté*, case 08-11.404 (available at [www.legimobile.fr](http://www.legimobile.fr)). It should be observed, however, that some first instance courts and appeal courts in France continue to admit the protection of a fragrance as a work. For comments on this French case law see, e.g., Latreille, o.c. 2009, 142 (with references in footnotes 31 and 32); J. Aittouares, “Droit d’auteur : les parfums refoulés”, *R.L.D.I.* 2008, 14; D. Galan, “Fragrances: la passation du flambeau de la résistance”, *R.L.D.I.* 2009, 12; A. Lucas, in *Propriétés intellectuelles* 2006, n° 21, 442; B. Edelman, note on Cass. 1 juillet 2008, *D.* 2009, 1182.

<sup>11</sup> Cass. 10 December 2013, case n° 11-19872, <https://www.legifrance.gouv.fr/> (The court held that the fragrance of a perfume, apart from its development process, is not in itself a work of the mind. It does not have itself a form with the characteristics of a work of a mind).

copyright protection (starting with the *Infopaq* decision of 2009<sup>12</sup>) and should therefore be considered with caution.

**b. The domain of copyright law**

8. The ECS is of the opinion that any definition of a work should take the *domain* of copyright as a starting point (i.e. it is necessary to determine what the copyright system aims to protect and, in doing so, to delimit its external borders).

Any analysis regarding the domain of copyright law and any consequent definition of ‘a work’ should comply with the international copyright instruments. Primary attention for the delimitation of the subject matter of copyright protection should thereby be given to Art. 2(1) of the Berne Convention (BC)<sup>13</sup>. While this provision does not contain a proper definition of what is to be considered “a work”, it does define the domain addressed by copyright law.

9. Article 2(1) BC sets out the outer borders of the copyright system by limiting it to three domains: “literary, scientific and artistic domain”. It more precisely clarifies that a protectable work (expression) “shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”. The inclusion of the scientific domain does not mean that the content of scientific works should be protected; such works are only copyrightable by the reason of their form<sup>14</sup>.

10. As copyright law introduces an exception to the general principle of economic freedom of trade and competition, it is important that its scope should not be interpreted too broadly so as to create broader legal boundaries than are justifiable by the objectives of the copyright system.

In other words, the purpose and the justification of the copyright system should govern the borders of the literary, scientific and artistic domain. The system aims at stimulating new creations in this domain as opposed to other domains, which fall within the realm of industrial property rights or which simply fall outside the (exceptional) IP system and thus are subject only to the (general) rules of freedom of competition. Some commentators claim that copyright protection is unnecessary for smells or tastes because other forms of protection can apply (such as trade secrets for food recipes) or suggest that such protection would stifle creativity due to legal uncertainty concerning the exact object of protection<sup>15</sup>.

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<sup>12</sup> Cf. the AG in the Dutch *Kecofa* case clearly stated that “notwithstanding the ever-increasing harmonization of copyright, this question has not been harmonized in Community law “(para 5.1).

<sup>13</sup> The WIPO Copyright Treaty, implemented into the EU legal order via the InfoSoc Directive, mandates compliance with Articles 1 to 21 of the Berne Convention.

<sup>14</sup> According to S. RICKETSON and J. GINSBURG: “As a result, the adjective “scientific’ in the context of ‘literary and artistic works’ seems unnecessary”, in *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Oxford Univ. Press, 2006, 406 (n° 8.06); WIPO Guide to the Berne Convention, 1978, p. 12, para 2.2.

<sup>15</sup> Ch. Buccafusco, “On the legal consequences of saucers: should Thomas Keller’s recipes be per se copyrightable?”, 24 *Cardozo Arts & Ent. L.J.*, (1121), 1149 ff & 1156; R. Dreyfuss, “Does IP need IP? Accommodating intellectual production outside the intellectual property paradigm”, Public Law & Legal Theory research paper series; working paper No 10-43, 2010, (1450) 1437 (available at SSRN); E. Fauchart and E. Von

11. Furthermore, there are other types of action or artefact that are implicitly excluded from the copyright field. This is the case for individual or collective sports such as the moves of football players. As in the case of athletic activities, smells and tastes do not express an aesthetic or other “idea” (cf. Art. 9(2) TRIPS) that is communicated via an “intellectual” (sic!) creation. Tastes and smells may evoke certain associations; for example, that of a flower. But those connotations are not communicated cognitively (by contrast with literary, scientific or artistic works), but *solely* by gustatory or olfactory perception. These types of artefact and perception therefore lie outside the copyright domain.

12. A decision that tastes and smells *per se* fall outside the domain of copyright and therefore cannot constitute a work, would comply with the Berne provision. If one does not follow this reasoning, the copyright system would lend itself to the protection of the smells of soaps, shower gels, petroleum products, clothes, car interiors, or the taste of beer, wine, fruits of an original variety, or any other fluid or solid food product. This would provide a potentially fertile ground for frivolous actions directed at disturbing the activities of competitors, especially of smaller new entrants (e.g. artisanal cheese producers or micro-breweries).

Hence, even in cases where an arguable plea could be made that a particular taste or smell results from an intellectual effort by an individual that bears the stamp of personal choices, copyright protection should be denied as such types of creations simply fall outside the domain of copyright.

**c. Legal object of protection: ‘a work’**

13. Even if one were to consider that the copyright domain is sufficiently broad to cater for the protection of sensory perceptions *per se*, such a conclusion should not automatically mean that tastes or smells or scents constitute copyright works. ‘A work’ presupposes the identification of an ‘expression’ as the concrete subject matter of protection. In the situation of tastes and smells, it remains unclear whether protection relates to the recipe or to the ultimate sensory perception. This is highlighted by referred question II.b.

14. The ECS is of the opinion that, in both situations, protection should be denied based on the idea/expression dichotomy, that dictates that ideas and principles underlying any element of a work cannot be protected.

*- As regards a recipe*

15. A recipe *per se* should be regarded as a non-protectable idea. In the same line of reasoning as that which underlies the exclusion of ideas – and, in general, mental concepts whether abstract or concrete – copyright also denies protection to bare facts<sup>16</sup>, raw

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Hippel, “Norms-based intellectual property systems: the case of French chefs”, 19 *Organization Science* 187 (2008); Ch. Barrère and V. Chossat, “Intellectual Property Rights and Cultural Heritage: the case of non-cumulative and non-degenerative creation’, *Review of Economic Research on Copyright Issues*, 2004, vol. 1(2), (97) 109 (available at [ssrn.com](http://ssrn.com)).

<sup>16</sup> The identification of ingredients necessary for the preparation of a dish should be looked upon as a statement of facts. Cf. in the US, *Publications International v. Meredith Corp.*, [88 F.3d 473](#) (7th Cir., 1996), at n° 40.

information and mere formulas. Although the Berne Convention does not contain any explicit statement in this respect, such interpretation is implied in the definition of 'literary and artistic works'. Further confirmation is, moreover, to be found in article 2 (8) Berne Convention<sup>17</sup>.

Unless and until ideas or methods are made perceptible and expressed in a certain ('literary or artistic') mode or form, copyright law does not come into play. And even if they are made perceptible, protection does not extend to underlying ideas, processes or methods. Protection for ideas or processes falls within the purview of patent law<sup>18</sup>.

16. The preceding findings, on the other hand, do not prejudice the possible conclusion that the *expression* of an individual recipe in textual or other form (publication in a cookery book or website, oral recitation on radio or television or before a live audience, for example) or a collection of recipes may qualify as a literary or artistic work meriting copyright protection, subject to the harmonized parameters of originality.

- *As regards sensory perception*

17. Two legal obstacles prevent such subject matter from qualifying as 'a work' for the purposes of copyright protection. Firstly, the ECS is of the opinion that smells and tastes constitute raw material that, in the same way as 'ideas', are excluded from copyright protection.

Secondly, the ECS submits that smells ('as such') and tastes ('as such') cannot constitute a 'work' as considered by the Berne Convention or any other binding international instrument. Indeed, all the examples provided in Article 2(1) relate to expressions that can be accessed or perceived by sight and hearing, as opposed to the other human senses of taste, smell and touch. These examples belong to the categories of textual material (book, pamphlets and other writings, lectures, addresses, sermons and other works of the same nature), sound material (musical compositions with or without words), and the broader visual field (works of drawing, painting, architecture, sculpture, engravings and lithography; photographic and cinematographic works, illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science, works of applied art and dramatic and dramatic-musical works).

One cannot ignore the finding that, although Article 2(1) BC was enacted at a time when tastes (of food products) and smells (as perfume) were generally well known and highly valued<sup>19</sup>, they were not included in the long list of examples of expressions that the international legislator considered as possible creations in the "literary, scientific and artistic domain". The decision not to include examples of taste and smell creations in the BC may be interpreted as an indication that such creations were not meant to fall within the domain of copyright protection.

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<sup>17</sup> Ricketson/Ginsburg, *o.c.* 2006, paras 8.07 & 8.105.

<sup>18</sup> E.g. in the case at stake, a patent had been obtained on 10 July 2012 for the process of the manufacturing of the Heksenkaas (see judgement Court Gelderland 10 July 2015, para 2.8).

<sup>19</sup> One could even state that their success predates the very concept of copyright with many centuries.

The preceding argument is confirmed by the establishment of the system of exclusive rights. The right of reproduction and the right of communication to the public, as well as lending rights, rental rights, etc. and the limitations on those rights, are clearly designed to apply to the forms of works mentioned in Art. 2(1) BC, but are difficult to apply to tastes and smells. How is a taste to be communicated to the public in the sense of Art. 3 InfoSoc Directive? Would a person communicate a perfume to the public when travelling on public transport? How would exceptions, such as 'quotation', apply to tastes and smells?

18. While the list in Article 2(1) is non-exhaustive and should cover other forms of expressions falling within the understanding of 'literary and artistic works', it is certainly not unlimited. An interpretation that would extend the scope of Article 2(1) to *other objects* or *categories* of works should take care not to run counter to the internationally accepted legal framework. Extending the scope of protection is only possible by a unanimous decision of the BC Member States to incorporate new subject matter.

19. It should finally be born in mind that, in common law countries, such as the UK or Cyprus, additional criteria are applicable: the requirement of fixation and the requirement for the protected form to fall within a closed list of works. It would be audacious to interpret the existing EU legal framework and case law as having harmonized those conditions. On the contrary, the legislator's silence could well be read as indicating an intention not to interfere with these aspects of national law. EU common law countries never expressly accepted that the fixation principle and the principle of the closed list (two conditions which lead necessarily to the conclusion that smells and tastes are outside the scope of protection of copyright law) are no longer relevant. As a consequence, accepting that taste and smell may constitute protected works at the EU level may constitute a violation of the principle of subsidiarity.

The question of originality has been harmonised because there was a legislative basis for that harmonisation (for software, databases and photographs). The Court intervened to define the threshold which existed in all the Member States. On the contrary, it would appear more controversial for the CJEU to abolish the conditions of fixation and the closed list. Arguably, this is a task for the EU legislator. If we consider that those criteria have not been abolished (and are therefore left to the discretion of the Member States), the EU copyright law domain should take them into account.

## II. Practical Concerns

20. The ECS is of the opinion that, in addition to the principal and conceptual arguments, too many practical obstacles would arise if the court were to decide that the taste (or smell) of a food product could be granted copyright protection. Many of the questions referred to the CJEU raise such practical issues.

The present opinion considers hereafter the most serious problems for legal certainty. As it is important that market players are able, at a minimum, to predict the legal consequences

of their conduct, the implications of protecting tastes and smells as copyright works may indeed be severe.

**a. Lack of precision of protected subject matter (& harm to legal certainty)**

21. It is important that creations that may be subject to copyright protection are identified with sufficient precision. In this respect, reference can be made to a concern of the French Supreme Court of 10 December 2013<sup>20</sup>, that copyright should protect creations in a form that can be apprehended ("*forme sensible*"), in the sense that they can be identified with sufficient precision as to allow their communication. It was furthermore concluded that the fragrance of a perfume does not itself have a sufficiently defined form to be protected as a work of the mind.

22. *Linked to this concern is the subjective character of the taste experience itself* (Cf. referred question I.c).

Works that exclusively consist of tastes or smells cannot be perceived objectively, as they depend on preferences. Preferences are by their very nature personal and not subject to training, as the whole education and training system in our societies largely ignores these issues<sup>21</sup>. Reference can be made on this issue to Advocate General Colomer's opinion in the Sieckmann case, which emphasized the different nature of the five human senses, three of which are 'mechanical' more objective senses (touch, sight, hearing), whilst the other two senses are 'chemical' (taste and smell)<sup>22</sup>.

It is to be admitted that problems of subjectivity can also be encountered in the case of creations that are accepted as works under current copyright law, e.g. certain works of contemporary arts, but that is hardly an argument to open copyright protection up to new classes of creations, whose very hallmark is that of instability and subjectivity.

23. *Linked to this concern, moreover, is the instability of the subject matter for which protection is sought, i.e. food, due to influences like temperature, storage, durability* (Cf. Question I.c). While this argument may not in itself preclude copyright protection<sup>23</sup>, in the current *Levola* case dealing with food products, there is the additional practical problem that the taste of a product varies with the age of the product, time of exposure to air,

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<sup>20</sup> Cass. 10 December 2013, case n° 11-19872, <https://www.legifrance.gouv.fr/>.

<sup>21</sup> E.g. there are differences of perception as between men and women; differences with regards to the number of taste buds; and variations of the perception of a smell depending on skin type, culture or climatic environment.

<sup>22</sup> See Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 6 November 2001, in case C-273/00 (Sieckmann), paras 24-25, further noting that: "Although any message which may be perceived through any sense can constitute a sign capable of identifying the goods of an undertaking, this innate capability is not always the same. The reason for this is very simple: perception of the outside world by human beings differs, depending upon the sense or window through which it takes place. 25. In neurophysiology, a distinction is generally made between 'mechanical' and 'chemical' senses. The first group consists of touch, sight and hearing, which are all easily comprehensible because they relate to the concept of shape and form (Gestalt) and can be described relatively objectively. Characterisation of the latter group, the senses of taste and smell, is more problematic due to the absence of precise rules for determining their content"

<sup>23</sup> See, e.g. works of artists like Damien Hirst, some of which are also of a 'perishable nature'.

temperature, remaining shelf life (perishable character) and also possibly due to the subjectivity of the experience of taste.

**b. Problems with infringement procedures (& harm to legal certainty)**

24. The enforcement of copyright in taste against infringements would also be confronted with severe problems of a practical nature.

25. *Evidence of infringement.* It would be extremely difficult for the creator of the taste of a product to substantiate and to provide evidence of the elements that show the mark of the creator, and thus the originality in the work.

Cf. referred question II.c: What would a claimant have to advance by way of evidence in proceedings alleging the infringement of a copyrighted taste? Is it sufficient to submit the food itself (so that judges can assess for themselves, by tasting and smelling, whether the product meets the threshold for protection<sup>24</sup>) or must the claimant also provide a description of the creative choices in relation to the taste composition and/or the recipe on the basis of which the taste qualifies as the maker's an own intellectual creation?

26. *Assessment of infringement.* How should a court determine whether the taste of the allegedly infringing product is similar to such an extent as to give rise to copyright infringement? Is it determinative (alone or in combination with other factors) that the overall impression of both tastes is the same? Is the requirement of similar overall impression applicable in a field where the members of the public and judges do not have the capability, the training and/or the experience to adequately distinguish between the different items? (Cf. referred question II.d)

III. Conclusion: no need for protection, other IP rights offer sufficient protection

27. The many legal, conceptual and practical obstacles should prompt the CJEU to deny copyright protection for the taste of a food product. Among other things, such protection would, in a non-justifiable and excessive manner, hamper free competition.

28. For the sake of completeness, the ECS observes that such food creations may benefit from better adapted schemes of protection, such as trade secret law, possibly patent law and/or rules on unfair competition (e.g. against 'taste-alikes'). The products themselves often also have other, more recognisable features that can be protected far more easily than taste under existing intellectual property rights, and in particular trademark law (e.g. their packaging, shape, brand etc.).

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<sup>24</sup> In the earlier ex parte order, the judge requested samples of both products. Following the tasting, the Court ruled that infringement was sufficiently plausible and that the taste of the two products was similar enough to warrant the seizure)

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## Addendum

### *Questions referred*

- a) Does Union law preclude the taste of a food product — as the own intellectual creation of the author — being granted copyright protection? In particular:
- 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 only relate to creations which can be perceived by sight and/or by hearing?
- 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 restrictions, as governed by Articles 2 to 5 of Directive 2001/29/EC,<sup>1</sup> preclude the copyright protection of the taste of a food product?
  - o If the answer to question 1(a) is in the negative:
    - a) What are the requirements for the copyright protection of the taste of a food product?
    - 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 the decisive factor here that the overall impressions of the two tastes are the same?

### *Background of the case*

The dispute revolves around two flavours of cheese spread. There is on the one hand the product of the plaintiff the Levola company bearing the trademark **Heks'nkaas** (Dutch for "witches' cheese") which is a dip created by a local greengrocer in 2007 who sold his secret recipe to the company Levola that subsequently introduced the cheese spread to the rest of the country in 2011. The referring court noted that the greengrocer had created this recipe by processing a batch of cream cheese into a spread by adding a mayonnaise-based sauce, cut leek, parsley and garlic pulp.

The prejudicial questions are referred in the framework of an infringement procedure against competitor Smilde Foods, which sells a cheese spread with an allegedly similar taste marketed under the trademark **Witte Wievenkaas** (Dutch for "white women's" cheese").

The dispute at the core of proceedings leading to the prejudicial questions did not deal with the respective trademarks<sup>25</sup> but centers on the products' similar tastes

Levola claims that its spread has such a distinctive taste that it is eligible for copyright protection. It argues that the same line of reasoning should be applied as in an earlier landmark case of the Dutch Supreme Court where copyright protection was accepted in respect of perfumes<sup>26</sup>. The notion "taste" could, according to Levola, in a similar way be described as "the sensory perception upon the consumption of a foodstuff, consisting of a combination of basic flavours and the mouthfeel caused by, among other things, the viscosity and consistency of the product"<sup>27</sup>. This position is contested by defendant Smilde arguing that a taste in itself cannot be protected by copyright and that, for a number of reasons, the EU system of copyright law cannot and should not be applied to a taste.

Proceedings in this case were initiated in 2015 before the District Court of Gelderland. The Court decided not to deal with the question whether tastes can be the subject of copyright protection 'for reasons of process-economy' and merely assumed that this could be the case. Ultimately, Levola's claim was rejected because it had failed to substantiate the elements of originality in respect of the taste of Heks'nkaas and, in particular, how the author has stamped the taste with his 'personal touch' as is required for protection under both Dutch and European harmonized principles of copyright law. The judge also refused to sample the cheese in order to experience its taste as proposed by Levola and held that it was up to Levola to substantiate why Heks'nkaas would be protected by copyright<sup>28</sup>.

It is relevant to observe that in a similar case but against a different company<sup>29</sup>, another result was reached. End 2014, upon Levola's request for an ex-parte order for protective measures, the District Court of The Hague had allowed a seizure of documents relating to the creation of the defendant's "Magic Cheese" product. With reference to the Dutch Supreme Court decision *Kecofa* on the copyright protection of scents, the Court acknowledged in a preliminary opinion that tastes, including Heks'nkaas, could benefit from copyright protection. In this case the court had requested samples of both products. Following the tasting, the court further ruled that infringement was sufficiently plausible as the taste of the two products was similar enough as to warrant the seizure<sup>30</sup>. In the subsequent proceedings on the merits, the Court however decided, after having studied an expert report and also having experimented itself with the respective tastes, that the taste of Heks'nkaas did not meet the standards to qualify as a copyright protected work<sup>31</sup>.

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<sup>25</sup> In this respect there has been an separate opposition procedure involving the two same parties. On 28 February 2017, the Court of Appeal of The Hague more in particular held that witches and "witte wieven" (that in Dutch, also refers to a type of ghostly, witch-like creature) are indeed both "supernatural, magical creatures with negative connotations" and concluded that these signs are conceptually highly similar to such an extent that it offsets the differences on the visual and phonetic level. In view of this conclusion of similarity combined with the identical nature of the goods, Smilde's trademark application was refused.

<sup>26</sup> Hoge Raad 16 June 2006, case Lancôme/Kecofa

<sup>27</sup> (reference)

<sup>28</sup> District Court Gelderland 10 June 2015, *AMI-Tijdschrift voor Auteurs-, media- en informatierecht* 2015, 146.

<sup>29</sup> European Food Company who brought the spread of "Magic Cheese" on the market.

<sup>30</sup> Pres. District Court The Hague 13 January 2015, para 2.2.

<sup>31</sup> District Court The Hague 3 May 2017, ECLI:NL:RBDHA:2017:4384

On appeal against the decision of the District Court of Gelderland in the currently discussed case, the Court of Appeal of Arnhem-Leeuwarden, with reference to the conflicting case law in the Netherlands and France<sup>32</sup>, observed that “there is reasonable doubt as to whether and to what extent EU law leaves room for intellectual protection of the taste of a foodstuff” and decided to seek guidance from the CJEU<sup>33</sup>.

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<sup>32</sup> Court of Appeal Arnhem-Leeuwarden 23 May 2017 (“The highest national case-law in the European Union therefore differs as regards a comparable question as to whether a smell may qualify for copyright protection” (para 7.7)).

<sup>33</sup> *Ibid.* para 7.8.