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Copyrightability

It's a Matter of Taste: EU Top Court to Address Copyright on Taste

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Can you copyright the taste of food? That's the question that the Court of Justice of the European Union (CJEU) is set to tackle, after the Court of Appeal of Arnhem-Leeuwarden, Netherlands (*Gerechtshof Arnhem-Leeuwarden*), referred several questions on the issue.

Whether copyright protection protects tastes has been stirring up emotions in European legal circles for some time. Some say that such protection would be contrary to the idea-expression dichotomy, the notion that ideas and principles underlying any element of a work can never be protected.

Others argue protecting taste would negatively affect free competition, among other things. Allowing taste copyright would lead to creative stagnation because when chefs invent new dishes and thus tastes, they always build on already existing dishes. If to do so would mean risking liability for copyright infringement, they may become less willing to experiment and innovate.

Some also question the added value of using copyright law to protect taste. They argue that tastes or taste ef-

fects can be protected just as well via patent law and that the products themselves often also have other, more recognizable features that can be protected far more easily than taste under the existing intellectual property rights, such as the packaging, shape, and brand. There may also be protection under trade secret laws or laws on unfair competition.

Legal certainty is also a concern. Market players at minimum need to be able to predict, as exactly as possible, the legal consequences of their actions. With taste, that may be a problem, given the difficulties of ascertaining crucial elements such as a taste's origin, the date of its creation and of course its exact description and scope (if not based on the recipe and/or list of ingredients).

Tale of Two Cheeses

The dispute revolves around two flavors of cheese spread. One is the very popular product Heks'nkaas ("witches' cheese" in Dutch), a dip created by a green grocer in 2007 and sold by the Levola company.

Levola, which purchased the secret product in 2011, says that the spread has such a distinctive taste that it is eligible for copyright protection. According to the Dutch court's opinion, the recipe involves cream cheese processed into a spread by adding a mayonnaise-based sauce, cut leek, parsley, and garlic pulp.

The other cheese spread is by Smilde Foods's Witte Wievenkaas ("white women's cheese").

Levola argued that a taste should be treated like a scent, which the Dutch Supreme Court ruled deserves copyright protection, in the landmark *Lancome/Kecofa* case back in 2006 (NautaDutilh acted for Lancome in the matter). The company described "taste" as "the sensory perception upon the consumption of a foodstuff, consisting of a combination of basic flavors and the mouthfeel caused by, among other things, the viscosity and consistency of the product."

Smilde's product apparently tastes a lot like Levola's Heks'nkaas. In contrast to Levola, Smilde argues 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.

Levola and Smilde have also faced off over similarities between their trademarks for the respective products. In Dutch, "witte wieven" also refers to a type of ghostly, witch-like creature. On Feb. 28, 2017, the Court of Appeal of The Hague held that witches and "witte wieven" are indeed both "supernatural, magical creatures with negative connotations" which makes the signs conceptually similar. In view of this similarity combined with the identical nature of the goods, the Court of Appeal of The Hague refused Smilde's trademark application.

In the current matter about the products' taste, the district court previously found it unnecessary to decide whether a taste can be copyrighted. It concluded that Levola had simply failed to put forward facts and arguments regarding which elements, or combination of elements, of the product's taste give rise to its own original character and bear the maker's personal mark, both of which required for copyright protection in the Netherlands.

Appeal of Arnhem-Leeuwarden

The Court of Appeal held that the core question of whether taste is copyrightable must be addressed. In its judgment, it first sets out the applicable international and national frameworks, including a useful list of the CJEU's decisions regarding the requirements that must be met by a work in order to be protected by copyright. According to Smilde, that case law has made the Dutch Supreme Court's 2006 decision about scent obsolete.

For the Court of Appeal, the case law makes clear that in order for a work to gain copyright protection, it must be shown that the maker has made creative choices, and only then can one speak of an intellectual creation. Whether or not such creative choices have been made, and to what extent, also depends on the nature of the work. For example, if it concerns an article of daily use, the functional requirements will usually limit the maker's freedom to make creative choices. This affects the scope of a claimant's obligation to put forward facts and arguments in support of its claim.

The Court of Appeal also said that, unlike the Dutch Supreme Court, the French Supreme Court has categorically rejected the protection of scents, most recently in a decision from December, 2013, showing there is disagreement among the highest courts of various EU member states.

Because of this disagreement, there is reasonable doubt about whether a taste can be protected by copyright under EU copyright law and that the CJEU's guidance is required, the court said.

Questions for the EU Top Court

The Court of Appeal first asked the CJEU to address whether EU law in general precludes granting copyright protection to a taste. More specifically, the court asked whether granting such protection is precluded by (i) Art. 2 (1) of the Berne Convention which seems to relate only to visual and auditory creations, (ii) the instability of the food due to factors like temperature and durability, and the subjective character of the taste experience itself, and (iii) the system of exclusive rights, such as the right of communication to the public, lending rights, and rental rights, and the limitations on those rights, such as quotations, which may not be compatible with a taste.

If the CJEU decides that EU law does not preclude granting copyright protection to a taste, the court also asks:

1. What are the requirements for granting such protection?

2. Is the protection limited to the taste as such or does it extend to the underlying recipe?

3. What must be put forward by the claimant in proceedings alleging the infringement of a copyrighted taste?

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Is it sufficient to submit the food itself, so that judges can assess, by tasting and smelling, whether the product meets the threshold for protection, or must the claimant also provide a description of the creative choices in relation to the taste composition or the recipe on the basis of which the taste qualifies as the maker's own intellectual creation?

4. 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? Does it turn on whether the overall impression of both tastes is the same?