NEWSLETTER

From: Intellectual Property department

Subject: A TASTE IS NOT PROTECTABLE BY COPYRIGHT!

Date: 13 November 2018

A taste is not a "work" and is therefore not protectable by copyright!

In a judgment of 13 November 2018 (C-310/17, Levola Hengelo BV v. Smilde Foods BV) the Court of Justice of the European Union (the highest court in the EU) ruled that a taste does not constitute a "work" and is therefore not protectable by copyright.

In that case, the Court was asked to rule on the interpretation of the concept of "work" as referred to in Directive !001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, and more specifically on the question of whether the taste of a food product was likely to constitute such a "work".The food product at issue was the "Heksenkaas" (literally "*witches' cheese*"), a spreadable cheese marketed by Levola.

Levola sued Smile, which markets a cheese named "Witte Wievenkaas", claiming on the one hand that the taste of Heksenkaas is its manufacturer's personal intellectual creation and therefore eligible for copyright protection as a work and, on the other hand, that the taste of "Witte Wievenkaas" manufactured by Smilde constitutes a reproduction of this work.

The notion of copyright-protected "work" is a concept of European law, so the Dutch court asked the Court of Justice whether the taste of a food product can be protected by copyright as a personal intellectual creation.

In its judgment, the Court of Justice recalls that the taste of a food product can only be protected by copyright if such a taste can be described as "work".

Following the Court, it is important for two cumulative conditions to be met in order for an object to qualify as a "work":

- On the one hand, the object concerned must be original, in the sense that it is the author's personal intellectual creation;

- On the other hand, the qualification of "work" is reserved for the elements that are the expression of such an intellectual creation.

The Court concludes that the notion of "work" necessarily implies an expression of the subject matter which makes it identifiable "*with sufficient precision and objectivity*", even though that expression is not necessarily in permanent form.

It is indeed important to be able to identify, clearly and precisely, the subject matter so protected, and ensure that there is no element of subjectivity in the process of identifying the protected subject matter, which implies that the latter must be capable of being expressed in a precise and objective manner.

However, as regards the taste of a food product, the Court considers that the possibility of a precise and objective identification is lacking, since the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they 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.

The Court adds that the precise and objective identification of the taste of a food product, which enables it to be distinguished from the taste of other products, is not technically possible in the current state of scientific development.

On the basis of those considerations, the Court therefore concludes that the taste of a food product cannot be classified as a 'work' within the meaning of Directive 2001/29 and is therefore not protectable by copyright

The carrots therefore seem to be cooked for the « Heksenkaas »…

Some remarks regarding this judgment.

1) In France, the Court of Cassation (the highest French court) refused the protection of odors by copyright, especially for perfumes. The opposite occured in the Netherlands. The judgment of the Court of Justice thus seems to question the Dutch case law according to which a

perfume, an odor, is protectable by the copyright: the difference between perfume and flavor is indeed very thin.

2) The question asked to the Court was whether EU law precludes the taste of a food product from being protected by copyright.

One may question whether the question asked to the Court was the right one and whether the decision and the thinking of the Court would have been the same if the question had been asked in respect of a food product as such; that is to say, if a food product as a whole can constitute a "work" within the meaning of copyright, because of its taste.

Indeed, the taste of a food product is only one "characteristic" of this product, just as the color of an object constitutes only one of its characteristic, to which are added its shape, its proportions, its texture, etc.

In the first instance, the Dutch court rejected the cheese maker's request on the ground that the cheese maker did not indicate which elements or combination of elements of the Heksenkaas taste gave it a proper original character and a personal imprint: a priori, the qualification of the cheese as a work, because of a particular taste or combination of taste, did not seem to be excluded.

3) By this judgment, the Court of Justice seems to take into consideration a new criterion for copyright protection. Indeed, in addition to the condition of originality of the object, it requires the latter, to constitute a work, to be identifiable with sufficient precision and objectivity by the public. The Court does not limit itself to appreciate the expression of the author's creative effort.

Can it therefore be argued that an object which could be perceived differently by different persons does not constitute a 'work' (in the sense of copyright), in particular depending on factors such as the age, the experience, or the physical abilities of individuals, their preferences and habits, the environment or context in which the creation is observed, etc. ?

One may wonder whether the Court of Justice has not overreached in a concern more related to the proof of the possible reproduction of the protected work.

*

We feel that the subject is of importance for companies on the market, especially in the perfume or food industry. The copyright protection of the creations of these companies could constitute a significant

competitive advantage in addition to the rights of trademarks, designs and patents.

It remains to be seen whether the Court of Justice will rule again on this subject; perhaps by being seized of a question aimed at the whole product and not only its taste and/or its smell, which would allow the Court to mature its cheesy jurisprudence...

Wish to contact our legal experts?

Olivier Sasserath (Olivier.Sasserath@mvvp.be)

Adrien Renault (Adrien.Renault@mvvp.be)