

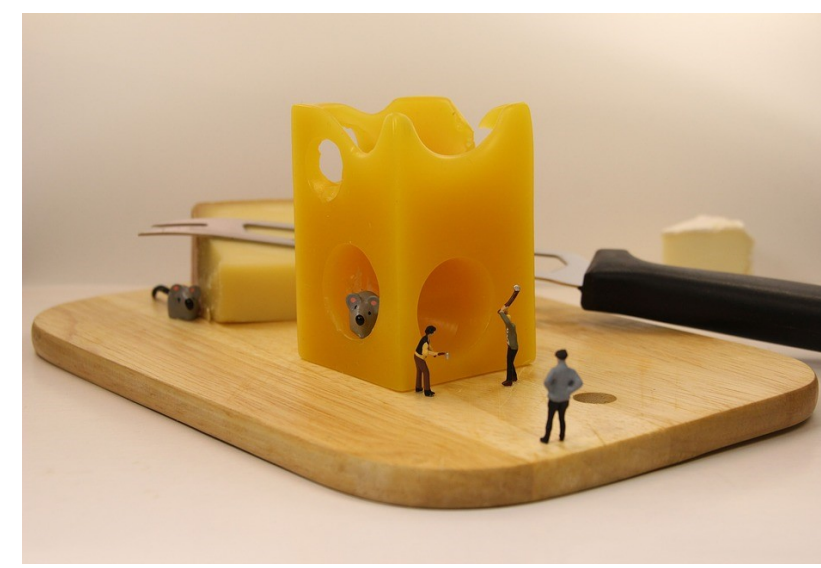
‘Homage au fromage’ or how the CJEU said farewell to Heks’nkaas by excluding copyright protection for works of taste

Kluwer Copyright Blog
December 5, 2018

Eugénie Coche (IViR)

Please refer to this post as: Eugénie Coche, ‘Homage au fromage’ or how the CJEU said farewell to Heks’nkaas by excluding copyright protection for works of taste’, Kluwer Copyright Blog, December 5 2018, <http://copyrightblog.kluweriplaw.com/2018/12/05/hommage-au-fromage-or-how-the-cjeu-said-farewell-to-heks-nkaas-by-excluding-copyright-protection-for-works-of-taste/>

On 13 November 2018, the CJEU clarified the scope of EU copyright law by excluding works of taste from copyright protection. This marks the end of a three-year long dispute, which arose in 2015 between two cheese producers and was based on the idea that the taste of a food product is copyright protected. In that particular case, the producer of a cheese called Heks’nkaas claimed that another cheese, namely ‘Witte Wievenkaas’, was a reproduction of his cheese because of its similar taste. As prescribed by article 13 Dutch Copyright law, the reproduction of a work requires prior permission from the author of the initial work. Importantly, a *conditio sine qua non* for this provision to apply is for the subject-matter at stake to qualify as a ‘work’ under copyright law. Consequently, whether the work of taste is a protectable subject-matter under EU copyright law was the core question that the Court of Justice of the European Union (hereinafter CJEU) had to answer.



While this question sounds quite straightforward, it did succeed in blurring the lines of the very essence of copyright law. On the one hand, it questioned whether the taste of a food product can potentially meet the originality criterion put forward by the CJEU in *Infopaq* and further defined in *Painer*. On the other hand, it shed light on the (non-) existence of additional requirements alongside the aforementioned originality criterion, such as whether the subject-matter should, in the first place, belong to a protectable ‘type of’ work. Such fuzziness was well illustrated by the different parties expressing their opinions before the CJEU on 4 June 2018. Importantly, Advocate General M. Wathelet argued in his opinion from 25 July 2018 that the subject-matter must, in the first place, be a protectable [type of] work to enjoy copyright protection (§46). Building further upon that, he considered that EU law precluded taste from falling within the scope of copyright protection.

Judgment of the CJEU

After deciding that the case was admissible, the Court clarified that the *Infosoc Directive* only grants copyright protection to a subject matter that amounts to a ‘work’, an autonomous EU concept whose interpretation should not vary between member states. For a ‘work’ to exist, two cumulative conditions need to be met. First, the subject matter must be ‘original’ in the sense that it is its author’s own intellectual creation. Second, by referring to *Infopaq* and the *Premier League* case, the intellectual creation at stake must take the form of an ‘expression’ by the author. This ‘expression’ requirement refers to the *idea-expression dichotomy* to which the Court implicitly makes reference by pointing to Article 2 of the *WIPO copyright treaty* and Article 9(2) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*. This dichotomy entails that copyright protection does not apply to ideas, procedures, methods of operation of mathematical concepts, but only to the expression of these.

The Court further emphasises that this ‘expression’ criterion entails that the subject matter be identifiable with sufficient precision and objectivity, although not in permanent form. According to the Court, this would ensure legal certainty and thereby serve authorities who are entrusted with copyright enforcement (such as collective management organisations) as well as third parties, such as economic competitors, who need to clearly define where the artistic freedom starts and ends.

According to the Court, the taste of a food product cannot meet these requirements as its identification primarily relies on ‘taste sensations and experiences’ (§42). Such identification is thus by definition subjective as it depends, ‘inter alia, 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’ (§42). In light of this lack of objective identification, the Court concludes that the taste of a food product cannot amount to a ‘work’ and is thereby precluded from copyright protection at EU level. The Court further clarifies that, in light of the autonomous ‘work’ concept, member states’ laws cannot grant copyright protection to works of taste.

Discussion

On many points, the Court’s reasoning mirrors the AG’s earlier opinion. Similarly to his point of view, the Court uses the *idea/expression dichotomy* (although without naming it as such) as its main argument for excluding the taste of a food product from the ambit of copyright law. This requirement implicitly mirrors the Court’s reasoning in the *Sieckmann* judgment, in which it ruled that the representation of smells should be ‘sufficiently clear, precise, and objective’ in order to function as a trademark (§70). Although copyright does not have a registration system in place, requiring the subject matter to be expressed in a form that is sufficiently precise and objectively identifiable makes sense when having regard to the often economic incentives behind infringement claims. Not requiring this would undeniably open the door to many abusive infringement claims and may encourage market monopolies. The Heks’nkaas cheese actually forms the perfect example. Unlike molecular *cuisine* or signature dishes by famous chefs which are in certain ways ‘unique’, Heks’nkaas is a spreadable cream cheese with some herbs. How many of those cheeses could one think of right now? This can be illustrated by a [similar infringement procedure](#) going on in the Netherlands, between Heks’nkaas and ‘Magic cheese’, where the latter cheese supposedly tastes the same as the former.

However, unlike the AG, the Court does not require a work to be part of a protectable ‘type’ of work but for such a work to constitute an ‘expression’. This line of reasoning fits well with the non-exhaustive lists of protectable works under Art 2(1) of the Berne Convention. It also allows for a future-oriented application of copyright law, leaving room for creative innovation within copyright law. This future-oriented approach is mirrored by the fact that the Court does not exclude taste from copyright protection in an absolute manner. Indeed, it states that ‘it is not possible in the current state of scientific development (emphasis added) to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind’ (§43). This means that – if digitisation permits it – taste may, one day, be copyright protectable. So, Heks’nkaas... “Farewell” or “A bientôt”?