Kluwer Copyright Blog

HEKS’NKAAS at the CJEU: the end of a cheese-war or the beginning of a new copyright era?

Eugénie Coche (IViR) · Tuesday, June 26th, 2018

On 4 June 2018, one of the core concepts of copyright – the copyright work – was disputed at the Court of Justice of the European Union (CJEU). The “cheese battle”, which started in 2015 at the Court of First Instance in Gelderland (the Netherlands) between HEKS’NKAAS (applicant) and ‘Witte Wievenkaas’ (defendant), resulted in a copyright war at EU level. Not only did the issue lead to unprecedented events, such as the cheese-tasting by judges in a parallel dispute between Heks’nkaas and Magic cheese, but also to unforeseen implications: defining or refining the scope of copyright law.

The core question in this case is: *can the taste of food be protected by copyright under EU law?* The controversial nature of this question, together with the main arguments put forward by both parties during the national proceedings, can be found in my earlier post. The present piece summarizes what fifteen judges heard on a *cheesy* Monday afternoon.

The 2009 *Infopaq* judgment is the building block of this dispute, and served as a reference framework for all parties. Accordingly, for copyright protection, the subject-matter must be original in the sense that it is its author’s own intellectual creation. The *Painer* case further refined this definition to the extent that the subject-matter ought to reflect the author’s own personality and be an expression of free and creative choices.

The competing arguments at the hearing

Heks’nkaas

Heks’nkaas argued that these criteria had always been applied in a consistent manner by the CJEU.

This factor therefore dictates whether copyright protection exists. The Court clarified in the *Premier League* case that football matches are excluded from copyright protection, citing a lack of room for creative freedom. The InfoSoc Directive merely refers to a "work" and copyright is *prima facie* constructed around the idea of the 'creative human being'. Heks'nkaas therefore claimed that the medium used for the author's creative expression does not play a role. Accordingly, taste is undeniably an expression of creativity. In order to illustrate this, reference was made to the signature dishes by famous chefs such as Paul Bocuse or Ferran Adrià. Moreover, EU law does not, *a priori*, preclude taste from copyright protection. It actually already allows for the protection of imperceptible and inaudible works. For example, the Community Design Regulation affords protection to the texture of a product (Art 3 sub (a)), which amounts to the protected design, while also explicitly recognizing, under Art 96(2), the subject-matter's parallel eligibility for copyright protection. This suggests that EU copyright law could extend to the *texture* of a work.

Concerning the subjective character of taste, Heks'nkaas argued that every work of art is perceived subjectively. To put this in Kant's words, to which express reference was made: 'Truth does exist but we cannot know it'. Musical scores are the translation of music; recipes are the translation of taste. However, a subjective gap stands between the translation and the work, which cannot be defined. It needs to be experienced. A lack of ability to accurately define smells or tastes is therefore not an objective justification for denying copyright protection under EU law. If this were the case, a considerable number of copyright-protected works should not deserve protection. In closing, Heks'nkaas argued that the purpose of the InfoSoc Directive is to afford a high level of protection to "intellectual creations". Taste should therefore be included within its scope.

Witte Wievenkaas

In opposition, Witte Wievenkaas pointed out that harmonisation of the originality criterion, under *Infopaq*, primarily serves internal market aims. To grant copyright protection to taste would run counter to these aims as it entails uncertainty. What if a certain taste is granted protection in country X but not in country Y? Two arguments were put forward: taste does not fit into the system of copyright, and taste lacks an appropriate means of translation.

Concerning the former argument, the defendant claimed that it would be impossible to 'communicate taste to the public' or to license the copyright on it. Moreover, different exceptions, such as the "citation" exception under Article 5(3)(b) of the InfoSoc Directive, would be inapplicable. Accordingly, by granting copyright to taste, the initial purposes of the Directive would be extended.

Concerning the latter argument, Witte Wievenkaas claimed that the work itself is instable as it is perceived differently depending on the *person* tasting it (men, women, pregnant, sick); *when* in time it is consumed (i.e. proximity to expiration date); and *where* (in the mountains, in the sun, etc.?). Unlike a Mozart composition, which sounds the same when heard at 10 or 40 degrees Celsius (this was explicitly mentioned), cheese has an *evolving* character. Witte Wievenkaas referred to the recent abolition, in the Netherlands, of the herring-, or oliebollentest to illustrate that taste cannot be objectively judged. *If experts cannot judge it; how could judges possibly do so?*

Taking the uncertainties surrounding taste into account, Witte Wievenkaas argued that granting protection would be undesirable for society at large. It would give rise to monopolies that are prone to misuse, to the detriment of small businesses. Instead of stimulating creation, it would curb innovation. Taste's indefinability and vagueness would run counter to Article 10bis of the Paris

Convention, which relates to unfair competition.

The Netherlands

Turning to the Netherlands, its representative clarified that no standpoint would be taken. The first part of the pleading explains that Dutch Copyright law is in line with the InfoSoc Directive and that both instruments are based on the Berne Convention. The non-exhaustive list of protectable works under Article 2(1) of the Convention has been further refined in jurisprudence.

The second part relates to the concept of 'work' as protectable subject-matter and to the fact that it has been harmonized at EU level through *Infopaq*. However, by referring to subsequent case law and to German law, the representative pointed out that the question remains whether the 'type' of work in which copyright protection can exist has been exhaustively harmonised. If not, Member States have discretion as to what 'type' of work should be protected. Since the Directive does not have a system in place for mutual recognition, possibly leading to internal market hindrance, the Netherlands proposed that this question be addressed by the Court.

In order to determine whether 'taste' can be copyright protected, the Court should provide Member States with clearer indications regarding the 'originality' criterion. *What constitutes a 'work'?* In particular, the Court should clarify whether additional requirements exist besides those set out in *Infopaq*. *Is there a need for objective representation or stability of the work?* Whereas trademark law requires such objective representation for registration purposes, which follows from *Sieckmann*, copyright exists without registration. *Is a stable medium for "taste" therefore needed at all?*

Accordingly, while deferring to the judgment of the Court, if the Court were to come to the decision that copyright could exist in taste, the representative requested that the Court better explain how to apply the *Infopaq* criteria to this type of work.

France

France, on the other hand, asked the Court to preclude the possibility for taste to be copyright protected. Taste does not meet the originality criterion set forth in *Infopaq* and does not fit within the 'types of work' listed under Art 2(1) of the Berne Convention. Although France accepted that this list is illustrative and non-exhaustive, it pointed out that none of the given examples are applicable to 'taste', which shows the intention of the legislator.

However, in the event that taste is not excluded from copyright protection, it is argued that it would still need to meet the 'objectivity' criterion. The CJEU has shown in *Sieckmann* that the subject-matter shall be described in an objective and unequivocal way. Not applying this requirement to taste would, in the same way as for trademarks, lead to legal uncertainty. This line of reasoning mirrors the Court of Cassation's position in *Lancôme*, where it ruled that copyright does not extend to smell because of its unidentifiable character.

The United Kingdom

The UK position is aligned with the categorical French "no". Its representative claimed that the question should be answered in two stages. Firstly, the work must belong to a 'type of work' that can be copyright-protected. Only if this question is answered in the affirmative, must regard be given to the originality test set out in *Infopaq* and *Painer*. To illustrate this, the representative

referred to the 2012 *SAS Institute* case, in which the Court drew this distinction.

Concerning the 'type of work', the representative argued that the Berne Convention contains a *de facto* exhaustive list. This is because Art 2(6) thereof requires Member States to grant protection to all the works listed therein. In order to avoid cross-border issues arising, it is thus of critical importance for all protectable works to be cited in the list. If the Court finds this list to be non-exhaustive, copyright shall only apply to visible or audible works (as illustrated in Berne). Reference is made to the *idea-expression dichotomy*, according to which copyright does not apply to ideas, only to the expression of these. Consequently, a recipe can be protected whereas its "taste" cannot.

In any event, the UK's representative further argued that 'taste' cannot meet the 'originality' criterion. Taste lacks any form of fixation and it evolves over time. Granting copyright protection would therefore result in practical difficulties: *how does one pinpoint infringement? How to compare two tastes objectively?* Moreover, from a commercial point of view, it would open the door to abusive infringement claims.

European Commission

Turning to the Commission's view, this echoes the idea expressed by the Netherlands, that the notion of 'work' is an autonomous EU concept. It takes the point of view, however, that Member States have no discretion as to what 'type' of work can be protected. Allowing for such discretion would run counter to this autonomous concept and be contrary to internal market goals.

Concerning the requirements for copyright protection, the Commission argued that these should solely be dictated by the originality criterion set out in *Infopaq* and *Painer*. Despite this, it is necessary to first find out whether the subject-matter is a protectable work. Doing so both ensures that copyright is properly demarcated from other intellectual property rights and that legal certainty and internal market aims are served.

According to the Commission, the Berne Convention contains a non-exhaustive list of copyright-protectable works. However, taste does not fit within these illustrative examples. Like the UK, it pointed out that copyright only applies to the expression of a work, a position supported by the TRIPS Agreement, WIPO and the Berne Convention. Taste lacks such a form of expression, which renders copyright non-applicable to the present situation.

Conclusion

The complexity of this dispute was reflected in the judges' controversial questions. Each party was asked to elucidate their point of view. Interestingly, Heks'nkaas was asked whether the taste of wine should also be copyright protected. The party replied that this could *a priori* be the case, but that the process of winemaking does not leave sufficient room for creative freedom, as its taste is influenced by external factors such as the grape used, the climate and the region. Creativity is thereby strongly limited. This answer shows the many nuances of copyright, some of which could, without much difficulty, similarly be applied to cheese.

What started as a 'cheese battle' might, in the near future, reveal the darkest secrets of copyright law. Is the concept of 'work' harmonized at EU level? Does copyright only allow for the protection of certain 'types' of work? If so, is the list in the Berne Convention guidance as to the types of works protected at EU level? In the event the Court fails to answer all of these questions, you

might address your cheese-related concerns to any of the fifty law students from Amsterdam, whose curiosity justified an eighteen-hour trip to Luxemburg (no exaggeration). Food lover, law nerd or both, they all found their guilty pleasure.

N.B.: the Advocate General will deliver its opinion on the 25th of July.

I would like to thank João Pedro Quintais and Stef van Gompel for their valuable insights and comments.

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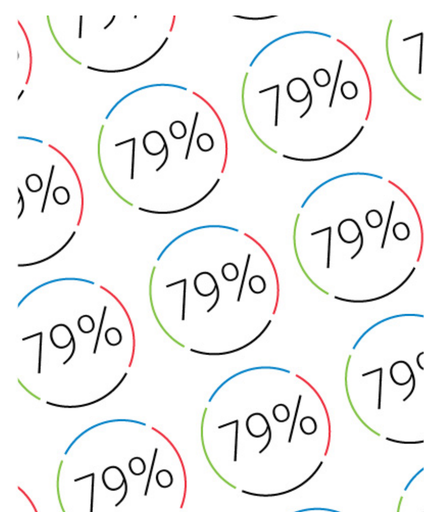

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