Kluwer Copyright Blog

‘Quel dommage, cher fromage’ or how the AG said “no” to copyright protection for works of taste

Eugénie Coche (IViR) · Thursday, September 20th, 2018

25 July 2018 marks a new episode in the Heks’nkaas saga. After tumultuous court proceedings at the national level and before the European Court of Justice, Advocate General M. Wathelet delivered his opinion in this controversial copyright dispute that is now pending before the Court of Justice of the European Union (CJEU). His opinion can be summarized as follows: there should be no copyright protection for works of taste.

Before scrutinizing his opinion, let’s briefly summarize the facts. Levola, the Dutch producer of ‘Heks’nkaas’ cheese, claims that Smilde Foods, producer of a similar soft cheese product named ‘Witte Wievenkaas’, infringes its copyright in the taste of ‘Heks’nkaas’. According to Levola, its product is a work protected under Dutch copyright law, and the taste of Witte Wievenkaas is similar to that of Heks’nkaas. Smilde Foods denies both arguments. The Court of Appeal of Arnhem/Leeuwarden asked several questions to the CJEU. The core question is: *can the taste of a food product amount to a ‘work’ and, thereby, be protected by copyright under EU law?*

The AG Opinion

After concluding that the case is admissible, the AG turned to the substance of the case. Taking into account that the notion of a ‘work’ is not defined in the Infosoc Directive, the AG opines that – in line with CJEU jurisprudence – **this notion is an autonomous concept of EU law**, whose meaning and scope does not differ between Member States. The AG referred to the French intervention (put forward during the oral hearing on June 4), as well as to the *Infopaq* and *Painer* decisions, to argue that for a ‘work’ to exist the subject-matter shall be original in the sense that it is its author’s own intellectual creation. However, as made clear in *Football Dataco*, the originality criterion has its limits. Originality is less likely to be found in a case where there is insufficient

room for creative freedom. Moreover, substantial efforts or invested know-how in the *creation* of the subject-matter are not valid grounds for copyright protection.

Unlike France, whose arguments before the CJEU merged 'originality' and 'type of work' as one requirement for copyright protection, the AG states that originality is by itself not sufficient to establish copyright protection. **The subject-matter must, in the first place, be a protectable *[type of]* 'work'.** To use the AG's words: 'the existence of a work on the one hand and the fact that it *[the work]* is original on the other are two distinguished requirements and shall not be put on equal footing' (§ 46). According to him, this reasoning can be inferred from *Infopaq* in which the CJEU implied this primary requirement. Consequently, a work that meets the originality threshold should not, automatically, be protected by copyright. The AG thus explicitly joins the Commission's point of view, which had previously argued that such two-step test would serve internal market aims, ensure legal certainty, and demarcate copyright from other intellectual property rights.

Subsequently, in light of this primary *sine qua non* condition for copyright protection, the AG analyses whether 'taste' is a protectable type of work. By referring to the WIPO Copyright Treaty, of which the EU is a contracting party, he argued that Article 2(1) of the Berne Convention (BC) should serve as a reference framework. This provision **contains a non-exhaustive list** of types of works. Whereas tastes or smells are not examples listed therein, they are also not explicitly excluded from the list.

Interestingly, by pointing to the existence of copyright protection for databases or computer programs, the AG states that, in case of doubt whether or not a type of work is protectable, the international community has regularly intervened to clearly establish that such works can be protected by copyright. This has already been done by either amending the BC or by concluding other multilateral agreements, such as the WIPO Copyright Treaty which recognizes, under Article 4, computer programs as literary works.

The AG further argues that the *idea-expression dichotomy* imposes additional obstacles to the protection of taste under copyright. According to him, **the form of expression of taste is not sufficiently precise and objectively identifiable**. Taste is transient and volatile. In order to make his point, he refers to the *Sieckmann* judgment, in which the CJEU ruled that smell is not susceptible to graphic representation and therefore cannot constitute a trademark. Whereas the issue in that case was similar to the present case, a crucial difference that cannot be overlooked is the intellectual property right at stake. Trademark law and copyright law are two different IP rights that serve very distinct purposes.

The Court's reasoning in *Sieckmann* must be seen in light of trademark law. Excluding smells as trademarks was justified by the trademark registration system. As stated by the Court, when requiring clarity and precision of the sign: 'the entry of the mark in a public register has the aim of making it accessible to the competent authorities and the public, particularly to economic operators' (§49). Unlike for trademarks, copyright law does not require any such registration. Consequently, applying the *Sieckmann* reasoning in the present case is not entirely straightforward. However, the AG supports his argument by pointing out that objectivity and precision are necessary in order to ensure legal certainty in the context of copyright infringement claims, both towards authors and third parties. The need for legal certainty mirrors the concerns expressed by both France and the United Kingdom before the CJEU. In my view, these points should play a crucial role in today's copyright debate. A lack of legal certainty could easily open the door to

abusive infringement claims. In this respect, it is worth mentioning that another similar infringement procedure is ongoing in the Netherlands, this time between Heks'nkaas and 'Magic Cheese'.

In light of the arguments above, the AG concluded that Union law precludes Member States from adopting national legislation that grants copyright protection to the taste of food.

Concluding Remarks

Whether or not the CJEU will follow the AG Opinion is unknown. The fact that, unlike computer programs and databases, copyright protection of taste has not [yet] been formally recognized in a legislative instrument cannot, in my opinion, justify per se its exclusion from the scope of copyright. While recognition in a legislative instrument may serve legal certainty purposes, when taking into account the non-exhaustive list of types of works under the Berne Convention, it should not be a *prima facie* condition for copyright protection.

However, the volatile character of taste, which goes hand in hand with legal uncertainty, is in my view of paramount importance in today's dispute. Moreover, the objectives behind copyright law should, in my opinion, be taken into account by the CJEU where existing law does not provide sufficient guidance on the issue. As said in my earlier blog post, the process for obtaining the cheese can already be protected by patent law and its brand by trademark law. Whereas, with a bit of imagination and goodwill, the taste of it *could* possibly be protected by copyright, the question still remains whether, in light of copyright's objectives, this *should* be so.

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