

Copyright in the Taste of Cheese?

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by Ron Moscona

For our U.S. readers with Thanksgiving and food still on their minds, the TMCA thought it would be timely to comment on recent news from Europe about cheese. The Court of Justice of the European Union (“ECJ”) held that there was no copyright in the taste of cheese, and the first question that popped into mind was “did the journalists get it wrong again?”

It turns out that they did not.

Well, the result (denying copyright protection for the taste of a food product) is hardly surprising. The more interesting question for readers of this blog is why the issue was brought before the highest court in the EU?

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In Common Law jurisdictions, such as the U.S., Canada, the United Kingdom and Australia, copyright legislation typically lays down an exhaustive list of the types of work or subject-matter that can attract copyright protection, such as the list in USC Title 17 §102. The list invariably covers the main categories of literary, dramatic, musical and artistic works and performances, as well as some special types of subject-matter such as

films and sound recordings. Usually, the law will recognise copyright only in a published work and subject to requirements such as fixation and originality. There are some variations between jurisdictions. EU law, for example, recognises a special copyright in databases.

However, many European jurisdictions adopt a slightly different approach in their copyright legislation, reflecting the text of the Berne Convention for the Protection of Literary and Artistic Works. Article 2(1) of the Convention states that “*The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression*”.

The Dutch copyright law sets out a list of works that can attract copyright protection, not particularly different from similar provisions in many other countries. However, in addition to specific forms of subject-matter, the Dutch law lists as “literary, scientific or artistic work”, “*in general, every production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression*”.

This catch-all provision opens the door to allegations of copyright infringement in relation to many forms of copying. In a previous case, a Dutch court reportedly accepted in principle that there could be copyright in the scent of a perfume. In the case at hand, the food retailer, Levola Hengelo BV accused its rival, Smilde Foods BV, of copying the flavour of one of its products, Heksenkaas, a spreadable dip containing cream cheese and fresh herbs. Levola argued that “*copyright in a taste refers to the ‘overall impression on the sense of taste caused by the consumption of a food product, including the sensation in the mouth perceived through the sense of touch’*”.

The case was referred by the Dutch court to the ECJ on a point of interpretation of EU harmonising legislation in the field of copyright which requires Member States (amongst other things) to ensure protection for authors of their works. The ECJ interprets this provision as one that requires uniform application of the concept of “works” throughout the EU. Accordingly, national copyright law can only extend to the taste of a food product if EU law recognises the taste as a work of authorship.

The ECJ wisely avoided the potentially murky question of classification, whether the taste of a food product (which is clearly the result of considerable skill and labour) should be treated as a form of literary, scientific or artistic work. Instead, the Court focused on the principle (drawn, again, from the Berne Convention) that copyright protects expressions, not ideas.

That principle, the Court held, requires that the subject-matter of protection has to be expressed in a manner which makes it identifiable with sufficient precision and objectivity. The ECJ concluded that the taste of a food product does not meet this requirement. It is too subjective and variable.

“Taste sensations and experiences” the Court held, “are subjective and variable since they depend, 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". Further, the Court pointed out, there is no technical or scientific way in which taste can be objectively identified with sufficient precision.

So there is no copyright in the taste of a food product, not because food (or its taste) is not a work of art, a scientific or artistic work – it may well be – but simple because it is too subjective.