



Press and Information

Court of Justice of the European Union
PRESS RELEASE No 171/18
Luxembourg, 13 November 2018

Judgment in Case C-310/17
Levola Hengelo BV v Smilde Foods BV

The taste of a food product is not eligible for copyright protection

The taste of a food product cannot be classified as a 'work'

'Heksenkaas' is a spreadable dip with cream cheese and fresh herbs, which was created in 2007 by a Dutch retailer of vegetables and fresh produce. The intellectual property rights in that product were transferred by the retailer to the current rightholder, Levola, a company governed by Dutch law.

Since January 2014, Smilde, a company governed by Dutch law, has been manufacturing a product called 'Witte Wievenkaas' for a supermarket chain in the Netherlands.

As Levola took the view that the production and sale of 'Witte Wievenkaas' infringed its copyright in the taste of 'Heksenkaas', it asked the Dutch courts to order Smilde to cease, inter alia, production and sale of that product. Levola claims that the taste of 'Heksenkaas' is a work protected by copyright and that the taste of 'Witte Wievenkaas' is a reproduction of that work.

Hearing the case on appeal, the Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands) has asked the Court of Justice whether the taste of a food product can be protected under the Copyright Directive.¹

In today's judgment, the Court makes clear that, in order to be protected by copyright under the Directive, the taste of a food product must be capable of being classified as a 'work' within the meaning of the Directive. Classification as a 'work' requires, first of all, that the subject matter concerned is an original intellectual creation. Secondly, there must be an 'expression' of that original intellectual creation.

In accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights, which was adopted in the framework of the World Trade Organisation and to which the EU has acceded,² and with the WIPO Copyright Treaty,³ to which the EU is a party, copyright protection may be granted to expressions, but not to ideas, procedures, methods of operation or mathematical concepts as such.

Accordingly, for there to be a 'work' as referred to in the Directive, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

² Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

³ World Intellectual Property Organisation Treaty, adopted in Geneva on 20 December 1996, which entered into force on 6 March 2002. That treaty was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

In that regard, the Court finds that **the taste of a food product cannot be identified with precision and objectivity**. Unlike, for example, a literary, pictorial, cinematographic or musical work, which is a precise and objective expression, the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable. They depend on, amongst other things, 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.

Moreover, it is not possible in the current state of scientific development 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.

Accordingly, the Court concludes that **the taste of a food product cannot be classified as a 'work' and consequently is not eligible for copyright protection under the Directive**.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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