ECLI:EU:C:2018:899

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

13 November 2018 (*)

(Reference for a preliminary ruling — Intellectual property — Harmonisation of certain aspects of copyright and related rights in the information society — Directive 2001/29/EC — Scope — Article 2 — Reproduction rights — Concept of 'work' — Taste of a food product)

In Case C-310/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands), made by decision of 23 May 2017, received at the Court on 29 May 2017, in the proceedings

Levola Hengelo BV

v

Smilde Foods BV,

THE COURT (Grand Chamber),

Composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, M. Vilaras (Rapporteur), E. Regan, T. von Danwitz and C. Toader, Presidents of Chamber, A. Rosas, E. Juhász, M. Ilešič, M. Safjan, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 June 2018,

after considering the observations submitted on behalf of:

– Levola Hengelo BV, by S. Klos, A. Ringnalda and J.A.K. van den Berg, advocaten,

– Smilde Foods BV, by T. Cohen Jehoram and S.T.M. Terpstra, advocaten,

– the Netherlands Government, by C.S. Schillemans, acting as Agent,

– the French Government, by D. Segoin and D. Colas, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the United Kingdom Government, by G. Brown and Z. Lavery, acting as Agents, and by N. Saunders, Barrister,

– the European Commission, by J. Samnadda and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the concept of a 'work', as referred to in 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 The request has been made in proceedings between Levola Hengelo BV ('Levola') and Smilde Foods BV ('Smilde') concerning an alleged infringement, by Smilde, of Levola's intellectual property rights relating to the taste of a food product.

Legal context

International law

3 Article 1 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention'), provides:

'The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.'

4 Article 2(1) and (2) of the Berne Convention states:

'(1) 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, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.'

5 Under Article 9(1) of the Berne Convention, authors of literary and artistic works protected by that convention are to have the exclusive right of authorising the reproduction of these works, in any manner or form.

6 Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is in Annex 1 C 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), provides as follows:

'1. Members shall comply with Articles 1 through 21 of the Berne Convention ... and the Appendix thereto. ...

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'

7 The World Intellectual Property Organisation ('WIPO') adopted in Geneva on 20 December 1996 the WIPO Copyright Treaty, 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; 'the WIPO Copyright Treaty'). According to Article 1(4) of the WIPO Copyright Treaty:

'Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.'

8 Article 2 of that treaty states:

'Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'

European Union law

Directive 2001/29

9 Articles 1 to 4 of Directive 2001/29 contain the following provisions:

'Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing [EU] provisions relating to:

(a) the legal protection of computer programs;

(b) rental right, lending right and certain rights related to copyright in the field of intellectual property;

(c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;

(d) the term of protection of copyright and certain related rights;

(e) the legal protection of databases.

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...

Article 3

Right of communication to the public of works and right of making available to the public other subject matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

Article 4

Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

...'

10 Article 5 of Directive 2001/29 sets out a series of exceptions to, and limitations on, the exclusive rights which Articles 2 to 4 of the directive confer on authors over their works.

Rules of Procedure of the Court of Justice

11 Article 94 of the Rules of Procedure of the Court of Justice provides:

‘In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.’

Netherlands law

12 Article 1 of the Auteurswet (the Copyright Law) provides:

‘Copyright is the exclusive right of the author of a literary, scientific or artistic work, or of his successors in title, to communicate that work to the public and to reproduce it, subject to the limitations laid down by law.’

13 Article 10(1) of the Copyright Law is worded as follows:

‘For the purposes of this Law, “literary, scientific or artistic works” shall mean:

1. books, brochures, newspapers, periodicals and other written material;

2. dramatic and dramatico-musical works;

3. lectures and addresses;

4. choreographic works and entertainments in dumb show;

5. musical compositions with or without words;

6. works of drawing, painting, architecture, sculpture, engraving and lithography;

7. maps;

8. plans, sketches and three-dimensional works relative to architecture, geography, topography or other sciences;

9. photographic works;

10. cinematographic works;

11. works of applied art and industrial designs;

12. computer programmes and preparatory material;

and, in general, every production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 'Heksenkaas' or 'Heks'nkaas'('Heksenkaas') is a spreadable dip containing cream cheese and fresh herbs, which was created by a Dutch retailer of vegetables and fresh produce in 2007. By an agreement concluded in 2011 and in return for remuneration linked to the turnover to be achieved by sales of Heksenkaas, its creator transferred his intellectual property rights over that product to Levola.

15 A patent for the method of manufacturing Heksenkaas was granted on 10 July 2012.

16 Since January 2014 Smilde has been manufacturing a product called 'Witte Wievenkaas' for a supermarket chain in the Netherlands.

17 Levola took the view that the production and sale of 'Witte Wievenkaas' infringed its copyright in the 'taste' of Heksenkaas and brought proceedings against Smilde before the Rechtbank Gelderland (Gelderland District Court, Netherlands).

18 After stating that, from its point of view, 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', Levola asked the Rechtbank Gelderland (Gelderland District Court) to rule (i) that the taste of Heksenkaas is its manufacturer's own intellectual creation and is therefore eligible for copyright protection as a work, within the meaning of Article 1 of the Copyright Law, and (ii) that the taste of the product manufactured by Smilde is a reproduction of that work. It also asked that court to issue a cease and desist order against Smilde in relation to all infringements of its copyright and, in particular, in relation to the production, purchase, sale, supply or other trade in the product known as 'Witte Wievenkaas'.

19 By judgment of 10 June 2015, the Rechtbank Gelderland (Gelderland District Court) held that it was not necessary to rule on whether the taste of Heksenkaas was protectable under copyright law, given that Levola's claims had, in any event, to be rejected since it had not indicated which elements, or combination of elements, of the taste of Heksenkaas gave it its unique, original character and personal stamp.

20 Levola appealed against that judgment before the referring court.

21 The latter considers that the key issue in the case before it is whether the taste of a food product may be eligible for copyright protection. It adds that the parties to the main proceedings have adopted diametrically opposed positions on this issue.

22 According to Levola, the taste of a food product may be classified as a work of literature, science or art that is eligible for copyright protection. Levola relies by analogy, inter alia, on the judgment of 16 June 2006 of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), *Lancôme* (NL:HR:2006:AU8940), in which that court accepted in principle the possibility of recognising copyright in the scent of a perfume.

23 Conversely, Smilde submits that the protection of tastes is not consistent with the copyright system, as the latter is intended purely for visual and auditory creations. Moreover, the instability of a food product and the subjective nature of the taste experience preclude the taste of a food product

qualifying for copyright protection as a work. Smilde further submits that the exclusive rights of the author of a work of intellectual property and the restrictions to which those rights are subject are, in practical terms, inapplicable in the case of tastes.

24 The referring court notes that the Cour de cassation (Court of Cassation, France) has categorically rejected the possibility of granting copyright protection to a scent, in particular in its judgment of 10 December 2013 (FR:CCASS:2013:CO01205). There is therefore divergence in the case-law of the national supreme courts of the European Union when it comes to the question — which is similar to that raised in the case in the main proceedings — as to whether a scent may be protected by copyright.

25 In those circumstances, the Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) (a) Does EU law preclude the taste of a food product — as the author’s own intellectual creation — being granted copyright protection? In particular:

(b) Is copyright protection precluded by the fact that the expression “literary and artistic works” in Article 2(1) of the Berne Convention, which is binding on all the Member States of the European Union, includes “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”, but that the examples cited in that provision relate only to creations which can be perceived by sight and/or by hearing?

(c) Does the (possible) instability of a food product and/or the subjective nature of the taste experience preclude the taste of a food product being eligible for copyright protection?

(d) Does the system of exclusive rights and limitations, as governed by Articles 2 to 5 of Directive [2001/29], preclude the copyright protection of the taste of a food product?

(2) If the answer to question 1(a) is in the negative:

(a) What are the requirements for the copyright protection of the taste of a food product?

(b) Is the copyright protection of a taste based solely on the taste as such or (also) on the recipe of the food product?

(c) What evidence should a party who, in infringement proceedings, claims to have created a copyright-protected taste of a food product, put forward? Is it sufficient for that party to present the food product involved in the proceedings to the court so that the court, by tasting and smelling, can form its own opinion as to whether the taste of the food product meets the requirements for copyright protection? Or should the applicant (also) provide a description of the creative choices involved in the taste composition and/or the recipe on the basis of which the taste can be considered to be the author’s own intellectual creation?

(d) How should the court in infringement proceedings determine whether the taste of the defendant’s food product corresponds to such an extent with the taste of the applicant’s food product that it constitutes an infringement of copyright? Is a determining factor here that the overall impressions of the two tastes are the same?’

Consideration of the questions referred

Admissibility

26 Smilde claims that the present request for a preliminary ruling is inadmissible because the action in the main proceedings should, in any event, be dismissed. It argues that Levola has not identified the elements of Heksenkaas which allegedly make it its author's own intellectual creation.

27 It must be recalled in that regard that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 24, and of 1 July 2010, *Sbarigia*, C-393/08, EU:C:2010:388, paragraph 19).

28 Indeed, it is settled case-law that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 24 June 2008, *Commune de Mesquer*, C-188/07, EU:C:2008:359, paragraph 30 and the case-law cited, and of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 29).

29 In the light of the information provided by the referring court, it cannot be held that the questions raised bear no relation to the actual facts of the main action or its purpose or concern a hypothetical problem. A different conclusion cannot be reached merely because the lower court, whose decision has been challenged before the referring court, took the view — unlike the referring court — that it was in a position to rule on the dispute before it without deciding upon the preliminary issue of whether the taste of a food product may be eligible for copyright protection.

30 Moreover, the referring court has, in accordance with Article 94 of the Rules of Procedure, provided the Court with the factual and legal material necessary to enable it to answer the questions raised.

31 Accordingly, the questions referred are admissible.

The first question

32 By its first question, the referring court asks, in essence, whether Directive 2001/29 must be interpreted as precluding (i) the taste of a food product from being protected by copyright under that directive and (ii) national legislation from being interpreted in such a way that it grants copyright protection to such a taste.

33 In that regard, Articles 2 to 4 of Directive 2001/29 state that the Member States are to provide for a set of exclusive rights relating, in the case of authors, to their 'works', while Article 5 sets out a series of exceptions and limitations to those rights. The directive makes no express reference to the laws of the Member States for the purpose of determining the meaning and scope of the concept of a 'work'. Accordingly, in view of the need for a uniform application of EU law and the principle of equality, that concept must normally be given an autonomous and uniform interpretation

throughout the European Union (see, to that effect, judgments of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 27 and 28, and of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraphs14 and 15).

34 It follows that the taste of a food product can be protected by copyright under Directive 2001/29 only if such a taste can be classified as a 'work' within the meaning of the directive (see, by analogy, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraph 29 and the case-law cited).

35 In that regard, two cumulative conditions must be satisfied for subject matter to be classified as a 'work' within the meaning of Directive 2001/29.

36 First, the subject matter concerned must be original in the sense that it is the author's own intellectual creation (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 97 and the case-law cited).

37 Secondly, only something which is the expression of the author's own intellectual creation may be classified as a 'work' within the meaning of Directive 2001/29 (see, to that effect, judgments of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraph 39, and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 159).

38 It should be recalled in that regard that although the European Union is not a party to the Berne Convention, it is nevertheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention (see, to that effect, judgments of 9 February 2012, *Luksan*, C-277/10, EU:C:2012:65, paragraph 59 and the case-law cited, and of 26 April 2012, *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, paragraph 29).

39 Under Article 2(1) of the Berne Convention, literary and artistic works include every production in the literary, scientific and artistic domain, whatever the mode or form of its expression may be. Moreover, in accordance with Article 2 of the WIPO Copyright Treaty and Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is mentioned in paragraph 6 of this judgment and which also forms part of the EU legal order (see, to that effect, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraphs 39 and 40), copyright protection may be granted to expressions, but not to ideas, procedures, methods of operation or mathematical concepts as such (see, to that effect, judgment of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, paragraph 33).

40 Accordingly, for there to be a 'work' as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form.

41 That is because, first, the authorities responsible for ensuring that the exclusive rights inherent in copyright are protected must be able to identify, clearly and precisely, the subject matter so protected. The same is true for individuals, in particular economic operators, who must be able to identify, clearly and precisely, what is the subject matter of protection which third parties, especially competitors, enjoy. Secondly, the need to ensure that there is no element of subjectivity — given that it is detrimental to legal certainty — in the process of identifying the protected subject matter means that the latter must be capable of being expressed in a precise and objective manner.

42 The taste of a food product cannot, however, be pinned down with precision and objectivity. Unlike, for example, a literary, pictorial, cinematographic or musical work, which is a precise and objective form of expression, the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which 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.

43 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.

44 It must therefore be concluded, on the basis of all of the foregoing considerations, that the taste of a food product cannot be classified as a 'work' within the meaning of Directive 2001/29.

45 In view of the requirement, referred to in paragraph 33 of this judgment, for a uniform interpretation of the concept of a 'work' throughout the European Union, it must also be concluded that Directive 2001/29 prevents national legislation from being interpreted in such a way that it grants copyright protection to the taste of a food product.

46 Accordingly, the answer to the first question is that Directive 2001/29 must be interpreted as precluding (i) the taste of a food product from being protected by copyright under that directive and (ii) national legislation from being interpreted in such a way that it grants copyright protection to such a taste.

The second question

47 In the light of the answer to the first question, there is no need to reply to the second question.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 must be interpreted as precluding (i) the taste of a food product from being protected by copyright under that directive and (ii) national legislation from being interpreted in such a way that it grants copyright protection to such a taste.

[Signatures]

* Language of the case: Dutch.