Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 25 July 2018 [1]

Case C-310/17

Levola Hengelo BV
v
Smilde Foods BV

(Request for a preliminary ruling from the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands))

(Reference for a preliminary ruling — Directive 2001/29/EC — Copyright and related rights — Concept of a 'work' — Taste of a food product)

1. This request for a preliminary ruling of 23 May 2017, lodged at the Court Registry on 29 May 2017 by the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands), concerns the interpretation of Articles 2 to 5 of 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. [2]

2. The request has been made in proceedings between Levola Hengelo BV ('Levola') and Smilde Foods BV ('Smilde'), two undertakings that produce foodstuffs, concerning the alleged infringement by Smilde of Levola's copyright relating to the taste of a spreadable dip with cream cheese and fresh herbs, known as 'Heksenkaas' or 'Heks'nkaas' ('Heksenkaas'). [3]

3. The referring court considers that, in order to determine the case before it, it is necessary for it to ascertain, inter alia, whether EU law, and in particular Directive 2001/29, precludes the copyright protection of the taste of a food product.

1 Original language: French.

2 OJ 2001 L 167, p. 10.

3 In English, 'Witches' cheese'.

I. Legal framework

A. International law

1. The Berne Convention

4. Article 2 of the Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), in the version arising from the amendment of 28 September 1979 ('the Berne Convention'), provides that:

'(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) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

…'

5. Under Article 9(1) of the Berne Convention:

'Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.'

2. WIPO Copyright Treaty

6. On 20 December 1996, the World Intellectual Property Organisation (WIPO) adopted, in Geneva, the WIPO Copyright Treaty ('the WIPO Copyright Treaty'), which entered into force on 6 March 2002 and which was approved on behalf of the European Community by Decision 2000/278/EC. [4]

7. Under Article 1(4) of the WIPO Copyright Treaty, entitled 'Relation to the Berne Convention':

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

4 Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6).

8. Article 2 of the WIPO Copyright Treaty, entitled 'Scope of Copyright Protection', provides:

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

9. Article 4 of the WIPO Copyright Treaty, entitled 'Computer Programs' provides:

'Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.'

10. Under Article 5 of the WIPO Copyright Treaty, entitled 'Compilations of Data (Databases)':

'Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.'

3. The WTO Agreement and the TRIPS Agreement

11. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (OJ 1994 L 336, p. 214, 'the TRIPS Agreement'), constituting Annex 1 C to the Agreement Establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3, 'the WTO Agreement'), was 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). [5]

12. Article 9 of the TRIPS Agreement, entitled 'Relation to the Berne Convention', states:

'1. Members [of the WTO] shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto …

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

13. Article 10 of the TRIPS Agreement, entitled 'Computer Programs and Compilations of Data', provides:

'1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.'

5 OJ 1994 L 336, p. 1.

B. EU law

14. Article 2 of Directive 2001/29, entitled 'Reproduction right', provides:

'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;

…'

15. Article 3 of Directive 2001/29, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

'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.

…'

16. Article 4 of Directive 2001/29, entitled 'Distribution right', provides:

'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.

…'

C. National law

17. Article 1 of the Auteurswet (Netherlands Copyright Law, 'the Copyright Law') provides:

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

18. Article 10 of the Copyright Law is worded as follows:

'1. For the purposes of this Act, literary, scientific or artistic works shall mean:

1. books, pamphlets, newspapers, periodicals and all other writings;

2. dramatic or 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 programs and preparatory materials;

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

…'

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

19. Heksenkaas is a spreadable dip with cream cheese and fresh herbs. It was created in 2007 by a Dutch retailer of vegetables and fresh produce. By an agreement concluded in 2011 and in exchange for remuneration linked to the turnover to be achieved by its sale, its creator transferred to Levola his intellectual property rights in that product.

20. A patent for the method of manufacturing Heksenkaas was granted on 10 July 2012 and the word mark 'Heksenkaas' was filed mid-2010.

21. Since January 2014, Smilde has been manufacturing a product known as 'Witte Wievenkaas' for a supermarket chain in the Netherlands.

22. Taking the view that the production and sale of Witte Wievenkaas infringed its copyright in the 'taste' of Heksenkaas, Levola brought proceedings against Smilde before the Rechtbank Gelderland (Gelderland District Court, Netherlands). Levola defined copyright in a taste as being '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'.

23. Levola asked the Rechtbank Gelderland (Gelderland District Court) to rule, first, that the taste of Heksenkaas was its manufacturer's own intellectual creation, and therefore benefited from copyright protection as a 'work' within the meaning of Article 1 of the Copyright Law and, secondly, that the taste of the product manufactured by Smilde constituted a reproduction of that 'work'. Levola also applied to that court for an order requiring Smilde to cease and desist from any infringement of its copyright, including the production, purchase, sale and any other marketing of the product known as 'Witte Wievenkaas'.

24. By judgment of 10 June 2015, the Rechtbank Gelderland (Gelderland District Court) held that, without it being necessary to rule on whether it was possible for copyright protection to be granted in respect of the taste of Heksenkaas, the claims made by Levola, should, in any event, be rejected, since the latter had failed to show which elements, or combination of elements, of the taste of Heksenkaas gave it its own original character and its own personal stamp.

25. Levola appealed against that judgment before the referring court.

26. The referring court considers that the central question raised in the case is whether the taste of a food product is eligible for copyright protection. It adds that the parties to the case before it have adopted diametrically opposing views on this issue.

27. According to Levola, the taste of a food product can be classified as a literary, scientific or artistic work that is eligible for copyright protection. Levola relies, 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 that the scent of a perfume may be eligible for copyright protection.

28. However, according to Smilde, the protection of tastes is not consistent with the copyright system, which concerns only visual and aural creations. Moreover, the instability of a food product and the subjective nature of the taste experience preclude the taste of a food product being eligible for copyright protection as a work. Furthermore, the exclusive rights of the author of a work of intellectual property and their restrictions are practically inapplicable to tastes.

29. The referring court notes that the Cour de cassation (Court of Cassation) (France) categorically rejected the possibility of granting copyright protection to a scent, inter alia in its judgment of 10 December 2013.[6] There is therefore divergence in the case-law of the national supreme courts of the European Union when it comes to the question, similar to that which is the subject of the case before the referring court, of the copyright protection of a scent.

30. Accordingly, the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden) 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/EC, 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

6 Cour de cassation, chambre commerciale (Court of Cassation, Commercial Division), 10 December 2013, No 11-19.872, not published in the Bulletin, (FR:CCASS:2013:CO01205).

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?'

III. The procedure before the Court

31. Written observations have been submitted by Levola, Smilde, the French, Italian and United Kingdom Governments and the European Commission. Levola, Smilde, and the Netherlands, French and United Kingdom Governments and the Commission presented oral argument at the hearing on 4 June 2018.

IV. Analysis

32. By its first question, the referring court asks, in essence, whether the taste of a food product constitutes a 'work' and may be granted copyright protection by Directive 2001/29.[7]

A. Admissibility

33. Smilde submits that the present request for a preliminary ruling is inadmissible. It takes the view that, in addition to the fact that Levola failed to fulfil its obligation in relation to the burden of presenting facts and adducing evidence in the case in the main proceedings, that case may also already be closed on the basis of the fact that the taste of Heksenkaas is not original.

34. In my view, the objection of inadmissibility raised by Smilde cannot be upheld for the following reasons.

35. 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. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may thus 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.[8]

7 According to Levola 'the issue in the dispute … between Levola and Smilde is the copyright protection of the taste of Heksenkaas *as such*. It is about the sensory impression through which flows the experience of that taste *as such*, and not the means by which that impression is created. What is sought, therefore, is not the protection of a specific substance or a list of ingredients. The work in respect of which protection is sought is the taste itself, not its form' (paragraph 9 of its observations). Levola adds that it 'is not inconceivable that taste may be reproduced through another form in the same way as an image created by an artist using oil paints may be imitated and reproduced in another form. A copyrighted work consists of the intangible expression and not the physical form which carries that expression' (paragraph 86 of its observations).

8 See judgment of 1 July 2010, *Sbarigia* (C-393/08, EU:C:2010:388, paragraphs 19 and 20 and the case-law cited).

36. It should be pointed out that the present request for a preliminary ruling concerns the interpretation of EU law and, more specifically, the interpretation of Articles 2 to 5 of Directive 2001/29. In the absence of any evidence, or even any claim, that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose or that the problem is hypothetical, I take the view that the questions referred by the national court on the interpretation of that directive and the concept of a 'work' cannot be regarded as inadmissible merely because one of the parties to the main proceedings considers that the case in the main proceedings must be resolved on the basis of other submissions and arguments.

B. Substance

1. The concept of a 'work' — a 'uniform and autonomous [concept] of EU law'

37. The concept of a 'work' for the purposes of Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 is not defined by that directive.[9] Moreover, those provisions make no reference to the national law as regards the concept of a 'work'.[10]

38. In such circumstances, according to the Court's settled case-law, the need for a uniform application of EU law and the principle of equality require the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope normally to be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation.[11]

39. It follows from that case-law that the term 'work' must be regarded as relating to an autonomous concept of EU law, the meaning and scope of which must be identical in all Member States. Therefore, it is for the Court to give a uniform interpretation in the EU legal order.[12]

40. Accordingly, the concept of a 'work', as an autonomous concept of EU law, does not permit Member States to lay down, in that regard, different or additional standards. EU law precludes, therefore, national legislation which, outside the framework provided for in Directive 2001/29,[13] provides for the possibility of the taste of food products being eligible for copyright protection.[14]

9 Furthermore, the copyright protection of the taste of a food product is not specifically governed by EU legislation.

10 According to Levola, 'if EU law recognises a uniform and autonomous concept of a work which does not give Member States the freedom to establish at national level additional conditions for granting copyright protection …, it must also resolve the question of whether Member States must grant copyright protection to original creations which are perceived in ways other than by sight or by ear, such as a taste or a scent, or whether they *may* not even grant copyright protection to such creations of taste or scent, even where that taste or scent is the result of a creative intellectual work through which the author has given expression to his personal creativity' (paragraph 41 of its observations). 'If the Court has, however, sought only to set a minimum qualitative threshold for the purposes of copyright protection in the form of a requirement of "own intellectual creation" — as, for example, accepted by the German case-law — it is therefore clear that Member States are free to decide whether or not to grant copyright protection to a work which consists of the taste of a culinary creation, where that taste may, at least, be classified as being the author's own intellectual creation. The minimum qualitative threshold of "own intellectual creation" does not necessarily exclude any of the human senses, so that it would be left to the discretion of Member States to determine the relevance of the senses by which the author's own intellectual creation is perceived' (paragraph 42 of its observations).

11 See judgment of 16 June 2011, *Omejc* (C-536/09, EU:C:2011:398, paragraph 19). See, also, judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraph 32 and the case-law cited).

12 See, to that effect, judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraph 33).

13 Or in another provision of EU law which might be adopted where that is the decision of the EU legislature.

14 See, by analogy, judgments of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraphs 27 to 29), and of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraphs 29 to 37).

2. The concept of a 'work' and the requirement for an intellectual creation

41. The French Government takes the view that in order to determine whether the taste of a food product is eligible for the copyright protection conferred by Directive 2001/29, it is necessary to determine whether it may be considered to be a work, that is to say, an original subject matter in the sense that it is the author's own intellectual creation.

42. The Court noted in paragraph 34 of the judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465) that 'it is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject matters as artistic or literary works presupposes that they are intellectual creations'.[15] The Court further held that copyright within the meaning of Article 2(a) of Directive 2001/29 was liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation.[16]

43. In paragraph 88 of the judgment of 1 December 2011, *Painer* (C-145/10, EU:C:2011:798), the Court ruled that an intellectual creation is an author's own if it reflects the author's personality. According to paragraph 39 of the judgment of 1 March 2012, *Football Dataco and Others* (C-604/10, EU:C:2012:115) the criterion of originality is not satisfied when the setting up of a database is dictated by technical considerations, rules or constraints which leave no room for creative freedom. Furthermore, in paragraph 42 of that judgment the Court held that the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author cannot as such justify the protection of it by copyright, if that labour and that skill do not express any originality in the selection or arrangement of that data.

44. I take the view, however, that, although subject matter is required to be original in order to be eligible for copyright protection, that does not seem to me to be sufficient. In addition to the requirement that the subject matter at issue must be original, it must also be a 'work'.

45. In paragraph 33 of the judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465), the Court ruled that 'Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorise or prohibit reproduction is intended to cover "work"'.[17]

46. It is clear from that case-law that Article 2(a) of Directive 2001/29 requires, first, the existence of a 'work'[18] and secondly, that that work should be original. It is important not to combine or amalgamate those two concepts, which are distinct from one another.

15 In its judgment in Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, the Supreme Court of the United States ruled that the *sine qua non* of copyright was originality.

16 Paragraph 37 of the judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465). According to the Court, 'works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are *their author's own intellectual creation*' (paragraph 35 of the judgment, my emphasis).

17 Article 3 of Directive 2001/29 on 'Right of communication to the public of works and right of making available to the public other subject matter' and Article 4 of that directive on 'Distribution right' also refer to a 'work'.

18 According to the United Kingdom Government, it would be quite wrong to interpret the judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465), 'as a ruling that any type of work whatsoever should be protected by copyright if it is an author's intellectual creation. The reasoning in paragraph 37 must be read in context with paragraphs 34 to 36 which make it clear that the scheme the Directive protects is in respect of only certain subject matters classified as artistic or literary works under the Berne Convention or the other Union legislation such as that relating to computer programs' (paragraph 19 of its observations).

47. Therefore, I consider, like the Commission, that the fact that a 'work may be copyright protected under Article 2(a) of Directive 2001/29 only where it meets that criterion of originality cannot, however, be interpreted as meaning that it implies, conversely, that any subject matter meeting that criterion should "automatically" be considered, therefore, as a copyright protected "work" for the purposes of that directive'. [19]

3. Does a taste constitute a work?

48. As Directive 2001/29 does not define the concept of a work, I consider it appropriate to take into account the provisions of the Berne Convention. Notwithstanding the fact that the European Union is not a contracting party to the Berne Convention, it 'is nevertheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party, which forms part of its legal order and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention'. [20]

49. Therefore, the European Union is required to comply, inter alia, with Article 2(1) of the Berne Convention which determines the scope of 'literary and artistic' works that are eligible for copyright protection. According to that provision, the terms 'literary and artistic works', 'include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'. Moreover, Article 2(1) of the Berne Convention contains a *non-exhaustive list* [21] of protected 'literary and artistic' works. [22]

50. That list makes no reference to tastes, or to works which are similar to tastes, such as scents or perfumes, but it does not exclude them expressly.

51. I would note, however, that, notwithstanding the fact that, under Article 2(1) of the Berne Convention, 'the expression "literary and artistic works" include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression', that provision refers only to works which are perceived visually or aurally, such as books and musical compositions, excluding productions which may be perceived by other senses such as taste, smell or touch.

52. Moreover, where there is continued doubt as to whether certain productions are eligible for copyright protection, the international community has regularly intervened to establish clearly that those 'works' were copyright protected — provided that they are original — either by making amendments to the Berne Convention, or by adopting other multilateral agreements. [23]

19 Paragraph 33 of the Commission's written observations. In the judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 96 to 99), the Court held that sporting events cannot be regarded as *intellectual creations classifiable as works* since, to be so classified, the subject matter concerned would have to be original in the sense that it is *its author's own intellectual creation*. Whilst it is true that the wording of those paragraphs of the judgment in question gives the impression that a 'work' is synonymous with an 'intellectual creation', and that the only requirement for claiming copyright is the existence of an 'intellectual creation', I consider that it is clear from that judgment that sporting events, and football matches, in particular, are not copyright protected, as they are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright. Sporting events, as such, lack originality. The issue of whether sporting events constitute (non-original) 'works' has not been examined by the Court.

20 See judgment of 9 February 2012, *Luksan* (C-277/10, EU:C:2012:65, paragraph 59).

21 In my view, the terms 'telles que', in the French-language version and 'such as' in the English-language version, demonstrate the non-exhaustive and therefore indicative nature of 'literary and artistic' works that are eligible for copyright protection.

22 See Article 2(6) of the Berne Convention.

23 See, to that effect, p. 25 of the Guide to the Copyright and Related Rights Treaties Administered by WIPO published in 2003 and available on the website at the following address: http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

53. Thus the WIPO Copyright Treaty, which is a special agreement for the purposes of the Berne Convention, was adopted, inter alia, in order to protect works in the digital environment,[24] such as computer programs and compilations of data or other materials (databases).[25]

54. The taste of a food product cannot be likened to any 'works' protected by that treaty and, to my knowledge, no other provision of international law provides for the copyright protection of the taste of a food product.[26]

55. Moreover, I consider, in accordance with the observations of the French Government and the Commission, that although the process of creating a food taste or a perfume requires labour and skill, this subject matter could be eligible for copyright protection only where it was original.[27] Copyright protection extends to *original expressions* and not to ideas, procedures, methods of operation or mathematical concepts as such.[28] I consider that, although the form in which a recipe is expressed (the expression) may be protected by copyright where the expression is original, copyright does not protect the recipe as such (the idea). That distinction is known as the 'idea/expression dichotomy'.

56. Moreover, those original expressions should be *identifiable with sufficient precision and objectivity*. Accordingly, in the judgment of 12 December 2002, *Sieckmann* (C-273/00, EU:C:2002:748, paragraph 55), which concerns the issue of whether a sign, in that case a scent, which is not in itself capable of being perceived visually, may constitute a trade mark, the Court held that it was possible 'provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is *clear, precise, self-contained, easily accessible, intelligible, durable and objective*'.[29]

24 See recital 15 of Directive 2001/29. Article 4 of the WIPO Copyright Treaty provides expressly that computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Article 5 of that treaty provides that databases, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are also protected in the same way, to the same standard. See, also, Article 10 of the TRIPS Agreement.

25 Directive 2001/29 concerns the legal protection of copyright and related rights with the exception, inter alia, of the legal protection of computer programs and the legal protection of databases. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16) concerns specifically the legal protection of computer programs. It is clear from the first recital of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), which was repealed and replaced by Directive 2009/24, 'that computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes'. I would note, in that regard, that the object code of a computer program is not, in principle, perceptible by a human being. However, the object code of a computer program is a specific and stable production which may be 'read' or 'perceived' specifically and objectively by a machine. Moreover, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20) concerns specifically the legal protection of databases. Article 3(1) of Directive 96/9, which relates to copyright, provides that 'databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection'. Article 7(1) of Directive 96/9 protects, by a *sui generis* right, databases which show that there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of their contents.

26 According to Smilde '*no* legislature (neither those who drafted the Berne Convention, nor the TRIPS Agreement negotiators, nor the authors of the WIPO copyright conventions, and certainly not the parties engaged in the legislative process that resulted in Directive [2001/29]) ever sought to enable the monopolisation, through copyright, of anything that is subjective, perishable, imprecise, changeable, intangible and technically determined, such as taste' (paragraph 91 of its observations).

27 Namely intellectual creations. See judgment of 1 March 2012, *Football Dataco and Others* (C-604/10, EU:C:2012:115, paragraph 42).

28 See, to that effect, judgment of 2 May 2012, *SAS Institute* (C-406/10, EU:C:2012:259, paragraph 33). See, also, Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPS Agreement.

29 It is true that the condition that a sign must be represented graphically no longer exists under EU law. However, it is important to note that Article 3(b) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1), which entered into force on 12 January 2016, and Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015, amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OJ 2015 L 341, p. 21), which entered into force on 23 March 2016, require that signs must be capable of being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

57. It would seem that, based on today's technology, the precise and objective identification of a taste or scent is currently impossible. In that regard, the Italian Government points out that 'despite the scientific efforts made to date to define unequivocally the organoleptic properties of food products, as things currently stand, "taste" is, in essence, a qualitative element, linked, in the first instance, to the subjective nature of the taste experience. The organoleptic properties of food are intended to be perceived and assessed by the sensory organs, principally by taste and smell, but also by touch, on the basis of the subjective experience and impressions left by a food product on those sensory organs. An objective characterisation of such experiences does not yet exist'. [30] I do not rule out the possibility that techniques may be developed in the future to enable the precise and objective identification of a taste or a scent, which could lead to the legislature taking action to protect them using copyright, or other means.

58. In my view, the possibility of entrusting to a court or a court-appointed expert the task of identifying a taste, as suggested by Levola in its written observations, does not detract in any way from the fact that that identification [31] would remain, by its very nature, a subjective exercise. [32] The ability to identify a work with sufficient precision and objectivity and, therefore, the scope of its copyright protection, is imperative in order to comply with the principle of legal certainty in the interests of the copyright holder and, more specifically, third parties who may face legal proceedings, inter alia criminal or infringement proceedings, [33] for infringement of copyright.

59. The argument that food products are potentially unstable is not, in itself, convincing. It is important to point out that, in addition to the fact that Directive 2001/29 does not lay down any obligation to fix a work, [34] it is not the form on or in which a work is fixed that is the subject matter of the copyright, but the work itself.

60. However, the fact that tastes themselves are ephemeral, volatile and unstable militates, in my view, against their precise and objective identification and, therefore, their classification as works for the purposes of copyright.

61. Therefore, I consider that the taste of a food product does not constitute a 'work' within the meaning of Directive 2001/29. It follows that a taste cannot be entitled to the reproduction right, [35] the right of communication to the public of works and the right of making available to the public other subject matter [36] or the distribution right [37] within the meaning of Directive 2001/29, which cover only works. Moreover, it should be pointed out that the exceptions and limitations provided for in Article 5 of Directive 2001/29 relate only to works protected by those rights.

30 See paragraph 34 of those observations.

31 I am talking here about the identification of the work and not the assessment of its originality, which is an exercise open to differing opinions and involves a degree of subjectivity. However, if the precise and objective identification of a work is not possible, assessment of its originality is also impossible.

32 The Commission considers that the sensations and impressions brought on by a taste 'are … subjective, intangible and (therefore) not reproducible, in any event with sufficient certainty, objectivity and specificity to be eligible for copyright protection' (paragraph 41 of its observations).

33 Recital 28 of Directive 2004/48/EU of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16) states that, 'in addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights'.

34 See, also, Article 2(2) of the Berne Convention.

35 See Article 2 of Directive 2001/29.

36 See Article 3 of Directive 2001/29.

37 See Article 4 of Directive 2001/29.

62. It follows from the foregoing considerations that Directive 2001/29 precludes the copyright protection of the taste of a food product. Given that the second question is raised only in the event of Directive 2001/29 not precluding the copyright protection of the taste of a food product and concerns, inter alia, the requirements for that protection and the scope of that protection, there is no need to answer that question.

V. Conclusion

63. Having regard to all the foregoing considerations, I propose that the Court answer the questions referred by the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands) as follows:

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 precludes the copyright protection of the taste of a food product.