**Why the CJEU cheese copyright case is anything but cheesy**

A few months ago a Dutch court (Arnhem-Leeuwarden Court of Appeal) made a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU), asking whether the EU copyright system – notably Directive 2001/29 (the InfoSoc Directive) – allows Member States to extend copyright protection to something like the taste of a particular cheese (in this case, the Dutch Heks'nkaas spreadable cheese) and, if so, what requirements must be met in order to determine subsistence of copyright protection.

‘Sensory’ copyright, i.e. protection for items that are primarily intended to be perceived by one of the senses (notably taste and smell), has been a topic often perceived as somewhat exotic, if not altogether marginal. This impression is misguided, and this is so essentially for three reasons.

The first reason is commercial. Over time, courts across Europe have been asked to tackle issues of sensory copyright. A well-known and widely discussed case has been that of perfume smells in both the Netherlands and France. Not long ago, the French Supreme Court dismissed the idea that protection would be available by means of copyright law (FR:CCASS:2013:CO01205). In 2015 a Dutch first instance court (Gelderland District Court) refused to acknowledge that copyright would subsist in the taste of Heks'nkaas. These cases suggest that – if nothing else – the items over which protection has been sought are all valuable from a commercial standpoint and worth protecting. How protection should however be granted has been unclear. This is possibly the case also because trade mark registration has been virtually ruled out at least since the CJEU decision in *Sieckmann*, C-273/00, and the situation is unlikely to change under the reformed EU trade mark regime.

The second reason goes to the very heart of copyright, in that it requires the CJEU to clarify what its object of protection – a ‘work’ – is. The CJEU will likely need to revisit and elaborate further on its earlier case law, notably *Infopaq*, C-5/08, and its progeny (particularly *BSA*, C-393/09, and*FAPL*, C-403/08 and C-429/08). There is no legislative definition of ‘work’. Guidance – at least in the context of the InfoSoc Directive – must therefore be found outside the body of EU law, notably in Article 2 of the Berne Convention. The Berne Convention adopts an open-ended notion of ‘literary and artistic works’, but does not define the concept. According to the current WIPO Guide, although the general tone of the Convention suggests that “it is not possible to speak about a complete definition” (BC-2.2.), “the context in which the words “work” and “author” are used in the Convention – closely related to each other – indicates that only those productions qualify as works which are intellectual creations (and, consequently, only those persons qualify as authors whose intellectual creative activity brings such works into existence).” (BC-2.3.). Does the taste of a cheese fall within such definition of ‘work’?

The third reason is the potential impact of the resulting CJEU decision on closed systems of copyright protection, such as those of the UK and Ireland. Unlike continental copyright regimes, in fact, both UK and Irish copyright laws envisage an exhaustive list of protectable categories. The result has been that in these countries less conventional works have struggled – or altogether failed (eg the assembly of a scene in *Creation Records* [1997] EWHC Ch 370 or the Star Wars Stormtrooper Helmet in *Lucasfilm* [2011] UKSC 39) – to be accommodated within one of the categories recognized by law. Compatibility of closed systems with EU law has been questioned for a while. In its judgment in *SAS* [2013] EWHC 69 (Ch), the High Court of England and Wales (Arnold J) stated that (para 27): “In the light of a number of recent judgments of the CJEU, it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in section 1(1)(a) of the Copyright, Designs and Patents 1988 and defined elsewhere in that Act.”

In conclusion, the *Heks'nkaas*case is one to watch very closely. Not only will it determine to what extent copyright protection may be stretched, but also what system of copyright categories EU law or - rather - the CJEU envisages. On a final and empirical note, after a very long string of cases tackling online issues (from linking to intermediary liability and injunctions and everything in-between) it is somewhat refreshing to see a more traditional type of case being referred to the CJEU and raising so many fundamental questions.