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Observations on the Nature of Fixation in U.K. and Dutch Copyright Law

Sophie Arkette

A dispute arising from a claim of copyright infringement of a taste was heard in a Dutch court, the Rechtbank Gelderland, on April 2, 2015.¹ Both parties in the case are food manufacturers. Levola Hengelo, the claimant, is known for its range of yogurt products, and Smilde Foods, the defendant, has a long established reputation for creating sauces, quiche, and margarine products. Levola seeks an injunction against Smilde's product, Witte Wievenkaas, a cream cheese dip, claiming not only that Levola's product enjoys copyright protection with respect to the judgment given about perfume scents in *Kecofa v. Lancôme*,² but also that the taste of Smilde's dip resembles Levola's product, Heks'nkaas, to such a degree as to warrant a claim for infringement under Article 13 of the Dutch Copyright Act of 1912.³

The defendant, Smilde, attempts to counter Levola's argument through a number of tactics: namely that its product is sufficiently distinct in taste from the claimant's product and that any claim for infringement is redundant.⁴ Smilde also disputes the appropriateness of the *Kecofa* judgment, in so far as the reference to the credibility of copyright for scents should be viewed as an obiter dictum, and not as a prima facie ruling for copyright subsistence of scent products.⁵ Moreover, Levola's claim for copyright is undermined by Smilde with respect to the product itself. Article 10(1) of the Dutch Copyright Act provides a list of protectable work that is subsumed within general terms as exemplified in Article 1. Although originality is not explicitly mentioned in the Copyright Act of 1912, it is a requirement used by the courts, with reference to the test proposed by the Supreme Court during a 1985 hearing.⁶ The test required that any work considered for copyright had to

1. Rb. Gelderland (Levola Hengelo BV/Smilde Foods BV) (Neth.), docket no. 272 772 2014/603.

2. HR 16 juni 2006, NJ 2006 585 (*Kecofa v. Lancôme*) (Neth.).

3. Stert. 1912. Article 13, Act of 23 September 1912, DCA, concerns the rights of reproduction, translation and of adaption providing the right-holder grounds to exploit the work in question.

4. *Levola Hengelo BV v. Smilde Foods BV*, (BR-M.FID1337265) 24-27.

5. *Id.* at 3.

6. *Screenprints Ltd v. Citroen BV IEPT 19851129*, HR & Supreme Court Jan 4 1991 Van Dale

possess original character and authorial stamp, both of which arise from the labor invested by the maker. In both counts, the defendant claims, Levola's product fails.⁷ It fails to be sufficiently original in its content. This can be shown not only by the route through which Levola obtained this product's license for distribution, but also by assessing the ingredients used to produce Levola's overall impression against ingredients used by its main competitors in similar cream cheese based products.

Even if it could be proven that the taste of Levola's product meets the demands set down by the Articles of the Dutch Copyright Act, the claim of copyright, as a monopoly right, flies in the face of the freedom of enterprise contained within Article 16 of the Charter of Fundamental Rights of the European Union.⁸ What is ultimately contested is the principle upon which the legal statutes are based: to protect any tangible work of authors, artists, or inventors when their right to exploit original work goes hand-in-hand with the advancement of artistic and cultural expression. The question in *Levola v. Smilde* is whether the copyright of the sensory transmission of taste and of smell can obtain rights for commodification.

What would the ramifications be if such an appeal were successful? First, there would be a strong demand for courts to establish policy in the realm of olfactory or gustatory values. Who, apart from an expert would have sufficient knowledge to assess two similar tastes or smells? And if it were possible to compare tastes with the degree of accuracy that could be called proof, how might the courts determine that a substantial part of a taste has been reproduced in another product? If taste is subject to alteration over time—or in adverse conditions, as is the case with wine (for instance, when the taste of a certain wine rests in part on its interaction with the air)—at what point in the taste's life cycle is the assessment to be made? Dutch copyright law is unusual to allow for the contemplation of works that are, in all respects, evanescent. It is not obvious how this state of affairs obtains, since Article 1 and Article 10(1) give no hint of the possible inclusion of purely sensory phenomena, even if one takes into account the basic requirement for protection, i.e., of a work being expressed in a form that is perceptual in one or more of the senses.⁹

The Dutch Copyright Act's non-exhaustive list of copyrightable works has used the Berne Convention as its template, albeit with a few minor alterations, such as in the realm of digital technology.¹⁰ If anything,

v. Romme HR NJ 1991, 608.

7. *Levola Hengelo BV v. Smilde Foods BV*, (BR-M.FID1337265) 15-18.

8. Article 16, Charter of the Fundamental Rights of the European Union art. 16, 2000 O.J. (C364) 1. (2000/C 364/01).

9. Article 1 & 10(1), Dutch Copyright Act (1912).

10. Act of July 7, 1994, amending the Copyright Act (1912) with respect to the protection of

adherence to the Berne Convention would seem to suggest that fixation in some form is required.¹¹ The fact that Article 10(1) prescribes the basis by which a work ought to be construed can be considered a condition of constraint. If, by comparison, one were to look at U.S. copyright statutes, one would find that the overarching claims for copyrightable work are comparatively robust by virtue of the unambiguous use of the term fixation.¹² Perceptual availability is only the first step towards protection. A work also needs to be reproducible and communicable. U.S. copyright law is also flexible enough to allow for the possibility of technological change and for that change to open up new avenues of fixing a work. If the technological vehicle is of a kind whereby the artistic expression remains intact, or at least withstands a change of medium, from analogue to digital and from digital to, say, chemical; and if its persistence through time is without the sacrifice of its intrinsic properties, then one can claim it has the stability required for copyright protection. Stability resides in fixation and in fixation alone, which is in the control of the author. By contrast, under U.K. copyright law, the fixing of a work can be undertaken by a third party.¹³

In the Dutch Copyright Act, there is no fixation requirement contained within the statutes. But this alone should not enable an open-door policy on copyright law. In the U.K., the Copyright Designs and Patents Act of 1988 does not explicitly contain a fixation requirement, nevertheless its influence can be felt in a number of cases involving art works whose expressive capacity fails to be materialized.¹⁴ Moreover, there is a general assumption that if a work is defined as something over and above an idea or a system, an expressive character needs to possess the attributes enabling it to be experienced and reproduced. In other words, it needs to be more than a sensory object of some kind. Judge Birss in *Abraham Moon & Sons v. Thornber* gives weight to the idea of materiality in relation to artistic expression:

Fixation is an important aspect of literary and artistic copyright (c.f. Art 2 Berne Convention). Although s3(2) of the 1988 Act only refers to literary, dramatic and musical work, and s4 has no corresponding provision, I presume that is just because it is assumed that s4(1) inevitably requires a record of the work in a

computer programs (NL006).

11. Article 2(2) Berne Convention for the Protection of Literary and Artistic Works (1886).

12. Section 102(a) of the Copyright Act (1976) contains the requirement that a work is “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

13. Copyright, Designs and Patent Act, 1988, section 3 (U.K.). A work can be fixed by a person other than the author.

14. *Merchandising Corporation v. Harpbond*, [1983] FSR 32 (U.K.); & *Creation Records v. New Group Newspapers*, [1997] E.M.L.R. 444 (U.K.).

material form.¹⁵

As construed, Section 4(a) of the Copyright, Designs and Patents Act is a list of the types of subject matter deemed suitable for protection. The list includes literary, dramatic and musical works, artistic works (defined by a finite list: painting, sculpture, drawing, photograph, collage), film and sound recording.¹⁶ An artistic work, if it is to be considered for protection, needs to exemplify characteristics pertaining to one or more of the listed categories. If it is a sculpture that is to be considered, then there are certain assumptions as to its characteristics, although no statutory definition is indicated. The most basic assumption is that it should possess extension: that is, that the work occupy a position in space and be observable from different angles. It is arguable whether occupation entails a material basis for a sculptural work, as works can appear to take up space and be observable from different points of view while being non-material, as in the case of the hologram. Judge Laddie, in *Metix v. Maughan*, opined that sculptural embodiment holds “with the shape or appearance” rather than just with “achieving a precise functional effect.”¹⁷ And Judge Mann, in his appeal to the encyclopedia definition of sculpture, described a sculptural work as not only being a form rendered in three dimensions, but of having an artistic purpose which distinguishes it from three-dimensional objects of utility.¹⁸ Judge Mann distinguishes works within the context of an exhibition space as being generally recognized as possessing aesthetic purpose, which he views as a necessary ingredient for being considered as artwork. To illustrate this point, he describes the following scenario:

A pile of bricks, temporarily on display at the Tate Modern for two weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for two weeks preparatory to a building project is equally plainly not. One asks why there is that difference and the answer lies, in my view, in having regard to its purpose. One is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes.¹⁹

As to why Article 10 of Dutch copyright law is considered the gateway to gustatory and olfactory works, one needs to look at the way in which it has been interpreted. Clearly, the courts have favored a broad

15. *Abraham Moon & Sons Ltd. v. Thornber*, [2012] EWPC 37, 104 (U.K.).

16. Copyright, Designs and Patents Act, 1988 section 4(a) (U.K.).

17. *Metix UK v. G.H. Maughan*, [1997] FSR 722 (U.K.).

18. *Lucasfilm Ltd v. Ainsworth*, [2008] EWHC 1878, 15-18 (U.K.).

19. *Lucasfilm Ltd v. Ainsworth*, [2008] EWHC 1878 (Ch) 118 (viii) (U.K.).

interpretation. Perhaps it is the overarching domain of literature, science, and art upon which interpretation rests. But even if that were the case, it would not answer the charge as to why works such as chemical formulae, tastes, or perfume scent fit within this domain. Bernt Hugenholtz has suggested that the trend in case law is to focus attention on the test of originality and think about domain subsumption afterwards.²⁰ He cites several cases where a work is borderline.²¹ For example, in the case *Manfred Spaargaren Confiserie v. Da Vinci Bonbons & Chocolate*, a praline sweet was deemed, by the District Court of Amsterdam, as possessing a taste that was worthy of copyright protection. In UK copyright law the term artistic expression is embedded within each of the categories contained within Section 4, but its domain does not extend to that of a supervenient concept under which borderline art works such as sound sculptures or landscape art or olfactory art can reside.

It is worth revisiting the Dutch case, *Levola v. Smilde*.²² Levola argues for protection by virtue of the judgment given in the case *Kecofa v. Lancôme*.²³ The part relevant to their claim is the following:

The description laid down in Art. 10 Auteurswet [Copyright Act] . . . of types of works, of what must be understood to be a ‘work’ in the sense of this Act, is put in general words and does not rule out scents. This implies that as to the question of whether a scent qualifies for protection under copyright law, or not, it is decisive whether this concerns a product that is open to human perception and whether it has an original character of its own and bears the personal stamp of the maker. The notion of a work in the Auteurswet does find its limits where a work’s own original character is no more than what is required to achieve a technical effect, but considering that in case of a perfume there is no purely technical effect, this last condition does not prevent granting protection under copyright law to the scent of a perfume. The circumstances that the properties of the human olfactory sense limit the ability to distinguish scents and that the level to which one can distinguish scents differs from one person to another, does not alter the above, nor does the circumstance that the specific nature of scents have the effect that not all provisions and restrictions in the Auteurswet can directly apply, considering for instance the use of perfume which cannot be denied to the

20. Bernt Hugenholtz, *Works of Literature, Science and Art*, in A CENTURY OF DUTCH COPYRIGHT LAW (2012) (Neth.).

21. Hof Amsterdam 9 December 1999, (Top Scan/Sound Machine) (Neth.) BIE 2001, No. 87, 415.

22. Rb. Gelderland (*Levola Hengelo BV/Smilde Foods BV*) (Neth.), docket no. 272 772 2014/603.

23. HR 16 juni 2006, LJN AU 8940 (*Kecofa/Lancôme*) (Neth.).

ordinary user and which by its nature necessarily implies the spreading of the scent.²⁴

What is relevant to a case that concerned an infringement of a scent by another is whether the work is available to human perception. If a work bears the signature of its maker, and is perceptually available, then the work should qualify for protection. The crux of the argument rests on whether any sense of stability is needed for a work to be perceptually present. Obliquely, the answer rests within Article 2(2) of the 1886 Berne Convention: “works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.” If fixation extends to a work’s constitutive properties, then the question of whether an olfactory work qualifies would be determined on molecular composition, and on whether that structure possessed durability. Aroma-chemicals are for the most part stable but subject to degradation by the enzymes in the nose. So a court would have to ascertain the impact of those enzymes, and to assess the level of change over time. “Open to human perception” is a curious turn of phrase in the sense that if an object is concealed, by the employment of meta-materials, or other camouflage techniques, then its presence is not perceptually open.

Within the gamut of U.K. copyright law, the nature of the appearance and the issue of whether a work of art possessing apparent rather than substantive form is stable enough to warrant a claim of fixation are open questions. Works of art whose structural properties are variable or whose presence is evanescent, or whose presence is not sufficiently distinguished from its immediate surroundings are considered borderline cases, and their fate is at the discretion of the courts. This reveals a grey area between the idea behind the work and its realization as material expression. U.K. copyright law does not offer guidance as to what might be considered as the minimum requirement for fixation. From Judge Birss’s point of view, the requirement of fixation is afforded to artistic expression on the basis that it is materially realizable, which, in some sense, over compensates its presence as an object within space.²⁵ Being tangible, or having features that possess tangibility, allows for a broader interpretation from which artistic expression can be construed. But the real problem in U.K. copyright law arises from the internal conflict between the classification system, and the mode of fixation. Works of artistic expression are generally taken to exemplify the way something appears in space, as opposed to the way something occurs in time. Of course tangible objects persist through time, but the point I am making is

24. Bernt Hugenholtz, *Works of Literature, Science and Art, in A CENTURY OF DUTCH COPYRIGHT LAW* 51 (2012).

25. *Abraham Moon & Sons Ltd v. Thomber*, [2012] EWPCC 37, 23 (U.K.).

that artistic expression can be realized in sensory modalities other than vision. But that would require a shift from the category of artistic expression to that of sound recording or musical composition. What if neither of those categories suit the work in question?

Consider an example of an artist who creates a series of sound sculptures or events, which fall under the umbrella of sonic arts. As a sculptor, the artist considers her material to be sound. Within this remit, she produces unique pieces that are then exhibited at site-specific locations. She makes a point of not recording or documenting the artworks, preferring to view the work as sound sculptures made manifest through audience participation. The only means of manipulating the sound is by virtue of the acoustical characteristics of the chosen site. For one piece, she uses a dome structure, similar to the Neolithic passage graves in Scotland, which are notable for their unusual acoustics. The participant is at liberty to activate the sound-sculpture by vocalization. This in turn produces standing waves and/or Helmholtz resonance, which in turn induces spatial disorientation and other intended psychological effects in the participant. In another piece, her idea is to produce a work with a degree of permanence by utilizing a resonant chamber's extraordinary reverberation time. Again, the work requires participation in activating the chamber's acoustics. The audience is given verbal instruction as to suitable positions within the space and of intensity in respect of vocalization. Each position produces a unique sound occurrence, an acoustic shadow, or a whispering gallery effect, and each sound phenomenon has attributes which reach beyond the recording equipment pick-up capabilities.

Or what if the artist produces a sound installation that uses the frequency range beyond human auditory perception, the ultrasonic range? She produces this work by means of high-frequency pulses from bats that have been specially trained to emit signals at pre-determined places in an exhibition space. Although the sound work is conceived to be an intangible sculpture, there are, at designated spots within the exhibition, headphone and audio equipment enabling a person to listen to short fragments of a transposed version of the sound installation.

And again, what of a work whose artistic expression involves the absence of audible sound? An artist who creates a work using the material of ultrasound could conceivably fix the work by transposing and recording the resultant sound. Its stability would be ensured through the particular sequence of digital bytes within the recording equipment; but if a piece were to be expressed as a temporal duration, unperforated by sound, then there would be some doubt. Arguably, a silent work, if recorded and stored in audio format would possess a digital signature, despite the lack of direct wavefront pressure input. Perhaps the capture of slight air disturbances would be sufficient for its fixation. If, however, a

silence installation was presented in an anechoic chamber, the lack of external input could reduce the encoded information to nothing more than the noise interference emissions from the audio equipment itself. To view silence as artistic expression, in any case, is problematic, in so far as it lacks the definition required for even the broadest interpretation of artistic expression, irrespective of the view that a silent occurrence bound within the context of a gallery is a work beyond the domain of idea.

The emergence of sonic arts as a form of expression for artists in the last decade has thrown up some interesting dilemmas, especially when many of those artists choose to make the work without the aid of audio equipment. The example of the artist who creates work by harnessing the acoustics in a given place is one example of the difficulties facing copyright protection. It is conceivable that the artist could describe in written form the coordinates of each acoustical phenomenon in the work, thus fixing the work in literary form. But what if she decides not to do so, and instead argues that length of reverberation time in works that are activated in acoustically resonant chambers is sufficient to ensure that they fall outside of the definition of ephemeral. She might argue that her work is not only a case of artistic expression made manifest in tangible form, but that the sounds produced in such an environment exist beyond the natural life of sounds as such and that those sounds, irrespective of alterations in spectral character over time, would be grounds enough to warrant fixation.

The case of *Kecofa v. Lancome* has many incarnations, starting with a hearing at the Rechtbank in Maastricht in 2002, where the possibility of copyright protection for perfume scents was first raised. Lancôme needed to satisfy the court that their product possessed an original and authorial character, and that Kecofa's perfume reproduced that distinctive character. In the subsequent appeals,²⁶ Lancôme's claim of infringement was upheld, and, in 2006, the High Court opined that the scent, rather than the liquid contained in the bottle, could be protected by virtue of its reactive properties in effecting the olfactory sense. The scent was then construed as a sensory mediator connecting the percipient to the chemical composition, such that a claim can be made that aroma-chemicals are perceptual. The step taken in *Levola v. Smilde* seems to further erode the concept of fixation. The basis of the hearing is not to analyze ingredients but to show that reproduction of a taste has taken place.

26. Hof Den Bosch 8 juni 2004, JAR 2004 (Kecofa/Lancôme) (Neth.); HR 16 juni 2006, NJ 2006 585 (Kecofa v. Lancôme) (Neth.).