The Concept of the Copyright Work under EU Law: More Than a Matter of Taste

Jani McCutcheon

Associate Professor, University of Western Australia Law School

14548 words including abstract and footnotes

Key words: copyright, copyright work, author, expression, taste, food, Levola Hengelo BV v Smilde Foods BV

Abstract

In Levola Hengelo BV v Smilde Foods BV *the Court of Justice of the European Union was asked, inter alia, to make a preliminary ruling on whether EU copyright law precludes the taste of food from being protected as a copyright work. This generated expectations that the ECJ and the Advocate General would clarify the scope and meaning of the copyright "work" under EU law. Instead, both the Court and the AG essentially concluded that taste could not be a copyright work because it could not be identified with sufficient objective precision. The article supplements the Court's reasoning by expanding significantly on why taste must, and yet cannot, be capable of objective identification, and explaining other essential attributes of the copyright work which exclude taste from copyright. The article then interrogates what clues the ECJ has provided on the scope of the copyright work under EU law, and whether it could, and should, have done more to explain the work's concept and boundaries. The article concludes that while* Levola *leaves us no closer to a harmonised definition of the copyright work in EU law, it was too ambitious to expect the ECJ to achieve this, particularly given the difficulty of theorising and conceiving of the work in the abstract, and independent to copyright's shaping filters.*

Introduction

In *Levola Hengelo BV v Smilde Foods BV* [1] ("*Levola*"), the European Court of Justice (ECJ) was asked, inter alia, to make a preliminary ruling on whether EU copyright law precludes the taste of food from being protected as a copyright work. The referred questions generated expectations that the ECJ and the Advocate General (AG) in his opinion to the Court[2] would clarify the scope and meaning of the copyright "work" under EU law. This question had not yet been directly addressed in ECJ decisions, which had focused instead on related issues of originality. Despite being the fundamental cornerstone of the copyright system, the copyright work has tended to evade independent examination, although that trend is starting to shift.[3] In *Levola*, both the AG and the Court avoided a comprehensive articulation of the concept of the copyright work in EU law. Instead, the Court in a brief judgement and the AG in a more considered opinion, essentially concluded that taste could not be a copyright work because it could not be identified with sufficient objective precision.

The analysis is structured as follows. First, the article briefly describes the issues in dispute and the reasoning of the AG and the ECJ in *Levola*, and situates the case in the broader context of EU law. Second, it deeply reflects on the reasons why taste cannot be a copyright work, considerably supplementing the reasoning of the ECJ and the AG. It expands significantly on why taste must, and yet cannot, be capable of objective identification. It explores the ECJ's ambiguous reference to the condition that a work be an "expression", and explains the more nuanced meaning of this term in the

[1] *Levola Hengelo BV v Smilde Foods BV* (C-310/17) EU:C:2018:899 ("*Levola*, ECJ").

[2] *Levola Hengelo BV v Smilde Foods BV* (C-310/17) EU:C:2018:618 Opinion of AG Wathelet ("*Levola*, AG").

[3] See e.g. Brad Sherman, "What Is a Work?" (2011) 12(1) *Theoretical Inquiries In Law* 99; Michael Madison, "The End Of The Work As We Know It" (2011-2012) 19 *Journal Of Intellectual Property Law* 325; Paul Goldstein, "What Is A Copyrighted Work? Why Does It Matter?" (2011) 58 *UCLA Law Review* 1175; Justin Hughes, "Size Matters (Or Should) in Copyright Law" (2005)74 *Fordham L. Rev.* 575; Jani McCutcheon, "Shape Shifters: Searching For the Copyright Work in Kinetic Living Art" (2017) 64 *Journal of the Copyright Society of the USA* 309.

context of taste and how it excludes taste from the copyright domain. It also explains how the causal chain between the intellectual labour of the chef and the ultimate taster may be too precarious to satisfy the condition that taste be an *authored* work.

Third, the article surveys where *Levola* leaves us in the search for a clearer concept of the copyright work in EU law. It criticises the ECJ's clumsy purported attempt to construe the work. While there is an understandable thirst for greater certainty in the meaning of the copyright work, the article queries whether, given the questions it was asked, the ECJ could, and should, have defined the work or mapped out its territorial limits, particularly by reference to the Berne Convention for the Protection of Literary and Artistic Works ('Berne').[4] The article posits that demands for the ECJ to define the work are unreasonable, since the ECJ was expected to define the ineffable, and perform an unnecessary, and even undesirable, task.

Background

Levola is an isolated decision by the ECJ on a specific aspect of copyright law. And yet, like all decisions of the ECJ, it is ultimately situated in a complex matrix of EU law constituted by treaties constructing the legal framework of the European Union and the legal instruments based on these treaties, such as regulations and directives. Within this context, general principles of EU law are developed through ECJ case law, with the ECJ functioning as guardian of the EU Treaties, and the copyright and other directives and regulations legislated under them. Article 114 of the Treaty on the Functioning of the European Union (TFEU) is most directly relevant to copyright law, allowing the EU to harmonize national laws for the establishment and functioning of the EU internal market. The protection of competition in the internal market as a foundational principle of the EU order inevitably forces a relationship between competition law policy and copyright law. The following discussion in

[4] Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979.

and around *Levola* and the broader concerns it generates should be considered within this broader narrative.

Turning specifically now to *Levola*, the facts and procedural background in *Levola* are more fully outlined in the AG's opinion[5] and in the ECJ judgment.[6] The plaintiff, Levola, sells a type of popular cream cheese called *Heks'nkaas*. The defendant, Smilde Foods, sells an allegedly similar cheese product. In 2015, Levola commenced action against Smilde Foods in the Gelderland District Court, claiming that the taste of its cheese product is a copyright work and that Smilde has infringed its copyright by making its cheese. Smilde Foods denied both arguments. On 10 June 2015, the Gelderland District Court refused to decide whether the *Heks'nkaas* flavor could be protected by copyright. Instead, it rejected Levola's claims because it could not explain which elements of the *Heks'nkaas* flavor gave it an original character and reflected the creator's personal imprint.[7] Levola appealed to the Dutch Appeal Court of Arnehm-Leeuwarden, relying on a 2006 judgment of the Supreme Court of the Netherlands (*Lancôme v Kefoca*)[8] which held that the smell of perfume, may, in principle, be eligible for copyright protection. However, since that judgment, European case law has differed on the question of copyright in perfume, with the French Cour de Cassation declaring categorically that perfumes cannot be protected under copyright.[9] The Appeal Court doubted that taste fell within the scope of copyright protection. It stayed the proceedings and referred a number of questions to the ECJ for a preliminary ruling, including:

[5] *Levola*, AG, fn.2, [19]-[26].

[6] *Levola*, ECJ, fn.1, [14]-[24].

[7] Rechtbank Gelderland 10 June 2015, ECLI:NL:RBGEL:2015:4674.

[8] Judgment of 16 June 2006, Lancôme, NL:HR:2006:AU8940; *Lancôme Parfums et Beauté et Cie SNC v Kecofa BV* [2006] ECDR 26.

[9] Cour de Cassation, judgment of 10 December 2013, FR:CCASS:2013:CO01205.

(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.[10]

On 25 July 2018, Advocate General M. Wathelet (AG) opined that the taste of a cheese is not eligible for copyright protection as a "work" under the InfoSoc Directive. The AG noted that the notion of a "work" is not defined in the Directive. This is an autonomous concept of EU law, and therefore Member States cannot adopt other or additional standards in this respect.[11] He clarified that originality is by itself not sufficient to establish copyright protection. It is also necessary to demonstrate that the protected matter is a "work" within Article 2(1) of Berne,[12] the AG warning that "it is important that these two distinct concepts are not merged or aligned".[13] Since the InfoSoc Directive does not define "work", the AG thought it appropriate to consider Berne. This forms part of the legal order of the EU because it is a party to the WIPO Copyright Treaty, Article 1(4) of which demands compliance with Articles 1 to 21

[10] *Levola*, ECJ, fn.1, [25].

[11] *Levola*, AG, fn.2, [40].

[12] *Levola*, AG, fn.2, [44].

[13] *Levola*, AG, fn.2, [46].

of Berne.[14] The AG noted that Article 2 of Berne contains a non-exhaustive list of types of works, which excludes tastes or smells, and without conclusively answering question 1(b), he noted that they are limited to works which can be seen and heard.[15] The AG explained that the recipe for the cheese could not be protected, since it was merely the idea of the cheese.[16] He insisted that original expressions should be "identifiable with sufficient precision and objectivity",[17] co-opting the *Sieckmann* case[18] from trade mark law. In *Sieckmann*, the ECJ ruled that smell cannot constitute a trademark because it cannot be graphically represented, which requires the representation to be "clear, precise, complete in its own right, easily accessible, intelligible, durable and objective".[19] Noting that taste is inherently subjective, the AG doubted that taste could be precisely defined, even using taste experts.[20] Nevertheless, this obligation must be discharged, in order to ensure legal certainty for both the copyright owner and potential infringers. The AG concluded for these reasons that the InfoSoc Directive precludes copyright protection of the taste of a foodstuff.

On 13 November 2018, in a very brief judgement, the ECJ also concluded that taste is precluded from being a copyright work under EU law, essentially because it cannot be identified with sufficient objective precision. The Court agreed that the concept of the work "must be given an autonomous and uniform interpretation throughout the EU",[21] holding that "the taste of a food product can be protected

[14] *Levola*, AG, fn.2, [48].

[15] *Levola*, AG, fn.2, [51].

[16] *Levola*, AG, fn.2, [55].

[17] *Levola*, AG, fn.2, [56].

[18] C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737; *Sieckmann v Deutsches Patent- und Markenamt* (Case C-273/00, 12 December 2002).

[19] C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737, I-11766 [33].

[20] *Levola*, AG, fn.2, [58].

[21] *Levola*, ECJ, fn.1, [34].

by copyright under Directive 2001/29 only if such a taste can be classified as a 'work' within the meaning of the directive".[22] The Court's reasoning on this point was, however, cursory and opaque, particularly relative to the AG. It held that two cumulative conditions had to be satisfied for subject matter to be classified as a "work" within the meaning of the Directive. First, "the subject matter concerned must be original in the sense that it is the author's own intellectual creation",[23] and second, it must be "the expression of the author's own intellectual creation".[24] At first glance, it is difficult to parse out these two elements, which are explored further below.

The ECJ then also referred to Article 2(1) of the Berne Convention, noting its stipulation that "literary and artistic works include every production in the literary, scientific and artistic domain, whatever the mode or form of its expression may be". The Court then referred to other copyright treaties which exclude copyright protection for "ideas, procedures, methods of operation or mathematical concepts as such", reserving copyright for "expressions".[25] After these mere recitations of international copyright law, the ECJ then concluded, in a rather opaque explanatory stretch, that "[a]ccordingly, 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".[26] The ECJ elaborated on the policy reasons for this,

> 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,

[22] *Levola*, ECJ, fn.1, [34].

[23] *Levola*, ECJ, fn.1, [36].

[24] *Levola*, ECJ, fn.1, [37].

[25] *Levola*, ECJ, fn.1, [39].

[26] *Levola*, ECJ, fn.1, [40].

> 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.[27]

The ECJ held that:

> 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.[28]

This approach of both the AG and the ECJ is consistent with *Société Lancôme v. Patrice Farque*,[29] in which the French Supreme Court held that copyright did not subsist in perfume because *"*copyright only protects creations in their tangible form, so far as this form is *identifiable with sufficient precision* to permit its communication; whereas the fragrance of a perfume … is not a form that has this

[27] *Levola*, ECJ, fn.1, [41]. And see *Levola*, AG, fn.2, [58] for similar statements.

[28] *Levola*, ECJ, fn.1, [42].

[29] Cour de Cassation, judgment of 10 December 2013, FR:CCASS:2013:CO01205, 11-19.872.

characteristic, and therefore cannot be protected by copyright". [30] It is also, as previously mentioned, consistent with *Sieckmann.*[31]

The following section expands on the reasons why taste, specifically, can never be clearly identified, and provides other reasons why it cannot be a copyright work.

Why taste can never be a copyright work

What is the claimed work in Levola v Smilde?

Levola raises the very question of what a "taste" is, which was not considered by the ECJ or the AG. However, an exploration of this question sheds light on why taste must sit outside the copyright domain. Levola defined the copyright in the taste as the "total impression of the taste senses caused by the consumption of a food, including the sense of mouth perceived by the sense of touch".[32] Neither the AG nor the ECJ commented on this proffered characterization. However, this definition, and its consonance with the notion of a copyright work demands robust interrogation. There are immediate issues. The first is that Levola's suggested definition is, somewhat oddly, the definition of the taste of "a food", rather than *this particular cheese*. The second complication is that a specific taste may be a noun, but the act of tasting is also a verb. Thus there is an odd and complex mesh of thing and action, a bit like calling a musical work a "hearing". Assuming Levola's claim is limited to taste as a noun, its own definition of the taste throws up a number of other issues. The first is Levola's reference to the plurality of "the taste senses", which include "the sense of mouth perceived by the sense of touch". Thus Levola also proposed that the touch (mouth feel) of the food was an element of the work. This is

[30] Cour de Cassation, judgment of 10 December 2013, FR:CCASS:2013:CO01205, 11-19.872, emphasis added.

[31] C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737; *Sieckmann v Deutsches Patent- und Markenamt* (Case C-273/00, 12 December 2002), fn.19.

[32] *Levola*, ECJ, fn.1, [22].

consistent with The Merriam-Webster Dictionary definition of taste as "a sensation obtained from a substance in the mouth that is typically produced by the stimulation of the sense of taste *combined with those of touch and smell".*[33] This definition adds another element, smell, which is a well-known influence on taste. We all know how bland substances can taste when we have a cold. For example, in her study of taste, Carolyn Korsmeyer notes that "a standard reason advanced for the claim that taste is a sense of limited scope is that there are really only four tastes: sweet, sour, bitter and salt. Combinations of these basic components deliver more complex flavours, but the rest is supplied by the nose".[34] Likewise, Nicola Perullo confirms that "[taste's] process of sensorial elaboration in fact always involves the sense of smell".[35] Therefore, there is an immediate problem with Levola's proposed definition, because it may be impossible to identify taste distinct from at least smell. So perhaps the work would at least have to be defined as the *combination* of the taste and smell of something. But mouth feel is apparently also influential, according even to Levola. So in truth, a taste is now a triad of taste, smell and touch, a construction which neuroscientists support.[36] We also know, however, that the taste of food is influenced by the look of the food product.[37] Indeed, Perullo argues that taste involves "from time to time – depending on the specific type of function or purpose – *all of the other senses*".[38] So where do the boundaries of this work (or these works) really end? For the reasons outlined below, these multiple

[33] "Taste". Merriam-Webster.com. 2019. https://www.merriam-webster.com (18 March 2019).

[34] Carolyn Korsmeyer, *Making Sense of Taste: Food and Philosophy*, 75 (Ithaca, New York: Cornell University Press, 2002).

[35] Nicola Perullo, *Taste as Experience: The Philosophy and Aesthetics of Food*, 5 (New York: Columbia University Press, 2016).

[36] "To our brains, 'taste' is actually a fusion of a food's taste, smell and touch into a single sensation". Dana Small, "How Does The Way Food Looks Or Its Smell Influence Taste?", *Scientific American*, [undated], at https://www.scientificamerican.com/article/experts-how-does-sight-smell-affect-taste/

[37] Dana Small, "How Does The Way Food Looks Or Its Smell Influence Taste?", *Scientific American*, [undated], at https://www.scientificamerican.com/article/experts-how-does-sight-smell-affect-taste/.

[38] Perullo, *Taste as Experience*, fn.34. Emphasis added.

elements of taste hopelessly complicate the potential for taste to be recognised as a copyright work, and clarify how it is in fact misleading to refer merely to "taste".

Identifiability as a universal definitional element of copyright works

As both the AG and the ECJ noted, the copyright work is not defined under the InfoSoc Directive, however the work does have some essential, and universal, attributes. One is that it must be identifiable. This means more than being expressed, perceptible or discernible. It means the shape, substance and contours of the work are clear and consistent, and that the distinctiveness and particularity of the work are objectively known. This was the essential basis for both the AG and ECJ rejecting taste as a copyright work, and it is the most persuasive aspect of their reasoning.

'Identifiability' is not an express requirement of any copyright instrument, whether Berne, the WIPO Copyright Treaty, or TRIPS. The requirement of identifiability is more elemental still, mandated by public policy, fairness and pragmatic common sense. It is so evident, it needs no articulation or explanation. This is why courts that have granted copyright protection to perfume have erred, disregarding this essential attribute, and often conflating identifiability with perceptibility and/or originality. For example, in *Kecofa v Lancome*,[39] the Dutch Supreme Court recognised copyright in the scent of perfume. However, it erred in its limited checklist of copyright criteria, which required only that works are amenable to human perception, original in bearing the personal stamp of the author, and not merely necessary to obtain a technical effect.[40] In the French Gaultier perfume decision, the Court rejected the defendant's argument that a perfume necessarily lacks the *originality* essential to copyright

[39] Judgment of 16 June 2006, Lancôme, NL:HR:2006:AU8940; *Lancôme Parfums et Beauté et Cie SNC v Kecofa BV* [2006] ECDR 26.

[40] Judgment of 16 June 2006, Lancôme, NL:HR:2006:AU8940; *Lancôme Parfums et Beauté et Cie SNC v Kecofa BV* [2006] ECDR 26, [25].

subsistence due to differences in how humans perceive fragrances.[41] The germane point is that the variability in perception of scent points to a lack of identifiability, rather than originality.

There are a number of reasons why identifiability is a foundational aspect of the copyright work. Copyright is a potentially powerful property monopoly of long duration, and the work serves as notice of the property claim. As a result, precise identification of the work has been a consistent concern[42] in order to avoid injustice.[43] So that the copyright system can function practically, all stakeholders need to know the boundaries of the work at issue. Copyright owners need to identify those limits in order to substantiate their property claims and organise and define infringement claims.[44] To prove infringement, judges need to know what they are comparing to the allegedly infringing work. Certain exceptions and defences may also depend on such a comparison. Whether a second comer has created a derivative work in which copyright subsists discretely may also depend on a clear identification of the source work from which the derivative work springs. The work may also be the subject of subsistence challenges, and judges need to know what is being challenged. Potential users or infringers of the work need to understand what territory is off-limits, particularly when infringement may lead to

[41] *Beauté Prestige Int"l v. Senteur Mazal*, Cour d"appel [CA] [regional court of appeal] Paris, 4e ch., Feb. 14, 2007, D. 2007, at 735, J. Daleau. Cited in Charles Cronin, "Lost And Found: Intellectual Property Of The Fragrance Industry; From Trade Secret To Trade Dress" (2015) 5:1 *New York University Journal Of Intellectual Property And Entertainment Law* 256, 282.

[42] *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 469 [15] (French CJ., Crennan and Kiefel JJ): "it is essential that the plaintiff identify precisely the work or works in which copyright is said to subsist and to have been infringed." See also another Australian case, *Komesaroff v Mickle* 1987 VR 703, 710 in which the Supreme Court of Victoria held that "it must be possible to define the work of artistic craftsmanship on which [the plaintiff] bases her action".

[43] "The Act creates a monopoly, and in such a case there must be certainty in the subject-matter of such monopoly in order to avoid injustice to the rest of the world": *Tate v Fullbrook* [1908] 1 KB 821, 832-833 (Farwell LJ).

[44] See Douglas Lichtman, "Copyright as a Rule of Evidence" (2003) 52 *Duke L.J*. 683, 730–33.

criminal or serious civil liability. Prospective assignees or licensees need to know what property they are buying.

The work also needs to be identifiable in order to know what we are applying other mandatory copyright doctrines *to*. For example, when we assess the originality of a work, we must know to what we apply that standard. The requirement of identifiability is also closely aligned with the copyright doctrine of fixation, and has been recognised in that context by the earliest copyright commentators. For example, Eaton Drone acknowledged "the assumption that materiality is essential to the determination of the identity of a thing".[45] Even those antagonistic to a material form requirement in copyright law recognise that a work must at least be identifiable. For example, Brennan and Christie argue that "[t]he *identity* of a work in which copyright is asserted can be determined in the absence of a material form of its expression",[46] citing the example of memorised works like *The Iliad*[47] and folk tunes[48] which are transferred from generation to generation.

If works need not be identifiable, then the copyright system rests on a bizarre and precarious foundation where a plaintiff need only demonstrate substantial similarity between the defendant's expression and their own. This was Levola's approach. Before the District Court of Gelderland, Levola's expert extolled the "original, extraordinarily creative, taste" of the cheese product, but could not "describe the

[45] Eaton Drone, *A Treatise on the Law of Property in Intellectual Productions* 6 (Boston, Little, Brown, and Company,1879).

[46] David Brennan and Andrew Christie, "Spoken Words and Copyright Subsistence in Anglo American Law" (2000) 4 *Intellectual Property Quarterly* 309, 311. Emphasis added.

[47] Citing Eaton Drone, Brennan and Christie explain how *The Iliad* was recited from memory at Greek festivals for centuries before being "imprisoned in written characters". Brennan and Christie, fn. 46, 312.

[48] For an overview of the challenge traditional music poses for copyright, see Luke McDonagh, "Protecting Traditional Music Under Copyright (And Choosing Not To Enforce It)", in E. Bonadio & N. Lucchi (eds.) *Non-Conventional Copyright - Do New and Atypical Works Deserve Copyright Protection?* (Edward Elgar, 2018).

taste of Heksenkaas in any substantive manner".[49] Indeed, Levola asserted that it was impossible to describe, and one need only experience the taste personally.[50] The Court rejected this argument and refused to taste the cheese, effectively (and correctly) insisting that the plaintiff substantiate the elements of the taste that justified copyright protection.[51] This simply confirms how the pathway from perceptual experience of a taste to verbal articulation of that taste is necessarily compromised. As Carolyn Korsmeyer observes, "epistemically speaking, taste and its kin, smell, are not considered senses that deliver a high degree of perceptual information to the mind".[52]

Is taste identifiable?

The above discussion assumes that a work's identity *can be proved*, whether through a material record or otherwise. Unlike the well-recognised copyright subject matter of music and literary works, discharging the identity burden of proof in the unfamiliar case of taste faces potentially insurmountable obstacles. Even unfixed works such as *The Iliad* and folk tunes are inherently easier to identify than something like taste. The words of an unfixed literary work can be articulated orally. The notes of an unfixed musical work can be played on a musical instrument. In this sense, as Brennan and Christie argue, "Identification is merely a problem of proof which can be overcome".[53]

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[49] Rechtbank Den Haag, 3 May 2017, *Levola Hengelo BV v European Food Company BV*, NL:RBDHA:2017:4384, para 4.16.

[50] Rechtbank Den Haag, 3 May 2017, *Levola Hengelo BV v European Food Company BV*, NL:RBDHA:2017:4384, para 3.3.

[51] Rechtbank Den Haag, 3 May 2017, *Levola Hengelo BV v European Food Company BV*, NL:RBDHA:2017:4384, para 3.3.

[52] Korsmeyer, *Making Sense of Taste*, fn.30, 68.

[53] Brennan and Christie, "Spoken Words and Copyright Subsistence", fn. 46, FN 134. See also Ysolde Gendreau, "The Criterion of Fixation in Copyright Law", (1994)159 *Revue Internationale Du Droit D"auteur* 110, 132.

How does one materially record a particular taste with sufficient specificity to discharge the identification burden? A written description of the taste would never suffice, because taste can never be unambiguously described. Blindfold ten different people, give them the same food to taste and ask them to describe what they have tasted and observe the variation. The accounts would inevitably also be crude and abstract, with descriptions such as "it's salty". As the ECJ[54] and the AG[55] noted, it seems that reliable and objective scientific analyses of tastes are not currently possible.[56] It may be possible to chemically analyse the food substance from which the taste emanates, but this is not an analysis of the taste itself. In any event, scientific analyses such as spectroscopy would require translation and explanation by an expert in the scientific language before they could be understood as tastes, if they ever could be. Experts are likely incapable of translating the results such that an ordinary person could appreciate the taste captured by the analytical process, and it is perhaps significant that Levola's own expert never attempted to identify the taste by reference to his own classification system.[57] This is consistent with *Sieckmann*, where the ECJ held that a chemical formula defining a scent is "not sufficiently intelligible", since "few people would recognise in such a formula the odour in question".[58] Thus we should not give too much weight to the AG's statement refusing to "exclude the possibility

[54] *Levola*, ECJ, fn.1, [43].

[55] *Levola*, AG, fn.2, [57].

[56] The scientific community seems aware that "a more effective method for objectively estimating taste properties is required", however it appears to be a long way away from discovering and implementing such a method, particularly for complex tastes. See Hoshi A, Aoki S, Kouno E, Ogasawara M, Onaka T, Miura Y, Mamiya K, "A Novel Objective Sour Taste Evaluation Method Based On Near-Infrared Spectroscopy" (2014) 39(4) *Chemical Senses* 313, 313.

[57]Rechtbank Den Haag, 3 May 2017, *Levola Hengelo BV v European Food Company BV*, NL:RBDHA:2017:4384, para [4.16].

[58] -273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737; *Sieckmann v Deutsches Patent- und Markenamt* (Case C-273/00, 12 December 2002), fn.19, I- 11774-75 [69].

that the techniques for the accurate and objective identification of a taste or smell may evolve *in the future*, which could lead the legislator to act and protect it by copyright or other means",[59] nor the ECJ's statement that "the *current* state of scientific development" prevents "a precise and objective identification of the taste of a food product",[60] suggesting that this might change.

In order to happen, let alone be identified, taste is utterly reliant on the interposition of a human, sensing being. A number of factors guarantee that taste is experienced subjectively, and differs between tasters. These include genetics, sex, skin type, culture, climate, smoking, hormones, medications, illness, specialised taste perception training such as that undertaken by oenologists, physiology such as the number of taste buds, what we have just been tasting or smelling and how much of it (risking olfactory and sensory fatigue), and the influence of other senses on the taste experience, including not just the obvious effect of smell on taste, but also what we hear and see when we are eating.[61] Of course, the subjective perception of taste will also differ according to the variations that affect the substance from which the taste is detected, such as temperature and spoilage. Recall also the earlier discussion suggesting that taste is in fact a compendium of senses. Does this mean that, in truth, we are talking about a plethora of works, as infinitely variable as the individual subjective responses to the food substance?

[59] *Levola*, AG, fn.2, [57].

[60] *Levola*, ECJ, fn.1, [43].

[61] See, e.g. Kate Hilpern, "Taste The Difference: How Our Genes, Gender And Even Hormones Affect The Way We Eat" *The Independent*, 11 November 2010, at https://www.independent.co.uk/life-style/food-and-drink/features/taste-the-difference-how-our-genes-gender-and-even-hormones-affect-the-way-we-eat-2130680.html; Clint Witchalls, "10 Scientific Facts About Flavour" *The Independent*, 4 May 2012, at https://www.independent.co.uk/life-style/food-and-drink/features/10-scientific-facts-about-flavour-7712218.html and Michael Eisenstein, "More Than Meets The Mouth: Certain Things Taste Differently To Different People" (2010) 468(7327) *Nature* S18(2).

It has been argued in the context of scents that,

> refusing protection for scents seems fully equivalent to denying protection for images because the impression varies according to, say, lighting, distance and angle, not to mention the visual acuity of observers, some of whom are colorblind. Music varies at least as much, perhaps more, if the characteristics of musical instruments are considered.[62]

The *Mugler* Court also referred to the idiosyncratic variations in how we hear music and likened them to different responses to a scent.[63] The *Gaultier* Court considered that literary, graphical, and musical works are all perceived differently, but they are nevertheless original copyright works.[64]

While we may all have different impressions of conventional copyright works, there are at least two important differences between those works and taste. First, there is a single, uniform material record of literary, musical, artistic and dramatic works that we respond to, even if idiosyncratically. These works manifest (or can manifest) in the universal and objective languages of musical notes, written words, and represented images. Those same words and music may provoke different emotional, psychological and conceptual responses, but they all emanate from a single starting point which is expressively certain (if not always materially recorded). Therefore, while we may recount our different experiences, we at least know we are all talking about the same thing that we respond differently to. This is not the case with taste, which doesn't chemically crystallise as taste until we taste, touch and smell the substance in which it inheres, and thus can never be objectively verified. This is a major point of departure between taste and conventional copyright works. The latter exist, and then are perceived, whereas taste does not even

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[62] Thomas Field, "Copyright Protection for Perfumes" (2004) 45 *IDEA - The Journal of Law and Technology* 19, 27.

[63] *Mugler v. Molinard*, Gaz. Pal. 2001, 17-18.01, cited in Charles Cronin, "Lost And Found", fn. 41, 281.

[64] *Beauté Prestige Int"l v. Senteur Mazal*, Cour d"appel [CA] [regional court of appeal] Paris, 4e ch., Feb. 14, 2007, D. 2007, at 735, J. Daleau, cited in Charles Cronin, "Lost And Found", fn. 41, 282.

exist until it is perceived, so the creation of the work and its perception is simultaneous. Taste can only be experienced *qua taste* by tasting a substance containing or generating the taste. Staring at a lump of soft white cheese or reading a recipe tells us nothing about how the food tastes. And when we do taste it, there is a further problem in that a flavour is, as the AG explained, "transitory, fleeting and unstable",[65] which in his view militated against "the precise and objective identification of it".[66] This is an important point. Taste is inherently unstable, often changing after the food or drink source first enters our mouth, and as it moves around in the mouth and down the throat and past different taste receptors on the tongue. It has different intensity at different physiological and time points, as most wine tasters will tell you, particularly with wine that has a strong "finish", or lasting impression. Again, there might be a plurality of tastes here over time and space, rather than a singular, stable taste.

The second difference is that we can create a common experience for the evaluation of literary, musical, artistic and dramatic works which radically diminishes perceptual variations. Music can be played on the same instrument, and words and images can be observed under the same lighting and viewing conditions. Diverse audiences tend to see words and hear music in a mechanically similar way, disregarding any disability or other circumstance distorting that process. The same cannot be said for taste or scent, where variations in the reception of taste are inevitable, vastly amplified relative to other works, and cannot be externally moderated. Also, the variations may not be known. We may not know that we have a certain genetic predisposition to taste a particular food in a particular way, in which case we can't factor that in to any comparison with other tastes. We also cannot predict how known differences will manifest. If women taste things differently to men, particularly at different times of the month, how do we detect that difference and what does that difference "look" like? All of these factors necessarily and irreparably destabilise the fundamental *identity* of taste as a work. We can never really answer the question "do you taste what I taste"? Another point to consider is the nature of the variations in our perceptions of conventional copyright works. There will always be different conceptual,

[65] *Levola*, AG, fn.2, [60].

[66] *Levola*, AG, fn.2, [60].

emotional, cultural, moral and psychological responses to copyright works, which cannot be controlled. However, for the purposes of this article, identity is concerned with mechanical and physiological responses, and with material consistency and certainty. We can set up consistent conditions for assuring this with conventional works. But we simply cannot do the same with taste.

In short, unlike a unique musical work, there is no single starting point with taste. There can, necessarily, only be multiple (and varied) starting points, one for each taster. In this regard, taste is quite unlike visual and auditory expression. This highlights the important differences between the more objective mechanical senses of sight and hearing and the more subjective chemical senses of taste and smell. It also highlights the inherent difficulty in establishing infringement, should copyright in taste be permitted. The only means of finely distinguishing between two tastes is by tasting. That experience is inevitably subjective, and different judges might reach different conclusions because of that subjectivity. This means that any determination of infringement would necessarily rest on very fragile foundations. This article does not argue that difficulties in establishing infringement should preclude copyright subsistence. However, because taste cannot be precisely identified, it cannot be a copyright work. A number of other reasons support this conclusion, discussed in the following sections.

Is a taste an authored work? And who is the author?

The unique manner in which taste manifests, raises the question of whether a taste is an *authored* work, and if so, who is the author? In Europe, the work must be the result of intellectual creation reflecting the author's personality.[67] Because taste only crystallises in the mouth of a consumer, and each taste is inevitably subjective depending on numerous potential variables, the question arises as to who is the author of the taste? Whose personality does it reflect? The germane authorial creativity can be found in the recipe, because it is the particular combination of foods and liquids which constitutes the food

[67] See Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECR I-6569, and Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533.

product from which the taste is generated. It might be argued that when a recipe is created, the author of the food aims to achieve a particular taste outcome, and the two cannot be uncoupled. Therefore in creating the food she simultaneously creates the taste. However, there are immediate problems, because merely creating a recipe does not necessarily mean that every food product made according to that recipe will taste consistently, or is repeatable. Variations may occur due to differences in ingredient brands, composition or quality (or even substitute ingredients), and slight but significant differences in measurements, temperature, oven quality, and length and method of cooking. Thus there is already variation in the food products, and therefore the recipe author's link to the authorship of the food product becomes tenuous. That authorial link is further weakened, if not severed, when those (variable) food products are tasted (variably) by multiple tasters.[68]

This analysis highlights another important distinction between taste and conventional copyright works, and between the taste and the object generating the taste. It's one thing to produce a musical work, for example, but another thing entirely to claim any kind of property interest in how that work is sensorially *received*. This is essentially what occurs when a property claim is made in taste. The author of the recipe is overreaching in their claims first to the food product made from the recipe, and then most importantly, to the taste resulting from the food product. As such, they are attempting to claim a property right in our individual, subjective sensory responses to the substance. It is equivalent to trying to achieve a property right in how a musical work is heard, or a literary work is read, or an artwork is seen. Those experiences are, of course, not authored because the person experiencing them invests no intellectual creativity. They are simply the inevitable result of our senses doing what they do. But if they did constitute authorship, they are authored by the person experiencing the cheese, not the author of the

[68] On the link between causation and authorship, see Shyamkrishna Balganesh, "Causing Copyright", (2017)117 *Columbia Law Review* 1, and Jani McCutcheon, "Natural Causes: When Author Meets Nature in Copyright Law and Art", (2018) 86(2) *University of Cincinnati Law Review* 707.

cheese. Blessed are the cheesemakers,[69] but cheese *consumers* are the "authors" of their taste sensations, not the cheesemakers.

Is a taste an "expression"?

Despite any definition of a copyright work, another fundamental and universal characterising feature of a work is that it must be an "expression". This is found in all major copyright instruments.[70] A requirement of expression may seem tautological due to the existing requirement of identifiability, which suggests clarity of expression. However, expression has a distinct meaning. Something may be expressed, but it nevertheless might not be identifiable. For example, a literary character may be assembled from the (expressed) words of a novel, but it is not objectively identifiable as a discrete work separate from the novel.[71]

The concept of expression in copyright law has been well traversed in the context of the idea-*expression* dichotomy, which ensures that the particular manifestation of an idea (i.e. an articulated *expression*) is protected rather than the more general abstract idea itself. This places the work on a continuum between abstract idea at the one end, and concrete, particularised expression at the other. The ECJ's second

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[69] *Monty Python"s Life of Brian* (1979). Scene 3: Jesus' Lack of Crowd Control on the Mount.

[70] Article 9(2) of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement provides that "[c]opyright protection extends to expressions and not to ideas, procedures, processes or mathematical concepts as such. Article 2 of the WIPO Copyright Treaty is in identical terms. Article 2 (1) of the Berne Convention clarifies that the term "literary and artistic works" includes "all works in the field of literature, science and art, whatever the mode or form of *expression*". This is frequently translated in the individual copyright statutes of member states. For example, Article L112-1 of France's Code de la Propriété Intellectuelle states that author's rights will be protected "in all intellectual works, regardless of the… form of *expression*". Emphases added.

[71] Jani McCutcheon, "Works of Fiction: The Misconception of Literary Characters as Copyright Works", forthcoming 2019, *Journal of the Copyright Society of the USA*, available at http://ssrn.com/author=732002.

condition that a work be "the expression of the author's own intellectual creation"[72] has a certain ambiguity about the meaning of 'expression', as a contrast to the first condition that taste be "original in the sense that it is the author's own intellectual creation".[73] As the lead-in to the ECJ's conclusion that taste lacks objective identity, this condition seems to separately reinforce the well-known doctrine that copyright does not extend to ideas, but only expression. It was open to the ECJ to more overtly explain how the inevitable vagueness in describing a taste suggests that taste occupies the territory of ideas rather than expression.

The individual meaning of "expression" in copyright instruments such as Berne uncoupled from the counterpoint of idea, has received less attention, and this particular meaning is very relevant when critiquing taste's place in copyright. The Merriam-Webster dictionary defines "expression" as **"**an act, process, or instance of representing *in a medium* (such as words)"; or "something that *manifests, embodies,* or symbolizes something else".[74] There is a materiality suggested in these definitions that speak of embodiment, whereas we know that in many EU (and other) copyright systems, material form is not a requirement of copyright subsistence. However, implicit in these definitions is a requirement that something be expressed (rather than repressed) and that we can perceive it. It requires a work to be more than an impression or implicit, internal, suggestion. A work must be laid bare and externalised. In this sense, expression is about bringing the interior thoughts of an author out into the light. From our earlier discussion, we know that whatever is expressed must also be identifiable. This comports with expression connoting clarity and avoiding doubt; for example we might describe something as "expressly stated" rather than tacitly suggested.

[72] *Levola*, ECJ, fn.1, [36].

[73] *Levola*, ECJ, fn.1, [35].

[74] "Expression". Merriam-Webster.com. 2019. https://www.merriam-webster.com (18 March 2019), emphases added.

The problem with taste is that it does not really come out into the light. It travels from one interior space, the author (or chef's) mind, to the taster's mouth. It does so via an expressed substance, the food, but this substance is not the claimed copyright work. In the case of taste, the food is the expressed medium, and taste is the (private) *result*. It is thus more accurate to describe taste as an *impression*, rather than expression. Indeed, note how the taste was claimed by Levola as the "total *impression* of the taste senses caused by the consumption of a food".[75] Or it may be more accurate to say that taste is a chemical *process* rather than an expressed thing, thus offending the prohibition on the protection of methods and systems in copyright schemes.[76] These more nuanced readings of 'expression' underscore why taste cannot be described as an expression, an essential criterion for copyright subsistence under EU law.

Even if taste is an expression, there are questions about what it expresses. Some commentators suggest that taste should be excluded from copyright protection because it does not express anything that stimulates the intellect,[77] or communicates cognitively perceptible ideas.[78] It merely evokes associations and gustatory responses.[79] A utilitarian justification for copyright might demand that a copyright work provide some intellectual fodder, and somehow expand knowledge. However, this appears doubtful.

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[75] *Levola*, AG, fn.2, [22]. Emphasis added.

[76] See fn. 70.

[77] Charles Cronin, "Genius in a Bottle: Perfume, Copyright, and Human Perception" (2009) 56 *Journal of the Copyright Society of the USA* 427, 430: "copyright regimes have always protected and promoted the creation of works that are not only produced, but also perceived, by senses that stimulate human intellection". See also Leon Calleja, "Why Copyright Lacks Taste and Scents " (2013) 21 *Journal of Intellectual Property Law* 1.

[78] European Copyright Society, *Opinion on the Pending Reference before the ECJ In Case 310/17 (Copyright Protection of Tastes)*, 19 February 2018, para 11: "smells and tastes do not express an aesthetic or other "idea" (cf. Art. 9(2) TRIPS) that is communicated via an "intellectual" (sic!) creation". Available at https://europeancopyrightsociety.org/opinions/

[79] European Copyright Society, fn.78, para 11.

Music, for example, does not really convey ideas, and most artistic works do not expand knowledge. It is probably sufficient for the expression constituting a work simply to be capable of appreciation.

In summary, taste encounters expression as an obstacle to copyright subsistence in two contexts. First, taste is too vague to be more than a shadowy outline or idea. And second, its impressionistic and interior character means taste is the diametric inverse of the express and the overt.

Whither the Work in EU Law?

This section will examine where *Levola* leaves us in our understanding of the copyright work under EU law, and ponder where it should, and could, have left us. Following a number of ECJ cases on originality, but which skirted the direct issue of "the work" in EU law, there were expectations that *Levola* would directly respond to the question "what is a work under EU law"?[80] There is an understandable lament that the ECJ did not give clearer guidance on the concept of the work, and left a number of questions unresolved, particularly whether the work is simply synonymous with originality.[81] However, this section suggests that the expectations of the ECJ in *Levola* were too ambitious, and questions whether it was necessary, possible, or even desirable for the ECJ to attempt to define the copyright work, or even clarify its outer boundaries.

Was the ECJ required to define the "work", and did it do so?

[80] See, eg Caterina Sganga, "The Notion Of 'Work' In EU Copyright Law After *Levola Hengelo*: One Answer Given, Three Question Marks Ahead" (2018) 41:7 *European Intellectual Property Review* 415, 415: "The 'Heks'nkaas' case promised to be the end of a jurisprudential saga where the clouds surrounding the notion of work in EU copyright law could be finally cleared out", and at 420, noting that the ECJ provided no "conceptual clarification" of the work.

[81] Sganga, fn. 80.

It is debatable whether the ECJ was, indeed, asked to explain the concept of the work in EU law. All of the referred questions ask whether *taste* is *precluded* from being a copyright work.[82] These questions invite exclusionary conclusions about *taste* specifically, rather than a positive definition of all of the conceptual contours of the copyright work more generally.

Notwithstanding the particular form of the questions, the ECJ considered that they concerned "the interpretation of the concept of a 'work' in the InfoSoc Directive",[83] and that taste could be protected by copyright "only if such a taste can be classified as a 'work' within the meaning of the directive".[84] This logically necessitates some consideration of the meaning of the "work", in order to determine whether taste conforms. However, the ECJ's attempt to articulate the meaning of work is rudimentary, tautological and opaque. It merely explained the "two cumulative conditions [which] must be satisfied for subject matter to be classified as a "work",[85] described above. The first condition that a work be "original in the sense that it is the author's own intellectual creation"[86] simply restates the originality criterion, or merges originality with the work (discussed below), and says nothing about what a work (which may or may not be original) actually is. The ECJ's second condition that a work be "the expression of the author's own intellectual creation",[87] is obscure, and appears to merely repeat the idea-expression dichotomy, shedding no new light on the meaning of the "work" under EU law. The ECJ effectively stipulated a third condition that a work be objectively identifiable. The end result is that

[82] "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". *Levola*, ECJ, fn.1 [32].

[83] *Levola*, ECJ, fn.1, [1].

[84] *Levola*, ECJ, fn.1, [34]. Similarly, the AG stated that "[b]y its first question, the referring court asks, in essence, whether the taste of a food product constitutes a 'work'". *Levola*, AG, fn.2, [32].

[85] *Levola*, ECJ, fn.1, [35].

[86] *Levola*, ECJ, fn.1, [35].

[87] *Levola*, ECJ, fn.1, [36].

despite the ECJ purportedly setting itself the task of clearly articulating the meaning of the work, it merely repeated two foundational doctrines of copyright subsistence, originality and expression, and confirmed an essential requirement of all property, objective identifiability. The Court restrictively assessed what it was required to do. It reached an exclusionary conclusion explaining why taste *is not* a work, rather than a positive articulation of what a work is. It fixed on the lack of objective identifiability of taste as the fatal blow to copyright status, and then apparently considered its work done. Strictly speaking, the ECJ did what it was asked to do, and what the referring court needed in order to give judgment; it determined whether taste is precluded from copyright protection. It is difficult to foresee when the ECJ might be given an opportunity to pronounce more broadly on the meaning of the copyright work in the abstract, when each referred question is triggered by sufficiently interested national courts, and relates to the specific facts of a given case. More expansive questions about the nature of the work in the abstract could be regarded as merely hypothetical, if posed, in which case the court should refuse to answer them.[88] This means that the limits of the copyright work in EU law may only become incrementally clearer as successive nonconventional entrants test its boundaries. In other words, we may be limited to ad hoc determinations of whether such phenomena as engineered DNA, perfumes, yoga moves, headlines, or graphic user interfaces are precluded from copyright protection, from which, gradually, a clearer picture of EU copyright's limits may emerge, if not a full understanding of the copyright work.

The relevance of The Berne Convention and its listed subject matter.

Despite recognising the binding effect of Berne, the ECJ completely ignored question 1(b), which pointedly asked whether copyright protection is precluded by the fact that Berne's exemplary list illustrating "the literary, scientific and artistic domain" is limited to creations which can be perceived by sight and/or by hearing. This was unfortunate, because answering question 1(a) doesn't necessarily answer question 1(b), even if the same conclusion is reached.

[88] *Levola*, ECJ, fn.1, [28].

As the foundational governing international law instrument on the copyright work, forming part of the EU legal order, it is arguable that both the AG and the ECJ should have more deeply scrutinised Berne in answering the referred questions. Neither the AG nor the ECJ opened up Berne to scrutiny in any meaningful way. Having said this, what would this examination have revealed? Can Berne help us define the work? This is highly doubtful. Its antiquated language nowhere discusses the work as an independent concept. Instead, it mentions "literary works" and "artistic works", suggesting perhaps that works can only ever be understood in relation to subject matter.[89] Under Berne, while literary and artistic works "shall include *every production … whatever may be the mode or form of its expression",* these "productions" only exist in the "literary, scientific and artistic domain". This raises obvious questions about what those domains and their limitations might be, given the ordinary meaning of "domain" as a bordered territory. If we can identify those territories, we might get a clearer understanding of Berne's implicit conception of the work. The ECJ arguably should have attempted to identify those borders, and it may not have been controversial to conclude that taste clearly falls outside even the broadest concept of "literary" or "artistic" work. Berne's somewhat incongruous reference to "scientific" works, with its suggestion of overreach into the territory of patents and industrial processes, has been dismissed as superfluous. It is suggested that these are simply literary or artistic works concerned with scientific matters, such as the description of an experiment, or diagrams.[90]

While the specific questions posed to the Court may not have strictly required it to articulate the boundaries of Berne's literary, scientific and artistic domains, question 1(b) at least required it to consider Berne's illustrative list, and whether the limitation of the exemplary subject matter to creations which can be seen or heard indicates that taste cannot be a copyright work. It is tempting to link concepts

[89] In support of this view, see Justine Pila, "Copyright and its Categories of Original Works" (2010) 30:2 *Oxford Journal of Legal Studies* 229.

[90] See S. Ricketson & J. Ginsburg, *International Copyright and Neighbouring Rights - The Berne Convention and Beyond* 403, Vol. 1 (Oxford: University Press, 2nd ed, 2005), 407. A similar view is expressed in Claude Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (WIPO 1978) 12, para 2.2.

of the work to copyright subject matter, and in systems implementing closed lists of subject matter, this is mandatory and effectively contains the outer boundaries of the work.[91] However, a number of systems mimic Berne and avoid a definition of the work, but include a list of illustrative examples of copyright subject matter. The deliberate inclusion of the list and the curation of the particular listed items suggests we cannot ignore them. However, they generate a number of questions, some of them perhaps much wider than the Court was strictly required to address. Because these lists are inclusive, they suggest that they may extend past the enumerated items. But what, if any, boundaries might ultimately apply, what criteria might contain them, and who sets the criteria? Does the list itself impose some boundaries to what might potentially be a "work", and what are they, and how are they derived? Do the particular items enumerated in the list have any significance, helping us to analogise or implicitly define copyright's outer limits, or are they simply a reflection of the random classes of subject matter that courts and legislatures have historically regarded as works? Is it possible to locate categories of works in these lists, and must any new works be classified taxonomically within or alongside these categories, or might a novel work establish its own new category?

In *Levola*, the AG suggested that taste should reflect some "common ground with the listed works".[92] But are there any shared, universal characteristics of existing subject matter that might delimit the domain of works? Most illustrative lists traverse a broad and varied spectrum of subject matter, including Berne,[93] and it may be very difficult to identify ontological similarities between the listed items. However, question 1(b) identifies an important common characteristic, and that is that they are limited to works which can be perceived by the mechanical senses of sight and hearing. This is perhaps

[91] See Tanya Aplin, "Subject Matter", in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (London: Edward Elgar, 2009).

[92] *Levola*, AG, fn.2, [54].

[93] See art. 2(1) of The Berne Convention fn.4.

telling, and ideally the ECJ would have addressed it. The AG at least expressly noted this limitation in the list,[94] even if he did not clearly answer question 1(b).

Further, the omission from these lists of taste or smell cannot be explained away on the basis that at the time the lists were formed, this was unknown technology. It is understandable to adopt an open-ended system in order to flexibly admit as yet unknown technology. However, it is more difficult to justify expanding inclusive lists to embrace already existing phenomena. If taste and smell are works, they are ancient, preceding all the listed items, and should have been the first to come to mind. Their exclusion from the list suggests that they are simply not regarded as works, most likely because, as the European Copyright Society argues, "such types of creations simply fall outside the domain of copyright".[95] This "I know it when I see it" approach to copyright exclusion has a certain intuitive appeal. The limitation of works to expression capable of being seen or heard is also consistent with an overwhelming scholarly assumption that, notwithstanding the inclusive lists, there *should* be subject matter boundaries.[96] It also

[94] *Levola*, AG, fn.2, [51].

[95] European Copyright Society, fn.78, para 12.

[96] See Pamela Samuelson, "Evolving Conceptions of Copyright Subject Matter" (2016) 78(1) *University of Pittsburgh Law Review* 18 (suggesting five criteria for limiting the evolution of copyright subject matter); Anthony Reese, "Copyrightable Subject Matter in the 'Next Great Copyright Act'" (2015) 29 *Berkeley Tech LJ* 1489, 490, arguing that subject matter should be expressly limited ("[d]rafting this Next Great Copyright Act *will require defining the scope of subject matter* protected by the Act") (emphasis added); Anthony Reese, "What Should Copyright Protect?" in Rebecca Giblin and Kimberlee Weatherall (eds) *What If We Could Reimagine Copyright?*, 116 (ANU Press, 2017): "A copyright system demands some identification of the universe of material to which copyright law does and does not apply"; Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §2.12 (2016): "the mere fact that subject matter is not enumerated in the statute does not categorically bar it from copyright protection. Nonetheless, not everything under the sun is thereby rendered eligible for copyright protection"; Christopher Buccafusco, "A Theory of Copyright Authorship" (2016) 102 *Virginia Law Review* 1229, 128: "There will be some creations that qualify constitutionally as authored writings but that are not within the scope of the current statutory scheme"; Alan Durham, "The Random Muse:

comports with the reality that, while copyright protection has certainly expanded markedly over the centuries to encompass technological, social and cultural development, with only a few aberrant examples like the French and Dutch decisions conferring copyright in perfume, this spread has been limited to works which can be seen and heard. Thus it is strongly arguable that the inability to hear or see taste is such a significant difference from the existing categories, that it should be disqualified as a work.

Nevertheless, the ECJ was averse to interpreting Berne's slim clues to a work's boundaries, namely its "domains" and exemplary subject matter. While it may appear to be a dereliction in duty not to at least squarely answer question 1(b), this is consonant with the Court's narrow approach to its task. Answering question 1(b) was technically superfluous once taste was excised as objectively unidentifiable. And yet, forgoing this opportunity to clearly relegate copyright works to phenomena that can be seen or heard is significant, signalling a willingness to impose only the most essential harmonised limitations on the territory of the work under EU law. This seems a clear message that the ECJ is open, at least in theory, to the potential for unseen and unheard expressions to be regarded as copyright works. However, the filter of objective identifiability may limit the potential of such phenomena to enter the copyright domain, and the ECJ's reliance on that filter may explain its unwillingness to answer question 1(b).

Is it necessary, possible, or desirable to define the work?

Authorship and Indeterminacy" (2002) 44 *William and Mary Law Review* 569, 634: "a fair interpretation of the Constitution and the Copyright Act, if not common sense, requires some limitations on the subject matter of copyright". Jonathan Griffiths, "Dematerialization, Pragmatism and the European Copyright Revolution" (2013) 33:4 *Oxford Journal Of Legal Studies* 1, 27: "[without] a defined list of protected forms, courts may find it harder to distinguish between cultural productions which are entitled to copyright protection ("works") and those which are not". And see European Copyright Society, fn.78, para 18: "While the list in Article 2(1) [of the Berne Convention] is non-exhaustive and should cover other forms of expressions falling within the understanding of "literary and artistic works", it is certainly not unlimited".

The analytical void left by *Levola* may disappoint many who sought greater clarity and certainty about the concept of the work under EU law. Perhaps there should be nothing surprising here; this merely entrenches a long-standing cross-jurisdictional jurisprudential avoidance of the question, or at least a confusion, about what is a "work"? The work occupies an almost metaphysical territory, bordering the immaterial and the material. It is part mental concept or authorial output, and part artefact or protected class.[97] Mental concepts are potentially boundless in nature, but to what extent does and should the concept of the work privilege certain mental concepts and not others with copyright protection? What should be included as copyright subject matter is relatively unexamined, at least in judicial settings, and there has not been a notable appetite to traverse the issue and harmonise the concept of the work, qua work, in the EU. Van Eechoud argues that "[t]he "work" and its categories were generally not seen as concepts requiring a uniform EU interpretation, other than for software and databases".[98] Notably, even the most recent, and most comprehensive, copyright directive, the Directive on Copyright in the Digital Single Market,[99] excluded a definition of the work.

[97] See, eg., Sherman, fn.3, 100, and Griffiths, fn. 96.

[98] Mireille van Eechoud, "Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work" (2012) 3:1 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 60, 63. See also Mireille van Eechoud and Bernt Hugenholtz et al, *Harmonizing European Copyright Law: The Challenges of Better* Lawmaking (Kluwer Law International 2009), 31: "The focus of the European Community's harmonization efforts so far has been on exclusive economic rights and their duration, and not so much on the subject matter these rights pertain to, nor, for that matter, on issues of authorship, ownership, or moral rights".

[99] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Perhaps there is, therefore, no pressing need to arrive at a clearer definition of the work. Across the world, the "work" as an independent concept remains undefined,[100] and the system is not apparently broken. Much work has been done examining other inconsistent and uncertain essential areas of copyright, particularly different standards of originality, notions of authorship, and, in closed list systems, whether certain types of creations fall within the admissible "boxes". But again, elusive definitions in these spaces have not caused the structure to crack. There might be pressure to arrive at a harmonised definition of "work" in the EU if there were examples of national systems causing social or market harm by conferring "extreme" copyright in the absence of a harmonised definition. And here, the broader EU legal order and the promotion of a competitive single internal market may exert some pressure on the copyright work to mitigate those harms. However, only the rarest aberrant decisions have protected such things as perfume, and even other judgments contradict that protection. The net result of this confusion is, at best, weak copyright protection for these nonconformist works, protection which *Levola* has now dissolved. In summary, defining the work may simply be unnecessary.

It may also be impossible. Calls for a clearer definition of the work assume that it can, indeed, be separately defined as an independent and coherent concept. It is, however, likely incapable of definition, in any copyright scheme,[101] and must remain a metaphysical and insoluble question. Madison, for example, has argued that "the search for definitional boundaries is chimeric".[102] This author has previously argued that the definition of the work may be inherently elusive, and the only thing that we might label a "work" is that which emerges from the doctrinal filtration system of originality, authorship, the exclusion of ideas, systems and methods and, where applicable, subject matter

[100] Madison, fn.3, 326: "The concept of the work appears to have little or no fixed meaning or meanings in the law, despite decades of inclusion of both term and concept in relevant statutes and treaties".

[101] McCutcheon, "Shape Shifters", fn.3. M. Madison, "IP Things as Boundary Objects: The Case of the Copyright Work" (2017) 6:3 *Laws* 13, p3 at https://doi.org/10.3390/laws6030013.

[102] Madison, "IP Things as Boundary Objects", fn.101, p 3.

categorisation and fixation.[103] We can now add to this list, objective identifiability.[104] The work is difficult, perhaps impossible, to unravel without correspondingly separating questions of authorship, originality, and, where applicable, fixation and subject matter definition. This results from the intense fusion between the work and those corresponding and frequently inter-related concepts, which is often reflected in statutes and other instruments. These may, for example, refer to "literary works", thus forcing a consideration of whether something is not merely a work, but a *literary* work, mandating reflection on specific subject matter and qualifiers such as "literary" or "artistic". In closed list systems, subject matter imposes perhaps the greatest pressure on the concept and shape of the work.[105] If we call something "a work of *authorship*", we now turn our gaze to the author, and the notion of authorship. Descriptions of an "*original* work" likewise invoke an examination of originality. A number of copyright systems utilise entire descriptive alloys, such as "an original work of authorship fixed in material form".[106] Similarly, in a blending of the Berne language with EU Directives and case law on originality, Art 1.1 of the Wittem Group's proposed European Copyright Code suggested the following definition of copyright: "Copyright subsists in a work, that is to say, any expression within the field of literature, art or science in so far as it constitutes its author's own intellectual creation".[107] These types of multi-factorial formula raise a whole orchestra of issues in which the work is just one, almost buried,

[103] McCutcheon, "Shape Shifters", fn.3. Even scholars purporting to examine head on "what should belong in copyright" tend to do so by engaging the doctrinal filters: "So to start, how does copyright law construct the box? What doctrines define the subject matter of copyright? The standard answer, the one that begins every introductory copyright law course, is originality and fixation". Joseph P. Liu, "What Belongs in Copyright?" (2015-2016) 39 *Columbia Journal of Law and Arts* 325, 325-326.

[104] As the author has also previously argued. See McCutcheon, "Shape Shifters", fn. 3; and McCutcheon, "Works of Fiction", fn. 71.

[105] See, for example, Griffiths, fn. 96, 10.

[106] 17 U.S.C. § 101.

[107] Wittem Group, *European Copyright Code*, available at https://www.ivir.nl/copyrightcode/european-copyright-code/#ftnref1

element. They demonstrate that the work is, in effect, a composite of copyright subsistence criteria and may never be independently examinable and, as Sherman notes, always "ontologically unstable".[108]

This raises real questions about the necessity, possibility and even the desirability, of independently examining the work, when so much shaping labour is done by these corresponding doctrines and criteria. Once we exhaust the questions of originality, authorship, expression, fixation, subject matter, and now objective identifiablity, is there anything left to independently examine? More importantly, what of concern might slip through the filters? And how will a definition of 'work' prevent that harm? Indeed, perhaps if we are searching for boundaries to the work in order to prevent harm, we shouldn't look for them in domains, or subject matter, or even copyright doctrine, but by examining the normative bases for the conferral of copyright. Perhaps we need to twist the question from "what can be a copyright work" to "why it *should* or *should not* be a copyright work"?[109] This would require a much more overt application of the fiercely contested territory of intellectual property rights theory than is conventionally undertaken, particularly by courts, when admitting new subject matter to the copyright domain. This is simply another reason why the work, qua work, may always defy demarcation.

Originality = work?

The ECJ's reluctance to expound independently on the concept of the work in EU copyright law can also be explained by its conflation of originality with the work. Why discuss the work independently if the assumption is that dealing with the issue of originality correspondingly deals with the issue of the work? This merger of the work with originality conceives of the work as tantamount to an ethereal "essence" capable of traversing different forms, "which has been described variously as 'originality', 'labour, skill and judgment', or 'intellectual creation'".[110] There is a kind of logic to the proposition that

[108] Sherman, fn.3, 119.

[109] See, eg, Samuelson, 'Evolving Conceptions', fn.96.

[110] Yin Harn Lee, "The Persistence Of The Text: The Concept Of The Work In Copyright Law - Part I"

if we locate this originality, we then locate the work. The focus is on the originality reflected in an expressed thing or artefact, rather than the thing itself. This conflation of originality with the work is understandable, particularly if the work is regarded simply as an amalgamation of copyright subsistence criteria, with the originality criterion privileged.

While the work is clearly bound to the criterion of originality, its status as a discrete element in this mix was pressed in *Levola* by the AG and stakeholders in their submissions,[111] and by others.[112] The AG stated "[i]t is clear from … case-law that Article 2(a) of Directive 2001/29 requires, first, the existence of a 'work' 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".[113] The attraction of maintaining a conceptual distinction between the work as thing, and the work as an "intellectual creation" is understandable, because it avoids ceding the issue of copyright subsistence solely to the question of originality, which would risk leaving copyright protection at large.

The ECJ ignored the AG's express warning to avoid conflation between originality and the work. Perhaps this was because the practice is apparently settled in EU case law,[114] and there is a tendency to

(2018) I.P.Q. 22, 23. See also Sherman, 'What is a Work?', fn.3; and Griffiths, fn. 96.

[111] *Levola*, AG, fn.2, [46].

[112] Mireille van Eechoud, "Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work" (2012) 3:1 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 60, 71: "Originality understood as the result of creative activity is only one factor in the work equation".

[113] *Levola*, AG, fn.2, [46].

[114] The trajectory of EU decisions privileging originality as the defining cornerstone of the work is discussed in van Eechoud, "Along the Road to Uniformity", fn. 112. See also See also E. Rosati "Originality in a Work, Or a Work of Originality: The Effects of the Infopaq Decision" (2011) 33(12) *European Intellectual Property Review* 746, 754: "…it appears that copyright protection is to arise any time a work, which is to be meant as "every production in the literary, scientific and artistic domain", is its author's own intellectual creation".

consider ECJ case law dealing with originality as the ECJ elaborating "an EU-wide concept of copyright 'work'".[115] Indeed, for this reason, the AG's claim that the division between work and originality is "clear from [the] case law"[116] is unpersuasive. One has to look hard for hints of it. It may be barely discernible in the ECJ's statement in the BSA case[117] that "the graphic user interface can, *as a work*, be protected by copyright if it is its author's own intellectual creation".[118] These could be deliberately chosen words implying that whether the GUI is a "work" is a preliminary inquiry, after which one can interrogate whether it is "the author's own intellectual creation". Or it could equally just be another example of the ECJ equating the work with intellectual creation. Suffice to say that the ECJ in *Levola* rather pointedly ignored this entire debate, and the impasse regarding the originality-work equivalence remains. Again, perhaps the ECJ was not strictly required to engage in the debate, let alone resolve the question. First, the ECJ was not asked that question. Preferably, a referring court would expressly pose the question of whether converging originality with the work is correct in law if it wanted it resolved. Second, the resolution of the question was superfluous once the ECJ founded its decision on the identifiability criterion.

Further, the question is not easily resolved, because in addressing it, important and problematic questions are generated. If, before turning to the question of originality, we must first confirm the

[115] van Eechoud, "Along the Road to Uniformity", fn. 112, 60 and 70: "Commentators are in broad agreement that the Court holds it a matter of European law that there is such a thing as a generalized work concept ('the author's own intellectual creation')". See also Justine Pila and Paul Torremans, *European Intellectual Property Law* (Oxford: Oxford University Press, 2016), 11.8, discussing how the ECJ's "most important contribution to date has been to define the authorial works in respect of which copyright must be recognised and protected by member states".

[116] *Levola*, AG, fn.2, [46].

[117] *Bezpečnostní softwarová asociace – Svaz·softwarové ochrany v Ministerstvo kultury* (C-393/09) ECLI:EU:C:2010:816.

[118] *Levola*, AG, fn.2, [46].

presence of a 'work', what conception of the 'work' is reflected in this demand? We are still left with the (probably insoluble) question of what the work is in order to assess the putative work for conformance with whatever that notion is, and then go on to assess originality. As discussed, the work is perhaps impossible to define as an abstract, universal concept. Was the ECJ expected to theorise the work? Or was it being asked to clarify the kind of *subject matter* that should be protected by copyright, thus conflating work with subject matter? It simply isn't clear. However, the AG and other proponents of the work/originality divide appear to be insisting on some kind of harmonised limitation to copyright subject matter, based on their concern that relying exclusively on the filter of originality could mean "that any *subject matter* meeting that criterion should 'automatically' be considered, therefore, as a copyright protected 'work'".[119] This notion that a work must exist within some protectable class is also reflected in the ECJ's statement that taste might be a copyright work if it "can be *classified* as a 'work' within the meaning of the directive".[120]

The obvious difficulty with this approach is that many EU member states utilise open-ended frameworks in which itemised subject matter lists are only illustrative,[121] indicated by expressions such as "including" or "such as".[122] Sganga is disappointed that the ECJ "did not clarify whether the notion of protected works is open-ended, quasi-closed or closed".[123] Whether this conclusion was even open to the ECJ, given that it was not asked this question, and given the preponderance of open list systems, is debatable. But in any event, had it concluded that the notion of the work was closed, this would bluntly conflict with the open-ended models of the vast majority of member states, and ignore both the exemplary nature of the lists, and Berne's very clear instruction in Art 2.1 that "'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be

[119] *Levola*, AG, fn.2, [47]. Emphasis added.

[120] *Levola*, ECJ, fn.1, [34]. Emphasis added.

[121] Notable exception where lists are unambiguously closed are the UK (at least pending Brexit), and Ireland.

[122] The template being art. 2.1 Berne.

[123] Sganga, fn. 80, 423.

the mode or form of its expression". The advantages of closed list systems are familiar, including enhanced certainty[124] and reduced opportunity to improperly appropriate the public domain or overlap with other intellectual property rights. However, presumably the member States adopting open-ended systems consciously privileged the flexibility they offer over these other advantages. They may, therefore, understandably object to their copyright ecosystems being exploded by the ECJ through a preliminary ruling without consultation. If the radical change to a harmonised closed list system is considered a worthy goal, it should come through a more broadly debated regulation or directive.

The other difficulty with this approach is that it simply opens up more questions. If a work exists in a kind of macro class, what are the boundaries of that class? If we go back to Berne as the limiting source,[125] we simply trigger debate on how to define the "literary, scientific and artistic domain". We also misconceive Berne as a *limiting* instrument, when its true purpose is to set *minimum* standards. In this regard, straining to find the boundaries of the work in Berne's rather opaque clues may be moot, given that Berne is a launching pad rather than a proscription. Do we then limit copyright protection to subject matter that has only historically been recognised or intended by both creators and society as copyright subject matter?[126] If so, how would the court, practically, render those limitations? And assuming they could be clearly set, would this undesirably ossify copyright and exclude worthy new entrants? Settling on macro categories of protection also doesn't help us resolve more difficult questions about whether familiar subject matter within those classes, like literary expressions, can be broken down

[124] See, eg, Aplin, fn. 91, 21.

[125] Van Eechoud, "Along the Road to Uniformity", fn. 112, 71, for example, argues that "[t]he creative form must bear on the right kind of production, a domain which in the Berne Convention is broadly described as 'every production in the literary, scientific and artistic domain'". While not defining those domains herself, she argues (at 71) that "[i]f the Court is on a road to a truly harmonized concept of a work of authorship, it will have to address these criteria as well".

[126] As suggested by Pila and Torremans, fn. 115, 11.3.7.3.

into smaller "micro works"[127] such as titles or chapters. Following *Infopaq*, the question of whether a larger expression may be almost infinitely divided into smaller parts provided they share the author's "own intellectual creation"[128] remains unresolved. All of this seems to lead irresistibly to the conclusion that, as argued above, the ECJ is relatively hamstrung in its ability to, ex ante, pronounce the copyright work's nature and boundaries. While at the cost of greater certainty, the practical result is that the ECJ can only determine, on an ad hoc, post-facto basis, whether a 'borderline' creation is indeed protected by copyright.

Conclusion

Levola may have dashed expectations for greater clarification of the meaning of the work under EU copyright law. Its perhaps most significant contribution is to illuminate an important, elemental condition of the copyright work, that of objective identifiability. This is a sine qua non of copyright protection. Identifiability is necessary to achieve the legal certainty and predictability needed to mark out the boundaries of the copyright monopoly. Clearly, there is a notice function performed by relative certainty of subject matter. Stakeholders' decisions about how to act will likely be influenced by their knowledge or reasonable expectations of whether something such as taste is a copyright work. Adequate identifiability of works thus protects and informs stakeholders who can plan their conduct in a fairer and more transparent system. The article explained in detail how the inherently subjective nature of taste precludes it from being precisely identified. This condition of identifiability has always existed, built as it is on the very concept of property. However, it is only when the copyright boundaries are stress-tested by putative nonconventional entrants like taste that such fundamental conventions rise to the surface for closer scrutiny. Objective identification is now a clear condition of the copyright work

[127] Hughes, fn. 3.

[128] *Infopaq* fn. 67 [38].

under EU law. The contribution made by this article is to dig deeper into that element, explaining its relevance in relation to taste and by analogy, other sensory subject matter.

This article also identified other bases on which the Court could reject taste as a copyright work. In so doing, it clarified some important foundational boundaries to the concept of the work not only in EU law, but beyond. In explaining the rather obvious claim that a work must be an expression, the article described how taste highlighted more nuanced shades of meaning of that term. This requires works to be more than an impression; to be externalised rather than internalised. Taste fails this test. It lingers in obscurity, forced by its own nature to remain in the dark. The article also explained how the ECJ may have overlooked, in the case of taste, the universal condition that a work be authored. This requires a sufficiently proximate causal relationship between the intellectual creation of an author and its downstream expression. Too many variables complicate the causal chain between chef and taster for taste to be considered an *authored* work.

The article explores whether there was more work the Court could have done to flesh out a clearer notion of the copyright work, including interrogating Berne's domains, and the significance of its listed subject matter, or at least the import of that subject matter being limited to the mechanical senses of seeing and hearing. It is tempting to clarify that a work must be capable of visual or auditory perception, since notwithstanding a few aberrant court decisions, those are the only receptors historically privileged by copyright. However, the ECJ was probably correct not to proclaim this, thereby acknowledging the (perhaps slim) possibility that some works may meet the essential criteria of objective identification, authorship, expression and originality and yet nevertheless not be capable of auditory or visual perception.

In its attempted definition of the EU work, the ECJ did little more than restate (somewhat ambiguously) two tenets of copyright subsistence, originality and expression, and clarify that, like all property, works must be objectively identifiable. This strongly suggests that originality may be the primary operational

filter to the boundary of the work under EU law, despite the potential incongruence of this.[129] If this is the final pronouncement on what a work is under EU law, then we must conclude that a work is, simply, an objectively identifiable original intellectual creation that is more than an idea. With more carefully worded, targeted questions, a future court may be able to clarify whether this is the proper construction of "work" under EU law, or whether there must be a separate preliminary enquiry to determine whether there are any other defining characteristics of the work, in particular whether there are broader classificatory limits to the work, and if so, what they are and where they originate. However, whether the ECJ can offer any guidance on these questions will depend very much on the subject matter of the dispute before the referring court, and the nature of the referred questions.

The ECJ's decision in *Levola* is, in any event, correct. Copyright protection should not be extended to taste, or any other phenomenon that fails any of the conditions mentioned above, at least without a preceding period of consultation during which the full policy implications of conferring copyright can be better considered in a more open, rigorous and democratic process. Considerations should include the theoretical, philosophical, ethical and economic justification for the putative nonconventional work entering the copyright domain, whether its protection is consonant with the objectives of the copyright system, and the availability and efficacy of alternative legal protection, particularly under trade secrets or patents. They should also include the possible harms that might ensue if something like taste is protected under copyright, including the potentially adverse and anti-competitive chill on the production and sale of food and drink products. If aberrant entrants like taste are then considered a copyright work, this at least allows a period of notice and market transition, reducing the potential to impose an unanticipated liability on market participants who, for example, could have no reasonable basis for assuming that copyright might extend to something like taste when it never has done historically. This is a preferable approach than new or non-conventional works being judicially declared through the private disputes of market competitors.

[129] See *Levola*, AG, fn.2, [44] – [47] and Rosati, fn. 114.

Levola leaves us no closer to a harmonised definition of the copyright work in EU law. However, it was too ambitious to expect the ECJ to craft a universal, comprehensive definition of the work, as critics apparently expected it to do. *Levola* importantly clarifies that works must be precisely and objectively identified expressions, but it suggests that the only remaining condition of the work is that it be an original intellectual creation. The ECJ thus conceives of the work as simply a slim bundle of copyright subsistence criteria, with a focus on the originality criterion. This leaves the scope of potential works relatively unbounded, and perhaps invites censure for failing to consider the possible adverse effects of rewarding copyright to any conceivable objectively identifiable, original intellectual creation, with no overarching classificatory limits. However, this is perhaps the best we can do, given the difficulty of theorising and conceiving of the work in the abstract, and independent to copyright's shaping filters. We will have to see whether the Court will have future opportunities to directly respond to the question of whether work and originality are indeed synonyms, and to ponder some of the potential limiting muscle exercised by Berne.