

# Copyright law does not protect the taste of cheese

By [Estelle Derclaye](#)

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United Kingdom - "Blessed are the cheesemakers", runs the famous line from the Monty Python film *Life of Brian*. But a recent court case gives the lie to the notion that manufacturers of cheese have fortune on their side, after the court that interprets EU law ruled that cheese cannot be protected by copyright.



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In November 2018, the Court of Justice of the European Union (CJEU) handed down its judgment in the case of [Levola Hengelo v Smilde Foods](#) – in which one cheesemaker sued another because they said their rival's product tasted the same as theirs. The ruling, that copyright law does not protect the taste of cheese, is important because it affects more than cheese. The judgment implies that other similar products such as perfumes cannot be copyrighted either.

While it might be bad news for the makers of cheese or scents, it's an important judgment for British and Irish artists as the court's argument implies that their creations do not have to fall into one of the eight rigid categories of the [UK Copyright Act](#) – such as "literary, dramatic and musical works" or "artistic works" – and therefore more works are protectable.

This may sound counter-intuitive but in fact, it is not. In the UK and Ireland, until the Levola decision, it was not sufficient for a creation to be an original expression, it needed to fit into one of the categories provided in the act – and different categories, under UK law, had different rights under the act. But, in continental Europe, to be protected by copyright, creations do not have to fall within categories – they just have to be an author's original expression. So the creation of a new perfume, cheese, cake, painting – to name but a few – is arguably an author's original expression.

This is why this case came to the CJEU. A Dutch company making spreadable cheese sued a competitor for copyright infringement as it argued the other company's cheese had a similar taste. The competitor counterclaimed that the taste of cheese was not protectable by copyright. Up until then, Dutch courts had found that [perfumes were subject to copyright](#). So why not tastes as well? The Dutch cheese-making company sued and the Dutch court referred this decision to the CJEU.

The CJEU replied that, apart from being an author's original expression, a work also had to "be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in

permanent form”. In other words, something cannot be protected by copyright if it is vague and subjective. It concluded that because tastes do not pass this hurdle, copyright cannot protect them.

But it added that if in the future, technology could identify tastes with enough precision and objectivity, then copyright could protect tastes. So, it did not completely close the door to the protection of tastes and smells. A more detailed examination of this judgment [can be found here](#).



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## What's in it for the UK?

The decision is great news for artists in the UK because it also *de facto* abolishes the requirement of categorisation. In the past, some artists were not protected. There was a [famous legal dispute in 1997](#) regarding use by a UK tabloid newspaper of an image that was very similar to the cover of Oasis's Be Here Now album.

The UK courts held that this scene was not protected by copyright because it could not fall in one of the subcategories of artistic works. It could not be a work of artistic craftsmanship as it was not crafted and it could not be a collage as the objects were not stuck to the ground with glue. It could not be sculpture as it was not carved, modelled or made in any of the other ways in which sculpture is made, and it could not be a dramatic work as there was no action (all objects and persons were static).

Because UK courts are bound by CJEU decisions, these sorts of scenes are now clearly protectable – even if the UK Copyright Act has not yet been modified to take account of the Levola decision, UK courts have to interpret the country's copyright law in light of the ruling recognising the copyright in an artist's original work of expression. This means that all sorts of modern, abstract, avant garde, mixed media art works now clearly fall within the realm of copyright law.

The Levola decision also means that it does not matter in which category these works used to fall – it has clarified that as long as something is an original artistic expression that can be clearly described (so not cheese or perfume, but books, paintings, songs, movies and the like). So, given that EU law, including CJEU case law, affects the way copyright is protected in the UK and Ireland as well, it means that all creators of artistic works, no matter how different they may be, will enjoy the same rights.

It may be that one day it will be possible to identify tastes and smells with enough precision and objectivity and that they will be protected by copyright in the EU. But for now, companies can imitate their competitors's cheeses and perfumes without the fear of breaching any copyright.

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