


KATHOLIEKE UNIVERSITEIT  
**LEUVEN**



**Copyright protection for  
culinary creations:  
Feasible? Desirable?**

**Marie-Christine Janssens**  
Centre for Intellectual Property Rights, Catholic University Leuven (KULeuven)  
BVA – Lunch Seminar 7 May 2012

**1. Amuse-gueules  
'Prime time superstars'**

- ❑ **Phenomenon of the 'superstar' chef → explosion of interest since mid 20<sup>th</sup> century**
  - Thousands of cookery and recipe books
  - Introduction of TV cooks and TV cookery programs with
    - Channels fighting for the most popular chefs
    - Prime time for cooking shows
  - Unprecedented popularity of cooking magazines, cooking websites, ....
- ❑ **Use of notions as 'culinary art' & 'culinary artists' ... → 'artistic work' (art. 2 BC)**
  - 'Koken is een kunst'
  - Is cooking an art? Not relevant for copyright purposes
- ❑ **Arrival (Revival?) of question of IP protection ..., in particular copyright protection**

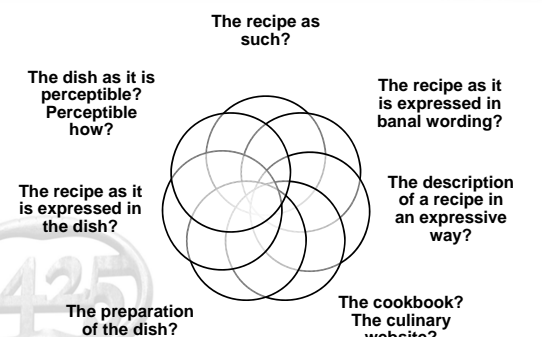
2

**2. Starter – choice of tapas  
shaped as Matryoshka dolls**

- ❑ **Program ALAI: 'recipes' versus 'works addressed to senses other than vision and hearing'**
  - Question whether recipes can be protected by copyright law = more sophisticated
- ❑ **Culinary creations come in different forms**
  - Answer will vary depending on their form
- ❑ **Distinguish between different layers of 'culinary creation'/'oeuvres gastronomiques'**

3

**In search of the appropriate subject:  
Which layer raises copyright issues?**



4

**Subject matter of copyright protection?**



- ❑ **Inconsistent literature and case law relating to Q. of copyrightability of recipes and dishes**
  - Appropriate subject matter?
    - Recipes (dish is reproduction/communication of recipe)
    - Dishes (recipe is fixation of the dish)
    - Both
- ❑ **Starting point : art. 2(1) BC → copyright affords protection to 'literary and artistic works'**
  - "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ....".
- ❑ **Relevant questions**
  - An expression that belongs to the literary, scientific or artistic domain?
  - Original expression?

→ **Both recipes and dishes may fulfill both requirements, but not always ....**

- Even in the 'fixation' countries (art. 2.2 BC)

5

**Focus on**

Recipes	Dishes
	
<p>→ list of ingredients</p> <p>→ (normally) accompanied by a set of instructions for preparing a particular dish</p>	<p>→ food contained or served on a plate</p> <p>→ What you can see, smell and taste</p>

6

**3. Soup**  
**'Grandmother's onion soup'**

**Particular nature of culinary creations**

- **The 'art' of cooking is one of the oldest in the world**
  - Onion Soup was already popular in Roman Times
  - earliest known recipe should date from approximately 1600 BC (Akkadian Tablet)
  - Story of the city Greek Colony Sybaris (6<sup>th</sup> century BC)
    - World first intellectual property law ?
- **Recipes (& dishes) exist for ages : earlier versions are continuously improved, altered or presented in a different form to suit current palates**
  - Culinary creations are collective creations
  - culinary world consists of a heritage created by hundreds of generations of cooks

7

**4. First course: recipes**  
**'Asparagus A la Flamande'**

□ **Recipe**

- **Ingredients**
  - 3 1/2 lb Asparagus -- white, trimmed
  - 3 tb Butter
  - 3 tb Water
  - 1/2 Lemon – juiced
  - Salt, pepper
  - Nutmeg
  - 1/2 bn Italian parsley – chopped
- **Directions**
  - Boil the asparagus during 12 - 18 min. depending on their size. Drain.
  - Melt the butter with the water and the lemon juice. Season with salt, pepper and nutmeg. Add the parsley.
  - Serve the asparagus on individual plates with 1 tbsp sauce. Serve the remaining sauce in a sauceboat

8

**Copyright protection?**

**At the one end : the unprotectable idea of the recipe, i.e. the non-expressed content of the recipe**

**In-between : various forms of expression**

**At the other end : the protectable highly creative individual expression of this recipe.**

9

**Recipe per se (non-expressed content)**

- **Majority holding : Area of non-protected 'idea'**
  - Ideas on which ingredients to be used and how to (best) process them
    - E.g. using crackers as a substitute for apples in 'Mock Apple Pie'
    - No protection even where the combination of ingredients contained in a recipe may be "original in a noncopyright sense"
  - unless and until ideas or methods are made perceptible or expressed in a certain mode or form, copyright law does not come into play.
    - even if made perceptible, protection will not extend to the underlying ideas, processes or methods. Protection for ideas or processes is the purview of patent law.
  - In the same line of reasoning : exclusion for as *bare facts, raw information, procedures, processes, methods of operation*
- **Cf. in Court of Appeals Liège 10 June 2011**
  - Cf. (sparse) case law in US, France, Netherlands

10

**Court of Appeal Liège 10 June 2011**  
**(IRDI 2012, 83; A&M 2012, ?)**

- **Court of Appeal Liège 10 June 2011**
  - A recipe "est d'abord une idée, comme en l'espèce celle relativement courante d'associer des bières à d'autres aliments. La démarche intellectuelle de l'appelante n'est donc pas susceptible de protection par le droit d'auteur"
- **cf. Publications International v Meredith Corp., 88 F.3d 473 (7th Cir., 1996) ("Discover Dannon-50 fabulous recipes with yogurt")**
  - there can be no monopoly in the copyright sense in the ideas for producing certain foodstuffs
  - Nor can there be copyright in the method one might use in preparing and combining the necessary ingredients

11

**The expression of the recipe 'in some mode or form'**

- **Description and/or communication of the recipe will upgrade the recipe from the non-protectable layer of mere ideas or processes to the protectable layer of expressions, e.g.**
  - in a book,
  - on a website
  - presentation during a broadcast
  - NOT : the dish (is not reproduction of recipe)
  - NOT : 'the act of preparing the recipe'
- **Author should 'transcend' elaboration of mere factual statements or information by transforming the recipe into a 'literary or artistic work'**
  - Application of originality test
    - EU: See ECJ case law Infopaq, Eva Maria Painer

12

**Sliding scale**

No expressive element

Some expressive element

Highly individual expression

13

**Sliding scale**

**❑ No expressive element in the listings of ingredients and instructions to prepare them**

- Majority of recipes → bare and mundane language (see, e.g. websites as 'kookjij.nl', 'silvo.nl', 'epicurious.com' of 'allrecipes.com')
- E.g. Court of Appeal Liège : "the disputed recipes merely state in brief and banal words the list of ingredients, their quantity and the culinary acts to be performed (peeling, cutting, splitting, chopping, cooking, etc.), in a form which is common since at least a century and which is now in the public domain"
- Quid protection as '*non-original creations*' such as 'geschriftenbescherming' in NL
  - NO → ECJ 1 March 2012, case C-604/10, *Football Dataco* : European copyright directives preclude national legislation to grant protection under conditions which are different to those set out in the harmonized rules

14

**Sliding scale**

**❑ No expressive element**

**❑ Some expressive element**

- 'thin' protection
- Only prevent copying of "constituent elements of the work that are original"

**❑ Highly individual expression (play of words, specific layout, pictures, ... )**

- E.g. including in a recipe suggestions for presentation, advice on wines to go with the meal, or hints on place settings and appropriate music; adding tales of the historical or ethnic origin of the recipe, ...

15

**Distinguish**

**Single recipe**

**Literary work**

**Database**

<input type="checkbox"/> basic kitchen cookbooks (the 'kitchen bibles'),
<input type="checkbox"/> instructional cookbooks,
<input type="checkbox"/> ethnic cookbooks,
<input type="checkbox"/> professional cookbooks,
<input type="checkbox"/> single-subject cookbooks (e.g. pizza's, barbecue, ...)
<input type="checkbox"/> cookbooks written by or for a specific (often popular) chef
<input type="checkbox"/> ...

**5. Molecular Sorbet**

**❑ Particular phenomenon of molecular gastronomy**

- Interlude to remind of other forms of protection

**❑ Chefs (food industry) are not left without protection**

- Patent law, e.g.
  - Numerous patents for food additives, micro & macro molecular food supplements, edible alternatives, healthy diet, calorie intake, ....
  - See, e.g. patents for 'vacuum cooking' and 'low temperature cooking' (methods) or 'Ingredient replacing egg whites to reduce toughness of batter coating's (product or composition of matter)
  - E.g. recipe of biscuit-spread (Speculaaspasta – Kh. Gent 20.01.2011)
- Trade Secrets Law (Coca Cola, KFC, ...)
  - See art. 39 TRIPs
  - E.g. 'Willy Wonka's Chocolate Factory'
  - Eg. Homaro Cantu → 4-page nondisclosure agreement
- Trade mark law
  - Name of Chef, name of typical menu item, shape of dish (unless substantial value)
  - Not : smell or taste of dish (ECJ 2002 Sieckman, C-273/00)
- Other forms
  - Laws of unfair competition
  - Protected geographical indication

17

**6. Main course: protection of dishes**

*'Fish sensation Van Gogh'*

**“Why should such chefs be treated differently from Tolstoy or Van Gogh?”**

→ They also draw, compose, imagine and present a great succession of (taste) sensations which are comparable to the sensations one feels when reading or admiring the two aforementioned illustrious men

18

**Main course**  
**Protection of dishes**

LEUVEN

❑ **Defining the subject matter: DISH =**

- > the food as it is served on a plate, i.e. in a form that one can normally see, smell and taste
- > resulting from
  - the inspiration of the moment'
  - the faithful translation of a (written) recipe, using the prescribed ingredients according to the instructions contained therein

❑ **A work?**

- Article 2 (1) BC : broad wording leaves open the door for protection as **'artistic works'**
  - every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression
- Clearly 'an expression', at least in its visual aspects
  - Even in 'fixation countries' (art. 2.2 BC)

19

**Dishes:**  
**the issue of perceptibility**

LEUVEN

❑ **Dishes are perceptible with (at least) three of the five traditionally recognized senses : sight, taste, smell**

- Note : **mechanical (sight, hearing) versus chemical (smell, taste, touch)**
- Examples in BC → **only works perceptible by mechanical senses**

❑ **Question: Is 'an expression' - and hence copyright protection - limited to a perception by mechanical senses?**

- Divergent viewpoints in national reports (e.g. Greek report; YES
- French report: NO)
- Divergent viewpoints in doctrine

20

**The dish**  
**in its visual appearance?**

LEUVEN

❑ **Positive answer is in line with traditional copyright which is used to deal with the mechanical senses, i.e. visually and orally perceptible works**

- Expression : the way the dish is arranged and decorated on the plate - 'sculptural-like' compositions
  - "Also the eye wants something"
  - "Transient" character (the work is eaten) is not problem for ©
- Subject to application of originality criterion
  - In practice: only occasional cases (cf. rare case law)
- 'Thin' copyright
  - Exclusive rights & moral rights
    - Reproduction (photo's)
    - Public communication (broadcasting live demonstration)
    - Moral right of integrity
- Protection does not extend to content (= recipe)

21

**The dish as can be perceived**  
**by its taste and smell**

LEUVEN

❑ **An 'expression'?**


- Are chemical senses to be treated differently or be excluded from copyright protection?

❑ **Case law relating to perfumes (2006)**

- *Kecofa*-case (NL) : the scent of a perfume can be a work and explicitly allowed for a perception of a work by the olfactory organ
- *Bsiri-Barbir* case "(a fragrance) does not constitute a tangible form of expression and therefore is not subject to copyright protection"

22

**Note**  
**Dishes versus perfumes**



❑ **In common**


- Both end-product of a recipe & perceptible by the chemical senses

❑ **Differences**

- The olfactory perception/features
  - = essence for perfumes (& deemed by the Dutch SC to constitute protectable subject matter)
  - = of much less significance in the case of dishes where the visual and gustatory perceptions are predominant
- physiological differences
  - Taste : four receptors to detect sweet, salty, sour and bitter
  - Smell : hundreds of olfactory receptors (388 according to some sources)
- incentive function copyright system?
  - beneficial effects in the perfume industry is likely
  - Such outcome is much less evident in the case of culinary creations

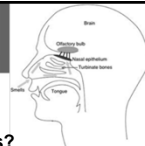
❑ **Conclusion: no justification for different treatment of chemical senses**

❑ **Quid mechanical versus chemical senses?**



23

**The dish as can be perceived**  
**by its taste and smell**



❑ **Arguments for different treatment of the senses?**

- **Mechanical senses allow for more objective perception while chemical senses lead to more subjective sensations?**
  - "sight and hearing are sources for 'objective' information; that is to say, what is learned concerns the world external to the body of the percipient"
  - "Smell and taste are chemical senses, so-called because they detect the presence of different chemicals as molecules in the air (smell) or dissolved in liquids (taste)".
- **Perception by the olfactory or gustatory senses lacks clear contours**
  - Smell and taste are "fleeting, variable and depending on the environment" (Hoge Raad *Kecova*)
  - "Box of Pandora"?
    - Harmful for the copyright system to allow for protection of subject matter that cannot be clearly delineated
    - Creating gateways for subject matter that © may not want to protect
- **Protecting smell and taste of dish during 70 years following the dead of their creator seems to verge on the ridiculous**

24

## 7. Papaya Desert: "Papaya aids digestion and contains enzymes for losing weight"

LEUVEN

- ❑ **Should copyright 'digest' culinary creations? Shouldn't it lose weight as regards its scope of application?**
  - Note : Questions do not relate to undisputed issues (e.g. originally expressed individual recipe, collections of recipes)
- ❑ **'The IP specialist should not remain unresponsive to the question whether and when copyright is necessary or desirable' (Dreyfuss)**
  - Copyright protection for culinary creations does not seem to be in compliance with the goals of copyright
- ❑ **Goals of copyright :**
  - Did you opt for the French or the Californian wine?
  - Different nature, justification and interests at stake between two systems (see dissertation A. Strowel)

25

## Concluding remarks to digest: Arguments against copyright

LEUVEN

- ❑ **Granting copyright will not enhance creations in the culinary world, and, ultimately growth of the public domain**
  - granting exclusive rights will not generate the incentives that encourage intellectual production in the culinary world
  - To the contrary, it might rather have a negative (dissuasive) effect !
- ❑ **Copyright is not a suitable instrument in view of the particular nature of culinary creations as 'collective heritage assets'**
  - Notion of sharing recipes is common in the culinary world
    - "Can you imagine Thomas Keller calling me and saying, 'Grant, I need to license your Black Truffle Explosion so I can put that on my menu?'"
  - Chefs seem to endorse the idea about sharing and hospitality which is in conflict with the idea of exclusive ownership of dishes, as long as they are given credit and are acknowledged in some way
- ❑ **In this domain, informal professional norms are in place**
  - 'norm-based intellectual property systems' are able to provide a substitute for 'law-based' IP systems' (E.g. in relation with giving credit to developers of significant recipes or dishes)
- ❑ **Findings are supported by**
  - Buccafusco, Dreyfuss, Barrère & Chassat, Fauchart & Van Hippel

25