



Does food flavouring constitute a "work"?

A & K Metaxopoulos & Partners Law Firm | Intellectual Property - Greece

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Introduction

In this case before the Multi-member Court of First Instance of Thessaloniki, the plaintiff requested judicial protection of his recipes (ie, dishes and seasonings) as works of IP.⁽¹⁾ He made this request on grounds including trademark law and unfair competition law. However, the Court rejected the action as:

- not legal, insofar as it concerned the protection of recipes as works of intellectual property; and
- unfounded, because recipes are assimilated to ideas and not to works enjoying copyrights protection under Greek (and EU) law.

Facts

The plaintiff was a chef, working for many years in the field of recipe research, development and innovation. He worked for large companies, active worldwide in the food industry, which specialised in the design and development of recipes and culinary products for industrial use.

In 2017, he met the first defendant, a high-ranking executive in an international food-industry company. The plaintiff and the first defendant set up a company (the second defendant) with the objective of trading recipes and spice mixes for mass consumption. The third defendant was a company active in the field of processing, packaging and trading spices and herbs, and in the production and trading of spice mixes, intended for a variety of cuisines. The third defendant was licensed to produce and market the disputed foods and spices under its own name and at its own expense, paying a fixed fee to the plaintiff for each individual product sold.

The plaintiff claimed that he alone decided the composition of these products and that this was known to the third defendant. However, the Multi-member Court of First Instance of Thessaloniki found this claim not to be valid. Copies of emails between the parties provided to the Court proved that opinions had been exchanged before the composition of the products was finalised.

Applicable legal provisions

The relevant law in this case was Law 2121/1993.

According to article 1(1):

intellectual creators, by creating the work, acquire intellectual property over it, which includes, as exclusive and absolute rights, the right to exploit the work (property right) and the right to protect the personal link to it (moral right).

Further, article 2(1) defines "work" as meaning:

*any **original** intellectual creation of speech, art or science, expressed in any form, in particular written or spoken texts, musical compositions, with or without text, plays with or without music, photographs, works of applied arts, illustrations, maps, three-dimensional works referred to in geography, topography, architecture or science. (Emphasis added.)*

Articles 4(1) and (3) concern the individual powers of the author on moral rights and article 12(2) concerns the transfer of intellectual rights (property and moral).

Taking all these provisions together, it follows that "work", as an intellectual creation of language, art or science, expressed in any form accessible to the senses, is protected by Law 2121/1993 – as long as it is original.

Originality

The meaning of "originality" is not generally defined by law.

However, it can be understood to mean that:

- under similar conditions and with the same objectives, no other creator, according to reasonable probability, would be able to create a similar work; or
- the work presents an individual singularity or reaches a creative level some distance from the already known.

This judgment concerned the "individuality" of work, which reflects the singularity of its creator's creative process. Work possesses "statistical uniqueness" according to this singularity.

(2) Therefore, whether an intellectual creation is "original" is a question of fact, rather than subjectivity. It is dependent on proof and is up to courts to decide.

Protection of work through originality

Originality is not only a condition for the protection of work; it is also a significant difference between a legally protected work and a simple intellectual creation (without copyright protection). It defines the extent of protection. Only elements of work that possess the required originality are protected from being taken by a third party. Other elements of work without originality are objects of free use.

Another point to note is that work does not have to be protected as a whole. As long as they have the necessary originality, parts of works are also eligible for protection. This does not impact

the relationship between the protected parts and the rest of the work. It is enough that the part, regardless of the overall creation, demonstrates the necessary originality.

Culpable IP infringement

The copyright holder is eligible for compensation and restitution of their moral damages in case of culpable IP infringement.

Culpable infringement can be committed either by:

- copying without any significant changes (slavish imitation); or
- adaptation through changing the form or structure of the work, so that there is similarity between the main content of the two works.

Compensation presupposes culpability and infringement of IP (or related rights) (ie, illegal behaviour), pursuant to:

- article 65(1) and (2) of Law 2121/1993;⁽³⁾
- article 914 of the Civil Code;⁽⁴⁾
- article 57 subsection c 59 of the Civil Code
- article 60 reference b of the Civil Code
- article 932 of the Civil Code

In general, for an act to be considered an illegal insult, it must:

- interfere with the powers (moral or property) of a creator;
- be done without the creator's permission; and
- lack any other reason that would remove the illegal character of the insult.

Culpability is only required for a compensation claim, while the very act of infringement implies the illegality.

Article 65(2)(b) determines a minimum limit of compensation, which is twice the remuneration that is usually or by law paid for the type of exploitation, carried out without a licence by the debtor. This is used to facilitate the proof of a claimant's damage and to determine the full compensation.⁽⁵⁾

Decision

The Multi-member Court of First Instance of Thessaloniki examined a complex request for judicial protection in this case. The request was based on IP provisions as well as trademark and unfair competition law. It also involved relevant tort provisions of the Civil Code.

The Court decided that the taste of food and method of production are not subject to IP protection.

It held that taste cannot be characterised as a "work" under directive 2001/29 (DEC C- 310/2017 in T N P LAW). Conversely, it specifically held that an intellectual creation of speech, art or science qualifies as "work" within the meaning of article 2(1) of Law 2121/1993, when it is:

- original; and
- expressed in any form, in such a way that it can be determined with sufficient precision and objectivity (even if this expression is not necessarily permanent).

The Court also held that the originality of an intellectual work, according to article 2(1), is the result of the personal intellectual efforts of its creator.

Specifically on the methods of production or of providing services, these are considered to be related to ideas and, therefore, not protectable.⁽⁶⁾ The Court held that ideas are not protected by Law 2121/1993. It also highlighted the previous Court of Justice of the European Union (CJEU) ruling that "copyright protection covers creations, but not ideas, operating methods or mathematical concepts as such".⁽⁷⁾

Further, it held that a distinctive feature takes precedence over a trademark if the use of the distinctive feature precedes the filing of the trademark.

Consequently, the plaintiff's action, brought to the Court on allegations of IP infringement, was rejected as not valid. The flavour of food cannot be characterised as "work" within the

meaning of Law 2121/1993 or directive 2001/29.

For further information on this topic please contact Kriton Metaxopoulos at A & K Metaxopoulos & Partners Law Firm by telephone (+30 210 725 7614) or email (k.metaxopoulos@metaxopouloslaw.gr). The A & K Metaxopoulos & Partners Law Firm website can be accessed at www.metaxopouloslaw.gr.

Endnotes

(1) Decision 15.010/2022 of the Multi-member Court of First Instance of Thessaloniki.

(2) To determine the criterion of "statistical uniqueness" of work under Greek jurisprudence, it is checked whether:

- under the same conditions and the same goals no other creator would in the ordinary course of things create the same work; or
- the work presents an individual peculiarity or a minimum limit of "creative height", as a result of which it stands out and differentiates itself from the works of everyday life or from other similar well-known, trivial or self-evident works, expressing at the same time something of the uniqueness of the creator's personality.

See:

- Supreme Court 1420/2019;
- Supreme Court 1215/2019;
- Supreme Court 415/2018;
- Supreme Court 1051/2015;
- Supreme Court 1625/2014;
- Supreme Court 537/2010; and
- Supreme Court 4/2022.

(3) Article 65(1) of Law 2121/1993 states that:

In any case of infringement of the intellectual property or related right, the creator or the beneficiary of the related right may claim the recognition of his right, the removal of the infringement and its exclusion in the future.

And article(2) stipulates that:

while whoever culpably infringed the intellectual property or related rights of another is obliged to compensate and satisfy the moral damage. The compensation cannot be lower than twice the fee that is usually or by law paid for the type of exploitation that did, without the permission, the obligee.

(4) Indeed, article 65 of Law 2121/1993 is a special provision in relation to article 914 of the Civil Code. The Civil Code applies:

- where article 65 leaves gaps; and
- where it would not be incompatible with the legislative spirit of Law 2121/1993.

(5) Supreme Court 484/2020.

(6) Athens First Instance Court 970/2020.

(7) CJEU, C-406/2010, ECLI:EU:C:2012:259, paragraph 33.