A Fracas about Fragrance

The uneasy application of copyright to perfume

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In 2009, a court in Lille, France (the Tribunal de Grande Instance) determined that by selling perfumes that were created, packaged and marketed to conjure the plaintiffs' well-known fragrances like Trésor *and* Drakkar Noir *the defendants had engaged in unfair competition, and had infringed not only the plaintiffs' trademarks, but also their* copyright *interests in these artistic works of scent.*

In *Perfume: Story of a Murderer,* Patrick Süskind's novel set in 18th-century France, the hapless and superannuated perfumer Giuseppe Baldini attempts to "reverse engineer" the formula of a competitor's successful fragrance. He intends, of course, to recreate and sell the fragrance under his own name. Baldini fails, but Grenouille, his sociopath apprentice, not only accurately dissects the competitor's perfume, but also enhances it to such an extent that the revised version is wonderfully profitable.

Baldini and Grenouille analyzed, reconstituted, and sold—without authorization—a valuable creation of a competitor. Ethical concerns aside, it is not immediately clear whether, even under today's elaborate regime of intellectual property protection, these two characters violated any intellectual property law. This fictional anecdote, thus, nicely posits the question whether—and to what extent—the laws of patent, trademark, unfair competition, and copyright do, or should, protect works of fragrance.

This discussion touches on the potential application of each of these areas of intellectual property law to perfume. It dwells, however, on the most problematic of these areas as applied to fragrance—namely copyright, which only recently has been successfully applied in lawsuits in France and in the Netherlands, to protect perfumes. The question whether copyright should extend to fragrances is far from settled, however, even in France, where courts at various levels have promulgated wildly inconsistent and contradictory decisions on this issue.

The most recent of these decisions was handed down in October 2009, by the *Tribunal de Grande Instance* (court of initial jurisdiction) in the northern French city of Lille. This court found two now-defunct French companies, PSD and JACAN, liable for a host of intellectual property transgressions stemming from their importing and selling "smell-alikes" produced by the Belgian fragrance manufacturer Bellure. The court determined that by selling perfumes that were created, packaged and marketed to conjure the plaintiffs' well-known fragrances like *Trésor* and *Drakkar Noir* the defendants had engaged in unfair competition, and had infringed not only the plaintiffs' trademarks, but also their *copyright* interests in these artistic works of scent.

The Lille case is the latest in a series of French lawsuits involving fragrance. Beginning about 30 years ago, in a dispute between the couture house Rochas and the perfume manufacturer De Laire, plaintiffs have argued that perfumes can be original works of intellectual expression. As such, these compositions should, plaintiffs have claimed, be protected by copyright no differently than verbal and visual works such as books and drawings.

In recent years French courts have become increasingly sympathetic towards this expansive view of copyright. This trend is part of a broader effort on the part of the French government to stem the considerable economic harm suffered by French companies as a result of counterfeit and knock-off products that have flooded the luxury goods market.

This is a regrettable development not only because other forms of intellectual property law provide adequate protection for perfumes, but also because copyright ultimately cannot meaningfully accommodate works of fragrance or flavor that are perceived through our chemical senses of taste and smell.[a] Before considering further copyright's applicability to works of fragrance, let us briefly touch on other existing means of protection under the law for these works.

[a]This thesis is developed at greater length in: C Cronin, Genius in a Bottle: Perfume, Copyright, and Human Perception, *Journal of the Copyright Society of the USA*, 56(2 –3) (2009) 427–483

Patent, Unfair Competition and Trademark

Patent: A patent provides the owner of an invention a 28-year right to exclude all others from a variety of activities involving the invention, including replicating and/or selling it. Unlike copyrights, patents are relatively difficult and expensive to obtain, and require registration with the government, and public disclosure of the formula, process, etc., of the protected invention.

The basic requirements of patentability are novelty and utility. This means simply that an invention must involve a new—and non-obvious—mechanism or procedure, and must produce a result that is useful, and not exclusively of aesthetic value. Both requirements have been liberally interpreted. For instance, fragrances that have been used in aromatherapy, and others that have been embedded in lingerie, have been deemed useful inventions on the grounds that they promote the emotional health of their consumers.

The very usefulness of an invention or process, however, may render it ineligible for protection by copyright, whose purpose is to protect works of human *expression,* not utility. Patents provide their owners strong monopolistic protection, but this 28-year monopoly is relatively brief compared to that of copyright (typically 70 years beyond the life of the author). Given that an inventor must fully disclose the invention in order to obtain a patent, the inventor loses all control over the exploitation of an invention at the end of its patent term.

Unfair competition and trade secret: Given the expense of obtaining a patent, the uncomfortable fit of patent's utility requirement with most perfumes, and the brief term of protection it offers, perfume makers do not resort to patents to protect their products from "predators." Perfume manufacturers, like those producing beverages, prepared foods, pharmaceuticals, etc., instead tend to rely on unfair competition and trade secret law to prevent, or hinder, others from producing products identical in chemical composition to theirs.

Unlike patents, copyrights, and trademarks—discrete areas of law set forth in dedicated federal statutes—unfair competition is a broad category of law, encompassing a variety of torts (i.e., civil wrongs, not criminal acts) like "passing off" of one's goods as those of a more established manufacturer. A perfume manufacturer's own formulas and processes are valuable assets, guarded by implied or actual contracts of confidentiality among the manufacturer's employees who are privy to these "trade secrets." Unlike patent, trademark and copyright, trade secret protection has no term or use requirement, and may provide indefinite protection for a formula (like the mythical Coca-Cola recipe).

Perfume manufacturers depend primarily on secrecy to safeguard their intellectual property, a reliance that has contributed to the distorted public perception of the fragrance industry as populated by territorial and

Machiavellian players.[b] Trade secrecy is, however, an increasingly porous means of intellectual property protection, as gas chromatography and mass spectrometry have made possible increasingly accurate analyses and re-creations of fragrances. Unless a fragrance is protected by patent or copyright this "reverse engineering" is legal unless it implicates unfair competition—that is, perhaps a violation by an ex-employee of a confidentiality or non-compete agreement with a perfume manufacturer.

Like digital technologies that pose both threats and opportunities to publishers of literary and musical works, chemical analysis technologies undermine the perfume industry's secrecy efforts while simultaneously offering, through the results of headspace technology, the potential for a broader palette of fragrances from which to create original new perfumes. The ambivalence of perfume manufacturers about the potential of these technologies is reflected particularly in France, where there is a growing number of lawsuits in which perfume manufacturers have claimed a new form of legal protection for their products under copyright law.

Trademark: Unlike patents, trademarks provide an indefinite term of exclusive use for registered marks. A mark's protection, however, depends upon its ongoing application in commerce to particular products or services. Words and designs, like "Xerox" and Nike's "swoosh" logo, are, of course, viable trademarks, but so are particular sounds and scents, as long as they effectively distinguish in the minds of consumers one good or service from another. Accordingly, some years ago the manufacturer of scented embroidery threads claimed a trademark for the synthetic plumeria/frangipani blossom fragrance with which she imbued the threads. After some dispute, she successfully obtained the trademark—it has since expired because of non-use—because the government ultimately conceded that this fragrance distinguished her product from those of her competitors in the market.

A registered trademark cannot be obviously descriptive or suggestive of the product or service it brands. The word "delish," for instance, could not be a registered mark for chocolates, but it could be registered for a plumbing concern. Accordingly, the scent of a particular perfume cannot serve as a trademark for the perfume itself—that role must be taken by imaginative names and packaging that allow consumers to readily distinguish one perfume from another.

Because human olfaction is not particularly acute, compared to our other senses, product names, packaging and celebrity endorsements are hugely important both to perfume manufacturers seeking sales, and to consumers seeking a particular product. Trademark protects these identifying names and "trade dress" components (shape of bottles, boxes, etc.) and a perfume house's "stable" of registered marks is invigilated over by its lawyers for competitors' use of infringing or piratical words and designs.

[b]This perception has been fueled also by writers like Patrick Süskind (*Perfume: The Story of a Murderer*) and Chandler Burr (*The Perfect Scent: A Year Inside the Perfume Industry in Paris and New York*) whose breathless tales of drama, intrigue, and glamour among perfumers strike me as about as apt portrayals of this industry as *Desperate Housewives* is of the lives of typical suburban Americans.

Copyright Protection for Perfume

In the United States and Europe authors do not need to register a work with the government to obtain copyright protection for it. Copyright "attaches" to a work the moment it is created, and ostensibly extends to a fathomless quantity of information in the form of e-mail messages, graffiti, colorful grotesqueries emerging from kindergarten art classes that we reverentially fix to refrigerator doors, as well as significant works of literature, art, music and film. All that copyright requires is that a work contains a meaningful quotient of original human expression and—under US law, but not French—that it is "fixed" in a tangible medium, like paper, videotape or memory chips.

While copyrightable expression must be original—i.e., originating with the author—it need not be unique. If, therefore, two authors independently created the same copyrightable work, both authors would enjoy an equal copyright interest in it.

To be copyrightable a work needs to evince a mere spark of creative expression. Works whose copyrights rely upon mere sparks of creative expression, however, are given similarly mere shreds of protection. Accordingly, if I scrawl a moustache on a reproduction of Leonardo da Vinci's *Mona Lisa*—which I can freely do because this painting is in the public domain—my copyright interest in the work would be very thin indeed, protecting only my particular addition to da Vinci's underlying work, and not the idea of defacing a masterpiece with a graffito of a moustache or any other image.

The French and Dutch cases that have dealt with copyright claims for perfumes have ultimately turned on the basic question of copyrightability. More particularly, these cases have grappled with the issue of whether perfumes are simply products of technical skill (*savoir faire*) or are in fact copyrightable works of intellection (*oeuvres de l'esprit*) that reveal the imprint of their creator's personality.

In 2006, in a case involving *Dune*—a fragrance created by the former Haarman & Reimer (now Symrise) and marketed under the Christian Dior brand—a French appeals court determined that perfume was not copyrightable expression because it was simply the product of technical know-how, like a tasty comestible or an effective pharmaceutical created from a recipe. On the other hand, several other courts in France (like the Lille court mentioned earlier) and the Netherlands that have considered this question over the past several decades have determined otherwise—i.e., that perfumes like the former Quest's (now Givaudan) *Angel* (marketed under Thierry Mugler's brand), L'Oréal's *Tresor* and Beauté Prestige International's *Le Mâle* are works of copyrightable expression, like literary or musical texts.

In 1999, when a French Commerce Court determined that *Angel* (formulated by Yves de Chiris) was a copyrightable work, the court was influenced by the writings of the late Edmond Roudnitska. Roudnitska, who created several of Dior and Hermes's classic perfumes, claimed that perfumery was not a technical or industrial undertaking, but rather—like music or poetry—an intellectual and aesthetic one. The court cited Roudnitska approvingly in defending its ultimate finding that perfumes are protectable works of authorship.

I agree with Roudnitska's premise that the creation of an original fragrance requires application of intellect and cultivated taste, as does the creation of any meaningful expressive work of authorship. I disagree, however, with the court's conclusion in the *Angel* case—and the reasoning of courts in other cases extending copyright to perfume—that this application of intellect and aesthetics on the part of perfumers necessarily establishes the copyrightability of their creations.

Earlier we noted that copyright's originality standard is low, and that even works of minimal expression are copyrightable. Even minimal expression, however, must be associated, on the part of those perceiving the work, with the particular author. Thus, lists of purely factual information like names, telephone numbers, math formulas, tide schedules, etc., are not copyrightable—at least not in the United States. This is because they evidence no original expression, regardless of the intellectual effort—fittingly called "sweat of the brow"—that may have been involved in gathering and presenting such information. Copyright requires, therefore, not only that the *creation* of a work involve original intellectual expression, but also that that the *perception* of that work—as revealed to the world at large—involves the expression of an identifiable human creator.

Over millions of years of evolution, human olfaction has atrophied, and our survival and advancement has become increasingly dependant upon sight and hearing. Unlike many animals, whose olfaction provides them much complex and vital information about the source of scents, humans now possess olfaction that offers only relatively crude information about the scents we perceive. Professional perfumers can, of course, dissect and describe fragrances, but only as combinations of broad terms that do not clearly link the fragrance in question with a particular individual creator.[c] The olfaction of typical perfume consumers produces even more generic descriptors like "fruity," "floral," "woody" and "musky" that can be appropriately applied to thousands of man-made perfumes as well as naturally occurring scents.

The misalliance between copyright and perfume is evident when one considers the potential deleterious consequences of extending this intellectual property right to fragrance compositions. The imprecision of human olfaction compared to the senses of sight and hearing—by which all works of copyrightable expression have been previously perceived—makes it impossible to determine two related issues that are fundamental to meaningful application of copyright principles: the protected scope of the copyrighted perfume, and the requisite similarity between two works on which one can establish a claim of infringement.

In many respects, fragrance compositions are like shades of color. A particular tint required for the fabric or paint used, for instance, by an artist, a fastidious decorator, or a stage designer, may involve many *essais* requiring the skillful application of knowledge of optics, viscosity, density, etc., of the colors and ingredients being combined.

Regardless of the inspiration and artful application on the part of its creator, a particular color shade ultimately produced by an artist, designer, etc., is not a copyrightable work of expression. Again, this is because human vision—despite being the most developed of our senses—cannot, independent of additional external information, perceive in a paint chip the imprint of the personality of its creator.

Permitting shades of color to be copyrighted would lead to absurdity with the "author" of a particular shade holding an utterly unenforceable monopoly right in a portion of the color spectrum. Extending copyright protection to creative fragrance compositions flirts with similarly absurd consequences, raising the possibility that the earliest to claim copyright may obtain the exclusive right to create and distribute perfumes within a particular category among the relatively few by which limited human olfaction assigns different fragrances. The ambiguity generated by such a legally designated right would likely inhibit, not stimulate, innovation in this area of creativity—the very outcome copyright law strives to prevent.

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[c]This is not to suggest that there is no role for verbal descriptions and discussions of perfumes; indeed, the fact that perfumes elude verbal description makes writing about them all the more challenging for the writer, and entertaining for the reader. Artful examples of work along these lines are Luca Turin and Tania Sanchez's book *Perfumes: The Guide,* and Victoria Frolova's Web site *Bois de Jasmin* (*www.boisdejasmin.com*).