

Protecting Intellectual Property in the Age of Transparency

Why the defense of fragrance industry trade secrets is so important, both politically and legally

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Two years ago the International Fragrance Association (IFRA) took the unprecedented step of publishing a list of all fragrance ingredients used around the world. This list of just over 3,000 ingredients was compiled and updated last year and is available at www.ifraorg.org.

The list publication is just the most recent innovation in what IFRA chairman Michel Bongi recently referred to as the “industry’s continuous approach to building trust in the safety of the materials we use.” Publishing this list was an enormous step toward increased transparency and is helping the industry learn more about the ingredients used to make fragrances. However, disclosure of ingredients in individual fragrance compounds is at the heart of the fragrance industry’s concerns with protecting its intellectual property.

Serious questions face the fragrance industry. Will a legislature, perhaps in California or another US state, or even in the US Congress, require the disclosure of individual fragrance ingredients used in a particular consumer product? The impact of such a requirement on the fragrance industry would be significant. This is why the defense of fragrance industry trade secrets is so important, both politically and legally.

The Political Landscape

More information on just about every subject is available on the Internet. Consumer access to this information has become a way of life, inevitably leading to calls for consumer product companies and fragrance suppliers to disclose what ingredients are used in individual fragrances. In response, the fragrance industry published the IFRA list. However, it is not prepared to disclose the ingredients or concentrations used in individual products because doing so would mean that the compositions would no longer be proprietary, in which case they would lose their value. The entire business model of the industry would be nullified.

Public opinion polls show that the typical consumer does not want to see the names of chemicals in their products; they just want to know that their favorite products are safe. This data suggests a lack of grassroots interest in knowing what ingredients are used in individual fragrance compounds. Yet public pressure on fragrance houses for disclosure is being created by a small cadre of consumer

and environmental advocates. Some of the groups most vocal about fragrances include Campaign for Safe Cosmetics, Environmental Working Group, Women Voices for the Earth, Breast Cancer Fund and potentially The PEW Charitable Trusts. In this context, the fragrance industry’s North American branch, IFRA North America (IFRA NA), is actively building alliances with key stakeholders and policymakers to advocate for preserving the ability of the industry to protect its intellectual property.

The main elements of IFRA NA’s political message are:

- Fragrances are valuable intellectual property representing enormous investment in research and development. A requirement to disclose the individual ingredients used in fragranced products would cause irreparable harm to the industry.
- Fragrance industry safety testing and use restrictions are robust. More money is spent every year and there is constant pressure to be more thorough, innovative and current in the testing program.
- There is an increasing willingness to share additional information about fragrance ingredients in use and that is precisely why IFRA published a list of ingredients.

The Legal Issues

Like any manufacturer, fragrance companies have all classifications of confidential business information: customer lists, ingredient suppliers, new product development ideas and proprietary financial data. It can be argued that fragrance formulas are the most valuable intellectual property owned by the fragrance houses.

Between the fragrance houses and their consumer product customers, ownership of the fragrance formula is a contractual matter; this is not covered by this article. This article addresses what’s at stake as the government considers requiring disclosure of the ingredients used in individual fragrances in consumer products.

Intellectual property is protected in several ways under US law. There are copyrights, which protect original works of authorship including literary, dramatic, musical

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and artistic works such as poetry, novels, movies or songs. Trademarks protect words, names, symbols or designs used in commerce. Patents are granted by the government to protect inventions or discoveries of new and useful processes. Although patents are sometimes used to protect individual fragrance molecules or fragrance delivery technologies, they are not practical for protecting compounded fragrance blends.

There are many tens of thousands, and perhaps hundreds of thousands, of unique fragrance mixtures, with each representing an olfactory point of difference from the others. To a consumer each of these mixtures smells different from the others; however, this fact is insufficient for the uniqueness required to receive a patent. After all, it can be claimed that these mixtures repeatedly comprise many of the same materials, only in different combinations. Use in commerce for a certain amount of time is another patent requirement. This, combined with the application requirement, means that the formula must be revealed before the patent is awarded. Taken together, all of these requirements make patents ill-suited for protecting fragrances.

Under existing law, the most appropriate way to protect fragrance formulas is to keep them as trade secrets. By definition, what makes it a trade secret is the secrecy. Secrecy is not a popular concept in these days of ubiquitous and instant information, which is why protecting fragrance formulas is so challenging.

From a legal standpoint, what would happen if the US Congress or a state legislature mandated disclosure of trade secret ingredient information such as fragrance formulas? The negative commercial impact of such a requirement would be so significant that litigation challenging the law would almost certainly result.

A legal challenge from individual companies or an industry association would require a court to weigh the public benefit of disclosure compared to the harm to companies set to lose their trade secrets. Such a challenge might involve the “takings clause” of the US Constitution.

The 5th Amendment clause requires “just compensation” when private property is taken for public use. If there were a legal challenge the legislative record would probably include justifications for the disclosure requirements, i.e. public health, consumer awareness, protection for special populations, etc., and the court would have to decide what’s more important, the consumer’s right to know or the industry’s valuable intellectual property. For now this issue remains in the political arena.

Next Steps

Any legislative ingredient disclosure requirement must thoughtfully address this legitimate trade secret issue, otherwise the battle is likely to shift to the courts. Mainstream politicians of both major US political parties know that business interests matter and that a sudden and dramatic move in this area might affect US jobs and innovation. Forcing companies to reveal their fragrance formulas would make it impossible for companies to hold

their market position. The key to many successful consumer products is the fragrance. If the fragrance formula for a popular body wash, shampoo or air freshener were to be disclosed, it would facilitate replication, making it much easier and inexpensive to copy popular fragrances. After years of research and development, including experimenting with different ingredients and combinations of ingredients, and market testing with consumers, would it be fair to make a company disclose this information?

Protecting fragrance trade secrets isn’t easy, but it is critical to the long-term survival of the industry. Current law, the Uniform Trade Secrets Act, common law cases, agency regulations, the Freedom of Information Act (FOIA), even the Federal Food, Drug & Cosmetic Act, all contain trade secret protections. The Congress or a state legislature shouldn’t just run past this long history of protection.

Want to get involved and keep up with the latest developments in fragrance intellectual property protections? Join IFRA NA and/or IFRA. More information is available at www.ifrana.org and www.ifraorg.org.

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