Stop Making Scents?

Ephemeral copyright protection for fragrances.

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The fragrance industry is commonly known for the production of costly perfumes, but its greatest assets are the intellectual properties behind these tangible creations. The most valuable of these are fragrance formulas, any one of which may cost several hundred thousands of dollars and require more than a year to develop.

The distinctive brand names and elegant packaging of fine fragrances obtain legal protection as trademarks. Innovative manufacturing and delivery methods, as well as "captive" fragrant molecules, are protected by patents that provide an exclusive right to exploit the method or molecule for 20 years. Patents provide strong protection—albeit for a limited time—but are not a viable alternative means of protection for fragrance formulas because only useful and novel inventions may be patented.

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Complexities of Protecting Formulas

For centuries, fragrance manufacturers protected their formulas simply by keeping them secret. Copies of formulas were kept under lock and key and shared with a limited number of trusted individuals, often family members. In the 20th century, formulas became highly complex, involving, at times, hundreds of ingredients. Their developers could protect these formulas by carving them into smaller components that were stored separately and only reassembled, like jigsaw puzzles, by the few individuals with access to all of the separated pieces. Today, fragrance formulas are still kept under lock and key, although virtually, in data files stored on secure servers. Hacking and copying these secured files is criminal, much as it was illegal to pick the physical locks on the drawers and safes of fragrance company executives and stealing or copying the formulas.

Security measures and the dissuasion of potential criminal prosecution now provide much less effective protection of fragrance formulas than they did in years past. It is much more difficult to limit access to information—including fragrance

formulas—now stored and transmitted digitally among the branch offices of global companies. Moreover, today, even if a creator manages to keep secret the formula to a successful fragrance, his or her competitors can still obtain it—or at least most of it—by analyzing its molecular composition using gas chromatography-mass spectrometry (GC-MS) technology. And, whereas obtaining a formula through unauthorized breaking and entering of physical barriers and spaces constitutes a crime, obtaining the same formula by analysis (reverse engineering) of the product produced from it is not generally considered illicit activity.

Challenge of Analytic Technologies

Today, one has the capacity to reverse engineer the formula of the pharmaceutical *Ambien* as readily as that of the perfume *Angel*. Having done so, a competitor of Clarins can legally manufacture and sell *Angel* under a different name (at least in the United States) but, until recently, a competitor of the Sanofi-Aventis pharmaceutical company could not do the same with *Ambien*. This is because *Ambien* was patented as a useful innovation that helps people sleep, whereas *Angel* is not.

The capacity to analyze fragrances inexpensively and accurately presents a serious challenge to the fragrance industry. Concerns about potential losses of confidential business information have, moreover, been exacerbated by increasingly stringent product disclosure regulations in Europe and the United States, requiring the partial or full disclosure of fragrance formulas. Where might the industry turn to stem the potential depletion of its most valuable intellectual properties?

Copyright for Fragrance

Given the capacity of analytic technologies to reveal much of the fragrance industry's valuable information, and the inaptness of patent protection for fragrance formulas, some industry players have turned to copyright as a potential means of protecting investment of intellectual effort in the creation of fine fragrances. Whereas patents protect only useful inventions, copyrights protect only *non*-useful works of original expression such as novels and films. Whereas patents are very expensive, time-consuming to acquire, and expire in 20 years, copyrights cost nothing to obtain and typically provide protection for at least 70 years. At first blush, therefore, copyright appears to offer an ideal form of protection for intellectual property associated with fragrance formulas. Surely there is a catch? There is.

Billions of copyrightable works are created every year; virtually none of them will have any economic value whatever, and even fewer will be profitable along the lines of "Harry Potter" or "Star Wars." While there is no cost to obtain a copyright, it is difficult and expensive to enforce it against a purported infringer. In the first place, a copyright does not provide—as does a patent—an absolute right to prevent others from creating a similar, or even identical, work. It only prohibits others from copying *your* work in the creation of the later work. Second, all copyrightable expression comprises *non*-copyrightable material like individual letters and words, or notes and chords. This means that: (1) It is relatively difficult to create an economically valuable work with a significant quotient of original expression; and (2) It is challenging to establish that the work of a purported infringer contains a substantial portion of *your* protected original expression.

Copyright's Application to Fragrance Tested in the Courts

The first attempt to obtain copyright protection for fragrances was initiated in the 1970s by de Laire, a small French fragrance compounder. De Laire had contracted with Rochas, the Paris couture house, to provide several new fragrance formulas to be marketed by Rochas. When—according to de Laire—Rochas independently produced and marketed several fragrances identical to those created on its behalf by de Laire, de Laire sued, claiming Rochas's unauthorized copying of its fragrances was an infringement of its copyright in these original works.

De Laire's claim against Rochas ultimately failed when the dispute reached the Court of Appeal in Paris. The fragrances in question were deemed ineligible for copyright protection because the court determined they were products of an "industrial nature" manufacturing process. Moreover, the court noted, de Laire's attorney referred to his client's fragrance formulas as "inventions," which suggested that any protection they merited could be provided only by patents, not by copyrights that protect only non-useful works of creative expression.

During the 40 years since the de Laire/Rochas dispute there have been numerous subsequent attempts in France to obtain judicial acceptance of fragrances as copyrightable works. Several of these efforts have been at least partially successful, like those involving the perfumes *Angel, Trésor* and *Le Mâle.* When competitors of Thierry Mugler, L'Oréal, and Prestige Beauté International (BPI) sold inexpensive "smell-alikes" of their popular perfumes, the creators of the originals claimed that their fragrances were creative works of intellectual effort and protected by copyright. A number of French courts agreed, extending copyright to fragrances because French copyright law protects *all* works of intellect as long as they are perceptible and original insofar as they reveal the "personal imprint" of the creator.

In 2006, given the previous successes in obtaining copyright protection for fragrances, the plaintiff and fragrance industry observers were confident that the highest French court (*Cour de Cassation*) would inevitably confirm the copyrightability of fragrance. Accordingly, there was considerable chagrin and surprise when the court reached the opposite conclusion. Ruling against a perfumer who had been dismissed by Haarmann & Reimer (now Symrise), who claimed copyright interest in the fragrance *Dune*, the court determined that fragrances cannot be classified as "works of intellect" (*œuvres de l'esprit*), given that they are, ultimately, merely products of technical know-how and therefore ineligible *per se* for copyright protection.

The French judicial system has a greater tolerance for insubordination among its constituent courts than that of the United States. Indeed, since the *Cour de Cassation*'s 2006 ruling, courts inferior to it have blithely issued decisions holding that copyright may apply to fragrances, even after the highest court in France decided it could not. Perhaps this judicial insolence was encouraged not only by a generally pro-copyright ethos in France, but also by the fact that only days after the *Cour de Cassation* decision the highest court in the Netherlands ruled that copyright *did* protect fragrances.

Latest Copyright Challenges

This state of ambiguity and judicial disorder was again brought to a head last December when the *Cour de Cassation*, once again adjudicating a claim initiated by Lancôme (L'Oréal) involving *Trésor,* issued a fourth ruling reiterating its position

that fragrances were not eligible for copyright protection. The basis of the court's decision was its finding that fragrances cannot be accurately and consistently described by those perceiving them. In other words—as one might extrapolate from this decision—unlike a "Harry Potter" story that may be consistently recounted by readers of all ages everywhere, *Trésor* or *Calèche* will manifest only wildly divergent and generalized descriptions by those who perceive these perfumes. Accordingly, given humans' limited scent perception, the law must not protect fragrances as copyrightable works of expression because doing so risks providing the creator of a *particular* fragrance a monopoly over an entire *family* of fragrances—citrus, *fougère,* floral, etc.

Notable, however, in the *Cour de Cassation*'s decision is the fact that it retreated slightly from the court's earlier view of fragrances themselves—i.e., the "olfactory forms"—as merely works of technical know-how. Its decision acknowledged that the creation of a fragrance might involve creative intellectual effort like that required to produce a literary work. Nevertheless, fragrances are not sufficiently perceptible and therefore cannot be effectively *communicated* to the public in the manner of a musical or literary work. Because fragrances cannot communicate specific information they cannot be protected by copyright.

The *Cour de Cassation* decision last December was disappointing to Lancôme, of course, but also to a cadre of avant garde perfumers in Europe and the United States. This new contingent of perfumers, who regard themselves as creators and artists, rather than artisans—like cooks or hairdressers—had hoped for a decision that would unequivocally establish fragrance's eligibility as a class of protectable authorial expression. This legal recognition would finally signal perfumers' capacity for original artistic creations, like that of novelists, composers and film directors. The uncertain economic consequences of the realization of such hopes, however, likely informed the *Cour de Cassation* decision once again to shut the Pandora's Box of copyright protection in this context.

What Next?

Given the qualms expressed by the French high court as to extending copyright protection to fragrances, it seems unlikely that copyright will ever become a new means of protecting original fragrances in France. Some would argue, however, that, paradoxically, this augurs well for innovation in the fragrance industry. If a popular new fragrance, like a new clothing design or culinary innovation, can be legally imitated and marketed by those other than the creator of the fragrance, these imitations will swiftly saturate the market and exhaust interest in the new fragrance. This exhaustion, in turn, will goad perfumers to create new fragrances—just as couturiers create new fashions every season—that may become popular and profitable in part because they signify a departure from previously popular scents, the residual profits of which are being chased by imitators. Under these circumstances imitation may be not only the "sincerest form of flattery" but also the strongest incentive to innovation. In the United States, for instance, where the sale of "smell-alike" fragrances is generally regarded as legally permissible, the rampant production of such knock-offs has not stymied creativity; arguably, it has, in fact, promoted it.

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Meanwhile, perfumers, fragrance houses and industry clients might be well advised not to discount the efficacy of trade secrets and unfair competition to protect their know-how and intellectual property. These more traditional means of legal protection do not provide their owners exclusive privileges (as do patents, trademarks and copyrights) but they are increasingly the focus of legislators in Europe and the United States, who are seeking to harmonize and strengthen the protection of these legal mechanisms to adapt them to realities of the global market—e.g., widespread reverse engineering, stringent transparency requirements and itinerant employees. On a more fundamental level, individual members of the fragrance industry might regularly audit their IP assets and ultimately collaborate among themselves to develop an industry-wide code of conduct that might offer protection for formulas and know-how beyond that now available under intellectual property law.

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