

# Intellectual Property in the Fine Fragrance Industry

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The perfume or fine fragrance industry generates tens of billions of dollars each year (Gannon, 2008), but fine fragrances are very costly to develop, package and market (Cronin, 2009). Though natural products are still used to a limited extent, the trend toward simpler, synthetic ingredients makes it a trivial matter for a competitor to reverse-engineer a scent and sell it at a greatly reduced price (Su, 2014). Understandably, manufacturers have sought intellectual property protections on their products and product ingredients, with varying degrees of success. In the U.S., fragrances are not protected by copyright. In Europe, copyright protection has recently been extended to scents. This paper explores the intellectual property protections currently available in the industry and recent legal challenges that have ignited a debate among fine fragrance manufacturers, their competitors, and skilled individuals who compose fragrances.

## **Information Security in a Changing World**

Just as manufacturers of foods, beverages, and pharmaceuticals seek to protect their products from imitation, perfume makers have long protected formulas “simply by keeping them secret,” closely guarded by a few employees or family members (Cronin, 2014). Before 19<sup>th</sup> and 20<sup>th</sup> century technological advances, perfumes were composed entirely of natural products, often difficult-to-obtain and expensive essences of flowers, leaves, roots, and animal secretions. Ingredient scarcity itself likely provided some measure of security.

Around the turn of the 20<sup>th</sup> century, the burgeoning petroleum industry provided chemists with the means to recreate or approximate natural products cheaply. Petroleum-derived synthetic materials began to be appreciated in their own right, as when Ernest Beaux used a cheap, simple petroleum-derived molecule to create the fizzy top note of Chanel NO. 5, a luxury perfume based primarily on natural rose and jasmine extracts (Cronin, 2009). With time, manufacturers embraced the use of synthetics, which were not only cheap but could be engineered to be safer on skin, or to better withstand degradation by light and heat. The era of modern fine fragrances had begun.

Modern perfume formulas can contain well over one hundred ingredients (van Asten, 2002), but widespread use of synthetic materials presents an information security problem for fragrance manufacturers. Unlike natural essences, which are extraordinarily complex mixtures, synthetic ingredients are single molecules. Synthetics “can be read with incredible ease by reverse

engineering tools, such as a gas chromatograph.” (Su, 2014). Today, without resorting to theft, a competitor can analyze and reconstruct a fragrance molecule for molecule, selling the reconstruction as its own product.

### **U.S. Law and Fragrances**

The two strongest intellectual property protections available to unique works are patent and copyright, both of which grant exclusivity for a finite period, incentivizing creative investment. Patent law protects useful inventions, whereas copyright protects works of creative expression, i.e., non-useful works. Just as drug manufacturers can patent their useful products, a chemist (or fragrance company) developing a novel molecule may patent its *use* in a scent. However, scents created for aesthetic purposes cannot be patented under U.S. law, because they do not meet the standard of utility (Su, 2014).

U.S. copyright law provides protection for creative works “fixed in any tangible medium of expression” (17 U.S.C. § 102, 2012). The problem for fragrance manufacturers is the highly subjective human experience of scent. In Cronin’s (2014) words: “... perfumes are not original expressions of authorship because human olfaction is too crude to allow us to perceive and describe fragrances in anything other than broad terms.” (p. 435) Thus, in the U.S., there is nothing to prevent reverse-engineered fragrances from entering the market, which indeed happens on a large scale as “copycat” or “replica” fragrances (Su, 2014). How do manufacturers protect their products?

### **Tricks of the Trade**

U.S. Code provides protection from the theft of trade secrets (18 U.S.C. § 1832, 2012), such as the secret formula of Coca-Cola. Trade secrets offer manufacturers a measure of protection, but advances in analytical technology have rendered the direct theft of a formula unnecessary. Instead, fragrance manufacturers develop and patent single synthetic molecules with unique olfactory properties. The molecules are not sold to other manufacturers, but kept “captive” – used only in the patent holder’s products – for the duration of the patent. Exact replication of the product would require the captive molecule, which is protected by patent (Su, 2014).

Distinctive packaging forms the bulk of protections sought by fine fragrance manufacturers (Seville, 2007). Trademarks are words, symbols, or designs used to identify and distinguish the goods of one manufacturer from those of another (15 U.S.C. § 1127, 2012). A competitor may legally sell a replica fragrance, but must take care not to infringe upon the name and packaging of the original, so that consumers may distinguish the two products.

### **Legal Challenges**

In a 2004 decision, a Paris court of appeals found that Bellure NV, a Belgian perfume maker, infringed upon and took unfair advantage of L’Oreal’s trademarked packaging and designs of 12 of its fragrances. Bellure NV appealed and lost the case. The

higher court not only upheld the lower court ruling, but found that L’Oreal’s *fragrances* could be protected by copyright: “The French copyright code doesn’t specify an exhaustive list of works eligible to be protected by copyright and doesn’t exclude those that can be perceived by smell. A perfume can be a work of intellect protected by the law when it’s original.” (*The Toronto Star*, 2006).

A similar battle reached the Dutch Supreme Court in the same year with *Kecofa v. Lancôme*. After losing a trademark suit against a competitor, Lancôme sought protection under copyright. Seville (2007) writes that the Dutch court abruptly reversed a long history of “unfriendliness” of copyright law towards scents. The court declared Lancôme’s perfume TRÉSOR protected by copyright, and Kecofa had infringed the copyright by using 24 of the 26 ingredients contained in TRÉSOR. The court used scientific evidence as a basis for its decision.

An interesting change in perspective is provided by a third case, which reached the French Supreme Court in 2006. In *Bsiri-Barbir v. Haarman & Reimer*, the court considered the work of a Nejlá Bsiri-Barbir, a former employee of Haarman & Reimer (now Symrise). She claimed Haarman & Reimer continued to market and profit from her artistic creation, and was owed royalties on their income, even if she was no longer employed by the corporation (Sciolino, 2006). The court found Bsiri-Barbir’s work ineligible for copyright protection, reversing the lower Paris court’s ruling.

The European cases have spurred debate over the utility of copyright in fragrances. Seville (2007) argues that differing protections create an impediment to the free movement of goods within the European Union. Su (2014) argues these cases can form the basis of more nuanced, *sui generis* copyright protection custom-made for fragrances. Field (2004), reacting to the first French appeals court decision, argues the best venues for manufacturers seeking protection are legislatures rather than courts. Field concludes with U.S. Supreme Court Justice Stapelton’s remark:

Courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article’s utilitarian function (30).

### **What Next?**

Parallels may be drawn between fine fragrance and fashion design. Indeed, many fashion designers receive valuable income by licensing their names and brands directly to fragrance manufacturers (*Fashion Law Wiki*, 2009). Both industries produce luxury goods that are widely imitated, using cheaper raw materials. Again from *Fashion Law Wiki*: “These very different products are not in competition with each other – they are in separate market sectors geared towards different consumers.” Elavia (2014) agrees. She claims the consumer base for fragrances is already differentiated, and current trademark protections make it clear that replica goods are not exact replicas; that is, there is no consumer expectation of equivalent quality.

Elavia also points out fashion design industry norms that promote a “culture of sharing”—she argues that tiered, discrete markets drive, rather than stifle, innovation at the top. Certainly, copyright protection for fragrances would eliminate entire sectors (and many jobs) built around consumers who have no access to the luxury market. To Elavia, the relative harmony seen within fashion design industry is an important argument against the extension of copyright to fashion design. In the case of intractable disputes, she proposes a licensing model, as is used in the film and music industries.

### Conclusion

The modern fine fragrance industry is highly profitable but requires significant investment in development, marketing and advertising. Current U.S. law does not provide copyright protection to fragrances. Though fragrance formulation may be the result of considerable creative effort, copyright protection is difficult to justify because of the subjective nature of the human sense of smell. In response, manufacturers have looked to other means to protect their products, such as trademarked packaging and patents on individual ingredients. Recent European court cases have reignited debate on fragrance copyright. In the meantime large mass-markets for imitative products have emerged; these would be directly impacted by extension of copyright protection to fragrances. In the U.S., the current climate among fine fragrance manufacturers and their competitors is one of uneasy coexistence.

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Cite as: Henning, M. (2015). Intellectual property in the fine fragrance industry. *City Tech Writer*, 10, 36-40. Online at <https://openlab.citytech.cuny.edu/city-tech-writer-sampler/>