

## Fashion Apparel Law Blog

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### [European Copyright Protection of Fragrances is Largely a Matter of Common Scents](#)

As the perfume industry has blossomed into a \$20 billion dollar a year business, it has encountered a formidable adversary in the form of "smell-alike" fragrances. Such perfumes are unlicensed "copies" of popular fragrances that are meant to appeal to those who wish to possess premium scents without the premium prices. Smell-alikes have achieved a significant percentage of the perfume market because there is a lack of copyright protection concerning fragrances in most countries. To combat this problem, European perfume manufacturers have been battling in court for protection of their scents for the past decade.

French perfume manufacturers had momentary relief from smell-alikes when an appeals court ruled in *L'Oréal v. Bellure* (2006) that perfumes were entitled to the French *droits d'auteur* (authorial rights) that protect their creators from imitation for 70 years. (This case should be distinguished from [the recently decided British perfume trademark case of the same name](#).) L'Oréal brought a copyright infringement suit against Bellure, a Belgian company, for producing smell-alikes of popular L'Oréal brands. In previous years, perfume manufacturers brought imitators to court on charges of trademark infringement when names or packaging were nearly identical. However, L'Oréal could not take this route, because Bellure had changed the names and packaging enough to avoid prosecution in such areas. Thus, L'Oréal sued Bellure on a copyright claim for copying its fragrances. Using chemical analysis to break down the copycat perfumes into their basic elements, L'Oréal showed that the smell-alikes had nearly identical ingredients to their own perfumes. The court held that this constituted infringement of the smells of L'Oréal's perfumes, and ordered Bellure to pay damages.

The idea that fragrances could be infringed upon, however, was overruled when this case was appealed to a higher court. A later case affirmed this decision. In *Bsiri-Barbir v. Haarmann & Reimer* (2006) the French Supreme Court held that a perfume's fragrance does not constitute a tangible form of expression and therefore is not subject to copyright protection. The court reasoned that perfumes are manufactured through the application of merely technical knowledge and thus are not subject to copyright protection because they are not expressions of the mind of the person who compiles perfume ingredients. Under the court's analysis, then, perfumery does not merit copyright protection because it is merely putting together chemicals – an implementation of technical knowledge that lacks the creativity necessary to constitute copyrightable expression under French law.

The French Supreme Court's examination of the perfume manufacturing process echoes problems that other courts have found with assigning copyright to a fragrance. For instance, perfumes are composed of sub-element fragrances called "notes." There are top, middle and bottom notes: the top note of a perfume is the first impression that a consumer gets from a fragrance; the middle note is what other people will smell from the fragrance; and the bottom note is the underlying scent of the entire perfume. Furthermore, each note will last for varying periods of time. Complicating matters is the fact that the skin of the wearer can alter the smell of a particular fragrance. With such malleable and fickle grades of smells and their durations, it would be very tough to award copyright protection to fragrances.

However, there have been some strides in copyright protection for perfumes in other countries, as evidenced by the Dutch case *Lancôme v. Kecofa* (2006). The court held that Lancôme's *Tresor* product was indeed protected by copyright, which was infringed upon by a perfume using 24 of *Tresor*'s 26 ingredients. Like the *L'Oréal* case, the court in *Lancôme* felt that fragrance is too fleeting to be subject to copyright protection. But, it awarded copyright protection to the liquid substance that gives off the fragrance. In the past, this liquid would only be protected by patents and trade secrets. The court held that this liquid is subject to copyright protection because it is a fixed substance that gives off a fragrance that can be recognized by the senses, which makes it tangible enough to be regarded as a copyrightable work under Dutch law. This ruling lends credence to the chemical analysis technique used in the overruled holding in *L'Oréal* by showing if perfumes' similar chemical compositions produce similar fragrances, then there could be copyright infringement.

While the state of copyright protection for perfumes seems to constantly be in flux, it is advisable that perfume manufacturers always carefully document the development of a perfume copiously, in case of possible future disputes.