INTRODUCTION

On February 14, 2007 the Cour d’appel in Paris affirmed a lower court’s determination that several perfumes sold by Beauté Prestige International, under the name of designer Jean-Paul Gaultier, were protected by copyright.\(^1\) This was not the first instance in which a French court had entertained the question whether copyright protection could extend to perfume.\(^2\) The appellate court opinion was striking, however, in that it deliberately flouted the ruling of the highest French court, the Cour de cassation, of June 13, 2006, involving the fragrance manufacturer Haarman & Reimer, on the same issue.\(^3\)

In a laconic dismissal of the copyright claim of an erstwhile Haarman & Reimer employee against the company, the Cour de cassation ruled in 2006 that perfumes are not eligible for protection under French copyright law because they are a product of the application of purely technical knowledge and lack, therefore, a discernable association with the individual personalities of their creators.\(^4\) In its startling Gaultier opinion of February 2007 the Cour d’appel noted the defendant’s reliance upon the same argument and language used in the Cour de cassation’s declination of copyright protection for fragrance in Haarman & Reimer.\(^5\) The Cour d’appel went on, however, to discount this argument entirely, asserting that perfumes were copyrightable precisely because they could embody the imprint of their creators’ personalities.\(^6\)

While the Haarman & Reimer and Gaultier cases were being litigated in France, courts in the Netherlands also were pondering the copyrightability of fragrance. On June 16, 2006 – three days after the French Cour de cassation’s rejection of copyrightability in Haarman & Reimer – the Supreme Court in the Netherlands upheld an appeals court’s finding that Lancôme’s perfume “Trésor” was a copyrightable work.\(^7\) Taking an antipodal stance to that of the French high court in Haarman, the Dutch Supreme Court determined that perfumes were not merely technical works and, more significantly, that a

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\(^1\) Author’s bona fides and acknowledgements.
\(^3\) See infra pp. 7-12. In this article I use the word “perfume” to refer to a scent intended by its creator to be used for aesthetic purposes.
\(^4\) See id.
\(^5\) See Gaultier, supra note 1, at 9.
\(^6\) The defendant, Senteur Mazal, has appealed to the Cour de cassation that likely will hold in the defendant’s favor given its earlier decision in Haarman & Reimer that copyright does not cover perfume.
\(^7\) Lancôme/Kecofa, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 16 juni 2006, AMI 2006/5, 161 (ann. Quaedvlieg) (Neth.) [hereinafter Lancôme].
manufactured fragrance could bear the personal imprint of the creator, thereby rendering it an original work of authorship eligible for copyright protection.

These recent French and Dutch cases illustrate the unsettled jurisprudence on the applicability of copyright to perfume—a recurring issue brought before European courts over the past thirty years. The disunity among European courts on the particular issue of the copyrightability of perfume raises, however, a more fundamental question now percolating within national and international copyright regimes: what is copyrightable expression?

Recent contagious application and distribution of digital technologies has generated widespread familiarity with copyright challenges posed by these technologies, particularly on issues like fair use, duration, and liability. Efforts by media industries to check the insouciant use of digital technologies to copy and distribute their copyrighted works are front-page issues that have engendered great interest, argument, and commentary. Less well known is a simultaneous undercurrent in which creators of works not protected by copyright have sought to insinuate their creations among those that are so protected. Fragrances are not the only products for which creators have recently sought copyright protection. Living gardens, fashion designs, boat designs, culinary creations, and computer programs are among those works whose creators have now secured, or seek, copyright protection, or sui generis quasi-copyright protection, for these works that fall outside the margins of traditional copyrightable expression.

While the scope of works protected by copyright has expanded to accommodate technological and social developments over copyright’s roughly 300-year history, this expansion has been limited to works of authorship perceived through our senses of sight and hearing. Until the recent fragrance cases in France and the Netherlands, no work perceived exclusively through the chemical senses of taste and smell, or the mechanical sense of touch, had been deemed copyrightable. The flagrantly contradictory opinions in these cases in France are a tocsin of the potential for peculiar and deleterious consequences implicated in allowing chemically perceived works within copyright’s ambit.

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8 This development in the U.S. has been thoroughly chronicled, particularly by those critical of existing copyright law and policy. See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

9 See id.

During the past thirty years the U.S. has become the largest national market for fragrance, and home to some of its largest producers. Given the recent spate of cases in Europe involving the copyrightability of fragrance, and the significant financial stake in this industry held by U.S. concerns, it is inevitable that a U.S. court will soon face a prima facia dispute involving a copyright claim for a manufactured fragrance. The inconsistent determinations by European courts on the copyright status of works of fragrance have left a murky and confusing trail that will provide little guidance to courts in the U.S. or elsewhere on this issue.

This article argues that copyright should protect only works that are perceptible to humans through our senses of vision and hearing. Fragrances, flavors, and textures may engage and delight our senses of olfaction, taste, and touch respectively. Unlike visible or audible works, however, they cannot evoke rational human intellection because human chemical senses, as well as our sense of touch, are dramatically less acute than are human senses of sight and hearing.

Both author- (Continental) and user-oriented (Anglo-American) copyright regimes have always protected and promoted the creation of works that are not only produced, but also perceived, by senses that stimulate human intellection. By extending copyright protection to chemically perceived works Dutch and French courts in the recent perfume cases have given short shrift to the latter requirement thereby opening the door to claims of copyright in works that copyright law was never meant to -- nor can it meaningfully -- protect.

I use the issue of perfume and copyright as the basis for a broader thesis that copyright should be limited to works perceived through our senses of sight and hearing.

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12 The U.S. fragrance industry might also follow the lead of fashion designers and, in an effort to secure protection that the industry believes promotes its economic interests, attempt to change the copyright statute itself. See supra note 10.
13 Some believe that the framers of the Berne Convention never anticipated the list of protected works in Article 2 of the Convention to incorporate chemically perceived products like scents and flavors, and that inconsistent national stances on the question of copyrightability for fragrances could lead to ruptured trade relations among European Union nations involved in this industry. See Herman Cohen Jehoram, Dutch Supreme Court Recognizes Copyright in the Scent of a Perfume: The Flying Dutchman: All Sails, no Anchor I: 28 EIPR 629 (2006).
14 Braille editions of verbal or musical works are perceived through touch, but that does not make them fundamentally tactile works. While we perceive fragrances and flavors only through our senses of smell and taste respectively, we can perceive musical and literary works through three senses: touch, vision, and hearing.
15 Anglo-American copyright’s philosophical underpinning is utilitarian – i.e. to stimulate production of the greatest number of goods at the lowest price. See PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 4 (2001). Continental author’s right is grounded in a philosophy of natural rights in which copy protection is considered a matter of right and justice. The Berne Convention bridges the two traditions by imposing minimum standards for both regimes. See id.
After offering an overview of the history, creation, and use of manufactured fragrances, I analyze the determinations of various European courts over the past thirty years on the question of perfume’s copyrightability. This analysis particularly considers the question of the appropriate criteria for determining whether a work satisfies copyright’s threshold requirement of original expression. Then I posit why copyright is an inappropriate form of protection for perfume, and by analogy for other chemically or tactilely perceived works as well. I conclude that existing trademark, trade secret, and patent laws provide sufficient and effective means both for protecting intellectual investment, and also for fostering lively innovation and productivity for manufactured fragrances.

**HISTORICAL OVERVIEW: CREATION AND USE OF PERFUME**

According to Greek mythology Venus created the first perfume when she let fall a drop of her blood on a rose that her son then kissed. Homer referred to perfume as the ambrosial aroma ensuing from a visit of the gods from Olympus. In a more prosaic vein, around 300 B.C. Theophrastus of Athens—a student of Aristotle and mentor of Alexander the Great--wrote “On Odors”, the first essay on the production and uses of fragrances.

Religion has played an important role in the history of perfume— one need only think of the heady olfactory references in Solomon’s Song of Songs and the fragrant gifts given by the Magi to the infant Jesus. The word “perfume” itself (combining the Latin “per” and “fumus”—“through smoke”) alludes to the early use of aromatics burned as incense to please gods and ancestors. An Egyptian temple whose walls were impregnated with fragrant musk continues to exhale a trace of that perfume over 1000 years after it was built. We still use—albeit now frequently ironically—“odour of sanctity” to describe individuals exhibiting extraordinary piety or innocence. The expression comes from Pope Benedict XIV’s treatise on canonization, De Servorum Dei Beatificatione (1734), and identifies the holy fragrance said to emanate from the corpses of recently deceased individuals destined for sainthood.

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16 See I. LAZENNEC, MANUEL DE PARFUMERIE 7 (2nd ed., 1928).
17 See id.
19 “For your love is better than wine, your anointing oils are fragrant, your name is perfume poured out…” Song of Solomon 1:3. “On entering the house, they saw the child with Mary his mother; and they knelt down and paid him homage. Then, opening their treasure chests, they offered him gifts of gold, frankincense, and myrrh.” Matthew 2:11.
21 See CHARLES RÉGISMANSET, PHILOSOPHIE DES PARFUMS 27 (1907).
22 See AESCUAPE, LE NEZ ET L’ODORAT DANS L’ART, L’HISTOIRE ET LA LITTÉRATURE 90, (No. 3, 1931). About two hundred years after Pope Benedict theorized on “odour of sanctity” one finds similar ideas in writings influenced by Madame Blavatsky’s Theosophical Society. Among many fanciful assertions in Roland Hunt’s prototypical New Age monograph of Theosophical ideas is the notion that the appeal of
Europe in the Middle Ages -- France in particular -- had developed perfumes for religious, medical, and aesthetic uses. In 1190, in an act attesting to the commercial potential for the nascent perfume industry, King Philip II chartered the French perfume guild and required aspiring perfumers to spend at least seven years training to become master perfumers.23 In the twelfth century the polymath Benedictine nun Hildegard of Bingen, invented lavender water.24 Europe’s first medical school was established in 1220 in Montpellier where the chalky soil and warm climate provided ideal conditions for cultivating aromatic and curative plants.25 The eponymous “Hungary Water”, the first named fragrance, was produced around 1370.26 But it was in the nineteenth and early twentieth centuries that the European -- and then American -- perfume industry developed legs for the development and expansion that laid the groundwork for this industry’s broad reach and influence throughout the world today.

For many years the city of Grasse, on the Côte d’Azur, was Mecca for perfumers. Its climate and geography are ideal for cultivating lavender, tuberose, and jasmine flowers, all of which have been grown there since the sixteenth century when Catherine de Medici wore leather gloves made in Grasse that had been imbued with locally produced fragrances.27 In the latter half of the eighteenth century demand for fragrances by royals and aristocrats associated with the “perfumed court” of Louis XVI and Marie Antoinette established Grasse and nearby Montpellier as preeminent centers of perfume manufacture.28 In the eighteenth and nineteenth centuries Grasse perfume houses like Guerlain and Molinard were more directly connected with both agricultural and also industrial components of the creation of perfume than they are today.29

one’s “auric perfume” correlates to one’s state of spiritual evolution. See Roland Hunt, A Radiant and Fragrant Symphony 194 (1937).

25 See Morris, supra note 20, at 63.
26 See id.
27 See Cathy Newman, Perfume XXX (1998). In the sixteenth century Grasse was a center for leather tanning – a notoriously malodorous industry that prompted the development of products that would counter the foul stench of tanned leather and thereby make these products more appealing. Thus, the origins of the modern industry that creates the most enticing odors are found in an industry associated with one of the most repellant.
28 See Septimus Piesse, Histoire des Parfums 24 (1905). The 1789 Revolution was not particularly damaging to this industry; Napoleon is said to have daily drained several bottles of perfume, and he hired Jean-Louis Fargeon as his personal perfumer after Fargeon’s previous employer, Marie Antoinette, was executed. See Winter, supra note 25, at 99. Jean-Louis Fargeon was jailed during the French Revolution, but escaped the guillotine. A poetic appeal he wrote while in prison that sketches his life and work is published in Elisabeth de Feydeau’s Jean-Louis Fargeon, Parfumeur de Marie-Antoinette (2004).
29 See Newman, supra note 27, at XXX. Economic prosperity in the nineteenth century contributed to the growth of Grasse’s perfume industry as a broader segment of society could afford to purchase products for purely aesthetic enjoyment. See generally, Parfums de France; Grasse et sa Region (1923). Reflecting broader cultural and artistic currents of this era of Romanticism, the products of plants and flowers -- perfume in particular – became less exclusively associated with mundane hygienic or medical applications. In the narratives of literature, music, and ballet, they were often associated with the diabolical or divine means of inducing hallucinations, infatuations, or death. Women to a greater extent than men were subjected to sinister applications of floral and herbal concoctions, as one observes from the pathetic fates of opera heroines like Delibes’s Lakmé, Puccini’s Suor Angelica, and Meyerbeer’s Sélíka (L’Africaine).
Grasse still holds an important place in the perfume industry, but no longer for the cultivation and processing of acres of fragrant flowers. For the most part, this work has been outsourced to India, Pakistan, Indonesia, and Egypt where labor and land cost less than they do in the South of France. Perfume manufacturers in Grasse – like their counterparts in northern New Jersey and in Switzerland -- now occupy themselves with the creation and manufacture of perfumes from raw natural materials produced elsewhere, and from synthetic substances they produce themselves.

In the 1920s Ernest Beaux, a perfumer working for Chanel, used the chemical compound of aromatic aldehyde to create the sparkling top note in “No. 5”. “Henceforth,” claimed Beaux, betraying a positivist attitude characteristic of his time, “it will be the responsibility of research chemists to discover new molecules to permit original notes to see the light of day. The future of perfume lies in the hands of Science.” Creation and consumption of perfume is influenced by the zeitgeist of an increasingly global market, and the growing enthusiasm over the past twenty-five years for organic produce, flowers, wine, fabrics, and the like, has spread to fragrances and cosmetics. Recent trends favoring au naturel perfumes notwithstanding, there is much truth in Beaux’s prediction as evidenced in the chemical orientation today of fragrance and flavor industry giants like Givaudan and Firmenich that focus on patentable new scents known as “captives”.

mephitic Manchineel and Datura flowers respectively are agents of death in L’Africaine (1865) and Lakmé (1883); Suor Angelica, respected among her convent sistern for her pharmacological knack, brews and drinks a lethal potion of her own devising using flowers she loved. Saint-Georges’s’s libretto for Adolph Adam’s ballet Le Corsaire (1856) adds the gloss of a poisonous flower to Byron’s underlying swashbuckling poem; similarly, Minkus’s ballet La Bayadere (1877), set in India like Lakmé, dispatches the heroine Nikiya to the “Kingdom of the Shades” by means of a lethal bite from a venomous snake secreted in a bouquet of flowers. (Les Fleurs du mal indeed! -- Baudelaire’s work dates from 1857.) The extravagantly powerful attributes ascribed to these fragrances and potions in nineteenth-century literature and music – an outgrowth of campaigns during the nineteenth century by French and British explorers and colonizers in exotic locations in Africa, Asia, and the South Pacific -- seeped into daily life as well. For instance, young women were warned never to inhale the fragrance of tuberose in the evening lest they sink into a “state of voluptuous intoxication”. See ELIZABETH BARILLÉ & CATHERINE LAROZE, THE BOOK OF PERFUME 23 (Tamara Blondel, trans., 1995). These febrile implications remain a trope in marketing perfume today as indicated by popular sellers like “Opium”, “Poison”, and “Obsession”.

See NEWMAN, supra note 27, at XXX.

Makers of the most expensive French perfumes – e.g., Guerlain and Chanel -- still use essences derived from flowers grown in Grasse. They consider these native materials to be superior to all others. See BARILLÉ, supra note 29, at 51.

See id., at 40. ‘‘New car smell’ is an aldehydic fragrance. See Henry Fountain, Observatory: That New Car Smell is Intoxicating, Not Toxic, N. Y. TIMES, April 24, 2007, at F3.

Over the past several years there has been a small renaissance in Grasse of the flower-growing business. It is very much a boutique industry, with small firms following practices of sustainable agriculture, that sell only to high-end perfume makers. See DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 161 (2007). The Osmothèque in Versailles has a collection of fragrances that allows one trace the development of tastes in perfumes over the past century or so. See Osmothèque, http://www.osmotheque.fr/presentation/index.html (last viewed June 15, 2007).

Captives are aroma chemicals developed by a supplier, such as damascenone, a synthetic rose created by Firmenich in the 1970s, or sandalore, a synthetic sandalwood. Nearly all of the big suppliers have research
Over many centuries, perfume making techniques have evolved to some extent, along with the ingredients used for composition of new fragrances. Expression – an extant, low-tech method of extracting fragrance by muddling the peel of citrus fruit – has been used since ancient times. Distillation – obtaining essential oil by condensing the steam produced by flowers boiled in water, which is directed through a cooling coil – was used in Arabia for obtaining floral essences as early as the tenth century.\(^{36}\) The most sumptuous floral extracts, however, were traditionally obtained through *enfluerage*, a “cold-extraction” technique.\(^{37}\) The labor of *enfluerage* is prohibitively expensive today and most essence providers resort to a process known as maceration in which chemical solvents extract jasmine and tuberose essences.\(^{38}\)

As they were developed, the techniques of extracting floral essences became widely known and freely disseminated orally and by the publication of numerous instructional manuals, the first of which is the aforementioned “On Odors” by Theophrastus.\(^{39}\) On the other hand, particular combinations of these essences by which costly perfumes and unguents were produced, have long been – and still are – jealously protected as core assets by fragrance producers. Like commercial producers of prepared foods, beverages, and pharmaceuticals, perfume manufacturers now depend upon various means to protect information they consider proprietary, including legal protection through trade secret, patent, and trademark law. Recently, perfume creators in Europe have attempted through litigation to expand the law’s protection of works of fragrance by copyright.

**COPYRIGHT AND PERFUME: CASE LAW**

Beginning in 1975 with *Rochas v. De Laire*, the first case involving a claim of copyright for fragrance, judicial opinions on this question have consistently raised, and turned upon, the question whether a fragrance can be considered the original expression of the personality of its creator.\(^{40}\) French fragrance manufacturer De Laire had contracted with the Paris couture house of Rochas to create several new fragrances, and divulge to programs devoted to the search for new materials. When a new synthetic is created the supplier patents it. NEWMAN, *supra* note 27, at 101.

\(^{36}\) An Arabian physician named Avicenna is credited with having first distilled floral essences in the tenth century. *See* A. HYATT VERRILL, *PERFUMES AND SPICES* 92 (1945). This technique is still used for extracting essences of flowers like lavender and roses whose fragrance is not destroyed by the heat of boiling water.

\(^{37}\) Richly scented flowers like tuberose and jasmine cannot withstand the heat of distillation and reluctantly render their fragrance only when it is bled from them by animal fat in which they have been mired. Once the fat has become saturated with fragrance it is washed in alcohol, which evaporates leaving behind a precious oleaginous essence or *pomade*. *See* BARILLÉ, *supra* note 29, at 33.


\(^{39}\) *See* supra note 18 and accompanying text.

Rochas their formulae. The parties also agreed that for ten years De Laire would be the sole provider to Rochas of any of these new fragrances that the fashion house chose to add to its perfume line. After providing Rochas the formula for one new perfume, but subsequently receiving no orders to produce it, De Laire sued, claiming Rochas had infringed its copyright in the perfume rendered by this formula by producing an identical perfume themselves.

Taking its cue from the plaintiff’s reference to their perfumes as “inventions”, the Paris Cour d’appel upheld the lower court’s decision that perfumes are practical works that could be eligible for patent protection. The court went on to find that because perfumes are not tractable to meaningful and consistent description by those who perceive them, they cannot be deemed copyrightable works of intellect -- “oeuvres d’esprit”.

This is an oblique way of saying that 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. Describing a fragrance as “sweet” or “spicy”, for example, is not evidence of a commonly held perceptual discernment that allows us consistently to identify and to describe elements in works like novels and paintings that associate them with their creators.

About fifteen years after the Rochas appeals court decision, the Paris Tribunal de Commerce considered the question of perfume’s copyrightability when French designer Thierry Mugler sued Molinard, an august French perfume house based in Grasse. In 1992, in an effort to capitalize on the runaway success of “Angel” – a perfume created by the fragrance and flavor manufacturer Quest International for a Mugler commission -- Molinard began selling “Nirmala”, marketed as a “smell-alike” of “Angel”.

The Mugler court disagreed with the defendant’s argument based on the Rochas holding that perfumes are merely the products of industrial technique and therefore not original works of personal intellecction. Perfumes can be original, the court found, particularly those like “Angel” that introduce unexpected new notes into the bouquet of fashionable fragrances -- in this case culinary scents, specifically that of sugary caramel. Comparing the formula of a perfume to the score of a musical work, the court suggested that variations among the perceptions and reactions to the sillage trailing

41 See id.
42 See id.
44 “Angel” is a particular favorite of perfume critic Luca Turin who waxes rhapsodic about its synthesis of chocolate, vanilla, and fruity notes, and claims it is the culmination of a similar line of scents established by Paul Parquet’s “Fougère Royale” created for Houbigant in 1882. See Luca Turin, Parfums: Le Guide 13 (2d ed. 1994). “Nirmala” is a Hindu girls’ name meaning “purity” and was once before the name of a now obsolete French perfume.
46 See id., at 5. Molinard ultimately was not held liable for copyright infringement because the creator of “Angel” -- and thereby only legitimate copyright claimant under French law -- was not Mugler but rather Quest Flavors & Fragrances that was not a party to the dispute.
someone wearing perfume are akin to the idiosyncratic receptions among those listening to the same musical work.\(^{47}\)

In rejecting the *Rochas* decision that perfumes were not copyrightable, the *Mugler* court was influenced by the writings of Edmond Roudnitska, at that time the éminence grise of the French perfume industry.\(^{48}\) Roudnitska, the “nose” that created some of Dior and Hermès’s most successful fragrances, believed that an original perfume was not the product of an industrial process, but rather of one of aesthetic research and composition.\(^{49}\)

Roudnitska’s published philosophical musings on perfume creation as a cerebral undertaking were similarly influential five years after the *Mugler* decision when the Paris Cour d’appel upheld a claim of copyright infringement brought by the cosmetic company l’Oréal against Bellure, a Belgian importer of “smell-alike” fragrances manufactured in Dubai.\(^{50}\) The fact that the French Intellectual Property Code does not include fragrances among its list of copyrightable works was not, in the opinion of the l’Oréal court, dispositive on the issue of copyrightability.\(^{51}\) All works of intellect, in the view of this court, are eligible for copyright protection – even those that might also be patentable, and even those that are not fixed – if they are perceptible, and also original insofar as they reveal the imprint of the creator’s personality.\(^{52}\)

At the same time l’Oréal was prosecuting its copyright infringement claim against Bellure in France, Lancôme, a subsidiary of l’Oréal, was litigating an infringement action in the Netherlands against the Dutch perfume seller Kecofa. As in the French action against Bellure, “Trésor” was again the perfume at issue, with Lancôme claiming Kecofa’s “Female Treasure” to be a counterfeit version of their fragrance and an infringement of their copyright in it. The District Court in Maastricht, and then the

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\(^{47}\) See *id.*, at 4. “Sillage”, the French word meaning “wake”, is commonly used among perfumers to refer to the residual scent molecules one perceives after someone wearing perfume has swept by.

\(^{48}\) See *id.*

\(^{49}\) “E. Roudinetska [sic], creator of famous fragrances, posits that a major new perfume is not the result of industrial processes, but is an aesthetic project that consists of the artful combination of some dozens of essences with the purpose of obtaining thereby an olfactory creation both beautiful and distinctive.” *Mugler*, *id.*, at 4. See also, EDMOND ROUDNITSKA, L’ESTHÉTIQUE EN QUESTION: INTRODUCTION À UNE ESTHÉTIQUE DE L’ODORAT (1977); LE PARFUM (1996).

\(^{50}\) Bellure v. l’Oréal, et al., Cour d’appel (C.A.) regional court of appeal] Paris, 4\(^{e}\) ch. A, Jan. 25, 2006, Gaz. Pal. 2006, XXX, aff’g Bellure v. l’Oréal et al., Tribunale de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 26, 2004, Gaz. Pal. 2004, XXX. The plaintiff, l’Oréal, informed the court of the opinions of both Roudnitska, and also Jean-Paul Guerlain -- scion of one of the most famous French perfume dynasties -- who shared Roudnitska’s high-minded views on the creation and purpose of perfume. Guerlain lost his vision when he was a teenager and this loss and the compensatory sharpening of his other senses allowed him to become one of the most skilled “noses” in the field. See *Morning Edition: Perfume Master* (N.P.R. broadcast March 5, 2002).

\(^{51}\) L’Oréal sued Bellure in Great Britain as well, but limited their claims to trademark infringement. See L’Oréal v. Bellure, [2006] EWCH (Ch) 2355. In his opinion, Justice Lewison alludes to the fact that the list of protectable works in the U.K. Copyright, Designs and Patents Act (1988) is exhaustive and does not include chemically perceived materials like scents and flavors. *Id.* at ¶ 13. L’Oréal’s success in the U.K. litigation was more modest than that in France with the English court finding legitimacy in only three of l’Oréal’s trademark infringement claims, and in none of the claims of “passing-off”. See *id.*

\(^{52}\) See L’Oréal,[Cour d’appel], *supra* note 50, at XXX.
Appeals Court in Den Bosch, held in favor of Lancôme and, in 2006, Kecofa appealed to the Dutch Supreme Court.

The Appeals Court had determined that the locus of copyright in perfume was the liquid itself; the fragrance it exudes is too ephemeral to qualify for protection.\(^{53}\) The Supreme Court agreed with the determination that fragrances could qualify for copyright protection, but adjusted the grounds of the Appeals Court’s decision declaring that this court intended to say that fragrances as fixed in liquid – and not the liquid itself -- were eligible for copyright protection.\(^{54}\) The Supreme Court went on to find that nothing in the Dutch Copyright Statute excludes fragrance compositions from the scope of its protection as long as they are perceptible, original (i.e. bearing the personal imprint of their creator) and not purely technical (i.e. useful).\(^{55}\)

Returning to France, in February of 2007 the same Paris appeals court that had found l’Oréal’s perfumes eligible for copyright in the 2006 French case upheld a lower court’s finding that designer Jean-Paul Gaultier’s perfumes were also copyrightable.\(^{56}\) Beauté Prestige International, Gaultier’s perfume manufacturer, had sued a French competitor, Senteur Mazal. Beauté claimed Mazal infringed the copyrights and trademarks protecting Gaultier’s perfumes like “Le Mâle”, when Mazal created and marketed “Inmate for Men” [sic] and other fragrances that it sold at prices fractions of those of the Gaultier products.

Like the Tribunal de Commerce in the Mugler decision of eight years earlier, the Cour d’appel in the Gaultier case discounted the defendant’s argument that variances in human perception of a fragrance make it impossible to establish that a perfume possesses originality required for copyright protection.\(^{57}\) The Cour d’appel responded to this

\(^{53}\) Considering that the scent itself is too fleeting and variable and dependent on the environment it cannot be protected by copyright laws. Lancôme/Kecofa, I.B ¶ 4, (Ct. App., Den Bosch 2004). Available online (LJN number: AP2368) at www.rechtspraak.nl. English translation by Annemarie Field at www.piercelaw.edu/tfield/tresor.pdf

\(^{54}\) Lancôme/Kecofa, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 16 juni 2006, AMI 2006/5, 161 (ann. Quaedvlieg) (Neth.). From the earlier Appeal Court’s reasoning one might conclude that this court would consider physical artifacts like paper books and plastic compact discs copyrightable, but not the works of intellect they embody. When the Appeal Court’s decision was issued in 2004 it was criticized for this reason by Thomas Field, and more recently by Herman Cohen Jehoram in his reaction to the 2006 Supreme Court decision. See Thomas Field, Copyright Protection for Perfumes, 45 IDEA 19 (2004); Herman Cohen Jehoram, Dutch Supreme Court Recognizes Copyright in the Scent of a Perfume: The Flying Dutchman: All Sails, no Anchor I: 28 EIPR 629 (2006).

\(^{55}\) See id.


\(^{57}\) Both the Mugler and l’Oréal opinions emphasize the role of the perfumer as author in making the argument that fragrance may be copyrightable. These opinions also reference evidence offered by their respective plaintiffs as to how the role of users -- wearers and those who come in contact with them -- of perfume support the idea that perfume is copyrightable expression. The plaintiffs in each of these cases claimed that the results of their surveys indicated that consumers were likely to mistake “smell alike” fragrances for those created by the plaintiffs. See Mugler v. Molinard, Tribunale de commerce [T. Com.]
argument noting that literary, graphical, and musical works are also perceived variously by different individuals, and that these variations do not cloud the originality of these works. The court went on in this vein observing that creators of musical, literary, and graphical works, like perfume creators, also apply technical “know how” to some extent, but that this application of practical knowledge obviously does not render books, music, and paintings merely products of technical application.

The only deviation from the recent trend set by French and Dutch courts towards considering perfume to be works of copyrightable expression occurred in 2006 when the Cour de cassation in Paris affirmed the opinion of the Versailles Cour d’appel holding perfume ineligible for copyright protection. In 2002, after being dismissed from her position as a perfumer, Nejla Bsiri-Barbir, a Paris-based employee of the German fragrance manufacturer Haarman & Reimer, sued this corporation. In addition to claiming wrongful termination, the plaintiff asserted that since the time of her dismissal Haarman & Reimer had continued to produce and market “Dune”, a profitable fragrance she had helped create while employed by the company. The company did so without paying her royalties which, in her opinion, violated her copyrightable intellectual contribution in the creation of the fragrance.

Chromatography, the technique of identifying the molecular components of a liquid or gas mixture, was proposed a century ago, but its application for the analysis of scent is a relatively recent development. Using “headspace technology” – specifically an apparatus that allows the application of gas chromatography to flowering plants -- botanists and chemists can now obtain exact information about the identity and distribution of a flower fragrance’s molecules. This information can be used to create artificial versions of naturally occurring scents – especially useful for those produced by endangered or rare plant species – and also to analyze man-made perfumes. Using the same technology one can also “reverse engineer” any odor to reveal its molecular structure, and allow one to produce a copy of it. See Luca Turin, The Secret of Scent, 38-40 (2006).

58 Id. This argument has a disingenuous cast. Variation in human perception of a fragrance is mainly the result of physiologic differences in olfaction – particularly from the gradual onset of anosmia with aging. A child’s hearing or sight may be more acute than those of someone in their 50s, but the variation in the perception of a literary, musical, or graphical work by individuals of different ages reflects variations in intellectual maturity, and not physical divergences. Neither this court, nor that of Mugler, addressed the implications, in terms of establishing originality, of the variations in the exuding (not perceiving) of fragrance by the idiosyncratic interaction of a perfume with the physiologies of its various wearers.


60 See Bsiri-Barbir v. Haarman & Reimer, Cour de cassation [Cass. 1e civ.] [Ultimate Court of Appeal] Paris, June 13, 2006, Bull. civ. I. No. XXX. Reflecting its revolutionary origins and a distrust of adventurous judges, the modern French legal system places little importance on case law precedence that is fundamental to the legal systems of the U.S., Britain and other Common Law nations. See Catherine Elliott & Catherine Vernon, The French Legal System (2000). The importance of precedence is growing in France, but judges never cite prior decisions as the basis for their own judgments; indeed, court opinions are considered an “unwritten source” of law. See id. at 51.

61 See Haarman & Reimer, id., at XXX.
In its curt dismissal of Bsiri-Barbir’s allegation of copyright infringement the Cour de cassation subscribed to the rationale of the Rochas Cour d’appel decision of twenty years earlier. Like the court in Rochas, the Cour de cassation in Haarman & Reimer based its rejection of copyright on a determination that perfume is entirely a product of the application of technical “know-how”. As such it is incapable of expressing the original “imprint of an author’s personality” that is required for copyright. This basis for rejection flatly contradicts the underlying rational of the decisions in Mugler, l’Oréal, and eventually Gaultier, finding works of fragrance copyrightable -- i.e. perfume may be an original expression of its creator’s personality.

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62 See id.
63 French perfume cases prior to Haarman & Reimer involved disputes between different perfume manufacturers. The ex-employee and employer litigants in Haarman & Reimer were in privity with respect to “Dune”, the product at the center of this dispute. This fact may have contributed to a decision in the instant case that is so contrary to that of l’Oréal only six months earlier. French copyright law grants authors control over distribution of their work, and the integrity of copies of it. See Code de la Propriété Intellectuelle [Intellectual Property Code] L. 121-1 -- L. 121-4 (1992). It also allows them to attach their name to all replications of their work, and even to retrace the work from public distribution. See id. Unlike proprietary rights (for profitable exploitation of the work) that an author may transfer to another (e.g., to an employer) French law does not allow authors to sell, or otherwise relinquish, their moral rights. See id. If, therefore, the court had determined that Haarman & Reimer’s perfume “Dune” were a work of authorship, the plaintiff automatically would have been considered an author of it. As such she would have been entitled to a fair share of the profits it generated. More disconcerting, however, is the fact that as an author, the plaintiff -- already nursing antipathy towards the company that terminated her -- could assert her moral right of retraction (among others) thereby forcing Haarman & Reimer to discontinue the production and sale of a profitable fragrance. Perfumers employed by other fragrance and flavor companies would then do the same thing and, more likely, pursue means by which to parlay moral rights into economic windfalls by seeking ransoms for fragrances they have help to create that have succeeded in the market. In France, professional perfumers assume that the fragrances they create are “works made for hire,” and any intellectual property rights that might be associated with them devolve to their employer or the fashion house or celebrity customer that commissions the perfume. See e-mail from Yves de Chiris to author, December 8, 2007, 12:46:00 PST (on file with author).
The opinions in these Dutch and French cases emphasize the role of the perfume creator and give short shrift to that of the user, in deciding whether fragrance may be copyrightable. L’Oréal, for instance expressly states that a perfume can reveal the personality of its creator, and thereby be an original work. Neither L’Oréal, nor any of the other cases, however, addresses the issue of what constitutes the “revelation” of a work, a question that necessarily implicates those to whom the work is “revealed”.

On the copyrightability of perfume -- and that of other works we perceive through smell, taste, or touch -- whether a creator has revealed his work is as important as whether he has used his intellect to create something original. It is axiomatic that a work can be revealed only if it is perceptible. The novel question, then, raised by these perfume cases is: how perceptible must a work be to be eligible for copyright protection? Put otherwise: should variances in the acuity of our senses determine the copyrightability of a manufactured creation that is perceived by one or more of them?

COPYRIGHT AND HUMAN SENSES

In fall, 2006 the New York Times introduced “Scent Strip”, a recurring column in the Sunday T Style magazine, dedicated to reviews of perfumes.64 “Scent Strip” reviews were to be written by free-lance journalist Chandler Burr, author of The Emperor of Scent, a non-fiction work published in 2003.65 “Scent Strip” was touted as the first regular perfume criticism column in a major mainstream newspaper.66

The promotion for “Scent Strip” included a brief appearance by Chandler Burr on NBC’s Today Show.67 Today’s host Matt Lauer handily identified as sunscreen the

64 See Julian Borger, New York Times Hires Man with Nose for a Story, THE GUARDIAN Aug. 25, 2006, at 17. “Scent Strip” first appeared in the New York Times on Sunday, August 27, 2006. The name “Scent Strip” plays with the same expression for fragrance samples embedded in magazines, which are exposed by tearing away the paper strips covering them.
65 In The Emperor of Scent, Burr gives an empathetic recounting of fragrance chemist Luca Turin’s quixotic efforts to persuade the scientific community to entertain seriously a theory of olfaction based on molecular vibration. Burr’s book broadly circulated Turin’s ideas. This prompted Rockefeller University scientists to test Turin’s theory, whereupon they found no evidence supporting it. The Rockefeller University report was published in the April 2004 issue of Nature Neuroscience. The accepted theory of olfaction is that proposed by 2004 Nobel Prize winners Richard Axel and Linda Buck, whose research at Columbia University indicated that we perceive scents according to the various shapes of their constituent molecules. See Richard Axel & Linda Buck, A Novel Multigene Family May Encode Odorant Receptors: A Molecular Basis for Odor Recognition, 65 CELL 175 (1991). Turin claims his vibration theory of olfaction was instigated by similar theories put forth by Malcolm Dyson and R. H. Wright. See LUCA TURIN, THE SECRET OF SCENT 114-144 (2006). One finds, however, intimations of this theory predating those of Dyson and Wright in Septimus Piesse’s Histoire des Parfums (1905). Piesse writes: “Certainly, the best way, in my opinion, of understanding the perception of scents is to consider them as particular vibrations which affect the nervous system, as colors affect the eye, as sounds affect the ear.” SEPTIMUS PIESSE, HISTOIRE DES PARFUMS XXX (1905).
sample of Coppertone that Burr handed to him on a wand of paper. But when Lauer and co-host Natalie Morales challenged Burr to identify well-known fragrances they had applied to their wrists before taping the show – “Purell” and “Calèche” respectively – Burr was unable to identify either of them.68

Shortly after Burr’s Today Show appearance, and in an entirely unrelated event, the FM radio station 105.3 KISS broadcast in New York one of their informal contests for listeners. The winner would be the first to identify the song of which the station would play a clip of its opening. The clip played was a half-second sample of a single pitch. Tyrone Glover, a hair stylist cutting my hair while FM 105.3 played in the background of a Supercuts shop, immediately and correctly responded: “Bee Gees, ‘Stayin’ Alive’.”69

Chandler Burr’s nose enabled him to describe “Calèche” but only in broadly descriptive terms indicating ability roughly to dissect a fragrance.70 Tyrone Glover’s formally untrained ear, on the other hand, perceived and synthesized instantaneously complex information derived from the merest hint of an audible work that he easily identified. As I suggest below, the dramatic difference in human acuity among the senses that these vignettes illustrate is the underlying reason copyright protection should not be provided to manufactured fragrances and other chemically perceived works.71

Chemical Senses: Olfaction and Taste

Our perception of an odor or taste is determined by our brain’s recognition of, and response to, the molecular shapes of the odor or taste’s chemical elements.72 Given the instinctual nature of olfaction and taste, we can do little to control our perception of, or reaction to, the odor or flavor of a substance without changing the molecular composition of the material source of the scent or flavor itself – e.g., diluting it with alcohol, adding salt to it.73 This is especially true for the sense of taste that, like the mechanical sense of touch, requires bodily contact with an object to perceive it.

68 Hermès’s “Calèche” is an all-time classic that has been popular for decades – the fragrance equivalent of Ravel’s Bolero or van Gogh’s “Starry Night”. Purell is an anti-bacterial hand sanitizer that is ubiquitous in New York. It has a strong astringent scent.
69 I was at the Supercuts shop at 6th Avenue and Waverly Place in New York. Tyrone Glover is a professional hair stylist. He is not a musician, but listens to popular music on the radio while working. Author’s conversation with Tyrone Glover, May 24, 2007.
70 “[...]It’s not floral, it’s aldehydic, it’s very clean, it’s … lovely...” Today Show, id. These terms describes hundreds of fragrances, just as “portrait”, “oil”, and “lovely” describe hundreds of well-known paintings, like Leonardo’s “Mona Lisa”.
71 There is no olfactory equivalent of “perfect pitch” that some individuals are born with, and that allows them to identify and reproduce (hum, typically) one of the thirteen pitches of the chromatic scale (assuming this scale is one’s reference) without allusion to a known pitch and regardless of the acuity of one’s hearing. With smell, physiological differences (determined by age, health, etc.) produce varying levels of olfactory sensitivity among humans.
72 See supra note 65.
73 “A chemical sense was the first sense to appear in the mobile life-forms that emerged in the earth, and it is the only sense that the most primitive single-celled creatures share with us today...For us, vision has taken over as the primary sense that facilitates our survival. Yet odors still evoke in us the remnants of this primeval survival code.” RACHEL HERZ, THE SCENT OF DESIRE 14 (2007).
The senses of sight, hearing, and smell are remote senses in that the object seen, heard, or smelled does not need to touch the body of the person perceiving it. This physical space allows us greater control over perception of these objects than we have over our perception of flavors or surfaces.\footnote{Unlike scented, flavored, and tactile works, visible and audible works are also tractable to digital representations.} We can view objects from various perspectives and hear sounds differently by altering our distance from them. We can weaken our perception of an odorous substance by lessening the number of scented molecules that it emits, or that we inhale, by covering, respectively, the substance or our nostrils.

The distance between our bodies and scents allows us some control over our reception of odors. We have, however, far greater ability to control what we see and hear, and also how we respond to what we see and hear, than we do over which odors we smell, and how we perceive those odors.\footnote{“Vision, in particular, is, as Hans Jonas has pointed out, the prototype and perhaps the origin of teoria, meaning detached beholding, contemplation.” \textit{Rudolf Arnheim, Visual Thinking} 17 (1969).} Scents stimulate direct impressions, and not the conscious intellectual manipulations that words and other visible symbols evoke. These manipulations prompted by visual cues allow us to synthesize pieces of information stored in our memories to create complex and original ideas and expression.\footnote{Information enters the mind through the senses, but olfaction and taste involve merely the collecting of information on odors and flavors. “The Sensualist philosophers have reminded us forcefully that nothing is in the intellect which was not previously in the senses. However, even they considered the gathering of perceptual data to be unskilled labor, indispensable but inferior. The business of creating concepts, accumulating knowledge, connecting, separating, and inferring was reserved to the “higher” cognitive functions of the mind…” \textit{Id.}, at 2.} Sights and sounds can be projected abstractly through language and symbols. Odors, however, can be meaningfully described only by referring to their sources.\footnote{“Only the source of an odor is truly apprehended as an entity, to the point that we are unable to give a name to the latter save via the former.” Annick Le Guérer, \textit{Olfaction and Cognition: A Philosophical and Psychoanalytic View}, in \textit{Olfaction, Taste, and Cognition} 4 (Catherine Rouby, et al., eds., 2002). Le Guérer provides an overview of the negative stance toward olfaction taken by noted thinkers throughout history. \textit{Id.} Over 1500 years ago Saint Augustine spoke of the preeminence of sight noting our promiscuous use of vision terminology for other senses: “see how it smells;” “see how it feels;” “see how it sounds.” \textit{Saint Augustine of Hippo, Confessions} 189 (Barbour & Co. 1984). Other thinkers, beginning with Plato, have observed that the vocabulary of scent is impoverished, particularly compared to those of sight and hearing. Perhaps because vision is the most acute sense visual works hold the greatest potential for stimulating -- and requiring -- thought and imagination. Some musicians -- admittedly a dwindling number because of the ubiquity of recorded performances -- will savor most fully, say, a symphony by Schubert, by reading its score in silence and “hearing” an ideal performance. \textit{See} Mihaly Csikszentmihalyi, \textit{Flow: The Psychology of Optimal Experience} 117 (1990). The neurologist Oliver Sacks has written how his father carried with him miniature (also known as “pocket”) orchestral scores that he would read between his patients’ appointments to provide himself “a little internal concert.” \textit{See} \textit{Oliver Sacks, Musicophilia} 31 (2007). “He did not need to put a record on the gramophone, for he could play a score almost as vividly in his mind, perhaps with different moods or interpretations, and sometimes improvisations of his own.” \textit{Id} Similarly, the printed words of a novel by an exceptional writer like Jane Austen hold greater potential for idealization and interpretation by the reader than does a cut-rate BBC production of it. Even listening to an audio recording of a novel is typically less meaningful than reading it oneself silently or aloud. \textit{See} Andrew Adam Newman, \textit{Your Cheatin’ Listenin’ Ways}, N.Y. Times, Aug. 2,}
Our ability to conjure and reproduce a scent is drastically inferior to our ability to do the same with an image or sound. Attempting to recall the fragrance of a rose, for instance, we may knit a wispy memory of it from mental images of the flower or something else that is rose-scented or flavored. On the other hand, we can handily summon in our “mind’s eye” an accurate visual representation of a rose, and can sketch at least a rough drawing of one. The same is true of a musical work we are familiar with, which we can “hear” silently, and can reproduce with varying degrees of completeness and accuracy whether simply by humming the melody or by reproducing the entire work in symbolic notation from aural memory.

The difficulty of describing scents reflects their primal nature and their instinctual rather than intellectual appeal. Because they are not tractable to verbal description and their appeal is very subjective, scents generally do not offer precise information about objects external to us and are more important to sensory pleasure than to the acquisition and growth of knowledge, and to societal advancement. In most other mammals olfaction is a more vital sense, essential to survival and reproduction. The atrophying of olfaction and coincident improvement of vision in humans over many hundreds of thousand years distinguishes us from other mammals and marks us as human.

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2007, Fashion & Style § at 1.. Parents intuit this difference when they require their children to read books, rather than, or prior to, watching motion picture versions of them -- that are almost unfailingly disappointing, typically having been neutered of all wit by producers attempting to appeal to broader and less-educated audiences than those for the books.


79 A good book, a fine piece of art, a great work of music can enthral our mind for hours. Our sense of smell, however swiftly fatigues of even the most appealing fragrances that we can appreciate anew only by removing ourselves from them. Our sense of taste is similarly affected by diminishing returns from extended exposure to a particular flavor. Swift olfactory and gustatory fatigue reflects the animalic quality of these senses. Animals have neither the need nor capability to ponder scents or tastes; they may take pleasure in them, but once their instinctual needs are satisfied, these scents and tastes are no longer immediately useful or interesting to them. On the other hand, human vision and hearing, in cooperation with our minds, can “tune out” images and sounds we may consider banal and relegated these stimuli to visual and sonic “wallpaper” to allow us to consider at greater length images and sounds that mean more to us.

Although the senses of smell and taste, for example, are rich in nuances, all this wealth produces – at least for the human mind – only a very primitive order. Therefore, one can indulge in smells and tastes, but one can hardly think in them. In vision and hearing, shapes, colors, movements, sounds, are susceptible to definite and highly complex organization in space and time. These two senses are therefore the media par excellence for the exercise of intelligence. Vision is helped by the sense of touch and the muscle sense, but the sense of touch alone cannot vie with vision, mainly because it is not a distance sense. Dependent upon immediate contact, it must explore shapes inch by inch and step by step, it must laboriously build up some notion of that total three-dimensional space which the eye comprehends in one sweep…


81 Indeed, deprivation of our senses of smells and tastes makes us disconsolate, but complete deprivation of sights and sounds leads to insanity. “The facilities of the sense of vision are not only available to the mind; they are indispensable for its functioning.” Id., at 19.
Apart from a minute segment of the population whose vocational or amateur interests require honing olfaction to recognize and understand the interaction of different scents, efforts to improve olfactory acuity do not meaningfully enhance our knowledge and understanding of the world. Some – like Freud – have suggested that a preoccupation with odor over other sensory stimuli is potentially symptomatic of regression and latent animality, and is a maladaptive trait among civilized humans who universally promote the understanding of visual and aural stimuli over those of scents and tastes. It is not surprising then, that while humans have concocted wonderful scents and flavors – in particular through imaginative use of synthetic materials – nature alone is still responsible for the most sublime creations of both.

Chemically Perceived Works and Copyright

1. The Dynamic Nature of Copyright

The underlying objective of copyright -- and its civil-law analog “author’s right” – has been to encourage intellectual activity leading to the creation of socially beneficial works. Both copyright and author’s right systems share the fundamental requirement that to be eligible for protection a work must evince the intellectual expression of its author. Common law “copyright” countries (e.g., United States, United Kingdom) also require that a work of expression be captured in a recording, text, drawing, etc. to be eligible for protection.

Over time, political exigencies and technological developments have attenuated these broad eligibility requirements. The evolving scope of works protected by U.S. copyright law over the past 200 years resonates with President John Adams’s well-known remark to his wife Abigail about his need to study politics and war so that his grandsons might study poetry and music. The “maps, charts, and books” of the first U.S.

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82 For over a million years, since man has been walking upright, our sense of smell has become less acute. This is because our noses are farther than they used to be from the ground – where odors are strongest – and because the perception and identification of odors has become less essential to our physical safety and survival.
83 Id. Given his addiction to tobacco, Freud obviously enjoyed scents and flavors. “The concept of ‘odor’ was branded with negative connotations in the Victorian era. Then the notion that animals smell – that is, stink – but civilized people did not, or rather “should not,” reigned, and this view has contaminated endeavors to explore and understand our sense of smell ever since.” RACHEL HERZ, THE SCENT OF DESIRE 23 (2007).
84 The goal of perfumers is often to replicate as closely as possible a fragrance produced by nature. See LUCA TURIN, THE SECRET OF SCENT 16 (2007). In this respect perfumers appear to be artisans, not artists. See id.
85 See GOLDSTEIN, supra note 15.
87 See U.S. COPYRIGHT ACT, id. The fixation requirement reveals the historical emphasis on interests of readers (“users”) in common law copyright regimes.
88 I must study politics and war that my sons may have liberty to study mathematics and philosophy. My sons ought to study mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce, and agriculture in order to give their children a right to study paintings, poetry, music, architecture, statuary, tapestry, and porcelain. FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS: WITH A MEMOIR OF MRS. ADAMS, 380 (1875). The undeveloped country needed for survival and
Copyright Act (1790) reflected the fledgling government’s need to provide incentives for the production of works of intellect that would promote survival and basic development of the new nation.89 Once these were secure, copyright was gradually extended to intellectual creations used for less obviously practical purposes, like photographs (1865), motion pictures (1912), and sound recordings (1971).90

The Constitution’s exhortive language establishing Congress’s prerogative to “… secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries” has acquired talismanic status as the basis for ballooning patent, trademark, and copyright statutes that protect an expanding range of works of intellect.91 Reflecting national development and technological progress, today’s copyright statute covers genres of authorship like computer programs and new modes of reprography and distribution, like photocopying and file-sharing, of which the Framers might have only dreamed.92 Along with the expansion of the scope of works covered and the term of protection, the addition over time of statutory provisions for “fair use” and copying exemptions for libraries and archives reflect the underlying social objective of U.S. copyright law to make works of information as accessible as possible to the greatest number of users.93

The “maps, charts and books” protected under the first U.S. copyright statute were drafted exclusively by men – Colonial and Federal period explorers, surveyors, and clergymen, in particular. With the development of the country, the concomitant expansion of copyright protection covering a broader range of works, and the desegregation of professions once practiced only by men, expressive works by women gradually achieved copyright parity with those of men – or did they? Fashion designs, recipes for edibles, flower arrangements, decorated shop windows, hairstyles and perfume – all products of creative endeavors we still associate more with women and growth the building of roads, industries, and farms; to a much lesser extent the indigenous production of original works of music, drama, and poetry. Conveniently enough, these works of intellect, while not encouraged by strong domestic copyright protection, were easily transportable from elsewhere, England in particular. Until enactment of the Chase Act in 1891 that offered protection to the works of non-nationals, the U.S. continued to tweak the country it had recently defeated in war by allowing piracy of works of foreign authors that were not protected at that time in the U.S. See Barbara Ringer, The Role of the United States in International Copyright – Past, Present, and Future, 56 GEO. L. J. 1050 (1968). The United State’s swashbuckling attitude during the nineteenth century towards the economic interests of foreign authors has come home to roost in the twenty-first. The U.S. is the leading producer of computer software, and entertainment in a variety of digital media, whose economic value is significantly affected by copyright. Developing countries in particular have reputations for lax enforcement of copyright. In 2004 the Motion Picture Association of America claimed ninety-five percent of the DVDs sold in China were bootleg copies, resulting in losses of $280 million to U.S. film studios. See Hollywood Tells China to Raise Commitment to Fighting Piracy, WALL ST. J., May 23, 2005, online ed. The U.S. has brought this concern to bear on the negotiation of foreign trade policy hoping thereby to provide greater protection abroad for the economic potential flowing from the international appetite for U.S. technology and entertainment. See Edmund Andrews, Piracy Move on China Seen as Near, N.Y. TIMES, April 7, 2007, at Bus. § 1.

89 See 1 Stat. 124 (1790).
91 U.S. CONST. art. I, §8, cl. 8.
93 See id., §§ 107, 108.
homosexual men than with heterosexual men—have never been considered copyrightable works in the U.S.\textsuperscript{94}

Copyright’s malleability has generated and accommodated jousting among the producers of various forms of creative work—e.g., photography, sound recordings, and computer programs— for inclusion under its mantle. Most recently, the apparel industry has sought protection under at least the fringe of copyright through a bid to amend the Copyright Act by carving out a sui generis three-year copyright term for original fashion designs.\textsuperscript{95} This legislative foray by clothing designers auspices similar efforts, whether in the judiciary or legislature, by the closely allied perfume industry, to promote copyright protection for manufactured fragrances.

2. Authorship and the Creation of Perfume

A. Eligibility Requirements under U.S. Copyright Law

The U.S. Copyright Act offers protection to “original works of authorship fixed in any tangible medium of expression.”\textsuperscript{96} Manufactured fragrances handily meet the statute’s minimal originality requirement as interpreted by the Supreme Court that the work in question originated with the author himself, and that it “possesses at least some minimal degree of creativity.”\textsuperscript{97} The fixation requirement reflects the limiting term “writings” in the copyright enabling clause of Article 1 of the Constitution.\textsuperscript{98} The Copyright Act defines a “fixed” work as existing in a tangible medium that is “sufficiently permanent or stable … for more than transitory duration.”\textsuperscript{99}

While scented molecules are invisible, intangible, and evanescent, the media in which they are fixed—e.g., liquids, waxy solids—are visible, palpable, and durable. Permanence and transience are relative states—a fact well known particularly to archivists bedeviled with preserving copyrightable information recorded on now-obsolete media (e.g., piano rolls, Beta videotape, large floppy computer disks). A copyright claim for fragrance should not fail on grounds of imperceptibility or impermanence given that

\textsuperscript{94} Others have raised the question whether the history of intellectual property law indicates a bias favoring areas of intellectual productivity traditionally associated more with men than with women, rightly suggesting that the matter warrants further consideration. See Kal Raustiala & Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 VA. L. REV. 1687, 1775 (2006).


\textsuperscript{96} 17 U.S. C. § 102 (a) (2000).


\textsuperscript{98} The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. U. S. CONST. art. I § 8, cl. 8.

\textsuperscript{99} 17 U.S. C. § 101 (2000). This purposefully broad definition has accommodated the extension of copyright to works in widely ranging media—like motion pictures and stuffed animals—that the Framers did not likely contemplate when they used the term “writings.” “…As our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated.” Goldstein v. California, 412 U.S. 546, 563 (1973).
the substance – typically liquid of which alcohol is a significant portion -- that encapsulates a scent and releases it through evaporation, can exist in an essentially stable state for years.\textsuperscript{100} More permanent still are verbal texts or audio recordings documenting the means of re-creating the perfume that could be used to establish fixation of the work.\textsuperscript{101} 

Whether a perfume may be a “work of authorship” is a more subtle question than whether it may be fixed or original. The fact that fragrance is not among the items on the copyright statute’s list of works of authorship eligible for protection is not, however, dispositive on this question.”\textsuperscript{102} The legislative history of the U.S. copyright statute -- the 1976 Act -- indicates Congress intended this list to be illustrative, not exhaustive; the language is purposefully vague so that new genres of creative work may be protected by copyright even though the statute does not identify them.\textsuperscript{103} Accordingly, consideration of the creative process by which perfumes are created will best inform us as to whether manufactured fragrances should be considered “works of authorship.”

B. Role of the Perfumer

Perfume is still freighted with feminized imagery, the result, in part, of the boost during the nineteenth century in personal and domestic hygiene in which women played the leading role.\textsuperscript{104} Musical and graphical works that alluded to perfume making have long depicted this enterprise as a lighthearted undertaking for pretty young women.\textsuperscript{105} An accurate representation of the creation and manufacture of perfume today would look rather different.

\begin{footnotesize}
\begin{footnote}{\textsuperscript{100} See Osmothèque, \textit{supra} note 34.}
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\begin{footnote}{\textsuperscript{101} Malla Pollack has argued that culinary creations should qualify for copyright protection, and draws an analogy between recipes and notated scores that are intermediate fixations of copyrightable musical works. \textit{See} Malla Pollack, \textit{Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake}, 12 CARDOZO L. REV. 1477, 1499 (1991).}
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\begin{footnote}{\textsuperscript{102} U.S. Copyright Act § 102(a), 17 U.S. C § 101 (2000).}
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\begin{footnote}{\textsuperscript{103} The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that the subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.}
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\begin{footnote}{\textsuperscript{104} \textit{See}, e.g., \textit{Martha Verbrugge, Able-Bodied Womanhood; Personal Health and Social Change in Nineteenth-Century Boston} (1988); \textit{The Nineteenth-Century Woman: Her Cultural and Physical World} (eds. Sara Delamont and Lorna Duffin) 1978.}
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\begin{footnote}{\textsuperscript{105} E.g., Jacques Offenbach’s \textit{opéra comique La Jolie Parfumeuse} (1873); Pre-Raphaelite paintings by E.A. Abbey and John William Waterhouse (\textit{see Barillé, \textit{supra}} note 29, at 98). The development of the “still room” (i.e. distillation room) in affluent households in Europe, beginning in the sixteenth century, played a role in the gendering of perfume. “The task of making home remedies, fragrant waters, perfumes, cosmetics, scented soaps and candles, moth repellants and pot pourri, was carried out by the ladies of the household.” \textit{Julia Lawless, The Fragrant Garden} 69 (2005).}
\end{footnote}
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Some perfumers of a romantic cast have little formal education in the sciences. Often they are autodidacts whose honed olfaction is a result of their enjoyment of fragrances, and who rely more on their impressions of the results of informed trial-and-error in mixing essential oils than on predictions grounded in an understanding of the molecular structures of odors. Most perfumers today, however, work in teams for large firms like Givaudan and Firminich. Men and women create perfumes; many fragrance creators are chemists; and most perfumers also create flavors for food products and scents for domestic and industrial products like deodorizers and detergents.

With respect to attribution, perfumes are akin to literary works from Medieval and Renaissance eras. Literary texts from these times often have anonymous authors, or their authorship is ascribed to a sponsoring king, or fictional muse. Today, a broad range of once-obscure fragrance essences is available anywhere thanks to advertising and sales via the internet and relatively inexpensive shipping. Hence, “bespoke” perfumes, once a nearly risible affectation and luxury, are now available to anyone, and not particularly expensive.

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106 L’Occitane’s founder, Olivier Baussan is one of these improvisatory perfumers. See supra note 120. So is Blaise Mautin, who works independently out of his studio in Paris, creating bespoke perfumes, in particular for the Hyatt Corporation that deploys them in its priciest hotels. See http://paris.vendome.hyatt.com/hyatt/hotels/index.jsp.

107 Retail consumers of “Diorissimo”, for instance, neither know nor care that the fragrance was created by Edmond Roudnitska – the most prominent French perfumer in the first half of the 20th century. The consumers’ principal concern is that they are purchasing a product made by Dior, whose role is analogous to that of a publisher. The purchaser of a book or audio recording, on the other hand, is more concerned with the ascribed author or performer than with obtaining the output of a particular publisher.

108 “Perfumery used to be a male preserve, but in recent years... the proportion has gone to fifty-fifty and many of the world’s most successful perfumers ... are women.” Luca Turin, The Secret of Scent 11 (2006).

109 See Richard Posner, Law and Literature 381 (rev. ed. 2003). Beowulf is perhaps the best-known anonymous literary work. In the late 18th century, Louis XV’s perfumers created a new fragrance daily that particularly suited the King, and that he permitted no one else to wear. See I. Lazennec, Manuel de Parfumerie 9 (2nd ed., 1928). Nearly two centuries later the perfumer Lorenzo Villerosi created a perfume for the exclusive use of a latter-day Marie Antoinette, Jacqueline Kennedy. See Barille, supra note 29, at 129. After Queen Victoria visited Grasse, she is said to have perfumed the air of Buckingham Palace during festivities with a proprietary fragrance created just for that purpose. Queen Elizabeth II does not maintain this practice, but she does occasionally scent rooms at Buckingham Palace using commercially available aerosol air fresheners produced by suppliers like Floris, who hold the Royal Warrant. See e-mail from Edward Griffiths, Deputy Master of the Household, Buckingham Palace, (May 10, 2007, 03:51 BST) (on file with author).

108 See generally Julia Szabo, The Home Front: A Nose With an Eye, N. Y. Times, April 1, 2001, at F 6. This trend in the creation or “authorship” of perfume is an instance of “mass customization” – a phenomenon that economists Robert Frank and Philip Cook have discussed in the context of other commodities like clothing, recorded music, and even beer. Robert Frank & Philip Cook, The Winner-Take-All Society 45 (1995). Briefly, “mass customization” alludes to the fact that while modern industrial technologies have led to mass production of uniform goods, recent innovations – particularly in information and communications technologies – make it possible to purchase a somewhat personalized commodity: “build your own car;” “create your own pair of jeans;” “compose your own fragrance.” Increasingly, businesses too are commissioning “signature” fragrances with which they “brand” the air of their public spaces. The purpose of these fragrances is not to camouflage malodor, but rather to serve as an olfactory trademark that consumers will come to associate with a particular restaurant, hotel, or even housing development. Blaise Mautin’s bespoke fragrance for the Hyatt Hotel at the Place Vendôme is an
Despite blended attribution now often associated with bespoke fragrances, the perfume market is still rife with the equivalent of ghost-writings. It is doubtful Liz Taylor or Michael Jordan is attuned to the different notes of amber and vetiver, let alone the molecular structures of aldehydes and ketones. As is increasingly common with movie and athletic stars, however, their names are allied with perfumes – and often other products as well, especially clothing -- much as those of sponsoring royalty and inspirational muses were ascribed to literary works of earlier eras.\(^{111}\)

In recent years, however, there has been a trend among a growing number of perfumers to have their names prominently displayed on their creations.\(^{112}\) The French perfume seller Frédéric Malle refers to himself as a “publisher of fragrances,” and his line of products as “Editions de Parfums.”\(^{113}\) Those claiming that perfumes are original works of creative intellection worthy of copyright protection -- like symphonies and literary works -- would find support for their position in Malle’s publishing analog, and perhaps even more so from perfumery’s long-standing cooption of music terminology.\(^{114}\)

The Victorian art and literary critic Walter Pater famously asserted: “… all art constantly aspires towards the condition of music.”\(^{115}\) The application of musical

irresistible blend of vanilla and musk notes that captures the hotel’s voluptuous atmosphere as well as its princely location in Paris. See supra note 104. In creating a fragrance for the Park Hyatt in Zurich, Mautin used bracing astringent notes that would particularly appeal to business travelers in a country vaunted for orderliness. Mautin works alone in a studio in his apartment in Paris near the Arc de Triomphe. Before creating a perfume he becomes acquainted with the location or individual for which it is being created, like an architect or designer who becomes personally familiar with the location and space on which he is working. Using information gathered on these visits, and in cooperation with the commissioning party, he develops a heuristic verbal brief describing the proposed fragrance and the ambiance it is meant to evoke. He then settles down at his orgue de parfum and improvises until he achieves a combination of scented notes that best reflect the spirit of the brief. See conversation with the author (Dec. 22, 2006). See also, Blaise Mautin, Parfumeur, http://www.blaise-mautin.com/. Dana Thomas discusses the evolution of perfume trends, quoting Hermès’s “nose” Jean-Claude Ellena: “In the beginning of the twentieth century, perfumery was more figurative. It was floral bouquets … [n]ow we are in narrative: the perfume tells a story … next, perfume will be olfactive: you will be able to smell a place. Like Un Jardin sur le Nil. You can smell the souk, the mango groves, the heat, and the dry desert. You will travel with perfume…” Dana Thomas, DELUXE: HOW LUXURY LOST ITS LUSTER 158 (2007).

\(^{111}\) These include Elizabeth Taylor’s “Passion” and Michael Jordan’s eponymous scent.

\(^{112}\) The fashionable fragrances of British perfumer Jo Malone, for instance, are all labeled simply “Jo Malone”, and the same is true for those of Blaise Mautin. See Jo Malone, London, http://www.jomalone.com/. On Blaise Mautin see supra note 108.

\(^{113}\) See Editions de Parfums, Frédéric Malle, Paris, http://www.editionsdeparfums.com/mallesite_gb/index.htm. Malle gives his perfumes fanciful names like “Angéliques sous la pluie” (“Angeliques Kissed by Rain”) but he presents these as a publisher would the titles of literary or musical works, with the perfumer prominently identified as the author.


\(^{115}\) Walter Pater, THE RENAISSANCE; STUDIES IN ART AND POETRY, 140 (1899). The belief that music is the most sublime of the arts was particularly prevalent in Pater’s time, reflecting reverence toward the great works of nineteenth-century German musicians, Wagner in particular. See Ruth Solie, “Music in their larger soul”, George Eliot’s “The Legend of Jubal” and Victorian Musicality, in THE FIGURE OF MUSIC IN NINETEENTH-CENTURY BRITISH POETRY 123. (Phyllis Weliver, ed., 2005). See also JOHN J. CONLON, WALTER PATER AND THE FRENCH TRADITION 127 (1982). Perfumery’s use of musical vocabulary pre-dates
the Victorian period. On what could have been the eve of his execution Jean-Louis Fargeon -- perfumer to Marie-Antoinette -- analogized his life to a properly composed perfume using, in turn, the metaphor of a well-ordered musical composition. “…I have ordered my entire life as I ordered my scented compositions. First one strikes a chord in the major mode before letting escape head notes which then rush forward -- foolishly, lively, and impatiently like youth. Middle notes (“notes de coeur palpitent”) follow -- sweet, accomplished and vibrant like the full realization of a personality. Finally, heavy, lasting, and tenacious, the bass notes sound…” DE FEYDEAU, supra note 29, at 15.

116 Elisabeth Barillé notes the popular French writer Didier Decoin’s observation on this point: “[s]ometimes I spend long hours assembling the words which will enable me to reproduce the tantalizing fragrances you inhale when laying your cheek against that of a young girl in a garden in summer. In actual fact, it is probably easier to describe the great Cornelian agitation of the soul than the simple scent of a violet.” BARILLÉ, supra note 29, at 10.

117 Novelist Patrick Süskind depicts this experience when presenting Baldini’s perfume shop, in which Süskind’s protagonist Grenouille apprenticed:

…The result was that an indescribable chaos of odors reigned in the House of Baldini. However exquisite the quality of individual items … the blend of odors was almost unbearable, as if each musician in a thousand-member orchestra were playing a different melody at fortissimo. Baldini and his assistants were themselves inured to this chaos, like aging orchestra conductors (all of whom are hard of hearing, of course).

SÜSKIND, supra note 38 at 47.

118 These terms are, of course, part of music’s vocabulary as well. See generally, THE NEW HARVARD DICTIONARY OF MUSIC (Don Randall, ed., 1986). The number of “notes” in perfume organs increased dramatically with the addition of synthetic fragrances in the 19th century. During the same century pipe organs underwent significant development through the introduction of electric-powered mechanisms and the addition of evocative stops -- begging to be pulled -- like jeu de clochette (little bells) and effet d’orage (thunder). There is a photograph of a modern perfume organ at the Parfums Molinard website: http://www.saveursdumonde.net/belle/parfum/composition.htm. Many sources discuss the use of musical terminology in describing the process of creating a perfume. Cathy Newman makes musical allusions throughout her book Perfume: The Art and Science of Scent (1998); Edmond Roudnitska uses musical terms in describing the process by which he creates a new fragrance (see EDMOND ROUDNITSKA, L’ESTHÉTIQUE EN QUESTION; INTRODUCTION À UNE ESTHÉTIQUE DE L’ODORAT 199 (1977)); French patent attorney Pierre Breese notes common use of the expression “faire des gammes” (practice scales) in perfumery, as well as the development of identifiable personal styles by successful “noses” (see Pierre Breese, Une Fragrance Constitue-t’elle une Oeuvre de l’Esprit Protégée par le Droit d’Auteur?; http://breese.blogs.com/pi/files/parfum_droit_dateur.pdf [on file with author]).

119 See ROUDNITSKA, LE PARFUM (1996), at XXX. Roudnitska notes that the harmonies of a musical work are heard sequentially while those of a perfume are inhaled simultaneously. See id., at 38. Jean-Baptiste Grenouille, Patrick Süskind’s sinister protagonist in Perfume, develops the olfactory equivalence of perfect pitch that enabled him to create perfumes -- just as Roudnitska suggests -- without working at all with
Like the 20th-century French composer Olivier Messiaen, the 20th-century French perfumer Roudnitska was deeply attached to nature, albeit more to flora than fauna. At the same time Messiaen was striving to incorporate birdcalls into his music Roudnitska was conjuring with artificial fragrances the elusive perfumes of flowers not tractable to techniques like distillation and enfleurage.

One finds promiscuous use of descriptive musical terminology across disciplines and industries, but the curious coincidences between the processes of writing a musical work and creating a perfume are unusually numerous and striking. The intangible and

fragrant essences. See supra note 38. Skilled musicians can create music without access to a piano or other musical instrument. Even as a child Mozart wrote music in bed; Jacques Offenbach had a desk installed in his carriage so he could work on his **opéras bouffes** while dashing among theaters in Paris. See **MAYNARD SOLOMON, MOZART; A LIFE 39 (1995); JAMES HARDING, OFFENBACH; A BIOGRAPHY 98 (1980).**

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See generally, **JOCELYNE & JEAN-PAUL LE MAQUET, SOUS LE SIGNE DU PARFUM: EDMOND ROUDNITSKA, COMPOSITEUR-PARFUMEUR (1991).** Olivier Messiaen is the best known of many musicians who have attempted, since time immemorial, to incorporate birdcalls -- and other sounds heard in natural landscapes -- within their works. See [Hear], e.g., Messian’s *Le Réveil des oiseaux; Catalogue d’oiseaux; Fauvette des jardins.* Earlier well-known instances of musical works featuring birdcalls include Beethoven’s *Symphony No. 6 in F, Op. 68 (“Pastoral”)* and Haydn’s *String Quartet in D, Op. 65, No. 5 (“The Lark”).* According to Roudnitska, a fine perfume, like a well-wrought work of music, is the result of imaginative new note combinations. The creation of these is possible only by one grounded in the fundamental qualities of these notes and their relations to one another.

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**ROUDNITSKA,** *Le Parfum* (1996) at XXX.

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**J** For some, *Diorissimo* will be a striking evocation of lily-of-the-valley; for others – more numerous – it will be a decidedly floral note but above all a fresh, green composition which, in a more general fashion, following nature, suggests the woodland, streams, etc. We are, in fact, in the presence of an olfactory arabesque which has taken as its initial inspiration, not only the fragrance of lily-of-the-valley, but also its accompanying natural context, creating an imaginary and personal framework. … The composer has effectively created in the abstract, like an initial leitmotiv, an idealized evocation of lily-of-the-valley … Even in this case, the perfume is a pure work of intellect; the odor itself [the naturally occurring fragrance of lily-of-the-valley] becomes accessory, a simple tool like the chisel of a sculptor.

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120 See generally, **JOHNNY & JEAN-ROBERT LE MAQUET, SOUS LE SIGNE DU PARFUM: EDMOND ROUDNITSKA, COMPOSITEUR-PARFUMEUR (1991).**

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121 See **MAYNARD SOLOMON, MOZART; A LIFE 39 (1995); JAMES HARDING, OFFENBACH; A BIOGRAPHY 98 (1980).** 122 One finds recently a strain of perfumery whose ethos resonates with that of the “Early Music” and “Period Instrument” movements. “Early Music” and the related “Period Instrument” are terms associated with the study of music written prior the “Common Practice” period (J.S. Bach to Debussy) and the performance of this – and later – music using instruments and techniques used at the time the music was written. Olivier Baussan founded l’Occitane in the 1970s brewing a home-made stew of flowers in a copper still he bought for forty dollars. The aura l’Occitane’s publicists cultivate is that of a company that capitalizes on naturally occurring plant properties rather than on science and technology. According to its website, l’Occitane uses traditional production methods and no animal byproducts; shopping bags are made
elusive qualities of the forms by which both music and perfume are ultimately conveyed and perceived -- sound waves; scented molecules -- further relates these two arts. Moreover, unlike wine, haute cuisine and couture, perfume, like music, has no practical use other than to provide aesthetic enjoyment.

In light of the foregoing discussion it appears that works of fragrance satisfy statutory requirements to be eligible for copyright protection in the United States. They can be original; they can be fixed; and the practices and writings of some of the greatest perfumers persuasively argue that perfumes are aesthetic works that result from the application of personal intellect and imagination on the part of their creators. As such, they can be considered works of authorship. Our perception of perfume, however, is very different from our perception of copyrightable visible and audible works. This difference raises the question whether perfume is not only created but also perceived as a work of copyrightable expression.

from algae removed from canals in Venice as part of pollution reduction efforts there. See L’Occitane en Provence, http://usa.loccitane.com/our_philosophy/respect.asp (last visited June 14, 2007). The same is true of Aveda, the cosmetic company founded in Minneapolis by a hairdresser with a commitment to environmentalism. Aveda’s chief perfumer, Koichi Shizozawa acknowledged that using only naturally occurring raw materials in creating perfume is akin to playing only the white keys of a piano. See Doreen Carvajal, Personal Business; Whiffs of Combat Waft Over Natural Cosmetics, N.Y. TIMES, Aug. 12, 2006, at Bus. § 1.

123 “Music to Your Nose,” claims a print advertisement for Bond No. 9’s “West Side” appearing in the May 2007 Playbill for the American Ballet Theatre at the Metropolitan Opera House. “You’ve heard the West Side – Now Smell It. (Bond’s No. 9’s West Side, That Is).”

124 Manufactured fragrances may have practical, useful, and industrial applications. See infra, note 147 and accompanying text. The more a perfume is refined, and costly, however, the less useful it is likely to be. Some might argue that even musical works can be useful. Like fragrances, however, the more refined the music the less useful it is. With due respect to the U.S. Marine Band, musicologists in general do not consider the marches of John Philip Souza musically significant works, but they were enormously popular and useful in rousing patriotic sentiment among soldiers during WW I. See “John Philip Souza,” NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS (1980). In a more sinister vein, in their efforts to “break” prisoners at Abu Ghraib and Bagram Air Base, the U.S. military tortured them with “heavy metal” songs played at high volume. See TAXI TO THE DARK SIDE (Jigsaw Productions 2007).

125 The same catholic view of authorship, however, could be argued for flower arrangements, potpourri, hairstyles, ornamental gardens, the “choreography” of firework and water fountain displays, tableaux vivants and similar works -- none of which are currently copyrightable in the United States. Patrick Blanc, a botanist and designer working in France, claims copyright in his “botanical tapestries” – essentially gardens on a vertical rather than horizontal plane – but is flattered by those who use the same concept as long as their arrangements of plants are not identical to his. See Kristin Hohenadel, All His Rooms are Living Rooms, N.Y. TIMES, May 3, 2007, at F1. Water fountain performances and tableaux vivants, along with firework displays, were integral to the musical and dramatic performances for Baroque nobility – and are particularly associated with the theatrical monstrosities of the court of Louis XIV. These pastimes remained popular up through the early 20th century, and practitioners of these curious arts still emerge each summer to delight audiences at places like Longwood Gardens in Kennett Square, Pennsylvania and “Pageant of the Masters” in Laguna Beach, California. See Longwood Gardens, http://www.longwoodgardens.org/; Pageant of the Masters, http://www.fairport.com/site/overview_pom.asp. We refer to the “playing” of fountains, as we do the “playing” of an instrument. Indeed, the first pipe organs were water-powered and vestiges of this technology can still be found, for instance, in the restored 16th-century water organ at the Villa d’Este near Tivoli.
3. Perception of Perfume and Copyrightable Expression

Copyright law in the Netherlands and France is grounded in the philosophical underpinnings of “author’s rights” that champion the interests of individual creators in maintaining perpetual dominion over their creations as manifestations of their personalities.\(^\text{126}\) Given that the work of a perfumer is strikingly evocative of that of visual artists, writers, and musicians, it is not surprising that courts in these “author’s rights” countries have found perfume copyrightable by emphasizing the perfumer’s role in the creation of an original fragrance. Examining the question of perfume’s copyrightability more from a user-oriented Common Law perspective, however, extending copyright protection to fragrances – and to other works perceived by our chemical and tactile senses – places in more dubious light the pro-copyright positions recently promulgated by the French and Dutch courts.

The creation of a fine fragrance requires the application of intellect, knowledge, taste, and imagination on the part of its creator. Fragrances – and flavors -- do not, however, require the direct engagement of these same attributes to be perceived and appreciated. The perception of perfume may stimulate the recognition and appreciation of the intellectual effort deployed in its creation. This recognition and appreciation is so much more generalized than it is in the perception of copyrightable works in all other media, however, that it provides little support to the argument for copyright protection for fragrances.

Like pharmaceuticals, perfumes and flavors require for their creation a sophisticated understanding of their chemical components that allows one to combine elements in imaginative new ways. Our perception of pharmaceuticals is akin to our perception of perfumes and flavors in that we typically receive these substances via our chemical senses of taste and smell, and perfumes and flavors, like pharmaceuticals, trigger responses that are primarily somatic rather than intellectual. When we ingest or inhale a drug we recognize and appreciate our physical reaction to it. This recognition and appreciation does not, however, depend upon our interest in, or understanding of, the skillful work of the chemist who designed the formula to which our bodies react. Our recognition and appreciation of drugs is linked, rather, to perception of our physical reaction to its interaction with our bodies. The same is true for perfume.

Human olfaction is relatively crude, and even perfumers perceive and describe fragrances – regardless of the complexity of their chemical structure -- only in broad terms like “floral” and “musky”.\(^\text{127}\) These categories may comprise a practically infinite number of instantiations just as do the categories “mystery” and “romance” for fiction, or

\(^{126}\) See Goldstein, supra note 15.
\(^{127}\) It is because our senses of olfaction and taste are relatively blunt that those who use extravagant metaphors to describe perfumes and flavors – particularly those of wines – are easy targets of ridicule. See supra note 25 and accompanying text. “A wonderfully irreverent test of … color deception even conned French wine experts. When the experts were given a white Bordeaux that had been adulterated with red food coloring to taste, they described it exactly as they would a fine red wine. And when the same white wine was given to them without any added coloring they used all the descriptors they normally reserved for a lovely white Bordeaux.” Rachel Herz, The Scent of Desire 56 – 57 (2007).
“classical” and “jazz” for music. A work is copyrightable, however, only if – and only
the extent to which – those who come into contact with it perceive it within a generic
category as the expressive work of a particular creator. The lack of olfactory acuity
underlying the verbal imprecision associated with fragrance, however, makes it
impossible for the ordinary consumer, let alone a fragrance expert, to segregate two or
more scents into anything more than unprotectable broad descriptive categories.128

 Manufactured perfumes require intellecction for their creation, but not for their
perception or appreciation, which are purely instinctual activities. This attribute of these
chemically perceived works underlies the argument that, regardless of the mental effort
invested in their creation, perfumes ought not to be considered copyrightable like works
of authorship perceived through our senses of sight and hearing. The fixed product of
mental effort should be eligible for copyright protection only if there is a reasonably
accurate perception of the creator’s original efforts by those perceiving works that are the
product of them. The imprecision of human olfaction – and the swift onset of fatigue
associated with this sense -- makes impossible for fragrances the meaningful
determination of two related issues that are fundamental to copyrightable works: the
scope of the protected work; and the constitution of an infringing work.

 Copyright’s economic and psychic incentives for creative work depend upon the
ability it provides to prevent others from copying one’s work. This ability, in turn,
depends on the copyright holder’s capacity to provide convincing evidence of substantial
similarity of copyrightable elements between his and the purportedly infringing work.129
Whether the copyrightable elements of two works are substantially similar is ultimately
determined by ordinary members of the work’s intended audience or market.130

 The application of gas chromatography to analyze scents has made possible
graphical representation of a scent’s molecular distribution.131 Seemingly identical
molecular “snapshots” of two fragrances, which are produced by gas chromatography,
are probative on the question of substantial similarity between the fragrances, but the
slightest variation between the molecular structures of two compositions may produce
very different scents.132 Also, most perfume is meant to be worn on the body, and it
interacts chemically and idiosyncratically with the skin, perspiration, and hair of each
wearper, producing somewhat different fragrances.133 Thus, two individuals may apply
the same perfume, but having done so, exude slightly different ones.134 Apart from the

128 Like three blind men describing an elephant, humans may correctly perceive different characteristics of
a perfume, but our olfactory ability does not permit us to synthesize the chemical components of a perfume
so that we intellectually appreciate the artfulness of its composition. Our hearing and sight, on the other
hand, are developed – and can be further educated -- to enable such synthesizes of visual and audible works.
129 See Douglas Y’Barbo, Origin of the Contemporary Standard for Copyright Infringement, 6 J. INTELL.
130 See id.
131 See supra note 57 and accompanying text.
133 See id.
134 This chameleon-like aspect of perfume is not shared with apparel and other worn accessories. We will
likely perceive differently the sillages of individuals of different ages, races, and sizes wearing the same
fact that perfumes as they are ultimately perceived are volatile, where copyright infringement is concerned, the legal issue whether one work is substantially the same as another is determined by normal human perception, not mechanical analysis.

Even if fragrances were copyrightable, no one could monopolize by copyright overarching categories like “floral” or “spicy”. Making one of these groups proprietary would have an inhibiting effect on innovation in the fields of scent and flavor creation. Because most humans perceive perfumes and flavors simply as “spicy”, “floral”, etc., and not as specific molecular compositions, the copyright for any “spicy” or “floral” perfume or flavor would have the potential effect of allowing the copyright holder to monopolize an entire genre of works. ¹³⁵

By the same token, the relative lack of olfactory acuity in humans, and our inchoate perception and description of scent, would render copyright registrations for fragrances essentially worthless. No one would be allowed to monopolize through copyright a genre of fragrance, yet the typical -- and even expert -- perfume fancier perceives fragrance only in generic terms. The fact that gas chromatology may indicate that two fragrances have similar molecular structures is irrelevant on the question of substantial similarity between competing works. This is because the typical consumer -- whose reaction ultimately determines whether copyrightable portions of two works are substantially similar -- can, at best, place both in the same unprotectable generic category. ¹³⁶

PROTECTING PERFUME AND PROMOTING INNOVATION IN THE FIELD

Trade Secret, Patent, and Trademark

Throughout the history of copyright lawmakers have expanded the scope and term of its protection to foster the production of works of new technologies. ¹³⁷ Perfume, on the other hand, if these individuals wear the same suit we can immediately discern the identity of the apparel design despite the significant differences in the wearers’ appearances. ¹³⁵ Under copyright’s “merger” doctrine if the range of potential expression of an idea is limited, expression and idea merge, and therefore works expressing this idea are not copyrightable. See Nimmer on Copyright § 2.18 (2007).

¹³⁶ An analogy to color is useful in this context. An original tint of paint may be the result of creative intellectual effort involving careful combination of dyes reflecting many colors of the spectrum. The ordinary consumer, however, who perceives the particular hue of the skillfully mixed paint, will identify and describe it in generic terms, and not as the finely calibrated combination of dyes that comprise it and distinguish it from all other paint shades. Colors are not copyrightable any more than are individual words or musical notes; they are protected only insofar as they have been incorporated into an original visible work that is created, and directly comprehended and describable, through human intellect. If the creator of the paint color were to draft a verbal text relating the means of creating the color this text might qualify for copyright protection as a literary work. Even if this text could generate in the mind of the reader an accurate mental image of the particular color, however, the color itself is not protected by copyright because we do not perceive it as an author’s expression unless it is combined with other colors in such a way that we identify this combination of colors with its creator.

¹³⁷ These expansions have strained, at times, normative understanding of what constitutes an expressive work -- e.g., computer programs as literary works. See supra note 90.
however, is not the product of a new technology that might indicate a need to consider new means of protection under copyright law. It is, rather, the product of a profitable industry that has thrived despite the more limited protection available to it through trade secret, patent, and trademark law.  

In his novel Perfume, Patrick Süskind depicts the secretive world of the eighteenth century perfumer. Then, as now, the appeal of a new perfume was unpredictable, and this market was particularly vulnerable to changing tastes and the imperative to be au courant. The enterprise of Giuseppe Baldini -- the hapless and superannuated perfumer of Süskind’s novel -- is failing because his customers have abandoned him for a more talented perfumer whose “Amor et Psyche” has taken Paris aristocrats by storm. Baldini attempts to analyze “Amor et Psyche” hoping to capitalize on its popularity by producing and selling it himself under a different name. Baldini’s attempt to reverse engineer Pélissier’s perfume fails, but Süskind’s protagonist, Jean-Baptiste Grenouille, saves Baldini’s livelihood by applying his olfactory genius to dissecting the perfume and then improving it to such an extent that the result “…was to ‘Amor and Psyche’ as a symphony is to the scratching of a lonely violin.”

Süskind’s Grenouille is entirely fictional; one would need superhuman olfaction to be able to analyze and reproduce a complex perfume like “Amor and Psyche”. Its creator, therefore, could protect his work from copyists and imitators simply by keeping secret the ingredients and methods by which the perfume was produced. Control of trade secrets -- and prosecution by proprietors of them against those who obtain and use them illegally -- remains a viable means by which fragrance manufacturers -- and other industries, like pharmaceuticals -- protect their products from competitors.

New technologies, gas chromatography in particular challenge trade secret’s efficacy to provide to perfume creators and producers the level of protection upon which they previously relied. Gas chromatography and mass spectrography analyses identify the presence and mass of molecules in a scent. Those molecules, however, likely include

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138 In 2006 the U.S. fragrance market grew by 2.9% to reach a value of $6.7 billion. See MARKETLINE BUSINESS INFORMATION CENTRE, FRAGRANCES IN THE UNITED STATES (2006) available at http://dbic.datamonitor.com. Forecasts for this market indicate a 14% increase over the 2006 value by the year 2011. See id.


140 Id., at 85. Süskind uses many musical analogies in his novel, and this example of one-upmanship in perfume composition was likely inspired by remarkable instances of this practice in music. Beethoven, for instance, wrote his Diabelli Variations to demonstrate his ability to transform a pedestrian theme into a great work -- archly referring to his work as “transformations” (Veränderungen) rather than the more customary “variations” (Variationen) by which the work ultimately became known. See WILLIAM KINDERMAN, BEETHOVEN’S DIABELLI VARIATIONS 5 (1989).

141 Or, perhaps subhuman olfaction. See supra note 75 and accompanying text.

142 Over a century ago, perfume historian Septimus Piesse deplored the secrecy of this industry. “As art, perfumery will not rise to the height it should attain because those who benefit from it commercially are so secretive about their procedures. No industry that operates under a veil of secrecy can advance or take a position of any general importance. I would suggest following the path of physicians from Ancient Greece who, every year, inscribed in the temple of Asclepios all the cures they had made and the means by which they were created.” SEPTIMUS PIESS, HISTOIRE DES PARFUMS 27 (1905).

143 See supra note 57
“captives”, which are patented. Perfume itself is now one of the 450 active classes that the Government has identified as patentable products and processes. The 450 classes comprise an astonishing array of products and processes ranging from “abrating” to “x-ray,” but all products and processes within these classes must meet the same fundamental requirements of utility, novelty, and non-obviousness to be patentable.

A newly created fragrance – i.e., not naturally produced by a flower or tree – may be novel and non-obvious, but its utility is less apparent. A utility claim for a fragrance that masks the ghastly odors of workplaces associated with animal slaughter or sewage would appear irreproachable. Many also find useful air fresheners that mask disagreeable odors associated with bathrooms and basements with a stronger chemical fragrance. But one finds among scented products that have been recently issued patents more speculative utility claims involving, for instance, “psycho-sedation” (aromatherapy) and the enhancement of the “physical and spiritual health” of the wearer of fragrant undergarments.

Different scented products have varying levels of utility determined by their applications. A fragrance that might make bearable an unspeakably malodorous workplace is more useful than one used to counter domestic cooking odors which, in turn, is arguably more useful than a perfume worn purely for the wearer’s delectation and that of those in close physical proximity to him or her. The more a fragrance’s purpose is

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144 See supra note 35.
145 See OFFICE OF PATENT CLASSIFICATION, U.S. PATENT AND TRADEMARK OFFICE, MANUAL OF PATENTS CLASSIFICATION (April 2007) available at http://www.uspto.gov/web/offices/opc/. There are 450 active classes, but class numbers on the current classification list go as high as 987; Class 512 is “Perfume Products. Id.
147 The patent statute is succinct on utility and patentability: “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore…” 35 U.S.C. §101. In practice, the question of utility is a factual matter determined by courts and other legally recognized fora for dispute resolution. In 1950, reviewing the utility claim for “Airwick” air freshener, the Patent Office Board of Appeals determined that the acceptable standard of utility for air fresheners, deodorants, and perfumes was lower than that for medicines. See Ex Parte Paschal, 88 U.S.P.Q. 131, 133 (1951). Despite the fact that it was unclear how these products affected humans, the fact that they did was sufficient to establish utility given that no harmful effects had been associated with them. See id. See also, Antoinette Konski, The Utility Rejection in Biotechnology and Pharmaceutical Prosecution Practice, 76 J. PAT. & TRADEMARK OFF. SOC’y 821 (1994).
149 Wearing fragrance to compensate for sketchy personal hygiene may be useful to both wearers and those with whom they are in contact, but this is never advertised or promoted as an intended use by the perfume’s creator or manufacturer. The appeal and economic value of a perfume are actually enhanced by its lack of utility. Lysol underscores the utility of its stolidly named aerosol “Air Sanitizer” as an economical and effective product to control “bathroom, pet, garbage, and diaper odors”, whereas Patou fosters an attitude of hedonic and heedless extravagance in advertising “Joy” as “the costliest perfume in the world.” Economist
to mask an undesirable odor -- rather than to enhance an unscented environment -- the more useful it is.\textsuperscript{150}

Given the speculative nature of perfume’s utility (seduce? inspire? soothe?) and the potential derogation associated with unadvertised pedestrian uses of it -- cover body malodor or provide a protective halo in locations of olfactory peril, like subway cars in the summer -- creators of perfumes intended for purely aesthetic application do not typically seek patent protection for their products.\textsuperscript{151} Apart from the fact that the claimed purpose for a perfume typically would not satisfy patent law’s usefulness requirement, a patent would provide only twenty years of protection, and would require the applicant to divulge the perfume’s formula to the public.\textsuperscript{152} Some evergreens like “Shalimar” remain popular for decades, and some perfumes are re-launched after a period of market dormancy.\textsuperscript{153} Thus, even if a perfume were patentable, given the unpredictable market lifespan of a new release, trade secret may be as effective as patent law in protecting a successful new release from predation.

Patents provide a twenty-year monopoly on inventions, whereas registered trademarks offer a perpetual monopoly of a “word, name, symbol, or device” if the claimant establishes continual use of it in commerce, and the mark is distinctive and indicates the source of a product.\textsuperscript{154} Sounds, colors, and even fragrances have met these

\textsuperscript{150} Some fragrances, of course, serve both purposes -- like the piña colada aroma added to topical anesthetic used by dentists both to suppress the unpleasant smell of the anesthetic and also to evoke the calming image of a tropical beach.

\textsuperscript{151} Those who have spent time reading in municipal libraries will appreciate the motivation behind the Morristown, New Jersey library that successfully defended in court their expulsion of a reader whose stench prevented others from using the library in comfort. See Library Hygiene in Morristown, N.Y. Times, March 28, 1992, at A22. The Library of Congress prohibits “…interfering by offensive personal hygiene with the use of [reading rooms] by another person.” See, Library of Congress Security, http://www.loc.gov/rr/security/conduct.html (last visited June 16, 2007). On the other hand, wearing perfume in the hermetic atmosphere of the typical business office may be prohibited by an employer, or at least be considered maladaptive by co-workers. Along these lines, the Municipal Transportation Authority in San Francisco recently required the California Milk Processor Board to remove chocolate scented advertisements posted near public bus stops. See Stuart Elliott, Joint Promotion Adds Stickers to Sweet Smell of Marketing, N.Y. Times, April 2, 2007, at C5. “Nowhere, however, is the hazardous potential of aromas taken so seriously as in Halifax, Nova Scotia, where it is actually illegal to wear fragrances in public.” RACHEL HERZ, THE SCENT OF DESIRE 113 (2007).


\textsuperscript{154} Sounds, colors, and even fragrances have met these
requirements and have been successfully registered in the U.S. as trademarks. Labeling and packaging are vital to the promotion of perfume, and lawyers for perfume producers invigilate over trademarked names, logos, and bottle and package designs associated with their products. Given the limited number of colors that can be effectively used in marketing a perfume, it would not be possible to register the color of a perfume by claiming that it had acquired secondary meaning among buyers. Otherwise, the pool of viable color marks would be swiftly exhausted.


\[156\] It is possible also to protect a perfume bottle from imitations by obtaining a design patent for it. Moreover, one can register its design as a trademark for that perfume, and register a copyright for a two-dimensional image of the bottle. The velvet bags, lined boxes, gilded ribbons and cords, are meant to signify the precious contents of the glass reliquaries they cushion and wrap. The little flacons themselves are, of course, significant in marketing perfumes. The appeal of a few perfume bottles may lie in their vulgarity but most aim to attract buyers by their tasteful designs and crystal that suggest the worth and refinement of their contents and their purchasers. Jean Paul Gaultier’s “Classique” and “Le Male” and more recently, “Fleur de Male,” are presented in bottles shaped like women’s and men’s torsos, with exaggerated protuberances typical of Mattel dolls. More typical, however, is Anna Sui’s “Secret Wish” that evokes more ethereal pleasures with a demure angel figurine atop its clear glass bottle. Similarly, Patron, Guerlain, Dior, and others have used dainty designs rendered in Baccarat glass for their perfumes. Perfume bottle collections, and even little museums dedicated to them -- e.g. the Barcelona Perfume Museum, and the Fragonard Perfume Museums in Paris and Grasse -- support the notion that perfume and perfume bottles are works of art.

Perfumers like to evoke intoxication and associations with illicit psychoactive substances like opium -- a storied drug with artsy and Oriental associations -- cocaine, and absinthe, but only to a point. Terms like “crack” or “meth” – suggesting permanently unflattering penury – are unlikely ever to be found on the side of a Baccarat flask. Like manufacturers of most commodities, perfume makers name a new fragrance only after considering its potential resonance with the perfume’s targeted consumers. Names of fragrances range among fanciful words like “Sacrebleu!” (De Nicolai), more generic terms like “Beautiful” (Estée Lauder), and edgier apppellations like “Poison” (Dior) and Opium (Saint Laurent). There are perfumes named for individuals like “Coco” (Chanel) that impart an affinity with glamour and fashion, and for locations with an affluent-yet-bohemian vibe like “Riverside Drive” (Bond No. 9) and “Rive Gauche” (Saint Laurent). The names of most perfumes are not therefore, descriptive of particular perfumes but rather, in the hopeful minds of their creators, merely evocative of them. Used in commerce, these names distinguish one perfume from another, and readily meet the requirement that they indicate the source of a particular fragrance to be registered as a trademark.

\[157\] The Supreme Court has determined that a color could be registered as a trademark if it had acquired “secondary meaning” in the eyes of consumers of the product in question – i.e., used over time it came to indicate the maker of the product, and not the product itself. See Qualitex Co. v Jacobson Products Co., 514 U.S. 159 (1995). Qualitex involved an obscure product -- dry-cleaning pads -- used within a specific industry. Given these narrow circumstances, it seems unlikely that the Court’s allowance of the color trademark registration might unfairly crimp the economic opportunity of others manufacturing dry-cleaning pads by requiring them to tint their products with a color other than the particular “gold-green” used by the plaintiff. Water and alcohol are the principal ingredients in perfume, and most perfumes are naturally colorless. Manufacturers color them to make them more appealing. Unlike utilitarian dry-cleaning pads, the color of which has no bearing on the appeal of the product – other than to indicate its source – perfume, a product of no utility, relies to some extent on its color to attract buyers. There are, of course, perfumes with idiosyncratic coloring, but most perfumes are tinted a shade of gold or light amber suggestive of wealth; these hues come to mind when we think of perfume. No one would purchase a dark inky fragrance the application of which might appear to stain one’s skin or clothing.
Today it is possible not only to protect a perfume by trademark, but also to protect a non-odorous product using perfume as its trademark. In 1990 the Trademark Trial and Appeal Board determined that a “floral fragrance reminiscent of Plumeria blossoms” was a distinctive mark that identified and distinguished from other producers within the industry, the embroidery thread of the claimant Celia Clarke. The Board, noting the purposely broad language of the Trademark Statute (Lanham Act) delineating the sphere of registrable marks, agreed with the claimant’s argument that the allowance of her registration would not prevent others from registering a different scent -- like rose -- for their thread. It also noted that the registrant was the first -- and apparently only -- party in the field to use perfume to market and brand her product. Since Clarke, the Trademark Office has registered other scent marks, like a vanilla fragrance for office paper supplies. There has not, however, been a flood of claims and registrations that might have prompted reconsideration or narrowing of this decision.

Like the French and Dutch courts that found perfumes copyrightable, the Board in Clarke did not consider the relative bluntness of human olfaction compared to sight and hearing, and whether this perceptual disparity should bear on the legality of fragrances as registered trademarks. Unless one suffers anosmia, even a small quantity of the odor of natural gas, smoke, or sewage is immediately recognizable, and triggers within all of us the same alarms for survival and health. Our noses are “less educated” than they were once, however, and even professional perfumers employ not so much a native perceptual ability but rather the knowledge they have acquired through extensive exposure to, and analysis of, scents.

The citrus aroma of a madeleine triggered a lifetime of memories depicted by Proust, and recent studies suggest that scent may improve our recall of a wide range of information. The fact that scent can engender memories and associations supports the premise that fragrances can be legitimate trademarks – effectively conjuring something outside the product to which a mark is applied, a fundamental requirement for trademark protection. A viable trademark, however, depends on the specificity of the conjured association. For example, the label on a bottle of Coca-Cola compels an immediate, accurate, and universal identification of the source of its contents. The odor and taste of an unlabelled cola, on the other hand, initially invokes in the average consumer a muddle of potential sources – Coke, Pepsi, Dr. Pepper, Tab, etc. The odor and taste might also,

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158 See Clarke, supra note 153.
159 See id., at 1239.
160 U.S. Trademark No. 78,641,906 (filed June 2, 2005).
161 In the 1930s a Connecticut home insurance firm impregnated their advertising brochures with the scent of charred wood. See Marston Bogert, Your Nose Knows, 39 SCIENTIFIC MONTHLY 345 (1934).
162 Even among perfumers perceptions of an odor are likely to vary significantly because age, sex, hormonal cycles, and cultural background that play a more significant role in olfaction than they do in our senses of hearing and sight. See Lorraine M. Fleck, What Makes Sense in One Country May Not in Another: A Survey of Select Jurisdictions re Scent Mark Registration, and a Critique of Scents as Trade-Marks 21 (2003) (paper submitted to Centre for Innovation Law and Policy, Faculty of Law, Queen’s University) (on file with author).
163 See Benedict Carey, Study Uncovers Memory Aid: A Scent During Sleep, N.Y. TIMES, March 9, 2007, at XXX.
and to a greater extent than a bottle’s visible label, evoke memories and emotions that have nothing to do with the source of the cola.\textsuperscript{164}

There are thousands of different scents, but without visual, tactile, or aural cues -- e.g., image of a rose, the deafening and gusty emissions of an accelerating bus or jet -- humans accurately identify a relatively small number of these. Almost no one could readily distinguish Celia Clarke’s plumeria-scented thread from another’s with a jasmine scent or yet another’s with the fragrance of violets.\textsuperscript{165} Her registration should not prevent the registration of any scent other than that described in her registration as “floral fragrance reminiscent of Plumeria blossoms”\textsuperscript{166} Given the vast array of scents, granting a monopoly over a specific scent for one product would not appear unfairly and swiftly to exhaust the pool of scents others might use to mark similar products. As a practical matter, Celia Clarke could unfairly benefit from being the first to register a scent mark for thread because our lack of olfactory finesse would lead most consumers to identify Clarke as the source of \textit{any} attractively scented thread.\textsuperscript{167}

Trade secret, patent, and trademark law provide limited protection to works of fragrance yet the fragrance and flavor industries are profitable and innovative.\textsuperscript{168} This is because, like the products of the closely related apparel industry, perfume is a “solidarity good,” and innovation in this area is stimulated by imitation and piracy.

\textit{Perfumes as \textit{“Solidarity Goods”}}

“Solidarity goods” are products that derive much of their economic value from consumer desire to participate in current trends and fashions, rather than from their

\textsuperscript{164} See Fleck, \textit{supra} note 160, at 20. “The sense of smell is linked to a more primal part of the brain that doesn’t so much identify an object as it tells us if we like it or not, according to Gary Beauchamp, director of the Monell Chemical Senses Center in Philadelphia.” Glenn Jeffers, \textit{Pepper in the air? It’s Eau de Park Hyatt, CHI. TRIB.}, June 29, 2006, at B4.

\textsuperscript{165} Plumeria, more commonly known as Frangipani, is a fragrant tropical plant whose flowers are used in making leis. \textit{See ALFRED BYRD GRAF, TROPICA: COLOR CYCLOPEDIA OF EXOTIC PLANTS AND TREES} 78 (5th ed. 2003).

\textsuperscript{166} U.S. Trademark No. 73,758,429 (filed Oct. 18, 1988).

\textsuperscript{167}\textit{Clarke} established the possibility of registering a scent mark, but only for products that are naturally non-odorous or that do not contain fragrance as an inherent attribute -- as do perfumes and cosmetics. Accordingly, just as the term “Apple Pie” is merely descriptive of potpourri infused with an apple pie fragrance -- the Board’s example -- the scent of baking apples would be considered merely descriptive when applied to a supplier’s apples and related products like pie and sauce. \textit{Clarke} does not broach whether it should be possible to register a scent mark for a product like perfume in which fragrance is the \textit{principal} attribute. Marie Dubarry argues that fragrance, as the object itself of protection, should not preclude registration of scent marks for a particular perfume. \textit{See Dubarry, \textit{supra} note 112, at 45.} Dubarry acknowledges that the scent of a perfume is descriptive of one characteristic of it – its odor -- and that the scent might be considered functional given the basic value of perfume is fragrance. She makes the Jesuitical suggestion, however, that a scent may represent the “idée générale” of a perfume, not the substance of the product, and as applied to the liquid itself (i.e. the “jus”, not the formula) it should be registrable because it distinguishes that liquid perfume from all others. \textit{See id.}

\textsuperscript{168} \textit{See supra} note 11.
intrinsic qualities.\textsuperscript{169} Many products, copyrightable and otherwise, are solidarity goods, including certain comestibles and potables, movies, clothing, music recordings, and books. The degree of solidarity among products varies; sales of a new model of vacuum cleaner are influenced relatively little by solidarity forces whereas those of a new book might be determined almost entirely by them.\textsuperscript{170}

In general, the market success of copyrightable works like books, movies, and music recordings, depends upon solidarity influences to a greater extent than it does for useful patentable products like vacuum cleaners and new plant varieties or molecules. Perfumes, which are neither useful nor currently subject to copyright protection, elicit highly subjective consumer responses, and rely heavily upon consumer solidarity for survival and success in the marketplace. Like the publishing, recording, and movie industries, the perfume industry regularly releases new products launched after market testing, and with costly promotion campaigns.\textsuperscript{171} The fragrance industry relies upon packaging and celebrity endorsement to an ever-increasing extent – and even more than does the apparel industry to which it is closely related -- to promote consumer solidarity.\textsuperscript{172}

\textsuperscript{169} Of course “solidarity” also influences spheres other than economics; the term expresses very generally the “…relations of mutual dependence existing between the individual members of one and the same whole.” \textsc{The New Palgrave: A Dictionary of Economics} v.4, 421 (1987). “Solidarity does not favour competition, but raises…’each for all’ against ‘everyone for himself’.” \textit{Id.}

\textsuperscript{170} So Alan Dershowitz would have us believe about the writings of Noam Chomsky: “I don’t know anyone who’s ever read a Chomsky book … you buy them, you put them in your pockets, you put them on your coffee table …. There are a lot of bent pages in Chomsky books and they are usually at about page 16.” Motoko Rich, \textsc{U.S. Bestseller, Thanks to a Rave by a Latin Leftist}, \textsc{N.Y. Times}, Sept. 23, 2006, at A XXX.

\textsuperscript{171} The importance of promotion for the economic success of a new fragrance is discussed in the judgment in the U.K. case that l’Oréal brought against Bellure. See \textsc{L’Oréal v. Bellure, [2006] EWCH (Ch) 2355.} See also, \textsc{Dana Thomas, Deluxe: How Luxury Lost its Luster} 161 (2007).

\textsuperscript{172} Although perfumes associated with couturiers like Thierry Mugler and stars like Sarah Jessica Parker (star of television’s “Sex in the City”) and “Diddy” (entertainer Sean John Combs) are typically created by one of the “Big Boys” – i.e. a handful of multinational conglomerates that produce most of the world’s manufactured flavors and fragrances -- the endorsements and promotions associated with “their” fragrances suggest that the star or couturier played a prominent role in the creation of a perfume. They also imply that the star in question wears the often eponymous fragrance as an extension of their persona. Locations also are used as marks to foster consumer identification -- e.g., Bond No. 9’s “Gramercy Park”, Guerlain’s “Shalimar” (a legendary garden in India). Some fragrances similarly capitalize on trends like environmentalism, pacifism and meditation. The perfume house Bond No. 9 promotes it fragrance “Peace” using this puffery with nary a hint of irony or embarrassment:

[\textsc{This hodgepodge multi-ethnic, multi-vision}’ed [sic] metropolis [New York] has also reigned as a place of tolerance and détente … ‘Peace’ [is] arguably the most beautifully civic-minded fragrance ever devised… we see this emissary of peace soaring through our city, across the country, across the seas,…]

\textit{See} Bond No 9, New York, \textsc{http://www.bondno9.com/catalog/}. “Dune” was supposed to evoke ‘a feeling of serenity’ and ‘an escape from the complexities of today’s competitive society.’ \textit{See} Elaine Sciolino
There is nothing intrinsic to the personalities or acting of Jennifer Lopez or Sarah Jessica Parker connecting them with the particular scent of “Glow” or “Lovely”, to which these actresses have, respectively, attached their names and images. Nor has Sean Combs any rapport between the lemon, bergamot, tangerine, iris, sage, and lavender mélange of his “Unforgivable” beyond his imprimatur on a fragrance that purportedly comprises these notes. Consumers would not purchase “Lovely” or “Unforgivable” if they found these fragrances unappealing; pre-market testing generally prevents widespread consumer rejection of a new fragrance release. Human olfaction, however, is very subjective and relatively untrained, and consumer identification with an endorser, or with the marketed aura of a fragrance, determines the success of a new release to a greater extent than the particular qualities of the fragrance itself.

(Quoting advertising copy) Skin Deep: Is a Scent Like a Song? Oui and Non, N.Y. TIMES, July 13, 2006, at Style § 1.


174 See Sean John Fragrances, http://www.seanjohnfragrances.com/. Fragrances with dominant musky or astringent notes are often described as “masculine”; those with pronounced floral essences as “feminine”. Men wear “cologne”; women wear perfume. “During Napoleon’s reign, fragrances were not gender specific, but by the late nineteenth century, perfume wearing had become gender stereotyped.” RACHEL HERZ, THE SCENT OF DESIRE 174 (2007). In fact, there are no consistent differences between the molecular compositions of so-called masculine and feminine fragrances. The artificial segregation of fragrances by gender is a ploy to cultivate male consumers. While women have readily co-opted male accoutrements (ties, dress shirts, cuff links, etc.) men have been more reluctant to dress, ornament, groom, and perfume themselves with products historically associated with women. Accordingly, many men anxious to appear au courant now wear earrings, but usually in only one ear, and rarely anything that resembles the bedizened hoops and tassels worn by women. The perfume industry -- like those of leather goods, apparel, cosmetics, etc. -- is attuned to sexual insecurities of men insofar as their acquisition and use of fragrances, and package their wares using hyper-masculine imagery and language that enable men to connect with their inner dandies without undue psychic distress. In the 1970s, the fashion among men for coffsbest attained and maintained using techniques, equipment, and products previously associated with women (blow dryers, tinting, etc.) engendered “unisex” hair stylists, now ubiquitous, and the gradual decline of women and men’s “beauty shops” and “barber shops” respectively. More recently there has been a similar trend in perfume, with the appearance of fragrances like Bulgari’s “Black” and Calvin Klein’s “One Summer” promoted as “unisex” scents. Most recently a “general mistrust” among young men of heavily marketed products has fueled sales of “artisanal” fragrances, and the shedding of qualms about whether a fragrance smells masculine. “[T]hose young men are subtly altering the men’s fragrance head space, a move that can be seen as readily at Wal-Mart as at Barneys New York.” David Colman, Dress Codes: Younger, and Faster to Pick Up the Scent, N.Y. TIMES, July 26, 2007, at E5. “Today the metrosexual is the fastest-growing consumer market for fine fragrance.” RACHEL HERZ, THE SCENT OF DESIRE 175 (2007). Fragrance companies rely on “focus-groups” to determine what will appeal to consumers; Hollywood does the same with movies. See CHANDLER BURR, THE PERFECT SCENT; A YEAR INSIDE THE PERFUME INDUSTRY IN PARIS AND NEW YORK, 153 (2007). This practice tends to produce marketable but indistinctive products. See id.

174 As purely luxury goods, perfumes are associated with visible stylishness, extravagance, romance and frivolity; not political, intellectual, or economic renown (Eleanor Roosevelt, Stephen Hawkins, and Bill Gates’s names and images, for instance, will never be used to promote perfume).

Many [perfumes] are introduced by fashion designers; celebrities, from the band Kiss to teen star Hilary Duff; and even car companies…Previously people would select a product, whether its sunglasses or fragrance, because it suited them…Now, they identify themselves with celebrities,
The exclusive rights provided by copyright result in monopolization of financial opportunity in lottery markets for solidarity goods like books and movies. In these markets, it has been argued, copyright suppresses rather than promotes creativity and productivity. The profitability of a good is directly correlated to the extent to which it enjoys consumer solidarity. The positive economic network externalities of these goods entice publishers to expend extraordinary resources on marketing to establish solidarity for relatively few works, and those of reliable sellers in particular. These expenditures divert funds that publishers might otherwise spend—assuming a less protective copyright regime—to put out instead a greater number of new works and establish more heterodox catalogs of books available for purchase.

To the extent solidarity forces perniciously affect creativity and consumer choice for perfumes, however, copyright does not abet this consequence as it may in the publishing industry. Like media works that are hyped with hopes of their becoming best sellers or blockbusters, perfumes are launched with costly campaigns designed to create a buzz resulting in snowballing solidarity. These marketing campaigns, however, do not capitalize on copyright protection as do those for new works in other media. They cannot, of course, because perfume is not protected by copyright in the U.S., and its copyright status is generally ambiguous elsewhere as well. Even if fragrance were copyrightable, a new perfume’s popularity, at least initially, is generated by consumer identification with its name, endorsement, and packaging. These attributes are protected by trademark and contract law.

In other words, the arguably copyrightable component of retail perfumes—i.e. the original combinations of invisible and intangible scent molecules—is not the only, or even principal, determinant of the perfume’s success in the marketplace. Certainly there are “classics” that have sold well for decades in some measure because of the intrinsic

and that influences their purchasing decisions. They want to buy into the Hollywood celebrity lifestyle.


178 See id., at 780.

179 See id., at 802.

180 The greatest challenge to luxury brand perfumes today is the recent rise of the celebrity perfume, such as Sarah Jessica Parker’s Lovely and Jennifer Lopez’s Glow, both produced by Coty. Celebrity perfumes have a short, explosive life: they hit the market with a tsunami of publicity, sell vast amounts to the middle market, and then disappear. And they have pushed luxury brands such as Chanel, Dior, and Givenchy to do the same. “The industry has educated consumers to be volatile,” said Michael Steib, a consumer goods analyst at Morgan Stanley in London. “The challenge for the big labels is to differentiate themselves from the other brands that are often discounted, have a very short shelf life, and are totally dependent upon the names associated with them.”

and lasting appeal of the fragrances themselves. The continued profitability of these perfumes too, however, depends heavily upon ongoing campaigns to foster solidarity among newly targeted consumers.

If a perfume sells well the fashion/perfume house or designer may capitalize on its popularity by creating “flankers” – new fragrances sold as derivative products -- e.g., “updated”, “for men”, “lighter”, versions of the original. Unlike the mass-produced, lower price/quality versions of haute couture that are sold in department stores, perfume “flankers” are not less expensive than the original fragrances from which they are derived. This is because perfume, compared to designer-labeled clothing, is not expensive. A quarter ounce of Chanel’s “No. 5” costs under $100; a Chanel suit costs fifty times that amount.

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181 E.g., Chanel’s “No. 5”; Guerlain’s “Shalimar”. At least part of their ongoing success may be attributed to consumers’ belief that, given the relatively short shelf-life of most new perfumes, a perfume that has remained viable for over fifty years must be exceptionally good to survive in such a competitive field. In this respect Chanel’s “No. 5” is akin to the handful of popular songs out of the thousands recorded in any particular year that continue to be broadcast -- having acquired “oldie” or “anthem” status -- years and even decades after their release. Once a “classic” (e.g., Steinway pianos, Waterford glass, Rolex watches) a product’s ongoing success depends upon its producer’s gingerly capitalizing on this status while simultaneously making the product appear currently fashionable to attract potential new consumers.

182 Like the recent television and print advertisements featuring actress Nicole Kidman endorsing Chanel’s “No. 5” -- in need of an image update given that its previous star endorser was Marilyn Monroe. As a result of this campaign, U.S. sales of “No. 5” grew by nearly 26% in 2004. The perfume itself was not altered in any way. See Cheryl Lu-Lien Tan, supra note 151. Many prominent clothing designers and fashion houses have attached their names and brands to fragrances they have commissioned -- Donna Karan, Tom Ford, Givenchy, etc. -- implying that these fragrances are intrinsically related to, or are an extension of, their apparel lines. Most significant is the fact that new fashions and fragrances share dependence for survival upon the success of a manufactured “buzz” surrounding their debuts. These launches often involve the direct participation of a well-known entertainer: e.g., Jennifer Lopez wearing a particular designer’s gown at the Academy Awards; Paris Hilton and David Beckham hawking “their” fragrances through appearances at flagship department stores and in print and online advertisements. A perfume’s allure usually sags along with the diminishment of the designer’s or endorsing star’s popularity and/or physical attractiveness. While Nicole Kidman appears in Chanel advertisements, she -- like other currently “A-list” movie actors (e.g., Johnny Depp, Meryl Streep, Tom Cruise, Julia Roberts) does not promote her own perfume line. The slightly crass odor of opportunism accompanying entertainers’ direct ventures into the commodity markets of apparel and fragrance (e.g., “Diddy”, Jennifer Lopez, Sarah Jessica Parker, Michael Jordan) might tarnish the image of these “A-list” stars who earn enormous sums from their acting alone. On the other hand, fashion/perfume houses (e.g. Bulgari, Dolce & Gabbana) consider “supermodels” like Gisele Bündchen and Kate Moss too insignificant to be attached to their perfumes in any capacity other than promotional window dressing. Paul Newman has put his name on salad dressing, lemonade, and dog food, but only did this as his movie career waned, and purportedly as a means of raising money for his favorite charitable causes. See Newman’s Own, http://www.newmansown.com/index.cfm.

183 See Cheryl Lu-Lien Tan, supra note 151.

184 Fashion houses become perfume houses as well only after they are well-established in the apparel industry. This allows them to capitalize on the cachet of their expensive clothing, and to broaden consumer solidarity for their brand by tapping into a broader base of consumers with a more mixed composition of wealth. In other words, a fashion-conscious college student could not purchase a Donna Karan skirt priced at $1000, but she might enjoy a certain communion with this designer buying Donna Karan perfume at less than a tenth the price of the skirt. Because perfume is a luxury good, and fundamentally different from clothing, a line of perfume will not damage the chic image of Karan’s apparel lines despite the fact that it is within the financial reach of a greater number of consumers. See DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 5 (2007).
According to perfume critics, some of the finest fragrances are found in inexpensive and useful products like sun block and laundry detergent. The fact that no one deliberately perfumes their body with laundry detergent and similarly pedestrian products, regardless of their olfactory appeal, underscores the importance of packaging and promotion in establishing demand for a new perfume. Once demand is secured, predators may leech it legally, which leads to the question whether this parasitical relationship suppresses or motivates innovation in this field.

**Perfumes and the “Piracy Paradox”**

Clothing is a basic human necessity and articles of clothing are useful products and cannot be protected by copyright. If a new *haute couture* design is favored among those in the sliver of society who have the means and desire to be part of fashion’s avant-garde, other clothing designers and manufacturers will swiftly copy and sell it in various guises to increasingly larger and less affluent segments of society whose tastes are influenced by glamorous trend-setters at the peak of the economic pyramid.

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Id., at 33.


186 The manufactured appeal of perfumes is akin to that of bottled water that is commonly inferior to tap. Similarly, inexpensive products like Vaseline are often more effective and healthier than cosmetics sold at hundreds of times its price.

That women continue to invest money and faith in over-the-counter creams for which no scientific testing is required is a source of astonishment to some physicians. “Do I think any of this is better than a bottle of Purpose?” said Dr. Robyn Gmyrek, assistant clinical professor of dermatology at Columbia University. “No.” (Purpose, a moisturizer, costs about $10 at drug stores.)… “I feel very strongly that this is all such a lie,” said Dr. Cheryl Thellman-Karcher, a Manhattan dermatologist. “When my patients ask me about this stuff, I tell them, Save your money or give it to someone who needs it.”

Gina Bellafante, *Is This Cream Worth $500?*, N.Y. TIMES, June 15, 2003, at XXX. See also, Natasha Singer, *Face Potions Break the Four-Figure Barrier*, N.Y. TIMES, Oct. 27, 2005, at Style § 3.

187 See supra note 145 and accompanying text.

188 In the movie adaptation of Lauren Weisberger’s novel *The Devil Wears Prada* Meryl Streep’s supercilious Miranda Priestly, in a withering disparagement visited upon a subordinate, summarizes the life-cycle of a typical fashion trend:

You go to your closet and you select … that lumpy blue sweater … What you don’t know is that that sweater is not just blue, it’s not turquoise, its not lapis, its actually cerulean… In 2002 Oscar de la Renta did a collection of cerulean gowns, and then I think it was Yves Saint Laurent, wasn’t it, who showed cerulean military jackets … and then cerulean showed up in the collections of eight different designers, and then it filtered down to the departments stores, and then trickled on down into some tragic Casual Corner where you, no doubt, fished it out of some clearance bin…

*THE DEVIL WEARS PRADA* (20th Century Fox 2006).
This copying falls roughly into two categories: “legal” and “illegal”. “Legal” copying includes “look-alike” clothing -- e.g., a London Fog raincoat that conjures a more expensive one by Burberry. These look-alikes are often put out by the producer of an original haute couture item, but are sold at lower prices and manufactured with less care and using materials inferior to those of the original. “Illegal” copying involves counterfeit -- i.e. the production and sale of seemingly identical reproductions of haute couture articles by unauthorized parties -- e.g., “Hermès” scarves and “Prada” handbags sold by street vendors.

The apparel and accessories industries – particularly at the high end – combat the potential damage to their revenues and reputation from illegal copying by asserting claims of trademark (“passing off”) and copyright infringement. The design of a Chanel suit or Hermès scarf is not protected by copyright, but their fabric patterns may be protected by copyright and these companies’ distinctive names and logos enjoy trademark protection.

Kal Raustiala and Christopher Sprigman have proposed that the absence of copyright protection for fashion designs may actually stimulate cycles in the fashion industry that, in turn, foster the vigorous production of original work. These authors call this a “piracy paradox” – i.e., copying that is illegal in other contexts, and that one might assume would inhibit innovation, actually provokes creative work in the field of fashion design. To paraphrase Coco Chanel: “luxury is exclusivity;” regardless of the intrinsic aesthetic goodness of an apparel design, once it is worn by those in the middle and low economic classes the affluent will shun it. They will clothe themselves instead in new designs that distinguish and segregate them from the Lumpenproletariat.

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190 Only extravagantly gullible consumers might believe that a ten-dollar “Hermès” scarf purchased from a seller whose retail shop consists of a folding table on a busy sidewalk, is an Hermès product. In fact, both sellers and purchasers of counterfeit products share a tacit conspiracy to enjoy certain economic and psychic benefits associated with luxury products without paying the fair price to do so. See Carolyn Curiel, Editorial Notebook: Bagging La Mode on the Cheap, N. Y. TIMES, July 6, 2007, at A14. “According to a study by the British law firm Davenport Lyons, two-thirds of British consumers are ‘proud to tell their family and friends’ that they bought fake luxury fashion items.” Dana Thomas, Terror’s Purse Strings, N. Y. TIMES, Aug. 30, 2007, at A23. Apparel and accessories counterfeit racketeers are run by narcotics and child prostitution syndicates that are a principal source of funding for terrorist groups. See id. “Luxury brands are among the most counterfeited products today – the World Customs Organization states that the fashion industry loses up to $9.7 (€7.5) per year to counterfeiting – and most of the counterfeiters’ profits fund illicit activities such as drug trafficking, human trafficking, and terrorism.” Dana Thomas, Deluxe: How Luxury Lost Its Luster 5 (2007).
191 See RAUSTIALA & SPRIGMAN, supra note 92.
192 “Piracy paradox” alliterates nicely, but “piracy” – like “bootleg” -- generally is associated more with illegal copying and passing off of protected names and expression than with the more benign copying and deriving that Raustiala and Sprigman discuss.
193 Coco Chanel regarded luxury as “the opposite of vulgarity.” Margaret Bruce & Christine Kratz Competitive Marketing Strategies of Luxury Fashion Companies, in FASHION MARKETING: CONTEMPORARY ISSUES, 130,131 (Margaret Bruce & Tony Hines, eds., 2d ed. 2007). The “Members Only” label nicely captures the ethos of cachet that spurs innovation in the apparel industry. Ironically enough, “Members Only” jackets, successfully marketed to style-conscious men in the early 1980s, are now so unfashionable -- most likely in part because of the comically dreadful label -- that today these
While many fashion houses are affiliated with lines of perfumes – as well as lines of other products like handbags – new perfumes are not launched with the frequency of clothing designs. The regular recurrence of spring and fall clothing lines coordinated to changes in weather reflect the utility of clothing that perfume does not share. Also, perfumes take longer than clothing fashions to become obsolete because we perceive fragrances less keenly and less critically than we do apparel.\textsuperscript{194}

The perfume industry contends with the same legal and illegal copying found in the clothing trade. Low-grade perfumes passed off as originals through trademark/dress infringement are illegal counterfeits. The sidewalk vendor selling “Hermès” scarves is probably also selling “Hermès” perfume. “Smell-alikes”, on the other hand, are legal imitations of popular fragrances sold by merchants unrelated to the manufacturer of the original perfume from which they have derived their product. Some “smell-alikes” quietly capitalize on a new trend – e.g. culinary scents – and are marketed without reference to the perfume that initiated the trend.\textsuperscript{195}

Another type of “smell-alike”, however, is marketed with blatant reference to the original trend-setting perfume. These “smell-alikes” are invariably less expensive than the perfumes to which they aspire.\textsuperscript{196} Like the “tragic Casual Corner clearance bin,” the fluorescent-lighted aisle of a discount pharmacy in a marginal neighborhood in which one finds “smell-alikes” signals the demise of a once-fashionable perfume or fragrance trend. While expensive evergreens like “Shalimar” have survived for the better part of a century, few perfumes can withstand accessibility to, and popularity among, the least affluent. The appeal of copyrightable works like popular movies, books, and music recordings attenuates over time as it does for apparel designs and perfumes. Copyrightable works, however, do not necessarily loose intrinsic value or prestige from widespread distribution and accessibility. This is true, however, for trendy clothing and perfumes.

Consider, for instance, the internal reaction of a fashion-conscious physician, who observes a hospital orderly reading the same novel as he. Most likely he would think more highly of the subordinate than otherwise. Finding the orderly wearing apparel and garments are worn only by men (and women) of such limited economic means they are neither concerned with -- nor can they afford -- apparel other than that meeting basic vocational and physical needs.\textsuperscript{194} For instance, it is riskier to wear platform shoes and flared-leg polyester trousers at a dignified gathering in 2007 than to wear Revlon’s “Charlie” – a popular fragrance in the 1970s. This is because those over forty will immediately and universally think “disco” -- with some degree of approval or opprobrium -- from a mere glance at the shoes and trousers, but few, if any, could identify “Charlie”, let alone recall that it was fashionable thirty years ago.\textsuperscript{195} The same happens in the fashion industry -- e.g., a jean maker may manufacture a certain cut after a competitor’s product has made it popular.\textsuperscript{196} They are targeted to “high-proles”, advertised in print publications like Parade Magazine -- “If you liked X, you’ll love Y” -- and typically sold in chain-store pharmacies in low-rent areas. Paul Fussell offers a thorough -- and priceless -- explanation of the term “high-prole” in his taxonomy of the American social hierarchy. See PAUL FUSSELL, CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM 24 – 50 (1983). Justice Lewison gives an overview of the role of “smell-alikes” in the fragrance market in his l’Oréal v. Bellure opinion. See supra note 51.
fragrance identical to his, on the other hand, would likely invoke disquieting concerns on the part of the physician about the currency and refinement of his own taste. Long before a once-fashionable perfume is evicted from the high-rent district of the entry floors of department stores and is relocated to the populist shelves of pharmacies -- or even the wilderness of Wal-Mart -- perfume houses have created new fragrances to take their place. Like designers of new apparel, perfumers will attempt to create products that are original, yet capture the zeitgeist of an era by association with a popular entertainer or trend.\textsuperscript{197}

Although the chemical composition of the liquid of an advertised “smell alike” may be close -- or virtually identical -- to the more expensive original, it will have little of the original’s marketable aura because it lacks the non-intrinsic aspects of the original that are responsible for much of its appeal.\textsuperscript{198} The same is true of certain other creative works like books and popular music.\textsuperscript{199} Much of the value of creative works that appeal to the intellect and senses lies in their originality; the more slavish and acknowledged the imitation of the original work by the second or third comer, the greater the risk of alienating consumers.\textsuperscript{200}


\textsuperscript{198} A pirated version, on the other hand, may benefit from a purchaser’s flickering hope that he may have obtained the “genuine article”, albeit by questionable means.

\textsuperscript{199} While a digital scan of a “Harry Potter” book holds much of the value of its original print publication, a different book about wizards, promoted as “similar to ‘Harry Potter’,” or an audio recording of a singer who “sounds like Britney Spears” -- is of little or negligible value because these are unacceptable substitutes for the originals.

\textsuperscript{200} Intentionally and purely parodic works generally avoid this risk. Works with ambiguous parodic intent do not. For example, New York City Opera’s print advertisements for its 2007 production of The Pirates of Penzance featured a photo of a stocky, middle-aged, Broadway actor/singer (Mark Kudisch) of unprepossessing physiognomy, garbed, coiffed, and posed to conjure Johnny Depp’s lissome Disney pirate was, in this writer’s opinion, embarrassing precisely because it was not intended to appear grotesque.
Counterfeit – i.e. illegal -- perfumes, however, differ from bootleg popular music recordings and unauthorized scans of bestsellers in that their marketability depends more on effective replication of product packaging than on canny imitation or copying of the perfume itself. Those who listen to popular music can quickly discern whether the recorded voice on the bootleg CD they purchased is in fact that of Britney Spears, regardless of its packaging; avid readers of “Harry Potter” books recognize J.K. Rowling’s prose even if the copies they are reading have no dust jackets. It is unlikely, however, that fragrance consumers could readily identify Chanel’s “No. 5” without its packaging, let alone tell whether the sample is counterfeit -- even if it is presented alongside the genuine fragrance, on anonymous paper wands. This is because, unlike the “Harry Potter” book that one perceives through the sense of sight -- or sound or touch, if the reader is blind -- one perceives perfume through the less acute chemical sense of smell.

CONCLUSION

The common cold inflicts temporary anosmia by swelling the nasal membranes that prevents scented molecules from reaching our olfactory nerves. We experience, along with the discomfort of a cold, loss of the pleasure we derive from agreeable scents, and much of our enjoyment from food and drink. The realization that this is a temporary impairment makes bearable what we might otherwise consider a catastrophic diminishment of our capacity to enjoy life. Olfaction may be the most animalic and vestigial of our senses but it profoundly influences our capacity to relish our existence.

Fragrances and flavors are perceived sensually, but have the potential to stimulate great works that are created and perceived through intellection. Fragrance enhances the capacity of the unconscious mind to retain information, and our olfactory memory may even, uncannily, predict events. These are powerful attributes, and there are undoubtedly others that will be discovered as the mysteries and the potential of olfaction – the least understood sense – are revealed.

No manufactured perfume can match the indescribable perfume of roses, jasmine, and many of other flowers. In this respect, scent is ultimately more in nature’s realm then in humanity’s. Nature is the greatest perfumer but it is not the greatest poet, musician, painter, sculptor, novelist, choreographer, or motion picture producer.

201 See Carey, supra note 161. See also, ELIZABETH MAYER, EXTRAORDINARY KNOWING; SCIENCE, SKEPTICISM, AND THE INEXPLICABLE POWERS OF THE HUMAN MIND (2007). “I was on a bus and all of a sudden found myself smelling the perfume my brother’s ex-wife used to wear. When the bus stopped, she got on. I hadn’t smelled that perfume or seen her in thirty years.” Id., at 6.

202 See Turin, supra note 57, at 16 (noting that perfumers and flavorists are humbled by nature).

203 Oscar Wilde went so far as to suggest that all naturally occurring aesthetic phenomena are inferior to artful human renderings of them. In his essay “The Decay of Lying,” in a campily effete dialogue between two ostensibly male characters, Cyril and Vivian, Vivian declares: “Sunsets are quite old-fashioned. They belong to the time when Turner was the last note in art… [I was] looking at the glorious sky…and what was it? It was simply a very second-rate Turner, a Turner of a bad period, with all the painter’s worst faults exaggerated and over-emphasized.” See THE COMPLETE WORKS OF OSCAR WILDE 1086 (1999).
Metaphors aside -- e.g., “lyrical landscape”, “poetic bloom”, “musical brook” -- nature is incapable of producing poetry, music, works of fine art, etc. These are exclusively artifacts of human intellection and our creation of them differentiates us from animals. Copyright champions humanity by encouraging the production of original expressive works that only we can create and interpret.  

This discussion has attempted to underscore the profound differences between our perception of scents and our perception of copyrightable works of human authorship. The insertion of copyright into the field of manufactured scent -- regardless whether the intended purpose of a fragrance is practical, medical, or purely aesthetic -- would likely prove to be an irrelevant distraction, and provide little meaningful protection to creators in this area. Worse, it would spawn uncertainty as to the scope of proprietary rights in fragrances and retard, or even stall, innovation in this curious quarter of human endeavor – the very event copyright law is intended to prevent.

To be copyrightable, original expression requires a sensible degree of consistency and complexity in its perception. The whine of a dog, or cry of an infant, may express discomfort or hunger, but these sounds are not original or copyrightable. An intentionally arranged bouquet of purple hyacinths and red roses expresses in floriography: “I’m sorry; I love you,” but this arrangement is no more original and copyrightable expression than is its English “translation”. Similarly, a perfume may express its creator’s intentions for a floral, musky, woody, fragrance, but our perception of the perfume as merely floral, musky, woody, -- if, in fact, our perception is this acute -- is rudimentary and subjective compared to that for copyrightable expressive works.