COPYRIGHT AND PERFUME: NOSE, INTELLECT AND INDUSTRY

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In 2006, two supreme courts in Europe ruled on whether a perfume fragrance could be protected by copyright. The decisions came to opposite conclusions. On 13 June 2006, the French Court of Cassation decided in the famous Bsiri Barbir v. Haarmann & Reimer case that a perfume fragrance could not benefit from the protection afforded to intellectual works by copyright[1]. By contrast, just three days later, the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) held that "the description given in Article 10 of the Copyright Act of what is to be understood as a 'work' within the meaning of that Act is general and does not rule out the inclusion of scents"[2].

In France, the debate on the protection of perfumes has been going on for a long time and was already very developed before the Court of Cassation rendered its decision. The result of the decision ran counter to the majority view that had emerged in legal literature and did not immediately succeed in convincing the lower courts. The District Court of Bobigny[3] and the Court of Appeal of Paris[4] continued to grant copyright protection[5]. Those legal authors who favoured protection did not rally to the Court of Cassation's decision either[6]. So the discussion flared again[7]. Even once two further rulings of the regulatory court in 2008[8] and 2009[9] had removed all doubt as to whether it would ever yield, the Court of Appeal of Paris and the District Court of Lille persisted[10] in taking the opposite approach; and legal literature continues to raise questions[11]. This suggests at the very least that more work of persuasion is required.

By contrast, in the Netherlands, although the subject of the protection of perfumes was addressed as early as 1970 by Mr Verkade[12], it was not until the Lancôme v. Kecofa case that a wider circle of authors entered the debate. However, while the Supreme Court of the Netherlands came down in favour of protection, most commentaries either rejected it or were reserved about it.

The Economic Context of Perfumes: Creation, Market, Copying

Before turning to the legal analysis, it may be instructive to recall a few simple facts concerning the creation, production and marketing of fragrances. In principle, a perfume may be created by a single individual working on a totally independent basis, like an artist producing a painting. However, such a situation is extremely uncommon and applies only to a few very exclusive perfumes. The creation of almost all perfumes takes place within the industrial context of a market producing fairly impressive turnovers. It seems to us that, in principle, this circumstance should not affect issues relating to the field of coverage of copyright. The production of works of applied art or films and the activities of the media, to mention just a few examples, also imply an industrial activity. However, this view is not shared by everyone[13].

In his book *The Perfect Scent*, the New York Times perfume critic, Chandler Burr, offers a host of details on the perfume sector in the United States and France[14]. In a typical situation, luxury fashion houses like Guerlain, Gucci or Dior take the decision to produce a new perfume. But, in general, they do not create it themselves, even though they like to perpetuate the myth that they do. Instead, they give a "brief" concerning the perfume that they wish to create to the sector specialising in the creation of fragrances. Notwithstanding

the sector's economic importance, the names of the firms are often unknown to the general public: Givaudan, Firmenich, IFF, Symrise, Takasago and (*sic*) Haarmann & Reimer.

It should be mentioned in passing that these firms do not just create perfumes in the narrow sense. They also produce synthetic fragrances for an infinite number of applications like detergents, washing powder, drinks, food, cars, commercial spaces such as supermarkets (and their various departments) and hotels. So it should come as no surprise that the fragrance industry also includes companies like Unilever and Procter & Gamble. Fragrances developed for washing powders have even been known to have been added later as ingredients to certain perfumes because part of the consumer public (especially in the United States) loves to smell like a clean shirt. Once copyright is granted in perfumes, it cannot be excluded that manufacturers will claim the same protection for fragrances added to fairly ordinary products or premises – provided that the smell as such is original.

In modern society, the importance of fragrances added to all kinds of products is growing. It can be attributed to the fact that smells may deeply influence behaviour. Human beings are extremely sensitive to olfactory signs. Recent research in the Netherlands has revealed among other things that 9% of female travellers feel more at ease in a bus which has a small bowl containing washing-up liquid placed in it. An orangey fragrance sprayed round the corridors and cells of a police station in Rotterdam had a calming effect on detainees who needed fewer sedatives (an annual saving of between 5 and 10%), wanted to take more showers and were "better behaved"[15]. It goes without saying that systematic research is conducted into the influence of smells on buying behaviour.

To return to perfumes, the luxury fashion house's brief concerning the perfume that it is looking for may be pragmatic or poetic in form. Chandler Burr cites the example of a brief which said: "Give us the fragrance of a warm cloud floating above Sicily in a cool spring sky from which silvery drops of rain are falling on a woman with emerald eyes"[16]; but others just say in substance that the perfume must be more successful than the market leader and appeal to everyone. Moreover, it is not unknown for there to be no brief at all, with the fashion house asking the perfumer to create "a fragrance".

So perfumers or "noses" set to work based on the instructions given to them by luxury firms. They are the creators of the fragrances. There are two aspects to the work of a nose. Firstly, he or she must form a concept of the future fragrance. This is a creative activity. Even if the brief or the basic concept is fairly concrete, for example if it is a question of creating a perfume representing "Paris", an artistic transformation of it has to be achieved: it is the perfumer's interpretation of the theme. Then this "*opus mysticum*" has to take on the concrete form of an "*opus mechanicum*", namely a substance containing that fragrance. On a computer, the perfumer draws up a composition of basic ingredients, the result of which should correspond to the olfactory concept in the perfumer's head. This second stage of the nose's activity is a matter of know-how and is technical in nature. The components are usually synthetic; the molecular structure of natural materials is too complex. Even then it is necessary to have the right intuition. There are no fixed rules for the composition of perfumes: it is a chemical game with capricious molecules.

The formula created in this way is sent to the laboratory where technicians produce a sample of the matching aromatic substance – called "juice" in the sector – which is then placed at the perfumer's disposal. Based on the sample, the perfumer will then begin perfecting the creation. Moreover, the activity performed by the technicians is not confined to carrying out orders: it may also be innovative, through the creation of new olfactory molecules which may serve as elements for the construction of new perfumes.

That is not the end of the process. Several companies in the sector will submit their perfumers' results to the luxury firm's creative management team which will select one of the

concepts. The perfumer whose concept is chosen will pursue his or her work with the creative management team. The perfumer may submit a number of versions to it. The team will make its choice, which is not necessarily the fragrance that the nose thinks is the best from an artistic viewpoint. The perfume's subsequent development will thus take place in liaison with the client. However, the formulas are held by the fragrance industries and not by the luxury goods and fashion houses.

Of course, practice does not always follow this pattern. All kinds of variations are possible. And lastly, it must not be forgotten that the perfume alone is not the fashion house's end product. There is also the bottle, the packaging and the name, each of which is the result of a very conscientious creative process. The bottles are not necessarily designed for the particular perfume; sometimes fashion houses choose designs on sale in the marketplace. Again, it is not the product's creative qualities alone that can launch it on the market. As we all know, its introduction will be backed by an advertising strategy requiring substantial investments.

We shall first take stock of the arguments that have been given for and against protecting perfumes as intellectual works (I). Then we shall study how such protection could be implemented by focusing on the Netherlands where the possibility of protection has been accepted (II).

I. The Arguments Advanced for or against Protection

In its famous ruling of 13 June 2006, the Court of Cassation decided that "a perfume fragrance, which is the result of the simple application of know-how, does not constitute the creation of a form of expression, within the meaning of the [IPC], able to benefit from the protection of works of the mind by authors' rights". These lines summarise in a few words the numerous objections that have been put forward against the protection of perfumes by copyright. According to the opponents of protection, making a perfume involves an industrial process rather than a creative intellectual one; a perfume does not constitute a form and it lies outside the categories of works protected by the law. We shall run through these objections in more detail and add each time the reply given by the proponents of protection. The extraordinary richness of the debate in France provides a more or less exhaustive list of the arguments on both sides[17].

1. Perfumes are just the result of the simple application of know-how. The fragrance's creation is to be identified with the technical process involved in the composition of the substance in which it is contained[18].

In reply, it is argued in the first place that "noses" (the composers of perfumes) are guided in their work, not by a desire to create a particular formula, but indeed by the olfactory form, the sensory impression that they wish to achieve. The production of the physical medium (known as the "juice"), which depends on know-how, must not be amalgamated with the olfactory form that prompted the author to create the work; that form is a personal expression and an intellectual work. All applied art (and pure art) requires a command of know-how[19]. A perfume is an artistic work whose form depends on its creator's taste and arbitrary judgment and which may express its creator's personality[20]. In addition, it is important not to confuse similar formulas and similar fragrances[21]: a more or less identical fragrance may be (re)created through a variety of compositions and a composition that is largely the same may produce a very different fragrance by changing just a few ingredients.

2. A perfume does not constitute a form.

A whole set of different arguments can be placed within this category[22]. The work does not constitute a form because it is not stable: the fragrance develops in various stages

once it has been applied to the skin; it is evanescent; it varies depending on the type of skin on which it is applied; in addition, not only the intellectual perception but also the physical perception of fragrances varies from person to person.

The proponents of protection reply by referring to categories of works of a traditional, non-controversial kind which are not stable or permanent either, or which may be perceived differently, but which are nevertheless fully "established" categories in the copyright world. They conclude that, in this respect, fragrances do not differ from other works to a degree that would justify excluding them from copyright protection. In terms of the principles, it can be pointed out that a fragrance "can be reproduced. Therefore, it has a form"[23] and that what matters is the expression – which has been cast in a physical medium (the juice) – and not its perception.

3. The system excludes perfumes.

The Berne Convention and national laws include only works which appeal to the senses of sight or hearing. Creations which appeal to other categories of senses are thus implicitly excluded. Otherwise, there would be a risk that culinary creations or wines could not be denied protection either[24].

The response will be not only that the law confirms the irrelevance of the form and that the list of works is open, but also that literary works themselves, which represent the archetype of the protected categories of works, do not appeal to the eye and scarcely to the ear. A Chinese translation of a work by Paul Celan contains the work without there being any resemblance as perceived by the eye or the ear. Nevertheless, while the legal argument can be contested, we shall see that if the law does not treat perfumes on a different footing, our neurological system does, with consequences that have an impact in legal terms.

4. It is impossible to determine the originality of perfumes.

In spite of the surprising and often unexpected role that our sense of smell plays at the subconscious level, at the conscious one, we have a limited and underdeveloped knowledge and perception of smells. We do not know how to "read" perfumes; we find it hard to analyse them, compare them and assess them in structured contexts. This fact, which is supported by neurological research[25], represents a very serious obstacle as far as copyright is concerned because it makes it difficult to assess originality and unlawful copying.

Added to this is the fact that most perfumes fall into about fifteen "families" whose representatives inevitably bear a certain resemblance to each other[26]. As style and kind are not restricted[27], creators of perfumes are free to produce their own creations which come within a group of fragrances that are already fairly close to one another. In other words, like creators in other fields, composers of perfume may claim freedom of style. Considering how difficult it can be to maintain a balance between the protected sphere, on the one hand, and freedom to imitate a style, on the other, in sectors like that of designs which are far more familiar than fragrances, it is understandable to be averse to the idea of applying these vague concepts in the even vaguer sphere of fragrances.

Therefore, a subjective evaluation of originality and similarity has to be ruled out, except perhaps in certain cases which we shall look at later. That is why an objective instrument to assess similarities between aromatic substances would be most helpful. And, indeed, the similarity of substances can be subjected to an objective appraisal based on a chemical analysis. However, such a tool can be of assistance only where the two substances are identical. As has been shown in the Netherlands, in a very detailed article by two technical experts[28], there is no linear relationship between the degree of similarity of the chemical compositions and the degree of resemblance of the fragrances themselves. Subtle

changes in the physical composition may completely alter the olfactory impression, whereas, by contrast, a fairly similar fragrance can be created through a chemical composition which suggests a much bigger difference. The conclusion that has to be drawn, therefore, is that, unless the substances are identical, it is necessary to fall back on the simple sense of smell to assess resemblances.

The argument that it may prove very difficult to determine the originality and also the extent of the protection of a fragrance is a serious objection which is highlighted not just by the opponents of protection. However, while the latter see it as proof that copyright protection cannot work, the proponents of protection presume that this obstacle will not always be insuperable[29] and challenge the view that this reason is sufficient to preclude point-blank any recourse to copyright. Moreover, issues concerning literary or musical plagiarism are just as tricky and hard to settle. The difference is thus less absolute than it appears at first sight.

5. The case law of the Court of Justice of the European Union

Neither the French Court of Cassation nor the Dutch Hoge Raad took European copyright law into consideration in their decisions. This is not surprising because the concept of an intellectual work has not been harmonised, with the exception of the criterion of originality applicable – it seemed – to computer programs, databases and photographs. However, it is well known that, in 2009, in the *Infopaq v. DDF* case, the European Court of Justice more or less extended this criterion's applicability to all works: "...copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation"[30].

It is hard to say what impact this ruling could have on the problem of perfume. In principle, it should be secondary for the simple reason that the standard of originality set out in the three directives in question clearly concerns only the "threshold level"[31] and not the question of the sphere of copyright and the categories of productions which may qualify as intellectual works. However, we also saw that in the decision of the Dutch Supreme Court, the question of the presence of originality and that of the sphere of copyright are combined without distinction into a single criterion of originality and personal stamp; and this seems to be a policy that can be noted frequently, and not just in Dutch decisions. One can add that the Court of Justice seems impatient to proceed with the major project of harmonising copyright and is not always worried about crossing certain boundaries that might impede it.

The *Infopaq* ruling generalised a technocratic criterion tailor-made for computer programs and databases, i.e. works having marked features of productions involving "know how". A strange consequence of this decision could be that it may facilitate the protection of scents, even if it is assumed that the creation of perfumes is in fact the result of the simple application of know-how, as the Court of Cassation posited. From the moment that a perfume was original in the sense that it was its author's own intellectual creation, the way to protection would be open. In the face of such a possibility, one would nevertheless be inclined to murmur *non tali auxilio*.

6. Current status

While the discussion is still going on, we are starting to see a certain repetition of the arguments. For the purposes of this article, suffice it to note that, as far as positive law is concerned, the highest court denied protection in France and accepted it in the Netherlands. We shall now give a short summary of the opinions of Dutch legal authors.

II. The Implementation of Protection

As is well known, in the Netherlands, the Supreme Court (Hoge Raad) accepted the copyrightability of perfumes in the Lancôme v. Kecofa ("*Trésor*") ruling of 16 June 2006[32]. It remains to be seen how such copyright protection can be implemented in practice. We shall first study the reasons that led the Court to reach its decision (A) and then consider a few specific questions (B).

A. The Lancôme v. Kecofa ("*Trésor*") Ruling

1. The Ruling and its Grounds

It may come as a surprise to learn that, in the appeal for annulment, the opponent of Lancôme Parfums no longer even challenged the fact that fragrances could enjoy copyright protection because this seemed such a settled matter in the Netherlands. Nevertheless, the Supreme Court (Hoge Raad) took the opportunity to confirm that "this starting point is correct". The Court then continued:

> "Besides the non-limitative list of categories of works, the description given in Article 10 of the Copyright Act of what is to be understood as a 'work' within the meaning of that Act is general and does not rule out the inclusion of scents. It follows that, for the question whether a scent may qualify for copyright protection, what is decisive is whether it involves a creation that is amenable to human perception and whether it has its own original character bearing the personal stamp of the author. It is true that the concept of a work in the Copyright Act meets its limit where the work's own original character concerns only what is necessary to obtain a technical effect, but given that, in the case of a perfume, there is no question of a purely technical effect, the latter condition does not prevent copyright protection from being granted to the fragrance of a perfume. The fact that the properties of the human sense of smell limit the ability to distinguish scents and that the extent to which scents can be distinguished differs from person to person does not alter the foregoing, nor does the fact that as a consequence of the specific nature of scents not all the provisions and limitations in the Copyright Act can be applied without restriction, having regard, for example, to the use of a perfume which, given its nature, necessarily implies spreading the scent and cannot be denied the ordinary user."

The Supreme Court thus realised that the legislator had not contemplated perfumes when drafting the law and that, as a result, there could be situations in which the text of the law should clearly not be applied literally. This is not a new approach; in 1965, there was a precedent with "non-original writings", a Dutch speciality criticised by the majority of legal authors but dear to the legislator who refuses categorically to abolish it. After stating that the protection afforded to authors of literary and artistic works by the 1912 Act was based on the special character of those works as the fruit of the author's creative effort, the Supreme Court[33] concluded that, although Article 10 of the Dutch Act, in particular by using the terms "all writings", had extended that protection to works devoid of any original character,

> "the legislator's intention cannot have been that, consequently, the provisions of the law, which are based on that specific character of protected works [i.e. originality – AQ], should apply without change to works which do not have such a character and whose authors can derive their entitlement to protection only from the fact that they wrote them down; the question whether and in what way the provisions are to be applied to writings lacking original character must be assessed, in the absence of any general rules on the subject in the law, for each of those provisions individually, according to their scope".

2. Reactions in Dutch Legal Literature

Several authors have rejected the result of the Lancôme/Kecofa ruling and criticised the Supreme Court for taking the issues raised by such acceptance too lightly. Several

German[34] and Belgian[35] commentaries also share this assessment. Other authors confine themselves to expressing reservations without taking a stand against the principle of possible protection[36]. Almost all of the commentaries[37] express disquiet about the attendant difficulties of determining the originality of perfumes and the scope of protection.

Strident criticism has been voiced by Mr H. Cohen Jehoram. One only has to read the title of his commentary to know: "The Dutch Supreme Court Recognises Copyright in the Scent of a Perfume. The Flying Dutchman: All Sails, No Anchor"[38]. According to this author, perfumers should not be identified with artists; on the contrary, creators of fragrances, rather than being artists, are actually anonymous molecular biologists working for a small group of seven companies producing perfumes like they produce fragrances for cleaning products[39]. He argues that blindly applying principles without considering whether protection is appropriate represents a perfect example of what is called *Begriffsjurisprudenz* in Germany, undiscerning doctrinal legal reasoning, totally removed from social reality. Moreover, copyright covers only works that are perceptible to the eye and the ear, whereas perfumes are for the purely functional purpose of making their users seductive. Lastly, he considers that, by accepting protection, the Netherlands has isolated itself from other Member States of the European Union which have taken the opposite stand.

In a detailed note in *Nederlandse Jurisprudentie*[40], Mr J. Spoor defended the idea that the fragrance itself could not be identified as the subject matter for protection, but only the composition of the perfume as fixed in its recipe. Although the fragrance's impression is what the perfumer wished to achieve, it is not the thing that the perfumer created, which is the composition of the fragrance[41]. It is essential that, in copyright, the subject matter of the exclusive right should be clearly identifiable. It must be capable of being perceived simply and unambiguously. Only the formula can meet this condition. This would not prevent the protection from covering liquids having an intentionally different composition but leading to an essentially similar fragrance. Nevertheless, Mr Spoor predicts significant problems when it comes to determining the extent of protection and whether fragrances could be included in the copyright system. He wonders whether it was not the "dogmatics, if not the rhetoric" of copyright that inspired the decision and concludes that an action based on unfair competition would have been a better way to combat a parasitic imitation of the original product[42].

Mr Grosheide does not seem to be against protection as such but wonders whether sufficient consideration has been given to its implications: will copyright protection extend to tastes, or even feelings[43]? These scruples do not haunt Mr Prins who expresses support for protection, without excluding at the same time protection for wines and brandies[44].

Mr Hugenholtz commented[45] that the Hoge Raad had skimmed too lightly over the question whether perfumes really belonged to the sphere of literary and artistic works, in short, culture; was their place not, rather, within the sphere of industry? In addition, he doubted whether a monopoly extending 70 years *post mortem auctoris* was desirable from the standpoint of free competition. His commentary shares the objections raised by the other authors mentioned above concerning the issue of determining the subject matter and scope of the protection. The work formed by a fragrance lacks clear contours and this could be a threat to legal certainty.

In the opinion of Mr Dommering[46], copyright merely offers a "layer of sensory protection in order to protect the technical knowledge of how to make the perfume". The question of protection should not be approached as an ontological one, like the Supreme Court did, but rather as a practical question, by considering the appropriateness of the resultant exploitation rights, the term of protection and the products that will be affected, representing a far wider circle than perfumes alone.

Mr Koelman argues that, because we do not have a highly developed sense of smell and can distinguish only a limited palette of scents, there is a risk that protection could lead to undue monopolies[47].

Ms M. De Cock Buning considered, in a note accompanying the ruling handed down by the Court of Appeal of Bois-le-Duc prior to the decision of the Hoge Raad, that, to the extent that perfume could be classified as a cultural product, it would belong to the sphere of copyright; acknowledging the long list of problems that such protection could raise, she concluded, however, that the question whether or not new subject matter was accepted within the field of copyright often depended on legal policy and that practice was able to find solutions[48]. We shall return to this question further on.

B. Application of Copyright

1. Determining a Perfume's Originality

This is the problem that promises to be the most difficult one. However, it should not be insuperable. When members of the public – and the courts – can distinguish a new perfume from the other perfumes around it without too much trouble, there seems to be no reason why its originality should not be confirmed. However, it is important to be wary of abuse. One possible case might be if industries systematically created samples, not for the purpose of marketing a perfume, but in order to build a line of defence of exclusive rights with the sole aim of torpedoing competitors' initiatives. This is a problem that is not necessarily limited to perfumes. In Dutch law, such use of the exclusive right could probably be parried, *inter alia*, by invoking an abuse of power under Article 13 of Book 3 of the Civil Code.

2. The Exploitation Rights

The Dutch Copyright Act, which dates back to 1912, has only two forms of exploitation which are subject to the exclusive right: making available to the public ("openbaarmaking") and copying ("verveelvoudiging"). As one would expect, these concepts are interpreted very broadly. Hence making available to the public covers not only performance and communication but also the work's distribution. Apart from reproduction, copying also covers the work's adaptation, which, after all, constitutes a way of "copying" another person's creation. Therefore, it is interesting to see how these broad concepts would apply to an olfactory work.

a. Reproduction and Adaptations of the Fragrance

Reproduction

Historically, the reproduction right represents the cradle and heart of authors' rights. Copyright arises as soon as technical progress offers the possibility of mechanical reproduction, a specific type of unfair competition to which the industries marketing intellectual and artistic creativity are particularly vulnerable. Reproduction of a perfume has always been possible for anyone in possession of the formula. But now, thanks to techniques of gas chromatography and mass spectrometry[49], the secret of any perfume can be deciphered in a few days. Therefore, it is clear that copyright may at least fulfil a useful function in protecting perfume against identical reproduction.

Adaptation

As already indicated, considerable difficulties may arise in connection with the right of adaptation. It can be pointed out, however, that traditional works may also provide cases in which determining the dividing line between what is infringing and what is not is extremely

hard and, in the final analysis, depends on a subjective judgment. Will this present such difficulties in the case of perfumes that protection could become an illusion? Not always.

Dutch law is often characterised by a practical approach. There are fairly widespread decisions on products with little originality in which the courts have based their analysis on whether the combination of certain choices led to an original effect. Accordingly, the combination of the fragrance and its name could constitute such a work. This is important because imitators are becoming more and more cunning in their efforts to ensure that the names of their products do not infringe trademark law while still retaining a reference to the original name. For example, in the Dutch case in question here, the imitation of Lancôme's *Trésor* had been named "Female Treasure". In many cases, the name of a perfume contains a creative element. It cannot be ruled out that the imitation of the two elements combined – similarity of the name and similarity of the fragrance – may convince the courts that there is infringement. It also seems that the trickier the question of infringement is to resolve, the more the courts tend to consider other circumstances, which moreover often do have real importance and may indeed help the courts to achieve a good distribution of justice. The decision of the Supreme Court of the Netherlands shows surprisingly clear signs of such an approach: in a revealing "not to mention that" clause, it pointed out that "as emerges from Kecofa's own advertising messages cited by Lancôme and not disputed by Kecofa, it aims to banish all differences between its perfumes and the ones it is competing with, except the price"[50].

Hence the right of adaptation would not necessarily be doomed to exist in a comatose state. It is true that, from a dogmatic viewpoint, the solution is not the most elegant. Nevertheless, this approach, as developed in case law, covers practical needs fairly well; no one took issue with it when it was applied to traditional categories of works, like works of applied art.

The Alternative of Protection by Unfair Competition Law

It has been argued that we are not condemned to put up with the uncertainties of the right of adaptation in order to afford protection to perfumes because unfair competition law could do the job just as well, if not better[51]. But is that absolutely certain[52]? Dutch law is extremely strict on the matter of granting additional protection under unfair competition law. According to the Supreme Court's consistent case law dating back to 1953[53], except where a third party needlessly causes confusion when it could have followed a different course, such protection is purely and simply excluded outside the intellectual property laws. The principle of free competition thus has considerable weight. Consequently, a fragrance as such will probably not be protected under Dutch unfair competition law. It is the result of creativity, effort and investment, forming the essential value of the product. If this result is denied protection under the intellectual property laws, then free competition and the benefits attached to it must prevail in the Netherlands. The same considerations cast doubt on whether a fragrance's resemblance could be viewed as an "aggravating circumstance" adding to other factors which, taken together, could lead a court to conclude that the imitation caused confusion. This is because, if the other factors could not independently give rise to that conclusion, it is hard to see how the circumstance of the product's imitation, which after all is lawful, could justify it.

b. "Public Presentation"

In France, as in the Netherlands, there are fears that if perfumes were protected, it would no longer be possible to wear perfume in a public place where others could share the pleasure of its fragrance. However, the Supreme Court realised that "as a consequence of the specific nature of scents not all the provisions and limitations in the Copyright Act can be

applied without restriction, having regard, for example, to the use of a perfume which, given its nature, necessarily implies spreading the scent and cannot be denied the ordinary user".

This exceptional clause may not even be needed. No court has ever prohibited fashion creations, spectacle frames, hats, jewellery (even of a loud kind), watches and exclusive footwear from being worn in public. Yet these products are all copyright-protected works. Perfumes can be placed in the same category of personal accessories.

An old ruling provides useful guidance to determine the boundary between personal use of a work and its exploitation. In 1979, the Supreme Court of the Netherlands took a stand on the circumstances in which the personal use of a portable radio resulted in communication to the public. An employee of "De Zon" (The Sun) laundry in Goes in the province of Zeeland, played her private transistor radio while she was working. The radio was placed on a wrapping table in a hall in which there were another 25 to 30 employees. Because of both the distance between the work places and the noise of the machines, only one or two other women could listen to the radio apart from its owner, or possibly three or four if it was played loudly, in which case, however, according to the other employees, "the boss made a comment". It was the only transistor radio because the other employees did not have one and the laundry itself did not have any sound system. In Zeeland, in 1979, work was a serious matter.

The collective management society, BUMA, brought legal proceedings against the laundry. However, its claim was dismissed by the Supreme Court which held that if someone played music purely for his or her own pleasure, the fact that there were other people who could also hear the music did not make it a public performance unless the person playing it had a professional or commercial interest in other people listening to the music. The Court added that if the employee did not commit copyright infringement by playing her radio in this way, there was no onus on her employer to prohibit her from playing the radio while she worked.

There is a clear analogy with the case of perfumes. Wearing perfume does not form a public performance unless it is in the professional or commercial interest of its wearer that others should be able to smell it. For example, if an airline had identical perfume distributed to all its air hostesses and required them to wear it for work, this would constitute copyright infringement. And the author's permission would be necessary to perfume certain publicly accessible commercial premises with a pleasant smell[54].

3. Moral Rights

In the case of a perfume created as a commissioned work, the moral rights will belong to the author. It may be otherwise if there is an employment contract. The majority view in Dutch case law is that the moral rights in works created under an employment contract vest in the employer. They are particularly coveted by employers, not so that they can exercise the rights themselves, but to ensure that their employees cannot make use of them.

The opinion on the employer's moral rights is not unanimous and the Supreme Court has not yet taken a stand on the issue. But even if the moral rights had to remain with the employee, legal literature is of the view that, in most cases, an employment contract contains a tacit relinquishment of the moral rights more or less in full.

While the Dutch system has its advantages for average employment contracts, it is untenable in the case of independent intellectual workers producing works characterised by a high degree of creativity, not to mention situations in which it is agreed that the employee's name will be mentioned in connection with the work. As the author's honour and reputation

will then be at stake, it is difficult to see by what right the author could be prohibited from invoking his or her moral right[55].

Indeed, moral rights for perfumers could have a beneficial effect. Unlike the *haute couture* sector, where the personality of the top designers is not hidden, "noses" are completely unknown. In what way would it be shocking if they invoked their right to claim authorship? It would add to the product's profile. In addition, it is information that could provide knowledgeable consumers with guidance as to the quality of the product, which may be of substantial importance to them. Once it had become usual to mention the author's, name, its absence could be a sign to customers that the product was developed by an unknown person or that the author did not want his or her name linked to the product.

The right of integrity could also serve useful purposes. A nose whose name is mentioned on the perfume bottle should be able to object to changes being made to the perfume. Such a situation could arise if luxury goods firms, in a concern to make savings and shield their margins in a difficult market, left out or reduced ingredients which they considered too costly[56]. Apparently, this is not exceptional. Exercising the right of integrity could then guarantee the work's authenticity in the interest not only of the author but also consumers who seek the refinement of personal expression in exclusive perfumes.

CONCLUSION

From a dogmatic standpoint, it seems hard to deny that making perfumes can be a creative and artistic activity. Having said that, when it comes to the application of copyright protection, it is true that determining both the originality of perfume and the scope of protection promises to be difficult. Nevertheless, this does not justify complete pessimism about such protection. It can serve as a means of combating identical reproduction and it may be very helpful against increasingly subtle imitations based on a combination of the original fragrance and its name. At the same time, the exercise of the moral rights could serve more constructive purposes than what one might think at first sight.

(English translation by
Margaret PLATT-HOMMEL)

NOTES

1. Cass. 1st Civ. 13 June 2006, Bsiri-Barbir v. Haarmann & Reimer et al., RIDA no. 210, Oct. 2006, p. 202, obs. P. Sirinelli, p. 348, decision; JCP G 2006, II, 10138, note F. Pollaud-Dulian, and I, 162, obs. Ch. Caron; JCP E 2007, 1114, obs. M-E. Laporte-Legeais; PI 2006, no. 21, p. 442, note A. Lucas; D 2006, p. 2993, obs P. Sirinelli; Revue Critique de Jurisprudence Belge, 1st quarter 2007, pp. 5-23, note L. Van Bunnen; (in English:) IIC 2006, 988; (in German:) GRUR Int 2006, p. 951, with a commentary by C. Well-Szönyi, pp. 1039-1041.

2. Hoge Raad 16 June 2006, Kecofa v. Lancôme ("*Trésor*"). English, French and Spanish translation and commentary by P.B. Hugenholtz, in: Chronicle of The Netherlands. Dutch Copyright Law, 2001-2010, RIDA no. 226, Oct. 2010, pp. 299-303; (in French:) detailed commentary by M. Foschi, in: Droit d'auteur et parfums: vers une protection des fragrances?, *Auteurs & Media* 2006, pp. 309-317; (in German:) GRUR Int 2006, pp. 951-955; (in English:) IIC 2006, pp. 997-1104; See also the short commentaries by Ch. Gielen, EIPR 2006, N-174; K. Koelman, Copyright in the Courts: Perfume as Artistic Expression? WIPO Magazine September 2006; W. Leppink and M. Veltman, Netherlands court grants copyright protection to perfume scent, JIPL 2006, 756-758; (in Dutch:) www.rechtspraak.nl, no. LJN: AU8940; NJ

2006, 585, note J.H. Spoor; IER 2006, no. 54 p. 201; note W. Grosheide in no. 88, pp. 313-314; Ars Aequi 2006, pp. 821-824, note P.B. Hugenholtz; AMI 2006, no. 14, pp. 168-173, note A. Quaedvlieg.

3. TGI Bobigny, 28 Nov. 2006, JCP G 2007, I, 101, obs. Ch. Caron; PI 2007, no. 23, p. 203, obs. J-M. Bruguière; RIDA, no. 212, April 2007, p. 166, note P. Sirinelli.

4. CA Paris 14 Feb. 2007, Beauté Prestige International v. Senteur Mazal, D 2007 AJ 735, obs J. Daleau; (in English:) IIC 2008, pp. 113-114.

5. A Dutch observer commented in 2007 with both malice and admiration that "the French judges of the facts can be as persistent as some bad smells": R.J. Prins, In dezelfde geest, BIE 2007, pp. 223-224.

6. A. Lucas, H-J. Lucas, Traité de la propriété littéraire et artistique, 3rd ed. 2006, Paris: Litec, pp. 66-67, taking the view that the ruling of 13 June 2006 seemed too peremptory and that none of the objections raised in legal literature justified exclusion as a matter of principle; Ph. Gaudrat, Juris Classeur PLA Fasc. 1134, hoped that "the lower courts will resist this regrettable regression in the legal analysis".

7. M. Vivant, Parfum : l'heureuse résistance des juges du fond, D 2007, pp. 954-955.

8. Cass. Com. 1 July 2008, Senteur Mazal v. Beauté Prestige International, RIDA no. 217, July 2008, p. 314 and p. 198 obs. P. Sirinelli; D 2009, pp. 1182-1184, note B. Edelman; PI 2008, no. 29, p. 419 obs J-M. Bruguière; (in German:) GRUR Int 2009, pp. 622-623 with obs. by C. Well-Szönyi.

9. Cass. 1st Civ. 22 Jan. 2009, Argéville co. v. Lancôme Parfums, RIDA no. 219, Jan. 2009, p. 370 and p. 198, obs P. Sirinelli.

10. CA Paris 22 Sept. 2010, RIDA no. 226, Oct. 2010, pp. 501-505, confirming infringement when the defendant had not disputed the principle of the protection of the fragrances at issue (p. 504); and TGI Lille 22 Oct. 2009, L'Oréal v. Jacan, RIDA no. 226, Oct. 2010, pp. 510-518; P. Sirinelli, Case Law Section, pp. 358-372.

11. Ph. Gaudrat, Juris Classeur PLA (2009) Fasc. 1134 no. 52; Y. Gaubiac, Fragrances et Œuvres de l'esprit, in: *Droits de propriété intellectuelle. Liber amicorum Georges BONET*, pp. 217-228, at 227.

12. D.W.F. Verkade, De parfumeur auteur, BIE 1970, p. 18.

13. For example, H. Cohen Jehoram argues that the production of perfumes is the job "of anonymous molecular biologists" PI 2007, p. 7.

14. C. Burr, *The Perfect Scent. A Year Inside the Perfume Industry in Paris and New York,* New York: Picador 2007. Nearly all the information that follows has been taken from his publication. See, *inter alia*, pages 22-23, 32-33, 45, 55, 104, 127, 130-131, 153, 209, 217, 254-256, 272 and 282.

15. I. Weyel, Je neus achterna, NRC Handelsblad, 29 May 2011.

16. C. Burr 2007, p. 55.

17. However, only a summary can be presented here: it would take up a whole book to enter into all the subtilities. Unfortunately, the author did not have access to all the sources.

18. B. Edelman, D. 2009, p. 1183, referring to the Advocate General's opinion.

19. See, *inter alia*, A. Lucas, Propriétés Intellectuelles 2006, p. 443; M. Vivant, D. 2007, p. 955; Y. Gaubiac, Fragrances et Œuvres de l'esprit, in: *Droits de propriété intellectuelle. Liber amicorum Georges BONET*, pp. 217-228, at pp. 222 and 225; P. Sirinelli, RIDA no. 210, Oct. 2006, p. 214; Ch. Caron, *Droits d'auteur et droits voisins*, 2nd ed. 2009, Paris: Litec, no. 192 p. 148; Ph. Gaudrat, Juris Classeur PLA Fasc. 1134 no. 51.

20. See, *inter alia*, Ch. Caron, *Droits d'auteur et droits voisins*, 2nd ed. 2009, Paris: Litec, no. 192, pp. 147-149.

21. P. Sirinelli, Propriétés Intellectuelles 2005, p. 49.

22. F. Pollaud-Dullian, JCP 2006, pp. 1598 and 1599.

23. Y. Gaubiac, Fragrances et Œuvres de l'esprit, in: *Droits de propriété intellectuelle. Liber amicorum Georges BONET*, pp. 217-228, at p. 226.

24. F. Pollaud-Dullian, JCP 2006, p. 1599; H. Cohen Jehoram, Propriétés Intellectuelles 2007, p. 8.

25. S. Balañá, L'industrie du parfum à l'assaut du droit d'auteur… fumus boni juris?, PI 2005, pp. 254-268, p. 261, II.d); also published in German: Urheberrechtsschutz für Parfums, GRUR Int 2005, pp. 979-991, no. 3 p. 985.

26. S. Balañá, citing E. Roudnitska and J-P. Pamoukdjian, in: L'industrie du parfum à l'assaut du droit d'auteur… fumus boni juris?, PI 2005, pp. 254-268, p. 255, III.c); also published in German: Urheberrechtsschutz für Parfums, GRUR Int 2005, pp. 979-991, no. 3 p. 988.

27. P. Sirinelli, Propriétés Intellectuelles 2005, at p. 49; F. Pollaud-Dullian, JCP 2006, p. 1598.

28. J.E.R. Frijters, C.P.M. van Houte, De geur van de parfum zit niet in de fles, Nederlands Juristenblad NJB 2004, p. 1988.

29. P. Sirinelli, Propriétés Intellectuelles 2005, p. 49; C. Bernault, JurisClasseur PLA Fasc 1135, no. 13 p. 4.

30. CJEU 16 July 2009, C-5/08, Infopaq v. DDF, no. 37.

31. See also G. Schulze, Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs? Anmerkung zu EuGH "Infopaq/DDF", GRUR 2009, 1019-1022.

32. See note 2, *supra*.

33. Hoge Raad 25 June 1965, *NV Televizier*, Ars Aequi 1965, 345, note H. Cohen Jehoram.

34. C. Well-Szönyi, GRUR Int 2006, pp. 1039-1041 and GRUR Int. 2009, pp. 622-623.

35. L. van Bunnen note in Revue Critique de Jurisprudence Belge, 1st quarter 2007, pp. 5-23.

36. G. Schulze, Urheberrechtsschutz für Parfum und andere Duftkompositionen?, in: *Schutz von Kreativität und Wettbewerb. Festschrift für Ulrich Loewenheim zum 75. Geburtstag*, pp. 275-286, considers that copyright protection cannot be excluded but would prefer a solution to be found in unfair competition law. By contrast, S. Fröhlich, *Düfte als geistiges Eigentum*, Tübingen: Mohr Siebeck, 2008, pp. 110-112, takes a stand in favour of copyright protection and rejects the unfair competition alternative.

37. A. Quaedvlieg, AMI 2006, pp. 168-172.

38. H. Cohen Jehoram, La Cour de cassation des Pays-Bas reconnaît un droit d'auteur sur la fragrance d'un parfum. Le hollandais volant – Toutes voiles dehors, pas d'ancre, PI 2007, Libre opinion, pp. 6-9; in German: Der niederländische Hoge Raad gewährt einem Parfumduft Urheberrechtsschutz. Der Fliegende Holländer – lauter Segel, kein Anker, GRUR Int. 2006, pp. 920-922; in English: The Dutch Supreme Court Recognises Copyright in the Scent of a Perfume. The Flying Dutchman: All Sails, No Anchor; in Dutch: Het parfumgeurarrest van de Hoge Raad kan de EG en dan de wereld veroveren of zelf ten onder gaan, NJB 2006, pp. 1624-1627; in Dutch: Auteurs & Media, 2006, pp. 331-333.

39. On the industrial aspect of perfumes: C. Burr, *The Perfect Scent. A Year inside the Perfume Industry in Paris and New York*, Picador, New York 2007.

40. NJ 2006, 585.

41. Endorsed by N. van Lingen, Het parfum van Viotta, in: D.J.G. Visser and D.W.F. Verkade (eds.), *Een eigen, oorspronkelijk karakter: opstellen aangeboden aan prof. Mr. Jaap H. Spoor,* Amsterdam: uitgeverij DeLex 2007, pp. 225-231, at pp. 229-230. However, while it is true that perfumers create a composition, their intention is to create a fragrance rather than a recipe and the test that they will apply to their creations will be primarily whether the result smells nice.

42. We have doubts about whether it would be easy in Dutch law to provide protection based on unfair competition law; this aspect will be considered in more detail later. However, it is clear that the extent to which unfair competition law can be used as a means of tackling infringement will have a strong influence on the "pressure" that may exist to accept copyright protection.

43. Note W. Grosheide, IER 2006, no. 88, pp. 313-314; see also his column in IER 2007, p. 66.

44. R.J. Prins, De geest uit de fles. Over de bescherming van geuren in Frankrijk, BIE 2006, pp. 468-475, at p. 475.

45. Ars Aequi 2006, pp. 821-824, note P.B. Hugenholtz; by the same author, note under the judgment of the District Court of Maastricht dated 18 March 2002 in the same case, AMI 2002, pp. 193-195, from which we quote the following sentence: “The advance into copyright by the empire of the senses is being confirmed”.

46. E.J. Dommering, Auteursrecht op parfum: de definitieve verdamping van het werkbegrip, in: D.J.G. Visser and D.W.F. Verkade (eds.), *Een eigen, oorspronkelijk karakter: opstellen aangeboden aan prof. Mr. Jaap H. Spoor,* Amsterdam: uitgeverij DeLex 2007, pp. 65-79.

47. K. Koelman, Copyright in the Courts: Perfume as Artistic Expression? WIPO Magazine, Sept. 2006.

48. M. de Cock Buning, note under the ruling of the Court of Appeal of Bois-le-Duc dated 8 June 2004 in the *Trésor* case, IER 2004, no. 73, pp. 325-326.

49. J.E.R. Frijters, C.P.M. van Houte, De geur van de parfum zit niet in de fles, Nederlands Juristenblad NJB 2004, p. 1988; C. Well-Szönyi, GRUR Int 2006, p. 1039; S. Balañá, L’industrie du parfum à l’assaut du droit d’auteur… fumus boni juris?, PI 2005, pp. 254-268, p. 255, I.b); also published in German: Urheberrechtsschutz für Parfums, GRUR Int 2005, pp. 979-991, no. 3 p. 981.

50. No. 3.4.3, *in fine*.

51. J.H. Spoor in NJ 2006, 585; C. Well-Szönyi, GRUR Int 2006, pp. 1039-1041 and GRUR Int 2009, pp. 622-623. Cf. for France: F. Pollaud-Dulian, JCP 2006, p 1600; G. Schulze, Urheberrechtsschutz für Parfum und andere Duftkompositionen?, in: *Schutz von Kreativität und Wettbewerb. Festschrift für Ulrich Loewenheim zum 75. Geburtstag*, p. 286.

52. For Germany, see the criticism by S. Fröhlich, *Düfte als geistiges Eigentum*, Tübingen: Mohr Siebeck, 2008, p. 224.

53. Hoge Raad, 26 June 1953, Nederlandse Jurisprudentie 1954, 90, *Hyster Karry Krane*.

54. There remains the question whether European case law, according to which the term “public” in the concept of “communication to the public” refers to an indeterminate number of potential television viewers, could have an indirect influence on the concept of public performance, so that it would involve commercial premises accessible to an indeterminate number of members of the public. The Dutch Hoge Raad has started to extend this solution of the European Court of Justice (7 Dec. 2006, C-306/05, SGAE v. Rafael Hoteles, no. 37) to other forms of exploitation: Hoge Raad, 19 June 2009, BUMA v. Chellomedia, AMI 2010, pp. 12-18, note P.B. Hugenholtz. Such a step seems undesirable and, for the moment, not very likely.

55. A. Quaedvlieg, Intellectuele Eigendom, in: C.J. Loonstra, W.A. Zondag, SDU Commentaar Arbeidsrecht (2010), II, no. 39, para. C.7.3-4.

56. S. Fröhlich, *Düfte als geistiges Eigentum*, Tübingen: Mohr Siebeck, 2008, p. 98, referring to Barbet, Breese, Guichard, Lecoquière, Lehu, Vanheems, *Le marketing olfactif – une approche créative, commerciale et juridique du parfum et des odeurs*, Paris 1999, p. 364 *et seq*.