COPYRIGHT PROTECTION FOR PERFUMES*

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I. INTRODUCTION

In June 2004, the *Lancôme* opinion from the Netherlands held that perfume compositions are copyrightable.[1] NautaDutilh, the firm that represented Lancôme, claimed the ruling was "internationally groundbreaking."[2]

That assessment is accurate primarily because the Appeals Court did not rely on principles unique to Dutch law. The statement is further substantiated by the Court's finding that the scent, rather than the composition, of Lancôme's perfume qualified for copyright protection. Perfume manufacturers seeking additional grounds for relief from imitation—in the United States and elsewhere—will be pleased. Precedential or not, the Dutch Court's opinion will make it difficult for other courts to dismiss manufacturers' claims as frivolous.

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** The author's earliest relevant experience is recounted in Thomas G. Field, Jr. and James B. Gilbert, *Quantitation of Methanethiol in Aqueous Solutions by Head-space Gas Chromatography,* 38 Anal. Chem. 628 (1966) (describing use of gas chromatography for quantitative and qualitative analysis of odiferous compounds). Other information is available on the author's home page at http://www.piercelaw.edu/tfield/tgf.htm.

1 Annemarie Louis Margot Field, I.B. [¶ 4] *Lancôme Parfums et Beauté et cie S.N.C. v. Kecofa B.V*, http://www.piercelaw.edu/tfield/tresor.pdf (accessed October 12, 2004); 45 IDEA 63 (2004) (an English translation of the Dutch case *Lancôme Parfums et Beauté et cie S.N.C. v. Kecofa B.V.*, (Dutch Ct. App., Den Bosch, 2004)) [hereinafter *Lancôme*].

2 NautaDutilh, *NautuDutilh Wins Lawsuit Lancôme's Perfume 'Trésor'*, http://www.nautadutilh.com/frameset.asp (accessed Aug. 6, 2004) (quoting lead-in to article).

The opinion warrants close attention because its effects are likely to reach well beyond the potential impact on the perfume market.[3] It will affect all products having an exclusively olfactory appeal, including, for example, most blends of spices and flavorings.

The thesis of this paper is that the Dutch Court erred in protecting compositions rather than scents or fragrances. As discussed below, such an approach runs afoul of basic copyright principles here and abroad.

But what of scents? It would be relatively novel,[4] but hardly radical, to urge that the olfactory appeal of perfumes is as deserving of protection as the aural or visual appeal of music, poetry or images. Adaptations needed to protect scents as such would be modest, but this paper also concludes that, with scant evidence of need, even that is unwarranted.

To support my thesis and ultimate conclusion, it is necessary, first, to flag the most relevant language in the remarkably brief Dutch opinion; following that, I provide useful information about the parties, necessary background about the perfume industry and information about other protections available to perfume manufacturers.

II. *LANCÔME PARFUMS ET BEAUTÉ ET CIE S.N.C. V. KECOFA B.V.*

Regarding the key issue of whether the general nature of perfumes permits any copyright protection the Court concluded, "[c]onsidering that the scent itself is too fleeting and variable and dependent on the environment, it cannot be protected by copyright laws."[5] The Court nevertheless held "that the material that gives off the scent can be perceived through the senses and is sufficiently concrete and stable to be considered a 'work' under the Copyright Act of 1912."[6]

Having found copyrightable subject matter, the Court turned to the question of originality, the second requirement for a protectable

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3 *See e.g.* Chandler Burr, *The Emperor of Scent* 8 (New York Random House 2002) (perfumes generate about $20 billion in annual sales).

4 *See* Marie Dubarry, *La Protection Juridique d'une Fragrance* 35 (2000), http://www.en-droit.com/intellex/ouvrages/protection_juridique_fragrance.pdf (accessed Oct. 12, 2004) (three French decisions have refused to extend copyright to perfumes).

5 *Lancôme*, *supra* n. 1, at I.A. [¶ 1].

6 *Id.* at I.A. [¶ 2] (an English version of the Dutch copyright statute is available for access online at http://www.ivir.nl/legislation/nl/copyrightact.html (accessed Oct. 12, 2004)).

work. The Court held that to be original, a perfume "does not need to be new in the objective sense," but only "subjectively" novel as viewed by its creator.[7] Using that standard, the Court rejected defendant's argument that plaintiff's perfume lacked originality:

> Lancôme chose 26 olfactory components out of several hundreds of components that led to this specific and unique combination, which was very popular upon its introduction to the public. The perfume is the result of the fact that Lancôme was trying to create a striking and unique scent. Since these facts were not sufficiently denied by Kecofa, the [trial court properly found the perfume to be original].[8]

In the last three sections of its opinion, the Court ruled, for example, that Lancôme owned the rights to the perfume in question and was entitled to Kecofa's profits.[9] But such matters, themselves, are of little concern to anyone other than the parties.

III. BACKGROUND

A. The Parties

The last quoted observation of the Court reflects but one way in which Kecofa failed to meet its burden on factual issues.[10] But the much smaller company appears to have been overwhelmed. As reported in a widely carried AP account by Toby Sterling, "Kecofa had 70 employees and sales of [US$12.3 million] in 2002. Lancôme is owned by France's L'Oreal, with 50,000 employees and sales of more than [US$17.2 billion] in 2003."[11] In the same vein, Sterling reported that Leon Meels, a Kecofa spokesman, had "said the company's profit margins are so small that the cost of . . . [calculating earnings from infringing sales] would likely be greater than the earnings themselves."[12]

Following receipt of the adverse decision, Kecofa promised to produce a non-infringing version of *Female Treasure,*[13] by August 1 and

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7 *Id.* at I.A. [¶ 3].

8 *Id.* at I.B. [¶ 1].

9 *Lancôme, supra* n. 1.

10 *Id.* at I.B. [¶ 1]; *see also id.* at I.B. [¶ 3].

11 Toby Sterling, *Ruling Protecting Lancôme's "Tresor" from Cheap Replicas Rattles the Industry*, Canadian Press ¶ 17 (July 23, 2004) (available at 2004 WL 87766638).

12 *Id.* at ¶ 20.

13 *See Lancôme*, *supra* n. 1, at Procedural History [¶ 1] (Despite similarities in product names, plaintiff's trademark was earlier found not to be infringed.).

to seek further review.[14] No reformulated product has yet been introduced,[15] but an appeal is pending.[16] Given procedural challenges, the Dutch Supreme Court may not reach the merits.[17] In any event, as long as the current ruling stands, copyright lawyers here and abroad will be happy to mine a new, golden source of legal ambiguity.

B. Perfumes

Chandler Burr's recent book, *The Emperor of Scent,* furnishes extensive discussion of the perfume industry, the composition of old perfumes and the design of new ones.[18] Burr's most notable contribution, however, is his attempt to explain Luca Turin's "novel theory of primary olfactory reception based on a form of inelastic electron tunneling spectroscopy"[19] and his lively account of why that theory has so far failed to gain acceptance.[20] Of particular relevance to possibly expanded intellectual property protection for perfumes is Turin's conclusion that our sense of smell is "not more subjective than color or sound."[21]

A Consumer Reports article also provides useful information.[22] For example, with regard to copies, it states:

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14 *See* Kecofa Cosmetics, *Nieuws*, http://www.kecofa.nl/nl/nieuws.asp (accessed Aug. 5, 2004) (in Dutch) (Leon Meels was kind enough to email the author an English summary on July 26, 2004.) [hereinafter *Nieuws*].

15 *Id.* According to Meels, Kecofa intended that "[t]he ingredients will be different, the scent however will be exactly the same as before." A recent visit (Oct. 23, 2004) to Kecofa's website, http://www.kecofa.com, however, disclosed only one product name containing the word "treasure"—"Revealed Treasure."

16 Personal communication from Robert S. Meijer, Kecofa's appellate counsel (Oct. 5, 2004) (indicating that an appeal (cassation) had earlier been filed with the Dutch Supreme Court).

17 *Id.* (It is argued, for example, that the Appeal Court's finding the composition copyrightable was a surprise because plaintiff had argued only that the scent was copyrightable.).

18 Burr, *supra* n. 3, at 8.

19 *Id.* at 147; *see also* Luca Turin, *Rational Odorant Design,* http://www.flexitral.com/research/Rational_odorants.pdf (accessed Aug. 11, 2004) (Richard Axel and Linda B. Buck were later awarded a 2004 Nobel Prize for their contributions to understanding olefaction); *see e.g.* http://www.Nobelprize.org/ medicine/laureates/2004 (accessed Oct. 23, 2004); Turin, *supra* at 3 (briefly related their work to his).

20 *See e.g.* Burr, *supra* n. 3, at 140-183.

21 Turin, *supra* n. 19, at 11 (examples at 12-13 are compelling).

22 *How to Buy a Fragrance*, 58 Consumer Reps. 765 (Dec. 1993).

> If you're buying cologne instead of perfume, consider fragrance knock-offs. In side-by-side comparisons, our experts judged *Giorgio* cologne and the knock-off, *Primo,* exactly the same in overall quality. . . . In a comparison of *Chanel No. 5* cologne and . . . *An Impression of Chanel,* the real thing scored only a bit higher than the knock-off.
>
> *Ninja* doesn't state outright that it's an *Opium* copy but does invite the comparison. [O]ur experts . . . gave *Ninja* slightly higher marks than *Opium* toilet water and significantly higher marks than *Opium* perfume. Our experts found *Ninja* . . . more complex—and, therefore, more interesting.[23]

Notwithstanding that assessment, *Ninja,* available only as a cologne, was sold in 1993 at $8 per ounce whereas *Opium* perfume was $205 per ounce and *Opium* toilet water was $30 per ounce.[24] Thus, despite imitation, it is unclear that perfume designers suffer.

Indeed, *4711* cologne created by Mulhens in 1792,[25] is still marketed by its creator.[26] Although the trademark and corresponding secret formula were once separately held,[27] that seems to no longer be true.[28] Likewise, despite attempts to imitate,[29] Chanel No. 5 is still one of the world's best known perfumes. Created in 1921,[30] it was the first product to be inducted into the Fragrance Hall of Fame in 1987.[31] Shalimar, created in 1925 and inducted into the Fragrance Hall of Fame in 1989, sells for $93 per quarter-ounce,[32] despite efforts to imitate it.[33] Subject to the same risk, Joy, created in 1930 and inducted into the

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23 *Id.* at 768-69.

24 *Id.* at 769.

25 *Mulhens & Kropff, Inc. v. Ferd. Muelhens, Inc.*, 43 F.2d 937, 938 (2d Cir. 1930).

26 *See* FragranceNet, *FragranceNet.com*, http://www.fragrancenet.com (accessed Oct. 12, 2004) (search term: 4711).

27 *Mulhens & Kropff*, 43 F.2d at 938.

28 *See* FragranceNet, *supra* n. 26.

29 *See How to Buy a Fragrance*, *supra* n. 22; *see also Smith v. Chanel, Inc.*, 402 F.2d 562, 567 (9th Cir. 1968) ("Appellees [Chanel] conceded below and concede here that appellants 'have the right to copy, if they can, the unpatented formula of appellees' product.'").

30 This and further information is provided at Chanel's website. Chanel, *Chanel No. 5,* http://www.chanel.com (accessed Sept. 24, 2004) (*select* Fragrance & Beauty, *select* Fragrance, *select* No. 5, *select* Discover the History of No. 5).

31 The Fragrance Foundation, *Previous Winners of the "FiFi" Awards,* http://www.fragrance.org/fifi_pastwin.html (accessed Oct. 12, 2004).

32 *E.g.* FragranceNet, *supra* n. 26 (*search* Shalimar).

33 *See Saxony Prod., Inc. v. Guerlain, Inc.*, 513 F.2d 716, 722 (9th Cir. 1975).

Fragrance Hall of Fame in 1990,[34] continues, at $235 per half-ounce, to be one of the most expensive perfumes.[35]

Had U.S. copyrights been available for those products, they would seem to have been forfeited for publication without notice.[36] That issue aside, copyright on any perfume created before 1923 would have expired in the United States and possibly much sooner elsewhere.[37]

C. Legal Protection Other Than Copyright

Justice Brandeis once accurately stated:

> The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.[38]

As illustrated above, some perfume designers have nevertheless managed to keep imitators at bay longer than would be possible using copyright alone.[39]

First, although trademark and related law cannot be used to prevent product duplication or accurate comparative statements,[40] protection for brand names and non-functional product configurations or packaging[41] is adequate to stop blatant and not-so-blatant counterfeits.[42]

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34 *Previous Winners of the "FiFi" Awards*, *supra* n. 31.

35 Parfums Raffy, *Joy Perfume*, http://www.parfumsraffy.com/women/joy.html (accessed Oct. 12, 2004); *see also How to Buy a Fragrance*, *supra* n. 22, at 768.

36 *See* 17 U.S.C. § 405(a) (2000).

37 *See e.g.* Laura N. Gasaway, *When U.S. Works Pass into the Public Domain*, http://www.unc.edu/~unclng/public-d.htm (accessed Oct. 3, 2004). Outside the United States, duration may be shorter; under Art. 12 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) [hereinafter TRIPS Agreement] or Art. 7 of the Berne Convention for the Protection of Literary and Artistic Works (1971) [hereinafter Berne Convention], they need not exceed 50 years.

38 *Intl. News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

39 *Supra* nn. 27-37.

40 *See e.g. Chanel*, 402 F.2d at 563.

41 *See e.g.* 15 U.S.C. § 1125(a)(3) (2000 & Supp. 2004) (stating that plaintiffs must show that unregistered trade dress is not functional); *see also TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 523 U.S. 23, 29 (2001).

42 *See* 15 U.S.C. §§ 1116(d), 1117(b).

Second, compositions of marketed perfumes that cannot be determined organoleptically by highly trained experts, or by use of gas chromatography and other modern analytical techniques,[43] enjoy trade secret protection.[44] In such ways, the identity and quantity of major ingredients might be readily determined. But complex blends derived from natural oils are unlikely to be duplicated exactly.

This seems to explain, at least partly, differences between the originals and knock-offs mentioned by Consumer Reports.[45] Yet, as also mentioned, naturally occurring oils are expensive; for example, 800 pounds of jasmine blossoms yield only a pound of essence.[46] Thus, "more and more, the aromatics are now synthetics, developed in a laboratory."[47]

Patents, however, are available for those synthetics. As explained by Klaus Bruns and Ursula Weber in a U.S. Patent:

> The use of fragrances as perfumes and odorants has existed for as long as can be remembered. These substances were early obtained from suitable animal and plant sources, and since the nineteenth century synthetic fragrances have been prepared by chemists.
>
> The requirements for a desirable fragrance are subjective and change with the fashion. This gives rise to a constant demand for new fragrances which may stand alone or act as compliments to those already available.
>
> The problem faced by the synthetic chemist is the lack of predictability of success in producing an acceptable fragrance since it has yet to be established that there is any predictable relationship between chemical structure and fragrance characteristics or nuances.[48]

Bruns and Weber then described means for obtaining new compounds of "unusual lasting power" and said that, when mixed with other fragrances:

> Such compositions can be used to perfume cosmetic preparations, such as creams, lotions, colognes, aerosols, and toilet soaps, as well

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43 *See e.g. Bonito Boats, Inc. v. Thunder Craft Boats, Inc*., 489 U.S. 141, 160 (1989) (citing chromatography as an acceptable way to reverse engineer unpatented chemicals).

44 *Id.*

45 *How to Buy a Fragrance*, *supra* n. 22, at 768-69.

46 *Id.* at 765, 768.

47 *Id*. at 768; *see also* Turin, *supra* n. 19, at 1-2.

48 U.S. Pat. No. 4,555,359 (col. 1, ll. 6-19).

> as in extract perfumery. But they may also be used for odor improvement of technical products.[49]

In May 2004 alone, patents were granted for a compound useful as a perfume fixative/enhancer,[50] another for a perfuming and flavoring ingredient,[51] and a third for a family of ethers useful "as a constituent of fragrance mixtures or perfume oil."[52]

It may seem strange to people unfamiliar with patent law, but patentable substances need not be entirely new. Those existing only within complex natural mixtures may be claimed in novel,[53] purer, forms if means of obtaining them are not obvious to ordinary perfume chemists.[54] Likewise, new mixtures of natural or synthetic ingredients may be patented if they have nonobvious characteristics.[55] Such patents do not reduce the public domain—upon expiration, they expand it.[56]

IV. RECONSIDERATION OF *LANCÔME V. KECOFA*

After losing its trademark suit, Lancôme sought protection under copyright.[57] Thus, it is fair to assume that it held no patents. Moreover, if Lancôme's perfume consisted of only twenty-six easily identified and quantified ingredients, protection against others improperly obtaining its formula would be of little use. Whether that is true and how accurately Kecofa, using twenty-four of those ingredients, was able to duplicate its scent is unclear. The Court said that the twenty-fifth ingredient was substituted because it was cheaper,[58] but Kecofa denies that.[59] In any

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49 *Id.* at col. 2, ll. 11-15.

50 U.S. Pat. No. 6,737,396.

51 U.S. Pat. No. 6,734,158.

52 U.S. Pat. No. 6,734,159.

53 35 U.S.C. § 102 (2000).

54 *Id.* at § 103.

55 *Id.; see also e.g. U.S. v. Adams*, 383 U.S. 39, 51 (1966). Luca Turin related in a July 31 e-mail that "the intensity vs. concentration curve for each material is different: doubling the [amount] of, say, dihydromyrcenol may preserve the same overall 'form' whereas doubling geosmin would make a huge difference."

56 *But see GRAIN, Biopiracy, TRIPS and the Patenting of Asia's Rice Bowl*, http://www.grain.org/briefings/?id=29 (accessed Oct. 3, 2004) (the reference to a patent on ilang-ilang seems to reflect this common misunderstanding); *see e.g. supra* n. 48 (the patent contains ilang-ilang oil as well as several other natural oils).

57 *Lancôme*, *supra* n. 1.

58 *Id.* at III. [¶ 3].

event, one must wonder about the extent to which consumers would find Kecofa's copy fully equivalent.[60]

By finding the scent as such "too fleeting and variable and dependent on the environment" to be protected by copyright,[61] the Court rendered such queries irrelevant. Although the Court did not explain its rationale, Consumer Reports offered some insight into how and why a perfume's impact varies over time and from user to user:

> The blends that perfume chemists put together are designed to create different impressions at different times. The top notes are the scents you notice . . . for the first 10 to 15 minutes the perfume is on your skin. Then the middle notes surface [and] dominate for the next several hours. . . . The end notes are . . . the basis for the fragrance; they last until there's nothing left to smell. Applying a fragrance to your wrist is pointless if you're buying . . . for someone else. The bottled chemicals react with the skin's chemicals, so the same fragrance can smell slightly different from one wearer to another.[62]

Yet, refusing protection for scents seems fully equivalent to denying protection for images because the impression varies according to, say, lighting, distance and angle, not to mention the visual acuity of observers, some of whom are colorblind. Music varies at least as much,

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59 *Nieuws, supra* n. 14 at 14 [¶ 5] recites:

> Oh ja, 1 ingredient was volgens L'Oreal niet identiek maar een "goedkope" vervanging voor hun Musk ingredient. NEE, dat was geen goedkope vervanging maar zelfs een duurdere. Een vervanging die KECOFA nodig vond omdat dit Musk ingredient al jaren ter discussie staat omdat het direct door de huid wordt opgenomen en zich verzamelt in de moedermelk. Sinds einde 1997 worden deze Musk verbindingen dus ook niet meer gebruikt door KECOFA.

As translated by Annemarie Field and Professor Johannes E.R. Frijters, that paragraph argues:

> And oh, 1 ingredient according to L'Oreal was not identical but a "cheap" replacement for their Musk ingredient. NO, that was not a cheap replacement but in fact a more expensive ingredient. A replacement Kecofa found necessary because this Musk ingredient has been the point of discussion for years because it is directly absorbed by the skin and collects in the breast milk. Since the end of 1997 these Musk compounds are no longer used by Kecofa.

60 It is unclear whether the Court, *supra* n. 58, meant that the quantities as well as the ingredients were the same. If not, that poses an additional problem. *See e.g.* Johannes E.R. Frijters & Cornelis P.M. Van Houte, *De geur van Parfum zit niet in the fles* (The odor of perfume is not contained in the bottle), 79 Nederlands Juristenblad 1987, 1989 (2004) (noting that scents are determined by both ingredient identity and concentration) (translations by Jan Frijters & Annemarie Field).

61 *Lancôme, supra* n. 1, at I.A. [¶ 1].

62 *How to Buy a Fragrance*, *supra* n. 22, at 769.

perhaps more, if the characteristics of musical instruments are considered.

That aside, copyrights in three-dimensional works are infringed, with few exceptions, by two-dimensional works such as photographs and paintings[63] as well as by three-dimensional replicas. Likewise, copyrights in paintings or photographs are infringed by digital reproductions.[64] Thus, copyrights are infringed by works of substantial similarity, regardless of media or lack of permanence.[65]

In the United States, courts and Congress have long been hostile to offering copyright protection to potentially patentable subject matter. In a seminal opinion, the U.S. Supreme Court stated:

> The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government. . . . Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book, if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries.[66]

Essentially codifying the next-to-last sentence, the 1976 Copyright Act provides:

> In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described . . . or embodied in [a] work.[67]

Similarly, the Act withholds protection from articles that have "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[68] Compositions of matter, however, are not explicitly excluded in the Act.

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63 *See* Dutch Copyright Act 1912 Art. 18 (translation at http://www.ivir.nl/legislation/nl/copyrightact.html (accessed Oct. 3, 2004)); *cf.* 17 U.S.C. § 120(a).

64 *See e.g. Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002).

65 *Id.* (Infringing images vanished as soon as computer users moved on to something else.).

66 *Baker v. Selden*, 101 U.S. 99, 102-03 (1879).

67 17 U.S.C. § 102(b); *see also* TRIPS Agreement at Art. 9(2) (containing a similar provision to 17 U.S.C. § 102(b)).

68 17 U.S.C. § 101 (definition of a "useful article").

Aversion to extending copyright protection to potentially patentable subject matter is, nevertheless, well-grounded and is expected to be global. As noted earlier, qualifying works enjoy at least 50 years of automatic protection under the Berne Convention and the TRIPS Agreement.[69] Moreover, as found in *Lancôme,*[70] qualifying works need not be objectively novel, much less nonobvious.[71]

Why, then, would anyone seek patents, country-by-country, for protection lasting no more than 20 years?[72] Moreover, assuming that requirements going well beyond objective novelty can be met,[73] patent protection is conditioned upon disclosure; copyright protection is not.[74] Until such issues are squarely confronted, no court should allow copyright protection for product compositions regardless of their intended use.

Copyright protection for scents, however, is less bothersome. Luca Turin kindly confirmed Kecofa's assertion[75] that scent is not necessarily dependent on composition.[76] Aesthetic appeal divorced from composition is unlikely to be unpatentable, and infringement could be determined by the combination of expert and lay assessments applied to other copyrighted works.[77] Moreover, scent has no apparent function beyond conveying olfactory information—the classic basis for distinguishing copyrightable sculpture from articles protectable only, if at all, by design patents.[78]

Addressing that issue, the U.S. Supreme Court said:

> Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold.
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> Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—

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69 *See* Parfums Raffy, *supra* n. 35.

70 *Lancôme*, *supra* n.1, at I.B. [¶ 3].

71 *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (the leading U.S. case on the originality requirement).

72 *See e.g.* TRIPS Agreement at Art. 33.

73 *See e.g. id.* at Art. 27(1).

74 *See e.g. id.* at Art. 29(1); *see also* Pat. No. 4,555,359, *supra* n. 48 (examples in cited patent).

75 *See supra* nn. 13-15.

76 E-Mail from Luca Turin, Chief Tech. Officer, Flexitral, Inc., to the author, *perfume compositions* (July 31, 2004, 12:32 p.m.) (copy on file with Author).

77 *See e.g. Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380, 382-83 (S.D.N.Y. 1987) (noting the difficulty of applying the same standards to a variety of works).

78 *See* 17 U.S.C. § 101.

> not the idea itself. . . . Absent copying there can be no infringement of copyright. . . . We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration.[79]

Yet, as Judge Stapleton later observed: "Courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function."[80]

If perfume manufacturers are short-changed by their current intellectual property options, they should present their case to legislatures, not to courts. Judges who appreciate what they are getting into should be reluctant to venture forth without legislative guidance.

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[79] *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954) (notes and citations omitted).

[80] *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 670 (3d Cir 1990).