

One on the nose for Bellure: French appellate court confirms that perfumes are copyright protected

Société Bellure v SA L'Oréal et al., Cour d'appel de Paris, 25 January 2006

The Cour d'appel de Paris has held that a fragrance could be protected by copyright, as long as it fulfils the requirement of originality.

Legal context

Article L 112-2 of the French Intellectual Property Code provides that all works of the mind are protected, whatever their genre, form of expression, merit or purpose.

Facts

L'Oréal, together with other perfume manufacturers (Lancôme, Prestige, Parfums Cacharel, Parfums Ralph Lauren and Parfums Guy Laroche) took legal action against Bellure, a Belgian perfume manufacturer, before the Tribunal de Grande Instance de Paris. The famous perfume manufacturers claimed that Bellure infringed several of their intellectual property rights. First, they claimed that there was infringement of their trade marks and design (*modèle*) rights in the packaging and in the shapes of several of their perfume flasks. Second, they claimed that their copyright was infringed in several of their fragrances (such as Trésor, Anais Anais, Noa and Acqua di Gio). Third, they claimed that Bellure committed acts of unfair competition. Bellure, having lost in first instance, appealed to the Cour d'appel de Paris.

Analysis

Copyright Bellure claimed that, since French copyright law only protects works accessible to sight or hearing, not to taste or smell, fragrances could not be protected by copyright. The court did not follow this reasoning. First, it observed that Article L 112-2 of the Intellectual Property Code does not list protectable works exhaustively and does not therefore exclude those which are perceptible by smell. The article provides that 'all works of the mind are protected whatever their genre, form of expression, merit or purpose'. Second, French copyright law, contrary to British and United States law, does not require the work to be fixed in order for it to be protected: it is sufficient that the work's form be perceptible. Thus a fragrance is protected because it is perceptible by a human sense. A fragrance for which the olfactory composition is determinable fulfils this condition. Third, a fragrance can be a work if it is original, ie if it reveals the creativity of its author. The court held that the claimants' fragrances were original and that they were protected by copyright. Relying on sensory and physico-chemical analyses of the alleged infringing perfumes and on tests on members of the public, the court found Bellure's perfumes similar to those of the claimants and therefore infringing.

Designs L'Oréal holds a design right on the packaging of one of its perfumes. Bellure claimed that this design was neither new nor original, but did not produce any proof of previous designs in order to prove L'Oréal's design was not new. The court confirmed the validity of the design and held that Bellure's quasi-slavish reproduction of it infringed L'Oréal's design right. L'Oréal was also the proprietor of a design right in the lid of a perfume flask. The slight differences between that lid and the lid of Bellure's perfume flask did not produce a different overall impression on the informed user. The Court therefore confirmed Bellure's infringement of L'Oréal's design right.

Trade marks The court also found Bellure liable for infringement of the figurative trade mark rights that some of the claimants which it held in the shape and colours of their boxes, packaging and flasks for several of their perfumes. The court's main reason for finding all these trade mark infringements was that Bellure's packaging, flasks and/or colours were either identical or similar to those figurative marks, although the word marks used in relation to the respective infringing products were different. For example, Bellure's word mark for the product imitating Cacharel's word mark ANAIS ANAIS was called NICE FLOWER. In addition, the court found that Bellure was liable for acts of unfair competition. Bellure created a similarity of appearance by using the same or similar colours, packaging, and other indicia of identification in some of its perfumes and this created a risk of confusion with the perfumes of the famous manufacturers.

Practical significance

As the infringements of designs and trade marks were relatively straightforward, the court just applied the law. This decision does not therefore demonstrate any noteworthy development in the interpretation of legal concepts such as the design concept of the 'informed user'. The main significance of this case is that the Cour d'appel de Paris confirms the earlier case law of lower courts on the copyright protection of perfumes. In 1999, in a case concerning a copy of the perfume 'Angel' by T. Mugler, the Tribunal de Commerce de Paris had held that fragrances could be protected by copyright as long as they were original. In 2002, in a case concerning the perfume 'Le M âle' by J.P. Gaultier, the Tribunal de Première Instance de Paris had also ruled that perfumes could be copyright works, although there the perfume was not held to be original (see *T. Mugler v GLB Molinard*, T. com. Paris, 24.09.1999, Gaz. Pal., 17-18.01.2001, n. 17-18, p. 5 ff). In 2004 already, in a case also involving Bellure as a defendant, the Cour d'appel de Paris had confirmed the copyrightability of perfumes but had not given clear guidelines as to the specific definition of originality in their respect. The Court had even been clumsy in stating that the olfactory elements had to be chosen with an aesthetic aim (see *Beauté Prestige International v. Bellure*, CA Paris, 4th ch., 17.09.2004, unpublished. According to article L. 112-2 and a constant case law, neither beauty [whether something is aesthetic or not], nor merit can intervene in the decision whether copyright in a work subsists

or whether the work is original. For a comment, see P. Sirinelli, *Prop. Int.*, n. 14, p. 47 ff) The Cour d'appel de Paris has now given a much clearer definition of originality for perfumes: fragrances are protected if they are the fruit of an original combination of oils in such proportions that their smells reveal the creative contribution of the author.

In June 2004 a Dutch appellate court in s'Hertogenbosch also held that perfumes (their olfactory substance) could be protected by copyright (*Lancôme v Kecofa* [2005] ECDR 5). Thus in the Netherlands, as in France, a perfume is protectable by copyright for the same reasons. As a scent is perceptible by the senses, it is sufficient for it to be a work. Thereafter it is just a question of checking whether the work is original, ie whether it bears the personal stamp of the maker. In the case of perfumes, the Dutch court said that it is the combination of several carefully chosen ingredients that makes the perfume original. Accordingly the specific originality criterion for perfumes is similar in the Netherlands and France.

In the United Kingdom, perfumes are only protected by copyright if they fall within one of the eight categories of protected work under section 1 of the Copyright Act; for example, literary or graphic works. This could be the case if the chemical composition of the perfume was described in a written or graphical manner—which would also fix the work, as is required in the United Kingdom. The written description of perfumes could be said to be a particular type of literary work i.e. a recipe (in *Brigid Folley v Elliott* [1982] RPC 433 a knitting guide was held to be a literary work and in *Autospin (Oil Seas) Ltd v Beehive Spinning* [1995] RPC 683 Laddie J. suggested that recipes could be literary works). However, this would not save fragrances, as reproducing them in three-dimensions (making the perfume) would not be an infringement. British copyright is thus of no help to perfume manufacturers. Ironically, however, originality would not be difficult to prove as only sufficient skill, judgment and labour, a much lower requirement than the French, and more generally continental one, is required. In addition, as the current trend in the EU is almost categorically to exclude the protection of perfumes by trade marks (*Sieckmann's application* Case C-273/00 [2002] ECR I-11737, [2003] ETMR 37), British perfume manufacturers are left practically without intellectual property protection in respect of their fragrances. Manufacturers can for instance apply for patents but of course it is less quick and more expensive. This discrepancy between the different copyright national laws shows in any case that there is still work to be done at the EU level to harmonize copyright laws (here at the level of the definition of a work and of originality), if this is something that the European institutions wish to tackle.

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