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# The Smell of Protection: The Scope of Intellectual Property Rights in Perfume (Fragrance)

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## ABSTRACT

*This paper deals with the unsettled jurisprudential issue, whether protection should be extended to the aspect of perfume (smell only) in the fragrance industry. Currently, the aspect of protection is available to the perfume industry through the usage of trademarks, trade secrets, patents and even scent mark (in case of EU). In India there is not much development in this area due to which the paper has gone into comparing the laws prevalent in other countries such as Dutch, France, US, and EU in order to provide a comparative outlook and demonstrate the judicious reasoning for the court of law to appreciate the powerful fundamentals & support of law and accordingly arrive at a conclusion to bring forth protection under copyright to perfume per se. It is high time that the Indian law should advocate to provide protection for upcoming sectors, especially, fragrance by bringing the same under the purview of Copyright Law. Furthermore, as protection under Intellectual Property Laws has been extended to visual as well as auditory creation, it is long overdue for the same to be extended to olfactory creations.*

## I. INTRODUCTION

Today Fragrance industry has been steadily rising in the Industrial Sector and has been delivering magnificently to the economy worldwide<sup>2</sup>. The current statistics suggest that the fragrance industry would touch USD 52.4 billion by 2025.<sup>3</sup> It is one of the most prominent industries, found to be a driving engine of economy of many developed countries like France, Switzerland, and United Kingdom etc. Fragrances play a vital role in our lives that we cannot think to step out of our house without spraying the liquid inside the attractive cologne cases/bottles. It can be assumed that in this world like everybody has a different perception or opinion about things, the same way every person has a different choice of aroma specification. The perfume rates range from low to high making it possible for everyone to

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<sup>2</sup> *Fragrances Report 2020*, Statista Consumer Market Outlook, (Sep 17, 2020, 18:08 P.M), <https://www.statista.com/outlook/70050000/119/fragrances/india>.

In Indian economy, fragrance segment revenue amounts to US\$306.7min 2020. The market is expected to grow annually by 5.5% (CAGR 2020-2023).

<sup>3</sup> M. Shahbandeh, *Global perfume market size 2013-2025*, (Sep. 14, 2020, 11:45 A.M), <https://www.statista.com/statistics/259221/global-fragrance-market-size/>.

have access to it. The perfumes can be categorized as- deodorants, colognes, body mist, roll-ons, solid perfume etc. These categorisations make it more appealing of a market next to the fashion industry. It is said that *“this is very competitive industry with companies spending 12% or more of their revenue on R&D yet one in three perfumes fails, and the average lifespan of a fragrance is somewhere between three and four years. It is absurd that despite the fact that a bottle of Chanel No. 5 is sold every 55 seconds, there’s no protection for fragrances.”*<sup>4</sup>

A particular odor can not only evoke memories, emotions but it is more closely related with a person, place(s), or things. Under the Indian Copyright Act<sup>5</sup>, we have protection for literary, dramatic, musical & artistic works, sound recordings and cinematograph films, then can we not have protection for odor(smell). In India we do not have any explicit protection for smell per se. Protection can be given to the chemical proportion, mixture of components, certain synthetic olfactory elements, the formulae developed for aroma to be manufactured et cetera. *“The liquid or the fragrance itself has never enjoyed any such protection and neither has the fragrance itself.”*<sup>6</sup> Therefore, this paper would emphasise upon the importance of giving protection to the component of fragrance (aroma) itself, instead of the protection available to it indirectly depending upon the various parameters under which the protection is sought. After having studied the scenario in other countries, the author would like to draw some attention to this topic for the Indian Judiciary to address.

## II. BACKGROUND AND COMPARATIVE VIEW: SCENARIO IN INDIA AND OTHER COUNTRIES

The idea of protection of Intellectual Property Rights emerged in the early 15<sup>th</sup> and 16<sup>th</sup> century during the Elizabethan era. IP rights are territorial in nature, therefore, a product might enjoy protection in one country but not in another if it hasn't been applied for the same in that respective nation. The purpose behind implementation of such laws was to protect the creation of a person from third party who/which could duplicate the work for their personal monetary benefits. IP protects the result of human creative endeavours and innovation.

Many studies conducted on the prospects of Fragrance Industry in India and its value addition to the economy of the country have reported that India contributes approximately \$500

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<sup>4</sup>Gaelyn Scott, *IP Protection for Fragrances*, Mondaq (Oct 10, 2018, 9:07 A.M), <https://www.mondaq.com/southafrica/trademark/336746/ip-protection-for-fragrances>.

<sup>5</sup>The Copyright Act 1957 S.13.

<sup>6</sup>Shalini Menezes, *Smelly Rights: Copyright in Perfume* (Oct. 12, 2018, 14:18 P.M), <https://www.patentbaristas.com/archives/2010/01/19/smelly-rights-copyright-in-perfume>.

million<sup>7</sup> to the global fragrance economy of Fashion Industry. The Government has notified Fashion Industry to be a luxury due to the same, hefty taxes and charges were laid down in this sector. Currently, protection for perfume bottle as a product altogether is sought under the realms of Trade Secret, Trademark, and Patents. However, according to my opinion a definite protection should be designed for the same under copyright and not for the product as a whole but the scent in that bottle. It is the copyright protection that extends to 'artistic work'. The definition of 'artistic work' *per se* does not explicitly provide the category of smell but it can be amended to include scent. Artistic work under Indian Copyright Act, 1957 means, "(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a [work of architecture]; and (iii) any other work of artistic craftsmanship;"<sup>8</sup>, thus, the creation of a unique smell can extend to under the third division, that is, "artistic craftsmanship". This also raises the question, i.e. if perfumers could be included under the category of craftsmen? Referring to the French Courts decision<sup>9</sup>, they went on to say that a perfumer cannot be recognised as an artistic craftsman because not only they do not make the perfume by themselves solely but also the making of a perfume is similar to that of a regular craftsmen akin to an artisan. Differing from this point of view, as like any other copyrightable work, for instance, in fashion industry the end product turns out to be a result of the industrial work undertaken by several people at various stages, there is no one person who carries out the whole work by themselves. The creators of perfume are to be designated as craftsmen because nowhere under Indian jurisdiction has the term 'craftsmen' been defined and adopting the general interpretation, the word reflects the creator's intention to create a work of art. Therefore, the intention of any perfumer is to devise anew scents captivating the customers according to their desires and distinct tastes.

In comparison to this on-going debate, recently the Dutch Supreme Court set a precedent in favour of giving protection to smell (*Kecofa v. Lancome*)<sup>10</sup>. In this case, there are two parties involved i.e. Lancome, a French cosmetics company and Kecofa, a Dutch company. Lancome sold a perfume by the name of Tresor (Treasure), whereas Kecofa sold their perfume at one tenth of the price under the name Female Treasure. Therefore, Lancome brought a suit against Kecofa on the grounds that they had trademark over the name Treasure

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<sup>7</sup>Fragrance & Flavor Industry in India, MSME (**June 11, 2019 15:33 P.M**), <https://msme.gov.in/fragrance-flavour-industry-india>.

<sup>8</sup> The (Indian) Copyright Act 1957S. 2 cl(c).

<sup>9</sup>*Bsiri-Barbir v. Haarman& Reimer* Cour de cassation [Cass. 1e civ.] Paris, June 13, 2006, D. 2006, Somm. 1741, J. Daleau.

<sup>10</sup>*Kecofa v. Lancôme*, HR, LJJN, (2006)AU8940.

and claimed copyright in the perfume. It was held by the Court that there was no breach of trademark and the names were not similar so as to be confused by the customers, but to Lancôme's surprise their claim to copyright was admitted and upheld. The court pronounced that, "*the scent of a perfume is different from its recipe or the liquid containing it, comparing the latter to the paper of a book, which is not subject matter of copyright, whereas the content of the book is. This distinction implies that a perfume that contains completely different ingredients but smells the same may be infringing, while a perfume with a similar formula but a different scent would not be.*"<sup>11</sup> In other words, if a smell is original, then in principle it can be a copyrightable subject matter. Due to unavailability of explicit protection available to smell under artistic work in Dutch laws it could not render perfumers R&D, finance and time in making such a unique smell appealing to customers go in vain. It can be said that it attracts the old principle of Sweat of the Brow, according to which the creator gains rights by simple diligence in during creation of a work. Creativity under this doctrine does not imply originality, to the extent of being new altogether, but there should be presence of creativity. Hence, this is validly applicable to a perfumer and her/his creativity.

At the same time, around three days prior to the aforementioned ruling given by the court in Netherlands, the scenario was inconsistent in France. The place of birth of the most luxurious perfumes, France has over the period of time contested many applications regarding extension of copyright protection to fragrance, but the highest court in France, *Cour de Cassation*, has been reluctant to this approach and claims perfume production to be a mere know-how technicality. The same was reflected in the dismissal of the copyright claim in the case of *Haarman and Reimer*(2006)<sup>12</sup>, wherein it was ruled that "*perfumes are not eligible for protection under French Copyright because they are a product of the application of purely technical knowledge and therefore, lack discernable association with the individual's personalities of their creators. This shows the unsettled jurisprudence over the applicability of copyright on perfumes*"<sup>13</sup>.

Whereas in U.S, many perfumers get protection under Patent Laws. The protection is sought for the newly created scent molecules known as 'captive odorants'. Interestingly, these odorants provide a much broader scope of protection as they include within their umbrella

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<sup>11</sup>**Kamiel Koelman**, *Copyright in the Courts: Perfume as Artistic Expression?* WIPOMAGAZINE (June 13, 2018 9:05 A.M),[http://www.wipo.int/wipo\\_magazine/en/2006/05/article\\_0001.html](http://www.wipo.int/wipo_magazine/en/2006/05/article_0001.html).

<sup>12</sup>*Bsiri-Barbir v. Haarman& Reimer*, Cour de cassation [Cass.1e civ.][Ultimate Ct. App.] Paris, June 13, 2006, D.2006, Somm.1741, J.Daleau.

<sup>13</sup>David A. Einhorn& Lesley Portnoy, *The Copyrightability of Perfumes: I Smell a Symphony*, (July 14, 2018, 11:23 A.M), [https://www.bakerlaw.com/files/Uploads/Documents/News/Articles/INTELLECTUAL%20PROPERTY/Einhorn\\_&\\_Portnoy\\_IP\\_Today\\_4-1-10.pdf](https://www.bakerlaw.com/files/Uploads/Documents/News/Articles/INTELLECTUAL%20PROPERTY/Einhorn_&_Portnoy_IP_Today_4-1-10.pdf).

any formulations of fragrances which comprise those molecules. However, many perfumers resist the usage of patent mechanism to protect their perfumes owing to the fact that procuring a patent is an extremely expensive as well as time consuming transaction given the limited duration of protection available.

Even trade secrets are used as a shield for perfumes. A trade secret can be defined as a “*formulae, technical know-how or a method of business adopted by an employer which is unknown to others and such information has reasonable impact on organizational expansion and economic interest*”<sup>14</sup>. Thus, it should be such so as to not to be within the knowledge of the public domain or be a form of public property. The chemical combinations which brings about the development of the unique smell are necessarily to be kept confidential and this can be done easily through a trade secret, which is why it is also the most commonly used method when it comes to seeking protection for fragrance over the world. “*The fragrance itself is a formula—an amalgamation of other scents to create a new, unique product not commonly known to others. The exclusivity of this new product is what makes it commercially valuable to the owner. Since no one else knows the formula, no one else can create and sell it, which, in turn, directs consumers to buy the fragrance from the owner. Due to this competitive advantage, it is beneficial to the owner to take reasonable measures to keep the formula a secret—which most perfumers do.*”<sup>15</sup> Despite the ease to obtain trade secret protection, perfumers desire to turn towards other mechanisms for protection due to apprehension over the reason of disclosure of the knowledge amongst the public, thus, ceasing the protection immediately. Perhaps, due to the production of perfume manufacturing with the inclusion of many employees, the formulae/know-how is even more vulnerable to disclosure as the information or knowledge has been disseminated amongst many to get out of the industry faster. Not just this, due to technological advancements and increment in the reach of science, reverse engineering is a common factor through which the fragrances can be reengineered easily. Hence, the perfumers are seeking to obtain protection under other IP domains.

### III. ARGUMENTS ADVANCED IN FAVOUR OF GRANTING PROTECTION TO SMELL

Firstly, a perfume is not produced just by the application of the simple know-how. It is artistic work whose manufacturing depicts form of creator’s taste and judgment which might also bring out the personality of the creator. Merely, because of a result of know-how it shouldn’t be turned down to grant protection because for example every painter begins from

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<sup>14</sup>*American Express Bank Ltd. v. PriyaPuri*, HI LLJ (Del)540(2006).

<sup>15</sup>S. Margaret Duangpanya, *The Sweet Smell of Protection: The Scope of Intellectual Property Rights in Perfume*, Lumen (June 18, 2018, 17:09 P.M),[https://lumendatabase.org/blog\\_entries/752](https://lumendatabase.org/blog_entries/752).

the common know-how in order to come up with a masterpiece. A command of know-how is necessary for all applied as well as pure art. Development of anything is beyond the bounds of question without the ordinary expertise.

Secondly, some people might also argue that perfume is not a form. But, a perfume does not constitute to be a form as it is unstable- the development of fragrance goes through various stages on application on the skin, “it is evanescent as 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”<sup>16</sup>. To justify, the perfume has a form of its own which is neither solid nor liquidified with respect to visual representation, but when it comes to ‘smell’ the form is ‘gaseous’. Emergence of form argument is a necessity for a tangible product to appeal to the eyes, thus, the sole basis is to give protection to something which is intangible.

Thirdly, National Laws and Berne Convention only extends protection to work which is appealing to the sight or hearing and not something which is olfactory. Appealing creations to the other senses were kept out of the realm of protection, otherwise it could have back-fired, so as to be unable to deny protection to wines and other culinary creations. Another probable assumption that can stand for this is, the framers back in the past during drafting the relevant laws were neither aware nor could they foresee that concept of fragrance would gain relevance seeking protection in the market. In EU even with the introduction of the scent mark (falling under the domain of trademark)<sup>17</sup> it calls for a visual representation of the scent through formulations such as a description of a scent shall be such in order to be unique by the usage of signs, words, colours, numerals etc. “In the best known and so far only affirmative decision concerning the registration of a scent (*Vennootschaponder Firma Senta Aromatic Marketing vs. Markgraaf B.V.*<sup>18</sup>), the Office decided to register the ‘scent of freshly cut grass’ for tennis balls. In its justification, the Board of Appeal ruled that “*the graphic representation may consist in a description of the scent which is distinguishable,*

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<sup>16</sup>Antoon Quaadvlieg, *Copyright And Perfume: Nose, Intellect And Industry* (June 19, 2018, 16:45 P.M), [https://klos.nl/wpcontent/uploads/2017/07/Quaadvlieg\\_Copyright\\_and\\_Perfume.pdf](https://klos.nl/wpcontent/uploads/2017/07/Quaadvlieg_Copyright_and_Perfume.pdf).

<sup>17</sup>EU Regulation of (EU) 2017/1001, S.1 art.4.

Under the EU Regulation of (EU) 2017/1001:- an EU trademark: – May consist of any signs, in particular words, including personal names or designs, letters, numerals, colors, the shape of goods or the packaging of goods, or sounds, provided that such signs are capable of: – Distinguishing the goods or services offered by one undertaking from those of other undertakings; and – Being represented in the Register of EU trademarks in a manner allowing the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

<sup>18</sup>*Vennootschaponder Firma Senta Aromatic Marketing vs. Markgraaf B.V.*, R 156 / (1998)-2.

*recognizable and which everyone knows on the basis of experience*”<sup>19</sup>. “Thus, the Board considered it sufficient to specify that the mark consists of the scent of freshly cut grass applied to the product, i.e. tennis balls.”<sup>20</sup> Perhaps, the most vital idea to be internalised is that fragrance is for the nose to appeal/identify and is not meant for the purpose of intriguing our eyes.

#### IV. CONCLUSION

Fragrance industry is usually a branded one and not a generic one. As the raw materials and components are unique and secret these are live in action and speaking. Studying the various outlooks and reasoning of courts in cases outside India, it is important to note that IPR is still at a *niche* stage in India, though it joined the WIPO in 1975 and derives most of its laws in congruence to the Berne Convention. Adjudging the growth and share of perfume/fragrance industry to the economy the Indian jurisprudence fathoms into the noteworthiness of including fragrance under the head of ‘artistic work’ of copyright. The appealing of olfactory receptors should be given a chance since with the technological advancement recognition of an exact smell or taste can be performed through spectrogram and other graphics, therefore, getting rid of the argument with respect to difference in perception to different people in case of fragrance. Even though, it is believed that the smell is not a product of the perfumer’s mind, however, what is often overlooked is that it is due to the perfumer’s capability to identify “the ability of a substance to emit a certain fragrance and the fact that the fragrance can be commercially exploited.”<sup>21</sup> It is this recognising ability of the creator that deserves to be lauded. With the protectionist trend of IPR, exclusion of fragrances from copyright could be very difficult to be justified, as it could diminish the very objective of IPR laws. Thus, this ‘Sweet Smell’ should be granted protection.

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<sup>19</sup>Joanna Wozniak, *Can one have exclusive right to a scent?* (Aug.20, 2020, 10:04 A.M) <http://www.codozasady.pl/en/can-one-have-exclusive-right-to-a-scent/>.

<sup>20</sup>Wozniak, *supra* note 18.

<sup>21</sup>Menzes, *supra* note 5.