***L'Oreal v. Bellure*: Paris Court of Appeal confirms that perfumes are copyrightable, published in JIPLP, 2006**

Paris Court of Appeal, *Société Bellure v. SA L'Oréal et al*., 25 January 2006

Single sentence summary
The Paris Court of Appeal held that a fragrance could be protected by copyright as long as it is original.

Legal context
Art. 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'Oreal, 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 Court of First Instance of 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 on the packaging and on shapes of several of their perfume flasks. Second, they claimed that their copyrights on several of their fragrances (such as Trésor, Anais Anais, Noa, Acqua di Gio) were infringed. Third, they also claimed Bellure committed acts of unfair competition. Bellure, having lost in first instance, appealed the decision. The Paris Court of Appeal ruled on 25 January 2006.

Analysis
Copyright
Bellure claimed that French copyright law only protects works accessible to sight or hearing, not to taste or smell. Therefore, fragrances could not be protected by copyright. The Court did not follow this reasoning. First, it reminded that art. L. 112-2 of the Intellectual Property Code does not list protectable works exhaustively and does not 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 English and American 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 for it to be protected. Thus a fragrance is protected because it is perceptible by a human sense. A fragrance whose olfactory composition is determinable fulfils this condition. Third, a fragrance can be a work if it is original, i.e. it reveals the creativity of its author.

The Court held that L'Oreal et al.'s fragrances were original and protected by copyright. Relying on sensorial and physico-chemical analyses of the alleged infringing perfumes and tests on members of the public, the Court found Bellure's perfumes similar to those of L'Oreal et al. and therefore infringing.

Designs
L'Oreal 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 to prove L'Oreal's design was not new. The Court confirmed the validity of the design and held that Bellure's quasi-slavish reproduction of it was infringing L'Oreal's design right. L'Oreal was also the holder of a design right on the lid of a perfume flask. The slight differences in 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'Oreal's design right.

Trade marks

The Paris Court of Appeal also found Bellure guilty of infringement of the figurative trade mark rights that some of the claimants hold on the shape and colours of their boxes, packaging and flasks for several of their perfumes mentioned above. The Court's main reason for 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 several counterfeiting verbal trade marks themselves were different. For example, Bellure's verbal trade mark imitating Cacharel's verbal trade mark "Anais Anais" was called "Nice Flower".

In addition, the Court found that Bellure was guilty of unfair competition acts. Bellure created a resemblance by using the same or similar colours, packaging, and other suggestions 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 rather straightforward, the court just applied the law [Note: keep this sentence as such]. Therefore, the decision does not bring noteworthy developments on the interpretation of legal concepts such as the design concept of "informed user".

The main significance of this case is that the Paris Court of Appeal confirms previous case law of lower courts on the copyrightability of perfumes. In 1999, in a case concerning a copy of the perfume "Angel" by T. Mugler, the Commercial Court of 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 Mâle" by J.P. Gauthier, the Tribunal de Première Instance de Paris had also ruled that perfumes could be copyright works (although in that case the perfume was not held to be original).[1] 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.[2] 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, the Court of Appeal of s'Hertogenbosch also held that perfumes (their olfactory substance) could be protected by copyright.[3] Therefore, in the Netherlands like 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, i.e. whether it bears the personal stamp of the maker. In case of perfumes, the Dutch court said that it is the combination of several carefully chosen ingredients that make the perfume original. Therefore the specific originality criterion for perfumes is similar in the Netherlands and France.

In the United Kingdom, perfumes could only be protected by copyright if they could fall within one of the eight categories of s. 1 of the Copyright Act, e.g. if they could be said to be a literary or graphic work. This could be the case if the chemical composition of the perfume was described in a written or graphical manner. At the same time this would fix the work, as is required in the United Kingdom. The written description of perfumes could be said to be a

[1] See *T. Mugler v GLB Molinard*, T. com. Paris, 24.09.1999, Gaz. Pal., 17-18.01.2001, n. 17-18, p. 5 ff.
[2] *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.
[3] This decision was the result of an action by Lancôme against a copier.

particular type of literary work, i.e. a recipe.[4] [Note: keep this part of the sentence] However, this would not save them, as reproducing them in three-dimensions (making the perfume) would not be an infringement. Therefore British copyright is 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 to almost categorically exclude the protection of perfumes by trade marks[5], British perfume manufacturers are left practically without intellectual property protection.[6] This discrepancy in the different copyright national laws shows in any case that there is still work to do at EU level to harmonise copyright laws (here at the level of the definition of a work and of originality), if it is something that the European institutions wish to tackle.

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[4] In *Brigid Folley v. Ellott* [1982] RPC 433 it was held that a knitting guide was a literary work and in *Autospin (Oil Seas) Ltd v. Beehive Spinning* [1995] RPC 683 Laddie J. suggested recipes could be literary works.

[5] See *Ralf Sieckmann*, case C-273/00, 12.12.2002 (ECJ), in which the Court held that in respect of an olfactory sign, the requirements of graphic representability are not satisfied by a chemical formula, by a description in written words, by the deposit of an odour sample or by a combination of those elements. In respect of the description of an odour, although it is graphic, it is not sufficiently clear, precise and objective. More recently, in respect of the smell of lemons for soles of shoes, the Board of Appeal of OHIM followed the *Sieckmann* ruling.

[6] Manufacturers can for instance apply for patents but of course it is less quick and more expensive. [Note: keep this sentence]