Kluwer Copyright Blog

France: no copyright protection for perfume

Brad Spitz (REALEX) · Monday, February 17th, 2014

The Supreme Court maintains its position in a case concerning a Lancôme perfume, stating that 'copyright only protects creations in their tangible form, so far as this form is identifiable with sufficient precision to permit its communication; whereas the fragrance of a perfume … is not a form that has this characteristic, and therefore cannot be protected by copyright'.

Article L.112-1 of the French Intellectual Property Code (IPC) protects 'the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose', without giving a definition of originality.

French case law has defined originality as the expression of the personality of the author. This definition is in line with European case law, which validated the French broad conception of originality, in particular in *Infopaq* (Case C?5/08) and in *Painer* (Case C?145/10), in which the European Court of Justice ruled that 'As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author's own if it reflects the author's personality' (para. 88).

Article L.112-2 IPC provides a non-exhaustive list of the works that may be protected by copyright. Even though this list does not include perfumes and fragrances, under French law, all creations are protected by copyright if they are original, regardless of the merit of the author or the purpose of the work, and of the type of work and the form of expression.

In 2006, in the land of the world's finest perfumes and fragrances, the French Supreme Court nevertheless ruled that 'the fragrance of a perfume, which results from the simple implementation of a skill' may not benefit from the protection of copyright (Supreme Court, 13 June 2006, 02-44718).

Despite resistance from certain lower courts and much harsh criticism stating that the creator makes choices in order to create the perfume, which is in a perceptible form (e.g. Michel Vivant, *Droit d'auteur: le Paradis pour le boulon? L'enfer pour le parfum?*, 91 RLDI 57, No. 3043 (2013)), the Supreme Court has so far maintained its position. For example, the Supreme Court quashed a judgment of the Court of Appeal of Paris of 14 February 2007 which had ruled that the perfume *Jean-Paul Gaultier Le Mâle* is protected by copyright; for the Court of Appeal 'a perfume may be a work of the mind in respect of Book 1 of the Intellectual Property Code if, bearing the imprint of the personality of its author, it is original' (Supreme Court, 1 July 2008, 07-13952).

In the present case, the Supreme Court, in a judgment of 10 December 2013 (11-19872), yet again maintains its position in a case concerning a Lancôme perfume, stating that 'copyright only protects creations in their tangible form, so far as this form is identifiable with sufficient precision to permit its communication; whereas the fragrance of a perfume, which, outside its process of development that is not itself a work of the mind, is not a form that has this characteristic, and therefore cannot be protected by copyright'.

Is that to say that we should stop protecting music? Both music and perfumes are intangible but can be written down on paper and are in a perceptible form.

Unless the legislator intervenes to include perfume in Article L.112-2 IPC's non-exhaustive list of works that can be protected if they are original, perfume will remain unprotected in France for a long time, at least by copyright law.

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