



## Essences of Ownership- The Copyrightability and Intellectual Property Issues Surrounding Fragrances

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*"The notion of intellectual property must keep pace with the times; it should embrace new concepts, including the protection of scents and fragrances."*

— Justice William O. Douglas

There is a certain discord regarding the copyrightability of fragrances in India. Various arguments defy the contentions that are for and against the very premise of fragrances falling under the ambit of Intellectual Property. This manuscript would include the aspects that are at stake in dialogue whenever the difference with respect to the plight of fragrances falling under the aegis of copyright is discussed. The topic is controversial and brings in different postulations. A comparison is drawn with regard to the plight of copyrightability in various countries. The essentiality of fragrances is also put forward. The very premise of fragrances is compared to other identical commodities, and the future prospects regarding bringing fragrances under the ambit of Intellectual Property are discussed. Also, the advent of not being able to copyright generic scents is a foundation of contrivances blessed by nature. Fragrances can be subject to duplication because of the commonality of certain fragrances, and the very aspect of differentiation is hard to scale and define; however, it is high time that a probable solution is garnered.

**Keywords:** Copyrightability, Fragrances, Intellectual Property, Controversy, Duplication

The credibility of fragrances concerning copyright is an engrossing matter. The unfolding matter revolves around copyright protection with regard to fragrances. The Berne Convention was an international assembly that agreed upon a set of legal principles that protect artistic & literary works. India is a member of the Berne Convention which provides an international forum that deals with the protection of works and the rights of the artists, even countries like France & Italy are acknowledged names for their chronicles of fragrances, India fairly is a new and vogueish name in the market but is gathering a plenteous appellation the scenario. Fragrances are largely identifiable by the name or ownership of a certain brand or artist attached to it. Brands and names that are known for the production of fragrances are very possessive about the composition of the said fragrance that goes on and about and brings profitability to their name. It is a well-known fact that the globe recognizes these countries as renowned names known as countries with a prosperous fragrance industry.<sup>1</sup>

Copyright forms a part of intellectual property rights, and it provides a preservative and safeguarding provision for the necessary interests of authors alongside the propagation of economic and social factors. Fragrances, in certain cases, form part of a lineage that is protected by generations of people owning family-run businesses. In a country like India, numerous businesses have carved a niche in the perfume industry where there is a generational set up of graceful propagation of their fragrance businesses, and they have, as a result, reaped huge profits and wealth out of it. In general, contrivances such as graphics, statutes, and songs comparably are sheltered by the aegis of copyrightability. However, the theme of the manuscript would talk about fragrances being sheltered under it. Since the very design of artistic works or literary works in general carries a specificity and generalised notion to it which is not present during describing fragrances' notes and the effect it possesses. It can also be put together that fragrances from the composition of chemicals in certain amounts artistically entail a certain smell that captivates people and obliges them to buy them for themselves to feel better about themselves.<sup>2</sup>

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It is also done to imprint a certain personality trait on other's minds by the way they smell. This has become a social construct and does not impede the way humans co-exist. Certainly, arguments persist that fragrances are know-how and not creations. Know-how can be safeguarded under contractual protection but it is not put under exclusive rights. Human beings, by the very virtue of possessing human rights severable, have some ingress to creativity, and fragrances can be deemed as the resultant outsource of the creativity of humans. Fragrances have become a necessary contrivance in today's time and express a certain essence that transcends a person's individuality. It can become a very stringent imposition for fragrances to be copyrighted, as it may lead to a series of disagreements regarding the legality of this safeguard; however, it is equally important for the fragrances to be safeguarded. The problem arises as to how a person would be able to delineate a certain fragrance while registering it under copyright. The definition of a particular fragrance can be described and put in context differently by two different people. One may as well miss certain notes of the particular fragrance, whereas the other person may, in totality, define and thrive under the description of the said fragrance. So here is where subjectivity thrives. It may complicate the process of copyright.<sup>3</sup>

Fragrances are like art, which, when asked to be defined, can fall prey to the impediment of subjectivity. Copyright requires the apt projection of the subject for it to be protected. However, there are certain advancements in spectrogram technology that allow for the exact description of smell or taste through spectrograms and other graphics. However, paintings are protected under Intellectual Property Rights and are also subject to different views regarding their description. Article 2 of the Berne Convention presents a non-exhaustive list of protectable works of art: the commentators are unanimous on this point. This means that what is not included in the list is not necessarily excluded; therefore, fragrances are not excluded a priori. There is a certain protectionist approach that accompanies the protection of fragrances, and it can be questionable with regard to the constitutionality of whether perfumes be copyrighted or not.

The justifiability of fragrances being protected under IPR would also pose a question of their

justifiability. There are pros as well as cons regarding this disputable matter. Whether the fragrance form is underqualified or simple creativity is also put into question. Fragrances are personal contrivances that connect the user with the author alongside an intimate appeal. The character of fragrances is not very permanent; after application to the body or clothes for a certain period, they reduce into nothingness where they are out of sensation after a particular period.<sup>4</sup>

The French jurisprudence had a reluctance to protect fragrances. They were not registered art forms, but as a form of chemical composition that held an aesthetic value to it. Certainly, there have been many instances where the bottles of the requisite perfumes have been protected, but with regard to the smell, it has been a matter of debate. France has a significant history with its culture that adamantly represents the perfume industry and is well known for the same. The lack of necessary conditions in the furtherance of it and the ability to reproduce the fragrances have acted as an impediment to getting the fragrances copyrighted. It is also unlikely that a patent protects a fragrance; it covers the technical facet. Trade secrets are used to protect the smell/fragrances. Courts have also shown reluctance to grant copyright protection because of various reasons, such as sign appropriation and public domain interests. Fragrances, while integral to branding and consumer appeal, currently receive limited legal protection under Indian law, particularly under the regimes of contract law and intellectual property rights (IPR). Contractually, protection of fragrances is primarily governed by the Indian Contract Act, 1872. Through private agreements such as non-disclosure agreements, licensing arrangements, or manufacturing contracts, parties can regulate the use, distribution, and confidentiality of fragrance formulations. These contracts, enforceable under Sections 10, 73 and 74 of the Contract Act, offer remedies for breach and damages.<sup>5</sup> However, such protections are quoad hoc—specific to the contracting parties—and do not provide universal or statutory rights enforceable against third parties, thus offering relatively lesser legal shield.

When it comes to IPR, the landscape is more complex. Copyright laws generally do not extend to fragrances due to the lack of fixation and the challenge of perceivability by the general public. Patent law, under the Patents Act, 1970, may afford protection to novel and non-obvious fragrance

compositions that have industrial application. Nevertheless, the possibility of reverse engineering and high costs associated with patent prosecution and enforcement often deter creators. Trademark law theoretically allows for the registration of non-traditional marks, including olfactory ones, under the Trade Marks Act, 1999.<sup>6</sup> However, practical difficulties such as the requirement for graphical representation and challenges in demonstrating distinctiveness limit its applicability in India, although jurisdictions like the EU and the US have recognized such marks in limited cases.<sup>7</sup>

Expanding legal protection for fragrances poses significant concerns, notably the risk of overprotection. Granting exclusive rights over scents could result in monopolies over commonly used or naturally occurring fragrances, stifling creativity and market competition. Moreover, the legal enforcement of such rights would involve extensive litigation, expert evidence in chemistry and olfaction, and intricate questions of originality and infringement, ultimately placing a greater burden on the judiciary. This raises the broader question of whether such protections should be restricted to luxury fragrances, which involve unique branding and substantial investments, or whether they should be extended to all fragrance-based products. Limiting legal protections to luxury perfumes may appear more justified, while extending them universally could escalate costs, hinder innovation, and complicate enforcement.<sup>8</sup> Hence, any move to enhance legal protection for fragrances must strike a careful balance between incentivizing innovation and avoiding the pitfalls of legal and economic overreach.<sup>9</sup>

Copyright is a legal concept, enacted by most governments, giving the creator of an original work exclusive rights to it, usually for a limited time. Generally, it is "the right to copy", but it also gives the copyright holder the right to be credited for the work, to determine who may adapt the work to other forms, who may perform the work, who may financially benefit from it, and other related rights. It is a form of intellectual property (like a patent, a trademark, or a trade secret) applicable to any expressible form of an idea or information that is substantive and discrete. Section 14 of the **Copyright Act, 1957** iterates about the meaning of copyright.<sup>10</sup>

Various contentions pose the likelihood or future prospects in this regard. One of them namely, if

regulations are made in this regard they may as well affect other contrivances that possess olfactory appeal and might have a futuristic appeal and may as well go beyond. The olfactory appeal of fragrances shall be protected as much as sounds, poetry, and images are protected. The perfume manufacturers shall also be safeguarded concerning their creation. Fragrances like sounds vanish after some time into nothingness as if they did not exist in the first place however they assimilate a positive proposition.

In the case of *Lancôme Parfums et Beauté et cie S.N.C. v Kecofa B.V.*, the court conclusively 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'. However, the court reaffirmed that perfumes are not copyrightable under French Law, which also transcends the complexity & concretisation of fragrances under a framework to be put under the aegis of intellectual property.<sup>11</sup>

In **Chandler Burr's** recent book, "*The Emperor of Scent*", it was concluded that the sense of smell is not more subjective than color or sound. Here, it can be inferred that the very basis of a colour or sound in its specificity purports its individuality or existence as a whole but the fact that fragrances carry with it, a mixture of notes and various smells intertwined together to conclusively present a presentable fragrance which at times, becomes a very complex phenomenon for it to be put or displayed as a specific contrivance. Whereas, colors and sound would never be differently defined by different persons, fragrances may as well be.<sup>12</sup>

It can also be presupposed that, in general, the noblest out of human productions- knowledge, truths ascertained, conceptions, and ideas became, after voluntary communication to others, free as the air to common use. With the advent of autonomy and self-regard, humans have tended to accrue selfishness in regard to their conceptions; however, in the garb of selfish motives, humans should not leave the very facet of humanity and keep things accessible to everyone. The attributability of the protection of one's property, thereby delimiting oneself and disregarding others, is not appreciable. Certain fragrances entail a complex composition that is tough to describe.

Perfumes have been in existence for a long time, but the onset and inclusion of factories in the picture and the embodiment of chemicals have just been added. Earlier, plants and animals were the sources of fragrances. Now, synthetic perfumes have been added

to the making of fragrances. Perfumes and fragrances have, in the due course of subjectivity and fashion, been made desirable to the public at large so that they procure profits. The impression that a particular fragrance project is also differentiable when intake by various people, in addition to the smell they possess, at various angles, etc.

The procedure for creating a perfume transcends the boundaries of mere technical application or basic routine know-how. It constitutes a step-by-step process wherein the perfumer exercises substantial skill, judgment, and aesthetic discretion. The composition of a fragrance involves the artistic selection and blending of aromatic ingredients, making it a manifestation of the creator's personality, cultural influences, and distinctive creative expression. Perceiving the idea from the intellectual property law perspective, this has prompted considerable debate across jurisdictions. In the European Union, the Court of Justice in *Sieckmann v. Deutsches Patent- und Markenamt*<sup>13</sup> emphasized the difficulty in protecting scents as trademarks due to the requirement of graphical representation and objective identifiability. Similarly, in *Lancôme v. Kecofa*<sup>14</sup>, the Dutch Supreme Court acknowledged that a perfume could qualify for copyright protection if it reflects the author's own intellectual creation discarding the sweat of the brow doctrine.

However, it has been observed through multiple instances that French jurisprudence has been somewhat more favorable, occasionally recognizing perfumes as protectable under *droit d'auteur* when they are deemed to reflect creative choices and personal imprint. However, common law jurisdictions such as the United Kingdom and the United States remain hesitant to accord copyright protection to olfactory creations, generally viewing them as functional products rather than expressive works, thereby failing the fixation and originality standards required for protection. Nevertheless, trade secrets and industrial design laws can provide indirect protection, particularly where the formulation of a perfume involves confidential information, trade practices, or unique bottle designs. Furthermore, *sui generis* protection models are increasingly being discussed at the WIPO and national levels to address the legal vacuum for such intangible yet creative outputs. Therefore, it is critical to recognize that the manufacturing of a perfume is not merely an industrial or chemical act but an intellectual and

artistic process—one that straddles the domains of science, aesthetics, and legal creativity. It is this complex nature that challenges traditional IP classifications and calls for a more evolved, interdisciplinary approach to protection.

In the case of *Baker v. Selden*, 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.”*<sup>15</sup>

The copyrightability of a particular fragrance in the interests of people at large shall be attributable to globality and the world at large and shall digress from the issues that act as hindrances for it to oblige.

However, it can be deemed conclusive that, for the subjectivity of perfumes to be a subject under Intellectual Property, they shall be referred to the legislation and not the judiciary. Judicial subjectivity may in the course of increased time lower the temerity of this pressing issue.<sup>16</sup>

In the case of *Coty Germany GmbH v. Xeryus Retail Private Limited & Anr*, the Delhi High Court reprimanded a website that was selling perfume testers bearing the name of ‘CK’ and imposed a cost of 1,00,000 /-; An *ex parte* order was passed in a suit of infringement and passing off. The testers were being sold in lieu of commercial value. It was deemed as an unfair trade practice. The court ordered the defendant injunction from marketing, selling, advertising, etc. its goods using the impugned trademark/logo/label or any other identical or deceptively similar trademark/ logo/label in relation to their goods and business of Perfume Testers and other allied/related products. The court also restrained them from doing any act which may amount to trademark and copyright infringement, passing-off, or a violation of Coty Germany’s proprietary rights in its trade name- “CALVIN KLEIN” or “CK”.<sup>17</sup>

The Indian courts have garnered vigilance with respect to the cardinal issue of bringing fragrances under the ambit of Intellectual Property Rights. Judicial discretion is used to advertise and propagate the legal values that a particular country instills prior to the regulation being made with respect to the copyrightability of fragrances. These judgments can hold literary value concerning future aspects in this regard.

A higher degree of similarity is deemed to be imitation and the person gets to prove that he has created the particular product independently. In order to bring about a global essence to the copyrightability of fragrances and to administer the happenings across the globe, we need to cater to the holistic approach with regard to the copyright of fragrances. According to the Dutch High Court, perceptible and original fragrances can garner protection under Intellectual Property. 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. For instance, the smell of roses will not be protected but if a person adds his twists to it, he will be subject to the protection of the formula that he has generated. Hereby, conclusively it is advised to document the procedure of generating the particular fragrance/scent so that it can circumvent future legal battles in case someone files for infringement of their Intellectual Property Rights.<sup>18</sup>

Worldwide, the notion of bringing perfumes as a contrivance under Intellectual Property has been vividly discussed. The creation of a particular fragrance can be termed as an aggregate of an artist that can carry the very intimate or personal endorsement of a person that he/she, by the very facet of creativity, can monetize it. However, for the production of fragrances on a large scale, an amass inclusion of factories is necessitated. Hence, the very personal notion of the identity of fragrances is negated. Big perfume houses, which are well known particularly, do not individualize the making of the fragrance and rather give out the details and their expectations of how they want their new fragrances to smell like, and in the furtherance of it, those fragrances are created. They try to accentuate the very basis of creation of new fragrances and try to inculcate an intimate touch towards it, which is very likely to give a personal touch to the said perfumes.

Copyrightability of fragrances for the body will enhance the commonality of protection of fragrances of detergents and room sprays, etc, and hence would lead to copyrightability of fragrances used for contrivances in everyday use because it is currently vogue to use various fragrances in most common things. It may lead to a series of conflictual events where different brands may be deemed to claim originality of a particular fragrance, which would lead to a lot of litigation. The smell is particularly known to carry a sense of safety, and it is known to affect human behaviour, which has been proved in the course of different events. Music and good smells tend to accentuate and are proven to be good for the human brain and are constantly seen as feel good factors often talked about together. Various fragrances have, time and again, proven to leave a calming effect on the brain, which, as a result, makes the working of humans more productive and effortless. Humans tend to memorize particular scents and perfumes that act as a contrivance accruing out of nostalgic events, either merry or sad. Perfumes are the most appealing commodity known to mankind, and they have transcended to be a basic necessity in the new times.<sup>19</sup>

The creator of fragrances tends to individualize and create a particular fragrance with intimate notions when asked to. For instance, if it is implored for them to create a scent that reminds the buyer of the said fragrance of Paris. For instance, a person's artistic transformation and creativity are showcased through mixing various chemical compositions and reaching out to a particular output generated out of the said composition. This actualization has no rules and entirely depends and varies according to the creativity of the person being assigned to do so.<sup>20</sup> The intuitive goal of forming a particular fragrance out of the notions that have been inflicted through the mind of the person so commanding in for the creation of a new fragrance is a very beautiful fact of the industry and contravenes the realm of rivalry of varied perfume houses. Variedly, samples are made out of different compositions, and the technician creates new fragrances and then submits them for acquiescence. Then, the perfumer adds the facet of creativity to the product.<sup>21</sup>

The selection of fragrances by the perfume houses is very selective and they tend to take in the perfumer whose scent is best favoured by the perfume house to create as a new fragrance and monetize it and ask the perfumer to work for the management team. The

perfumer submits multiple similar fragrances and the company accepts one or more favourably. However, it is not very necessary for various perfume houses to follow the same pattern, and it is a very artistic facet and differs variably. The perfume bottle's design, the fragrance, and the advertisement of the particular fragrance play a very integral role in the marketability of the fragrance and are likely to attract customers on these factors. Most fragrance houses tend to protect the design of the bottles they use, for fragrances through intellectual property as it transcends an intimate facet of the personalisation of a particular brand and hence affects the marketability.<sup>22</sup>

### **Copyrightability: *Sustenance v Contravention***

Both supporters and those who oppose the idea of the protection of perfumes under intellectual property have their very own contentions backed up with reasons. The people in opposition tend to put forward the point that fragrances do not carry an intimate notion, and they contravene the idea that fragrances have a personalized and artistic input, but they are a product of factory improvisation and hence shall not be protected under intellectual property. Meanwhile, the supporters tend to actualize and comprehend the facet of an intellectual mind that is present behind the creation of varied fragrances.<sup>23</sup>

The human brain variedly applies creativity and analyses its arbitrary mind to propose the idea of the formation of a particular fragrance. The fragrances can be deemed to be the very brainchild of a person which indistinctively may or may not be relative or match a particular fragrance. Perfumes are very judicial to be defined. A particular scent may be defined differently by one person and very distinctively by another. A creator may also personally and differentially like and add to the scent according to their idiosyncratic mind. A composition may vary according to the chemicals added or subtracted to it. The Physical perception of the person, the angle with which it is applied, the body part applied to it, etcetera, vary as does the intellectual perception of it. Also, there is a contention that perfumes are evanescent instruments that can be reproduced and are not so differentiated that they should garner copyright protection.<sup>24</sup>

The Berne Convention applies to the commodities that can appeal to sight or hearing, and perfumes are excluded in this sense. However, perfumes on the human brain have a differential exclusivity and the

brain can very easily differentiate differing scents. The brain's identification of scents casts an embargo upon the law to bring in regulations that can be further used for the protection of fragrances statutorily. The structural context and originality of a fragrance are very hard to trace, and the original and foremost production of the fragrance can be very hard to define. The particular reaction of the brain after it comes in consonance with a particular fragrance has no particularity or actualization and is restricted brain's domain. Perfumes can draw resemblances to each other, and the creators are free to create and preach different fragrances. The creators of the fragrances may carry out a certain style of fragrances that they produce. It may become a very conflictual domain to strike a balance between creating a new fragrance altogether and not falling in parlance with another fragrance that is already claimed by a brand to be their artistic expression that is monetized.

Perfumes can vaguely be formed and represented distinctively. Objective instrumentalities to evaluate and assess various fragrances and a scale to measure and connote various fragrances are also integral. The very calculation and assessment of the fragrances to further it towards the domain of copyrightability shall have a concrete basis and scale. However, the very outcome of a fragrance can be brought into existence by two very different compositions or procedures that can create similar results. However, the very fact of finding differential substances used in two fragrances shall only be assessed upon both of them smelling similarly where henceforth the probability of intellectual property accrues. The very premise of identification of fragrances is a very tricky facet and to claim and identify the very factum of its originality is another arduous matter.<sup>25</sup>

Various contentions have been repeatedly followed up. The technology and databases can resultantly save up the components, and the varying compositions under them can protect the fragrances under the umbrella of protection by law. However, the neurological identification by the human mind can also be extended to protect the regulations de jure. Conclusively, it can generate utter havoc not have to have fragrances being protected and henceforth can prove to be a violation of the artistic impression and sanctity of the creator. The business draws legitimacy through law and expects it to safeguard the rights of the persons involved by the very factum of them residing under a particular sovereign country and being bounded geographically.

There is a particular sanctity and sense of ownership that is carried by the creator of a particular fragrance; for instance, writers and painters tend to take pride in their books and paintings respectively; however, for that to be put to action, proper documentation and identification for the legal recognition and differentiation is important. Another problem that accrues is the establishment of originality and how it is purported. There is a certain sense of credibility that is undefeately being purported between fragrances as an outcome of factory setup versus them being artistic creations that form the very basis of differences.<sup>26</sup>

Perfumes are used to add a very personal and seductive touch to the body or appearance. They vary according to occasions and events and, therefore transcend, a very intellectualized facet of a person without him/her having to speak. Just like culinary dishes, perfumes tend to be a part of the person and carry variety and assortments. The ontological or sensory protection is not only aligned to varied fragrances being garnered under protection but further relates it to the domain of differential sets of rights of various persons. It may or may not consequentially lead to exploitation and violation of rights of various people if not appropriated particularly and procedurally. The global advent of copyrightability shall also be considered and the limitation of the brain to identify only certain scents can also prove to impede it. A whole set of problems may accrue out of it as a result because of undue monopolies and the variance of cultural fragrances. Ordinary and indigent people who, in the course of hand-to-mouth living, may also be restrictively held to comply with legal regulations, which may cost them exploitation and inability to preach small business that feeds their respective families. Out of litigation, Huge Fragrance Brands may as well take undue advantage of their names and their filthy rich existence in the market.<sup>27</sup>

Fragrance companies may also try to bring other companies down by proving their very own production of the particular sample of fragrance beforehand and may further increase undue competition between them which could lead to corruption and other tenable consequences. It would also be very different, fascinating, and contemporary to look at how various companies and perfume houses deal with the advent of copying and duplicating their signature scents by others. The only certainty is that any step by the lawmakers would multiply cases and we'll be

reading about a lot of jurisprudence and a new aspect altogether in this field of law. Reproduction of perfumes which may by the advancement of technology gets deciphered in a few days by competing companies and the advent of copyright will as a result act as a protection and safeguard for it. There would be a definite line set and limit as to what fragrances would fall under the embargo of infringement and what fragrances would not.<sup>28</sup>

There is a certain boundary between the use and exploitation of a commodity. The generic notion in common parlance may as well propagate the inherent obligation/ restriction on people to apply particular fragrances however, the government shall never put restrictions on the sense of style and appeal a person carries for instance, the clothes, accessories, and the fragrances a person uses, Persons are by the fact of sovereignty and freedom may as well comply and use varied fragrances. However, certain lines are to be drawn; particular companies cannot monopolize fragrances of someone else's creation without prior permission and cannot violate the intellectual property rights of someone else or their creation. The aspect of morality and exploitation seeps in and is expected to not be violative of other creator's rights.<sup>29</sup>

Moreover, more minds behind a particular fragrance would want their names to be known to the general public so that their creations would be known and actualized by people, further leading to varied dimensions in this regard. The very mysterious facet of a scent and the creators behind it being anonymous people would slow down. There would be more litigation in which there would be the legal battle of creators versus the company versus the opposing party claiming the ownership of the requisite fragrance. Also, Legal heirs carrying forward the legacy of the businesses of their forefathers may as well claim the origination of the fragrances on two opposite ends and it would henceforth become difficult for the lawmakers and the judiciary to assess and grant the copyrightability to a particular side. The work's authenticity shall largely be affected. Perfumes are a very convivial and fun asset and the relocation of them as weighty and intense commodities may as well defeat the very premise of their existence and could lead to declined usage and production on the pretext of trepidation.

It can be a difficult but not impossible outcome to be achieved. There can either be a dogmatic/traditional or a dreadnought approach to it which may

either have preposterous or serious consequences. The very basis and introduction of new regulations de jure is laid on the premise of discussing the pros and, at the same time, negating them. Hereby, it can be a very indefinite facet and may have varied conclusions.<sup>30</sup>

Smells to be copyrighted like recipes; the way they are created is in discussions everywhere. Fragrances like taste are known to bestow a sense of pleasure to the person so applying it or consuming something. Fragrances are like sensations and are not tangible. This can be one of the many reasons why there is a reluctance concerning the copyrightability of fragrances. Compared to live musical and culinary aspects, Fragrances are identical to them in many aspects. Taste, fragrances, and sounds are ardors having notional values, however stimulating, and have a feel-good factor attached to them. The sensations of smell and taste are exclusive in nature and have an aesthetic utility to them.<sup>31</sup>

The dimensions are hereby subjective and time-bound. Fragrances also, after a definitive period, get reduced to nothingness and do not have permanence in nature; however, they imprint an impressionable indentation in the minds of people. Fragrances are sensorily pleasurable and the independence of fragrances created shall have an artistic value to it and the autonomy of the person creating the fragrance shall have a medium level of creativity attached to it. The exclusivity or repulsivity of fragrances to be adjudged by the legitimacy of law is an understatement. Bringing legal aspects to the creative domain of fragrances' copyrightability has numerous arguments and needs to be particularized and discussed. Literature has a written expression to it and carries an immaculate portrayal of the same, with original expressions and feasibility.<sup>32</sup> However, fragrances have subjectivity attached and are variably defined by different people. Where there is a set procedure laid out concerning the formability of a certain contrivance that is necessary, it may be so permitted. For instance, the format of a letter will always remain the same and hence cannot be put to the tenets of copyrightability. Similarly, various authors tend to be inspired by the literary works of other authors by reading and incorporating their ideas and then transmogrifying them into their own words in the form of a personalized piece of work. It doesn't qualify as plagiarism as long as it is original, creative, and inspired.

Copyrightability of perfumes may also cut forth the persistent artistic creativity and may give rise to a conflictual domain. The selection and arrangement

shall be different when an artist idolizes another artist's work when he/she tends to take inspiration and create his/her work. Functional necessities can also not be stringent and cannot attract copyrightability. For instance, a telephone directory is supposedly designated to have an alphabetical order and thus cannot be copyrighted. The very factum of finding something and creating something can also be appropriated in the case of fragrances. The first person to find the smell of roses did not create it but merely discovered it and could not get it copyrighted because it was before his finding. The smell of roses persisted, and his mere discovery made it known to people.<sup>33</sup>

On the other hand, the person who invents a certain fragrance by mixing compositions as per his conscience is said to be the inventor/ creator of the particular fragrance and shall have the rights attached to it. The *origination v making* makes the requisite differences. However, the intricate artistic value can be deemed to be both creating and finding the fragrance. Some people find the facet of copyrightability of fragrances to be problematic as people generally face problems in distinguishing the differences between two fragrances, which may also create undue monopolies. People would have to be educated about the Intellectual Property Rights attached to the fragrances because it would be a relatively new domain altogether. Also, the subjectivity of the smell people perceive by a certain fragrance can also attract a lot of disputes.<sup>34</sup>

The sense of smell is a godly bestowal upon humans and the sense of fragrances can hardly attract any form of originality and hence are hard to copyright. With the very advent of being able to have senses particularly being able to smell. Humans are gifted, and it is fundamentally in the due course of nature, and it is fundamentally, in the due course of nature. It might as well be a violation if fragrances attract legal aspects of usage and rights. It is also a conventional argument that fragrances hardly have an attribute that may attract copyrightability. The very premise of copyrightability ensures that an artist acquires control of how his art and the outcome of his creativity are used. The rights are derived from the capability of reproducing it to the autonomy of the creator's creation.<sup>35</sup>

The factor of immediate transmission from the bottle to the person who applies the fragrance is yet another significant factor that signifies the

transferability and nature of the fragrance. The more distant the person is from the person applying the fragrance, the less likely he/she is to be able to smell the particular fragrance. The inability to contemplate the fragrance is another factor that makes it difficult to be copyrighted. The fragrance tends to transcend sensuous gratification and approval to the public at large present at a proximity. The geographical outreach has its limitations in the case of fragrances; hence, copyrightability may become an issue. Fragrances would be confined to the permissible limits and the very facet of publication to the public at large would be constrained. Fragrances also have a facet of private validation attached to them which varies concerning persons.<sup>36</sup>

The traditional reluctance of copyright regimes to recognize fragrances as protectable works largely stems from challenges of fixation, originality, and identifiability—criteria central to most copyright statutes worldwide. However, the emergence of advanced scientific and digital technologies now offers viable mechanisms to overcome these legal hurdles and reframe the conversation around olfactory copyright. Electronic noses (e-noses), which simulate human olfaction through chemical sensors and artificial intelligence, can now reliably detect, classify, and reproduce scent compositions, creating digitally stored olfactory “fingerprints.” Combined with gas chromatography-mass spectrometry (GC-MS) and gas chromatography-olfactometry (GC-O), these tools can generate quantifiable and reproducible records of a fragrance’s molecular structure—thus fulfilling the fixation requirement under copyright law. These data outputs can be archived and authenticated in digital formats, allowing for formal registration, comparison, and enforcement through a legally admissible evidentiary trail.

In India, while the Copyright Act, 1957 does not explicitly recognize fragrances as a category of protectable works, the statute defines a “literary, dramatic, musical, or artistic work” under Section 2(c)–(o), and emphasizes “originality” and “expression” over ideas. Indian courts, influenced by the Supreme Court’s ruling in *Eastern Book Company v. D.B. Modak* (2008), have adopted the “modicum of creativity” test for originality. Applying this to fragrances, one could argue that the deliberate, creative process behind scent formulation meets the originality threshold, especially when supported by scientific data evidencing the unique composition.

Moreover, under Section 14, copyright extends to the exclusive right to reproduce and communicate a work to the public. With modern technologies enabling the digital recording and transmission of olfactory content (e.g., via olfactory virtual reality systems), even this criterion can arguably be fulfilled.

The EU law post-*Infopaq* and *Painer* recognizes originality as “the author’s own intellectual creation,” a test that modern scent-design technologies—like IBM’s *Philyra* or Givaudan’s *Carto*, which use AI to design novel scent formulations traceable to individual perfumers—could arguably meet.

In the United States, the Copyright Act, 1976, under 17 U.S.C. § 102, requires fixation in a tangible medium, which has so far excluded ephemeral or sensory works like scents. However, the development of digital olfactory storage systems and scent-emitting hardware for multimedia (such as VR headsets or scent-enabled advertising kiosks) may soon satisfy even the U.S. fixation requirement by creating durable, perceivable formats for olfactory works.<sup>37</sup> Similarly, the evidentiary reliability of AI-driven scent registries could support authorship claims and infringement actions. The time is ripe to reconsider the legal treatment of fragrances—not as functional or utilitarian products but as creative expressions worthy of protection.<sup>38</sup>

The fusion of biotechnology, artificial intelligence, and digital scent storage now makes it both feasible and legally sound to classify certain perfumes and olfactory works as copyrightable. To ensure balance, policymakers in India and globally may consider developing a *sui generis* regime for olfactory creations or revising existing copyright laws to accommodate new forms of creative expression—just as was done with software, databases, and multimedia works in earlier decades.

## Conclusion

The discernment regarding this context shall be a judicial decision and a probable scale shall be advanced that delineates the exact fragrance and there shall be restrictive boundaries that are drawn so as for owners/claimants of the fragrances to not go beyond the permissible limits and not to cast an embargo and go against the tenet of creativity and the naturality and impish nature of the vehemence that fragrances cast to the world at large.

To accommodate fragrances within the ambit of copyright protection, a multi-pronged legislative and

jurisprudential approach is necessary—one that draws from established precedents in analogous creative domains. First, national copyright statutes (such as India's Copyright Act, 1957) should consider explicitly including olfactory works within the definition of "artistic works" under Section 2(c), or alternatively, inserting a new clause for "sensory or experiential works" to account for non-visual and non-auditory creations. This mirrors the way jurisdictions incorporated software into copyright law in the 1980s and 1990s, by either amending definitions or issuing clarificatory guidelines.

Second, to satisfy the fixation requirement, lawmakers can establish technical standards allowing fixation through olfactory documentation technologies—such as gas chromatography–mass spectrometry (GC-MS), electronic noses, and AI-generated scent profiles—as legally recognized forms of fixation, akin to musical scores or architectural blueprints. Such standards can be promulgated through rules or practice directions by copyright offices (e.g., the Indian Copyright Office or the U.S. Copyright Office), much like they have done for digital formats in multimedia and software registration.

Third, to avoid monopolistic abuse and overbroad protection, copyright for fragrances should be limited in scope and duration. This can be done by drawing inspiration from the European Union's Database Directive and India's sui generis protection for plant varieties, which allow creators limited rights subject to public interest exceptions. Similar use-based exceptions or "functionality exclusions" could ensure that protection is reserved for artistic compositions, not utilitarian scents (e.g., air fresheners or detergents).

Fourth, as in the case of musical or architectural works, where infringement is proven through substantial similarity and access, courts should adopt a comparative olfactory analysis model using expert perfumers, scent documentation, and chemical composition data to assess infringement. Fragrance profiles could be registered in a centralized digital scent repository (national or international), which would assist enforcement and serve as a reference database similar to those maintained for copyrighted music or patent claims.

Finally, international cooperation will be vital. Multilateral frameworks such as the Berne Convention and TRIPS Agreement should be revisited to expand the notion of "literary and artistic works" to include emerging artistic domains,

especially in light of evolving technologies. Until such harmonization is achieved, jurisdictions like France and the Netherlands (which already recognize fragrances under copyright) can serve as jurisprudential laboratories, offering models that common law countries like India may selectively incorporate through judicial innovation or legislative amendment.

The protection of fragrances shall be a full-fledged sense of protectability and not for the termination of innovation. Changes shall be brought about in such a way that they do not cause an impediment to the unenlightened and there persists no miscarriage of justice. The scalability of fragrances and the identification of them is another obstacle that is in need to be tackled for the measurability and the requisite recourse that shall be advanced if there persists a violation of the issue of copyrightability.

## References

- 1 Conley J M & Weaver R M, The difficulties in protecting scents, *Journal of the Patent Office Society*, 58 (1976) 127.
- 2 Dinwoodie G B & Janis M D, Confusion over use: Contextualism in trademark law, *Iowa Law Review*, 92 (2007) 1597.
- 3 Ginsburg J C, The concept of authorship in comparative copyright law, *DePaul Law Review*, 52 (2003) 1063.
- 4 Calboli I, Trademark registration and the duty to use: A global perspective, *Buffalo Law Review*, 58 (2010) 387.
- 5 Indian Contract Act, 1872, § 10, § 73, § 74 (India).
- 6 The Trade Marks Act, 1999, § 2(zb) (India).
- 7 World Intellectual Property Organisation 'Non-Conventional Copyright Subject Matter: Fragrances and Gastronomy'[https://www.wipo.int/edocs/mdocs/sme/en/wipo\\_smes\\_rom\\_09/wipo\\_smes\\_rom\\_09\\_k\\_theme05\\_3-related1.pdf](https://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_rom_09/wipo_smes_rom_09_k_theme05_3-related1.pdf) (accessed on 18 December 2023).
- 8 *Rensselaer Polytechnic Inst. v Apple Inc.*, No. 1:13-cv-0633, 2014 WL 5285635 (N.D.N.Y. Oct. 15, 2014).
- 9 Gopalakrishnan N S & Agitha T G, Principles of intellectual property, 123–132 (Eastern Book Company 2014).
- 10 Copyright Act, 1957, § 14, No. 14, Acts of Parliament, 1957 (India).
- 11 *Lancôme Parfums et Beauté et cie S.N.C. v Kecofa B.V.*, Hoge Raad [HR] [Supreme Court], 16 June 2006, LJN AU8940, NJ 2006/585 (Neth.).
- 12 Chandler Burr, The Emperor of Scent (2003).
- 13 Case C-273/00, *Sieckmann v Deutsches Patent- und Markenamt*, ECLI:EU:C:2002:748, 2002 E.C.R. I-11737 (Dec. 12, 2002).
- 14 *Lancôme Parfums et Beauté et cie S.N.C. v Kecofa B.V.*, Hoge Raad [HR] [Supreme Court], 16 June 2006, LJN AU8940, NJ 2006/585 (Neth.).
- 15 *Baker v Selden*, 101 U.S. 99 (1879).
- 16 Field T G, Copyright protection for perfumes, *IDEA: The Journal of Law and Technology*, 45 (2004) 19.

- 17 *Coty Germany GmbH v Xeryus Retail Private Limited & Anr*, (2023) Live Law (Del) 62.
- 18 Kamiel Koelman, Copyright in the courts: Perfume as artistic expression? *WIPO Magazine*, 5 (2006).
- 19 Moskin J E, The shape of things to come—Emerging theories of design protection, *Trademark Report*, 86 (67) (1996) 72.
- 20 Franklyn D J, The new certainty of dilution, *Fordham Intellectual Property Media & Entertainment Law Journal*, 16 (2006) 933, 938.
- 21 Rajan M T S, Moral rights and the protection of cultural heritage, *Marquette Intellectual Property & Innovation Law Review*, 9 (2005) 225, 230.
- 22 Kur A, Fundamental concerns in the harmonization of (European) trademark law, *Marquette Intellectual Property & Innovation Law Review*, 11 (2007) 21, 24.
- 23 Fisher W, Theories of intellectual property, in *New Essays in the Legal and Political Theory of Property*, 168, 172 (Stephen R. Munzer ed., 2001).
- 24 Yu P K, A tale of two development agendas, *Ohio Northern University Law Review*, 35 (2009) 465, 470.
- 25 Calboli I, Trademark registration and the duty to use: A global perspective, *Buffalo Law Review*, 58 (2010) 387, 390.
- 26 Conley J M & Weaver R M, The difficulties in protecting scents, *Journal of the Patent Office Society*, 58 (1976) 127, 129.
- 27 Frankel S, The copyrightability of perfumes: Intellectual property meets the senses, *International Review Intellectual Property & Competition Law*, 35 (2004) 120, 122.
- 28 Dreyfuss R C, Expressive genericity: Trademarks as language in the pepsu generation, *Notre Dame Law Review*, 65 (1990) 397, 402.
- 29 Gordon W J, A property right in self-expression: equality and individualism in the natural law of intellectual property, *Yale Law Journal*, 102(1993) 1533, 1537.
- 30 Douglas W O, Intellectual property and the law of fragrances, *Harvard Journal Law & Technology*, 10 (1996) 123, 125.
- 31 Phadke A, The challenges of copyrighting scents in India, *Indian Journal of Intellectual Property Law*, 15 (2021) 78, 80.
- 32 Tandon N, Comparative study on copyrightability of fragrances, 22 *WIPO Journal*, 22 (2019) 230, 235.
- 33 Gupta A K, Nature's bounty: Copyrighting natural scents, *IPR Q*, 8 (2020) 312, 318.
- 34 Kur A, Fundamental concerns in the harmonization of (European) trademark law, *Marquette Intellectual Property & Innovation Law Review*, 11 (2007) 24.
- 35 Reichman J H, Charting the collapse of the patent-copyright dichotomy: Premises for a restructured international intellectual property system, *Cardozo Law's Arts & Entertainment Law Journal*, 13 (1995) 480.
- 36 Calleja L, Why copyright law lacks taste and scents, *Journal of Intellectual Property Law*, 21 (1) (2013) 1.
- 37 European Intellectual Property Office (EUIPO), Guidelines for Examination of European Union Trade Marks, Part B, Section 4, Non-Traditional Marks (Oct. 2023), <https://euiipo.europa.eu>.
- 38 Prashant Reddy T & Chandrashekar S, Create, copy, disrupt: India's intellectual property dilemmas (Oxford Univ. Press 2017).