
TOWARD A SCENTED JURISPRUDENCE: A PHILOSOPHICAL DEFENSE OF ENHANCED INTELLECTUAL PROPERTY PROTECTIONS FOR FRAGRANCES

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On July 5th, 1946, the United States (“U.S.”) Congress passed the Lanham Act in order to consolidate and clarify previous case law addressing trademark regulation and protection.¹ The report that accompanied the bill, H. Rept. 219, claimed that any trademark statute sought to address two central concerns: first, consumer protection from unsafe fraudulent goods, and second, protection of the trademark owner’s product in the face of misappropriation.² This ethical foundation that trademark infringement causes harm to both the misled consumer and the mimicked producer has been well integrated into the language of trademark case law for almost all consumer goods.³ However, as the current doctrines of trademark law limit its applicability to fragrance,⁴ many perfumers have found their creations stolen and imitated. American trademark and copyright jurisprudence has lagged behind the developments and understandings of perfumery science, allowing artisan perfumers within the U.S. to be unprotected from intellectual theft. This paper will first introduce a history of fragrance case law within the U.S. before contrasting this legal framework with European and French precedents. From this point, American scholarship defending scent’s trademark exclusion will be examined and countered, concluding with an alternative vision of fragrance’s place in American intellectual property law.

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1. *The Lanham Act Lays the Foundation for Modern Trademark Law*, LIBR. OF CONG. (July 2025), <https://guides.loc.gov/this-month-in-business-history/july/passage-lanham-act-trademarks> [https://perma.cc/X67X-26ZB].

2. *Id.*

3. *See id.*

4. *See infra* notes 11–13 and accompanying text.

I. SMELLS, COURTROOMS, AND THE DOCTRINE OF FUNCTIONALITY

The recent unprecedented surge in imitation fragrances has put a new market strain on inventive perfumery.⁵ This strain has, in turn, renewed interest in the possibility of scent-marks within American law, though the current legal precedent heavily constrains this interest. Under current law, perfume scent cannot be trademarked due to the doctrine of functionality, a basis that holds that the functional purpose of an item cannot be the trademarked trait.⁶ The purpose of the functionality argument is to allow free innovation and prevent a monopoly on practices or product features that have a utilitarian benefit to the whole market.⁷ For example, a company that builds a chair with armrests cannot trademark this feature, as a standard armrest supports the function of a chair, which is comfortable sitting. From a utility perspective, the rest of the furniture industry should be able to put armrests on their products if they choose. Previous rulings have held that the function of perfume is its smell,⁸ so a trademark on scent, in this instance, would fail the functionality doctrine.⁹ From a distant legal standpoint, this reasoning makes sense; it would seem like a clear issue of monopoly if it were possible to trademark the perfume scent of a rose, and no other perfume house could produce this scent. This is particularly pressing in trademark law as trademarks can be renewed indefinitely, unlike patents.¹⁰ However, as will be developed later, the nuances in perfumery allow the law to prevent this form of monopoly from occurring.

Under current U.S. intellectual property (“IP”) law, perfumes as a product fall under differing legal protections. The shape of the perfume bottle, for example, can be trademarked if its form is distinct, though the liquid inside the bottle cannot.¹¹ While patent law can address the scientific component of the liquid perfume, this protection is constrained. If a perfume house invents a new way to extract scent from a particular material, this invention can be patented, but not the smell that was the product of this extraction.¹² In both cases, the current legal framework inhibits perfumers from owning the very quality they seek to protect: the scent of their creation.¹³

5. Alexandra Hildreth, *Dupes Have Taken over Fragrance. Here's What That Means for Luxury*, VOGUE BUS. (June 14, 2024), <https://www.voguebusiness.com/story/beauty/dupes-have-taken-over-fragrance-heres-what-that-means-for-luxury> [<https://perma.cc/CCR4-8Z5W>].

6. See Elijah Hartman, *U.S. Trademark Functionality and Protectable Aesthetics: Can I Trademark That?*, HARRIS SLIWOSKI (May 7, 2024), <https://harris-sliwoski.com/blog/u-s-trademark-functionality-and-protectable-aesthetics-can-i-trademark-that/> [<https://perma.cc/5K7G-W56M>].

7. *Id.*

8. See, e.g., *In re Clarke*, 17 U.S.P.Q.2d (BNA) 1238, 1239 n.4 (T.T.A.B. 1990).

9. Rajiv Suri, *Scent Trademark Registration*, TRADEMARK LAW. MAG. (Dec. 23, 2022), <https://trademarklawyermagazine.com/scent-trademark-registration/> [<https://perma.cc/6YXS-AC26>].

10. *Does a Trademark Expire?*, KAUFHOLD & DIX PAT. L. (Jan. 21, 2021), <https://www.kaufholdpatentgroup.com/does-a-trademark-expire/> [<https://perma.cc/4Q4P-9YNL>].

11. See Yashika Nagpal, *Perfume as an Artistic Expression: Scope of Intellectual Property Rights in Perfume*, FASHION & L.J. (Oct. 3, 2021), <https://fashionlawjournal.com/perfume-as-an-artistic-expression-scope-of-intellectual-property-rights-in-perfume/> [<https://perma.cc/3NNX-5J29>].

12. *Id.*

13. *Id.*

For most of modern American legal history, the solution to this predicament was to protect trade secrets.¹⁴ A perfumer was entitled to classify her scent as a trade secret, and this secrecy could ensure the relative protection of her intellectual property. Often, this arrangement is made analogous to that of a Michelin star chef who cannot trademark her recipe but is allowed to prevent disclosure of the recipe so that others do not copy her creation.¹⁵ However, in recent years, the production equipment required to extract various scents has become more readily available, as well as the ability to reverse engineer perfumes which create copycat products.¹⁶ The protection under trade secret law has thus diminished rapidly as the market has grown saturated with imitation scents.

In the European context, perfume has a greater legal protection than American precedent allows.¹⁷ In *L'Oreal v. Bellure*, the European Court of Justice held that taking advantage of the reputation built by a previous trademark is actionable *per se*.¹⁸ This case dealt with imitation perfume, and while fragrance under European Union (“EU”) law still remains outside the bounds of standard trademark, the outcome in *L'Oreal v. Bellure* expanded protections to address copycat perfumery without requiring the creation of scent marks.¹⁹ Many imitation fragrances will use phrasing such as “inspired by Killian’s Love Don’t Be Shy” or “Smells just like Tom Ford’s Lost Cherry” to signal to consumers that the scent being sold is a recreation. The consumer, in these cases, is only purchasing the perfume due to its cheap recreation of the good they actually wish to possess, and the counterfeit producer rides upon the reputation built by these perfumers to sell their copycat product.²⁰ *L'Oreal v. Bellure* prevents this act of free riding, effectively outlawing imitation fragrances without addressing scent as a legally ‘ownable’ trait.²¹

Beyond the limitation toward free-riding, French courts have developed copyright protections that apply to the art of perfumery, creating a way to protect scent without relying on trademarks.²² In 1999, the French tribunal ruled that *Angel* by Thierry Mugler was not merely a perfume or scented product but rather an original work of art eligible for copyright protection.²³ In 2006, the Paris court provided copyright protection to perfumes created by L’Oreal, Prestige, Parfums

14. *Id.*

15. See, e.g., Claire M. Germain, *Don't Steal My Recipe! A Comparative Study of French and U.S. Law on the Protection of Culinary Recipes and Dishes Against Copying* 20–22 (Univ. of Fla. Levin Coll. of L. Schol. Repos., Working Paper No. 7, 2019), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1007&context=working> [https://perma.cc/7G2J-3U72].

16. Nagpal, *supra* note 11.

17. *See id.*

18. Dev Gangjee & Robert Burrell, *Because You're Worth It: L'Oreal and the Prohibition on Free Riding*, 73 MODERN L. REV. 282, 282 (2010).

19. *See id.* at 283–84.

20. *See id.*

21. *See id.* at 282–83.

22. Nagpal, *supra* note 11.

23. *Id.*

Cacharel, Parfums Ralph Lauren, and Parfums Guy Laroche.²⁴ The legal standing of perfume as a creative work within copyright embodies the sociolegal trait of codified culture or the expression of social norms.²⁵ France remains the perfumery capital of the world,²⁶ and fragrance's social dominance may explain why the classification of perfume as an art form has developed within the French legal code.

When the U.S. Copyright Act was passed in 1976, the U.S. House report stated that certain mediums of expression could develop into creative works that the act should aim to extend and protect.²⁷ With the complexities of modern perfumery, it seems the French courts have accepted the perfumer's claims of artistic creation. At the same time, American precedent still holds that scent is a product, not a creative endeavor, and therefore a concern of trademark, not copyright.²⁸ Despite this precedent, case law and jurisprudence surrounding copyright and scent are relatively underdeveloped within the U.S., leaving room for legal development and expansion in the future.

II. THE LEGAL PHILOSOPHY OF ELUSIVE SCENT

In Douglas Churovich's analysis for the Saint Louis University Public Law Review, his support for the current legal standard regarding scent and trademark had much to do with fragrance's incompatibility with the courtroom.²⁹ Churovich raises points such as human noses are particularly inept at distinguishing scents from one another, fragrances change too sensitively by heat and time, there is no common language to describe scents accurately, and people are worse with objective fragrance memory due to its close link with the emotional centers of our brains.³⁰ If a perfumer were to submit their fragrance to the trademark office in a few months (depending on fragrance composition), the scent would macerate. Maceration is the process of perfume sitting undisturbed so that its ingredients continue to break down, blend, and mature.³¹ Often, this process results in a substantive change to the fragrance profile.³² As humans struggle to retain scent memories in a unemotional sense when replacing the broken-down fragrance, it would be hard for a court to verify the bottle replacing the original is an exact fragrance match, as the original fragrance now ceases to exist in its trademarked capacity. Due to the subjective imagery often evoked in

24. *Id.*

25. See Nagpal, *supra* note 11; Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws*, 15 J. EUR. ECON. ASS'N 245, 245–47 (2017).

26. Nagpal, *supra* note 11.

27. *Id.*

28. *See id.*

29. Douglas Churovich, *Scents, Sense or Cents?: Something Stinks in the Lanham Act*, 20 ST. LOUIS U. PUB. L. REV. 293, 312–14 (2001).

30. *Id.* at 299–304.

31. *From Good to Great: How Maceration Transforms Your Perfume*, RARE SCENTS (June 24, 2024), <https://www.rarescents.com/blogs/news/from-good-to-great-how-maceration-transforms-your-perfume> [<https://perma.cc/3YUL-5QDM>].

32. *Id.*

fragrance descriptions, the courts would find little support in verbal descriptions of the scent as a verification process. Churovich's imagery of an elusive scent and administrative hassle is not without merit; the point pertaining to scent maceration is particularly relevant, though much of this administrative burden would be procedurally unnecessary due to developments in the world of perfumery.

First, verification of scent *can* occur based on fragrance descriptions. Perfume is not only described in the poetic terms included in advertisements but also in the more tangible breakdowns of the top note, middle note, and base note scent profiles.³³ Should a perfume company seek to modify its scent without notifying the trademark office, this would be evident when the scent profile changes and can no longer be matched to the notes described on the trademark application. Beyond this, maceration time is calculable, meaning it could easily be a legal requirement of the trademark office that the scent sample has to be replaced before the maceration date, and failure of this requirement is a forfeit of the current trademark.³⁴ These two proposed legal procedures alleviate much, if not all, of the legal burden proposed by Churovich.

Despite this clarification, trademark expansion to scent remains highly implausible within the U.S. due to a compounding precedent that diligently excludes it. However, this exclusion from trademark law does not exhaust the protection possibilities for scent under IP law more broadly.

III. AN ALTERNATE VISION

In the suggestion of a scent mark, there are further ethical considerations of market monopolies and the deployment of excess trademarking as a tool to stifle all potential and future competition.³⁵ What happens if, after the introduction of scent marks, a large luxury perfume house spends the money to trademark or copyright all standard scents, rose, vanilla, sandalwood, and bergamot, to inhibit competition? In this scenario, it is hard to imagine a small perfumer standing a chance in trademark litigation when defending their simple vanilla perfume, a scent now trademarked by a cosmetic giant. This concern is not new, however, and like other senses that have been covered under IP law, such as sight and hearing, the complexities of the creative medium allow the law to navigate these potential concerns.

33. Hannah Ellingson, *Top Notes, Middle Notes, Base Notes*, OLFATORY, NYC, <https://www.olfactorynyc.com/blogs/news/top-notes-middle-notes-base-notes?srsId=AfmBOoqDfviY3y7uWZN7VMquhspw2C7aa-NITFhPBE3v9t7Oz1MSZO5-> [<https://perma.cc/7KUG-HKHQ>] (last visited Sept. 17, 2025).

34. See *The Truth Behind Perfume Maceration: Enhancing Fragrance Longevity*, TUOKSU, <https://www.tuoksu.co/blogs/perfume/the-truth-behind-perfume-maceration-enhancing-fragrance-longevity?srsId=AfmBOopKTROhI0Q6ojerpkTq7x5359ydXKZZWkPBZtZYcqf1BzwWebNe> [<https://perma.cc/X675-JR92>] (last visited Sept. 17, 2025); *From Good to Great: How Maceration Transforms Your Perfume*, *supra* note 31.

35. Hartman, *supra* note 6.

Within perfumery, an accord is a fragrance invention.³⁶ On the other hand, a note is a scent extracted from a tangible material.³⁷ For example, we might not have the science yet to extract the smell of a green apple, but many perfumes on the fragrance market have a ‘note’ of green apple. This is really a green apple accord, the combination of many notes (think flower oils, wood oils, citrus oils) to create the scent illusion of an apple. There are thousands of ways to combine different oils to create an apple-like scent, and each perfume house has its own imitation of a green apple made of entirely different notes and physical materials. Fragrance law in the matter of accords could mirror photography copyright law, which is to say you *cannot* own the right to be the only person who can take photos of trees, but you can own your rendition of that type of photo.³⁸ One perfume house could not own the scent concept of a ‘green apple,’ but it seems reasonable that they could be entitled to own their version of the green apple scent that a trained artisan perfumer had invented and imagined for themselves.

Music copyright law holds a similar but narrower stance, where music notes and guitar cords cannot be copyrighted, but combining these traits into a singular work or song can be.³⁹ Perhaps the accords themselves could not be copyrighted, but instead, could be a marker of the complexity and distinctness required for a perfume as a whole to be eligible for copyright. Currently, French copyright law for fragrance requires a distinctiveness of character, a legal requirement that has often been left to the judge’s subjectivity.⁴⁰ By having a legal standard rooted in analyzing the accords comprising a perfume, the ingenuity or creative involvement of the perfumer seeking protection is more readily understood. This requirement would also remove the possibility of market squandering due to monopoly ownership over ‘simple’ scents, as notes and fragrances without unique accords would be ineligible for copyright protection.

In conclusion, American trademark case law has relatively cemented fragrance’s exclusion from trademark protection. Still, copyright may be a plausible legal avenue as imitation fragrances place additional economic pressure on perfumers. However, because perfume has a less prominent cultural capital in the U.S. than in France, the argument of fragrance as an art form seems unlikely to sway judges in American jurisdictions. Despite this restriction on implementation, the legal frameworks of copyright within the U.S. translate well to the developments in perfumery, laying the groundwork for potential protections should social norms shift favorably for the world of fragrance.

36. Hannah Ellingson, *Fragrance 101: What Is a Perfume Accord?*, OLFACTORY, NYC, <https://www.olfactorynyc.com/blogs/news/fragrance-101-what-is-an-accord> [https://perma.cc/344V-KLDP] (last visited Sept. 17, 2025).

37. *Id.*

38. See *Photographer or Model: Who Owns the Rights to a Photograph?*, LAWRENCE G. TOWNSEND, INTELL. PROP. LAW. (Nov. 15, 2021), <https://www.lgt-law.com/blog/2021/11/photographer-or-model-who-owns-the-rights-to-a-photograph/> [https://perma.cc/SFG9-7MRY].

39. Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1870–73 (2018).

40. Nagpal, *supra* note 11.