

# LANCÔME PARFUMS ET BEAUTÉ ET CIE S.N.C. v. KECOFA B.V.\*

ENGLISH TRANSLATION BY:  
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## FINDINGS OF FACT

The Appeals Court in Den Bosch relies on the facts as determined by the lower court in Maastricht. Lancôme is the owner of the registered trademark *Trésor* in the Benelux since 1985. The mark *Trésor* covers a variety of cosmetics including a perfume and eau de toilette with the so-called *Trésor* scent. Appellee is the owner of *Female Treasure* in the Benelux since 1993 and licensed use of the mark to Kecofa. Kecofa brought the perfume *Female Treasure* on the market in 1993.

## PROCEDURAL HISTORY

In May, 1995, the Rechtbank in Amsterdam denied claims by Lancôme of trademark infringement based on the lack of similarity between the marks. The Hof (Court of Appeal) confirmed this judgment on April 17, 1997 based on its holding that the public would not associate the two marks. Appeal against this judgment was withdrawn.

In April 18, 2002 the Rechtbank in Maastricht held that a perfume can be protected under copyright law if it satisfies the criteria of the Copyright Act of 1912. The Court ordered Lancôme to prove that: (1) Its perfume has an original character carrying a personal stamp of the maker; (2)

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\* Court of Appeals at Den Bosch (C0200726/MA), decided June 8, pub. June 21, 2004 (available in Dutch at <http://www.rechtspraak.nl> (LJN number: AP2368)).

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Lancôme is the maker of the perfume; and (3) Kecofa's perfume is an infringing copy of Lancôme's perfume.

## OPINION OF THE APPEALS COURT

### I.

To determine whether a perfume can claim copyright protection, a two part test must be satisfied: (a) Is it a work which, by its nature, can claim copyright protection; and (b) Does this work have an original character which carries a personal stamp by the maker of the work?

#### A. *Nature of the Work*

The Court distinguishes between the material that gives off the scent (the material that is specially composed and developed to produce a certain scent), and the scent itself. Considering that the scent itself is too fleeting and variable and dependent on the environment, it can not be protected by copyright laws.

However, the Court holds 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" under the Copyright Act of 1912.

Kecofa argues that the perception of the perfume is too subjective to be a "work." But the Court says that perception is always somewhat subjective. The material that gives off the scent, however, is a designed composition of ingredients that can most certainly be objectively ascertained.

#### B. *Originality*

Lancôme claims that its perfume is original and holds a personal stamp of the maker because the perfume came forth out of a carefully designed process. Lancôme chose 26 olfactory components out of several hundreds of components that led to this specific and unique combination, which was very popular upon its introduction to the public. The perfume is the result of the fact that Lancôme was trying to create a striking and unique scent. Since these facts were not sufficiently denied by Kecofa, the Court agreed that the perfume is original and carries a personal stamp.

Kecofa counters that Trésor fits within a long tradition of perfumes with a feminine, fruity and flowery character. Moreover, Trésor is comparable to "Eternity" by Calvin Klein and it was derived from "Exclamation" by Grosjman according to Kecofa.

The Court notes that, to receive copyright protection, the work does

not need to be new in the objective sense. It needs to be subjectively original as viewed by the maker. Kecofa carries the burden of proof to show that Lancôme derived its perfume from someone else. The fact that the perfume fits a certain style or tradition is insufficient to consider it unoriginal. Furthermore, Kecofa submitted insufficient evidence that Trésor was based on Exclamation. Also, Kecofa did not contradict the evidence Lancôme showed regarding its originality through its creative developing process.

The court concludes that Trésor is original and carries a personal stamp from the maker and can therefore be considered a copyrighted work under the Copyright Act.

## II.

The next issue before the Court is whether Lancôme is the exclusive (copyright) owner of the perfume.

Kecofa argues that according to Dutch international civil law French law should be applied, because Lancôme is a French company. Under French law the company that publishes the work is assumed to be the rightful owner. This assumption can only be rebutted by the real maker of the work. Since Lancôme published Trésor, it is assumed to be the copyright owner of the perfume. Kecofa's argument is therefore not relevant.

Under Dutch law, a company is considered the maker of the work if it publishes the work without mentioning an individual as the maker. Lancôme published Trésor without naming an individual as the maker and can therefore be considered the maker of the work.

## III.

The third issue before the Court is whether Lancôme's copyright has been infringed.

Kecofa infringes on Lancôme's copyright if its product incorporates the copyrighted aspects of Trésor to such an extent that the overall impressions of the two products differ so little that defendant's perfume can no longer be considered an independent creation.

Lancôme offered the Court an expert report of a physical-chemical analysis of the two perfumes. The report concluded that, given the fact that there are hundreds of different components that could have been used, it is highly unlikely that it is a coincidence that Kecofa used 24 of the exact components out of the 26 in total used by Lancôme. The 25th ingredient was a cheaper substitute of the remaining Trésor component. Since the expertise of the report was not denied by Kecofa, nor the accusation of copying, the Court concludes that Kecofa must have copied Lancôme's product and therefore violated Lancôme's copyrights.

**JUDGMENT**

Kecofa must cease to produce, sell, stock, import and export any perfume that copies Trésor. Every time that Kecofa violates this order it will have to pay 2500 Euros per product or per day.

Kecofa must pay 16,398.51 Euros to Lancôme plus all its profits from the sale of Female Treasure. Kecofa must pay the costs of the litigation before the court in Maastricht and Den Bosch, including attorneys' fees. (In total roughly 4,400 Euros.)