

# THE PROTECTION OF OLFATORY CREATIONS

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## Abstract

*The olfactory works/creations, the perfumes that everyone likes are some of the oldest intellectual goods. Their creation involves science, imagination, talent. But in spite of the spectacular evolution of this category of creations, the huge number of consumers and their importance in everyday life, and despite the openness that intellectual property law has generally manifested towards intellectual creations, including the new ones (cinematography, computer programs and pharmaceutical and biotechnological inventions being the fastest received and more fully integrated into a protection system), olfactory creations have remained the Cinderella in this field. Perhaps also from the perfume manufacturers lack of interest. Creators, that is. Or maybe because the protection by secrecy is enough. We're trying to find out.*

**Keywords:** *olfactory works, perfumes, patents, copyright, intellectual rights, work secret,*

## 1. Introduction

**Is it necessary and possible to protect perfumes by intellectual rights?** Doctrine and jurisprudence are not unitary in relation to the vocation of perfumes to be protected by intellectual rights (copyright, invention patents, design and / or model certificates or trademarks or work secrets). They were not even consistent. And it seems that perfumers particularly interested in financial success, are rarely interested in the system of protecting their creations and their exclusive rights, and rarely claim their violation. The secret, kept aloof, seems to provide the necessary and sufficient comfort as long as the secret remains secret. In essence, what would they need to create a perfume for which the patented protection is for only 20 years when the secret could provide them with much longer lasting protection, and stealing the recipe and producing the same perfume could be sanctioned by action in unfair competition? In addition, the perfumers' world is quite small, and the consumers that matter become a loyal clientele as long as they like the perfume. Conscious, intuitive, simply attracted, consumers will look for and choose quality perfumes, marked with well-known brands and produced by known perfumers and in which they trust.

But the inside of the perfume industry is populated only with honest people? We do not think so, even if the risk of counterfeiting a protected fragrance by a perfumer inside the profession is reduced. Large perfume manufacturers are few<sup>1</sup>, are organized in associations (like writers, plastic artists, musicians, architects, etc. do), and a perfumer accused of

counterfeiting a competitor's perfume risks losing not only the respect of competitors but also the clientele and exclude itself or be excluded from this industry. An unwritten code of honour that would make the protection of perfumes unnecessary by rules of law and recourse to justice. An idyllic vision and invalidated by what is happening around us.

The most expensive perfume, *Clive Christian's Imperial Majesty*, can be purchased for 251,000 dollars, packed in a Baccarat container with a gold frame and a 5-carat diamond. It is true that the content is worth only 15,000 dollars and contains a few hundred ingredients. The rest is the price of packaging, a "support" in which the fragrance is fixed, and which is usually not a simple package, it is itself a valuable work of art even it lacks content, but a work of a particular kind. Because this support is multiplied, even in the case of such perfume, it is an industrial product, the support loses its quality to be unique and original in the sense of copyright, and used as a container for a liquid product, it is not capable of being the external form of a three-dimensional product, as required by the law of industrial designs.

Perfumes released for the general public are subject to rules other than very expensive fragrances, but we do not believe that the latter are the target of counterfeiters, but rather products for the general public.

Until the nineteenth century, perfumes were created entirely on the basis of natural ingredients, obtained by pressing and then by distillation from plants or animal extracts (for example, musk). In the year 1000, Avicenna<sup>2</sup> (Ibn Sina) invented the process of distilling the fragrances of flowers, and it made it possible to produce large-scale modern perfume.

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<sup>1</sup> Producer Dove claims that there are around 900 qualified perfumers in the world, but the information cannot be verified. <https://www.unilever.ro/whats-in-our-products/your-ingredient-questions-answered/fragrances.html>

<sup>2</sup> Abu Ali Sina or Ibn Sina, known in the Western world under the Latin name of Avicenna (980-1037), Persian, was a physicist, astronomer, physician, philosopher, writer, inventor of the golden years of Islam. His medical work has been at the heart of the medical study for 500 years in the Orient but also in the West.

Expensive, however, because obtaining natural flavours involves the raw material, a lot (for one kilogram of royal jasmine flowers, for example, 10,000 flowers are needed and for one kilogram of gross jasmine essence, 350 kilograms of petals are necessary).

Synthetic aromas (invented and produced since 1874) have made it possible to produce perfumes at affordable prices for everyone. With today's possibilities and the flavours available for perfumers today, the production of a perfume bottle costs around 10 euros, but on the market, such bottle is sold for at least 10 times the production price. The perfume price therefore means the costs of production, the value of the container (not very high in the final price), the reputation of the manufacturer (its brand) and the perfume brand. Perhaps there is no industry (admitting that perfumery is just industry) where brands can influence so much the price of the product offered on the market. And for which brands themselves are so illicitly used.

Counterfeit perfumes are sold at prices three to five times lower than the original ones, those whose brands are illegally applied on their packaging<sup>3</sup>, the gains from illicit activities with fragrances are not as high as in the case of drug trafficking, but also the risks to which perfume counterfeiters are exposing are much smaller. However, millions of consumers now use counterfeit perfumes, and Romania has become a transit and consumer territory for such products. Hazardous to health. And for that, it's only a way: buying perfume with a certain origin. I mean, from authorized distributors.

Counterfeiting, in the case of perfumes, does not interfere with the composition of the original perfume unless it deteriorates its image. No copyright or inventor's rights is violated by counterfeiting in this area, but by trademark right. Famous perfume trademarks are applied to fragrance packaging whose content does not usually have any connection with the original fragrance. That is why the action for damages will concern the counterfeiting of the trademark and not the counterfeiting of the perfume (smell) and the violation of the rights on it.

This may be a real cause of the lack of interest of perfumers for intellectual property protection of their products.

However, it is well known today that many essences and ingredients of those used in perfumery are allergenic or even injurious to health, and their use is subject to more and more severe rules from the **International Fragrance Association**. The list of allergenic and toxic products includes both natural and synthetic ingredients, and the list of prohibited or low-tolerant perfume products is on the rise. There are even natural allergens, such as the essences of the lichen

Evernia prunastri (which grows on the oak or other tree bark) and the essences of ylan ylan jasmine. However, counterfeit fragrances are not subject to any control, and the risks to consumers are very high, some of which are unnoticeable in the short term from their use.

I have previously pointed out that in the doctrine and jurisprudence the problem of perfume protection is controversial, the positions expressed being most often at the extremes. We believe that perfumes are intellectual creations and that they are protectable by intellectual rights. As for perfume brands, they make this product category an immense favour, and in their case best suits the statement that in the absence of souls, things have trademarks.

## 2. The International Fragrance Association (IFRA) and its role in the perfume industry

Creators live with the feeling of belonging to a profession, but also with the need to associate in order to protect and promote their interests through collective actions. The organization does not make them "craftsmen", and they remain creators. Things are the same with parfums.

Perhaps the existence of the International Perfume Association and its (assumed) attributions support the idea that perfumery is a profession (for few, the number of qualified perfumers is, according to some sources 700, according to others 900, however none of them seems plausible), and that making new perfumes is simply a craft and not an art. The production of quality and safe to use perfumes is usually carried out in large production units, where only qualified personnel in this line of work conduct such activities, having the status of creative employees. Obviously, there are also independent creators. IFRA declares itself to be representative in the perfume industry, but its members are not creators - natural persons, but producers and producer associations.

The international association is constituted, as we have seen, also of national associations, however not all national associations are IFRA members. One of these (Fragrance Creators Association, formerly until 2018, International Fragrances Association of North America - IFRANA) represents, according to the information posted on its website<sup>4</sup>, farmers, artists, researchers, inventors, scientists, perfumers which compose the fragrance community. People who, as stated on the association's website, "spend a few years creating beautiful smells and enhancing the beauty of life." Its purpose is consumer olfactory education, safety, sharing scientific information of interest. A documentary film released by IFRANA, entitled "The Story of Fragrances", that gives a look at the artistic and

<sup>3</sup> With a simple search on the sales sites is found that an Armani Sport Code perfume, it sells with 333 Lei in a shop that operates legally and with 133 Lei by the sellers of products, which can only be counterfeited at this price." Pedlars" selling on the street have perfume deals bearing famous brands with 50 Lei!

<sup>4</sup> <https://www.fragrancecreators.org/about-us>

scientific world behind fragrances, the effort made by manufacturers for the quality of perfumes and the most important goal of perfumers, keeping the consumers safe.

Associations such as the ones mentioned above are many in the world and their essential objectives are the same: consumer protection through quality products and the protection of the interests of perfume manufacturers.

The IFRA was established in 1973 and is headquartered in Geneva, with an operations centre in Brussels. The members ("regular members") are 8 multinational companies and 21 national associations, plus another 8 associate members from countries where there are no national parfums associations. IFRA keeps a register of all ingredients used in perfumery, in active formulas at the time of publication, and includes flavoured ingredients and functional ingredients or components, that is, those substances that are essential for fragrances such as antioxidants, diluents, solvents, preservatives, colours, etc. Each listed ingredient is rated for safety, but the responsibility for the safety of the ingredients used lies with the manufacturers.

IFRA has a research institute (RIFM) which is the scientific centre of the perfume industry (IFRA's annual budget for research is \$ 8 million), it has standards for all products that are raw materials in perfumery but also for perfumes, those being published in IFRA Code of Practice, which is updated according to the association's procedures. The standard decision belongs to the experts. At the RIFM's proposal, the International Fragrances Association has forbidden or restricted the use of 186 substances in perfume making, and its members are bound to comply with these standards, their compliance being a condition of belonging to IFRA. The Association has a body of independent and renowned experts in areas such as dermatology, toxicology, pathology and environmental sciences which has the role to evaluate data on perfume ingredients and to ensure that their usage does not pose a risk to the consumer. In those cases where the assessment reveals risks, experts propose restricting or banning that product, either by issuing a standard or by restricting or banning a material. But IFRA standards are only mandatory for members of this association so that the risk of using allergenic or even toxic ingredients in the perfume industry is still high.

As far as perfume associations are concerned, their existence cannot influence the qualification of perfumes, the nature and the creative domain they belong to, the rights of the creators or the protection system. Since the world, perfumery has not yet occupied its deserved place among protected intellectual creations, and a system of protection

tailored to their specifics is in the interest of both creators and consumers.

### 3. A bit of history ... fragrant

The history of fragrances, fascinating, challenging and a worthwhile research from a biblical and secular perspective, helps us to understand perfumes. Their place and role in our lives and the fact that they are intellectual creations.

#### 3.1. Sacred Origin and Perfumes in the Old Testament

Perfumes are appreciated by (almost) everyone. Surely God likes them too, Who, when created everything, also created Havila country, where you can find gold ("good," the Bible says, strangely enough), onyx stone (semiprecious, easy to process, later appreciated even by crowned heads) and bdellium (a resin produced by an oriental palm), also He was the one who left to people "the craft of making flavours" and two special recipes of perfume<sup>5</sup>, one liquid and the other solid. Recipes He had revealed to Moses, asking him to put them into the works but reserving their use for himself (in the Temple) and for the priests who were to serve in the Temple (Aaron and his children), but even for them only for religious purposes, on the altar of incense. The Temple and the Altar that Moses was also taught how to make them (a true architectural project describes the Bible in their case), where and how to be placed (in a tent to be built following God's plan precisely and in which the altar is to be placed) and on which the perfume should burn eternally and the smoke emanate to make the connection between man and God.

The ingredients and the recipe of this fragrance were revealed by God to Moses, which had to make it out of "*the best spices*" and which are specifically indicated: selected myrrh (500 shekels worth), spicy cinnamon (250 shekels), aromatic cane (250 shekels), cassia (500 shekels, the cassia being, apparently, the honeysuckle, but the name is also used for cinnamon) and a hin<sup>6</sup> of olive oil<sup>7</sup>. "Of them, God told Moses, you will make **a fragrant myrrh after the craft of the perfume makers; this will be the oil of the holy anointing (...)** with it you will **anoint the tent of testimony and the ark of the testimony and the altar of burnt, Aaron and his sons (...)** to serve Me as priests" and "**human body will not be anointed with it, and in the image of its composition, do not make for yourself the same myrrh (...)** the one who will do something like that, or the one who gives it out to whom he does not have to give, will be cut from his nation".<sup>8</sup>

God gives Moses a second recipe for the product and process for incense (technically speaking, it is a

<sup>5</sup> *The Old Testament, Genesis, 2.11.* However, the Havila country is not identified, and no explanation has been found for the indication that gold is only found in this country.

<sup>6</sup> Liquid measuring unit equal to 5.7 liters.

<sup>7</sup> *Exodus, Chap. 30, The Altar of Incense, 30.23 - 30.38*

<sup>8</sup> *Exodus, Chap. 30, The Altar of Incense, 30.23 - 30.38*

solid fragrance), saying: "get your spices: *stacts*<sup>9</sup>, *oniha*<sup>10</sup>, *galbanum*<sup>11</sup> and pure incense, all the same measure, and make of them by **the craft of aroma makers**, a mixture of incense, with addition of salt, clean and holy. Crush it fine and put it in front of the ark of the covenant, in the tent of tabernacle (...) **Incense so made is not to be used for you** (...) who will do such a mixture (...) that soul will be cut out of his kind."<sup>12</sup>.

As you can see, there are two products, one with an oily consistency, the second one, a solid product (but which does not make it less perfume), both well-smelling. The indications given to Moses are recipes / inventions of products and processes brought to the attention of the people and for which the Inventor of the recipe has given a limited right of use, i.e. a production and use license in order to ensure a permanent relationship between Him and man through intermingling the smell and smoke produced by the two perfumes. The smoke that has the meaning of the people's speaking to God, while the light (candle) has the meaning of God's speaking to his people. Thus, two inventions of perfume / perfume products have been conveyed to Moses, with the right to manufacture and to use perpetual but limited (to a social class, that of the priests and respectively for a place, that is, only in the Temple) which means that inventions can never fall into the public domain, which is not entirely in accordance with the law of inventions as conceived by people who have limited the duration of the inventor's exclusive right and have made it possible for the invention to fall under public domain where the usage is free.

The assertion sometimes made in the sense that God would have stopped people from using perfumes is contrary to the Bible. As I have shown, God has given Moses two recipes, asking him to make "**fragrant myrrh after the craft of the perfume makers**" and "**incense after the crafts of the same perfume makers**", that is, **after a known and cherished craft and which** if it would be contrary to God's wish (will) would certainly not have been recommended to be used to make the holy myrrh and incense. But the trade with flavours was, as the Old Testament reveals many times, ordinary and flourishing. The sale of Joseph, one of Jacob's 13 sons, by the brothers of some essence merchants who bought people also demonstrates how active the perfume essences trade was and how valuable the flavours were.

### 3.2. Fragrances in the New Testament

Our conclusion that God loves perfumes is also reinforced by the New Testament, which speaks of perfumes at two important moments of Jesus' life: Birth and Crucifixion.

According to Matthew (2.11), the Eastern Magi (whose number and occupation are not mentioned by the Evangelist) guided by the star, traced Mary and Joseph in the very Night Jesus Was Born and gave to Child Jesus, gold, myrrh and incense. The Magi are numbered and called, however, by a Gospel of the Armenian Church, and according to it they would have been: Melkon (King of Persia), Gaspar, King of India, and Baltazar, King of Arabia. Other sources, however, consider them Persians of Zoroastrian religion, astronomers and great priests and, undoubtedly, rich and entrusted with the events that were to come and which they were eager to honour. And their gifts also given as symbols: believers offering a portion of the wealth to the poor (gold), freshness, hope for eternal life, and for the miracle cure (myrrh) and people identifying themselves with the Church and with prayer (incense).

Declare saints of the Roman Catholic Church for their gesture of giving gold, myrrh and incense to Child Jesus, and being the first mortals who believed in the miraculous Birth and in Jesus, the Magi continue their relation with perfumes also in eternal life, because their relics are in the Dome of Cologne (the second high in Germany - 157 meters), built especially for this purpose between 1248-1473<sup>13</sup> on the site of another church and which became a place of pilgrimage<sup>14</sup>, the city being visited in our century by over 6 million people each year.

How is it known and believed to be the genuine relics in the Dome of Cologne, some 3,500-4,000 kilometres from the place where they were ended their lives? This is related to the history and especially to the traditions of the Church.

According to the tradition of the Catholic Church, the relics of the Magi would have been discovered on Mount Victor by Empress Hellen<sup>15</sup> (Emperor Constantine's mother) during her pilgrimage to the Holy Land, a few years before she died, an occasion with which she discovered the Place of Nativity and the Holy Cross (along with those on which were crucified with Jesus, the two thieves). She would have brought the relics of the Magi to the Holy Church of

<sup>9</sup> Pliny the Elder mentions this ingredient in Natural History as used by Syrians in medicine and ... in perfumery. Obviously, the resin with this name must be produced by a plant, but we have not identified it. In his Natural History, Pliny the Elder describes several perfume recipes.

<sup>10</sup> Oniha or onihias, a plant unidentified by botanists and / or theologians, the term being out of use. It can only be a plant from which extracts of aromatic essences are used for the holy oil.

<sup>11</sup> Galbanum is probably an aromatic plant (ferrule galbaniflua), hard to identify, as well as other aromatic plants to which the Old Testament refers. The identified one grows in Iran, Afghanistan, India. Cut to the extremities, produces a milky juice that strengthens and takes the form of a gummied resin. It is not known in Romania

<sup>12</sup> Exodus, 30.34 – 30.38.

<sup>13</sup> The construction was completed 632 years after its inception, but today it is still working to repair the damage suffered during the last World War.

<sup>14</sup> Umberto Eco puts in the mouth of his Baudolino character the following statement: "a relic how it is possible to change the destiny of a city, to make it a target of uninterrupted pilgrimage, to turn a parish into a sanctuary." U. Eco, *op. cit.*

<sup>15</sup> Flavia Iulia Helena or Helena Augusta (248-329), often called the Empress Helena.

Constantinople, from where they would have been taken by the Crusaders to Milan and given to Bishop Eustorgius<sup>16</sup>. In 1162-1163, the city of Milan was defeated and almost destroyed by Emperor Frederic Barbarossa<sup>17</sup>, the relics of the Three Magi being taken away from the church and transferred to Cologne in 1164, by the order of Emperor's counsellor, Archbishop Rainald von Dassel<sup>18</sup> of Koln- a town where the famous Dome was later built.

Marco Polo tells, however, that in 1270, in the city of Sabaa (south of Tehran), he saw three great, next to each other and beautiful tombs, in which the three Magi were buried: Baltazar, Melchior and Gaspar. *"Their bodies - said the famous traveller - are still unspoiled, with hair and whole beards. „It's just that the history of Marco Polo's life says he would have started his journey that brought his celebrity in 1271! Well?"*

Are the relics of the Magi in the Cologne Cathedral some fakes? At the beginning of the second Christian millennium, trade with false sacraments (as well as with indulgences) was an ugly plague on the cheek of the Christian Church. It was *"a vermin and, being a vermin, it was impossible to destroy it. When you were able to eradicate it in one place, it appeared in another. All the well-meaning priests and the popes denounced (falsifiers, n. a.) Fought against them, but without any result. Their pursuit was one of the most lucrative and hard to prove. In 1274, Umberto de Romani, ex-general in the Order of the Dominicans, declared that these sales exposed the Church in derision and demanded heresy. One of the first tasks of the Inquisition, said Pope Alexander IV, is the quenching of this scandalous trade."*<sup>19</sup>.

We do not believe that there is any conflict between faith and science about the Magi and the place of their eternity, but only a mystery that we cannot unravel. In fact, it is said about the relics that *"it is faith that makes them true, not they prove faith"*<sup>20</sup>. And the Cologne does all it can to strengthen their authenticity: the city's coat of arms is made up of three wreaths of the Holy Magi and 11 tears of St. Ursula and her companions<sup>21</sup>, who have been martyred in Cologne.

Cologne's connection with perfumes does not end at the famous Dom where the relics of the Magi are laid, because as we shall see later, Cologne City Hall also offered a place of honour on the front wall of the building that houses it, to a statue of a perfumer that brought glory to this old city, whose name comes from the Latin "colony", the fragrances it created here and a distinguishing sign that became generic (odicolon): Joseph Maria Farina, who founded the oldest perfume factory in operation in the world.

If Matthew told us in his Gospel about the gifts made by the Magi to Child Jesus, Mark tells us (14.3 - 14.9) that two days before Easter, while he was with his crowd in Bethany, at table in the house of Simon The Leprous, a woman (to whom Evangelist Mark, unlike Evangelist John, does not mention her name) came with an alabaster<sup>22</sup> bowl filled with *"clean, nard myrrh of great importance"*. According to the Gospel of John the Apostle (12.1-12.3), the event took place 6 days before Easter on the day of entering Jerusalem before the beginning of the Passions, and the woman was Mary Magdalene, sister of Martha and Lazarus (as shown in The Gospel of John *"And Mary was the one who anointed the Lord and wiped His feet with the hair of her head, whose brother Lazarus was ill (...)"*). And breaking the bowl poured the myrrh (perfume) over the head and feet of Jesus, wiping his feet with her hair, to the displeasure of some of the disciples who murmured against the woman, saying, *"Why did this waste of myrrh?"*(...) *"this ointment could have sold for more than 300 dinars and give that money to the poor."* But Jesus upbraided the murmurers by saying to them, according to the testimony of Evangelist Mark: *"Leave her. Why are you upsetting her? She has done a beautiful thing for Me"* (...) and according to Evangelist Matthew *"(...) That she, turning this ointment on My body, made it to My burial "*, the event prefiguring the embalming that no one of those present did not understand. The most dissatisfied member of Jesus crowd, Mark tells us, none other than Judas Iscariot, who was also the keeper of the money bag of the group (from where he stole now and then for himself), went after this incident to the archbishops ("

<sup>16</sup> Umberto Eco claims that the relics would have been offered by the Basileus of the Emperor of the East. Umberto Eco, Baudolino, Polirrom Publishing House, 2013. Work available in digital format on available in digital format on [https://books.google.ro/books?id=kSdrDAAAQBAJ&pg=PT125&lpg=PT125&dq=descoperirea+moa%C8%99telor+magilor&source=bl&ot\\_s=nWpc0dgOaX&sig=ACfU3U1xbJwdshqqURTaZOtyEYr4V1ybQ&hl=ro&sa=X&ved=2ahUKEwi5q8296szhAhUFqIsKHQgPBqsQ6AEwBHoECAkQAQ#v=onepage&q=descoperirea%20moa%C8%99telor%20magilor&f=false](https://books.google.ro/books?id=kSdrDAAAQBAJ&pg=PT125&lpg=PT125&dq=descoperirea+moa%C8%99telor+magilor&source=bl&ot_s=nWpc0dgOaX&sig=ACfU3U1xbJwdshqqURTaZOtyEYr4V1ybQ&hl=ro&sa=X&ved=2ahUKEwi5q8296szhAhUFqIsKHQgPBqsQ6AEwBHoECAkQAQ#v=onepage&q=descoperirea%20moa%C8%99telor%20magilor&f=false)

<sup>17</sup> Frederick I, also called Barbarossa (1122-1190), was anointed emperor of the Holy Roman Empire of the German Nation in 1155. He invaded Italy four times and was in conflict with the papacy, being excommunicated (in 1177) by Pope Alexander III. He had as counsellor and chancellor Archbishop Rainald von Dassel (1120-1167). He set up a crusade and went to the Holy Land with his army but died drowning at crossing the Goksu River in Anatolia. The attempt to keep his body in a barrel of vinegar was not successful, so he was buried in Antioch. The legend says he would not have died, and that he sleeps in a limestone cave in Germany, waiting for the right time to give his country the grandeur of the past. That's why Hitler gave his Russian invasion operation his name (Operation Barbarossa).

<sup>18</sup> Rainald von Dassel (1120-1167) was a close friend of Emperor Fredrick Barbarossa and archbishop of Cologne, a town in which he spent less than a year because of the missions he had besides his emperor. In the Dome of Cologne there is a statue of his body, without his arms and without the bottom of his body. R. von Dassel doubted the authenticity of the relics, placing their garments (which looked like ones of troubadours) to be changed with others like the ones of bishops, archimandrites or even popes.

<sup>19</sup> See A. Hyatt-Verrill, *Inquisition*, Mondero Publishing House, 1992, pp. 213-214.

<sup>20</sup> Umberto Eco, Baudolino.

<sup>21</sup> In number 11,000 and virgins, all of them being killed by the Hunts in 383.

<sup>22</sup> Variety of white, grey or black marble-like gypsum used to make ornamental objects. It was used to create perfume containers because it was porous, allowing the slow evaporation of the liquid to release the pleasant smell.

most important priests ") to sell Jesus. That is, "a clean and very expensive" perfume bottle (which could not be the same as that made for the incense altar and reserved for the use only by the priests) was also a cause of the sale of Jesus by Judas!

The Bible also mentions a situation similar to what is known as the "Anointing of Bethany," the occurrence preceding the one above, while Jesus was in the house of a Pharisee when a sinful woman "**knowing that He is sitting at the table in the house of the Pharisee, brought an alabaster with myrrh. And standing by the back near His feet, crying, began to wet His feet with tears and with the hair of her head she wiped the tears away. And kiss His feet and anoint them with a myrrh.**"

### 3.3. Is the Bible against Fragrances?

If the Bible were against perfumes, if perfumes were evil things, then of course we would all have a problem, because we would sit outside of the holy teachings. And it would be an important argument for one part of the world to exclude them from protection or that we could not ignore in any case.

But as we have said, God has made all of them, including raw materials and perfume recipes for the use of the Church and the priests, and He has also given people the "craft" to do the others, and in His turn, Jesus received the gesture of perfuming Him (from head to toe) with a "high-priced nard myrrh" before being crucified, like Mary, His mother, who gladly received the gifts of the Magi in the name of Jesus, both moments symbolizing and being related to death and birth, end, and beginning. All of this tells us that the Bible is not against perfumes.

It is true, however, that some of the Fathers of the Christian Church have been hostile to perfumes and that even today, not all theologians seem to be in the admiration of perfumes that have passed the sacred area to become part of our everyday life. Let's recall two of the most hostile.

The first one is Tertullian of Carthage<sup>23</sup>, a lawyer in his first youth and one of the most prolific authors of the Christian Church, in "*De cultu feminarum*" (About Women's clothing) criticized vestments dyeing and the women's use of makeup, under the word that it would violate the will of God. „*It cannot be legitimate, said Tertullian, which is achieved by violating this will. What God did not make; he means he does not like it. Do you think God could not have commanded the sheep to produce purple or sky-coloured wool? If he could and did not do, it means that he did not want it and what God did not want, we have no right to manufacture. What does not come from God, the author of nature, is not good for nature. It is not difficult to understand that*

*these things (dyed clothes and makeup, etc.) come from the devil, which is a forger of nature*"<sup>24</sup>. We find, however, that Tertullian, who was a great lawyer before becoming a great theologian, contradicts himself the Bible that often speaks of the colours of the garments, blue and purple being the favourite colours in Bible writings. Tertullian was criticized even in his lifetime because he was excessive and paradoxical in his judgments.

The second is Saint John Chrysostom<sup>25</sup> who, two hundred years later, says more firmly compared to Tertullian that "you do not have to wear perfume, but virtue! Nothing is more unclean than a soul that has a body that wears a perfume. The scent of the body and of the garments is the sign of the inner spirit and impurity. When the devil rushes to ruin the soul and mourn it, then it fills in the body, with the help of perfumes, the dirt of its wickedness. "

It is hard to contradict this Church Teacher, but we are of the opinion that he has nevertheless accepted the use of natural fragrances, weak, to remove unpleasant odours, his interdiction was only towards "spiritual soldiers," i.e. priests. But as we have seen, God gave them (his priests) a perfume for them only.

Lux (the origin of the word is *luxura*, which means in Latin, dissipation) in which the Romans lived did not partake of perfumes and their excessive use. Perhaps from here and from the condemnation of all that the Romans have done against Christians comes the hostility of some Church Fathers to perfumes. And it is hard to say how perfume fashion survived in the dark Middle Ages, dominated by the Christian Church, hostile to science, art, luxury and bathing (weird, because the Bible reminds us of foot washing several times, Jesus himself doing this gesture ) and criticism of all kinds of sins and vices (but whose development in the very heart of the Church could not prevent it, which generated the movement of Luther and Reformation), but it is certain that at the beginning of the Renaissance there were well-known perfumers and that then liquid perfumes appear, as we know them today, which could not happen on a virgin land. Since the 13th century, the art of perfumery has grown a lot, and we must not be very surprised about it, because alchemy and alchemists were then many and in vogue, even if they were ending up on the cleansing fires of all sins by the feared Inquisition.

Did Moses followers respect the divine will to use the ointment made according to the recipe revealed by God? It seems not, but I also didn't find arguments in the sense that the perfume, except for the priestly ointment, would have been another forbidden apple to men, the Bible giving us a lot of evidence to the contrary and making perfumes continue their march.

<sup>23</sup> Quintus Septimius Florens Tertullianus, known mostly as Tertullian of Carthage (150 / 160-220), is the father of Western Christendom and founder of Western theology. He is the first theologian who used the word Trinitas to designate the Holy Trinity <https://ro.orthodoxwiki.org/Tertulian>

<sup>24</sup> Apud Mireille Buydens, *La propriété intellectuelle, Evolution historique et philosophique*, Bruylant, 2012, p. 67

<sup>25</sup> St. John Chrysostom (347-407), considered holy both in the Eastern Church and in the Western Church, worshiping him as the doctor of the Church. His theological work, preserved in its entirety, comprises 18 volumes. His critical Jewish works were used during the Second World War to persuade German Christians that Jews deserve to be exterminated.

And we have also identified a link over millennia between Biblical fragrances and perfumes that people use today.

Moses was married to the Ethiopian (black as coal) *Sephora* (or *Tzipporah*), the precious daughter of some wandering pastors in the desert, who saved his life after he had killed an Egyptian who was wrongfully and cruelly beating a Jew. In Greek *sephos* means *beauty*. And *tzipporah* means *bird* in Hebrew. These words are the result of a combined, inspired choice of perfume that led to the name of the famous perfume brand “*SEPHORA*”, which belongs today to the group Louis Vuitton Moët Hennessey (LVMH) that is selling more than 250 brands of perfumes and maintenance cosmetics. Promote these fragrances, women like to believe, as a token of appreciation for them, ignoring that, in reality, industry operates according to the rules of trade, and that in commerce products have no souls, but brands and if there is concern for feelings, it is just to attract and maintain customers for financial gain.

And we have learned that, by ignoring Tertullian, 20th century designers (Paul Poiret's debut) began dressing up women elegantly (and cheaper) using printed fabrics and adding to their garments also perfumes. After him, all great fashion houses combine the launch of new models of clothing, protected by intellectual rights, with new perfumes.

The origin of the perfumes is, as it can be seen, sacred, but it did not prevent their penetration into everyday life, so that they gradually lost from the aura of absolute holiness and closer to us, as we shall see, and from the naturalness in which there have existed for many millennia. But not from the idea of cleanliness, pleasure, attractiveness and courtesy when used wisely!

### 3.4. Fragrances of non-Christians

Perfumery has become an art and a science (we cannot determine precisely when) and a fabulous business, its transformation into industry, however, is also related to the lack of hygiene of crowned heads, some trying to cover their filth and odor by using large quantities of perfume and others were wearing them because they simply adore the pleasant smells.

Indeed, perfumes have been known for a long time and were also known by non-Jews and non-Christians. They knew and manufactured them, using it not only for religious purposes, the Sumerians (many of their perfume recipes were discovered in their "libraries", including Tapputi's name, the first perfumer of profession identified by historians), the Egyptians (who used the perfumes from birth to death<sup>26</sup> bathing in

fragrant water as part of their habits), the Chinese, the Hindus, the Persians (who invented, through Avicenna, the process of extracting essences / essential oils from the flowers by distillation in the year 1000, then used through the world, and nowadays), Greeks, Romans, Arabs (Al Kindi is the author of "The book of the Chemistry of Perfume and Distillations" containing over 100 perfume recipes). The Arabs, unable to use alcohol, because of the interdiction have replaced it with oil and solid perfumes, their refinement in the creation of scents being unmatched.

The Greeks, Homer tells us, have been taught by the Olympian gods to make and use perfumes, and they are the first who made liquid perfume and have organized industrial production, setting up numerous workshops for this purpose (in Crete, for example, ruins were discovered a 4 millennia perfumery with a surface area of more than 4,000 sqm, but the perfume industry was well known and developed on other islands, the oldest perfume being discovered in the Pyrgos town of Cyprus<sup>27</sup>) which was hardly facing the demand. The same Greeks were engaging an intense perfume trade, although commerce, workers' work, and the work of artists, including perfumers, were not highly valued, to either the Greeks or the Romans, which, on the contrary, were considered dishonorable.<sup>28</sup>

The Greeks used for the perfume, among other plants, the **rosemary**<sup>29</sup>, a Latin word composed of **ros** and **marinus**, meaning the dew of the sea. The plant, which is aromatic and has both culinary and medicinal properties, was also called incense, because the Greeks burned her leaves as incense, considering it sacred and having some of the spices of Aphrodite and of the sea (in whose foam, the legend says that the goddess was born and emerged). Out of it was also made the crown worn by the grooms as a covenant of faith and fidelity, called the "incense ring", but also the crown that was placed on the statues of gods in order to thank them (a habit of Romans proven plagiarists of the Greeks in many ways, not only in the arts, they also used it for a while). The plant it is used for cooking and the tradition tells us that, women who use will always remain beautiful and have loyal partners.

In ancient Greek the name of **rosemary** was however **livanos**, meaning **the incense tree**, a name that stems from the Semitic root of the word **lvn** or **lbn**, which means white, the explanation being that when burning, the incense gets milky white. This word **lbn** gave the name of Lebanon, the country whose mountains are brilliant white, are always covered with snow.

<sup>26</sup> 3.300 years after Tutankhamun's tomb was open smell of perfume was still coming out.

<sup>27</sup> Stelian Tănase, *The history of perfume*, December 2<sup>nd</sup> 2012, article available on <https://www.stelian-tanase.ro/istoria-parfumului/>

<sup>28</sup> Cicero considered „unworthy of a free and despicable man the earnings of all employees whose ability and value we do not pay; In these earnings the salary is itself the guarantee of servitude (...) All craftsmen are engaged in a despicable job, the workshop does not mean anything noble and the less acceptable are the occupations that serve the pleasures: butchers, cooks, fishermen; **add, if you like, perfumers, dancers and all gambling**. Instead, for jobs that involve more caution or from which an important service is expected, such as medicine, architecture, teaching knowledge of the nobles, these trades for the ranks they take advantage of - beautiful crafts (...) But of all companies that benefit from it, nothing is better than agriculture, nothing more productive, nothing more enjoyable, nothing more worthy of a man and a free man”. Cicero, *De Officiis*, Book I: 42, 150-151.

<sup>29</sup> The scientific name of the plant with so many qualities is **Rosmarinus officinalis**.

Everything that was happening in Athens had to reach also in Rome (the Romans reproduced statues of Greek artists without shocking anyone and doing it because they did not consider themselves capable of doing something more beautiful) also the perfumes followed the rule and Rome became, in time, not only a city of power, but also a city of civilization and good taste, where elegance and beauty were of great value, and perfumes, some of which used in excess (birds, dogs and horses and they were also wearing perfume) could not be missing. Martialis<sup>30</sup> tell us (the father of the word "plagiarized" with the meaning it has today and denouncing as a plagiarist of his works of Fidentius), mocking the excessive use of perfume in his time, one of his epigrams entitled even „*To a woman that wears too much perfume*”: „*Whenever you show up in to the world, you smell so good,/like you are carrying Cosmus Booth/Its heavy scent accompany you on the road./Filling the atmosphere with waves of perfume./O, Gallia, I don't like your cheap manners:/If I shell perfume it my mutt would smell the same*”. Note, of course, the reference to Cosmus (and his store), which indicates the origin of the term "cosmetics”.

### 3.5. Perfume and ... animals

By the way, perfuming dogs (and other animals), as seen, the idea to make them smell good is very old, and if we were to apply our famous Law no. 204/2006 regarding ethics in research, we find that, a famous perfumer is a plagiarist of ideas and should be punished if living in Romania. Thus, the famous perfumer South African Etienne de Swardt has joined the few and conquered his bosses from LVMH (Louis Vuiton Moët Henessy), Paris and the fashion world with his luxury fragrance for dogs created by him (one for cats was a failure). But the dogs, like horses or birds, as we have seen, are perfumed for a long time, so the idea of a dog perfume is not its own (it's not time for discussion and ideas, but it is worth remembering briefly: Swardt worked at Louis Vuiton, from whom the world was waiting for a perfume. He proposed to his bosses that it would be a "good joke" to make a perfume for dogs, but his bosses took the joke seriously, and he did it and became immediately famous. But the idea was known for two thousand years!). And it's beautiful what the famous, now, perfumer Swardt, graduate of Versailles school, apprentice at Givenchy say: *I love poetry and the perfume is a poetry*.

Recently, the **porcine perfume** was created, a perfume created by an American scientist, John McGlone, from Texas Tech. In fact, it is a breakthrough that has identified practical applications. McGlone noticed that androsterone, a steroid acting as a

pheromone produced by male pigs and contained in their fat and saliva, calms down dogs. Together with his colleagues it has done research and experiments and determined that the product is useful in calming down the noisy dogs, which can be extremely useful for noisy dog owners. And how in US anything new made under the sun is patentable, the product will be, certainly, patented in the near future.

Fragrances for animals, especially for pets and particularly for dogs, are a great success among people. However, it is unlikely, for a dog who has the odor more than a thousand times developed than the human smell to really appreciate the fragrances, it is well known that they do not like the smell of pepper, citrus and alcohol, forming part of the recipe of many perfumes.

### 3.6. The first “modern” perfume

History claims that in 1370 would have been created the first modern perfume at the request of Queen Isabella of Hungary, called Water of the Queen of Hungary, which it would have been used to seduce the King of Poland and marry him. The recipe is described in a work paper without a known author, printed in 1660 and the perfume is as real as possible: 30 ounces of alcohol and 20 ounces of rosemary essence. Only that, in the 14-th century that there was no Hungarian queen with this name<sup>31</sup> and no Polish king married to a Hungarian queen. Moreover, it also follows from the content of the recipe, that the named queen is the one who would have refused the marriage request from the Polish and that her product would have had also therapeutic virtues, that cannot be denied because the perfume has always had curative, protective and antiseptic qualities due to the alcohol content (also, in the Great Museum of Paris are exposed perfumes used against the plague). However, the legend is more beautiful than the historical truth<sup>32</sup>.

However, it is undeniable that perfumes have been, are **and** will be used by women to conquer men and men to conquer women. And that for women, they were (maybe they still are) a "weapon". Even though fragrances have often had to endure also the ungrateful role of unpleasant odors mystificator generated by the lack of water and soap of some (including crowned heads) or of the stench in the urban agglomerations that made Queen Elisabeth I's visits to London to be preceded by perfuming the streets she was passing by on her way in order to save the Glorious and / or Good Queen Bes (as her subjects love to call her) who could not stand bad odors. Queen Elizabeth was also famous for her statement: *"Whether it is needed or not I still wash myself once every three months"*. But compare

<sup>30</sup> Marcus Valerius Martialis, 40-104 d. Hr. is the author of 15 Epigrams books that identify the circumstances of Rome's life during Domitian, Nerva and Trajan. His epigrams have been translated into Romanian by Tudor Măinescu (1892-1977), who was a **judge** (1924-1948), satirical poet, epigram writer, fabulist, storyteller and translator.

<sup>31</sup> Still, there was a Hungarian woman, Isabella (1519-1559), married with Ioan I. Zapolia, king of Poland, but she lived during the 16<sup>th</sup> century and was regent in Transylvania.

<sup>32</sup> Some sources placed this fragrance on Queens Elizabeth of Hungary account. There was an Elisabeth of Hungary, descended from Andrew II, but she lived between 1207 and 1231. I COULD NOT identify a Queen Elizabeth of Hungary, who lived between 1305-1380, as claimed in some papers.

the Queen of England with Queen Isabella of Castile, who would have sworn not to wash herself until she would banish the Moors out of Spain (which it happened after many years of wars, only in 1492), while others say that she would have washed herself only twice in her lifetime: at birth and when she got married!

In history, men are no more different in terms of cleanliness. The Russian ambassador to Paris, for example, wrote about the King of the Sun (Louis the 14<sup>th</sup><sup>33</sup>) that „*its majesty stinks like a wild animal*” and about one of his predecessors, Henry the 4<sup>th</sup> it is said that his ugly smell have been provoked the faint of Maria de Medici at their first encounter. Thus, it is explained the origin of the bride's flower bouquet: its need to cover the unpleasant smell of the groom.

In such an ugly smelling environment the development of perfumery was more than necessary and it became an art in France, sometimes a "weapon" of seduction or by case a deadly one and an industry. And not only that! Caterina de Medici<sup>34</sup>, mother of three kings, a queen herself, famous for her Machiavellian nature and her passion for the poisons (cyanide with pleasant smell of almonds), with which her opponents were liquidated and produced by her perfumer from Florence, named Renato, is the one who opened the first perfume shop in Paris. Today, *PUR POISON* ("pure poison") is a famous perfume of Dior House, Pur Poison being a non-descriptive brand for content.

### 3.7. Perfumes with ... gloves and guillotine with perfume

The perfumes had their path and future assured even without the intervention of the ones that did not know the "craftsmanship of flavor makers". But the need to remove the unpleasant smells of gloves made of animal skin to make them more attractive has made the tanning industry in the seventeenth century to link with that of parfums (in 1656 they also set up a guild), which would radically change the destiny of the French city of Grasse de Provence. Thus, a craftsman from Grasse "came up with the idea" of impregnating gloves he produced with perfume, and then began to produce the flavors necessary to apply his idea, but they are authors who claim that the idea was put into practice in other lands, so the French in Grasse would be just copiers<sup>35</sup>. It is certain that his scented gloves have been very successful (Queen Maria Antoinette bought 18 pairs of gloves from Grasse weekly), so his recipe was quickly and by many copied, the production of perfumes in Grasse growing ever since. The growing

was that great, so he took the lead in the gloves industry and turned the city of Grasse into the world capital of raw materials (flowers) and perfume production (more than 60 companies are based there) and later became the host of the International Museum of Perfumes, a museum that now has over 50,000 exhibits. The city also hosts two festivals: roses of May and of jasmine (in August).

The development of the perfume industry was also determined by the increasing demand of the consumer market as such that much later the perfume became an ingredient for detergents, soaps, cosmetics, etc.

During Louis, the 15<sup>th</sup><sup>36</sup> lifetime his court was named due to the high consumption of perfumes, "*le cour parfume*". A royal court where the beautiful, smart, cultivated and good perfumes lover, the Pompadour marquise<sup>37</sup> occupied an important position, which is why she has gained a lot of enmity. However, it is hard to say that the beautiful courtesan would have been the one who, six years after her death, would have determined in 1770 the adoption in France of a law punishing women who abused perfume to seduce men. This story with the perfume as a men's bait, has a long history as we can see, on behalf which, as I have already shown, there is a lot of fabulizing about.

It is not the only oddity of the French in terms of perfumes, which they loved very much, since during the Revolution they even created perfumes. One of these was called "*Parfum á la Guillotine*"! Of course, it was not created to drive away the stench of blood from Place de la Ville, where dozens of executions by guillotine took place accompanied by the ecstatic screams of the crowd. A *Parfum Sophistic Guillotine* (unisex) is still produced today, the basic ingredients being lichen, orange and bloody grapefruit.

### 3.8. Perfumes, Napoleon, Josephine and Queen Mary

Napoleon Bonaparte was a great perfume lover, he used high-quality perfumes (two-liter violets fragrance per week!) and loved, over the power of understanding of many of his contemporaries, a single woman, Josephine<sup>38</sup> and whom himself crowned her as a queen, forgiving her infidelities that made him enormously suffer and scandalizing even his close relatives. Even after the divorce, the Emperor loved Josephine (platonically, say his admirers), but she also loved Napoleon until her death (May 29, 1814).

Josephine was an elegant woman who, apart from the many vaporous dresses she regularly orders, loves the fragrance of musk, the smell of which is said to

<sup>33</sup> Ludwig the 14<sup>th</sup>, 1638-1715. Known as „Ludwig the Great” or „The King of the Sun”.

<sup>34</sup> Caterina de Medici, 1519-1589

<sup>35</sup> But Magda C. Ursache claims the fashion of scented gloves was brought to Paris by Caterina de Medici. In other words, gloves' scent was known in Italy long before being used by the Grasse tanners, and if that was true and the Italians had been patented, the French would have been just counterfeiters.

<sup>36</sup> Ludwig the 15<sup>th</sup>, 1710-1774. Also called "The Most Loved One" and "The Lazy King".

<sup>37</sup> Pompadour marquise (1721-1764), mistress of the King Ludwig the 15<sup>th</sup>.

<sup>38</sup> „My husband does not love me, he adores me, I think he will go insane”, wrote Josephine in a missive from 1796 that was auctioned at 36,655 EUR. A collection of 50 letters and 400 documents of the Empress regarding the French Revolution were sold for 700,000 EUR.

persist today in her bedroom in the Malmaison Palace (today being a museum at 15 km of Paris center) where, it is said that she died of Napoleon's longing. The emperor who was left without a crown and who, even before being exiled to the island of Elba, frequently visited the one he had divorced from state reasons and made long walks with her through the palace garden full of roses that were also her favorite flowers. Emperor Napoleon died on the cursed island where he was exiled with a small box containing two burning perfume pills (solid) by his head, Houbigant, one of his favorite perfumes.

Josephine's musk perfume, however, made many victims among the deer that produced the so expensive essence and which, in order to be harvested, was to be preceded by the killing of the animal, the species being threatened even today with extinction. The chance has revealed, as we shall see, the synthetic musk aroma, and that helped save the little deer producer of natural musk.

It is said - and certainly, it is not just a legend - that the French perfume industry has moved its weight center of gravity from Grasse to Paris and has developed vertiginously in the eighteenth century due to Napoleon's passion for perfumes. In a family of gloves producers, Grasse Francois Rance was born who when he decided to dedicate himself exclusively to perfumery (1795), quickly became known and became Napoleon's favorite perfumer for whom he created the perfumes "Le Vainqueur", "Triomphe" and "L'Eau de Austerlitz". Later, his descendants created perfumes for Napoleon the Third and his wife, among them „Heroique”. Rance's descendants are the owners of Le Procope Restaurant, Paris's oldest restaurant <sup>39</sup> where famous characters such as La Fontaine, Hugo, Balzac, Voltaire, Diderot, Verlaine, Anatole France enjoyed the culinary delights and ... Napoleon Bonaparte, whose lieutenant hat (given by him) is a valuable showcase of the restaurant<sup>40</sup>.

In 1752, Jean-François Houbigant was born in Paris, who, helped by the family to whom his parents were servants, studied (at Grasse <sup>41</sup>) the art of perfumery, ascending then, in a France where people were exaggerated to hide the odors generated by precarious hygiene. In 1775 he opened in Paris, on Rue

Faubourg Saint Honore (an area in development and inhabited by aristocrats), a shop of gloves, perfumes and flowers, his small business prospering rapidly thanks to the products that conquered the world and became the famous perfume house (one of the oldest in the world and the first one who isolate coumarin<sup>42</sup> from the Tonka beans, a vanilla-like substance) „Houbigant”<sup>43</sup> and perfume provider for many royal homes, including for the Queen Mary of Romania.

The beautiful (the most beautiful queen of Europe, her many admirers were saying), the elegance (by attitude and dress style combined with quality perfumes), intelligent, spiritual and diplomatic (conquered the world and all the important people she met, and there were many, working for the benefit of the country), loving beautiful (queen of arts called by others) Queen Mary, she adored quality perfumes.

In 1921 Queen Mary accepted to become the image of the perfume "Quelques Fleurs Royale" (the first multifloral fragrance created in the history of perfumes <sup>44</sup> in 1829 and still produced today) and „*Mon Boudoir*” (created in 1912 and no longer produced since 1978) made by the Houbigant House. Queen Maria was the first crowned head who accepted an association of her name with *Pond's* cosmetics, that led to a sensational increase in sales.

Specialists say that the Queen's Peleş rooms would preserve the smell of *Mon Boudoir*, a perfume that the French want to recreate.

### 3.9. Odicolon, the first degenerate fragrance brand

In 1709, an Italian perfumer, Giovanni Maria Farina<sup>45</sup> (German version Johann Maria Farina, French version Jean Marie Farina) settled in Köln (Cologne in French), in Germany, where he open a perfume factory that still exists today (it is the oldest in the world and reached the eighth generation of perfumers). Here he created a delicate, fresh, light fragrance from a blend of Hesperides, Mediterranean flowers and aromatic plants that quickly became famous in the world and indisputably from the royal courts of the time (whose official supplier became) and whose creator, granting him German citizenship, as a gratitude to the city that embraced and adopted him and named him *Echt*

<sup>39</sup> It was founded in 1686 by the Sicilian Francesco Procopio Dei Coltelli. [https://www.yelp.com/biz\\_photos/le-procope-paris-2?select=yG00jwEcDBi1X](https://www.yelp.com/biz_photos/le-procope-paris-2?select=yG00jwEcDBi1X)

<sup>40</sup> Among many other pieces of historical and artistic value, there is also the farewell note of Queen Maria Antoinette written by her shortly before being guillotined, on a napkin which still retains the traces of her tears.

<sup>41</sup> The information is not clear, on the site is written: „De nos jours, la composition de parfums Houbigant se fait toujours à Grasse, jardin mondial des parfums ou, il y a deux cent ans, Jean François Houbigant fit ses premières créations.” [https://www.google.com/search?ei=Zbq4XP6\\_KuukrgSA9qn4DA&q=de+nos+jour%2C+la+composition+des+parfums+Houbigant&oeq=de+nos+jour%2C+la+composition+des+parfums+Houbigant&gs\\_l=psy-ab.3...22999.46240..48294...0.0..1.216.5147.19j29j1.....0....1..gws-wiz.....0j0i131j0i67j0i70i255j0i22i30j0i19j0i22i30i19j33i22i29i30j33i21j33i160.i\\_s3RWg3pv4](https://www.google.com/search?ei=Zbq4XP6_KuukrgSA9qn4DA&q=de+nos+jour%2C+la+composition+des+parfums+Houbigant&oeq=de+nos+jour%2C+la+composition+des+parfums+Houbigant&gs_l=psy-ab.3...22999.46240..48294...0.0..1.216.5147.19j29j1.....0....1..gws-wiz.....0j0i131j0i67j0i70i255j0i22i30j0i19j0i22i30i19j33i22i29i30j33i21j33i160.i_s3RWg3pv4)

<sup>42</sup> Coumarin (C<sub>9</sub>H<sub>6</sub>O<sub>2</sub>) is a toxic, flavoring substance with vanilla-like odor, used in perfumery and cosmetics and forbidden in food. It was discovered in 1822 in Tonka beans, synthetically produced since 1868. Warfarin, a coumarin derivative, is used in medicine (anticoagulant) in the manufacture of fluorescent dyes and poisons for mice.

The brand has lost its former glory, sadly says Dominique Valentin, seeming to be forgotten by the great public. <http://www.racinesenseine.fr/puteaux/pages/rose0008.html>

<sup>44</sup> This fragrance is considered an important innovation in perfumery and then influences composition.

<sup>45</sup> Johann Maria Farina (1685-1766), learned the art of fragrance in Venice, in the studio of his uncle Carlos Gennari, a producer of perfumes for aristocrats.

*Kölnisch Wasser* (True Köln Water) or in the fashionable French of those times „*Eau de Cologne*”. As it is known today trademark degenerated (in Romania) in the word "odicolon", a word that, according to DEX, designates light perfumes. Neutral noun and it can be no other way because the perfume is **unisex**. Köln-ul also has become thanks to Farina's perfumes, world famous and as a sign of gratitude to Farina, he was awarded the title of the honorary citizen of the city and on the facade of Cologne City Hall one of the many statues (second floor, left) depicts the famous perfumer. The word "**colony**", pronounced with emphasis on the second "o" it means fragrant liquid, made of alcohol and various aromatic vegetable oils used in cosmetics. 100 years later, Napoleon Bonaparte was to be, without his will, the origin of another German perfume, bearing a mark consisting of figures: **4711**.

A winner, in just 19 days, against the Prussians at Jena and Auerstadt, Napoleon Bonaparte put an end to the Roman Empire of the German Nation (on October 27, 1806 he entered Berlin, bowing with respect in front of The Great Frederick funeral's monument<sup>46</sup>) and ordered that all the houses in the occupied territory be numbered. In Cologne, a house located on Glockengasse Street, belonging to a certain Carlo Francesco Farina (a character unrelated to Johann Maria Farina, the founder of the famous Farina fragrance house), received the number 4711. The German Wilhelm Mulhens, who was a modest perfumier, but with a special sense of business, bought from the owner of house number 4711 the right to use the name, the same as that of the famous Cologne perfumer, as a business name (trademark), taking advantage of the lack of laws protecting the distinctive signs and inventions in Prussia.

Buying the name of the owner of that house and taking advantage of the troubled times and the lack of legal prohibitions, Mulhens produced in his firm Farina perfumes under the name of the famous perfumier: Farina. Of course, you notice the conflict between brand and firm (trade name) or between the firm and the trademark and the priority violation of the first perfume producer, Farina and Eau de Cologne, but at the time of the events, the Paris Convention for the Protection of Industrial Property, brands and firms was not even a project.

However, in 1875 under the trademark law adopted in Germany (unified) only a year before, the sign **4711** with a bell and other figurative signs (green

color) was registered as a perfume mark. Mulhens was not the only one who parasied Farina and the perfume that made him famous and the Cologne. *The Eau de Cologne* could have been counterfeited, sometimes counterfeited, sometimes tolerated or even encouraged by the Farina family (as we shall see) and anyway impossible to sanction in the absence of legal regulations, so that the name became generic and the brand has made history!

A descendant of the famous creator, named Jean Marie Joseph Farina, settled in Paris in 1806 and established his own company under the name of Farina, with the permission of his family in Cologne, creating a different perfume for another audience. The company he later sold to Roger & Gallet, who still produces another fragrance "Roger & Gallet Jean Marie Farina". And that's how we got to mess with the real Farina.

However, as I have said, also the name of Eau de Cologne comes from Cologne to which the true Germans call it *Echt Kölnisch Wasser*. True Cologne Water. To know: it was, is and will only be "colony water" produced in Cologne. Any other Cologne is likely to mislead the true origin of the product. But *Eau de Cologne* is a long history, degenerating into the "odicolon", a word that, not only in Romanian language, has the meaning of a faint fragrance.

It is true that before a complete degeneration, a famous perfumer, Pierre-François Pascal Guerlain, also created a "related" perfume called *Eau de Cologne Impériale*, for a good friend of the Romanians, the engraved Emperor Napoleon III<sup>47</sup>, a perfume that brought notoriety to its creator, because it soon became the favorite of many houses of kings and emperors.

#### 4. And yet ... is the fragrance a work of intellectual creation?

Asking this issue is only useful for the creative perfumer. For the one who works at random, for the one who copies or reproduces a recipe to another, it cannot be a creative activity generating opera, intellectual creation and protection by any intellectual right.

Fragrance is defined as a combination of aromatic essential oils or aromatic compounds, fixative agents and fragrance-friendly solvents! Or even shorter: a fragrance is an odor obtained by combining several elements. Which means that the perfume is defined by itself and that is why this definition cannot say much about perfumes! Sounds anosmic, does not have pepper

<sup>46</sup> Frederic the 2nd or The Great Frederic (1712-1786), surnamed royal warrior, was a friend of Voltaire. Art lover (he was a talented musician, philosopher, poet), a complete military (he won important victories and made Prussia a powerful and respected kingdom), misogynyn (he was forced to participate in the execution of an officer with whom he was suspected of having an indecent relationship), builder of Sans Souci palace (without care) which is associated with the legend of the miller who responded to the aggressive royal offer, of buying his mill that "the king may want my mill at any cost, but there are also judges in Berlin". In front of his funeral monument, Napoleon Bonaparte asked his generals to discover himself and said, "If he were alive, we would not be here today."

<sup>47</sup> Charles Louis Napoleon Bonaparte (1808-1873), the nephew brother of Napoleon Bonaparte, President of the Second Republic (1848-1852), became Napoleon III, Emperor of France (1852-1871). He had an adventurous life (he was sentenced to life imprisonment in 1840, escaped in 1846, returned to the country). It has made an important contribution to the industrialization of France and the modernization of Paris. Defeated in the Battle of Sedan on September 1, 1870, he became captive to the Germans and was released on March 19, 1871. He settled in Chislehurst, England where he died and was buried on January 9, 1873. Unforgiven by the French for losing the battle at Sedan is called the "Forgotten Emperor", being the only French monarch buried in foreign land.

and salt, has no charm, has no substance! It may be appropriate for exact science this definition, but not for the needs of intellectual property law. Which, as it is well known, operates, and not only in the field of copyright, with subjective and relative criteria even when it imposes a protection criterion such as the novelty that is only apparently objective. And this, because the novelty of the invention is an objective criterion only in relation to what we know and identified as a state of the art or a stage of skill, not with everything that really exists in the state of the art. And fragrances are a good example to prove that novelty is not as absolute as we often find it. Perfumes contain many elements, the most important being fragrances, essences or essential oils. For many years (thousands of years) the essence of flowers such as rose, lavender, lily of the valley, rosemary, lilac, violet, bergamot, iris, lily, jasmine etc., flowers of fruitful fruits such as lemon, orange, cherry, plants such as vanilla, patchouli (patchouli), mint, basil, safflower, acanthus, almond, coriander, cinnamon, pepper, vanilla, herbs with aromatic properties (oak mussels), by-products such as resins and incense (which was more precious than gold), or products of animals such as musk, amber, clover, castoreum - obtained from killed animals or painful procedures for animals, or hyraceum - fossilized badger excrements. Synthetic vanilla was invented in 1874 (vanillin<sup>48</sup>), and since then perfumes have entered into a new era, that of inventions, of multiple blends, but also of perfumes with allergenic potential or even worse.

Perfumes seem to us to a certain extent like words. Of words that do not build (like stones, for example) in a real, immediate, visible, palpable manner. Immaterial words that we use and set one after the other to say what we think in the original way are suggestions indirectly communicated. That's how the perfumes are. No solid substance (they still have a substance) and losing their materiality in the air where they are lost in a short time. We "get drunk" temporarily with their flavors! It inspires us! They give us a nice air! Or on the contrary. It brings or turns on the one who we wanted to meet on the way! Because fragrances create moods, they influence behaviors. Provides confidence, relaxation, pleasure, attraction, sympathy, goodwill, or rejection response. It is not only about the scent in case of fragrances. It's also our own way of reacting to smells, combinations of flavors when they are successful or, on the contrary. Something that is transmitted to our minds, something that, without

knowing it, influences our attitude. Which makes a interlocutor a loser or a winner. Of the soul, mind, grace and heart! Fragrances appeal to smell (considered fainter as weaker than sight, hearing, and tactile sense) and are more persuasive than spoken or written words.

But the book does the same thing: it tells us what its author is able to tell us, and probably always less than he wants to tell us, to convey to us. Even now our words, as easily seen here, will not be able to tell everything about a perfume and describe a perfume.

A successful Parisian perfumer in Paris, Octavian Coifan, with a workshop across the Eiffel Tower, says that perfumery is the eighth art. It is correct to say that perfumery is an art, but Hegel<sup>49</sup>, undecided how he used to be, and how are almost all the philosophers, in his "*Aesthetics Lectures*" (which also tells us that intellectual goods are an extension of human personality), divided the arts into only six categories<sup>50</sup>, much later, some added three others, of which, unfortunately, perfumery is nowhere to be found. Her place in the arts is fully deserved, as Mr. Coifan says, who added that the perfume is a poem. A silent poem that addresses an important sense of smell. Fragrances have always been fascinated, being considered sacred products, the art of which masters were respected and almost frightened, and in antiquity they were seen as gods secrets holders<sup>51</sup>, and later in the Middle Ages they became not only fragrant but and alchemists or connoisseurs of poisons and at risk of being considered heretics and then usable products from common people to crowned heads.

For about three centuries, since fragrance became a symbol of civilization and then an indispensable accessory, perfumers are seen as artists or as inventors, or at least as specialists who, when valuable, are also hunted by big houses productive, a true professional being very difficult to prepare and keep in a world where competition is particularly strong.

However, we believe, that no other activity of man is so subtle as the art, science, innovation of fragrant and the entry, in 1874 (when the synthetic vanilla flavor was invented), in the era of synthetic perfumes only increases the inventive side of this fabulous domain! Perfumery continually creates: essences (which are no longer mere chance discoveries), ingredients, combinations of flavors, colors, and product presentation. Perfumers work a lot searching and researching, and some of them say that, even their sleep is haunted by essences, combinations or formulas, and that their encounters with nature are a

<sup>48</sup> The first to use vanilla in a perfume was Guerlain, in 1889, for the Jicky perfume, which is still produced today.

<sup>49</sup> Georg Wilhelm Hegel (1770-1831) is the main representative of the classic German philosophy. He learned the first Latin declension at the age of five. His favorite readings were, among other things, the Greek tragedies, preserving his preference for Greek language and culture all his life, translating Longin ("On the sublime"), Epictet ("The Handbook"), Sofocle ("Antigone"). His fundamental work "Spirit Phenomenology" was published in 1807. He was a graduate of Fichte at the philosophy department of the University of Berlin. He died of cholera. After his death, the disciples split up into the "Right Hegelians", who represented political conservatism, and "left Hegelians" or "Hegelian youths" who pronounced themselves for atheism and liberal democracy. Karl Marx belongs to this current.

<sup>50</sup> 1) architecture; 2) sculpture; 3) painting; 4) dance; 5) music; 6) poetry (literature) to which it was later added; 7) cinema (added in 1912)

9) Drawings (1946).

<sup>51</sup> Cicero was not sharing same opinion, but he put all the artists among those paid for their work for the benefit of others, and who was not worthy of the appreciation enjoyed by warriors, athletes, and those who worked their own land. Cicero, De Officiis, Book I: 42, 150-1

duty and an opportunity for olfactory indulgence in the first place and only then visual delight, that for them the street and crowds are full of smells, each betraying something of the personality of the bearer and of the person who created it and which they are trying to identify.

Quite similar to classical works (written, painted, played, filmed in the creator's own style), fragrances are also combinations of elements, some existing, others invented in particular, from which a product, a perfume is obtained. When the product is original, new it is the result of a creative process, and the perfumer is a creator, which is synonymous with an author or an inventor. What difference can be made between the author of an original book and the author of an original perfume? What difference could we make between the one who invented a molecule and made an innovative drug and the one who discovered a molecule with which it gets a new perfume? We do not see any, and we see no reason why the fragrance, when it's original or when it's an invention, is excluded from protection! Fragrances, said Charles Baudelaire, who was a great lover of such products,<sup>52</sup> „ *must express the emotions of our soul and our senses*”.

Three protection systems are seen as possible for fragrances: copyright, patent, and manufacturing secret (or service). But also cumulation. Industrial designs and brands have a special role in perfumery. These give them an appearance of shape and ... soul.

### 5. Perfume protection by copyright

As I have already said, we do not see any impediment to the protection of perfumes by copyright. A protection with more specific rules, but copyright laws contain special rules for many categories of creations (computer programs are the best known, but they add to cinematographic works to photos and many more).

The "form" of intellectual creation must be widely understood as the way in which the work is expressed, it is exteriorized. The form of the musical work is in the score and includes the rhythm, the harmony, the melody, the form of expression of a mime is in his gestures, of a ballerina in the movements of her body, of a perfume in its smell, etc. The reluctance expressed with regard to protection of fragrances can be explained for non-perfumers, for those people who cannot perceive so many smells as the perfumers do (20,000 some may say, but who can count them? We believe that they are infinite!) Or for those who cannot explain in the case of perfumes neither the originality nor the novelty, nor the differences or similarities that can be seen by specialists, using similar concepts and

criteria of evaluation identical with those used in the classical works, demonstrating - in the case of perfumers, the necessity of admitting and applying the criterion of originality with variable geometry. Because if we compare the infinite essences, smells and ingredients of words, their combination in a personal manner, the original cannot be but a creation of expression, form, which is protectable by copyright. And when a new aromatic molecule is invented, such molecule and the product made by combining it with other elements can undoubtedly be an invention. As well as the combination of known elements, it can represent an invention.

Making a perfume is not a simple skill as it sometimes people claim on no ground<sup>53</sup>. In such a vision, photographing or painting should also be just skill, and the result, excluded from protection. It is difficult to say what's more about perfume: learning, discoveries, science, knowledge of the chemical formulas of essences (there are about 3,000 synthetically produced flavors at this moment time, respectively organic compounds synthesized in laboratories) and ingredients, choices and combinations of essences and ingredients the imagination and the special sense of the creator, the personality of the one who combines them so successfully that the perfumer, in time, becomes legendary for his miraculous creations. Or, maybe his developed sense of olfaction that helps him to distinguish several times more odors than ordinary people (about 10,000 after some authors) and handles them, just as the writer wielder of words does in his art.

It cannot be generalized because not all perfumes are original at the time of their production, they are not the result of a creative activity. There are well known perfume recipes, or forgotten, abandoned, lost recipes and based on which good perfumes can be produced without intellectual activity by their producers. A perfume made after a known recipe does not imply creative activity and will not be protected by an intellectual right, such as the reproduction of works of art. Similarly, the banal smell (even if the law does not condition copyright protection, a writing, a drawing, a perfume when it is banal, cannot be a work in the sense of the copyright law and will not be protected).

In a new fragrance, in a good fragrance that attracts the audience we talk about observation, it is art in combining essences and ingredients, it is grace, soul, passion, personal touch, there is much and incontestable originality in a perfume, that is why perfume, even if it involves a little physical work (infinitely less than a plastic artist does or even a writer) it can only be an intellectual creation.

<sup>52</sup> She also wrote a poem "Perfume Exotique," which inspired Byredo (Ben Gorham) to create a perfume. The idea of the perfume was born after Ben Gorham visited his mother's hometown in India. He studied plastic arts, but meeting with a great perfumer, Pierre Wulf, made him change his way. Lacking perfumery studies, he is considered an outsider in the field and even an anomaly. Explaining his olfactory wishes, he creates helped by great perfumers (Olivia Giacobetti and Gerome Epinette). However, he is considered an authentic and personal artist in the world of fashion, art and perfumery.

<sup>53</sup> Cristophe Alleaume, Nicolas Craipeau, Propriété intellectuelle, Cours et travaux dirigés, Lextenso éditions, Montchrestien, Paris, 2010, p. 5.

Octavian Coifan, mentioned before, says an important thing for qualifying perfume as a workpiece and the perfumer as a subject of copyright: *"Obtaining a pleasant smell does not make you a perfumer. It's just about the difference between an artist and the coloured pencil box that you give to a child. Art begins only when you master such fragrances. A kind of an art of illusion. As if the flower or landscape is under your nose."*

Flavours, odours used and obtained, proportions of mixtures, all demonstrate that demonstrate that works can "wear" the most diverse forms of expression, and the form is indifferent to the law when it recognizes or refuses to protect a creation of the original spirit which is genuine. Or, the same essences, the same ingredients used by two perfumers, may have different results, which are given by the personal nature of each perfumer in the way of usage and mixing, by the proportion of mixtures, the reactions that are caused by these mixtures, the final product being objectively and precisely identifiable.

The parfumer does not create a new form of expression, which already exists (as we have seen from the creation of the world), through its creation (the perfume), expressing his personality in a particular form, appropriable under the condition of originality, by copyright. The law does not condition copyright protection on the mode or form of creation, copyright being indifferent to the techniques used in order to create. The fact that pre-existing techniques ("the craft of aroma makers," says the Bible) does not make the obtained product non-appropriable. In a contrary interpretation, it would mean that plastic artists, musicians, writers, etc. who learn techniques to create, are not the authors of their works, and they cannot be protected, which obviously cannot be admitted. **Whatever** the techniques of realization and mode of expression, the law equally protects all works that fulfil the condition of originality. Seen as a fingerprint, as a manifestation of the author's personality in his creation (Article 7 of Law No. 8/1996).

According to art 7 of the Romanian Copyright Law, the original works of intellectual creation in the literary field, artistic or scientific field, regardless of the way of creation, the way or the form of expression and regardless of their value and destination, **are subject to copyright**, and the list is formulated as exemplary ("how are"), so if the perfumes are not on this list, doesn't mean that they are excluded. Values, on the contrary, implicit admission. The excluded achievements are limited in Art. 9 of the law and this text does not contain the perfume also.

There can therefore be no discrimination or exclusion depending on the creator's form of expression. Whatever form of expression, and smell is a form of expression<sup>54</sup>, it is susceptible to appropriation (we prefer to call it protection), and in order to protect a work, only its (original) form is taken into account. The term "form" has to be understood in a broad sense:

form is the way in which creation is expressed, exteriorized, and **there are no limitations regarding the way of expression, the form the work can take.**

The condition of the concrete form of expression is indifferent to the Romanian legislator, and the perfume has such a shape that makes the product identifiable objectively and sufficiently precise. The harmony, the rhythm and the melody line in music, the chain of words in which the ideas are written in a written work, the paths chosen to reach the results in computer programs, **the scent of a perfume**, are all (concrete and different) forms of expression. Form is not a secondary element of a protectable creation by copyright and the law has not "frozen" the form of the appropriable good by copyright. "It can make the only difference in things: so it happens with literature and music, where the elements used to create are limited in number: words, notes, smells"<sup>55</sup>.

It is always stated and sometimes too vehemently that merit or value is indifferent to the recognition of intellectual creation nature. We do not all agree with this idea (nor us), because banality does not meet the condition of originality, and in the case of perfumes, this is even more obvious. We do not, however, believe that **the judge** can be absolutely indifferent to the value, because in its absence there is no "work" to talk about. Of course, a criterion of value induces the idea of subjective appreciation, but so do the things in examining the fulfilment of the originality condition. However, the banal is excluded by default from protection because it cannot be considered "work". Which means that we operate, however, with a value criterion, and that we keep it from saying or recognizing it.

**The destination of the work or the sense by which a work is perceived must be neutral to copyright**, a solution derived from the principle of unity of art. Designed for contemplation, leisure reading or study, viewing and / or auditioning or other uses with aesthetic or utilitarian effect, intellectual creations with original forms are equally protected, excluding those which, considering the destination, the law expressly excludes from protection. This is not the case with the fragrance, for which there is no exclusion from legal protection. In addition, since they are not expressly excluded from protection, fragrances are protected as some that fall into the category of those which, without being listed, are implicitly admitted.

As for the argument that works are generally intended to be perceived by the sense of seeing and hearing and that the other senses are inferior and lacking in the ability to perceive the works, it is false, the demonstration being simple to do: the written works are perfectly perceptible by the touch sense as soon as they are "written" in Braille, or by hearing, when recorded and presented in this way to the "reader" (the listener). But to claim that only perceptible works by hearing or vision are protected, it means adding to the

<sup>54</sup> N. Binctin in *Droit de la propriété intellectuelle*. L.G.D.J., 2010, p. 57.

<sup>55</sup> N. Binctin, p. 44.

law, because no provision of Law no. 8/1996 does not permit the conclusion in the sense of limiting protected works in relation to the sense of their perception.

Neither fixation, the possibility or the impossibility of attaching the perfume to the support cannot be a reason for exclusion. Firstly, because the product can be stuck in its container. True, it is a form of attachment different from other works. But fixing computer programs did not break previous barriers? And in addition to computer programs, in themselves, they cannot be perceived by humans directly, with no sense. To be perceived, it takes a machine, a computer that makes it only partially perceptible. And then, the law does not provide for such a condition. Even more, it recognizes protection even of unfinished works. In the French doctrine, referring to the jurisprudence of the courts, it was found that the protection of perfumes is not conditional on fixation, according to the old rule stating that intellectual goods are independent of their possible support as soon as the form is perceptible. Accordingly, Nicolas Binctin points out, "*a perfume is therefore capable of being a work of protectable creation*" on the basis of copyright laws. It is true that the Berne Convention (Article 2 (2)) provided that Member States could make the protection of works subject to their attachment to a support. It is a faculty of states, not an obligation, and the Romanian law and all EU countries, except for Germany, do not provide for such a solution. But even if it was provided, we believe that in case of perfumes the possible condition of attachment is fulfilled, its support being its container.

Of course, the perfume has a peculiarity. Looked at it does not say (pretty) much. Only after being smelled and used, it says what is all about, however the fact that the fragrance addresses to the sense of smell does not make it either imperceptible or unprotectable. The sense of smell it may be the least understood, but it is not less important than other senses except for those who do not want to see the truth. There are also many authors who designate fragrances as "olfactory works".

## 6. Jurisprudence - protection of tastes and fragrances

The Court of Justice of the European Union has been questioned about the possibility of protecting the taste of a food product by copyright, the facts being as follows: "Heskenkaas" is a food product containing cheese, cream and herbs, created in 2007 by a private farmer, the rights to this being divested in 2011 to the Dutch firm Levola Hengelo BV (Levola). On July 10, 2012, a patent for this product was granted. Another Dutch firm, Smilde Foods BV (Smilde), marketed in 2014 a product called "Witte Wievenkaas" of the same taste and distributed in stores in the Netherlands.

Levola sued Smilde complaining that by placing on the market a product of the same taste it infringes his copyright on the taste of his product "Heskenkaas" and that the product "Witte Wievenkaas" constitutes a reproduction of this work, which is why he asked the Dutch court to ban the production and marketing of the "Witte Wievenkaas" product".

The first Dutch court rejected the request on the grounds that the Claimant did not specify which elements or combinations of elements of the 'Heskenkaas' taste would give the product an original, individual note without considering it necessary to analyse whether the 'Heskenkaas' taste was susceptible to protection by copyright. However, the court hearing the appeal has found it necessary to refer the CJEU on several questions, the first and most important being whether, under EU law, the taste of a food can be protected by copyright. In the reasoning of the request for referral, the Dutch appeal court also mentioned a judgment of the Supreme Court of the Netherlands rendered on June 16, 2006 in which it was accepted that a perfume is protected by copyright<sup>56</sup>.

Having to respond to the questions of the Dutch court, the CJEU rendered a Judgment on November 13, 2018<sup>57</sup> only on the possibility or the impossibility of protecting the taste of a food product, considering that in relation to that response, the others were no longer necessary and held that:

- I. the taste of a food product could be protected by copyright under Directive 2001/29 only if such a taste could be classified as a 'work' within the meaning of that directive. And for an object to be classified as a "work" within the meaning of Directive 2001/29, two cumulative conditions must be met: a) the object to be original, that is, to constitute an intellectual creation proper to its author, and b) "work" within the meaning of Directive 2001/29 is limited to elements which are the expression of such intellectual creation. This necessarily implies that there is an expression of the subject-matter of protection under copyright which makes it identifiable in a sufficiently precise and objective manner, even if that expression is not necessarily permanent (comments 35 to 40).
- II. Authorities and economic operators must be able to clearly and accurately identify protected objects in favour of third parties, in particular to other competitors. On the other hand, the need to remove any element of subjectivity, which is detrimental to legal certainty, in the process of identifying the protected object implies that the latter may be the object of a precise and objective expression (comment 41).
- III. The possibility of precise and objective identification of taste is lacking in case of taste, and there is no means in the current state of

<sup>56</sup> See also Mireille Buydens, *La propriété intellectuelle, Evolution historique et philosophique*, Bruylant, 2012, p xxx

<sup>57</sup> Case C-310/17, *Levola Hengelo BV vs Smilde Foods BV* has been settled by CJUE rendering a Judgment on November 13, 2018p, available on <http://curia.europa.eu/juris/liste.jsf?num=C-310/17>.

technology to make this possible (comments 42 to 43).

IV. It must therefore be concluded that the taste of a food product cannot be classified as a 'work' within the meaning of Directive 2001/29 and that, in view of the need to interpret the concept of work in the Union uniformly, it must be concluded that Directive 2001/29 precludes national legislations from being interpreted as conferring on the taste of a food product protection under copyright (comment 44 and the operative part).

Apparently, there can be no connection between what the CJEU has decided to exclude from protection **tastes and fragrances protection**. In fact, the grounds of the judgment allow the conclusion that judgment rendered on November 13, 2018 of the CJEU does not contain any grounds for excluding copyright protection from perfumes. On the contrary.

Thus, first of all, it should be noted that both Levola and the Dutch court referred to the judgment of the Supreme Court of the Netherlands of June 16, 2006, which allowed, in principle, the possibility to recognize a copyright on a perfume and this argument was not contradicted by the CJEU. Secondly, in its judgment of November 13, 2018, the CJEU, in argument 40, refers to the possibility of protection even in the case where the expression is not permanent and then added that the possibility of precise and objective identification is lacking with regard to taste of food products in the current state of development of science and technology, which means that in the future such precise and objective identifications could be made, and the issue of protecting the tastes of food could be reconsidered.

In the case of perfumes, this problem does not arise, the state of the art permitting the precise and objective identification of at least the elements which make up a perfume and its smell.

On the other hand, in the case of fragrances, the problem of non-permanent expression is not an issue. In copyright, ephemeral creations are non-permanent but protectable, such as those made out of sand, ice, but the range of this type of creation is infinite and was never in question the exclusion from the protection of ephemeral creations. The perfume is not even such an ephemeral creation, even if used as intended, its smell disappears over time. In the case of perfumers, identical compositions will give identical scent and there is the possibility of reproducing these compositions at infinity (as in the case of written works). In the case of perfumes there is a connection between the product (liquid, solid, oily perfume) and the smell it generates and releases the composition. The same composition will generate the same smell, and the composition and smell produced are objective and precisely identifiable with the technical means we have.

Decision no. 116 of 2006 of the Supreme Court of the Netherlands is not singular. In a judgment of the Paris Court of Appeal rendered on January 26, 2006, it is stated that *"and in the case a perfume meets the patentability conditions, by addressing a technical issue, patent protection still does not exclude a protection on behalf of copyright"*<sup>58</sup>. The court's argument was a response to the counterfeiter's defence, which, considering the creation under its chemical aspect, claimed that the victim L'Oréal had not submit the patent on the composition of its perfumes, so it cannot plead a counterfeit. However, the court said, this approach is legitimate, but it is not exclusive. **The perfume may have multiple ownership regimes, claiming one not impeding the exercise of others.**

Nicolas Binctin also reveals the inexplicable inconsistency of the French courts, usually creative and open to the new. Especially in the field of intellectual property rights. Thus, he states that by a decision of 13 June 2006 and decisions of 1 July 2008 and 22 January 2009, the Court of Cassation, repeating the same wording, attempted to reinstate the consideration of the perfume as being a creative act, rejecting its assessment from the point of view of copyright. Twice the Court has stated that *"the smell of a perfume, which comes from the mere implementation of a technique, is not the creation of a form of expression that can benefit from the protection of works of creation"*<sup>59</sup>. The approach found by the Court, according to Binctin, is contrary to the legal regime of copyright, which is not interested in the method of production, but in the originality of the final result.

Our conclusion is that perfume is not just a chemical formula and is not primarily a chemical formula. Fragrance is a particular form of expression and, consequently, can be considered work protectable by copyright. When the perfumer creates a perfume, the chemical formula is not the one sought and invented by the creator, but the perfume, even if it requires a composition and a chemical formula. Human imagination.

## 7. Fragrances protection by patent

We believe that the fragrance, seen as a combination of chemical elements, can also be protected by the patent, even though, as we have seen before, ... a perfume is not just a chemical formula. However, the molecule of a new scented substance, which is part of a perfume composition, can be protected by patent. P.-Y. Gautier, not very determined, states that *"the protection of fragrances or dishes, the outcome of a laboratory research and expressed in its chemical form, comes rather from the Law on patents"*<sup>60</sup>.

<sup>58</sup> Apud N. Binctin, op. cit. p. 57.

<sup>59</sup> *Ibidem*, pct. 54.

<sup>60</sup> *Ibidem*.

From what I said before going into this subchapter, making a perfume seems to resemble by some authors with mixing some substances after a " *craftsman of fragrances* " recipe and which does not necessarily have to be new to give a good perfume. A recipe that was old at the time of its use, was new once, it was original, as everything was new under the sun (all that man did for the first time on earth was new: from the stone carved knife, to the computer that has become an extension of our hands and minds). A situation that closely resembles with that of medicines, in which we have, on one hand, innovative medicines and, on the other hand, generic medicines, which are nothing else but originally innovative medicines, their composition coming into the public domain following the expiration of protection period.

Today, the perfume industry relies more on **synthetic chemicals (aromas)** and less on flowers or animal elements that were exclusively used to produce essences until the emergence / invention of synthetic flavours in 1874. The appearance of synthetic aromas in fragrance world, rather due to chance (but also penicillin is the result of a random discovery) and which resulted in the replacement of rare and expensive natural flavors with synthetic flavors that could be produced in any quantity and led to abandonment of many crops (of flowers) and many factories of natural essence, even in Grasse. In Grasse, for example, there were 2,200 flower crops in 1975, while in 1995 there were only 150 rose crops left and 20 jasmine crops (since then a they had a slight growth trend), perfume made of flowers being still popular, but much more expensive than synthetic ones. Fragrances with synthetic essences are cheaper. But more dangerous (and among natural flavors are some allergenic and / or toxic).

The year 1874 was marked by the invention of synthetic vanilla flavor (also called vanillin, although vanillin is the essential component of the vanilla extract having the chemical formula  $C_8H_8O_3$ ), much cheaper than natural vanilla<sup>61</sup> (the price of one kilogram of pods is 500 dollars, and one kilogram of vanilla over 11,000 US dollars) and took the place of the latter in food and beverages. But Synthetic Vanilla took the place of expensive natural vanilla into perfumery and made possible to produce much cheaper perfumes that became accessible to a much larger number of consumers. Undoubtedly, synthetic vanilla was an invention, but we did not find if was patented. The distinction between vanilla and vanillin: the first is a complex mixture of several hundred compounds, the second one is derived from phenol and is of great

purity. In practice, the difference between the two is hard to make, but not impossible.

The natural musk was (and is) the most expensive product used in perfumery. Obtained from a musk deer male gland<sup>62</sup>, 160 bags are required to obtain one kilogram of musk, which made the species threatened with extinction, since 1979 it was put under protection by banning its hunting. But the mossy deer is still in danger due to poaching, on the market the price of one kilogram of musk is 45,000 dollars (much more precious than gold), which is the most expensive ingredient in perfumery. Musk is obtained, with musk-like sacrifices and other animals but of inferior quality to that produced by the musk deer, as well as by plants, the latter being valuable by its natural properties, but it is difficult to obtain (the crops are expensive, of long duration, reduced quantities).

In 1888, the German chemist Albert Baur, trying to obtain a stronger explosive than the nitrotoluene of Alfred Nobel, found that the product he experimented with (which generated a small explosion) emanated a pleasant smell of ...musk which he named Nitromusk. But the product was chemically unstable and toxic and could not be used in perfumery. Continuing his research, Baur obtained nitric acid with 3-tert-butyltoluene **a musk-smelling product**, later known as the Baur musk. After six years of research, he obtained the white musk, product with an odour very close to that of the natural musk and which became indispensable in the perfume industry. Recently, however, it has been discovered that synthetic white musk is an allergen and carcinogen, but a replacement has not yet been found. On the other hand, many people do not detect this musk, so combinations of musk are used to make it identifiable.

The number of synthetic flavours has since grown continuously, and as with molecules in pharmaceutical field, there can be no impediment to their protection by patent if they meet the proper invention conditions (novelty, inventive activity and industrial applicability).

Are combinations of elements protectable?

In the case of new combinations of known products or combinations containing novel elements not known at the time of the invention, things are simple: the perfume is the result of a new chemical formula, derived from an inventive activity, and is patentable. The invention, however, consists of the chemical formula of the perfume, not in its smell, which is protected by copyright. Moreover, a new chemical formula for a perfume gives rise to a patent right

<sup>61</sup> Natural vanilla, isolated for the first time in 1810, is obtained from the pods of species of huge lianas (growing in the equatorial area), related to the orchid. The flavor has been discovered by chance because it is hidden in the pods and is released only after nine months of fermentation, using wool padded boxes for this process.

There are over 100 species of vanilla, but only three are used for their special flavor. The most valuable is *Vanilia Bourbon*. Its acquisition involves huge crops of lianas with long production cycles, where even pollination is done manually, natural pollination being made by a bee living in a small area, which is why liana could not be easily acclimated to other countries of the world, and fermentation takes place in special baskets in not less than 9 months

<sup>62</sup> Small animal (50-60 cm high and weighing 12-14 kg). The musk deer male has on the abdomen a protuberance of the size of a golf ball weighing 20-30 grams, half of which is the weight of the famous musk used in perfumery.

regardless of the quality of the smell, but if the smell is banal, it cannot be protected by copyright as well.

The combinations of known elements (molecules, essences, ingredients, fixatives, solvents) of compounds or chemical combinations that produce unexpected results different from those known may be inventions and can be protected by patents according to art. 47, paragraph 9 of GD no. 547/2008, approving the Regulation for the enforcement of Law no. 64/1991 on patents for invention. New uses of known substances may be inventions and within the meaning of art. 63 (2) lit. b) the European Patent Convention and Art. 43 (2) of the CBE Enforcement Regulation, which also speaks about **inventions having as object a way of usage of a product in our case of a molecule**. Also, Directive 98/44 / EC on the legal protection of biotechnological inventions, in comment no 28 of the reasoning, also states that **"a patent may be granted for any new application of a patented product" (of a new patented molecule)**.

The doctrine also considers that **we are in the presence of a product invention** in the case when obtaining a **new practical use of the product**, previously unachieved and that in such cases we can speak of a **"new product"** even if it is not substantially, a new body<sup>63</sup>. In other words, in principle, the **new use of a product (molecules) can be a product invention** (perfume).

The protection of chemical formulas by patent is almost unanimously admitted. Even those who are opposed to the protection of perfume by copyright, accept the protection by patent or by work secret. Thus, F. Pollaud-Dulian states that *"the formula of a perfume comes from the industrial technique in the cosmetics sector (...). Their protection comes from patents and / or from unfair competition and not from copyright, because the process or industrial product is the one that is trying to be protected and not an arbitrary external form that would give an industrial product"*<sup>64</sup>

We find a contradiction in F. Pollaud-Dulian's argument: if the perfume is the result of an intellectual creation activity, it must be protected by an intellectual right as one that is not expressly excluded from protection. Protection as an invention is conditioned by the fulfilment of novelty conditions, inventive activity and industrial applicability, a patent cannot be granted if these conditions are not fulfilled cumulatively. Protection by copyright, of the fulfilment of the condition of originality. Is it then possible that a perfume to be an intellectual creation under the inventions regime but not to be considered the same under the copyright regime? We recall the general rule that states, under the umbrella of intellectual property

rights there are products for the spirit, united by their common origin and separated by the protection regime.

However, we agree with the author quoted when he states that the process or product is the one for which protection is sought. We find here, even indirectly, the idea that the product can be protected by patent, both the product (the perfume) and the process of its realization (the recipe). And it is not unusual, the law of inventions allowing for patent protection of the product and the production process.

## 8. Is it better to protect fragrance by work secret?

Once created, whether it is a work protected by copyright or a patentable invention, the perfume recipe can become a work secret and kept as it is. With a benefit that can be higher than patent protection or even copyright. Fragrances are created on the market for hundreds of years and whose recipes are kept secret by the creators' successors or by their successors to rights.

The patenting of an invention is not obligatory, requiring the issuance of a patent for invention being a faculty for the person seeking a protection for the created invention, a title which, once released to the inventor or to the person entitled to the grant of the patent, renders opposable to third parties recognized / conferred by the patent, ensuring the protection of the exclusive right recognized by law. And it is possible that the number of inventions that even after the adoption of the patent protection system have not been patented, although they have contributed tremendously to the progress of mankind, exceed those that have been patented<sup>65</sup>.

Patenting the invention is the necessary solution for the inventor (or his successor in title) who wishes to protect himself against unauthorized use of his invention by third parties, but also those who may reach the same result without knowing the pre-existing invention, thus ensuring their competitive advantage over those operating in the same field, an advantage which is even the economic value of the invention. This is because, it is well known, in the matter of intellectual property rights, the rule is that of recognizing the right in favor of the person who first submits the patent application. But patenting is also the means by which, assuring its competitive advantage as an effect of the exclusive exploitation right, the inventor and those who invest in research and development provide the return of the often huge investments.

If the person who created an invention, considering the benefits he/she would obtain, opts for protection by secret<sup>66</sup>, this assuming protection by means of fact, the inventor (or its successor in title) will

<sup>63</sup> BR, op. cit. p. 88.

<sup>64</sup> Frederic Pollaud-Dulian, *Le droit d'auteur*, Economics, 2005, p. 117.

<sup>65</sup> Tricky and plastic, in the article "Intellectual Property in Central Europe," published in *Dilema Veche* in December 2006, Adrian Mihalache says that "Fire was stolen from the gods of Prometheus, because Zeus did not have the prudence to patent it".

<sup>66</sup> This secret must be kept temporarily and if a patent is requested to be issued, this obligation being for the patent authority to keep it between the time of the invention and the date of its publication, the breach of this obligation being an offense (Article 59 of Law No 64 / 1991)

have to take the necessary measures to ensure that all essential data of the invention and which would allow the reproduction of the result, they remain confidential. The protection of the secret and the commercial secret of an invention depends, in efficiency and duration, on the quality of the means used to preserve the secret, the number of persons to whom the invention is objectively or subjectively revealed, the volume and quality of the information in the invention is made available, to those whose information is to be disclosed, their preparation, their good faith, the interest and value of the invention kept secret, the quality of competitors in the field of invention, etc.

Secret invention is particularly vulnerable to reverse engineering procedures<sup>67</sup> which allow for reduced or similar efforts to achieve similar products than those obtained by the application of the secret invention and which, in this way, loses its practical utility. Or the exclusivity conferred by the invention patent is not secured by way of fact. The exclusive right conferred by the patent and its erga omnes opposability allows the holder, during its term of validity, to be the only one able to use the invention or to authorize any exploitation of the invention and to oppose unauthorized use and to be paid damages for use unauthorized by him.

The preservation of the secret of the invention does not mean, however, that the owner is deprived of any means of defense, the procedural means at its disposal being the action in unfair competition, a kind of action in civil tort liability that sanctions the acts of competition contrary to honest commercial practices. But while in the case of keeping the secret of the invention, with the intent of appropriation as a commercial secret, there is only a general and abstract obligation of all not to prejudice others (in this case, the owner of the commercial secret = invention secret) by acts/ acts of unfair competition, patenting involves obtaining a title of protection conferring erga omnes opposing rights to the inventor (its successor in title) so that the patent owner will have at hand to obtain sanctioning the violation of his / her exclusive right, the most convenient and efficient way of action in counterfeiting.

There is only one exception to the optional nature of the patent. This is the case for pharmaceutical products for which manufacturers are required to make the composition known but also other products for the obligation to provide complete information in order to protect consumers.

In the case of perfumery products, such an obligation does not exist at this time, so the secret protection of the perfume production is fully possible.

It is affordable, convenient and with a fairly high degree of safety for perfumes.

## 9. Perfumes protection as models or industrial designs

We have never thought that a liquid product could be protected as a design or a model. How could a liquid nevertheless fulfil the "condition of being a design or model" (Article 2 letter d) of Law no. 129/1992)? As regards the other two conditions (Article 6 of the Law on Models and Designs), namely, novelty and individuality if we were to assess them by taking into account the principle of "variable geometry" and that of "degree of freedom" in elaborating the design or model, we believe that they could be met if the fragrances were shaped.

The condition of "*being a model or design*" seems impossible to us only for liquid perfumes. This is because the liquids, which occupy an intermediate position between solids and gases, do not have their own shape and flow, thanks to the large particle mobility. Liquids, although they have volume, their shape depends on outside conditions. Without a stable outer form, they cannot in themselves constitute two-dimensional or three-dimensional shapes. Or the designs are defined by art. 2 lit. d) of Law no. 129/1992 regarding the models and designs as the exterior appearance of a product or part thereof, reproduced in two or three dimensions, resulting from the combination of the main characteristics, lines in particular **contours**, colours, **shapes**, texture and / or materials of the product itself and/or its ornamentation.

But fragrances can also be solid (as they may be in the form of gases) in which case the perfume, having a solid form, could be an industrial model. Or if there is such a possibility (for example, pills, sticks, candles, bath salts, soaps, etc.) and we see no impediment to giving the perfume a three-dimensional shape, we believe that the remaining issue here is the interest in protecting a perfume in this way and not to exclude all fragrances from industrial protection. Protectable as models will only be those that meet all the conditions for protection (it is a model, has novelty and has an individual character). Protecting the outer form of a (solid) perfume seems to be a weak and unexciting protection. The parfumeur will want to protect the smell and the recipe, the product and the process, and copyright or patent protection seems to us a much more effective solution.

And yet, the models have had and still have a huge impact on liquid perfumes!

The (great) nephew of Napoleon Bonaparte, the famous parfumeur Francois Coty<sup>68</sup>, the founder of a

<sup>67</sup> Reverse engineering consists of the study of goods/ products/ man-made intellectual creations and the process of extracting knowledge from them. Helps to identify the solutions and operating principles of a device / good / creation by analyzing their structure, functions, operations. Involves disassembly or decomposition of the device or system and analysis of its operation in order to achieve similar products. In the case of scientific research, the natural phenomena are not goods / products / creations made by man.

<sup>68</sup> Joseph Marie Francois Spoturno, descendent of one of Napoleon's aunts, Isabela Bonaparte. After the conscription he arrived in Paris, where he was the secretary of a Corsican politician (Emmanuel Arene), then he studied perfumery in Grasse, returned to Paris, created the

successful company - *Coty Inc.* - was the first to understand that an attractive recipient will contribute to the commercial success of the perfume and then collaborated with ceramist and jeweller **René Lalique** who made the recipients and labels of his products, but also with other famous designers. And he is also the one who (born in 1874, that is, the year when the first synthetic essence – vanilla was invented) created fragrances with synthetic flavours, cheap and consequently accessible to those with low incomes. And who said: *"Give a woman the best product made, wrap it in a perfect container, beautiful in its simplicity, but with impeccable taste, ask for a reasonable price for it and you will be assisting the birth of a business of a size that the world has never seen before."*

Perfume recipients can be industrial designs when they are not works protectable by copyright. And they can generate wars, like the case of the shape of the champagne stopper as a perfume recipient.

In the early 1990s, *Yves Saint Laurent* put on the market a fragrance called Champagne in a recipient that replicated the well-known stopper shape of the famous French sparkling wine and for which protection is ensured by indication of the Champagne region. Owners of the IGP Champagne right have reacted against such use, not because of the loss of customers (impossible for the products and the target customers, but because a third party took advantage of the notoriety that was gained long ago but very hard obtained and not easily maintained by sparkling wines with this name. Having to rule on the dispute submitted by the champagne producers the Paris Court of Appeal by decision of 15 December 1993, decided that by adopting the name 'Champagne', protected by IGP, which enjoys a notorious exception in both France and abroad, to launch a new luxury perfume, choosing a presentation that reminds of the characteristic cork of the bottles of this wine and by using in the promotional arguments the image and the taste sensations of joy and celebration they evoke (the famous champagne, n.a.), the manufacturer of this perfume wanted to create an attractive effect borrowed from the prestige of the disputed name and, by a constitutive procedure of parasitic act, diverted the notoriety of which only champagne producers and sellers can use for marketing the wine entitled to this name"<sup>69</sup>

Our conclusion is that there can be solid perfumes and for which protection as an industrial model is possible, but such protection is weak and of a reduced practical interest.

The containers in which fragrances are packaged may be works of art that can themselves be protected

when they fulfil the condition of originality (the fact that they also have a practical application is not excluding them from protection), but they are often applied works of art and give, like any creations applicable in industry, charm and attractiveness to the product called perfume. Or the opportunity to make the perfume a visible and perceptible product and a commercial good as the canvas makes possible the creation of the painting and the opportunity to perceive the painting. And which containers, according to the old model of Raymond Loewy's famous Coca Cola bottle, can also be protected as three-dimensional brands.

#### 10. In conclusion, why olfactory creations cannot be protected as brands?

From freshly mown grass fragrance for tennis balls, to rose perfume for tyres, from the scent No. 5 for Chanel perfumes to the bitter scent of beer for dart games, from the scent of plumeria flower for sewing threads up to the smell of cinnamon for advertising, all were attempts (some successful, others not) to record olfactory "marks" as brands. However, in the case of olfactory marks admitted for trademark, the protection was obtained for an (olfactory) mark registered as trademark, i.e. for the use of an odour in order to identify one merchant's products and / or services in relation to the services and / or products of the same kind of other merchants. The market knows such examples, but their success is reduced, because few people respond to such stimuli ... olfactory when they want to buy goods or services. The incentive rather concerns the possibility of identifying where a product or service known to the consumer is located and stores located in large shopping malls have adopted this custom (Massimo Dutti, Adidas, etc.) to make their presence felt, olfactory marks being used as a trade marks, not product. Recently, Anabelle Kaznov-Cofinet<sup>70</sup> has created eight different unisex fragrances of natural essences with two main categories, one with a touch of freshness, the second with a woody note, specially designed for the BMW 7 Series and inspired by this brand of cars. Perfumes that do not impregnate in passenger's clothing. The car maker and BMW perfume creator claim that fragrances, which are not impregnating in passenger clothing, give the luxury automobile an olfactory identity and an emotional

perfume *La Rose Jacqueminot*, which he tried to sell on the street without much success. Breaking a perfume bottle that slipped from his hand inside a shop drew attention to the smell of his perfume and soon brought his celebrity. He built near Paris "*La Cité des parfums*", a complex containing laboratories and factories producing his perfumes where 9,000 people were producing 100,000 bottles of perfume per day, and to meet the demand in the US market, created production centres in the US. He also unsuccessfully tried to enter politics and press business.

<sup>69</sup> Nicolas Binctin, N. Binctin in *Droit de la propriété intellectuelle*. L.G.D.J., 2010, p. 1233.

<sup>70</sup> Annabelle Kaznov-Coffinet has graduated ISIPCA (Institut supérieur international du parfum, de la cosmétique et de l'aromatique alimentaire and she was hired to create the BMW perfumes.

experience that enhances the user's well-being and even "improves the comfort of the new car"<sup>71</sup>.

The brand's ability to enhance perfumes is huge and, as I have already said, there are few areas of goods and services production where brands have such an important role and are so counterfeited. Specifically to perfume brands is the fact that they must make a difference also between the perfumes of the same manufacturer. And for that they use a brand of the manufacturer and a brand of the perfume (same situation we also encounter in the case of automotive manufacturers).

The brand or brands for perfume and olfactory brands are, however, two different things. The ones for perfumes are marks that distinguish between perfumes and are not olfactory marks. We also believe that olfactory marks for perfumes could not be registered because such marks would be devoid of distinctive character, they would be constituted of common marks in perfumery and it would in fact represent the product's characteristics, the technical result that give substantial value of the product (which is why the olfactory brand No. 5 for Chanel's perfume No 5 itself was refused to be registered). But also because for a consumer would be difficult or even impossible to identify perfumes on the shelf by its own sense of smell.

Susceptibility to registration of olfactory brands (which has raised delicate issues, including the possibility of graphic representation of these "marks", the creation of a brand repository that lasts over time, the relativity of fragrance perception through the sense of smell - a possible threat to the security of registration, and, consequently for the security of legal relations) was for the first time clarified by the European Court of Justice by the means of a preliminary question formulated in 2002 by The Federal Patent Court in Germany (although previously when registering the freshly mown grass smell, the OHIM examiner / current EUIPO drew attention to some particularly interesting issues<sup>72</sup>).

On that occasion, the Court explained the condition of graphic representation "*in the sense that a mark may consist of a sign that cannot be visually perceived, provided that it can be represented graphically. This graphic representation must allow the sign to be represented visually by images, lines or characters in order to be accurately identified.*"<sup>73</sup>

The European Court held that the requirement of graphic representation was established in order to know as precisely as possible the object of protection conferred by registration to the trade mark proprietor, the registration of the mark in the public register in

order to make it accessible to the authorities, the general public and the economic operators: *In order for the individuals accessing the registers to be able to precisely identify the nature of a trademark based on the registration, the graphic representation in the register must have a stand-alone status, easily accessible and comprehensible. In addition, in order to fulfil its registered trademark role, it must be perceived unequivocally and in the same way by everybody, so that the mark can be a guarantee for the indication of origin. In view of the duration of the registration of a trade mark and the fact that, as required by the Directive, it can be renewed for different periods, representation must be durable. Finally, brand representation must avoid any element of subjectivism in the process of identifying and perceiving the mark. Consequently, the means of graphic representation must be unequivocal and objective*"<sup>74</sup>.

The comments were subsequently taken up in the Directive (EU) 2015/2436 of the European Parliament and of the Council on December 16, 2015 on the approximation of the laws of Member States regarding trademarks, in Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) 207/2009 on the Community trade mark and subsequently in Regulation 1017/1001 of the European Parliament and of the Council of 14 June 2017 on the Mark of the European Union, being known as the "*Sieckmann Criteria*": in the preamble of the mentioned legal acts is provided that EU legislation "*should authorize that a mark is to be represented in any appropriate form by means of generally available technology, not necessarily by means of graphics, as long as the representation is clear, precise, autonomous, easily accessible, intelligible, durable and objective.*"

If European legislation so permits the registration of such distinctive unconventional signs of trade, why cannot olfactory creations be protected as trademarks?

The answer is found on one hand in the functions of marks and on the other hand in the principle of the specialty of marks. It does not only apply to olfactory brands, but to all distinctive marks of trade activity. Thus, in a first aspect, the main function, both legal and economic of a trade mark is to distinguish between the goods and services of its own proprietor and the products and services of other competitors. Therefore, what is protected by the exclusive right of registration is not the product of the creative activity, the intellectual creation resulting in the registered trademark, but the relational triangle proprietor-brand-

<sup>71</sup> <https://www.press.bmwgroup.com/romania/article/detail/T0240544RO/aromele-bmw-seria-7-detaliu-pentru-o-experien%C5%A3%C4%83-unic%C4%83?language=ro>

<sup>72</sup> "From my point of view, the examiner said, the mark was not represented graphically. What has been provided is a graphic representation of a description of what the brand means and not of the brand itself. And being a verbal communication of what the brand is, the extent of the mark protection purpose is not clear. For example, what is the difference between "the smell of freshly cut grass" of fresh grass or simply cut grass?" The decision of the Appeals Chamber of 11.02.1999 given in Case R 156 / 1998-2 . 4.

<sup>73</sup> Case C-273/00 of 12.12.2002 concerning the interpretation of Art. (2) of Directive 89/104 / EEC on the approximation of Member States laws relating to trade marks, concerning Ralph Sieckermann, comments 45 to 46.

<sup>74</sup> Idem.

product / service. In other words, the mark is protected by reference to the designated products / services and which the holder of the mark sells under that trade mark.

Under a second aspect, the principle of the trade mark's specialty implies that its use is limited to the goods and services for which it was registered and, implicitly, to the trade mark proprietor's field of activity: the right over the mark does not concern any creation or innovation, but exclusively what the holder has chosen to protect closely with a particular category of products and services.<sup>75</sup> And the principle of specialty has a profound significance for the trademark protection system: at the time of filing the application for registration, the conditions of distinctiveness, availability and even licit (for example, misleading brands) will be examined by reference to the products and services that the holder has chosen for his mark<sup>76</sup>.

In conclusion, answering to the question in the title, we reaffirm that olfactory works cannot be

protected by distinctive marks of trade activity (in this case marks) because what is protected by the registration of a mark is not the mark in itself regarded as an intellectual creation, but the exclusive character of the use of the mark by its proprietor for certain categories of goods and services for which it was registered. Exclusivity or monopoly over the mark helps the trademark owner to keep customer loyalty and distinguishes itself among its competitors. And even if the mark itself is made of a creation, whether it is a special graphic representation, a logo, a slogan, then it will be able to benefit from the protection conferred by copyright or, as the case may be, designs or models in the extent to which the conditions of protection are met. And with regard to the olfactory brands that represents stand-alone works, their protection would be conferred by the other rights, subject to the wording in the previous sections.

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<sup>75</sup> Frederic Pollaud-Dulian, *Propriete industrielle. La propriete industrielle*, Economica, Paris, 2011, p. 713.

<sup>76</sup> *Ibidem*, p. 714.