sufficiently important human rights. The prospect of further first-instance re-writing of domestic law is unsettling.

This decision is part of a tortuous series of developments (see Lindsay J.'s review in *O Ltd.* v. *Z* [2005] EWHC 238 (Ch)). What follows is an abbreviated account of the privilege's saga during the last twenty years or so. First, certain statutes have introduced so-called "use immunity": the respondent in civil proceedings can be ordered to supply information, even though this might tend to incriminate him; but the prosecution cannot use this information in evidence against him, his spouse or "civil partner" (*e.g.* the Supreme Court Act 1981, section 72(1)). But Parliament has not adopted this as a universal rule. Secondly, British legislation was amended by section 50 of the Youth Justice and Criminal Evidence Act 1999, to prevent the prosecution from using certain information extracted under extra-judicial procedures (following *Saunders* v. *UK* (1996) 23 E.H.R.R. 313, noted [1997] C.L.J. 243). Thirdly, recent Strasbourg decisions have peremptorily rejected attempts to justify certain inquisitorial powers in the name of (national) public policy (*e.g. Shannon* v. *UK* (2006) 42 E.H.R.R. 31, examined B. Thanki (ed.), *The Law of Privilege* (Oxford, 2006), 8.57 ff.).

Parliament last set the bounds of this privilege in 1968. If the present case survives, it will surely stimulate radical legislative review of this troublesome privilege's legitimate scope.

NEIL ANDREWS

COPYRIGHT IN PERFUMES: SMELLING A RAT

THE art of making perfumes began in ancient Egypt, was perfected by the Arabs, reaching a grateful Europe in the fourteenth century. Perfume was then a luxury enjoyed only by royalty and the wealthy. Much has changed. The global fragrance market is worth over ten billion US dollars. In France, by far the largest single market, nearly all women use some kind of perfume (as do half of the men). In this saturated and highly competitive market, manufacturers seek to protect their precious perfumes by whatever legal mechanisms come to hand. Trade mark law offers potential protection for brands, including the shape of bottles and packaging, and is the most straightforward response to counterfeiters. Passing off and unfair competition law are useful against close imitators: recent copycat shots include CHENAL No. 5, and TEMPERATURE (for FAHRENHEIT). Copyright and design law too may protect against reproduction of bottle shapes and packaging. But, with the advent of so-called 'smell-alikes', what has

https://doi.org/10.1017/S0008197307000372 Published online by Cambridge University Press

been sought recently has been protection of the smell of the perfume itself.

Historically, trade mark law in most countries has been unfriendly to the registration of smells. However, the Trade Marks Directive (First Council Directive 89/104/EEC, O.J. [1989] L 24/36) states that "a trade mark may consist of any sign capable of being represented graphically" (Article 1), apparently allowing the registration of smells. In *Sieckmann* (C-273/00 *Ralf Sieckmann* v. *Deutches Patent-und Markenamt* [2002] E.C.R. I-11737) the applicant sought to register the smell of cinnamon as an olfactory trade mark, citing its chemical formula, depositing an odour sample, and stating that the scent was "balsamically fruity with a slight hint of cinnamon" (a description corresponding to the classification of the perfume industry in the EU). The ECJ found that none of these efforts satisfied the requirement, since the graphic representation had to be "clear, precise, self-contained, easily accessible, intelligible, durable and objective". The hurdle seems almost insurmountable. There is the further challenge that the sign must be capable of distinguishing the goods of one undertaking from those of another. The consumer should be able to perceive it independently of the product itself. The UK has accepted applications for the smell of roses for tyres, and the smell of bitter beer applied to flights for darts, but this was before the *Sieckmann* judgment, and it seems unlikely that many more such marks will be granted. Although in the perfume industry there are well-established methodologies (known as "sensorial analysis") for describing smells, at the final levels of appreciation sensory perceptions are inevitably subjective.

Undeterred by these considerations, however, in January 2006 the Cour d'Appel de Paris ruled that perfume could be protected by copyright (*L'Oréal* v. *Bellure* [2006] E.C.D.R. 16). L'Oréal alleged that Bellure was selling near-identical copies of several of its major perfumes. Bellure had changed the names and packaging to minimise the risk of trade mark infringement: L'Oréal's TRÉSOR became LA VALEUR, ROMANCE became CHEEK TO CHEEK, and MIRACLE became PINK WONDER. L'Oréal therefore sought copyright protection for the perfumes themselves. The court noted that the French Intellectual Property Code does not exclude works which are accessed by smell, and states that copyright protects the rights of authors in all works of the mind, whatever their type, form of expression, merit or purpose. A perfume was capable of constituting a work of the mind if it showed the input of its author and was original. The fact that there are categories of perfumes identified by their dominant components (*e.g.* floral, fruity, woody) did not prevent the protection of individual scents which transcribe the creative input of

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the author, and are identifiable by their olefactory architectures. Sensorial and chemical analysis of the paired scents confirmed close similarities: 26 of the 30 constituent smells in MIRACLE were found in the rival PINK WONDER; 50 of the 52 components of ROMANCE were found in CHEEK TO CHEEK; and so on. Damages approached €1.5 million. The perfumers' triumph was brief, though. In June 2006, the French Cour de Cassation held that the fragrance of a perfume results from the mere implementation of know-how, so does not constitute the creation of a form of expression which is capable of enjoying copyright protection as a work of the mind (*Bsiri-Barbir* v. *Haarmann & Reimer* Civ. (1re ch.), 13 juin 2006; [2006] E.C.D.R. 28).

Also in June 2006, the Dutch Supreme Court dealt with an action involving a different copy of TRÉSOR, called FEMALE TREASURE (*Kecofa* v. *Lancôme* [2006] E.C.D.R. 26). Like the French Code, the Dutch Copyright Act does not exclude smells from protection as works. The Supreme Court held that what was significant was that the work was perceptible to humans, possessed an original character, and bore the personal stamp of its creator. TRÉSOR fulfilled these requirements. It made no difference that the ability to distinguish scents differed from person to person, since evidence of infringement could be collected by chemical analysis and by surveys. An expert report found that FEMALE TREASURE had 24 olfactory components in common with TRÉSOR, leaving only two unused by Kecofa. The Supreme Court therefore upheld the Appeal Court's finding that copyright subsisted in TRÉSOR and had been infringed.

Dutch law is now out of step with that of all other EU member states. *Parfumeurs* welcomed the Dutch ruling, believing their work to be indubitably artistic. Such thinking sits comfortably with the Romantic vision of the author as uniquely entitled to proprietorship of created works, but this paradigm has been seriously challenged in post-modern times. It also draws on an aesthetic discourse of originality which cries loudly for protection but has a tendency to forget its own debts. TRÉSOR itself owes much to two earlier perfumes: Calvin Klein's ETERNITY and Sophia Grosjman's EXCLAMATION. In addition to the philosophical difficulties, there are practical problems. It will require considerable creativity to apply certain acts of copyright infringement (*e.g.* distribution, making available to the public) to fragrance, whose fundamental purpose is that it will perceived not only by the wearer, but also by those in the vicinity. Furthermore, the ruling creates an unacceptable impediment to the free movement of goods within the EU. Harmonisation will be essential if the Dutch approach is maintained. The problem of

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smell-alikes is adequately covered by existing unfair competition law (Trade Mark Directive, Article 4(3)), applied to protect TRÉSOR in *L'Oréal* v. *Bellure* [2006] EWCH 2355 Ch; [2007] E.T.M.R. 1). The romantic allure of perfume may be considerable, but this Dutch romanticism is misplaced.

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