

Smells Like Trademark Protection: Copycat Perfumes Cannot Engage in Comparative Advertising, on Odor of the Court in the UK and EU

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L'Oreal scored a major victory in trademark protection against smell-alike perfumes this past month in England's Court of Appeal. In *L'Oréal v. Bellure*, the court held that Bellure's use of lists in its advertising that compared its perfumes' scents to those of well-known L'Oréal perfumes constituted trademark infringement. This widely-reported decision indicates a sea change in European trademark law, which is now recognizing the marketing and monetary effort a company expends when creating and maintaining trademarks. It also is a broad decision, perhaps having wide-ranging effects in other industries. This decision implements judgment in the European Court of Justice – the highest court in the European Union. Thus, the decision in this case applies to all of Europe.

The court initially noted that it is permissible for one to use the trademark of another for advertising purposes as long as there is no exploitation of the trademark's reputation, and the product being advertised is not a replica of the one whose trademark is being referenced. But, Bellure, the court held, took advantage of L'Oréal's trademarks' prestige and reputation through the comparing of its copycat perfumes to L'Oréal's originals in its advertisements. According to European trademark law, this amounted to taking advantage of the work that L'Oréal had put into its trademarks by using them to heighten the reputation of Bellure's smell-alike perfumes in its advertisements.

Justice Jacob, the author of the opinion, expressed his strong concerns about issuing his own decision. His reluctance stemmed from the fact that it is lawful to manufacture and sell smell-alike fragrances. He thought that it would make sense to market such perfumes as smelling just like perfumes they seek to replicate, which is what Bellure endeavored to do through the use of comparison lists. The judge felt that the average consumer is smart enough to realize that the smell-alikes are not of the same quality as the fragrances they seek to emulate. Also, he cited that the smell-alikes were marketed towards people who could not afford and therefore would never buy L'Oréal's perfumes. Thus, he believed that the replica perfumes would not hurt the business of the originals.

There could, however, be potential harm to premium perfume-makers if such comparative advertising caused people who could afford the originals to buy the replicas, instead. But, Justice Jacobs continued his hand-wringing, expressing that preventing manufacturers from being able to advertise

that they can make perfumes that smell just like expensive ones for a fraction of the cost constituted a greater harm: principles of free speech and free trade could be damaged. He reasoned that for businesses to run freely, there would need to be some element of competition. In order for there to be competition, Justice Jacob says, new products would need to take advantage of other products' reputations in advertising their own, which is exactly what Bellure did.

Justice Jacob wondered if this verdict could potentially have widespread effects in other industries by preventing businesses from engaging in similar actions to those of Bellure. For example, generic drug manufacturers have a need to advertise that their products are the same as well-known drugs under a trademark. The judge wondered if this verdict could prevent generic drug manufacturers (and other businesses) from advertising the truth about their products, and thus put them out of business. Perhaps whole industries could be decimated by such advertising constraints.

Ultimately, Justice Jacob ruled in favor of L'Oréal due to the strict language of European trademark law, which provides that if the use of another's trademark goes beyond being solely descriptive and instead affects the advertising functions of the trademark for the purposes of publicizing a replica, then it is not permissible use. The advantage that Bellure gained from the use of L'Oréal's trademarks was regarded by the court as unlawful "free-riding" on the trademarks' prestige.

The result could have been quite different under U.S. trademark law, which can be more permissive with respect to comparative advertising. Bellure's advertising in the U.S. would have been analyzed under the doctrine of fair use. In general, comparative advertising is regarded as fair use when the comparison being made is clear, not likely to generate confusion about the identity of the products, and does not suggest that the trademark holder endorses the product being advertised. Non-deceptive comparative advertising is encouraged in this country, because it assists consumers in making better choices when purchasing goods, promotes product improvements and encourages lower prices, echoing some of the concerns of Justice Jacob.

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