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HEADLINE: Ruling leaves a scent of disharmony

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LIKE a rose, a perfume by any other name would smell as sweet.

But actually selling a cheap knock-off under another name is a copyright violation.

A Dutch appeals court ruling granting France-based L'Oréal a copyright on its Tresor perfume could reverberate throughout the cosmetics industry and beyond.

The Dutch maker of cheap perfumes that lost the case, Kecofa BV, intends to appeal the decision to the Dutch Supreme Court.

L'Oréal's actions are 'the equivalent of someone introducing a fancy strawberry jam and then trying to prevent anybody else from selling a cheaper version', says Kecofa spokesman Leon Meels.

Until now, perfume makers have fought cheaper copycats by keeping their formulas secret or occasionally by patenting their chemical composition as an 'invention'.

Courts worldwide have held that the odour itself is something that belongs to nature, not to any person or company, and is not copyrightable.

But the court ruled Tresor was a distinct combination of ingredients 'not only measurable by the senses but also concrete and stable enough to be considered an 'authored work as intended by copyright'.

In other words, the perfume is more like a painting than a product.

Lawyers for L'Oréal, which won the right to block imitators from marketing cheap knock-off versions in the Netherlands, called the ruling 'revolutionary'.

Charles Gielen, of the law firm NautaDutilh, says perfume should be considered a creative work, despite relying on commonly known ingredients.

"Paintings are made of a mixture of colours, which are known components, and poems consist of normal words," he says.

"It's the combination that's artistic."

The court ruled Kecofa, which makes a perfume called Female Treasure, had infringed L'Oréal's copyright and must hand over all profits from the perfume since 1995.

Female Treasure is sold at Dutch shops and markets for around \$10 for a 100ml bottle, at a tenth of the cost of Tresor.

Thomas Field, a professor at Franklin Pierce Law Centre in New Hampshire and a former chemist, says the ruling could be 'bad, bad, from a public policy standpoint'.

"Where does it stop? Will new wines, or blends of spices and other condiments be copyrightable? If the law of the case stands, lawyers will be mining its golden ambiguity for many years," he says.

"A patent may be a better way for perfume makers to protect their product."

Patents grant exclusive manufacturing rights for 20 years, rather than 100 years or more for a copyright.

The Dutch court relied heavily on the testimony of experts hired by Lancome whose chemical analysis showed that Female Treasure contained 24 out of 26 chemical elements in common with Tresor.

Kecofa's Meels says Lancome's chemical analysis was misleading, since most perfumes contain similar ingredients.

"We should have presented our own experts, but we didn't have a lot of time to prepare and we underestimated how seriously the court would take their arguments," says Meels.