Non Conventional Copyright Subject Matter: Fragrances and Gastronomy.

The following considerations concern the relationship existing between copyright protection on one hand and fragrances and gastronomy on the other. The legal framework which has been considered is mainly the international one (Berne Convention); but also some national jurisdictions have been analyzed: in particular France and Italy have been presented as cases study; these two countries have been selected for the following reasons: France holds a very much developed fragrances industry and both the above mentioned countries may be considered as lead examples in the gastronomic field. In particular in Italy (but in France too to some extent) the market operators in the above mentioned fields are SMEs.

Copyright is an Intellectual Property Right (IPR) granted to creative works of art. As all other IPRs, Copyright is a strategic legal tool for development. By serving economic interests of creators and right owners as well as extra-patrimonial interests of authors, it fosters the social, economic and cultural development.

Works of art which are protectable by copyright are generally perceived by mechanical senses: for example graphics, statues and music songs. However we may wonder whether works perceivable through chemical senses are also covered by copyright. We are thinking about fragrances, i.e. intangible aromas of liquid or solid substances, as well as gastronomy "dishes", i.e. the results of a series of instructions which embeds an intangible taste.

Very often it has been argued that fragrances and dishes result from know-how and therefore they are not creations. Know-how is beyond the subject matter of protection; it may be covered by contractual rights, but it is not locked by exclusive rights. Fragrances and dishes are not necessarily simple know-how: they can be creations realized thanks to some know-how; this is true when they result from an « aesthetic » and creative search and not from a merely functional search. As a consequence, should fragrances makers and chefs be considered as creators, in principle fragrances and gastronomy could be covered by copyright.

There are several main arguments allowing us to state that fragrances and dishes can be defined as works of art.

According to a first argument works of art are expressed forms of human creations; the creation is by definition destined to be communicated since it is destined to be expressed into a specific form. The expressed form can be perceived by each and every of the five senses and not only by mechanical ones. It has been argued that the description of a smell/taste work of art cannot be neither objective nor stable. However on one hand a subjective perception of the

expressed forms concerns every work of art: should we ask to two different subjects to describe us a painting, it is likely they will refer to the exact colors used by the painter in terms slightly different; the parts of the painting that one subject notice as substantial can be neglected or underestimated by the second subject; and so on; in any case this different way to perceive the same work of art has never been used to argue that a painting cannot be covered by copyright; therefore it is unlikely that an opposite argument can apply to fragrances and dishes. On the other hand nowadays technologies are advanced enough to allow an exact smell or taste description through spectrogram and other graphics; so the perfect track of the expressed form can be the base on which the single perceptions are modulated.

According to a second argument article 2 of the Berne Convention presents a non exhaustive list of protectable works of art: the commentators are unanimous on this point. This means that what is not included in the list is not necessarily excluded; therefore fragrances and dishes are not excluded a priori. This legislative technique is a clue of a protectionist approach because in its presence the norm interpretation is extensive and not restrictive and as a consequence it is easier to include works such as fragrances and dishes into the protected works list. Additionally a discrimination argument can be advanced: in general according to constitutional principles it is not possible to provide with different protection to creators of different works of art genders; should we exclude fragrances and dishes from protection, we would sustain an unconstitutional interpretation.

According to a third general argument the IPRs current trend is very protectionist. Therefore the exclusion of fragrances and gastronomy from copyright protection could be very difficult to be justified, in particular because other functional works are in.

Once it is demonstrated that there exist arguments for considering fragrances and dishes as copyright subject matter, we may wonder whether there are any obstacles to the protection.

Copyright protects creative form of expressions only: in other words a minimum amount of creativity is the unique access requirement for the protection imposed by the international norms (Berne Convention, article XXX). Some jurisdictions ask for a qualified creativity, while some others require a simple creativity: one of the most responded clues for identifying a qualified creativity is the presence of an author's print in the work of art; therefore in such a case a fragrance or a dish would be protected when expressing some peculiarity which enables the user to connect the work to its creator. Differently a simple creativity is characterized by the mere presence of the author free choice; in such a case a fragrance or a dish would be protected when its expressed form is not imposed by necessary options.

The protectionist trend characterizing nowadays copyright is suggesting that many jurisdictions are opting for a simple creativity; the few jurisdictions remaining faithful to a qualified creativity requirement evaluate it in a very generous way. As a consequence there is not a big difference in terms of concrete solutions.
It has to be added that common law countries generally require the work to be fixed according to Berne Convention article 2.2; additionally some of them ask for a permanent character of the work of art. These two further requirements when present do not involve any obstacle to the fragrances and dishes protection: should we consider that the liquid or solid support emanating the fragrance does not imply a fixation, this latter can be easily verified when the fragrance has been translated in a spectrogram; the same reasoning can concern the taste embedded into a dish which can be expressed in a recipe.

The European Court of Justice has never judged on the copyright eligibility of fragrances or dishes. At the national level the courts of some countries only have afforded the above mentioned question and have not necessarily achieved the same solution.
The French jurisprudence registers some reluctance in protecting fragrances. In the 70s first instances courts were not considering fragrances as works of art, but as formulas of industrial products; therefore judged excluded fragrances from copyright protection. In the early 90s first instance courts and appeal courts changed direction and admitted that fragrances can be works of art because of the imagination and taste which are necessary to their creation. In a comparative law perspective, the maintenance of this approach seems to have been encouraged by Dutch court of appeal decision issued on 2004 which gave protection to a fragrance composition. Still the French highest judicial authority (Cour the Cassation) is resisting to this approach and stating that fragrances are a mere know-how.
In Italy there is no case on fragrances protection. It has to be noticed that some years ago the Italian CMO (SIAE) received a request to manage the rights over a *"perfume"* inspired to Eleonora Duse character. The commentators have interpreted this fact as a clue favorable to fragrances eligibility for copyright. However this is a false argument because the request was not concerning the fragrance itself, but the bottle containing the fragrance and the label distinguishing it, which eventually happened to be protectable also because their creator is an known artist.
Some considerations on the above notes deserve here some room.

Firstly it seems that France is one of the few countries where courts dealt with the fragrance copyright protection issue: this indicates the strength and the relevance of interests present in the French specific fragrances market, which is by far one of the most developed of Europe.

Secondly, and more generally, the courts reluctance to copyright protection may derive from policy decisions taking into account signs appropriation and public domain interests. Other IPRs (individual, collective, certification trademarks, geographical indications, patents) are often used for fragrances protection; however these rights may cover complementary products such as the fragrance bottles, logos, packages, etc.; it is unlikely that a distinctive sign is able to cover the fragrance because of the lack of some necessary conditions for protection (mainly graphical representation, distinctiveness and ability to distinguish the sign from the product); it is also unlikely that a patent protects a fragrance: patents cover technical solutions to a technical problem; should we admit that it is suitable to have a patent in fragrances and related products, this IPR will protect the fragrance chemical formula or the process to obtain it, but not the resulting smell. Differently trade secret is very much used to protect smell (and taste) works of art; generally trade secret is an appropriate solution when the information is hidden from the public view and the access requirements for protection are hardly fulfilled; in other words this kind of protection for fragrances on one hand remains particularly risky because the technology nowadays allows easily to get to and reproduce the hidden information; on the other hand we have studied that access requirement for copyright protection are not hardly met: therefore this cannot constitute a good argument for justifying a trade secret protection against a copyright protection. Finally fragrances may be protected by some unfair competition or passing-off principles or by contractual clauses: however these legal tools would provide simple liability rules and so a less intense protection than *erga omnes* rules such as property rights.

Thirdly major policy questions should be answered: is it a good choice to avoid copyright protection for fragrances? Would copyright over fragrances impose the risk of overprotection, which would increment the costs in the creation and product circulation process? Should copyright protection be welcomed by courts, which would be its boundaries: would it be limited to luxury fragrances only? Or should it be extended to soap, chocolate fragrances (and others) as well?

At this stage we can notice that depending on the market the presence of a more or less intense protection may have an impact on it: for instance Italian design market was more prosperous with one industrial property protection only than with the current double copyright and industrial design protection; fashion business is prosperous in both France and Italy

notwithstanding the many layers of protections. French fragrances business looks prosperous without copyright protection; should it work similarly to the design market, copyright presence over fragrances should be discouraged; should it be fashion-oriented, we could advance that copyright protection would not have a negative impact on it, provided that the protection is limited to luxury fragrances only…but then how to justify the discrimination with more humble related products?

As far as gastronomy is concerned, no case nor in France nor in Italy has never dealt with taste works of art protection; the few cases we found concern the copyright protection of the recipes, or of recipes databases. Three major considerations can be advanced on the gastronomy copyright protection issue.

The first note has a social connotation. Within the gastronomy market, in absence of protection a social norms-based system has been institutionalized: for instance chefs do not copy on each other and this matches with the design around principle of a copyright regime; if chefs share an information with someone, it cannot be repeated and this reminds us of the authorization paradigm; if someone develops a recipe he is credited as the father of it and this is a social right of authorship. The social-norms based system occurs when these social norms are enforced and some profit related to innovation is verified. Additionally in order to work appropriately this system needs the social norms to be stable and retaliatory: who is not respecting is punished; who is not joining in punishing is punished as well. As a matter of fact should someone violate this practice, he is excluded from the chefs community, his status is degraded and will not be given any further information. In conclusion the idea is that in some cases the lack of IPRs rules is substituted by social norms. Does this means that IPRs protection is necessary in this area? At least it means that some kind of IPRs are not an obstacle for the creative initiatives.

The second remark is the following one: should copyright protect “dishes”, would it be suitable to protect wine and other alcohol tastes? On one hand general and fundamental principles impose to avoid any kind of discrimination. On the other hand the observations advanced on fragrances protection may cover this issue as well to some extent.

The third question concerns the juridical implication of copyright protection: should we admit copyright protection over dishes, how could we enforce it? It is hard to provide with a satisfactory answer and this is the main argument against the suitability of copyright protection over taste works of art.