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Questions remain about protection of works of applied art post-Cofemel

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Introduction

The originality test for works of applied art is a perennial European copyright question that has hopefully been finally answered by the Court of Justice of the European Union (CJEU) in *Cofemel* and *Brompton Bicycle*.⁽¹⁾ But the question of how national courts will factor in prior art in the relevant field and the functional elements of the designs when assessing infringement remains an unsettled question, subject to trends and traditions in national case law.

In Sweden, there is a long-standing tradition for the courts to let the prior art and functional elements of the design severely limit the scope of protection of works of applied art and to generally only recognise a very narrow scope of protection for such works. In this recent case from the Patent and Market Court of Appeal, these questions were front and centre in a copyright infringement battle between two chairs.⁽²⁾

Facts

The rights holder of the so-called "Jackie" chair brought an action for copyright infringement against a competitor that had manufactured, marketed and sold a chair with a similar overall design. Both chairs were used within the healthcare industry and had certain arguably functional elements, such as cushions for the seat and back.

The claimant requested a variety of actions available to Swedish litigants in copyright litigation, including that the court:

- issue an injunction against the defendant under the penalty of a fine; and
- order the competitor to:
 - compensate for the infringement;
 - publicise the judgment; and
 - destroy all marketing materials and copies of the infringing chair.

The first-instance Patent and Market Court rejected the claims. The claimant proceeded to appeal the case to the second-instance Patent and Market Court of Appeal.

Decision

The Patent and Market Court of Appeal applied the CJEU's originality jurisprudence and found (unsurprisingly) that the Jackie chair qualified as a work of applied art by being the result of the author's intellectual creation and reflecting the author's personality, notwithstanding the functional requirements necessary for chairs used within the healthcare industry.

The Court emphasised that it had been settled by the CJEU that the extent of copyright protection for various kinds of works is not dependent on the level of creative freedom exercised by the author. Consequently, works of applied art do not have any narrower degree of protection than any other work afforded copyright protection.

However, when moving on from originality to the issue of how to conduct the infringement assessment between the two chairs, the Court drifted away from clear CJEU precedent. The majority of the Court conducted the infringement assessment according to the method established in earlier Swedish case law (NJA 1994 s 74). According to this method, works of applied art are compared to existing prior art. Works that are found to be "more original" compared with the prior art enjoy a greater scope of protection than "less original" works. Over the decades, this method has led works of applied art to be considered to have a very narrow scope of protection in Sweden, essentially only protection against direct copying.

In the present case, the battle stood between two chairs that had certain functional requirements. It was also undisputed that the design of the Jackie chair had been inspired by prior art and that similar armchairs were available on the market. The Court found that the chairs showed similarities when viewed from the front and the side, and that there were also similarities in the back cushions. Upon a closer inspection, the Court did, however, find that the chairs' overall impression differed in that the Jackie chair had an "additive" design including many separate parts, while the competing chair had an "integrated" design in which the separate parts were not visible. The armrests on the chairs, which were dominating parts of the design, differed significantly.

The Court concluded that the defendant's chair had an overall impression that differed from the Jackie chair to the extent that it did not fall within the scope of protection of the Jackie chair. Therefore, the competing chair did not infringe the copyright of the Jackie chair.

In a strongly worded and persuasively argued dissenting opinion, one of the judges on the panel objected to the method employed by the majority when assessing infringement (as well as the finding of non-infringement). According to the dissent, pre-*Infosoc* Swedish case law (eg, NJA 1994 s 74) lacks relevance after *Infopaq*, *Painer*, *Soulier and Doke* and, most importantly *Pelham*.⁽³⁾ The legal method of identifying the scope of protection of the work of applied art based on a comparison with prior art and applying it in infringement

assessment as established in previous Swedish case law is wrong for several reasons, not least that there is no novelty requirement in copyright (as compared to patents and designs). This method employed by the majority also seems to be incompatible with the majority's own reading of applicable CJEU case law that the creative freedom of the author shall not influence the scope of protection since that seems to be the inevitable result of employing such a method.

Comment

In this decision, the majority of the Court granted the Jackie chair a quite limited scope of protection, apparently based largely on the design's similarity to prior art and its functional elements. This may be right or wrong on the merits, but the most interesting part of the decision is undoubtedly the methodology question post-*Cofemel*. It seems that the ghost of old Swedish copyright jurisprudence haunts this decision and that the dissenting judge's view of the method to be employed in assessing infringement of works of applied art is at least more correct in light of recent CJEU jurisprudence.

Since the Court did not grant the claimant leave to appeal, it remains to be seen whether the Swedish courts will continue to apply the arguably outdated method established in NJA 1994 s 74 when assessing infringement of works of applied art in the future. When such future cases are argued, the dissenting judge's opinion will likely take centre stage.

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Endnotes

(1) C-683/17 and C 833/18, respectively.

(2) Patent and Market Court of Appeal, PMT 13853-20.

(3) C-5/08, C-145/10, C-301/15, C-403/08 FAPL, C-476/17, respectively.