

May 22 2023

Jaguar replica sportscar does not constitute copyright infringement

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Introduction

This case concerns a dispute between international car manufacturer Jaguar and a Swedish company, as well as the company's two owners, regarding allegations of copyright infringement in the defendants' production of a replica Jaguar C-Type sportscar.⁽¹⁾ The second-instance Patent and Market Court of Appeal reversed the first instance-court's decision and found that the replica did not constitute copyright infringement on two unusual grounds:

- there had been a sort of general consent from Jaguar in relation to some copyright exploitation; and
- the remaining copyright exploitation was allowed under the Swedish private use exception.

Patent and Market Court

The first-instance Patent and Market Court found that the replica constituted copyright infringement. Even though the famous C-Type Jaguar sports car had been created in the United Kingdom in the 1950s, the Court found the car model to be protected as a work of applied art under Swedish copyright today. The Court reached this conclusion after a circuitous route, analysing the applicable UK law in the 1950s, later EU law and modern copyright law.

In order to establish the original ownership of the copyright, the Court had to decide whether UK or Swedish law should be used. Since the issue had not previously been dealt with in Swedish case law, the Court applied the conflict of laws in intellectual property principles (known as the "CLIP principles", produced by a European Max Planck Group). This resulted in the conclusion that Swedish substantive copyright law should be applied, which led the Court to find that Jaguar was the original copyright holder.

The defendants presented the novel argument that the replica did not infringe Jaguar's copyright, based on:

- Jaguar's alleged decades-long acceptance and even celebration of replica car culture in general; and
- Jaguar's discussions with the defendants about their replica C-Type in particular, at various meetings over the years.

However, the first-instance court was not convinced that the defendants had made it clear to Jaguar that they intended to establish a commercial venture, rather than a hobby project for private use.

Patent and Market Court of Appeal

The Patent and Market Court of Appeal confirmed that:

- the Swedish Copyright Act was applicable;
- the Jaguar C-Type model qualified for protection as a work of applied art in Sweden; and
- Jaguar held the right to exploit the work.

But Jaguar's case started to derail when the Court decided to look more closely at the issue of whether it was the company which had taken actions that constituted infringement, or the private individuals, who would then be able to rely on the exception for private use in Swedish copyright. According to the Court, it had not been shown that the company had made any copies of the work, nor made it available to the public. The Court took into account, among other things, that:

- neither of the two individuals were employed by the company; and
- both individuals, under oath in court, had denied that the replica had been manufactured within the company.

Interestingly, the Court even found that the company could not be considered to have contributed to the two individuals' exploitation of the work (and thus be held liable for contributory infringement).

Furthermore, the Court found that Jaguar had given a general consent to the exploitation and thus accepted different forms of exploitation of replicas of Jaguar's C-Type model. However, the Court found that Jaguar had revoked its consent when a cease-and-desist letter had been sent in February 2018.

The defendant's exploitation of the work after February 2018 was thus not allowed and the question became whether the defendants' actions after that date constituted copyright infringement. The defendants convinced the Court that their actions after this date had all been in a private capacity and were thus allowed under the private use exception. The race was over, and the defendants won.

One judge was of a dissenting opinion as regards:

- the applicable law on the question of the original ownership of the copyright;

- the transfer of such right; and

- the motivation in relation to whether Jaguar Car Limited had acquired the copyright.

The dissenting judge was of the opinion that UK law should be applied, but found that Jaguar owned the copyright also under UK law.

The dissent was thus not material for the outcome of the case.

Comment

The Court's finding that Jaguar had given a "general consent" to the exploitation of the car model is viewed as problematic by many, and as a violation of basic contracting law by some. The conclusion raises several interesting questions about what kind of actions a rights holder must take to be considered to not have consented and thus to avoid losing the ability to take legal action to stop an infringement. Another important takeaway from this case is that the exception for private use under section 12 of the Swedish Copyright Act can be interpreted more broadly than previously believed.

This decision contains several interesting questions that are important for the application of the law in Sweden. The Patent and Market Court of Appeal seems to have been of the same opinion as it unusually granted leave to appeal to the Supreme Court. Unfortunately, the case was only appealed in relation to litigation costs (and that action in turn was withdrawn a couple of days later). The Supreme Court will thus not provide any guidance in relation to the interesting copyright questions in this case.

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Endnotes

(1) PMCA, PMT 625-21.