

SVEA COURT OF APPEAL
DIVISION 02
Unit 020107

JUDGMENT
6 November 2014
Stockholm

Case no.
T 4655-13

APPEALED JUDGMENT

Stockholm District Court's judgment of the 12th of April 2013 in case no. T 5907-10, see enclosure A

APPELLANT

G-Star Raw C.V.
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Netherlands

Counsel: Advokat Christina Berggren and jur.kand. Johan Engdahl
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OPPOSING PARTIES

1. H & M Hennes & Mauritz AB, 556042-7220
106 38 Stockholm

2. H & M Hennes & Mauritz Sverige AB, 556151-2376
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Counsel for 1 and 2: Advokat Henrik Wistam
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CONCERNING

Copyright infringement

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the claims for G-Star Raw C.V. not to be allowed to invoke that certain evidences (file exhibits 2-7, 30 and 33 of the District Court) show, respectively constitute a specimen of OriginalElwood, thus proving the appearance of OriginalElwood and of the five design elements of Original Elwood.
2. The Court of Appeal confirms the judgment of the District Court.
3. G-Star Raw C.V. is ordered to reimburse H & M Hennes & Mauritz AB's legal costs regarding the proceedings in the Court of Appeal of SEK 322,500, plus interest in accordance with section 6 of the Swedish Interest Act (1975:635) on the amount from today until payment is received.

4. G-Star Raw C.V. is ordered to reimburse H & M Hennes & Mauritz Sverige AB's legal costs regarding the proceedings in the Court of Appeal of SEK 322,500, plus interest in accordance with section 6 of the Swedish Interest Act (1975:635) on the amount from today until payment is received.
5. The Court of Appeal rejects the request for Christina Berggren and Johan Engdahl to be ordered to be jointly and severally liable with G-Star Raw C.V to reimburse part of H & M Hennes & Mauritz AB's and H & M Hennes & Mauritz Sverige AB's costs relating to the proceedings in the Court of Appeal.

CLAIMS IN THE COURT OF APPEAL

G-Star Raw C.V. (G-Star) has requested the Court of Appeal to approve the company's action in the District Court.

H & M Hennes & Mauritz AB and H & M Hennes & Mauritz Sverige AB (hereinafter jointly referred to as H&M) have disputed alteration of the judgment of the District Court.

H & M has requested the Court of Appeal to dismiss G-Star's claim, made first in the Court of Appeal, that the photographs, submitted by G-Star in the District Court (file exhibits 2-7 and 30 of the District Court), and the specimen of a pair of jeans (file exhibit 33 of the District Court) shows, respectively constitute a specimen of OriginalElwood, thus showing the appearance of OriginalElwood and of the five design elements on Original Elwood.

The parties have requested compensation for their costs relating to the proceedings in the Court of Appeal.

H&M has requested the court to, irrespective of the outcome of the case, order G-Star to reimburse H&M for costs in the Court of Appeal with an amount of SEK 315,000. Also, H&M has requested the counsels of G-Star to be ordered to be jointly and severally liable with G-Star to reimburse H&M for its costs in the Court of Appeal with an amount of SEK 50,000.

G-Star has disputed the claim for the counsels to be jointly and severally liable. G-Star has requested the court to grant the appeal regarding compensation of its costs in its entirety even if the company were to succeed solely with its action towards one of the companies H & M Hennes & Mauritz AB and H & M Hennes & Mauritz Sverige AB.

THE PARTIES' ACTIONS IN THE COURT OF APPEAL

Grounds

G-Star has specified that the work claimed to be protected by copyright and which is being invoked as ground for its action in the case is a pair of jeans with five design elements created by Pierre Morriset in the year of 1995 or 1996 (hereinafter referred to as OriginalElwood). The five design elements being invoked are kneepads, horizontal seams above the knee on the back side of the jeans, diagonal seams extending from the hip to the crutch on the front side of the pants, horizontal parts and seams placed on the back side at the far bottom of the legs of the pants and a circle shaped seem on the back part of the jeans.

Apart from the above stated grounds, the parties have invoked the same grounds as in the District Court.

PLEAD OF THE CAUSE

The parties have essentially pleaded their cause in the same way as in the District Court. In summary, they have also added the following.

G-Star: The pair of jeans submitted and invoked in the District Court (file exhibit 33 of the District Court) is a specimen of OriginalElwood, which shows the appearance of OriginalElwood and thus the appearance of the five distinctive design elements of OriginalElwood. The photographs that were submitted and invoked in the District Court (file exhibits 2-7 and 30 of the District Court) also show a specimen of OriginalElwood. Thus the photographs show the appearance of OriginalElwood and thereby the appearance of the five distinctive design elements. The jeans portrayed in file exhibit 30 of the District Court were created before the subject of infringement. The appearance of OriginalElwood has not been disputed in any other litigation between the parties. It is common knowledge within the fashion industry that G-Star owns the copyright to OriginalElwood as well as the fact that Pierre Morriset created the work.

H&M: It is not admitted that the submitted jeans and photographs are a specimen, respectively show, a specimen of OriginalElwood. G-Star has previously stated that the submitted jeans and photographs

of these pants do not constitute, respectively show, a specimen of OriginalElwood (see the judgment of the District Court, p. 11, first paragraph and p. 20, third paragraph). G-Star has in the Court of Appeal, for the first time, invoked that the submitted photographs (file exhibits 2-7 and 30 of the District Court) and the specimen of a pair of jeans (file exhibit 33 of the District Court) show, respectively constitute, a specimen of OriginalElwood which thereby show the appearance of OriginalElwood and of the five design elements of OriginalElwood. G-Star's invocation that the specimen of the jeans and the photographs of this pair of trousers constitute, respectively show, a specimen of OriginalElwood constitute a new fact which G-Star would have been able to invoke in the District Court and which there is no valid excuse for invoking for the first time in the Court of Appeal. The new facts should be dismissed by the Court of Appeal. G-Star invoked the specimen of the jeans and the photographs in the District Court in order to prove that the &-trousers infringe copyright, but not to prove what OriginalElwood looked like. The theme of proof may not be expanded in the Court of Appeal since it signifies that G-Star invokes new evidence, which consequently shall be dismissed.

G-Star: Throughout the entire litigation, the company has claimed that the specimen of the jeans submitted in the case and the photographs of these trousers constitute, respectively show, OriginalElwood. The District Court and H&M have confused the manufacturing year of the submitted specimen with the year of OriginalElwood's creation. From the theme of proof invoked by G-Star in the District Court regarding the jeans specimen and photographs follows that the jeans and photographs show what OriginalElwood looked like.

Legal costs

H&M: Approximately half of H&M's legal costs relate to work with addressing the procedural matters in the Court of Appeal. G-Star has not had any success in these aspects. Irrespectively of the outcome of the case, G-Star should therefore reimburse H&M's legal costs in the Court of Appeal, amounting to SEK 315,000. The counsels of G-Star have proceeded the litigation against H & M Hennes & Mauritz AB even though there has not been any evidence of an infringement and have done so also after H&M has provided details on the H&M companies' businesses. Through these actions, the counsels have acted carelessly and should therefore be ordered to reimburse parts of H&M's legal costs in the Court of Appeal.

G-Star: From the invoked audit certificate it is clear that H & M Hennes & Mauritz AB is guilty of infringement.

INVESTIGATION IN THE COURT OF APPEAL

The parties have invoked the same evidence as in the District Court.

THE COURT OF APPEAL'S REASONS FOR THE JUDGMENT

The claims for dismissal of new facts and evidence

The work which G-Star claims copyright to and invokes as ground for its infringement action in the case is a pair of jeans created by Pierre Morriset in the year of 1995 or 1996, with the following five design elements. Kneepads, horizontal seams above the knee on the back of the jeans, diagonal seams extending from the hip to the crutch on the front of the pants, horizontal parts and seams placed on the backside at the far bottom of the legs of the jeans and a circle shaped seem on the back part of the jeans.

From this follows that the appearance of the jeans in accordance with the submitted specimen (file exhibit 33 of the District Court) and the photographs (file exhibits 2-7 and 30 of the District Court) has not been invoked as ground for the action. However, G-Star has invoked the jeans specimen and the photographs as evidence in the case in the District Court as well as in the Court of Appeal.

Against this background, the jeans specimen (file exhibit 33 of the District Court) and the photographs (file exhibits 2-7 and 30 of the District Court) can, according to the opinion of the Court of Appeal, not be given any relevance as facts in the sense intended in chapter 50, section 25, third paragraph of the Swedish Code of Judicial Procedure, i.e. as legal facts, or in other words, as facts which can be of immediate relevance for the outcome of the case. On the other hand, if G-Star would have adjusted the ground by altering the description of the work into correspondence with the appearance in accordance with the submitted jeans specimen and the photographs it would have been regarded as new facts. G-Star has not done this. Accordingly, G-Star has not invoked any new facts as ground for its action in the Court of Appeal.

However, in the Court of Appeal G-Star has claimed that the theme of proof regarding the jeans specimen and the photographs that was submitted by G-Star to the District Court shall include that it is intended to show what OriginalElwood looked like, including the five specifically invoked design elements. The Court of Appeal understands this as G-star must be considered to have altered the theme of proof in relation to the jeans specimen and the photographs. The evidence was invoked already in the District Court. However, solely in support of that H&M's &-jeans falls within the scope of protection of G-Star's copyright to OriginalElwood. Even though this constitutes a limited widening of the theme of proof, the alteration cannot be considered as new evidence within the meaning chapter 50, section 25, third paragraph of the Swedish Code of Judicial Procedure. Accordingly, H&M's claim that G-Star's invocation of the altered theme of proof shall be regarded as new evidence, and thereby dismissed, should be rejected.

Has G-Star shown that OriginalElwood meets the required level of originality and is protected by copyright?

The work, which G-Star in the current case claims copyright to and invoke as ground for its infringement action, consists of the following facts according to G-Star. A pair of jeans created by Pierre Morriset in the year of 1995 or 1996, named Elwood, with five particularly invoked design elements. The invoked design elements are the following ones: kneepads, horizontal seams above the knee on the back of the jeans, diagonal seems extending from the hip to the crutch on the front side of the pants, horizontal parts and seems placed on the backside at the far bottom of the legs of the pants and a circle shaped seem on the back part of the jeans.

The question of whether the required level of originality is met is a matter of legal assessment of whether the description of the work, according to the facts being invoked, meet the required level of originality and distinctive character stipulated in the Act (1960:729) on Copyright in Literary and Artistic Works and case law. If the facts invoked regarding the appearance of the work are not admitted by the defendant, as in the current case, the party claiming copyright protection – in the current case G-Star – must prove how these facts manifest themselves so that the Court is able to

make an overall assessment of whether the claimed work meets the requirements for copyright protection.

Initially, the Court of Appeal states that the facts invoked by G-Star as ground for its claim as description of the work are general and indistinctly stated. The same applies to the five design elements that are described to a limited extent, but in an overall manner. E.g., it is not stated in detail what the kneepads looked like, what their measures were or what sort of stitches the seams were constructed of, nor was there any detailed description of what the circle shaped seam on the back part looked like.

Regarding the evidence which G-Star has invoked to demonstrate more precisely what the jeans with the five particularly invoked design elements looked like, G-Star has claimed that a pair of jeans, which the company has submitted to the case (file exhibit 33 of the District Court), constitute a specimen of OriginalElwood and that a number of photographs (file exhibits 2-7 and 30 of the District Court) show the same specimen. G-Star has claimed that this evidence show what the five distinctive and particularly invoked design elements looked like on OriginalElwood.

H&M has denied that the submitted jeans (file exhibit 33 of the District Court) constitute a specimen of OriginalElwood as well as that the submitted photographs (file exhibits 2-7 and 30 of the District Court) show a specimen of OriginalElwood and that the jeans and photographs would demonstrate what the five invoked design elements on Original Elwood looked like.

Apart from the submitted jeans specimen and the above mentioned photographs, G-Star has also invoked other evidences to show what the work looked like in support of that OriginalElwood meets the required level of originality. In summary, the evidences in question are the following. Witness statements from Pierre Morisset and Karl-Heinz Müller, photographs of other jeans which, according to G-Star, include the same design elements as the original work but are nonetheless not copies of the original work, judgments from other countries, a biography about Pierre Morisette, articles, excerpts from a book and pictures.

The question is then what appears from the invoked evidence regarding the facts which according to G-Star constitute the work.

In the witness statement from the stated creator, Pierre Morisset, he claims that he created the design for a pair of jeans known as Elwood in August 1995. He also claims that the jeans included the five design elements, which in the witness statement are described in about the same overall manner as in the ground for the action in the case. In the witness statement there is nothing that refers to the jeans specimen being invoked in the case (file exhibit 33 of the District Court), which G-Star alleges is a specimen of OriginalElwood, nor to the invoked photographs (file exhibits 2-7 and 30 of the District Court), which the company alleges show the specimen. Nor does the remaining evidence invoked by G-Star show anything that certifies that the submitted specimen and the mentioned photographs constitute or show a sample of OriginalElwood. Therefore, the conclusion of the Court of Appeal is that G-Star has not proved that the submitted jeans specimen (file exhibit 33 of the District Court) or the photographs (file exhibits 2-7 and 30 of the District Court), which allegedly shows the specimen, constitute or show what OriginalElwood looked like, including the five particularly invoked design elements. Nor is there anything in the remaining evidence invoked by G-star that shows how the facts, invoked by G-star, in relation to OrginialElwood were expressed.

The conclusion by the Court of Appeal is therefore that an assessment of the facts, which G-Star has invoked constitute OriginalElwood – including the five design elements – leads up to the conclusion that the work, in the manner being alleged by G-Star, does not meet the required level of originality. Accordingly, the work invoked by G-Star, in the manner claimed by G-Star, does not have copyright protection. In its assessment the Court of Appeal takes into consideration that G-Star, against the denial of H&M, has not succeeded in proving in detail what the five particularly invoked design elements on OriginalElwood looked like.

Already by the now stated reasons by the Court of Appeal, G-Star's action should be dismissed and the judgment of the District Court be confirmed. In the light of this, there is no reason for the Court of Appeal to otherwise consider the merits of the case.

Legal costs

The outcome of the case means that G-Star should be ordered to reimburse H&M for its legal costs in the Court of Appeal. The Court of Appeal considers the claimed amount to be reasonable.

When it comes to the claim for joint and several liabilities for the counsels of G-Star regarding legal costs, the Court of Appeal makes the following assessment. The Court states that it requires that the counsels have caused H&M's costs through negligence or carelessness in order for the joint and several liability to come into question; see chapter 18 section 6 and 7 of the Swedish Code of Judicial Procedure. The regulation refers to unfounded objections which have led up to costs. The Court of Appeal does not consider that the counsels' actions in the current case have been neither negligent nor careless. Thus, the counsels cannot become liable to pay compensation. Therefore, H&M's claim in this regard should be rejected.

HOW TO APPEAL, see enclosure B

The appeal should be submitted no later than 2014-12-04.