

4-17-2012

DC Comics Sues Gotham Garage Over Replica Batmobiles

Jeff Kettle

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/ipbrief>



Part of the [Intellectual Property Commons](#)

Recommended Citation

Kettle, Jeff (2012) "DC Comics Sues Gotham Garage Over Replica Batmobiles," *Intellectual Property Brief*: Vol. 3: Iss. 1, Article 4. Available at: <http://digitalcommons.wcl.american.edu/ipbrief/vol3/iss1/4>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Intellectual Property Brief by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

DC Comics Sues Gotham Garage Over Replica Batmobiles

Keywords

copyright, licensing, batman

DC Comics Sues Gotham Garage Over Replica Batmobiles

by Jeff Kettle

Editor's Note: The following blog post was published on www.ipbrief.net on June 27th, 2011.

Batman: "Better put five cents in the meter."

Robin: "No policeman's going to give the Batmobile a ticket."

Batman: "This money goes to building better roads. We all must do our part."

Last month, DC Comics, owner of the "Batman" brand, sued Orange County, CA based Gotham Garage for the "willful manufacture, promotion, display, distribution, offer for sale and sale of unlicensed and counterfeit products bearing the DC comics' copyrights and trademarks" for "producing, selling, offering for sale, renting and distributing unlicensed and counterfeit . . . BATMOBILE vehicles . . ."

Apparently Gotham Garage has been creating replica Batmobiles for a while, which look almost identical to the cars from the TV shows and movies, and bear the logos and marks of Batman and the Batmobile. There has been some chatter about whether or not DC Comics can claim infringement over the Batmobile when, in fact, the Batmobile was created by George Barris by modifying a 1955 Lincoln Futura. In support of this argument, some have brought up a trademark infringement suit between Carrol Shelby, the designer of the "Cobra," and a replica manufacturer "Factory Five" in which Shelby claimed that the replicas being sold infringed on his ownership of the Cobra design. The court ruled against Shelby's trademark claim, stating that the Cobra design was not his property and that because he did not have an active role in the marketplace, his proper method of protection should have been a design patent or copyright.

The Shelby case can clearly be distinguished from the current case. First off, DC Comics is very much a market participant, and bringing a trademark claim makes sense for their business interests. Additionally, DC Comics also has many copyrights and trademarks that are applicable to the claimed infringement. Finally, the court in the Shelby case claimed that there was no actual confusion between Shelby's Cobra and the replicas because the population did not associate Shelby with the Cobra. Here, there is clear confusion between Gotham Garage's exact replicas

of the Batmobile and the Batmobile interests owned by DC Comics.

Nevertheless, this issue goes beyond an exact replica of a vehicle used in a movie. Even if it can be argued DC cannot protect the replication of the 60s Batmobile deriving from the Lincoln Futura, the vehicle itself clearly contains several registered trademarks. Additionally, trade dress has been used in the past to protect the overall design of a vehicle, as in the case of the FERRARI 365 GTB/4, which was protected against duplication in the form of a toy car.

Looking at the requirements for a trademark claim, DC Comics has used their marks in interstate commerce, the marks are clearly distinctive with well-established secondary meaning, and the marks were blatantly used by Gotham Garage which would no doubt cause costumer confusion using the Sleekcraft elements for consumer confusion. It seems that at a minimum the replica cars would have to be produced without the registered marks.

The use of copyright can assist in this matter. Because copyright cannot have a utility element, it can only cover the expressive qualities of the object. Thus with copyright alone, DC Comics cannot prevent the entire reproduction of a working car, but only the sculptural or expressive elements that can be separated from the useful elements. The interesting question here is how much of these non-useful design elements actually belong to DC, and how much belong to the original Lincoln Futura? If DC Comics can prove that the expressive elements are separate from the functional characteristics, and they are independent of the Lincoln Futura, it will be much easier to prove infringement using copyright.

It seems, from a non-legal standpoint, that DC Comics should be able to fully protect its creations. But which IP protections will be used? And to what extent will the cars be protected? Tune in for future updates: same bat-time, same bat-channel!