Kluwer Copyright Blog

Precisions of the Belgian Supreme Court on the presumption of transfer to the employer of patrimonial copyrights in a program created within an employment relationship.

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Bankruptcy brings always its share of bad surprises, and it usually gets dodgier when intellectual property is involved… In this post, we propose a review of a decision of the Belgian Supreme Court illustrating this observation in the software development sector. We will start with the legal provisions applied by the Court and its decision to finally consider its consequences when applied to the facts of the case.

Article 2, §3 of the Directive 91/250/EEC (now 2009/24/EC) on the legal protection of computer programs provides that where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

This provision has been implemented under article 3 of the Belgian "software copyright" act of 30 June 1994 as a presumption of transfer to the employer of patrimonial copyrights to software developed by employees or statutory civil servants under the same conditions. When applicable, these copyrights are originally vested in the employee, but are presumed to have been immediately assigned to the employer.

In a decision of 3 June 2010, the Supreme Court of Belgium decides that this presumption does not apply to situations where a program is developed by the statutory manager of a limited liability company. The Court explains that such presumption is an exception to the main rule stating that copyrights transfer must be expressly provided. This automatic transfer provision is therefore to be narrowly construed. The Court hence quashes a judgment of the Court of appeal of Ghent, which decided that the copyrights to software developed by a manager were transferred to its company, even though all parties agreed that the manager was not bound to the company by an employment contract and no other written agreement provided for such transfer.

The Supreme Court also rejects the argument that, alternatively, as the manager was acting in the name and on behalf of the company, and given that the software has been developed according to the corporate purposes of the company, the software has to be considered as one of its assets. The Court reminds on this regard that under Belgian law, copyrights always vest first in physical persons, namely the actual creators of the works. One therefore cannot bypass the actual physical person(s) who created the software and consider a company to become the immediate, first and original owner of copyrights to a program.

This reasoning in law is questionable. By trying to bend the law and extending the scope of the presumption, the Court of Appeal made a mistake. The presumption indeed only applies to

employees and civil servants under certain conditions. A freelance manager does not fit in one of these two categories and is thus protected by general copyright law: no written and express agreement, no transfer.

Considering the facts of the case, one can however understand why the Court of Appeal leniently tried to apply the presumption. The litigation actually started with a cease and desist claim lodged by the manager against entities that bought the software from his company after its having been declared bankrupt. The defendants pointed out that, if this claim was upheld, it would mean that the court would endorse a situation where somebody could incorporate a company, manage it as a freelance manager, put it into the debt, and finally leave the wreck, taking with him the most important asset. However, by quashing the decision of the Court of Appeal, it is our opinion that the Supreme Court did not endorse any unfair situation but just applied copyright law strictly and squarely. Indeed, it seems that at the end of the day, the solution to the striking unfairness of the case is more likely to be found in corporate law principles, rather than in naturally author-protective measures such as copyright law.

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