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Belgian Supreme Court: against the tide of the CJEU's case law on "originality"?

Philippe Laurent (Marx, Van Ranst, Vermeersch & Partners) · Tuesday, March 6th, 2012

On 26 January 2012, the Belgian Supreme Court decided to quash an appeal decision deeming that "when requiring that a work must show the stamp of the author's personality in order to benefit from copyright protection, the judges of appeal do not validate their decision in law". According to the Supreme Court, a literary or artistic work is protected by copyright on condition that it is original in the sense that it is the author's own intellectual creation, and it is therefore not required that the work carry the stamp of the author's personality. One should stress that such decision is all the more surprising that the "stamp of the author's personality" can be considered as having been the traditional Belgian originality criterion for decades.

It seems that the Court allowed itself to be influenced by the arguments of the claimant, which were based on a strict interpretation of the Infopaq Case (C-5/08) and a word per word analysis of the since then generalized standard: "own", "intellectual", and "creation". The claimant alleged that the appeal court was wrong to take a decision on basis of a "personality stamp" criterion without even referring to the established legal terms.

Has the Supreme Court been bluffed by a mere wordplay?

One could indeed wonder whether the Supreme Court has taken into account the CJEU's latest case law, and more specifically the Painer Judgement of 1st December 2011 (C-145/10), which was issued nearly two months before the Supreme Court's decision.

As a reminder, recital 17 of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights provides that "*a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account*".

In its Painer Judgment, the CJEU uses that recital to create the link between the two compared criteria by deciding that an intellectual creation is an author's own if it reflects the author's personality, which is the case when, by making free and creative choices, the author stamps the work created with his 'personal touch' (§§ 87 to 92).

This "generic test" has been further confirmed in the recent Football Dataco Case C-604/10 (§38): the "*criterion of originality is satisfied when,* […] *its author expresses his creative ability in an*

original manner by making free and creative choices […] *and thus stamps his 'personal touch'*".

If one considers that such reasoning of the CJEU creates an equivalence between the "own intellectual creation" and the "personal touch stamp" criteria, one could indeed wonder what the Supreme Court is doing and eventually deem its decision contrary to the current status of European Law as harmonised by the Court of Justice.

Conversely, maybe the Supreme Court is particularly keen on rigorously applying the inflexible rules of propositional logic. Indeed, the CJEU seems to have so far only presented its reasoning as a *modus ponens*: if the author has stamped the work with its personal touch, then the criterion of originality is satisfied (p ? q). In such rule of inference, denying the antecedent is a formal fallacy: if the author has not stamped the work with his personal touch, one cannot validly (from a strict logical point of view) conclude that the work is not original for this sole reason. This also would imply, again from a strict logical point of view, that the two criteria are not equivalent and that there would still be some leeway left – at least theoretically – for finding originality in other circumstances than the "personal touch stamping"…

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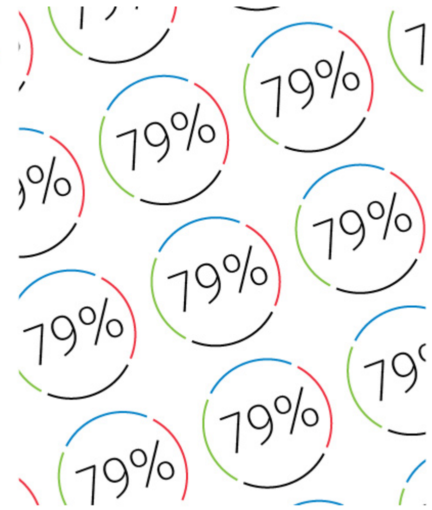

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