

Client Alert

Belgian Supreme Court Rules: Creative Use of the Law is Insufficient Ground for Lawyers to Claim Copyright Protection on Work Product

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In a recently released ruling (of June 25th), the Belgian Supreme Court confirmed a decision of the Court of Appeal of Ghent relating to the possibility of copyright protection for lawyers' work product created within the framework of their professional activity.

The matter was triggered by the Belgian tax administration's rejection of an inventive tax arrangement designed by a Belgian lawyer. The lawyer in question had argued that the works he had created while engaged in his professional activities, such as written legal opinions, trial briefs, draft contracts, letters and restructuring acts, are protected by copyright. In exchange for the transfer of his copyrights to his law firm, the lawyer received royalties. In Belgium, royalties are subject to a more favorable tax regime than personal income tax. The tax administration, however, did not accept the qualification of that income as revenue from copyrights. Since parties could not agree, the case ended up in court.

After the arguments put forward by the lawyer were not accepted by the first instance court, the case was brought before the fiscal chamber of the Court of Appeal of Ghent. The appeal judge stated that not every intellectual work is automatically protected by copyright. Only when a work is proven to be original, will copyrights come into play. This means that the work must be an expression of the personality of the author. For that to happen, according to the appeal judge, the author should be able to make free and creative choices.

The Court of Appeal took an original approach when applying these principles to the case. It ruled that the expert skills required of a lawyer were as such not sufficient to confer copyright protection for professional works produced by the lawyer. Even more, the activities of a lawyer, according to the appeal judge, are governed by so many rules that freedom and creativity would be extremely limited. The court explained that a lawyer has to apply the existing legislation and when doing so, the lawyer must moreover respect the applicable professional ethics rules. Furthermore, the factual elements that must be taken into account when advising clients are also not a result of free and creative choices. These facts are simply presented to the lawyer. According to the Court of Appeal of Ghent, a lawyer does not normally create intellectual works that result from free and creative choices, so that a lawyer's work is typically not copyright protected. If there are no copyrights, these also cannot be transferred, let alone that royalties should be paid for them.

However, the appeal judge did not close the copyright door completely. The court emphasized that a lawyer always has the option to provide concrete and effective evidence of the opposite. Since such evidence was not produced by the lawyer in question, the Court of Appeal ruled in favor of the Belgian tax administration.

This decision of the Court of Appeal of Ghent was appealed by the lawyer before the Belgian Supreme Court. In its recent ruling, the Supreme Court emphasized the difference between the view that a lawyer did not create

works protected by copyright versus the view that a lawyer, by definition, cannot create copyrighted works. According to the Supreme Court, the appeal judge did not decide that a lawyer cannot create copyrighted works, but only that the lawyer in question had failed to prove that his works fulfilled the requirement of originality. The appeal was therefore dismissed.

With this ruling, the Belgian Supreme Court has clearly left this fiscal backdoor open. However, it also left plenty of room for debate about the burden of proof that lawyers have to meet for their work product to qualify as copyright-protected creations. Given the favorable tax regime that is connected to such a qualification, we expect this debate to continue between the tax administration and lawyers, but on the basis of much more detailed evidence about the creative approach taken by lawyers when defending the interests of their clients.

If you are interested in further discussing this alert or in obtaining a copy of the discussed ruling, feel free to contact the authors directly.

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