Kluwer Copyright Blog

Red light for Sabam's pricing system for Internet access providers: up- and downstream IAP traffic do not constitute communication or making a work available to the public

Rosario Debilio (CRIDS) · Wednesday, May 6th, 2015

On the 13th March 2015, the President of the Brussels French speaking Court of First Instance pronounced a judgment to the detriment of Sabam, an important collective management organisation in Belgium. In 2011 Sabam decided to claim a fee from Internet access providers in exchange for a licence which allows these providers to communicate copyright protected works to the public (see here). I shall first discuss the control on the pricing system set up by Sabam. I shall then study how electronic communication law's notions were used to define the scope of this pricing system. A final discussion will be dedicated to the rest of the procedure in this case setting the Belgian State against Sabam.

1. Control of the pricing system set up by Sabam

Sabam is an organisation which manages the rights granted by Belgian copyright law to authors of works included in Sabam's catalogue, at the request of the rightholders. In the case at hand, Sabam intended to permit Internet access providers to communicate protected works to the public or to make those works available to the public. Sabam asked, in exchange for this permission, for a payment amounting to 3.4% of the annual subscription fee paid by Internet users to Internet access providers.

In conformity with the provisions of the Belgian Economic Law Code, this pricing system was subjected to a control carried out by the Control Service, part of the Federal Public Service Economy. The Control Service is entitled to issue a warning to a management organisation and to put it on notice to rectify a failure noted. That is what the Control service did *in specie*.

The failure noted was not rectified by Sabam in the period granted by the Control Service. The Minister of Economy then filed an action for an injunction on the basis of the provisions of the Belgian Economic Law Code in order to bring an end to the pricing system applied to Internet access providers.

The President of the Court of First Instance followed the Belgian State and ruled the aforesaid pricing system illegal because it cannot be based on article XI.165 of the Economic Law Code. This provision grants the author of a work the right to allow its communication to the public by any

process, including by making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.

The President of the Court of First Instance rejected Sabam's characterisation of making a work available to the public. Indeed, the work has to be available to a public on one of its members' demand. The Court of Justice of the European Union has had the opportunity on several occasions to specify the extent of the communication right. The President of the Court of First Instance referred to its case law in a classic analysis of the communication right, as detailed below.

- First, the availability of the work is protected as such without it being required that a member of the public actually perceives the work. Indeed, it must merely be possible for this person to perceive the work by any instrument transmitting, by signs, sounds or images, covering a means of communication such as display of the works on a screen (see, to this effect, *Football Association Premier League and others*, par. 192). This access must be made possible regardless of the means or technical process used (*Football Association Premier League and others*, par. 193 and *OSA*, par. 25). It is thus not determinant whether the public uses this chance or not (*Svensson and others*, par. 19).
- Then, making a work available to the public requires a public. The case law teaches that the notion of *public* targets an indeterminate number of persons in general, that it is not restricted to specific individuals belonging to a private group (*SCF*, par. 85).The notion of *public* also entails a fairly large number of people, which excludes from the concept groups of persons which are too small, or insignificant (*SCF*, par. 86).

The public is of course not present at the place of origin of the making available of the protected work (to this effect, *Football Association Premier League and others*, par. 200).

Additionally, authorisation has to be granted to communicate a work to a *new public*, that is to a public different from the public to whom the original act of communication of the work is directed (*SGAE*, par. 40; *Football Association Premier League and others*, par. 197 and 198; *Airfield and Canal Digitaal*, par.72; and *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, par. 38).

This also holds true for a communication made by a specific technical means, different from those used previously (*ITV Broadcasting and others*, par. 39; *BestWater International*, par. 14). When a communication is made according to the same technical means, the criterion of *new public* must be met in order to recognise the right to allow this communication (*Svensson and others*, par. 24).

- Finally, the access to the work must be on demand by a member of the public from a place and at a time individually chosen by him or her (article XI.165 of the Economic Law Code).

It should also be added that according to recital 27 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, mere provision of physical facilities for enabling or making a communication does not, in itself, amount to communication within the meaning of this directive.

The President of the Court of First Instance formulated two hypotheses that she analysed in the context of copyright law. The first consists of seeing the activities of an Internet access provider as falling under the mere provision of physical facilities referred to in the recital 27 of the Directive 2001/29/EC. These acts do not then lead to royalty payments on the part of these providers.

The second hypothesis consists of attempting to discern from the activities of an Internet access provider, acts of communication to the public additional to the "original" communication to the public carried out by a third party content provider (private individual Internet user or professional content provider). The President of the Court of First Instance ruled on this second hypothesis as follows: on the one hand, the communication of a work by an Internet user to an Internet access provider does not constitute an act of communication to the public within the meaning of copyright because the aforesaid provider alone does not constitute a member of the public in relation to the communication made by this Internet user. On the other hand, the communication of a work to subscribers of an Internet access provider does not constitute a communication to the public within the meaning of copyright by the Internet access provider, but rather by a third party, other than this provider.

For these reasons, Sabam was not entitled to set up a pricing system such as that at issue.

2. Notions of electronic communication law to define the scope of the pricing system

Sabam intended to claim royalty payments only from certain companies, namely those companies which enable the upstream traffic and the downstream traffic. According to Sabam, the conveyance of signals which convey information from a subscriber to an Internet access provider in the upstream traffic constituted making a work available to the public. As for the conveyance of signals which convey information from an Internet access provider to one of its subscribers in the downstream traffic, according to Sabam this constituted communicating a work to the public. Sabam's analysis was thus focused on the criterion of the public purpose of the conveyance.

In response to this analysis, the President of the Court of First Instance considered that the activities subjected to the pricing system set up by Sabam consisted of providing electronic communications services to subscribers.

Although the President of the Court of First Instance referred to the notion of *electronic communications services* defined by the Framework Directive (Directive 2002/21/EC) within its article 2, c), as well as to the notion of *subscriber* defined by the same directive within its article 2, k), the regulatory consequences in electronic communications law were not at issue in this case. Within the meaning of electronic communications law, an electronic communications service means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and conveyance services in networks used for broadcasting. However, it excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

The service in question may be provided to the public or not. It applies when it is provided to a subscriber, that is, within the meaning of electronic communications law, any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services. The regulatory consequences of this distinction were not at issue either.

The judgment will remind the readers of recital 10 of the Framework Directive (Directive 2002/21/EC) and recital 20 of the Authorisation Directive (Directive 2002/20/EC). According to

the first, the same undertaking can offer both an electronic communications service, such as access to the Internet, and services not covered under the Framework Directive, such as the provision of web-based content. According to the second, the same undertaking (for example a cable operator) can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under the Authorisation Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on this undertaking in relation to its activity as a content provider or distributor. Sabam attributed to the Internet access providers such activities not covered by the aforesaid directives. The President of the Court of First Instance did not follow Sabam on this point. The acts of "original" communication carried out by the content providers, not referred to in Sabam's pricing system, could not be identical, according to the President of the Court, to those attributed by Sabam to the Internet access providers.

3. What follows?

Even though the President of the Court of First Instance assessed that an Internet access provider does make available to its subscribers content in respect of which it carried out the "original" communication to the public, the aforesaid provider did not initiate this communication. Indeed the President highlights in the judgment that the Internet access provider is an intermediary between a third party, originator of the original communication to the public, and his or her public.

The judgment does not contain discussion in relation to the temporary reproduction exception. One of the hypotheses included in this exception is acts of reproduction:

- which are transient or incidental,
- which constitute an integral and essential part of a technological process,
- whose sole purpose is to enable a transmission in a network between third parties by an intermediary of a work or other subject-matter to be made; and
- which have no independent economic significance (article XI.189, par. 3, of the Economic Law Code).

No question was referred to the Court of Justice of the European Union for a preliminary ruling within these proceedings, the President of the Court of First Instance having judged that the Court of Justice has ruled previously on the point of law at issue in a dispute on a different issue. It is the judgment *UPC Telekabel Wien* pronounced on an issue related to the nature of the measures which may be ordered against an Internet access provider in its capacity of intermediary referred to in article 8, par. 3, of Directive 2001/29/EC.

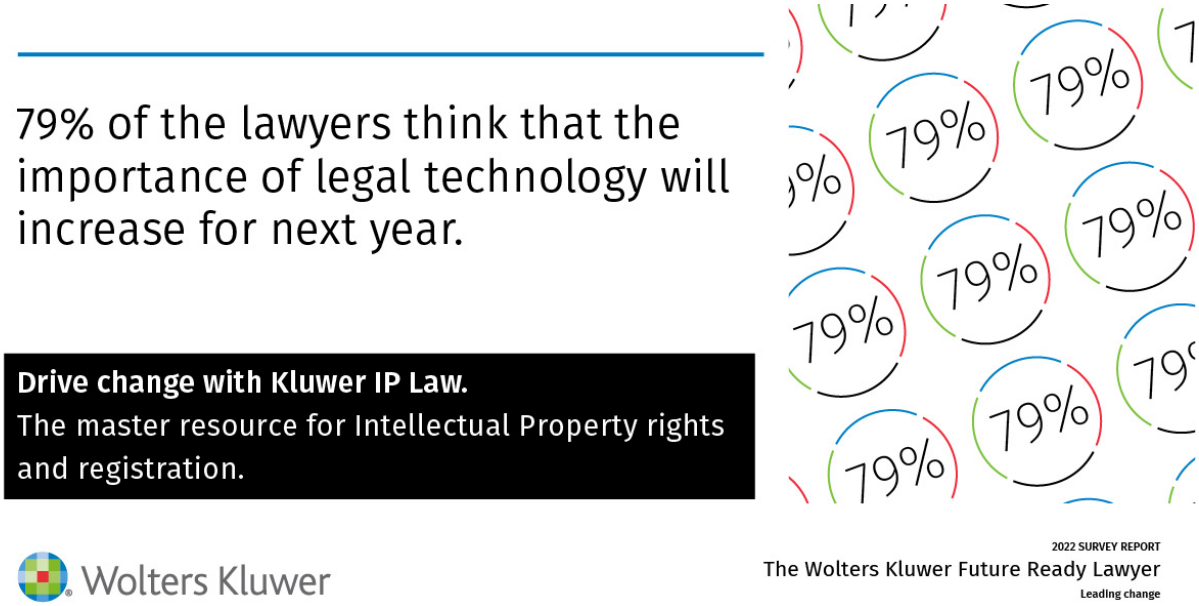
Sabam having indicated that it is intending to lodge an appeal (see here), the parties will have the opportunity to request that a question is referred to the Court of Justice for a preliminary ruling. However, the Brussels Court of appeal, like the Brussels Court of First Instance, is not compelled to refer such a question because only the supreme courts are bound to refer to the Court of Justice, according to the Treaty on the Functioning of the European Union. This confers this obligation within its article 267, subparagraph 3, on the national courts against whose decision there is no judicial remedy under national law, i.e. in Belgium, the Constitutional Court, the Court of cassation and the Council of State. The last word is still some way off. Watch this space…

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Wednesday, May 6th, 2015 at 12:00 pm and is filed under Belgium, Case Law, Collective management, Communication (right of), Digital Single Market, Making available (right of)
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.