Kluwer Copyright Blog

Unwaivable equitable remuneration rights for performers: disruption or balancing of interests?

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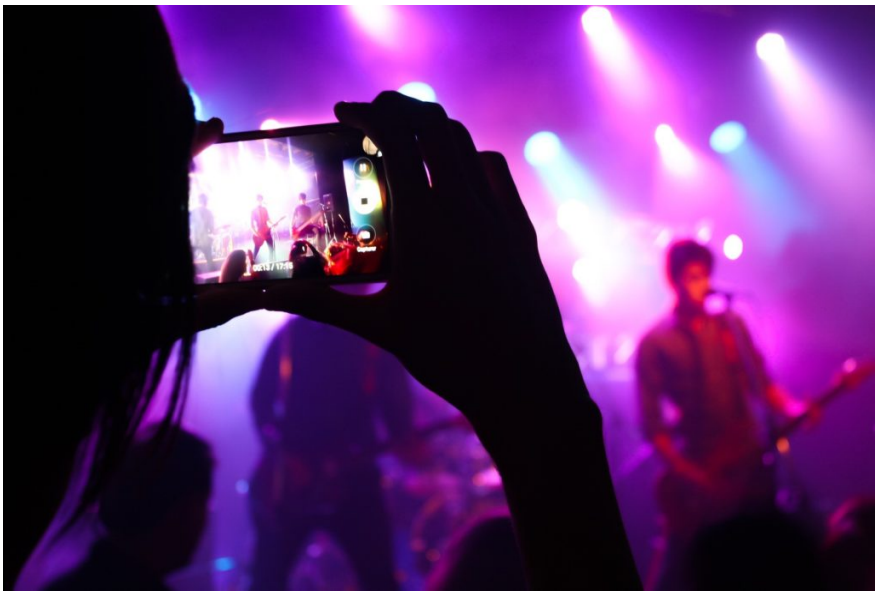

In an article recently published in the JIPITEC (and available here), I examined parts of the ongoing copyright reform process drawing on a case study on the Fair Internet for Performers Campaign. This process has been characterised by strong discourses centred on 'fairness'. Using discourse analysis, I found the concept of fairness to be mostly dependent on the stakeholders' relative bargaining power and framed by neo-liberal thought.

What follows expands on this article and responds to recent academic commentary on the unwaivable equitable remuneration rights demanded by the Fair Internet for Performers Campaign (henceforth FIPC).

The FIPC demands that performers receive collectively managed payments for the online use of their performances. Currently, performers have an exclusive right that is commonly signed-off in standard contracts. With the new addition to the copyright system, digital service providers such as Spotify would have to pay a blanket licence fee to use the performances. This is not a new idea: radio broadcasters have remunerated performers in this way for over two decades. Indeed, digital service providers have been remunerating authors and record companies in this way for much longer. In other words, it is a well-understood payment mechanism to remunerate content providers.

The legal tool proposed is an unwaivable equitable remuneration right in addition to the existing exclusive making available right (InfoSoc Directive Art. 3). The coalition demands that the right be unwaivable in contract so that performers have a right to remuneration from online use regardless of any signed contract terms. It is a tool that is far from perfect, mainly because of the complexities

related to working out how much every performer is due, but one that has been considered by the coalition representing over 500,000 musicians behind this campaign to be the preferred option.

In my JIPITEC article, I argued that the controversy surrounding this campaign is related to bargaining power. Put simply, stakeholders with low bargaining power want a change that reflects their contribution to the performances being exploited online. In contrast, stakeholders with high bargaining power are happy with the way things are and so would naturally oppose any change that involves reducing their wealth or indeed bargaining power.

This is an intuitive finding, one that could also lead to intuitive solutions. Considering that those with (well-acknowledged) low bargaining power are in the majority, this majority should be listened to. But far from it. The fact that the majority wants a change in the form of collective remuneration for online use of its performances doesn't mean that the change it proposes is the best one, and some academics have made this point.

In an independent study commissioned by the JURI committee, the authors admit that there is a bargaining power problem, but that this problem, of a structural nature, will not be easily rectified by legal intervention alone. They therefore demand an impact analysis before introducing such a 'potentially disruptive proposal by amendment'.

Specifically, they argue that 'there is a widely held assumption that granting rights, and regulating the transfer of these rights (ex-ante and ex-post), will inevitably improve the financial position of creators'. They argue that this is a mistake:

Whenever income is derived from a right, this is a result of the bargaining outcome between parties contracting over material protected by copyright law and demand in the market for this material. The right itself does not produce any money (see here at 53).

I agree with the authors that bargaining power and demand for the product are the two main indicators for the income level deriving from the exploitation of a copyrighted work. But the statement ignores the fact that the bargaining outcome significantly changes in different situations: contractual negotiations between individuals and their powerful contractors over exclusive rights for one performance are very different from a negotiation between large collective management organisations (CMOs) and those same contractors over collectively managed equitable remuneration rights of a large repertoire. In the second scenario, negotiation is carried out on a level playing field; in the first there are clear losers. In addition, negotiation between large industry bodies is often overseen by the Copyright Office or similar government body created for such events, who will listen to both parties and help mediate an equitable solution.

With natural caution, the study's authors demand that the EC makes it a priority to commission an independent impact study on equitable remuneration rights. Note that this is not the first time that an independent EU government-commissioned study makes this recommendation; to my knowledge there is at least one other such study. So, within the neoliberal regime, how likely is it that the EC will commission this much-needed independent study anytime soon?

As I argue in my JIPITEC article, the EU reform process is embedded in neo-liberal values. This means that it is more likely to favour liberal market transactions and support entrepreneurship at the expense of more socially-minded endeavours such as collective rewards. This being the case, it is understandable that collective solutions are overlooked and, where studies exist, they focus on contractual transactions (see e.g. here, here and here). There is further evidence from previous

copyright reforms that academic studies that criticise major corporations are dismissed (see here and here).

Then there is the difficulty of developing these studies in the first place. Independent studies that involve large amounts of qualitative data from individual musicians and difficult-to-access quantitative data from major corporations and CMOs are expensive and time-consuming for both academics and musicians' associations, which are typically strapped for cash. Indeed, quantitative data that could shed light on musicians' remuneration for radio are difficult to access because of problems with transparency, which the recent CRM Directive and article 14 of the current proposal attempt to address.

More to the point, insisting on independent studies ignores the fact that there are well-functioning precedents. According to Gervais, licences for secondary use for authors have been around since at least the nineteenth century. For producers, these were introduced early in the twentieth century. In the UK, the BBC begun paying record companies licence fees for the use of their sound recordings as early as 1924, when the BBC was only a few years old (see here). Although outside the legal system, the CMO for record labels and the musicians' union had agreements in place to share proceeds from secondary use by radio stations and retail shops, setting a precedent for what became the equitable remuneration right for communication to the public. Now, within the different copyright systems around the world, these agreements are still in place.

This study explores the German position (pp.64-6). Here, they note the complexities of the legal tools drafted in article 32 and 36 of the German Copyright Act, but that it otherwise supports the principle of equitable remuneration, quoting a statement by the German Constitutional Court (in a case upholding the constitutionality of Article 32):

"The legislature did not intend the reform to protect authors merely in cases of the blatant abuse of negotiating power by the exploiters, but to create legal arrangements for bringing about a general and comprehensive *balancing of interests* between authors and exploiters with regard to remuneration [italics are mine]".

That said, it should be conceded that the legal tool proposed by the Fair Internet for Performers Campaign is far from perfect. First, it implies a further expansion of the copyright system, which copyright scholars generally dislike for good reason – mainly because such expansion generally occurs at the expense of the public interest. But as long as the copyright system (as it is) is the main mechanism to regulate the creative industries, the FIPC's proposal is a reasonable and viable solution. Alternatively, principled opposition to expansion of the copyright system risks asking the stakeholder with the least bargaining power to absorb all the criticisms of copyright, while allowing those with the highest bargaining power to push on with *and* get their requests.

Second, CMOs have been under sustained scrutiny for a large part of the last century. The relationship between musicians and these large monopolies has been tense throughout the twentieth century, to say the least. Further, as I argue in another article currently under review, recent regulation of this relationship (the CRM Directive) is itself regulated through the same neoliberal lens. But, as I also argue, studies on CMOs, both independent and developed by musicians, have repeatedly demonstrated that CMOs are the preferred solution to the problem of mass licensing (see e.g. here, here and here).

So, what is the way forward, considering the reform is well underway? Waiting for another

copyright reform in ten or twenty years, means ten or twenty years of lost income for performers whose performances are used online. Leaving a situation that clearly requires change unchanged for a lack of independent studies is disingenuous, when the lack of such studies itself reflects deeply rooted structural inequalities.

I have made three points. First, that it is key to distinguish exclusive rights from collectively managed equitable remuneration rights. Ignoring the differences is more likely to help those with high bargaining power opposing equitable remuneration rights than those with low bargaining power in need of protection from powerful contractors. Second, I argued that there are structural obstacles to the delivery of independent studies on the impact of collectively managed rights. I suggested that this is because the processes of copyright reform operate within a neoliberal regime that privileges those with the highest bargaining power at the expense of those with the lowest. Third, although independent studies are wanting, there are plenty of precedents that suggest that the introduction of an unwaivable equitable remuneration right for the online use of performances is unlikely to disrupt the market beyond some just balancing of interests. More to the point, it should be remembered that change is clearly needed and wanted by a large majority of industry stakeholders, namely the content producers on which the entire industry depends.

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