

Kluwer Copyright Blog

Collective rights management and abuse of dominance: Court of appeal of Brussels applies the CJEU principles in a major Belgian festival case

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Background

On 8 September 2022, the Brussels court of appeal delivered a long-awaited judgment in a case between the collective management organisation “Belgian Association of Authors, Composers and Publishers” (“SABAM”) and a wide array of music festival organisers in Belgium, the overarching Federation of Music Festivals in Flanders (“FMFF”) and British direct licensing company Pace Rights Management. The court of appeal was seized to decide whether SABAM abused its dominant market position with an increase of its royalty rates for festivals.

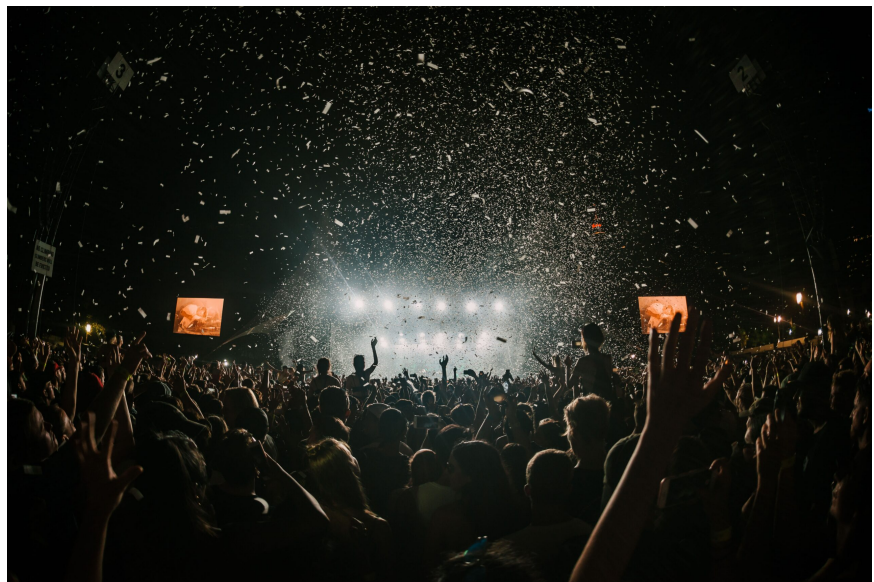


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The facts of this case date back to 2017, when SABAM increased the royalty rates owed by organisers of music festivals and concerts. SABAM applied a percentage to the gross receipts from ticket sales after deduction of certain costs or, alternatively, to the artistic budget (whichever amount was higher). It offered reductions of these basic rates, using a tranche-based system, to reflect the use of its repertoire: it charged 1/3 or 2/3 or 3/3 of the basic rate, depending on whether the festival organiser used less than 1/3, between 1/3 and 2/3 or over 2/3 of the SABAM repertoire

(the “1/3-2/3 rule”).

A significant number of music event organizers challenged the increase of the royalties and their calculation method before the companies court of Brussels, arguing that this constituted an abuse of dominance. In the first instance, the Brussels business court ruled in favour of the music festival organisers and FMFF (in a decision dated 12 April 2018) and SABAM was ordered to cease the application of the royalty rates that qualified as an abuse of dominance.

SABAM subsequently lodged an appeal against this judgment. The Brussels court of appeal first requested advice from the European Commission and then stayed the proceedings until the CJEU had issued its preliminary ruling in the similar case between SABAM and Belgian festival organisers Wecandance and Weareone.World (*SABAM*, C-372/19).

This earlier *SABAM* case resulted in a [settlement](#), hence the teachings of the CJEU decision in *SABAM* were not actually applied by the referring court. In the commented decision, however, the Brussels court of appeal repeatedly referred to the CJEU’s *SABAM* decision to motivate its findings concerning SABAM’s abuse of dominance.

This decision of the Brussels court of appeal is therefore the first major Belgian application of the CJEU’s *SABAM* ruling.

Analysis

The guiding principles of the CJEU’s SABAM ruling

Following a line of case law on article 102 TFEU and collective management organisations, the CJEU largely applied the principles of well-known cases such as *Basset v. Sacem* (C-402/85), *Kanal 5 and Tv4* (C-52/07) and *AKKA/LAA* (C-177/16).

In essence, the CJEU held that SABAM’s method of calculating royalties on the basis of gross ticket sales without deducting “non-music related costs” is not an abuse of dominance, unless the actual amounts of royalties based on SABAM’s rates to be paid by the festival organisers are excessive and unfair. A price is “excessive” if it does not have a reasonable relationship with the economic value of the services provided by the dominant undertaking (i.e. SABAM), which is for the national court to determine.

The CJEU offers various benchmarks for a comparative analysis, such as the prices previously charged by the dominant undertaking, prices it charged for other services or for different types of consumers, prices charged by other undertakings for the same or comparable services in other national markets (provided that such a comparison is made on a consistent basis using objective and verifiable criteria). The national courts should however bear in mind the “particular nature of copyright” and seek an appropriate balance between the interest of the composers (i.e. receiving remuneration for the use of their works) and that of users in using those works under reasonable conditions. The charging scheme should be fair for all parties, considering the economic value of the collective management service as such, the nature and scope of the use of the works and the economic value generated by that use.

In addition, the CJEU held that the tranche-based 1/3-2/3 rule was not sufficiently accurate. Any

CMO must take account of the number of works of its repertoire actually used in the royalties it applies. SABAM's 1/3-2/3 rule does so to a certain extent, but it is fairly imprecise and the national judge ought to verify whether more precise methods are available, in the light of the circumstances of the case, including the availability and reliability of the information regarding the use of the CMO's repertoire, and the existing technological tools. The national court should consider whether alternative methods exist to identify and quantify the use of the CMO's repertoire more precisely and whether these are capable of achieving the same legitimate aim (i.e. the protection of copyright holders' interests), without leading to a disproportionate increase in transaction and supervision costs.

Application of the principles by the Brussels court of appeal

The Brussels court of appeal sought guidance in these principles for its decision in the festival case that the 2017 increase of copyright fees was an abuse of SABAM's dominance.

SABAM is thus prohibited from implementing the royalty rate increase from 2017 and the 1/3-2/3 rule (to the extent this was necessary, after SABAM officially distanced itself from the 1/3-2/3 rule). SABAM was ordered to consider, to a reasonable extent, the portion of copyright protected music from its repertoire that was actually used and to identify and quantify this use in a precise way, when calculating the fees due.

The court of appeal did not assess the 1/3-2/3 rule in much detail. Following the first judgment of the companies court of Brussels in 2018, SABAM adopted more accurate tranches of 10% to reflect the actual use of its repertoire more precisely. The court of appeal understood from this change that SABAM had admitted to being capable of approximating more closely the actual use of its repertoire.

Furthermore, the court of appeal found an abuse of dominance when comparing SABAM's rates after the 2017 increase to its previous rates. SABAM had not offered a clear justification for the increase in royalty rates and how they maintained a reasonable relationship with its services (the fees are a percentage of the gross receipts and would have increased in any case with the receipts). In other words, SABAM could only increase the royalty rates if there was a corresponding change in SABAM's services that justified such increase. The court did not follow SABAM's arguments that the plummeting revenues from album sales had to be compensated (since authors are not able to increase their performance fees – unlike performers).

Interestingly, despite the suggestion of the Commission and the CJEU's case law, the court of appeal explicitly rejected the comparison of SABAM's rates to those of CMOs in other countries. SABAM had justified its royalty rate increase by pointing to the much higher rates applied by its peers in other EU countries (particularly Germany, France and the Netherlands), while the festival organisers turned to the rates in the UK and the US.

The court of appeal waved these comparisons away: the fact that royalty rates are higher in neighbouring countries does not mean that rates in Belgium are not excessive. Furthermore, the court noted that the CJEU did not clarify how a comparison with prices in neighbouring member states should work and, in any case, objective, relevant and verifiable criteria were not presented by the parties. A correct comparison would require that the exercise be made for each individual user on a homogenous basis. In any case, such a comparison would only deliver *prima facie*

evidence of excessiveness.

Further points of discussion: technological advancement

The most interesting point in the court of appeal's judgment relates to the duty of CMOs and users to accurately monitor the use of works belonging to the CMO's repertoire. While the 1/3-2/3 rule was considered too inaccurate, the question was then what role technology could play in quantifying the use of the SABAM repertoire and determining the copyright fees. The festivals expected SABAM to rely on such music recognition technology, while SABAM objected that the existing technical solutions are not sufficiently reliable (especially for live events) and entail additional costs for management and monitoring.

The court of appeal considered that the festival organiser has the burden of proving its claims that fewer works from the CMO's repertoire were actually performed, providing (digital) information – including from fingerprinting technology. On the other hand, the CMO must in any case determine the extent of the use of its repertoire and confirm whether it falls below the threshold used for calculating the royalty rates.

Depending on the outcome, the copyright fees should be reduced in favour of the festival organiser (if it uses less CMO repertoire than expected) or increased (where it uses more CMO repertoire than anticipated). SABAM's argument that the use of such digital fingerprinting technology would result in additional work was dismissed, the court pointing out that all parties have the duty to contribute to establishing the veracity of the reported events (“waarheidsvinding”).

Importantly, the court of appeal did not decide which technologies could be used to determine the actual use of the SABAM repertoire, nor how the costs of the use of the fingerprinting technology should be allocated. This is for the parties to negotiate.

Comment

The application of the known competition-copyright principles by the Brussels court of appeal is interesting in that the court explicitly finds that some elements of the calculation of royalty rates are not an abuse of dominance per se (calculating the fees on the basis of the gross receipt, refusal to deduct some costs), while other elements call for more caution on the CMO's end.

Firstly, CMOs are not prohibited from increasing their rates but they should be able to present a proper justification for doing so. The mere fact that authors are suffering income loss (due to technical or economic evolutions) is not sufficient, nor is the fact that CMOs in other Member States impose higher royalty rates.

Secondly, CMOs may adopt standard royalty rates for different types of exploitations – but they must apply a charging scheme that allows for corrections in function of the number of musical works of its repertoire actually performed. In accordance with settled case-law, their refusal to use alternative methods to identify and quantify the actual use of their repertoire more accurately may amount to an abuse of dominance, if such an alternative serves the same aim of protecting the authors' interests without leading to a disproportionate increase in the costs (transaction and

supervision costs).

In this case, the court of appeal initially seems to attribute the burden of employing fingerprinting technology to the users: festival organisers who claim a reduction of the basic royalty rate must provide the information supporting this claim. Upon closer examination and considering the dynamics between the CMOs and the users, this question is preceded by the question of the CMO's repertoire: a CMO may not claim copyright fees for the use of works that are not part of its repertoire. This means that it must prove for which portion of the works performed it actually has a mandate to claim remuneration. Downstream, beyond the collection of the remunerations, the CMO needs the statements of the actual use to distribute the remuneration among its members.

As the court of appeal observed, negotiations between the CMO and the (professional) user of its repertoire are unavoidable. Ideally, the parties agree on the most suitable method of identifying and quantifying the use of a CMO's repertoire – depending on the circumstances of each case, the typical use of works and the type of user. The CMO should indeed stay clear of a “one size fits all” approach, considering the diversity in the musical sector (ranging from international, commercial festivals to more experimental scenes) and the varied use of the CMO's repertoire. The parties should have a margin to agree on more or less tech-driven methods and use playlists in some cases or fingerprinting technology in others (considering the accuracy of such technology, its cost and the distribution of such cost among the parties).

Disclaimer: Crowell & Moring's Kristof Roox and Thomas De Meese represented Federatie Muziekfestivals in Vlaanderen VZW in these proceedings.

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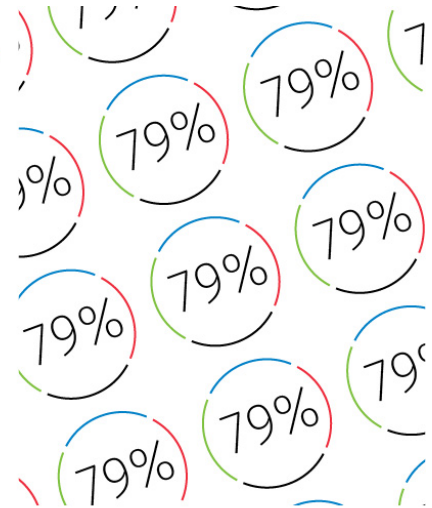
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