Kluwer Copyright Blog

Private copying levies, broadcasters and the principle of equal treatment – C-260/22 Seven.One Entertainment Group v Corint Media

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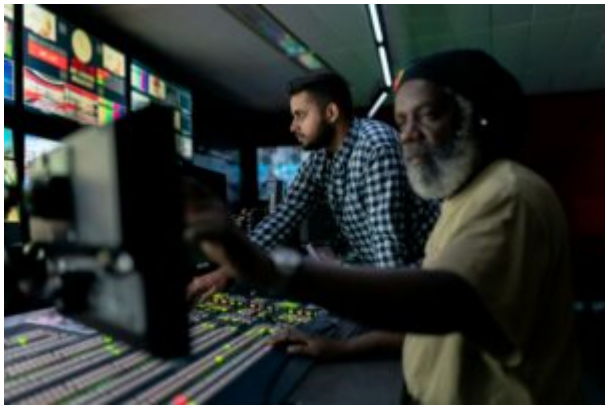

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In November 2023, the CJEU cast light on the right to fair compensation under the private copying exception harmonised by Article 5(2)(b) InfoSoc Directive and the thorny issue of whether broadcasters are entitled to it. This post considers this judgment. The big question is whether there's anything more to this seemingly mechanical judgment from the First Chamber than a mere statement of the obvious. It turns out that there's plenty.

Background

Based on a preliminary reference from Germany, the case has its origins in a simple contractual dispute between the operator of a TV channel (Seven.One) and a collective management organisation (CMO) that works for the benefit of private TV channels and radio stations (Corint Media). Under the contract, the CMO defends and enforces the rights of these categories of rightholders, including the right to receive fair compensation for reproductions carried out by natural persons under the private copying exception, which is harmonised by Article 5(2)(b) InfoSoc Directive. The problem is that under the German fair compensation regime (taking the form of private copying levies), broadcasting organisations are excluded. Hence the question, between the parties, whether there is anything for the CMO to collect (para 11).

But the issue before the CJEU is really a compatibility one between what Article 5(2)(b) requires and how it has been implemented in a Member State; more precisely, whether Member States may exclude particular categories of rightholders from the national system that is set up to meet the fair compensation requirement of Article 5(2)(b). This is a fundamental question of Member State prerogative and national copyright policy.

Excluding broadcasters as a category has logic to it – the fixation of a broadcast (a wired or wireless transmission) inevitably results in the fixation of sound or light (visual material), or both,

and becomes a sound recording or – to use the terminology of the InfoSoc Directive that seems to refer to an age old analogue storage technique rather than a cinematographic *work* – a film. Consequently, broadcasters, at least those that record their own transmissions, may be suitable to become holders of other neighbouring rights in their capacity as inevitable producers of sound or video recordings who are conferred a reproduction right by Article 2(c) and (d) and on that basis potentially be entitled to fair compensation instead (see also para 41 of the judgment). The multifaceted character of the activities undertaken by broadcasters is crystal clear to the Court (para 43). Nonetheless, broadcasters are recognised as a separate category of holders of a reproduction right in the InfoSoc Directive which is why clarity is rightly sought by the referring court.

Judgment and other pieces of the copyright puzzle

Compared to some judgments that involve sophisticated grammatical constructions when compatibility questions are at stake (such as C-463/12 *Copydan*), the judgment in this case at paragraph 53 is plain and simple. Essentially, Member States **cannot** exclude from the system of fair compensation required by Article 5(2)(b) rightholders that are conferred a reproduction right by Article 2 InfoSoc Directive, on the facts broadcasting organisations. That is **unless** those rightholders suffer minimal harm or none at all. Whether they do is for national courts to determine (paras 39, 49 and 52).

To the copyright afficionado this may seem like the Court is stating the obvious when Articles 2 and 5(2)(b) are read in light of recital 35. The reasoning underlying the CJEU's judgment is, however, anything but a mechanical reiteration of the contents of the InfoSoc Directive. It is a, perhaps unnecessarily complex, assessment of the admissibility of a limitation on the right to fair compensation from the level of the EU Charter. The Court sets up a test that is intended to enable national courts to determine when an exclusion from the system of fair compensation is warranted (further below).

There is more to this judgment, however. Whilst the Court seizes the opportunity to clarify the role of Advocate Generals (para 17), copyright lawyers should also take note of another insight. The Court retrieves the general rationale of protection of neighbouring rights; at least when it comes to broadcasters. Relying on a combined reading of recitals 4 and 9, the Court clarifies that the InfoSoc Directive seeks to provide a high level of protection which must foster substantial investment in, inter alia, network infrastructure (para 31). That is concretised later in the judgment to involve the protection of 'technical performance embodied in a broadcast' (para 42) as partly suggested by the German and Austrian governments (para 16 Opinion). The Court also concretises in the same paragraph protection of film producers by stating that it covers their organisational and economic performance. Although these concepts are equivocal when set against each other in the context in which they appear (further below), the fact remains that neighbouring rights – at least those mentioned by the Court – are not about creativity or costs of rights acquisition but investments that go into cables, satellites, antennas, all the technicians, and, as appropriate, mastering equipment, cameras, microphones, storage media, and then making it all work. In a nutshell, technology that let people see two astronauts climb down a ladder in 1969.

When is an exclusion of a category of rightholder from fair compensation warranted?

The short answer is summarised at paragraphs 49-50: to determine the compatibility of an exclusion of an entire group of rightholders from the system of fair compensation, national courts must make two assessments. First, they must assess if the rightholder category targeted by the exclusion suffers minimum or no harm compared to the other categories itemised in Article 2 InfoSoc Directive. Secondly, national courts must assess if the situation of all entities within the same rightholder category is comparable. If it is, an entire group can be excluded.

Crafting this instruction, the Court relies on a *triple* application of the principle of equal treatment. To comprehend the Court's line of reasoning, it is helpful to first read paragraphs 44-48 and only then 37-43. The analysis in the former is set in the context of the right to fair compensation in Article 5(2)(b), while in the latter it is in the context of the "exception" to that right contained in recital 35. In this way, the analysis matches the logic of the operative part of the judgment.

The first assessment (vis-à-vis other rightholder categories in Article 2)

The system of fair compensation must be linked to the harm caused to the rightholders on account of private copying, but also be consistent with the principle of equal treatment in Article 20 of the EU Charter (para 44). This principle means that comparable situations must not be treated differently, whereas different situations must not be treated in the same way, unless such treatment is objectively justified. According to the Court, broadcasters itemised in Article 2(e) are in a comparable situation to the rest *because* all those rightholders enjoy the exclusive right of reproduction (para 46). As superfluous as this assessment may appear, it is based on the understanding that the legislator's intention was to ensure that everybody gets the same level of protection (para 27), which is why, in principle, broadcasters are entitled to fair compensation (para 34). Therefore, if this category is intended to be treated differently, such treatment must be objectively justified. The Court reasons this by stating that the difference in treatment must be based on an objective and reasonable criterion and be proportionate to the aim pursued by the treatment concerned (para 45). But what aim is pursued by an exclusion is, it would appear, a matter of national copyright policy. After all, it is the Member States that have the option to provide for an exception to payment of fair compensation (para 38).

To the Court, absence of harm (or existence of a minimal level of harm), constitutes such a criterion. It does not go beyond what is necessary to safeguard a fair balance of rights between the rightholders and the users of protected subject matter (para 48). As safeguarding such a balance is one of the aims of the InfoSoc Directive (recital 31 and, conveniently, *GS Media* para 31), one could say that national copyright policy that aims for an exclusion must ultimately seek to safeguard a fair balance between rightsholders and users.

Thus, it is for the referring court to satisfy itself that broadcasters, compared to the other categories of rightholders, suffer only minimal harm in respect of reproductions of fixations of their broadcasts (first sentence, para 49).

Whether they do suffer such harm must also, according to the Court, be assessed objectively. Although the Court does not explicitly offer any guidance on what constitutes such criteria, inspiration can be retrieved from the earlier paragraphs that concern the exception in recital 35. Ultimately this is an assessment that should boil down to an analysis of the exclusive rights. And,

indeed, that is what the Court seems to be doing in paragraph 42. There the Court makes clear that the conferred right(s) of reproduction is not identical for the different rightholder categories. Presumably the Court means that the objective is different, as opposed to the act of reproduction as such, as the Court goes on to explain what it is intended to protect. In the case of producers of first fixations of films in Article 2(d), the reproduction right protects the *organisational and economic performance* of those producers, whereas in the case of broadcasters in Article 2(e) the reproduction right protects the *technical performance embodied in the broadcast*. Since both are neighbouring rights that concern reproduction of a fixation and not anything else (the same goes for phonogram producers who are not mentioned), the practical difference is not straightforward. But because the Court identifies *a* difference, it follows that the harm to the different rightsholders is, therefore, different. How exactly is not clear, but such an assessment at least delivers the necessary argument to mechanically apply the principle of equal treatment for rightholder categories considered in the judgment, leaving it to national courts to only focus on circumstances that are relevant for determining the threshold of harm as such (does the rightholder category suffer only minimal harm or none at all compared to the other rightsholders). The Court does not indicate what those circumstances could be and in some sense we are very much placed in the same position we were in prior to the judgment – that no obligation for payment of fair compensation may arise where rightholders only suffer minimal harm (recital 35 InfoSoc Directive).

The second assessment (entities within the same rightholder category)

The second part of the test (second sentence, para 49) seeks to ascertain the validity of a general exclusion of a rightholder category from the system of fair compensation by reference to the different entities that fall within the same (excluded) category. Essentially, this looks like another application of the principle of equal treatment. According to the Court, national courts must ascertain that all the entities (broadcasting organisations) are in a comparable situation with regard to the harm that they suffer. This justifies the exclusion as a group of all those entities from the right to fair compensation.

Similarly as under the first assessment, the second assessment must also be made on the basis of objective criteria. But, similarly, the Court does not provide any explicit guidance. And this is where the judgment seems unnecessarily complex, if not internally inconsistent.

On the one hand, it seems inspiration can be drawn from paragraph 43, where the Court itemises different scenarios taking place in the broadcasting sector. The fact that differences exist among broadcasters – some produce their broadcast themselves, some transmit broadcasts produced on commission or under licence of broadcasts produced by third parties etc – might be precisely the reason why different broadcasters are *not* in a comparable situation and that therefore an exclusion is not justified. Moreover, inspiration may also be drawn from the subsequent paragraphs where the Court first reports that parties that submitted written observations disagree on whether an entitlement to public financing renders the situation comparable between various broadcasters (para 51) and then immediately reminds that a comparison of the situation of broadcasters is an assessment of fact and therefore for national courts to carry out (para 52). This appears to imply that public financing could be a relevant circumstance if a national court deems it so.

On the other hand, the different configurations in the broadcasting sector relate to the degree to which broadcasters are also film producers (which is the Court's point at paragraph 43). The fact

that some broadcasters are entitled, for that reason, to fair compensation as film producers seems to be an irrelevant circumstance (para 41). Moreover, and most importantly, any fair compensation that is *not* linked to the harm caused to rightholders as a result of private copying is not compatible with the requirement that a fair balance be safeguarded between rightholders and users (para 37), which appears to preclude public financing as a relevant circumstance (depending on what that public financing is intended to finance). If indeed to compensate for the harm from private copying, then we learn from C-470/14 *EGEDA* that a publicly financed system of fair compensation must comply with several conditions to be compatible with EU law (cf paras 39-41 of *EGEDA*), but may be difficult to implement in practice.

Final remarks

This case is certainly another reminder of the relevance of fundamental rights in copyright law and a demonstration of how the EU Charter can work in practice to resolve intricate copyright questions. Though the case concerns broadcasters, the test established by the Court has general application and should (must!) be studied equally thoroughly in those Member States that may have opted to exclude other rightholders from their levy system.

At the same time, behind the Court's seemingly methodical approach lies a recipe for fragmentation. On the one hand the Court leaves national courts plenty of space to determine what objective circumstances are relevant under the first assessment for determining the threshold of harm to an exclusive right that is fully harmonised (on the status of the right see e.g. the AG's assessment at para 36 in his Opinion), and what are relevant for determining potential discriminatory effects under the second assessment. On the other, it is not explicitly clear from the case in what way the various circumstances itemised by the court are relevant for either of the two assessments (except the statement that the fact that broadcasters may fall into both Article 2(d) and (e) is irrelevant). In addition, incomplete is the implication at paragraph 53 that an assessment of the effects of an entitlement to public financing could be a a question of fact when such financing obviously requires a legal compatibility analysis in light of *EGEDA*before it can be accounted for as a relevant factual circumstance under the test set up by the Court.

The fact that the Court reaches for another fundamental rights tool makes this a very interesting copyright case that has fundamental relevance for assessing different policy choices. But in the present case there was probably a simpler, rudimentary, way of dealing with the issue – determining what a 'fixation' of a broadcast actually is, clarifying the relationship to the separate right of first fixation in Article 7(2) Rental and Lending Rights Directive, whether that right actually has to be exercised as a prerequisite, and sorting out any overlapping rights and entitlements to the fixation, and thus to fair compensation. Potentially, the true beneficiary out of the broadcasting collective would then emerge automatically; if this would even be necessary; after all *every* broadcaster that exercises the right of first fixation of their broadcast inevitably becomes a producer of a sound or video recording.

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