Kluwer Copyright Blog

Additional Remuneration Rights for Online Streaming on Reference to the CJEU

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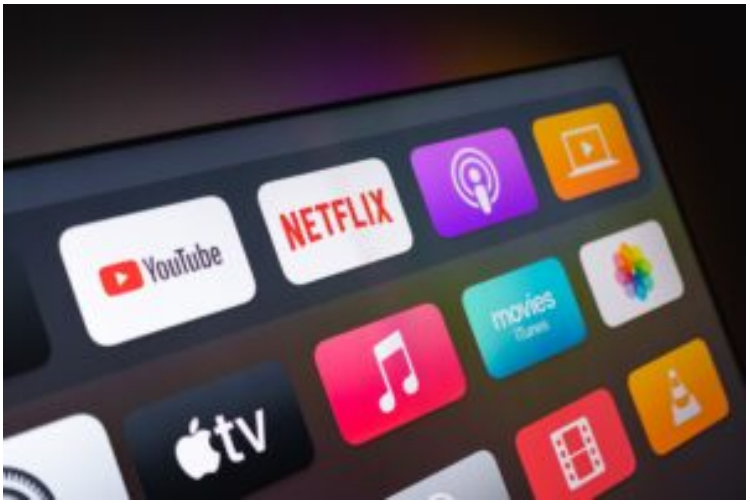

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On 26 September 2024, the Belgian Constitutional Court referred a highly topical issue of fair remuneration of authors and performers on online streaming platforms to the Court of Justice of the EU (CJEU). The reference, which is poised to result in one of the most significant CJEU judgments in the copyright law field, concerns the validity of a number of provisions of the Law of 19 June 2022, which transposed the 2019 Copyright in the Digital Single Market Directive (CDSMD) in Belgium.

In an apparent effort to empower authors and performers – who often do not benefit from the increased revenues generated by streaming their works due to the assignment of exploitation rights to producers and labels – the provisions referred to the CJEU introduce two types of non-transferable, unwaivable, and collectively administered additional (also known as residual) remuneration rights. These rights remain with the authors and performers even after they have contractually transferred their exploitation rights, and are, in fact, triggered by this transfer. The first of these rights applies to streaming services such as Netflix and Spotify (Article XI.228/11 of the Belgian Code of Economic Law), while the second pertains to online platforms like YouTube (Article XI.228/4 of the Belgian Code of Economic Law).

Perhaps unsurprisingly, soon after their introduction in Belgium in 2022, both remuneration rights were challenged by Google, Spotify, Meta, Sony, and the local Belgian video streaming service Streamz – a challenge that ultimately led to the present reference to the CJEU. The questions submitted by the Belgian Constitutional Court are reviewed below, along with explanations based on the relevant claims made by the applicants (spread across more than 180 pages of the French-language judgment).

Legal basis in EU law and double payment: Compatibility of additional remuneration rights with Articles 18 and 17 CDSMD

Following a procedural inquiry into whether the contested rights needed to be notified to the European Commission (which they were not) prior to their introduction into Belgian law, the Belgian Court questions the permissibility of these rights in light of Article 18 of the CDSMD, which concerns appropriate and proportionate remuneration for creators, and Article 17, which regulates online content-sharing service providers (OCSSPs).

Concerning the potential grounding of both remuneration rights in Article 18 CDSMD, the applicants argue that this provision does not establish any general principle of remuneration outside the contractual sphere. According to them, Article 18 CDSMD only applies to direct contractual relationships between authors and performers and their contracting parties (such as record labels or producers), and therefore cannot be extended to cover extra-contractual relationships between online platforms on the one hand and authors/performers on the other. It is also argued that Article 18 CDSMD precludes legislation resulting in double payment, whereas, according to the applicants, both contested additional remuneration rights create a significant risk of such over-payment. The applicants point out, specifically, that, due to residual remuneration rights, authors and performers could receive two streams of payment for the same exploitation: contractual remuneration, which must already be "appropriate and proportionate" pursuant to Article 18 CDSMD, and extra-contractual remuneration, paid in addition to what is provided contractually.

Regarding the remuneration right introduced for OCSSPs such as YouTube, and the question of whether this right could potentially be grounded in Article 17 CDSMD, the applicants argue that this provision constitutes a measure of maximum harmonization and, as such, does not permit the introduction of additional rules, such as a special right benefiting authors and performers. This was reportedly also the position of the European Commission during the drafting stage of the Belgian legislation, where the Commission services concluded that Article 17 does not allow Member States to introduce a remuneration right on online streaming platforms of the type eventually implemented in Belgium.

Partitioning of the exclusive right and the question of exceptions: Compatibility with Articles 3 and 5(3) InfoSoc

The referring court further questions the permissibility of the residual remuneration right for uses by fully licensed streaming services such as Netflix and Spotify with the InfoSoc Directive's Article 3 on the right of communication to the public and making available, and Article 5(3) thereof listing possible exceptions to these rights.

In this regard, the applicants argue that the additional remuneration right in question unduly divides the scope of the exclusive right in Article 3 InfoSoc into a (1) right to authorize and, correspondingly, to prohibit on the one hand, and (2) a right to remuneration on the other. According to the applicants, however, these two rights are intrinsically linked and cannot be separated. The applicants further observe that the contested remuneration right does not fall within any of the exceptions and limitations in Article 5(3) InfoSoc Directive (which, somewhat surprisingly, they believe it should).

Freedom to provide services (Article 56 TFEU) and the alleged inutility of residual remuneration rights

The Belgian Constitutional Court further raises the question of the compatibility of both additional remuneration rights with the freedom to provide services under Article 56 TFEU. The applicants' position is that contested rights restrict this freedom, since they make the cross-border provision of services by both online streaming platforms and fully licensed streaming services less attractive by creating legal barriers and transaction costs specific to the Belgian territory.

The applicants further claim that the restriction on the freedom to provide services under Article 56 TFEU, created by the two additional remuneration rights, cannot be justified, as it is not necessary to achieve its objective of improving the remuneration situation of authors and performers. They argue that these new residual remuneration rights actually weaken the bargaining position of creators: since they can no longer assign their remuneration rights, holders of derivative rights are likely to reduce their royalty payments, given the limited scope of authors' and performers' rights. In addition, the introduction of residual remuneration rights creates, according to the applicants, uncertainty in the price discussions between holders of derivative rights and streaming providers, which may result in lower overall payments. Finally, it is also claimed that the *travaux préparatoires* of the Law of 19 June 2022 do not reference any expert studies or other foundations supporting the necessity of creating additional remuneration rights to ensure appropriate remuneration.

Alleged violation of fundamental rights

Finally, the CJEU is asked to assess the compatibility of both additional remuneration rights with the freedom to conduct a business under Article 16 of the EU Charter of Fundamental Rights. This assessment may also take into account – insofar as the uses by OCSSPs such as YouTube are concerned – Articles 20 (equality before the law) and 21 (non-discrimination) of the Charter.

According to the applicants, the contested residual remuneration rights require streaming platforms and services to enter into two agreements, rather than one, for the same right. The first agreement is with the holders of derivative rights, to whom the authors and performers have assigned their right of communication or making available to the public. The second agreement is with collective management organisations representing authors and performers, covering these new inalienable and non-transferable remuneration rights. As a result, OCSSPs and streaming services face increased transaction costs and uncertainty, requiring measures with significant administrative and financial impacts – circumstances that, pursuant to the applicants, contradict the essence of the freedom to conduct a business under Article 16 of the Charter.

In relation to claims of equality of treatment and non-discrimination, the applicants argue that the new Belgian legislation treats service providers differently, so that one category remains able to conclude cross-border contracts without restrictions, while another category, specifically streaming platforms covered by Belgian law, is no longer able to do so.

Conclusion

As mentioned, the CJEU's judgment in this case promises to be one of the most significant upcoming pronouncements in EU copyright law. This is especially true given that an additional remuneration right related to fully licensed audiovisual platforms already exists in Spain for a number of years, where national courts have rejected, among other things, the double payment argument. Moreover, Germany has recently introduced an additional remuneration right for online streaming platforms, similar to Belgium's, following its own transposition of the CDSMD. The CJEU's ruling could therefore have far-reaching implications for the remuneration frameworks governing the use of authors' and performers' works by online streaming platforms across the entire EU.

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