Judgment from the Court of Justice of 25 November 2020, SABAM, C-372/19, EU:C:2020:959

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In Case C-372/19, the Court (Fifth Chamber) delivers its judgment in which reference for a preliminary ruling of proceedings between SABAM and Weareone.World BVBA and Wecandance NV concerning the royalties claimed by SABAM.

SABAM is a commercial company operating for profit as a single collective copyright management body in Belgium with a de facto monopoly on the market for royalties payable in respect of the reproduction of musical works.

Weareone.World and Wecandance are organizers of annual festivals, such as Tomorrowland and Wecandance, which have used musical works protected by copyright by SABAM, and such royalties are requested by SABAM from the organizers on the basis of fee 211 and may apply a minimum fee or a base fee.

The minimum fee is calculated from the sound surface area or number of available seats, while the base fee is calculated from the gross receipts from ticket sales or from the artistic budget when higher. An organizer may obtain reductions applied on the basic fee depending on the musical works performed at the event, provided that the works performed are communicated within the given deadline, so the reduction occurs when, if less than 1/3 of the works are from the SABAM repertoire 1/3 of the basic fee applies, if less than 2/3 of the works 2/3 of the basic fee applies, and if at least 2/3 of the works performed are from SABAM the full basic fee applies.

In 2017 SABAM brought actions before the referring Court against Weareone.World and Wecandance, seeking payment of the copyright royalties due in application of the base fee provided for in fee 211 for festival editions. The organizers challenged on the grounds that through modern technologies they identify more accurately the musical works performed and their duration, the 1/3-2/3 rule being inaccurate, and they accuse SABAM of calculating the basic fee without deducting from the gross revenues the expenses for the organization of the event, and the royalties calculated on the basis of fee 211 did not correspond to the economic value of the services provided by SABAM, since SABAM can ask for a higher royalty at events whose entrance fee is higher even if the same works from its repertoire are used, while the public's willingness to pay more is related to the organizers' efforts to bring a "full experience".

In this regard, the referring Court questions whether the fee applied by SABAM is in accordance with Article 102 TFEU and Article 16 of Directive 2014/26, whether there is an abuse of a dominant position by applying a royalty model for the right to reproduce musical works which is based on turnover and uses a fixed fee in stages, instead of a fee with an exact proportion using advanced technologies, and whether the royalty is conditioned by external factors such as the price of admission tickets, among others.

The Court finds that SABAM is an undertaking to which Article 102 TFEU applies because it holds a dominant position in a substantial part of the internal market. Moreover, in dealing with the royalty charged by collecting societies, it says that the way in which such undertakings behave is liable to constitute an abuse if, when the level of royalty is set, they charge an excessive price without any connection to the economic value of the contribution provided, so it must be assessed whether there is an excessive disproportion between the cost actually borne and the price actually asked, if there is disproportion, examine whether there is the imposition of an unfair price.

In addition, the Court of Justice states that the organizers' efforts to make these festivals a "complete experience" are likely to have an impact on the level of royalty required by SABAM, and cannot undermine the royalty table calculated on the basis of gross revenues from the sale of tickets, because the payment due depends on the number of people who enjoy the works and the importance of the works for the festival, and it can become difficult to determine and quantify unrelated elements and the contribution of SABAM. In fact, imposing an obligation on a collective management company to, in all cases, take these elements into account when setting a royalty table, would be capable of disproportionately increasing expenses with contracts and monitoring the use of musical works protected by Copyright.

Thus, the Court of Justice declares that it does not constitute an abuse of a dominant position within the meaning of Article 102 TFEU, when a collecting society with a de facto monopoly in a Member State imposes on festival organizers a table in which the royalty due for copyright is calculated based on a fee applied to gross revenues from ticket sales, without deducting from the revenues the charges for organizing the event that are not related to the musical works performed, provided that the imposition of the table is not excessive, which is the responsibility of the national judge to verify, and when a capable fixed system by levels is used, among the musical works performed, to determine which come from the management company's repertoire, and there are no another method capable of accomplishing the same objective, which allows to identify and quantify

with greater precision the use of musical works without resulting in a disproportionate increase in expenditures, which is also up to the national judge to verify, considering all circumstances, including the availability and reliability of the data provided, and the existing technological instruments.