[NL] Charging two different fees to private and professional music streaming users is unlawful

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In a judgment of 12 December 2018, the District Court of Amsterdam ruled that the Dutch collective rights management organisation Buma/Stemra acted unlawfully by charging two different fees based on a distinction between “private use” and “professional use” to users of online music streaming services.

The lawsuit was filed against Buma/Stemra by several producers of background music - all members of the Associated Business Music Distributors (hereafter: “ABMD” or “the claimants”). AMBD members offer background-music subscriptions to several businesses, such as shops, restaurants and gyms.

Their customers receive special computers that use an encrypted connection in order to access a database containing music that has been composed by AMBD members. Subscription prices range from EUR 45 to EUR 90 per month. Because AMBD members make background music available to the public, they are obliged to have a background music licence agreement with either Buma/Stemra or the Belgian collecting society, Sabam (which transfers such payments to Buma/Stemra). Accordingly, for every subscription, AMBD members have to pay a licence fee to Buma/Stemra or Sabam. The tariffs for the subscriptions and licence fee are determined by Buma, while Stemra determines and collects the mechanical rights for the reproduction of musical works on sound carriers, such as CDs and DVDs.

Streaming services that are not ABMD members pay 10% of their turnover, by way of a licensing fee, to Buma/Stemra. One example is Spotify, which costs EUR 10 per month, meaning that Spotify pays EUR 1 per user per month as a licensing fee to Buma/Stemra. Spotify excludes commercial use of its streaming services in its terms of use. However, the claimants noticed that some businesses have also used Spotify subscriptions. They asked Buma/Stemra to sanction both the businesses and Spotify. Buma/Stemra argued that it could only enforce its licenses with businesses; it was not able to enforce Spotify’s terms of use between Spotify in respect of Spotify’s customers.

The claimants argued that Buma/Stemra was acting unlawfully and abusing its dominant position by charging a different fee to ABMD members than it did to online music services such as Spotify, even though they are active on the same

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market. Furthermore, they argued that Buma/Stemra was acting unlawfully by not enforcing copyright in respect of businesses that use online streaming services that are meant for consumers. In the event that the Court ruled against the claimants by holding that Buma/Stemra was not acting unlawfully, the claimants requested that the Court issue a declaration that ABMD members do not provide services that constitute a "communication to the public", as defined in Article 3 Directive 2001/29, and that they were therefore not obliged to conclude a background music licence agreement with Buma/Stemra. The defendants pointed to the fact that they were not a party to the agreement between the streaming services and their consumers and that they were therefore not in a position to prohibit use that infringed the terms of use between a streaming service and its customer.

Given the fact that both ABMD's members and streaming services are active on the same market, the District Court found that Buma/Stemra was not allowed to charge different licensing fees. However, the Court found that the claimants could not claim compensation for the licensing fees already paid, as they had agreed to the tariffs in the past. In addition, the Court ruled that the defendants could not be obliged to enforce their rights. The Court held that the use of streaming services constitutes an alternative to using the services of ABMD; however, they are not the same kind of services. Only rightsholders can obligate the defendants to enforce their licenses. Third parties such as ABMD cannot. Furthermore, the Court decided that the services provided by ABMD constitute a "communication" to the public, as those services make the music available to a certain amount of people. The Court did not deem it of relevance that the connection with the services is encrypted. In conclusion, the Court decided that Buma/Stemra should refrain from charging two different fees based on a distinction between "private use" and "professional use" for users of online music streaming services.

District Court of Amsterdam, 22 January 2019, ECLI:NL:RBAMS:2018:8995

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:8995

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