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Korea: In dispute over network usage charges to high-traffic content providers, court rejects Netflix challenge to usage fee demands by network provider SK Broadband, finds Netflix obligated to pay consideration for network usage

Netflix suit filed in April 2020 had sought declaratory judgments confirming that Netflix (i) has no obligation to negotiate network usage fees with SKB and (ii) has no obligation to pay any network usage fees.

District Court decision of June 25, 2021 rejects Netflix arguments on both counts, ruling Netflix has an obligation to pay SKB for network usage (greatly expanding in recent years) – but stops short of delineating method or form of consideration.

While appealable by Netflix, the judgment meanwhile has weighty implications for ongoing conflict over network usage fees between ISPs and CPs.

The dispute arose in 2019 as SK Broadband (SKB), a major internet service provider (ISP) and subsidiary of leading mobile carrier SK Telecom, newly demanded network usage fees from Netflix for carrying its data traffic-heavy entertainment service to Korean users. After months of standoff, in November 2019 SKB filed for adjudication with the Korea Communications Commission (KCC) against Netflix Services Korea Ltd. and Netflix Inc. (together, Netflix), claiming that Netflix was obligated to negotiate and pay fees to SKB. Global content providers (CPs) like Netflix should, SKB argued, bear part of the network costs resulting from their services, which imposed massive traffic and burdens on the system. (Domestic CPs, such as Naver and Kakao, are known to pay annual network fees to local ISPs like SKB.)

In response, in April 2020, Netflix filed suit against SKB in Seoul Central

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District Court, seeking confirmation (or declaratory judgment) that Netflix is not obliged to negotiate network use fees with SKB, nor to pay it any such fees. Netflix's main line of argument was that it does not use SKB's network (merely connecting to SKB's POP servers in Tokyo and Hong Kong), and, based on net neutrality, CPs are not responsible for paying an ISP's network costs. (KCC adjudication was duly suspended in the interim.)

The District Court rejected each prong of Netflix's case, siding with SKB. In its June 25, 2021 decision, the court dismissed, without getting further into the merits, Netflix's claim that it had no obligation to negotiate with SKB regarding network costs. On this claim, the court deemed it unnecessary to have a full hearing, on grounds of lack of justiciability: The situation did not, in the court's view, involve a sufficient risk to Netflix that turned on the question of whether Netflix was or was not obligated to negotiate with SKB over the fees, and, to the extent that there was some such risk, this lawsuit was not an "efficient" method of resolving the risk.

Netflix has an obligation to pay SKB for network usage: The court rejected – that is, heard the merits of, but rejected – the claim that Netflix is not obligated to pay any network fees to SKB. The court cited the following reasons and factors in support of such an obligation to shoulder fees:

- Based on Commercial Code principles, absent special circumstances suggesting otherwise, where a party receives telecom services from a "common telecom service" provider (see below), which is not provided with an intention to do so free of charge, that recipient is obligated to pay consideration for such services.
- SKB engaged in providing, and Netflix received, "common telecom services", as defined under the Telecommunications Business Act (TBA), given that this includes the providing of internet network access, which SKB engaged in by operating its network (also expanding the international part of it), while Netflix was allowed to and did connect to that network.
- While SKB has a contractual obligation to provide its network for its service subscribers, nevertheless the transmission of content via that network constitutes "use" by Netflix as well. Such an arrangement, said the court, where a service provider receives payment from parties at both ends of its service, is not uncommon these days (compare credit card companies).
- Netflix can hardly deny that SKB provided it with (cross-border) network access. Connectivity to SKB's subscribers is available via interconnection with ISPs around the world. Netflix could have chosen to transmit content by those other means, but instead chose to utilize the direct connection to SKB's servers in Tokyo and Hong Kong, and indeed it enjoys exclusive use of SKB's international network in this regard. That connectivity, provided by SKB, allows Netflix to reliably transmit higher quality content to users. Thus SKB provides, and Netflix receives, a service of economic value.
- With the surge in Netflix viewership these past years, SBK incurred large expenses in upkeep of consistent connectivity for the users, whereas it did not evidently enjoy a commensurate,

offsetting increase in profits.

- Nothing shows that SKB ever intended to continue providing Netflix with its services free of charge (or to accept, in lieu of fees, compensation for certain infrastructure expenses, as claimed by Netflix), nor can this be deduced from the fact that SKB omitted to request such fees for some time after Netflix's Korea launch in 2016. To the contrary, SKB on multiple occasions expressed an intent to have Netflix pay network fees, e.g. by requesting sharing of costs for the international network.
- The court also cited the fact that, according to Netflix filings with the U.S. Federal Communications Commission in 2014, Netflix was at the time paying terminating access fees to ISPs in the U.S. such as Comcast, AT&T and Verizon, including in a content transmission structure with Comcast that appeared similar to the SKB arrangement.

Thus, the court reasoned, Netflix does have an obligation to pay SKB consideration for network usage, or specifically "connectivity". However, as to the actual scope, method or form of such consideration, the court explicitly left this open to negotiation between the parties, reasoning that the court must respect the principle of private autonomy (freedom of contract). (Left somewhat unclear is how precisely this relates to the other part of the decision, which rejected, on grounds of non-justiciability, Netflix's claim of no obligation to negotiate fees.) Among conceivable forms of consideration, the court listed for example monetary compensation, exclusivity arrangements, installation of Open Connect Appliances (OCAs) to help ease data traffic, and mutual sharing of facility costs.

The court's judgment seems likely to be appealed by Netflix, but for the time being it poses highly significant implications for the ongoing controversies over sharing of network costs between ISPs and CPs. The issue has been a matter of keen debate since 2020, when the TBA was amended to require CPs, along with other value added service providers meeting certain thresholds, to implement measures to enable "stable" supply of services to users – an amendment popularly called the "Netflix Law", and based largely on perceptions of network "free-riding" on the part of global CPs. (See our then [Legal Update](#) on the issue.)

The decision is a momentous one, not least of all as the first instance of a court here affirming a CP's obligation to bear network usage fees. At the same time, it leaves much to be determined by private negotiation. If and to the extent upheld, the judgment would form a critical precedent, as basis for Korean ISPs to seek network usage fees from global CPs. The decision may also encourage possible government efforts toward new regulation explicitly requiring CPs to bear specific amounts of network usage fees. In any event, the court's judgment, and further developments in the dispute, clearly merit close scrutiny by industry stakeholders, including other global CPs looking to expand their services in Korea.