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Case study: "copyright-free" in-store music and collective management

A & K Metaxopoulos & Partners Law Firm | Intellectual Property - Greece

Facts

Company A (a Greek company) provides music programmes – based on a specific repertoire and intended to function as background music – to retail stores and, more broadly, to commercial or workplaces. Such music is used as a background for the broadcasting of advertising messages that are heard in such commercial spaces on a daily basis. The advertising messages are played at a higher volume than the music.

In order to carry out this activity, company A signed contracts with certain suppliers from which it acquired all of the copyrights and related rights regarding the specific musical repertoire.

Company A's repertoire may be thought of as completely different to the so-called "commercial" repertoire, which – as a general rule – is managed by collective management organisations (CMOs) around the world and is particularly popular with the public due to its wider reach via radio and television and its commercial exploitation through its distribution to the public – for example, via material audio carriers (ie, CDs). In particular, company A's repertoire does not include works or recordings by so-called "commercial" artists who are better known to the public and who are represented by CMOs.

Due to the fact that company A's musical works are mainly used as background music for programmes (including advertising messages) created for the companies or stores concerned, they may be considered original commissioned musical works and not "commercial" works. They are not widely recognisable to the public, as they are not performed by well-known artists, and nor are they promoted for commercial purposes through radio, television or other typical distribution channels (eg, record stores). Pursuant to the contracts signed by company A and its suppliers, company A acquires all of the economic rights regarding the musical repertoire, while maintaining the right to grant sublicences to its customers (mainly retail chain stores) for the purpose of publicly performing recordings belonging to the repertoire as background music in stores.

Subsequently, company A entered into a cooperation agreement with another supplier, company B (an American company), which is now one of the largest music libraries in the global music industry. Company B grants through websites (ie, music platforms) licences regarding any kind of use (eg, background music or in-store use, television use, cinema use, or radio use) for over 550,000 original musical works belonging to more than 7,300 rights holders around the world (eg, composers, performing artists, publishers and record companies). These rights holders share a common characteristic: they have not entrusted the management of their copyrights or related rights to any CMO and thus they are not contractually bound to any CMO in any way.

Company B directly grants licences regarding the musical works that it manages (ie, without the intervention of any third party and/or any CMO). More specifically, it procures music licences from independent composers, performing artists, publishers and record companies and in turn sublicenses this music to its customers worldwide, for all kinds of uses, including as background or in-store music.

Company B certified that company A had been granted a licence that allowed it to sublicense its musical repertoire to customers in Greece and all around the world to be used as background music by granting direct licences. The musical works that make up company A's repertoire do not belong to the repertoire of any CMO worldwide, since the contributors assigned the works exclusively to company B for the purpose of granting further licences and exploiting them.

The creators and producers of the specific recordings, the rights to which are transferrable according to law, granted to company B and, consequently, to company A all of their copyrights and related rights. As far as the performers and the performing artists are concerned, in countries where such a transfer is allowed, they have assigned their rights to company B. In other countries (such as Greece) where such a transfer is not allowed, the performers of the musical works are not members of a CMO and have contractually undertaken the obligation not to be members of any CMO, having chosen to abstain from exercising the relevant right to collect equitable remuneration for acts of communication to the public. It may therefore be concluded that such right is not assigned to a CMO.

More specifically, the artists who signed a contract with company B explicitly state and guarantee that they have not assigned to any Greek or foreign CMO the right provided for in article 49(1) of the Greek Law on Intellectual Property[(1)] to collect equitable remuneration for acts of communication to the public in their name and/or on their behalf.

Recently, the Greek CMO for related rights in music (the applicant CMO) filed an application before the court against a well-known retail chain (customer C), which is a customer of company A, asking to collect equitable remuneration due to the use of music in its stores. Company A was also summoned to this case and it has now been heard at court. A decision is expected to be issued shortly.

Legal issues

The recordings provided to customer C were free from all legal and factual defects and in accordance with the contractual guarantees that company A had agreed with customer C. For these recordings, it can therefore be argued that an equitable remuneration is not due to the applicant CMO. The applicant CMO claimed, among other things, that it represents all of the artists and producers and can collect for them the equitable remuneration for acts of communication to the public. For more information on the collective management of copyright and neighbouring rights in Greece, click here.

The argument that no equitable renumeration is due to the applicant CMO is supported by a 2017 announcement by the Hellenic Copyright Organisation (HCO), which states that users are free from any obligation to pay equitable remuneration to a CMO if they prove that the works transmitted by them do not belong to the CMO's repertoire based on Law 4481/2017, which entered into force on 20 July 2017.

Specifically, the HCO stated as follows:

> *The user **may choose not to use in their store represented repertoire** (i.e. repertoire that is not represented by the abovementioned CMOs wherein the rights have been assigned either directly by the rightholders or via mutual agreements with other foreign CMOs). In that case, the user should not perform any musical work belonging to the CMO's repertoire either through a stereo installation or from the internet or through a TV or radio installation in his store . . . . **Whether or not a shopkeeper performs represented repertoire is a factual matter** and is not proven from the presentation (only) of certificates or other documents by companies or other entities that provide non-represented repertoire.* (Emphasis added.)

In the past, the HCO has also clarified as follows:

> *[T]he Law provides for the payment of remuneration to the rightholders only in case of use of their work. By law, if a repertoire, unprotected or unrepresented by CMOs, is performed exclusively in public, no remuneration is owed to those CMOs for its performance in public.*[(2)]

Therefore, no CMO is entitled to receive remuneration for the transmission of works by artists who are not its members and have not instructed it in writing to do so.

Case law

In a similar legal case, the Single Member Court of First Instance of Thessaloniki dismissed the CMO's application on the grounds that:

> *[T]he first defendant in the above store plays a specific type of music, namely metal and heavy-metal music of artists and bands that are not widely known and **are not represented by the applicant.*** (Emphasis added.)[(3)]

In addition, the Single Member Court of First Instance of Thessaloniki rejected an application of the CMO on the grounds that:

> ***[T]he use of music, not covered by the copyright legislation, in said company was considered probable.** Therefore, since the second defendant does not proceed to the public performance of musical works in which members of Collective Management Organizations -members of the applicant- participate, as required by the provision of article 49 par. 1 of Law 2121/1993, no obligation is created to pay to the artists represented by the applicant and the applicant itself, music singers and producers, the equitable remuneration provided for in the above provision, and the judged application, as far as the second defendant is concerned, should be dismissed as factually unfounded.* (Emphasis added.)[(4)]

Further, the procedural presumptions provided in article 7 of Law 4481/2017 in favour of CMOs are rebuttable and have been set to facilitate the probative legitimacy of CMOs.

More specifically, article 7(1) of Law 4481/2017 provides that:

Collective management organisations and collective protection organisations are presumed to have the power to manage and protect the rights of all works or objects of protection or all the rightsholders for which or for whom they state in writing that the relevant powers or equitable remuneration rights have been transferred to them or that they act under power - of -attorney or any other contractual agreement. Insofar as a collective management organisation, operating under the license granted by the Minister of Culture and Sports, exercises rights or brings claims under Law 2121/1993, which are subject to mandatory collective management, it is presumed that it represents all, and without exception, rightsholders, nationals and foreigners, and all, and without exception, their works. If, in the case of the preceding paragraph, there are more collective management organisations for a specific category of rightsholders, the l presumption applies if the rights are exercised jointly by all the relevant collective management organisations according to the more specific provisions of Law 2121/1993. Collective management and collective protection organisations can act in their name, judicially or extra judicially, if their competence is based on a transfer of the relevant power, or on a power - of - attorney, or on any other contractual agreement. Also, they are entitled to exercise all the rights that have been transferred to them by the rightholders or they are covered by power - of - attorney or by any other contractual agreement.

According to the established position of case law on this issue, the presumption is rebuttable and therefore if a user of recorded music claims that they do not use a repertoire which is represented by a specific CMO, the user should be the one to prove this.

According to article 7(3) of Law 4481/2017 and the explanatory memorandum of that law, these presumptions should be applied in such a way by CMOs so as not to affect the rights of the rights holders, as provided by law. In particular, these presumptions should not affect their ability to assign to different CMOs the management, in whole or in part, of certain powers or of certain works or objects of protection.

Key arguments

Since the presumption of representation is rebuttable, as explained above, it may be argued that the applicant CMO in this case is not entitled to claim payment of equitable remuneration according to article 49 of Law 2121/93 on behalf of performers and musicians who have been proved not to be its members.

Further, it may be argued that the fact that artists or performers cannot waive the right to equitable remuneration under article 49 of Law 2121/1993 does not mean that the CMO is entitled to collect this remuneration on behalf of non-members. It should be noted that there is no corresponding provision regarding phonogram producers – the right to equitable remuneration of phonogram producers may be assigned to third parties and phonogram producers may waive such claims.

Finally, it is noted that the applicant CMO in this case does not have a mechanism for attributing equitable remuneration to rights holders who are not its members. It has not rendered to this date any amount to a non-member-rights holder.

To conclude, a rights holder entitled to equitable remuneration under article 49 of Law 2121/1993 who is not a member of a CMO has the right to assign, whenever they wish, the collection of this equitable remuneration to any CMO inside or outside the European Union

or to refrain from collecting this remuneration, for their own reasons. In both cases, it can be argued that the CMO does not have the right to collect any equitable remuneration on behalf of rights holders who are not its members.

For further information on this topic please contact Kriton Metaxopoulos or Irini Daroussou at A & K Metaxopoulos & Partners Law Firm by telephone (+30 210 725 7614) or email (k.metaxopoulos@metaxopouloslaw.gr or idaroussou@metaxopouloslaw.gr). The A & K Metaxopoulos & Partners Law Firm website can be accessed at www.metaxopouloslaw.gr.

Endnotes

(1) Law 2121/1993.

(2) HCO's letters under Protocol Nos. 24010/21-10-2014 and 23446/15-07-2014.

(3) Decision No. 5653/2017.

(4) Decision No. 7647/2016.