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Court clarifies process for CMO equitable remuneration

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



KRITON
METAXOPOULOS

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Introduction

This case⁽¹⁾ concerned a collective management organisation's (CMO's) application for the temporary determination of related and neighbouring rights and copyrights. This was for equitable remuneration for public reproduction of intellectual works by catering businesses (ie, coffee shops). The judgment also dealt with the presumption of management and protection representative authority for CMOs.

As addressed in this case, if an application for determination concerns a use that has already been carried out, it would be a final determination, which has to be made by a competent regular court (excluding the procedure of injunctive measures). If the use has already occurred (and ceased), there would be no justifying reason for conducting two trials, namely one for the provisional and another for the final determination (ie, the award of the equitable remuneration). If the use has clearly taken place and ceased before the exercise of the application, article 49 of Law 2121/1993 is applicable, dealing with reasonable and uniform remuneration in the context of regular proceedings or trials.

Facts

The claimant was established and operated legally, according to the provisions of Law 2121/1993, as the only representative CMO for the protection of neighbouring rights of Greek musicians, singers and producers of audio carrier materials. The claimant was, by law, entitled and obliged to administer and collect the right to equitable and uniform remuneration according to article 49(1) of Law 2121/1993 in the Greek territory. This entailed negotiating and collecting judicially and extrajudicially the reasonable and uniform remuneration as stipulated in article 49 (public performance of material carriers of music). The claimant also had the presumption of legalisation for all national and foreign beneficiaries and for all their works.

The claimant had duly published a fee schedule for businesses who may have wished to use the musical works (such as cafes, restaurants, coffee shops, refreshment rooms, fast-food restaurants, coffee-patisseries, internet cafes, etc). The defendants' business fell within this list of businesses.

According to the claimant, in the context of their business activity, the defendants had used on a daily basis, throughout the operating hours of their businesses, physical sound speakers. The claimant alleged that these speakers had been legally procured and were used by the defendants to play recorded performances by Greek and foreign performers for the entertainment of their customers. The claimant argued that this use would have been a main factor in attracting, maintaining and increasing the defendants' clientele, thereby increasing their revenue.

The claimant proved that, although she had invited the defendants to pay determined amounts based on her legally published fee schedule, the latter did not respond to the negotiation efforts.

Based on these incidents, the claimant requested:

- a temporary determination of the amount of the equitable and uniform remuneration to which she was entitled for the years 2011 to 2021.
- that the first and third parties of the defendants be compelled to provide lists of the titles of the musical repertoire they had used during the above years, in order for the applicant to proceed with the distribution of the fees to the beneficiaries; and
- that the first and third parties of the defendants be compelled to temporarily pay her the half of the aforementioned amounts for the years 2011 to 2021 with legal interest dating from the service of the application.

Decision

Legal framework

Law 2121/1993

Law 2121/1993 protects the basic categories of beneficiaries of neighbouring rights. It does this by recognising performers' and producers' exclusive and absolute right, in some cases, (and in other cases a simple relative right to ask for an equitable remuneration) to allow or prohibit certain uses of their contributions.

Where the law establishes a right to fair or equitable remuneration, the beneficiary has only the relative right to demand this fair remuneration from users. When a legally recorded material sound medium or image is used for broadcasting or for presentation to the public, article 49(1) of Law 2121/1993 establishes a right to equitable remuneration in favour of:

- the performers or performing artists whose interpretation or performance was recorded on the material medium; and
- the producers of the material medium.

Article 6 of Law 4481/2017 states:

1. The collective management organizations have indicatively the following responsibilities, as well as any other competence that is consistent with the nature and purpose of a collective management organization provided that they are included in the operating license of the Minister of Culture and Sports and provided for in their statute:

a) manage the property right, the powers deriving from it, categories of powers or types of works or objects of protection for the territories chosen by the beneficiaries,

b) draw up contracts with the users for the conditions of exploitation of the works as well as for the due, percentage or even equitable remuneration,

c) ensure the beneficiaries a percentage remuneration as defined in par. 1 of article 32 of Law 2121/1993,

d) collect the remuneration provided for in this law and in Law 2121/1993 and distribute the collected amounts among the beneficiaries,

...

k) proceed in accordance with the fourth paragraph of paragraph 1 of article 7 to each administration or judicial or extrajudicial action for the legal protection of the rights of the beneficiaries and, in particular, to submit requests for injunctive measures, bring lawsuits, exercise legal remedies, file lawsuits and penal complaints, appear as civil plaintiffs, request the prohibition of acts that violate the right to the powers assigned to them and request the confiscation of illegal copies or the judicial custody of the goods in accordance with article 64 of Law 2121/1993,

l) receive from the users any information necessary for the application of the fees, the calculation of the fee and the collection and distribution of royalty revenue, using the relevant recognized industry standards.

Further, article 7 of Law 4481/2017 sets out the following presumptions:

1. Collective management organizations and collective protection organizations are presumed to have the authority to manage or protect rights in all works or protected objects or all beneficiaries, for which or for which they declare in writing that the relevant powers have been transferred to them or rights of reasonable remuneration or that are covered by the power of attorney or through any other contractual agreement.

As long as a collective management organization that operates with the permission of the Minister of Culture and Sports, exercises rights or claims within the framework of Law 2121/1993, which are subject to mandatory collective management, it is presumed to represent all the beneficiaries, nationals and foreigners without exception, and all without exception their works. If, in the case of the previous paragraph, there are more collective management organizations for a specific category of beneficiaries, the presumption applies, as long as the rights are exercised jointly by all the competent collective management organizations, in accordance with the more specific provisions of Law 2121/1993. Collective management organizations and collective protection organizations may act, judicially or extrajudicially, in their own name, if their competence is based on a transfer of the relevant power, or on a power of attorney, or on any other contractual agreement. They are also entitled to exercise all rights transferred to them by the beneficiary or covered by the power of attorney or any other contractual agreement.

2. For the judicial pursuit of the protection of the works and the beneficiaries represented by the collective management organization or by a collective protection organization, a sample report of the works that were exploited without the required license or without the payment of a reasonable fee is sufficient and it is not necessary to proceed to a full enumeration of these works.

3. The presumptions are applied by the organizations in such a way that the rights of the beneficiaries, as provided for in the law, are not affected, and in particular their possibility to allocate or not to different collective management organizations all or part of the management of certain powers or of some of their works or objects of protection.

Thus, article 7 establishes a rebuttable presumption, which, in principle, functions as evidence and aims to facilitate:

- CMOs' proof of:
 - their IP or related rights; and
 - their authority to draw up relevant contracts and collect relevant fees; and
- the judicial protection of the beneficiaries of these rights.

A rebuttable presumption therefore significantly strengthens a CMO's position vis-à-vis the users of the protected works.

Foreign entities

Under article 72(3) of Law 2121/1993, CMOs may also manage related rights of foreign entities and enter into reciprocity agreements with the corresponding foreign CMOs. With these contracts, the foreign CMOs provide power-of-attorney or transfer to the domestic CMOs their rights for the purpose of their management in Greece.

Further, article 22 of Law 4481/2017, stipulates that:

1. The collective management organizations and the users conduct negotiations for the granting of licenses for the use of the rights in good faith and in this context they exchange all necessary information in order for the users to have the freedom to use the works of their repertoire, they demand from them a percentage fee according to the specified in article 32 of Law 2121/1993

...

6. In the event of non-payment of a fee for obtaining a license or a dispute as to the amount of the fee claimed by the collective management organization, the user must, before any use, make an advance payment to the collective management organization administration the requested fee amount or that which the Single-Member Court of First Instance will have temporarily set and awarded, upon request of either the user or the collective management organization during the injunction procedure, as usually

paid in similar cases or as reasonable, if there are no similar cases . After a lawsuit brought by the collective management organization, or the user, the competent Single-Member Court of First Instance, which adjudicates during the KPoID property disputes procedure, definitively determines the fee and its amount and awards it.

7. In the event of a dispute between the user and the collective management organization as to the amount of the reasonable remuneration of article 49 of Law 2121/1992 and the terms of its payment, the Single-Member Court of First Instance, which is competent by application of the interim measures procedure, determines these provisionally at the request of the user or the collective management organization, and provisionally awards up to half of the reasonable fee it determined. For the final determination of the amount of the reasonable fee and the terms of its payment, the last paragraph of paragraph 6 shall be applied.

Court opinion on legal framework

The Court held that Greek law aims to regulate cases which cannot wait for the inherent slowness of a regular trial. Such cases include:

- cases being held "before any use" (as expressly defined in article 22(6) of Law 4481/2017); and
- cases being held during any use (which require an immediate determination of the fee to be paid, in order to draw up a contract between the parties and achieve the payment of the fee).

The Court held that Greek law aims to regulate these cases by providing for the possibility of a temporary determination of the reasonable remuneration (in the context of the injunction proceedings). Thus the law refers to determining the amount of the fee and the terms of its payment (ie, one lump sum or instalments, the date of payment, etc), as well as its temporary award.

Therefore, it follows that a CMO's application to a single-member court of first instance for the temporary determination of reasonable remuneration during injunction proceedings must be made after:

- negotiations with the users have taken place; and
- the parties have failed to reach an agreement;

The application should be made before or during any use, in order to avoid:

- arbitrariness and abusive discrimination by CMOs at the expense of users; and
- users being forced to accept unfair prices.

This would be achieved by providing the possibility of negotiating the amount of the fee due, based on the users' specific characteristics (eg, size or type of business, type of music performed, duration of use, etc). It would also allow users to decide not to use the works.

Therefore, the Court considered that, for an application to determine equitable remuneration, if it concerns use that has already been taken place, this would be a final determination. This determination must be made by the competent regular court (excluding the procedure of the injunctive measures). In the case of the past use, which has already ceased, there is no justifying reason to hold two trials (ie, for the temporary determination and for the final determination of equitable remuneration).

Court judgment

The Court held that, while the claimant's application had been competently submitted under the special procedure of injunctive measures, it should be rejected as legally unfounded.

As highlighted in the main paragraph of the decision, the law does not provide for temporarily determining equitable and uniform remuneration according to article 49 of Law 2121/1993 through the procedure of injunctive measures. In this case, the fee related to use which had been carried out and ceased before the exercise of the application. The claimant had requested a temporary determination of her reasonable and uniform remuneration for the period between 1 January 2011 to 31 December 2021. Assuming that all the claims in her application were true, the claimant had therefore requested temporary determination of equitable and uniform remuneration for uses that had already been carried out and ceased. However, for these uses, only a final determination of the applicant's equitable and uniform remuneration by the competent court with the special procedure of property disputes was permissible – not a temporary determination with injunctive measures. This was due to there being no justifiable reason for retrospectively holding two courts, one for the temporary determination and one for the final determination. The holding of two courts with essentially the same object would constitute excessive welfare for the applicant, which is not justified either by law or by practice.

Thus, the Court held that the application in question should be rejected as unfounded in law.

Comment

This decision follows decision No. 6024/22 of the Athens Court in which the defendants had raised a similar objection: that the practice of CMOs to make an application (related to past uses) with the procedure of injunctive relief is illegal and incompatible with fundamental principles of Greek Civil Procedure Law. In some instances, CMOs have achieved a temporary adjudication of equitable remuneration for past (and not future as the law provides) uses of background music under the special injunction proceedings (provided by article 22(7) of Law 4481/2017). This is despite Greek Civil Procedure Law prohibiting temporary adjudication of any claim in the context of injunctive proceedings with only few exceptions specifically provided by law. Equitable remuneration under article 49 of Law 2121/93 is not among these exceptions.

It is clear that Greek Courts have started to realise the legal gap in this behaviour of CMOs, which aims to circumvent the slow and lengthy ordinary proceedings of Greek civil procedure and use the provision of article 22(7) of Law 4481/2017 (which is intended for future uses) in order to obtain temporary payment of equitable remuneration for past uses. As the judgment in this case rightly states, equitable remuneration for past uses can be claimed only under ordinary and not injunctive proceedings for temporary determination.

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

Endnotes

(1) First-instance single-member court of Athens (457/2023).