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Who gets to be a member of a collective management organisation for copyright?

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Introduction

Collective management of copyright (ie, several rightsholders banding together as a collective management organisation (CMO)) to exercise and commercialise members' copyright collectively – as opposed to a person's efforts to exercise and commercialise their own copyright individually – is growing in importance within many creative sectors in the European Union and Sweden.

This is especially true in many digital sectors where individual negotiations with platforms and other big internet actors are not possible and the CMO route is the only road that leads to remuneration. This trend is also evident from recent EU copyright legislation's such as the DSM Directive, which continues to vest important new rights with CMOs.

This development inevitably raises the question of who can be a member of a CMO. In recent case⁽¹⁾ from the Patent and Market Court of Appeal, a split court found that a party's action for a declaration to become a member of a CMO was inadmissible on largely procedural grounds.

According to Chapter 4, section 1 of the Collective Management of Copyright Act,⁽²⁾ anyone who meets the membership conditions set up by a CMO shall be granted membership. According to section 2, such conditions must be objective, clear and non-discriminatory, and must be publicly available. According to Chapter 12, certain questions regarding membership in a CMO can be tried by the specialist Swedish Patent and Market Court and Patent and Market Court of Appeal.

Facts

In this case, a Swedish trade union or interest organisation for professional visual artists applied for membership in a Swedish CMO in the visual sector. The organisation was not granted membership and as a result the organisation sued, seeking that the Court determine it had the right to become a member. Importantly, the claimant structured its claim as a declaratory claim, for the Court to declare that it had a right to become a member.

The first instance Patent and Market Court found the declaratory claim inadmissible on procedural grounds. That decision was subsequently appealed to the Patent and Market Court of Appeal.

Decision

The main issue in this case was whether an action for a declaratory judgment, regarding the right to become a member of a CMO, was admissible under general Swedish procedural rules, as opposed to an enforcement action seeking concrete admission to the CMO.

The practical difference between the two claims may have seemed minor for the claimant, but procedurally it would turn out to be determinative for the outcome of the case.

Pursuant to Chapter 13, section 2 in the Code of Judicial Procedure, an action for a declaration of whether a certain legal relationship exists may be tried by courts if there is an uncertainty as to the legal relationship, and that uncertainty is to the detriment of the claimant.

In light of this, the Court found that the first question to be answered was whether the right to become a member of a CMO constituted a "certain legal relationship". The Court found that earlier case law supported the conclusion that a "certain legal relationship" only arises after an applicant has been accepted as a member, not before. After membership is granted, the management's statutes or conditions are considered to constitute the legal relationship between the applicant and the association, and can therefore be subject to a declaratory claim, but not before.

In the present case, the membership application had been refused and thus the Court determined that no legal relationship had arisen between the parties. Hence, there were no conditions to bring an action for a declaration in this case, and the Court rejected the appeal.

However, the chair was of a dissenting view and stated that the action for declaration should be allowed. Therefore, the Court allowed the claimant to appeal the decision to the Supreme Court.

Comment

In this case, the Patent and Market Court of Appeal rejected the action for a declaration since the right to become a member of a collective management was not considered to constitute a legal relationship that can be the subject of a declaratory judgment.

Quite simply, the claimant's own decisions on how to structure its case faced a procedural hurdle and fell flat. But beyond the fact that it is an interesting procedural question that now may end up before the Supreme Court, this case exemplifies the growing importance of

CMO membership in many creative sectors. In this sense, this largely procedural case may be a harbinger for future substantial cases regarding CMO membership, CMO management and other important parts of collective management of copyright.

For further information on this topic please contact [Filip Jerneke](#) or [Hans Eriksson](#) at Westerberg & Partners Advokatbyrå Ab by telephone (+46 8 5784 03 00) or email (filip.jerneke@westerberg.com or hans.eriksson@westerberg.com). The Westerberg & Partners Advokatbyrå Ab website can be accessed at www.westerberg.com.

Endnotes

- (1) Patent and Market Court of Appeal, PMÖ 8753-23.
- (2) SFS: 2016:977, implementing the Collective Rights Management Directive.