

# Scope of public body's use of individual's exclusive right in course of trade

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## Background

## Decision

## Comment

On April 4 2017 the Supreme Court outlined the assessment of the terms 'trader' and 'marketing' with regard to a municipality's use of a private individual's picture in newspaper advertisements and other informative material.

### Background

After a city in a municipality had been named the European capital of culture, the municipality used a picture showing a person (N) in newspaper advertisements and informative material in a project relating to the award. The municipality also used N's picture outside the said project, in connection with quotes, such as 'Are you uncertain of your sexual orientation?' and 'Have you been tested?'. N sued the municipality for damages on the grounds that it had used the picture in marketing the municipality and its business without his consent.

The district court referred the question of whether the municipality, in the capacity of trader, had used the picture to market goods, services or other commodities under the Act on Names and Pictures in Advertising to the Supreme Court.

### Decision

There is no general prohibition on the use of an individual's name or picture without his or her consent under Swedish law. However, there is a certain protection against commercial use, to ensure the protection of personal integrity. The provisions are modelled on criminal law, but since they provide an exclusive right to decide if and how an individual participates in different forms of advertising, the elements of IP law and the potential financial value are clear.

The Supreme Court stated that the term 'trader' has a wide meaning and that government and municipal bodies involved in commercial business are considered traders. The public body does not have to seek to make a profit; however, the exercise of public authority does not constitute commercial activity in itself. An overall assessment should be made and the following factors considered:

- the commercial aspect of the business;
- whether it includes mutually binding conditions; and
- whether it is run in competition with private traders.

Other important factors include whether the business is mandatory for the public body and if it is funded by public means.

With regards to the term 'marketing', the court noted that the relevant provisions often prohibit use of names or pictures in printed media where the constitutional acts on freedom of expression and freedom of the press are applicable. However, actions can be taken against commercial

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advertisements without violating the Freedom of the Press Act. If there is room for hesitation regarding whether the act is applicable, the court stated that it should be assumed that this is the case.

In the present case, the court concluded that the municipality had used N's picture in the project relating to the European capital of culture. The project's aim was to convey the message that the municipality had received the award and to raise interest in culture. The project was funded by public means. The business had included the exercise of public authority and the commercial elements were considered limited. The business had not been run in competition with private subjects and was not intended to make a profit. In light of this, the municipality was not considered a trader under the relevant provisions when running the project. It had not been shown that the aim of the municipality's use of the picture was to promote the sale of goods, services or other commodities, and the use was therefore not considered to be marketing.

The court did not find that the use of the picture combined with the quotes violated the relevant provisions and elaborated no further on the matter.

### **Comment**

When assessing the scope of what is considered 'use in the course of trade', especially within trademark and marketing law, the trend in previous decisions has been to include more and more use as being in the course of trade, leading to a more limited scope of private use. This decision may mark a shift in this trend and it remains to be seen whether it will be mirrored in cases involving trademark infringement or marketing law violations.

However, the decision concerns a public body. Several factors that the court deemed important in its assessment cannot be transferred to the use of private subjects (eg, whether the business in which the exclusive right was used includes the exercise of public authority or whether the business was mandatory). The decision's relevance in disputes between private subjects is therefore debatable.

The fact that the court allowed the municipality to use the picture once again highlights Sweden's lack of protection for an individual's personal integrity.

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