

The obligation of owners of establishments for leisure to pay the royalty fee when using musical compositions under the copyright law of the Kyrgyz Republic

Nowadays almost all places for leisure in our country - catering establishments such as restaurants, cafes, bars, etc. use domestic and foreign musical compositions to attract customers to their establishments. However, as the established practice shows, not all these establishments are aware of their obligation to pay the royalty fee when using musical compositions in their establishments under the copyright law of the Kyrgyz Republic (hereinafter referred to from time to time the “KR”) as they use them for commercial purposes - to attract customers.

In this regard, we would like to address issues regarding the use of musical compositions for commercial purposes by the above-mentioned establishments herein from the perspective of the Kyrgyz copyright law.

In Kyrgyz Republic the state body which regulates relations arising in the field of copyright and related rights and their protection is the State Service of Intellectual Property and Innovation under the Kyrgyz Government (the “Kyrgyzpatent”). Within the framework of the Law “On Copyright and Related Rights”¹ No. 6 dated 14.01.1998 (the “Copyright Law”) and the Regulation “On the State Service of Intellectual Property and Innovation under the Government of the KR”² No. 131 dated 20.02.2012 approved by the Resolution of the Government (the “Regulation on Kyrgyzpatent”), Kyrgyzpatent in accordance with the tasks assigned to it performs the following functions:

- to receive documents from users of copyright and related rights, confirming the legality of use of objects of copyright and related rights;
- to require availability of the applicable license agreement on the use of copyright and related rights from all users of objects of copyright and related rights;
- to enter into license agreements with users on granting the right to use objects of copyright and related rights;
- to collect fees, to make distributions and payments of remuneration for the use of works of national authors and holders of neighboring rights in foreign countries and foreign authors and holders of neighboring rights in the Kyrgyz Republic in accordance with the agreements

¹ This law regulates relations arising in connection with the creation and use of works of science, literature and art (copyright/ author’s right), phonograms, performances, broadcasts by broadcasting or cable broadcasting organizations (related rights).

² This Regulation implements a unified state policy in the field of protection of intellectual property and the development of innovation.

on mutual representation of interests with foreign organizations to manage property rights of authors and holders of neighboring rights;

- to require the provision of monthly reports about the used products;
- to take measures in case of failure by users of copyright and related rights to make the payment of the royalty fee.

I. The exclusive rights of a phonogram³ producer

In accordance with Article 38 of the Copyright Law, a phonogram producer⁴ owns the exclusive right to exploit the phonogram in any form as well as the right to receive remuneration for each form of use. The exclusive right to exploit the phonogram means the right to perform or to authorize actions such as:

- 1) to reproduce the phonogram;**
- 2) to remake and to work over/transform the phonogram in any way;
- 3) to distribute copies of the phonogram by sale, or rental, and etc.;
- 4) to import copies of the phonogram for the purpose of distribution, including copies made with the authorization of the phonogram producer;
- 5) to bring the phonogram to public in such a way that any person may access the phonogram from any place and at any time of their choice.**

It should be noted that this Article provides for should copies of a lawfully published phonogram have been placed on the market for sale, further their subsequent distribution is permitted without the consent of a phonogram producer and without payment of the royalty fee. However, this rule applies if a person uses a phonogram/soundtrack exclusively for personal purposes. Regarding establishments which use musical compositions to attract customers, i.e., not for personal use, but for commercial one, the mandatory payment of the royalty fee is made in accordance with the copyright law of the KR, which will be discussed in the next Section.

II. The use of phonograms published for commercial purposes without the consent of the phonogram producer

³ Phonogram/soundtrack - any exclusive sound recording of performances or other sounds that can be perceived, reproduced on any tangible medium (Article 4 of the Copyright Law).

⁴ Phonogram producer – individual or legal entity, who/which has taken the initiative and responsibility for the first sound recording of a performance or other sounds, given that such person must either physically make it or order it and pay for manufacturing; unless proved otherwise, the phonogram producer shall be an individual or legal entity, whose name or title is indicated on the phonogram and (or) on the box/case containing it in the usual way (Article 4 of the Copyright Law).

According to Article 4 of the Copyright Law, a public display, public performance or communication to public is any display, performance or communication of works, phonograms, either directly or with the help of technical means in a place open to public access, or in a place where a significant number of persons present, not belonging to the usual family ambiance. The use of musical works/compositions by establishments is considered public inasmuch as visitors of these establishments are different persons, not belonging to the same family with different gender, age, nationality, etc. Article 39 of the Copyright Law provides that a public performance or reproduction of a phonogram may be permitted without the consent of the producer to be used for commercial purposes, should the user of musical works make the payment of the royalty fee.

Based on the current provisions of the Copyright Law and established practice, it should be noted that most of the pieces of music played in restaurants, cafes, clubs, bars and etc. are reproduced illegally since the payment of the royalty fee is not made. According to Article 28 of the Copyright Law a work, which became public property, can be publicly performed without the payment of the royalty fee; though, works/compositions become the public domain only upon expiration of the term of copyright and related rights - 50 years after the author's death. Essentially, the pieces of music played in such establishments as restaurants, cafes, bars and etc., are used to attract visitors, therefore, in order to make a profit, which means that authors of the used works/compositions are entitled to a percentage from the profit.

Based on the foregoing and in accordance with Article 39 of the Copyright Law, the above-mentioned establishments for the use of musical works/compositions for commercial purposes should make the payment of the royalty fee to the body in charge to make collections, distribution and payment of the royalty fee - Kyrgyzpatent.

Article 39 of the Copyright Law provides that the amount of the royalty fee and its payment are determined by an agreement between the user of a phonogram, on the one hand, and a company that manages the rights of producers of phonograms, on the other hand, and in the event if the parties fail to agree – by Kyrgyzpatent. The amount of the royalty fee is established for each type of use of the phonogram. Users of phonograms should provide to the organization a program, containing detailed information on the number of performances, phonograms, as well as other information and documents necessary for the collection and distribution of the royalty fee.

III. Terms of a license agreement: the rates of the royalty fee for the use of copyright and related rights

Under the Copyright Law of the KR public catering facilities, i.e. restaurants, bars, cafes, snack bars, and etc. are the payers of the royalty fee, which are in accordance with paragraph 5 of Section I of the Regulation “On minimum rates of royalties for the use of copyright and related

rights”⁵ approved by the Government of the KR No. 488 dated 22.07.2002 (the “Regulations on the Author’s Remuneration Rates”) are required to conclude a license agreement with Kyrgyzpatent for the right to use objects of copyright and related rights, as well as to carry out the state registration in the established order.

The license agreement provides for the amount and terms of payment of the royalty fee, rights and obligations of the parties responsible for failure to fulfill obligations on payment and other conditions. The above mentioned establishments shall submit to the authorized representative of Kyrgyzpatent for checking purposes a duly executed calculation of the royalty fee to be paid and all the documents related to the calculations of the royalty fee for public performance of works/compositions; to allow representatives of Kyrgyzpatent free of charge to be present at their events for supervisory listening (examination).

The Regulations on the Author’s Remuneration Rates foresees a fixed rate out of gross collection received from the sale of tickets for shows, concerts (et al. program), set by Kyrgyzpatent, for the public use of copyright and related rights - the use of musical works by catering businesses (restaurants, bars, cafes, snack bars, etc.).

IV. Consequences of infringement of copyright and related rights in accordance with the legislation of the Kyrgyz Republic

A civil, criminal or administrative liability established by the legislation of the Kyrgyz Republic is foreseen for the infringement of copyright and related rights under the provisions of the acting Copyright Law. The legislation of the Kyrgyz Republic provides for a set of measures aimed at restoring or recognition of copyright and related rights and protection of interests of their owners when there is a violation or contesting.

Protection of the rights is implemented via applying certain remedies. As a rule, a right-holder himself or his successors address for the protection of the violated rights. Depending on the domain of legal relations, such legal protection methods are divided into civil law, administrative law and criminal law remedies.

a) Civil remedies

Article 11 of the Civil Code of the Kyrgyz Republic No. 15 dated 08.05.1996 (the “KR Civil Code”) lists methods for protection of civil rights related to the author’s right as the main means of protection. The main methods of protection are the following:

- Recognition of the right;

⁵ It regulates relations upon the payment of the royalty fee by organizations using objects of copyright and related rights.

- Restoration of situation, existed before the violation of the right;
- Suppression of acts, infringing the right or threatening to infringe, and recovery of losses;
- Recovery of profit from the infringer instead of compensation for losses;
- Payment of compensation in a fixed sum;
- Suppression of acts infringing the right or threatening to infringe (ban on advertising and offering of copies for sale, the sales ban, etc.) and other measures related to the protection of the right.

A universal remedy is recovery of losses. Recovery of moral damage may take place with respect to the author's right. Measures such as recovery of losses/damages, recovery of profit and payment of compensation applied at the discretion of the holder of exclusive rights (copyright and related). Thus, the above rules on the protection of civil rights as well as methods of protection provided by the Copyright Law shall apply in order to protect the author's right.

b) Administrative remedies

An administrative liability for infringement of the exclusive rights, manufacture, sale, rental, other unlawful use of copies of works or phonograms is provided for in Article 340 of the Code on Administrative Liability No.114 dated 08.04.1998 (the "CAL"). This Article foresees imposition of fine on citizens - from thirty to fifty calculation indexes⁶ (the "CI"), on officials - from fifty to one hundred CI with confiscation of counterfeit copies of works or phonograms. The latter shall be destroyed, except in the case of their transfer to the right holder at his request.

The second part of this Article provides for the same actions committed repeatedly within a year after the application of measures of administrative punishment by a fine on citizens - from fifty to one hundred CI, on officials - one hundred to two hundred CI with confiscation of counterfeit copies of works or phonograms. It should be noted that confiscated copies of works or phonograms in accordance with the first and second parts of this Article shall be destroyed in accordance with the law, except in cases of their transfer to the owner of copyright or related rights at his request.

In addition, Article 342 of the CAL provides for a liability for refusal to provide the required data on income/profit as well as the submission of incorrect data on income/profit received in connection with the use of objects of copyright and related rights by imposing an administrative fine on citizens - from twenty to forty CI, on officials - forty to eighty CI. The same actions provided for in this Article, committed repeatedly within a year after the application of administrative penalties,

⁶ One (1) calculation index (CI) is equal to 100 Kyrgyz soms according to the Resolution of the Jogorku Kenesh of the Kyrgyz Republic No. 1115-III dated 15.06.2006.

shall be punishable by an administrative fine on citizens - from forty to eighty CI, on officials - from eighty to one hundred CI.

An administrative fine on citizens - from twenty to forty CI, on officials - from forty to eighty CI is provided by Article 343 of the CAL for failure to perform a duty to register the license agreement on the use of objects of copyright and related rights and to obtain identification of the proper sample.

The same action under this Article committed repeatedly within a year after the application of administrative penalties causes imposition of an administrative fine on citizens - from forty to eighty CI, on officials - from eighty to one hundred and fifty CI.

Further, Article 345 of the CAL envisages the imposition of an administrative fine on citizens - from thirty to fifty CI, on officials - from fifty to one hundred and fifty CI for denial of users of copyright and related rights objects from the payment of the royalty fee's amounts for actually held public performance of the work/composition or breach of the terms to make deductions on the royalty fee set by the legislation of the KR.

A court is a competent authority, considering administrative violations in the field of intellectual property.

c) Criminal liability

Criminal-legal means of protection of the author's right are expressed in the form of application of criminal liability. Criminal liability for infringement of copyright and related rights established by Article 150 of the Criminal Code of the Kyrgyz Republic No. 68 dated 01.10.1997 (the "Criminal Code"). Criminal liability begins, when objects of copyright and related rights are deliberately used on a commercial scale (large damage - damage to five hundred times greater than CI), as well as the assignment of authorship or compulsion to co-authorship.

Article differentiates violations and provides two qualifying features:

- Duplicity in committing the offense;
- Committing a crime by a group of persons by prior agreement or an organized group.

Depending on the severity of the offense the offender shall be punished by a fine, "triple aiyp"⁷ or imprisonment.

When preliminary investigation bodies and courts consider these cases as well as when a claim is considered in civil and arbitration proceedings, seizure, confiscation and destruction of infringing copies and materials and equipment intended for the manufacture of such products are applied in corresponding cases.

⁷ Three times collection of the amount of caused damage in cash or in kind (the Criminal Code).

V. Conclusion

The aim of this article is to inform owners of catering facilities such as restaurants, cafes, bars, etc. on the obligation to pay the royalty fee according to the Copyright Law of the KR, when they use musical works for commercial purposes in their establishments, as well as on types of liability that may arise for the infringement of copyright and related rights in accordance with the legislation of the KR, when not following provisions of the Copyright Law of the KR. We hope that this article will be useful for the audience to which it is addressed from the perspective of Kyrgyz law and it will help to avoid legal problems often faced by the mentioned organizations in running their business.

This Article is prepared by Umtul Murat kyzy, an associate at Lorenz | International Lawyers, on August 09, 2016.