

Private copying levy under Russian law

How private copying levy must be collected in Russia? IV part of Civil code of Russian Federation (CC RF) grants authors, performers and producers of phonograms and audio-visual works exclusive reproduction right in order to control a certain use of relevant subject of intellectual property. Article 1245 of CC RF provides certain exception for copies of phonograms or audio-visual works made only for private purposes – “*Authors, performers, producers of phonograms and audio-visual works have the right to receive remuneration for free reproduction of phonograms and audio-visual works only for private purposes*”. For example, there is no remuneration for free reproduction of musical works for private purposes. But existing mechanism of collection, allocation and distribution of levy can take in account the interests of songwriters and musical publishers along with interests of producers and performers. If one composer creates musical work, other writer creates a text and producer, using musical work and text, makes sound recording, why producer and performer have the right to receive remuneration for free reproduction of phonogram when composer and writer don't have the right to receive remuneration for free reproduction of musical work and text? Why Russian law discriminates creators, owners of intellectual property rights? Even if you have a great talent, in most cases in order to create a phonogram you need at least text and musical accompaniment.

Under article 1245 natural persons have the right to make copies - “*only in private purposes*”. In other words, only natural persons have the right to reproduce phonograms or audio-visual works for their private use. Obligation to pay remuneration corresponds to the natural persons' right to make copies for private purposes. According to item 1 article 1245 “*such remuneration has compensatory character and is to be paid to right holders from moneys paid by manufacturers and importers of equipment and material mediums...*”.

Manufacturers and importers of equipment and material mediums are responsible for payment of levy. Since there is no opportunity to track precisely all copies made for private use and to calculate precise remuneration for all such copies, Russian legislator decided to make manufacturers and importers responsible for payment of private copying levy. Anyway the levy sum will be included in price and customer will “compensate” this paid levy. Accordingly, remuneration for private copies under the Russian law is compensation to right holders for reproduction of their phonograms and audio-visual works by natural persons without appropriate right holder’ permission.

Use of equipment and mediums for purposes other than private copying excludes such equipment and mediums from private copying levy under the CC RF. Article 1245 does not specify when exactly remuneration for private copying must be paid – whether immediately after equipment and mediums have been produced and accounted, or obligation to pay levy arises after transfer of ownership rights in equipment or mediums to importer, or obligation to pay levy arises after realisation of equipment or media by manufacturer or importer, i.e. from the moment the ownership rights in equipment or mediums have been transferred by the importer or manufacturer to buyer? Thus there is no conflict between provision of article 1245, providing obligation of manufacturers and importers of equipment or mediums to pay remuneration for private copying and provision of the same article, providing natural persons’ right to make copy for private purposes, because there is no precise reference to moment when the obligation to pay levy arise. Under item 4 article 1245 equipment, which is not intended for home private use is excluded from “taxation”. For example, computer or internal storage device, included in list of taxable equipment and mediums, can be used both for professional purposes, including business purposes, and for private home purposes.

As a conclusion from analysis of CC RF’s provisions we can precisely define what objects of intellectual property require statutory payment from

manufacturers and importers of equipment and mediums for free reproduction by natural persons. It is phonograms and audio-visual works in accordance with first sentence of item 1 article 1245 CC RF. For the purposes of centralised collection of this remuneration, Russian law, article 1244 CC RF, provides authorisation for collective management organisation to collect levy on an exclusive basis. In other words, CC RF defines why (free reproduction for private purposes), who (manufacturers and importers of equipment and mediums) and to whom (accredited collecting society) pays private copying levy. Accreditation, received in accordance with Russian law, authorises collecting management organisation to collect private copying levy on an exclusive basis.

Exclusive authorisation to collect private copying levy is useless without proper mechanism of its realisation, exercising. CC RF does not contain provisions how to exercise this authorisation. In accordance with second paragraph of item 1 article 1245 CC RF “list of equipment and mediums, applicable rates and procedures, prescribing how to collect relevant remuneration are to be adopted by Government of Russian Federation”. It means that Russian government prescribes how private copying levy should be collected, but it does not have power to make collective management organisation’ authority broader or restrict it.

Governmental decree #829 of 14.10.2010 “About remuneration for free reproduction of phonograms and audio-visual works for private purposes” contains list of taxable equipment and mediums and also procedure how to collect, allocate and distribute collected private copying levy to authors, performers and producers of phonograms and audio-visual works. In decree’s title it is stated “about remuneration for free reproduction of phonograms and audio-visual works” and procedure how to collect, allocate and distribute this remuneration, prescribed by this decree, contains in item 2 beneficiaries, who exactly has the right to receive this remuneration. Under item 2 of this

procedure beneficiaries are authors (authors of works, fixed in phonograms, and authors of audio-visual works), performers (performers, whose performances are fixed in phonograms, and performers, whose performances are fixed in audio-visual works), producers of phonograms and producers of audio-visual works, whose rights are valid (recognised) in Russian Federation in accordance with articles 1256, 1321 and 1328 CC RF. First, provision, making authors of works, fixed in phonograms, a beneficiaries of levy, conflicts with governmental decree, prescribing this procedure, it also conflicts with item 1 of article 1245 CC RF, where it is stated that remuneration is to be collected for free reproduction of phonograms, but not for musical works, and it also conflicts with article 1273 CC RF providing “free reproduction of rightfully published work by citizen (not by natural person) as needed and only for private purposes without payment of remuneration and without permission of any author or other right holder”. Secondly, not only Russian right holders have the right to receive remuneration for free reproduction of phonograms and audio-visual works but also right holders whose rights are recognised (valid) in Russian Federation.

And the most important is subject of “taxation” in accordance with governmental decrees. Let’s start with manufacturers. “Procedure about payment for free reproduction of phonograms and audio-visual works for private purposes by manufacturers of equipment and mediums used for such reproduction” prescribes how manufacturers must pay private copying levy. *“Equipment and mediums intended for export”* and professional equipment not intended for private home use are not subject to private copying levy. *Professional equipment*, under this procedure, means such *“equipment which by virtue of its design features and consumer properties is not exploited for satisfaction of person, family, home and other needs not related to business activity”*. Article 2 CC RF under business activity means *“independent activity, systematically intended to profit from exploitation of property, sale of goods,*

providing services and running at own risk by persons registered in this capacity in accordance with established procedure". So, under article 2 the qualificatory feature of business activity is profit, activity without profit it is not business activity. Therefore, **professional activity not intended to profit, like charity, and even without personal intentions** by virtue of "procedure about payment for free reproduction of phonograms and audio-visual works for private purposes by manufacturers of equipment and mediums used for such reproduction" **is qualified as private use**. Established by the procedure for manufacturers criterion which defines what equipment or mediums have to be imposed or free from levy ignores requirement of article 1245 CC RF, where it is stated that remuneration is to be paid only for reproduction for private purposes. Procedure for manufacturers does not take into account that certain equipment and mediums can be exploited both for private and business needs.

Item 3 of procedure for manufacturers contains a few very important definitions. One of them is "*realisation of equipment or mediums*" what means "*transfer of ownership rights in equipment or medium whether for payment or gratis from manufacturer to other person*". This definition is important because item 6 of procedure for manufacturers prescribes that "*payment of remuneration is to be made by manufacturers of equipment and mediums within 10 days following the end of each reporting period and the sum of a **payment** must be **calculated on the basis of** defined in accordance with this procedure price of realised equipment and mediums and quantity of **realised units of equipment and media** within past reporting period*". Under this provision a manufacturer must pay levy from all realised equipment and mediums what is in conflict with article 1245 CC RF, because the main principle – reproduction by natural persons and for private use – is not abided, i.e. payment made by manufacturer except private copying levy can also include certain sum of money which is not actually levy (remuneration for private copying) and cannot be required by accredited collecting society under current Russian law.

Let's briefly take a look at the "Procedure about payment for free reproduction of phonograms and audio-visual works for private purposes by importers of equipment and mediums used for such reproduction". Provisions of this procedure are almost similar to provisions of procedure for manufacturers. Anyway let's take a look. Under this procedure professional equipment not intended for private home use is not subject to private copying levy. Professional equipment means such "*equipment which by virtue of its design features and consumer properties is not exploited for satisfaction of person, family, home and other needs not related to business activity*". Taking into account article 2 CC RF, mentioned above, under this procedure **professional activity not intended to profit, like charity, and even without personal intentions** by virtue of "procedure about payment for free reproduction of phonograms and audio-visual works for private purposes by importers of equipment and mediums used for such reproduction" **is qualified as private use**. And again, established by the procedure for importers criterion which defines what equipment or mediums have to be imposed of free from levy ignores requirement of article 1245 CC RF, where it is stated that remuneration is to be paid only for reproduction for private purposes. This procedure does not take into account that certain equipment and mediums can be exploited both for private and business needs.

Under item 6 of procedure for importers "**payment** of remuneration is to be made by importer (custom applicant) and must be **calculated** by way of **multiplication** of levy rate by **unit's custom value** and then **by quantity of imported** equipment and/or mediums". Taking into account list of taxable equipment and mediums and provision of article 1245 CC RF – reproduction of phonograms and audio-visual works for private purposes – importer de facto must pay private copying levy from all imported equipment and/or mediums, i.e. importer must pay certain sum of money which is not actually private

copying levy (remuneration for private copying) and cannot be required by accredited collecting society under current Russian law.

Governmental decrees do not provide objective conditions to determine what equipment or medium is subject to private copying levy and how to ensure payment only of private copying levy.