

# Private Copying under the Russian Copyright Law

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## **1. Historical aspects**

Historically Soviet copyright law had wide exceptions from authors' rights, in particular for the purposes of private copying. In accordance with Article 493 of the 1964 Civil Code of the former RSFSR (similar provision existed in all other former Soviet republics) it was permitted to reproduce or to use the work which had been divulged for private purposes without the author's consent and without paying any remuneration. Broad exemptions of authors' rights were deemed to reflect the socialistic nature of Soviet copyright law where the works were more widely available for the society.

This provision remained until the new Law on Copyright and Neighboring Rights of 1993 was adopted.

The Russian Copyright Law of 1993 represented the first attempt in the CIS countries to create a modern copyright law in line with international standards. Needless to say that, in that time, the discussions in the working group for the new law were mainly conducted among copyright scholars, academicians and other specialists. The right holders and the users were not organized and united. Certain categories of rights holders even did not exist, such as performers or phonogram producers since performances and phonograms were not protected under the Soviet law.

Therefore, a WIPO model provisions and recommendations served as initial basis for private copying legislative provisions. However, the *nature of private copying remuneration* became a subject of intensive discussions during the preparation of the new Russian Copyright Law in 1992. It was recognized and agreed that the private copying levies should not be interpreted as a sort of a tax or other mandatory payment. The concept of private copying as actual remuneration due to the right holders prevailed.

## **2. Russian Law on Copyright and Neighboring Rights of 1993 and private copying**

As for practical mechanisms to ensure collection and distribution of private copying remuneration as it is established in Article 26 of the Russian Copyright Law of 1993 one can see that its structure is still not sufficiently developed.

Article 26 states that: “reproduction of audiovisual work or phonogram is permitted without the consent of the author, performer or phonogram producer when this copying is done for private purposes only”.

It means that it covers:

- *reproduction* and not any other use,
- two subject matters only: *audiovisual works and phonograms*,
- right holders who are covered with this exemption are: *authors, performers and phonogram producers*,
- the purpose of reproduction shall be only *private needs*.

It means that the scope of private copying exceptions under Article 26 is rather limited. As for the meaning of what is meant by “private” Article 26 does not offer any further details.

Article 26 imposes the payment of remuneration on manufactures and importers of equipment (audio- and video recorders and other equipment) and physical carriers (audio- and video tapes and cassettes, compact disks and other carriers) used for such reproduction. Basically, Article 26 is based on two shoulders: *manufactures and importers* and covers *equipment and blank carriers*.

Collection and distribution of remuneration shall be exercised by one of the collective societies managing rights of authors, phonogram producers and performers in accordance to the agreement among these organizations. In absence of such an agreement collected remuneration shall be distributed in the following proportion: 40% – authors, 30% – performers and 30% – phonogram producers.

Rates of remuneration and procedure for its collection shall be agreed between manufacturers and importers, on one hand, and collective societies, representing authors, phonogram producers and performers, on another hand. Only if such agreement is not reached, the rates and procedure shall be established by a special *government body*.

During the discussions at the preparatory stage for the Russian Copyright Law of 1993 in the Russian Parliament one of the proposals was it was recommended to include in Article 26 the provision that the list of equipment and blank carriers shall be approved by the Government. The idea was to define at the Governmental level what kind of equipment and what kind of blank carriers should be subject of remuneration under Article 26. Similar approach was recommended for rates of remuneration again, it was decided that the rates shall be established by the Government.

In 1992 this proposal was rejected since such approach would bring the remuneration for private copies into the sphere of public/governmental determination. In elaboration of 1993 the main spirit was to limit governmental regulation in copyright to a minimum contrary to what was a common feature of Soviet law.

### **3. Practical aspects of private copying provisions: why it does not work**

Ten years after the Law of 1993 was adopted Article 26 is still on paper and no private copying levies are collected. What is the reason for that?

Firstly, general problems with collective management of copyright and neighboring rights. There are a number of organizations in Russia which declare themselves collective societies. In reality, most of them are not proper collective societies and do not collect any remuneration. There is no proper collective society for phonogram producers, it is hard to say that existing society for performers functions efficiently.

There are more and more new societies with unclear representation, there is a lot of competition among them and very little chance to reach proper agreement on private copying. Previous attempts to form a sort of “umbrella” organization for private copying in a way were driven by an idea of serious financial flow coming immediately. The founding meeting of one of such “umbrella” organization was held in a private club almost in Frances Coppola style. One person involved in running such organization was even put in jail and he later claimed that he was “the first dissident under Article 26 of the Russian Copyright Law”.

Secondly, there are no organized and defined unions or other associations of manufacturers and importers. It makes rather difficult even to start any negotiations as to the rates and procedure of payment. Obviously, this represents additional reason why Article 26 is not implemented in practice.

Thirdly, on a governmental level a specialized body mentioned in Article 26 is not specified. At the moment various governmental functions in the area of copyright are performed by at least three organizations: Russian Patent and Trademark Office, Russian Ministry for Press, Broadcasting and Mass Media and Russian Ministry for Culture. No one of these organizations is nominated as a “special governmental body” in the context of Article 26. In addition to that none of the three organizations has official function of supervising collective societies.

Basically, under current situation it is unrealistic to expect that the rates and procedure of payment may be agreed according to Article 26.

### **4. Proposals for legislative revision: will it work?**

At the moment the amendments to the Russian Copyright Law 1993 are under consideration in the Parliament (second reading).

One of the proposals for Article 26 provides for including under the scope of private copying exemption a producer of audiovisual work. In addition, it is considered to specify that reproduction is permitted only by *a physical person without gaining any profit*. This appears to be rather important clarification of the scope of private use.

It is further suggested that the list of equipment and carrier together with the rate of remuneration and procedure for payment shall be approved by the Government. Obviously, the intention is to make the procedure under Article 26 working as previous ten years have shown that without governmental intervention it was unrealistic to expect the collective societies and manufacturers/importers to agree on that.

Another question is how far the governmental intervention should go. One of the problems is that any mandatory payment established by the government under the Russian legal system can hardly be part of private law to where copyright belongs and, therefore, may fall into the category of taxation (public law). If so it may be a problem in introducing this governmental decision since any kind of tax should be a part of the Tax Code adopted by the Parliament and cannot be introduced by the Government.

It is also proposed that a special governmental body authorized by the Government shall exercise control over collection and distribution of remuneration for private copying. It is a part of a general solution to clearly establish a governmental body in charge of supervising collective societies.

Another change is connected with adding audiovisual producers to private copying scheme. So, where Article 26 introduces 30% share for phonogram producers in case collective societies have not come to an agreement it is proposed to add "or audiovisual producers".

The amendments are aimed on making private copying scheme work. However, it is difficult to say what will be the final version of amendments for Article 26. It is even more difficult to predict whether these or similar amendments are sufficient to make Article 26 functional.