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Research Results
Резултати от научни изследвания

ROYALTIES PAYABLE FOR PUBLIC PERFORMANCE OF MUSICAL WORKS IN COMMERCIAL ESTABLISHMENTS AND OTHER PUBLIC LOCATIONS

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Abstract. This paper discusses:

Basic terms in the field of copyright and related rights, author and his basic characteristics and powers and holders of related rights and their powers, as an introduction to the topic;

Public performance of musical works as a legal regulation;

What, where and how is performed in public;

What is the royalty payable for public performance in commercial and other public venues and is such royalty always payable to copyright and related rights holders;

Examined are rulings of the ECJ related to the public performance of musical works in commercial and other public locations;

Relevant conclusions and recommendations on the subject are made.

Keywords: intellectual property; public performance; musical industry; radio industry

Introduction

We listen to music at home and in the car; when we play sports and when we work; when we celebrate and when we mourn; to calm down or to 'recharge'. At the end of the day, musical is an important part of our lives and a necessity that we cannot do without.

Music is created by composers. Lyricists join to create a song. The created piece of music is arranged and/or orchestrated. It is performed by instrumentalists and singers. It is recorded and the recording is organized and financed by musical producers. It is broadcast by radio stations on their programs, which in turn are created by the people committed to making radio programmes. A video is created to this song and broadcast on television. And all of these efforts are to bring the musical to the listener.

We hardly realize when we turn on the radio, load the CD or stream on the internet, how many people toil so that the result of their efforts can reach us and fill our daily lives with musical. All these people are creating and producing an intellectual product of

extremely high value. For them it is a way of life, but often, it is also their only means of generating income. In this sense, their labor, which gives birth to wonderful works and presents them to the public, must be fairly valued and rewarded. And in such a way as to stimulate them to create and delight us with new, different, original and wonderful works.

This is the reasoning behind the creation and adoption of Directive 2001/29/EC of the European Parliament and of the Council, dated May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society:

'If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers'.[1]

What is the legal regulation of the public performance of musical works in Bulgaria? What is the case law of the European Court of Justice on the subject? Are the rights and obligations of the holders of copyright and related rights clear for the users and consumers in public performances of musical works in commercial establishments, hotels, restaurants, taxis, notary and law offices, doctors' and dentists' offices, hairdressers' salons, etc.? How do collective organizations for rights management (CORMs) enable musical users to use it in accordance with the law?

We will try to answer these questions with this report, as the subject has once again been put on the public agenda recently, through press releases from the Ministry of Culture[2] announcing the launch of inspections of hairdressing salons, small shops and taxis regarding compliance with the CRRA (Copyright and Related Rights Act[3]) and more specifically the public performance of musical in them. The reaction that followed shows a clear lack of understanding of the problem, despite the awareness-raising campaigns, interviews, roundtables, meetings, etc. organized so far by the organizations of authors and holders of related rights, as well as by the relevant government bodies. From the complete refusal to pay for rights, to the idea of 'turn off the radio, turn on the computer to play musical from the Internet, or 'turn off the CD, turn on the TV' – all this is a clear sign that there is a lack of knowledge about what is legal and what is not, and more importantly – what is paid for, what is not, to whom, how much and how.

Methodology of the study

The present research material in terms of approach, methodology and identification of the available issues related to the due royalties in public

performances of musical in commercial and other public venues is based on the analysis of the legislation in force in the Republic of Bulgaria in the above-mentioned area, its application to the relevant users and its comparison with the relevant case law of the Court of Justice of the European Union. The basis of the conclusions and practical proposals are the results of the author's own analytical and synthetic observations and reflections, following his professional experience as a media manager – both commercial and public – with nearly 30 years of experience. And also, his practical experience as a musical producer, giving also the point of view of the holders of related rights.

I. To explain at the outset what *copyright and related rights are:*

Ownership by definition is "synonymous with possession, property, value in relation to the one who owns" (Borisov 2006).

– Until the early industrial revolution, property referred to 2 categories of objects:

– immovable property comprising land, buildings, etc.

– movable property comprising chattels, furniture, goods, etc.

The most characteristic feature of ownership is that it can only be used by the owner and cannot be used by others without the permission of that owner.

Intellectual property has always existed as a product of man's creative activity in designing material goods, but for a long time it was not recognized as such. Intellectual property is the ownership of the results of intellectual work.

"National systems for the protection of intellectual property are highly dependent on the level of economic development. At first glance, the relationship between national systems for the protection of intellectual property rights, which are characterized to the greatest extent by patents on inventions, and the level of economic development in countries should be bidirectional. By strengthening their intellectual property protection systems, governments help their country's economic and social development. At the same time, in economically strong countries, the development of technology and innovation is faster and more extensive, compared to less rich economies" (Aleksandrov 2022).

The system of intellectual property comprises the objects of intellectual property divided into three groups (objects of industrial property, objects of artistic-literary property and new objects of intellectual property) and their forms of protection as granted through industrial property rights, copyright and related rights and the right to new objects of intellectual property.

The object of protection as artistic-literary property is any work of literature, art and science which is the result of creative activity and which is expressed in any way and in any form. Creative endeavor is any endeavor in which the author has made some intellectual effort. "In order for a creative work to be a work of art, it must be created in the sphere of literature, science and art, be the result of creative activity and be expressed in an objective form" (Borisova 2003).

Such a work is, for example, the film. "He has a complex character, as it consists of a number of intangible property objects, whose authors have made their targeted creative efforts, thereby contributing to the finished product and, respectively, its success. All over the world, the film industry is driven by intellectual property, which is its main building block" (Nachev 2022).

The author is a natural person whose creative endeavors result in the creation of a certain work. Other natural or legal persons may also be copyright holders, only in the cases provided for under the CRRA.

Copyright, in the broad sense, is part of the intellectual property system which governs the relations of creation, use and protection of works of literature, art and science.

In a narrow sense, it is a property right that can be defined as **copyright**.

Copyright in theoretical terms is seen as the legally recognized and guaranteed ability of its owner to use the work he has created, to authorize its use by third parties and to prohibit such use. "An exclusive right in the field of artistic and literary property is established over works created by the author, and this is a complex right consisting of tangible (economic) and non-tangible (moral) rights" (Markova 2003).

"Companies invest in creating technological developments....., that receive protection through the system of industrial property (IP) and specifically as inventions, utility models and industrial designs. Through the use of objects of industrial property, a company can achieve significant profits if it succeeds in exercising the commercial monopoly in the right way and exploiting the advantages it has as the holder of the exclusive right to the objects of IP." (Pacheva 2022).

All this requires serious efforts and funds.

Unlike industrial property rights, copyright is not subject to registration in order to be considered as validly arisen. Copyright arises automatically, and the relevant moment for the arising of copyright is the moment at which the work was created – the creative result was objectified in such a way that the work could be objectively perceived by third parties.

The term 'related rights' refers to the rights of certain groups of persons who are intermediators between authors and the public in bringing copyright works to viewers and listeners. The full name of these rights is 'rights related to copyrights', adopted because of their similarity to copyright. Related rights should not be exercised in a way that could lead to an infringement or limitation of copyrights.

Holders of related rights are:

– artists for their artistic performances;

– record producers for the recordings they produce. The producer of a sound recording is the natural or legal person who arranges for the first recording to be made and secures its financing;

– film producers for the recordings of films and other audiovisual works they produce;

– radio and television organizations for their programs.

To summarize:

Copyright holders are persons who create works of literature, art and science, including musical works.

Holders of related rights are persons who make available to the public those works created by authors by performing, recording or broadcasting them.

II. And so we come to the crux of the topic that interests us: *the public performance of musical works in various venues*

Copyright holders, as we have pointed out above, have a legally recognized and guaranteed option (the so-called exclusive right) to use the work they have created, to permit its use by third parties under so-called **licensing agreements**, on the basis of which the copyright holder retains ownership of the work, but authorizes, for an appropriate remuneration, a third party to use the work for a specified period and to prohibit that use. The possible forms of use of a work are non-exhaustively listed in the law – Article 18 of the CRRA. They are:

Reproduction of the work;

Distribution;

The public presentation or performance of the work;

Wireless transmission of the work;

Cable transmission and retransmission of the work;

Translation of the work;

Revision of the work;

Offering wireless or cable access to an unlimited number of persons;

Import and export of copies of the work.

The use under Article 18, paragraph 2, items 3 to 8, inclusive, occurs "where the acts referred to are carried out in such a way as to enable the work to be perceived by an **unlimited number of persons"** Copyright and Related Rights Act (CRRA), 1993

In the present paper we are interested in one of these forms of exploitation, namely the rights of the author of **public performances**.

For holders of related rights, the same options mentioned above apply in relation to the use of a work to which they have contributed respectively. One of these is the proprietary right of public performance, again regulated in the CRRA. The texts are as follows:

"The performing artist shall have the exclusive right to permit for compensation:

.....

the public performance, the broadcasting by wireless means and the transmission and retransmission by cable of such recordings' (Article 76(1)(3) of the CRRA)

"The producer shall have the exclusive right to grant permission against compensation:

.....

the public performance, the broadcasting by wireless means and the transmission and retransmission of the recording by cable' (Article 86(1)(3) of the CRRA)

"The broadcasting organization which has made the initial broadcast or transmission of its own program shall have the exclusive right to grant permission against compensation:

.....

the public performance of the program, if this takes place in places accessible to the public on payment of an attendance fee' (Article 91(1)(4) of the CRRA)

"Public performance" means: any act by which a musical work is brought to the attention of an unlimited number of persons, this being done in places open to the public.

III. What, where and how is performed in public?

What? Any audio or audiovisual work may be performed in public, either live or recorded. Certain works (songs, symphonies, musical performances, etc.) are performed in front of a live audience in appropriate venues: concert halls, stadiums, squares, etc. This type of public performance of musical works is not the subject of this article.

A recording of a musical work in public can take place practically anywhere, the key being that the venue is publicly accessible, public and the performance is pre-designed for a wide range of listeners and viewers. This category also includes public performances of works included in radio and television programs, which are broadcast simultaneously or on record in relevant public places. It also includes works that can be accessed on the internet, e.g., through streaming platforms or broadcast by internet radio and genre audio channels. In general, when music is played in a public place and videos, TV programs, films and any other audiovisual works are viewed, this is a public performance and in the vast majority of cases the users of these works (owners or tenants of commercial and other public places) should have settled the rights for this public performance with the above-mentioned copyright and related rights holders.

Where? Non-exhaustively listed, such types of venues are: commercial establishments (shops, shopping malls, shopping complexes); hotels, guest houses, apartment complexes; catering establishments, nightclubs; taxis and public transport vehicles – urban, out-of-town and international; notary and law offices; doctors' and dentists' offices; hairdressers' and beauticians' salons; stadiums, sports halls, concert halls; lobbies of public buildings, hospitals, railway stations, bus stations. The criteria to include the respective venue in this group – where a public performance of copyrighted works takes place – are: public access to it and an audience above some reasonable minimum.

How? If the performance is not live, the sources from which recordings are broadcast may be various types of players on existing media; radio and television receivers broadcasting live or recorded radio and television programs; computers and any other devices that play back recordings of audio and audiovisual products.

IV. What is the amount of remuneration payable by users of musical in public performances and is such remuneration always payable to copyright and related rights holders?

The amount of compensation due to the proprietors of copyright and related rights on the use of works, performances, phonograms, radio and television programs shall be negotiated in a contract between the proprietors of the rights and the users.

Whenever use is negotiated by an organization conducting collective management of rights, the amount of compensation shall be set out in a contract between that organization and the users or their associations under the provisions of Art. 40 (f) (§ 5. (1) and (2) of the CRRA (Addendum – State Gazette, 25/2011 in force as of March 25, 2011).

According to the aforementioned texts of the law, there is no statutory regulation of the amount of remuneration payable by users for the use of musical works, including public performances. This is because, in practice, there are different conditions of such use. Conditions, such as: the size of the premises, the type of activity, the relevance of the musical to that activity, the value of tickets sold, the audience attracted, etc., determine different amounts of compensation payable. And since the usual and prevailing compensation for public performance is negotiated, administered and paid with and through collective rights management organizations (CRMs) (in Bulgaria these are Musicautor and Prophon), or with and through independent commercial rights management companies (a list of which is available on the website of the Ministry of Culture), each of these organizations has created, adopted and published on its website the relevant tariff. Tariffs take into account all the conditions mentioned above and set out different royalty rates depending on the specifics of every individual user. Any user wishing to use audio and/or audiovisual works in his/her own establishment by performing them in public must sign a contract with one of the organizations mentioned (depending on the repertoire desired for public performance and which repertoire is registered with the respective organization) and pay the compensation that corresponds to the specifics of his/her business and type of establishment.

Is remuneration always payable on public performance?

This is a question that concerns many users, not only in Bulgaria, but across the EU. That is why there is case law of the Court of Justice of the European Union (CJEU) on cases concerning remuneration in public enforcement, which is binding for all Member States and their courts. In this sense, I would like to point out 2 such judgments which, in my opinion, are decisive in order to answer the question raised and draw the relevant conclusions.

The first judgment of the ECJ is in Case C-162/10 in a dispute between Phonographic Performance (Ireland) Limited (PPL) and Ireland. In general terms, the cited case dealt with the question whether a hotel operator may broadcast radio and television signal in

public in its hotel without being obligated to pay remuneration for that use of audio and audiovisual works of copyright and related rights holders, since such remuneration has already been paid by the relevant broadcasting organizations for the use of those works in their programs.

The operative part of the judgment is clear:

'A hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal **is obliged to pay equitable remuneration** under Article 8(2) of Directive 2006/115 for the broadcast of a phonogram, **in addition to that paid by the broadcaster**.' (JUDGMENT OF THE COURT (Third Chamber) 15 March 2012[4]).

The main reason for this ruling is that this type of public broadcasting (in hotel rooms) is intended for and encompasses a large and targeted audience, hence, it constitutes an additional service increasing the value of the rooms paid by each hotel customer. In this sense, the public broadcasting in the case before the ECJ in fact helps to generate additional revenue for the hotel operator, which is why the Court concludes that it is fair for the rights holders to receive additional remuneration (over and above that paid by the broadcasting organizations whose programs are publicly performed).

There is, however, another ECJ decision C-135/10. The case arose out of a dispute between a dentist who played a radio in his office and the relevant collecting body, and again concerned whether remuneration was payable by the dentist for that use and whether it constituted a public communication within the meaning of the Act. The court's conclusions are clear:

'…a dentist such as the one in question in the case in the main proceedings who broadcasts phonograms free of charge in his dental practice, for the benefit of his clients and enjoyed by them without any active choice on their part, is not making a 'communication to the public' for the purposes of the application of Article 8(2) of Directive 92/100. (JUDGMENT OF THE COURT (Third Chamber) 15 March 2012[5]).

One clarification regarding the term 'communication to the public' used in the above-mentioned decision: by virtue of the Transitional and Final Provisions of the CRRA, Article 5a (SG No 21/2014), 'communication to the public' means the transmission of performance to the public by any means without broadcasting by wireless means in a way enabling the public to listen and/or watch it; i.e. in this case we have a public broadcasting of a recording, which is limited by the means by which the work reaches the audience – any means can be used excluding broadcasting by wireless means.

Therefore, in certain circumstances, viz:

– Small audience or public;

– Lack of additional revenue/income as a result of the radio program being broadcast;

– No expectation of an increase in clientele or an increase in the value of the services offered as a result of the radio broadcast

no public performance and no remuneration is due to copyright and related rights holders, in accordance with the aforementioned ECJ decision, which is binding in EU Member States when national courts deal with disputes of a similar nature.

V. Conclusions

In view of the foregoing, the following conclusions can be drawn:

1. The public broadcasting of audio and audio-visual works in commercial establishments and other public venues undoubtedly requires the payment by the user of an equitable remuneration in respect of the copyright and related rights holders, on the basis of license agreements governing that type of use of those works.

2. There are several questions that we should answer with regards to whether such remuneration is due:

– What is the size of the audience in front of which a communication to the public is made, though there is no clear definition of what is a small or a large audience? But as a result of logical interpretation, we come to the conclusion that in small venues, where the size of the room does not allow the simultaneous gathering of more than 10 visitors/customers/staff, a communication to the public cannot be carried out. The final decision on the size of the audience must be taken by the organizations for collective management of rights and included in their tariffs or by the competent Bulgarian court, if there is a dispute on this matter.

– Are there expectations, or does the communication to the public in the respective venue really contribute to an increase in the clientele or an increase in the value of the services offered in relation to the user?

– Is there any additional income for the user as a result of the communication to the public – sale of tickets, payment of an entrance fee, etc.

The last two criteria are objectively possible to determine in different businesses and it is a matter of judgment on the part of the rights holders and compliance with these criteria. Naturally, in the event of a dispute between the parties, the court will be the competent body, in accordance with European court practice.

The specified circumstances do not need to be cumulatively present in order to assess whether there is communication to the public or not.

3. If the communication to the public of audio and audio-visual works of recording in commercial establishments and other public venues obligates the user to pay remuneration to the rights holders, under the conditions specified in item 2, then the communication to the public of broadcast radio programs should be carried out freely and without payment of additional remuneration, under certain conditions. In the case under consideration, we are talking about 'additional' remuneration, insofar as the radio organizations themselves, by definition, pay a corresponding remuneration to the holders of copyright and related rights for the works used by them in their radio programs. What are our arguments in support of the conclusion that such additional remuneration is not owed by the user:

3.1. Broadcast radio stations shall pay the said remuneration based on rates adopted by the respective collective rights management organizations or independent commercial rights management companies. The tariff of Musicautor (since this is the largest organization for collective management of copyrights in Bulgaria, it determines the remuneration paid by all radio stations) reads as follows:

The amount of remuneration under this Tariff is determined in compliance with the following rules:

1. the remuneration is determined annually based on a percentage of the gross revenues from the relevant radio program for the relevant year and cannot be less than the minimum amount specified in the tariff below. The percentage depends on the percentage of musical content in the program - the musical and related literary works.

2. When determining the minimum annual remuneration, **the number of residents of all settlements, according to the data of the National Statistical Institute, for which the radio operator has a license** issued by the Commission for Communications Regulation (CCR) and broadcasts its radio program, as well as the percentage of musical content in the program. (https://www.musicalautor.org/bg/p/musicalautor/tarifi-i-dogovori/tarifi Art.2 of the Musicalautor's Tariff for On-air Radio Stations).

This pricing principle has also been adopted by other rights management organizations. Clearly, the coverage of the relevant radio is decisive in relation to the minimum remuneration due, i.e. each radio station pays for the rights to use the works for the entire audience in the licensed location where it broadcasts its program. It does not take into account that the average monthly radio audience is about 80% of the population (according to all the studies carried out in the last 20 years in Bulgaria) and that a radio station does not cover 100% of the audience in the specific location, and each station has different rating and varying numbers of listeners. In this sense, any communication to the public of radio programs, live or recorded, regardless of the size of the audience is implemented with already settled and paid-for media rights and **should not be paid for additionally**. Moreover, these rights are for 'wireless broadcasting and transmission in electronic communication networks of musicalal works and related literary works' (https://www.musicalautor.org/bg/p/musicalautor/tarifi-i-dogovori/tarifi Art.2 of the Musicalautor's Tariff for On-air Radio Stations) and it does not matter whether a particular radio is listened to by one person, two, ten or thousands – it has paid a fee to reach absolutely all residents of a location.

3.2. Radio stations create their programs, which include, in addition to mostly musical works, various other elements that they create themselves - news broadcasts, shows, reports, polls, jingles, promotions, advertisements and sponsor announcements. All these elements, in their entirety, constitute a radio program which, in addition to entertaining, has the task of educating and informing its listeners. But, as we have indicated above, radio operators as holders of related rights are entitled to remuneration for **the communication to the public** of the program, if this is done in locations accessible to the public **against payment of an entrance fee**. According to this argument, if the

communication to the public of a live or recorded radio program, in a relevant facility, does not bring the user additional revenue from fees and tickets, **it should be free of remuneration**. Moreover, this corresponds to the commented decisions of the Court of the European Union and the clear practice on this matter – if the communication to the public on the radio leads to additional income or is a condition for higher prices or attracting additional customers, it should incur additional remuneration, if not - no such is due.

This conclusion – that in communication to the public of live or recorded broadcast radio programs on any premises where such performance is not made against an entrance fee or ticket and which does not result in additional income, or increase in clientele, or increase in the value of the services offered, does not incur additional remuneration to be sought and collected - should be adopted by the holders of copyright and related rights and their organizations and become part of their terms and tariffs.

The analysis thus made, and its conclusions should be discussed by the interested parties and, if adopted, serve to refine the existing documents and practice regarding the public communication of musical works.

NOTES

1. DIRECTIVE 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; Paragraphs 10 and 11.
2. (http://mc.government.bg/object.php?p=52&s=618&sp=0&t=0&z=0&po=7025/ and http://mc.government.bg/object.php?p=52&s=618&sp=0&t=0&z=0&po=6944)
3. Copyright and Related Rights Act (CRRA), 1993 / 29.06.1993, art. 76, 1, 3; art. 86, 1, 3; art. 91, 1, 4; § 5. (1) i (2)
4. JUDGMENT OF THE COURT (Third Chamber) 15 March 2012 ‘Copyright and related rights — Directive 2006/115/EC — Articles 8 and 10 — Concepts of ‘user’ and ‘communication to the public’ — Installation in hotel bedrooms of televisions and/or radios to which the hotelier distributes a broadcast signal’

In Case C-162/10, reference for a preliminary ruling under Article 267 TFEU, from the High Court (Commercial Division) (Ireland), made by decision of 23 March 2010, in the proceedings Phonographic Performance (Ireland) Limited v Ireland.

5. JUDGMENT OF THE COURT (Third Chamber) 15 March 2012‘Copyright and related rights in the information society — Direct applicability of the Rome Convention, the TRIPS Agreement and the WPPT in the European Union legal order — Directive 92/100/EC — Article 8(2) — Directive 2001/29/EC — Concept of ‘communication to the public’– Communication to the public of phonograms broadcast by radio in a dental practice’

In Case C-135/10, reference for a preliminary ruling under Article 267 TFEU, from the Corte d'appello di Torino (Italy), made by decision of 10 February 2010, received at the Court on 15 March 2010, in the proceedings Società Consortile Fonografici (SCF) v Marco Del Corso.

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