

## **Use of Musical Works in Electronic Media (Broadcasting): Tariffing Principles**

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## **Exclusive Rights and Rights to Receive Royalties**

In compliance with the European judicial doctrine, the function of economic rights of authors is „protection of the economic interests of the rights-holders, achievable **provided the law guarantees, to a certain extent, the rights-holders’ exclusive rights concerning the use of works and receiving economic benefits** from granting permission to others to use the works in certain manner. In their essence, the economic rights of authors are rights in things (jus in rem) or real rights, since, in a similar way to those of real-estate, servitude, and other rights in things, they grant the owners a certain monopoly regarding the use of actually existing objects (works) and their handling. The rights are of economic (patrimonial) nature, since they are part of a person’s estate”<sup>1</sup>

It is highlighted in the glossary of copyright and neighbouring rights terms by World Intellectual Property Organization (hereinafter WIPO) that the rights to ask for royalties and stipulate other conditions of work use are inseparable from copyright, and emanate directly from the essence of exclusive rights (meaning that in case of exclusive rights it is not necessary to stipulate it additionally).”<sup>2</sup>

## **Basic Principles of Tariff Development**

Tariffs are established on the basis of recommendations by the International Confederation of Societies of Authors and Composers (hereinafter CISAC), where AKKA/LAA is a member, in compliance with the normative acts of the Republic of Latvia, as well as the tariffs for use of musical works in public performance approved by organizations for collective management of copyright in other member countries of the European Union, paying special attention to the Baltic nations.

One of the basic principles states that authors, in any case, hold the rights to receive equitable remuneration from the receipts concerning their works, while Article 4.b) of the valid CISAC Statutes stipulates that the organization’s mission is „to oversee and to guarantee compliance with economic and judicial interests regarding (literary) works (and works of art) on international basis as well as concerning local legislation”, therefore CISAC monitors the work of its members in development of tariffs. However, it should be kept in mind that, according to the provisions of Article 20.a) of the Statutes, “apart from purely administrative issues, all decisions adopted in compliance with the above Statutes and communicated to the members, are, in character, mere recommendations”.

<sup>1</sup> M. Grudulis. Ievads Autortiesībās., Rīga: Latvijas Vēstnesis, 2006, P. 111

<sup>2</sup> Guide to the Copyright and Related Rights Treaties administered by WIPO and Glossary of Copyright and Related Rights Terms, Geneva: WIPO, 2003, P.287.

Most of the regulations adopted by the CISAC stay within the boundaries of definition of basic principles and offering tariff criteria which are applied in all the tariffs adopted by the Society “Copyright and Communication Consulting Agency“ (AKKA/LAA), taking into account the rights-holders’ rights to receive equitable remuneration for use of their works, and, positively, the authors as rights-holders have the rights to stipulate the levels of royalties, moreover, national affiliation of authors may not be used as an excuse for lower royalties (the above principle emanates from provisions of reciprocal agreements between AKKA/LAA and foreign organizations for collective management of copyright):

- „The tariffs shall be **determined by the authors themselves**” (9<sup>th</sup> Congress, Warsaw, 1934.)
- „The authors shall always have a share in the distribution of income generated by their work, and this principle includes every single payment” (12<sup>th</sup> Congress, Paris, 1937; CIAD – Monte Carlo, 1971.)
- „In all countries the compensation due to authors and publishers shall be based on percentage system, which is the routine practice in exploitation of products of intellectual creativity.” (12<sup>th</sup> Congress, Paris, 1937).
- „Performance of foreign works cannot be an excuse for application of tariffs of lower percentage than those applied to national works” (13<sup>th</sup> Congress, Stockholm, 1938).

In tariff development, AKKA/LAA not only takes into account the general basic principles covered by CISAC recommendations, but also considers the national case law of Latvia as well as the case law of the European Union concerning the domain in question.

### **Possible Kinds of Tariffs Regarding Royalties**

When estimating the size of royalties, the tariffs can be defined in two ways:

- 1) as percentages of the work user’s receipts;
- 2) as a lump sum.

In order to select criteria for tariff development it is noted:

- a) if the used works are of primary importance in the relevant manner of work use, i.e. if the specified use is conceivable at all without works;
- b) if the used works are of secondary importance, i.e. the specified activity within the confines of which the works are used could, in principle, be possible without authors’ works.

- a) In the first case, taking into account that the relevant activity is not possible without use of authors’ works, the authors as persons whose work is directly exploited for generation of revenue, have legitimate grounds to expect a share of the work user’s receipts, collected, inter alia, by means of using authors’ works to a significant extent.
- b) In the second case, when the works are found to play a secondary role in the work user’s activity, and the works could theoretically be dispensed with, the authors have no basis to expect income defined as a percentage of the work user’s receipts, however, they can expect a lump sum.

Also, when choosing between percentages and fixed tariffs, it shall be considered if a direct link exists between revenue and work use:

- a) if a direct link exists, application of percentage - based assessment of royalties is justified, and a higher percentage for use of works shall be applied for closer ties between the revenue and the use of relevant works;
- b) where work use has no direct link to revenue, the royalties shall be defined as lump sums.

There is a reason to supplement all the percentage-based tariffs with a certain minimum of royalties. Such a minimum has a two-fold function. First of all, it guarantees the minimum level of royalties to the author for the use of the author's works, not permitting to reduce the deal to a formal transfer of license for work use paying an insignificant amount in return. Instead, the author is granted an equitable remuneration for exploitation of the author's exclusive rights. When stipulating any kind of minimum it should be attached to parameters objectively measurable, so that the application is not arbitrary. The relevant parameters should, as far as possible, be linked to the use of works (the audience in case of public performance or communication, the time of exposure, circulation, number of downloads, streaming episodes, subscribers etc.) and as far as possible consistent, comparable with similar cases of work use where such a minimum is not applied. Also, it must be taken into account that stipulating a minimum in spheres where authors' works are used in large quantities, the relevant minimum must also guarantee that the royalties actually reach the author, keeping in mind the costs of collective management and the author's obligation to pay taxes from the royalties.

Secondly, the provision of minimum prevents work users from abuse of authors' works practising dumping and cross-subsidizing within the confines of various services, since it compels the work users to prepare for a certain minimum payment that will have to be executed, no difference if the measure is commercial or non-commercial, and no matter if the user is a private entrepreneur, a society, an endowment or a state-funded legal entity (of any legal form). In this way the organizations for collective management also comply with the requirement emanating from the Competition Law, to apply uniform conditions to all users of works as long as permitted by objective criteria.

### **Choice of Tariff Principle Applicable to Electronic Media**

In line with the experience of other countries, the system of royalties' tariffs in the case of broadcasting is modelled taking into account the link between the use of works and the receipts from the use of works. In the case of electronic media of communication (radio and television, hereinafter EM), percentage-based definition is the universally adopted practice, where the level of due royalties is estimated as a percentage of the receipts of the relevant EM, depending on the share of musical works in the total air time of the relevant EM organizations; the percentage model is combined with a minimum fee (per month or year).

Such a rationale is used by majority of EU member countries and all the neighbouring countries of Latvia (see the websites of the relevant organizations for collective management of copyright of those nations, as well as the Competition Council's decision No 20, of

February 13, 2008<sup>3</sup>), therefore it is simple and comparable, and its application calls for no additional expenditure that could result from using diverse indexes either bound to the audiences reached by various programmes of the EM, or tethered to costs of air time in various categories.

Arguably, the relevant tariff rationale is also easily controllable and verifiable since the amount of due royalties only depends on two variables: the share of musical works in the total air time and the receipts of the relevant EM, and easily verifiable by third persons for the purpose of checking the level of royalties or the share of musical works.

Also, the above choice of tariff principles complies with the Latvian case law's regular model for defining compensation with regard to EM<sup>4</sup>, and is supported by the judgment of the **Court of Justice of the European Union (hereinafter ECJ, formerly, Court of Justice of the European Communities)**: "...a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works"<sup>5</sup>.

Finally, application of percentage-based tariffs complies with the provisions of Article 32, Section 2 of the Latvian Law on Collective Management of Copyright, (hereinafter – LCMC), since it embraces two of the criteria listed in Article 32, LCMC:

- it correlates with “direct commercial gains received by the user of object of copyright and neighbouring rights as a result of the relevant exploitation”, i.e. the size of the royalties have a direct link to the receipts collected by the user;
- It correlates with “the objective, the extent and the significance of the use of the work or the object of neighbouring rights” depending on the model of exploitation within the confines of commercial activities or other efforts.”, i.e. it is taken into account that the use of music in EM programmes has a decisive role, and the operation of EM is inconceivable without music. Consequently, the authors of the works are justified to receive percentage-based royalties for use of their works rather than a lump sum the latter being appropriate where only one work, or a few works would be used, and it would be possible to do entirely without works. In a similar way this LCMC standard is applied in the structure of the tariff itself, namely, a higher intensity of work use which is signalled by a higher share of music in the programme calls for a higher level of royalties, thus reflecting also the significance of musical works in each separate programme service (channel) of the relevant EM. In this way it is guaranteed that, for instance, a TV channel broadcasting predominantly sports and carrying a small share of

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<sup>3</sup> Competition Council of the Republic of Latvia. Decision No 20 of February 13, 2008 concerning the closure of proceedings in case No. Nr.2454/06/05/19, Pages 21 and 22.

<sup>4</sup> E.g. the verdict of the Supreme court of the Republic of Latvia in Case No. C04256408, AKKA/LAA vs Latvian Television, etc.

<sup>5</sup> ECJ ruling of December 11, 2008 in the case No. C-52/07, Kanal 5 Ltd, TV 4 AB vs STIM.

musical works, (a so-called sports channel), pays lower royalties than a *general entertainment channel* for large audiences, which, in turn, pays less than a dedicated *music channel*.

When stipulating the tariffs for EM under above circumstances, AKKA/LAA has applied percentage-based tariffs defining royalties as percentages of EM receipts, which in turn are classified in steps according to the intensity of work use, thus creating a logical link between the work user's income resulting from use of authors' works and the increment of the level of royalties which correlates with the increment of intensity of work use.

### **Auxiliary Criteria Applied to the Basic Tariff for EM**

When prescribing tariffs for any kind of usage, one must be aware that in some cases work use may be specially subsidized, be carried out under a non-commercial scheme or have no relation to the operator's receipts whatsoever.

However, even in such cases, disregarding that the work user makes no profit or uses works during non-commercial activities, the author retains the rights to receive royalties for use of the author's works. It follows the nature of exclusive rights mentioned in the introductory part of this document, and is stipulated by Article 15, Section 4 of the Copyright Law, stating that "the authors have the rights to use their work in any manner, to permit or deny its use, to receive royalties for the permission to use the works and the actual use of the works, except the cases stipulated by Law".

Thus it is supposed that authors have rights to receive royalties for use of their works except the limitations of copyright expressly stipulated by the Copyright Law.

In order to guarantee minimum of equitable remuneration to the authors for the use of their works, AKKA/LAA tariffs stipulate minimum payments for copyright, according to which the minimum fee is defined which shall be paid by users of works regardless of their income gained from work usage, even if such income is not received at all.

When stipulating the minimum payments for copyright, AKKA/LAA, on the basis of provisions of Article 32, Section two, paragraph 2, LCMC, takes into account such objective criteria of intensity of work use that not only characterize direct commercial gains taken by the work user but also the intensity of work usage:

- 1) Correlation of minimum payments with the share of musical works;
- 2) Such a level of minimum payment that guarantees, when executing distribution of collected royalties for the given method of work use, the possibility of technical distribution and practical payment, (the payable royalties must be measurable in full EURO cents);
- 3) The coverage of the relevant EM (international, national, Riga-specific regional etc.), which is connected to the audience reachable within the confines of the relevant footprint.

## Minimum Payments

When stipulating the minimum payment of copyright, AKKA/LAA, on the basis of LCMC, Article 32, Section 3, paragraphs 2 and 3, takes into account that all royalties collected must be high enough to encourage the author to enter an agreement in the first place and consequently such that they could be paid to the author at all. Even considering the large amount of used works and the high intensity of use characteristic of EM, the collected amounts must be such that royalties could be paid to the author at all.

In compliance with the above provisions of LCMC, Article 32, Section 3, Paragraphs 2 and 3, when defining the minimum annual payment for radio broadcasting with national coverage, AKKA/LAA applies an average model of a national broadcaster as a basis. In other words, in order to define the minimum level of payment, the organization uses a model of „Latvian average radio channel of national coverage”, in this case a radio channel with a national footprint and a content of musical works equal to 63% share of the total air time. The minimum annual payment of royalties per user is found as follows:

- 1) The total air time per annum is 525600 minutes ( $365(\text{days}) \times 24(\text{hours}) \times 60(\text{minutes}) = 525600$ ).
- 2) Assuming that the average duration of a song in radio format is 3 minutes, the number of songs broadcast on annual basis is 175200 ( $525600/3 = 175200$ ).
- 3) Since the average share of musical works is 63%, 110376 songs are broadcast per annum.
- 4) Taking into account that each musical work has at least three rights-holders (the composer, the lyricist and the arranger), the tentative number of concerned owners of unique works is 331128. The calculation may not use any criterion other than „unique works” since, in compliance with the provisions of section 1, Article 20, LCMC, distribution of royalties shall primarily be executed using the proportional method of distribution, meaning that one should first distribute the royalties pertaining to each work, and only then distribute the royalties among the relevant subjects of copyright. Taking into account that in terms of one year there would theoretically and practically, be at least one work that would be broadcast only once, even that work should be provided with royalties.
- 5) In order to provide at least one euro-cent to each of the 331128 rights-holders, the minimum payment of royalties should be 3311.28 EUR.
- 6) It should also be noted that the above assessment only concerns technical distribution of royalties but does not include the economic value of the service delivered to the EM

organization: the expenditure by AKKA/LAA for management of authors' rights, including the opportunity to use musical works on global granted by licensing agreements to the users of works, since AKKA/LAA has concluded agreements of collective management with Latvian authors and reciprocal representation agreements with organizations of collective management in other countries. Also, it sets up, updates and maintains databases of authors and authors' works. The above activities are part of objectively necessary synergy that provides AKKA/LAA with an opportunity to issue licenses or permissions for use of authors' works, to collect, distribute, pay royalties on behalf of the subjects of copyright, and monitor the market verifying the compliance of work use with the terms of agreements. According to the authors' agreements, the above management expenditure is limited to maximum of 25%, and further taxes are withheld from the payable royalties (the current quota of individual income tax, or IIN, is 23%).

- 7) Taking into account the deductions (23% and 25% accordingly), the minimum payment should be at least 5733,81 EUR to guarantee collection and distribution of royalties, relation to the actual use of authors' works, compliance with the provisions of the agreements, as well as actual payment of royalties after withholding the taxes.
- 8) Also, when stipulating the minima, AKKA/LAA is aware that not all payers of minimum royalties will match the model of „average” radio station, thus the minimum stipulated by AKKA/LAA shall also adapt to national broadcasters with a lower than average (minimum) share of works, e.g. 45%, which is close to the lower margin of steps of music share. So, if 5733.81 EUR corresponds to a 63% share of musical works, 4095.58 EUR would correspond to a 45% share of music.

The minimum fee for use of authors' works on radio with national coverage has been set by AKKA/LAA at EUR 4097.88, that has resulted from the relevant calculation in Latvian currency “lats” in circulation at the moment of assessment; the result was rounded upwards (noting that all assumptions of the numbers of rights-holders and the numbers of broadcast works are quite conservative).

Other minima stipulated by AKKA/LAA and applied to electronic media tariffs concerning broadcasting of works are based on similar principles of calculation.

### **Territorial Coverage**

Territorial coverage of a broadcaster's programme service determines the size of audience to which the authors' works are available; therefore such factors are taken into account when developing tariffs and determining the minimum annual quotas of royalties, since EM with a

national footprint will cover a wider audience than those with a local or regional footprint. An EM channel broadcasting to Riga and its environs will reach a considerably larger audience than similar EM channels broadcasting to other regional and local areas.<sup>6</sup> Application of territorial coverage in tariff development was explained in the document submitted by AKKA/LAA to the Competition Council within the confines of Council's self-imposed study No.2454/06/05/19, and the Competition Council took it into account and accepted the justification of AKKA/LAA tariffs as reflected in its decision No 20 of February 13, 2008 in the case No.2454/06/05/19.

### **Non-discriminative Application of Tariffs Developed by AKKA/LAA**

By default, the valid AKKA/LAA tariffs for broadcasting of musical works in EM programmes assumes equal treatment of subjects of copyright as well as various users of authors' works, regardless of their national affiliation or legal form.

When stipulating EM tariffs, AKKA/LAA maintains equal attitude towards all authors represented by AKKA/LAA, without discrimination of manageable economic rights or works according to national affiliation of the respective authors. Such a non-discriminative treatment is based on:

- 1) Binding recommendations to AKKA/LAA as a member of CISAC,
- 2) Duties imposed by reciprocal representative agreements between AKKA/LAA and foreign organizations for collective management of economic rights,
- 3) Acts of Law of the European Union imposing a ban on discrimination among nationals of various EU member countries,
- 4) Ruling of the European Court of Justice in the case of CISAC<sup>7</sup>.

Since:

- 1) AKKA/LAA finds itself in a dominating position concerning broadcasting rights for musical works in the Republic of Latvia;

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<sup>6</sup>According to the Central Statistical Bureau (CSB) of Latvia, the number of inhabitants in Riga and its environs in 2017 by 62638 exceeded the number of inhabitants of all the provinces (Latgallia, Courland, Livonia and Semigallia) combined, see the CSB database ISG01. "Area, population density and number of permanent residents of the nation's regions, towns and counties at the outset of the year", [http://data.csb.gov.lv/pxweb/lv/Sociala/Sociala\\_ikgad\\_iedz\\_iedzskaits/IS0010.px/?rxid=cd](http://data.csb.gov.lv/pxweb/lv/Sociala/Sociala_ikgad_iedz_iedzskaits/IS0010.px/?rxid=cd)

<sup>7</sup> The ruling of the European Commission on the Case No. COMP/C2/38.698 – CISAC, as well as the ECJ ruling of April 13, 2013 in the Case No. T-414/08, AKKA/LAA vs. Commission.

2) The ruling of ECJ of December 11, 2008 in the Case No. C-52/07 (Kanal 5 Ltd, TV 4 AB vs. STIM) points out that organizations for collective management of copyright cannot be deemed to abuse their dominant position, unless they:

- act selectively according to whether the companies concerned are commercial companies or public service undertakings,
- apply with respect to those companies dissimilar conditions to equivalent services;

AKKA/LAA applies non-discriminative principles to all EM organizations regardless of their legal form or status, whether they are commercial or public broadcasters, and applies equivalent tariffs to all.

### **Choice of Steps of Share of Musical Works in Basic Tariff and Definition of Adequate Percentage of Due Royalties for Specified Intervals**

#### **Thresholds of share of musical works**

In its valid tariffs for use of musical works in radio and television programmes by EM, AKKA/LAA uses steps according to the share of musical works in total air time. (Concerning radio organizations, the steps are: 0-25%, 25-40%, 40-65%, 65-80%, 80-100%, while with regard to television organizations they are: 0-5%, 5-10%, 10-20%, 20-30%, 30-40%, 40-50%, 50-70% un 70-100% respectively). Definition of steps is based on agreement reached in 2005 via mutual correspondence between AKKA/LAA and the Latvian Association of Broadcasters, LRA (see the minutes of the meeting of LRA and AKKA/LAA of April 19, 2005). Under the auspices of the above agreement, the existing steps of share of musical works valid for AKKA/LAA at that moment, were adjusted according to the proposal from Latvian Association of Broadcasters that represented the broadcasters with the purpose of guaranteeing a more uniform treatment of all EM, since before the agreement the share of musical works of a few broadcasters was claimed to be exactly on the borderline between steps. (See also the Competition Council's decision of February 13, 2018, P.19<sup>8</sup> finding that the steps have been defined following a proposal from Latvian Association of Broadcasters.)

Under the circumstances it is supposed that the share steps applied as a tool in definition of valid tariffs for broadcasting of musical works by EM are coordinated with the association representing the users of works; the respective method has been found justified by the

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<sup>8</sup> Competition Council of the Republic of Latvia. Decision No 20 of February 13, 2008 concerning the closure of proceedings in case No. Nr.2454/06/05/19 , P. 19

decision No. 20 of February 13, 2008 as well as by the court ruling in the case AKKA/LAA vs. Latvian Television<sup>9</sup>, adopted during the settlement of the relevant case at the session of Supreme Court's Civil cases department in the presence of counsel, and has been a solution in other disputes between AKKA/LAA and broadcasting organizations.

### **Definition of Royalties Matching Specified Percentage Steps**

In its valid tariffs for use of musical works in radio and television programmes by EM, AKKA/LAA uses steps according to the share of musical works in total air time. (Concerning radio organizations, the steps are: 0-25%, 25-40%, 40-65%, 65-80%, 80-100%, while with regard to television organizations they are: 0-5%, 5-10%, 10-20%, 20-30%, 30-40%, 40-50%, 50-70% un 70-100% respectively) are matched to specified royalties percentages in regard to the EM receipts. When defining a suitable percentage of royalties for each step, AKKA/LAA took guidance from average tariffs for use of music by EM in place at organizations of collective management of copyright in European Union's member countries. The Competition Council made its own comparison of percentage quotas used by organizations of collective management of copyright in European Union's member countries and found AKKA/LAA tariffs to be commensurate with tariffs imposed by organizations of collective management of copyright of other countries<sup>10</sup>, thus admitting that the royalties percentage stipulated by AKKA/LAA is proportional.

### **EM Organization's Income Basis Used for Calculation of Royalties**

Royalties are defined as certain percentages of the user's receipts, and the agreement shall stipulate the particular income basis from which the royalties will be computed, since the income basis is as important as the percentage level. The above income basis formulation must:

- a) be open in its definition so that it can accommodate new methods of generation of income insofar as such methods are associated with broadcasting of works;
- b) clearly define those sources of income that, at the moment of signing, are unequivocally understood to be associated with broadcasting of works and should be encompassed by the calculation basis.

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<sup>9</sup> Verdict of the Supreme Court of the Republic of Latvia in Case No. C04256408, AKKA/LAA vs „Latvijas Televīzija”, para [12.1].

<sup>10</sup> Competition Council of the Republic of Latvia. Decision No 20 of February 13, 2008 concerning the closure of proceedings in case No. Nr.2454/06/05/19 , P. 21, 22, 23

In cases where an EM organization operates another business that has no connection to usage of authors' works and no benefit from publicity of a radio or television programme, income from such an activity should not be part of those receipts that form the basis of royalties' calculation.

In a similar way, it is justified not to calculate royalties from VAT that, collected in the process of commercials sales, does not form EM organization's income but is transferred to the national balance instead.

In consideration of the above, when defining the calculation basis, AKKA/LAA uses an open legal term: "Income is understood as all income of the relevant EM organization that is derived from operation of electronic media."

On a separate list, AKKA/LAA stipulates the basic components of minimum calculation basis that are unquestionably regarded as income basis of EM subject to royalties (considering the agreement with Latvian Association of Broadcasters, court rulings regarding the licensing agreements that are in place, etc.):

- 1) income from commercial advertising services of all kinds;
- 2) income from partial or full transfer of air time exploitation rights to third parties;
- 3) income from transfer (sale) of rights to broadcast, receive or use programmes to third parties;
- 4) income from pay services associated with broadcasting;
- 5) any subsidies, grants or donations received from state, municipalities or other entities.

The income from commercial advertising in question means income from all kinds of commercial advertising regularly paid to the EM organization for placement of commercials and advertising of similar content into the programme, excluding the compensation to agents, however, not exceeding 15% of the value of each service of commercial advertising. The 15% deduction is not applicable in cases when the relevant payments are sent to one person that falls into the category of associated companies for the purposes of the Law on Corporate Income Tax. The above deduction is based on the fact that, although an EM organization may theoretically have received the income as a payment, it actually transfers the given amount to the advertising agency for furnishing an advertiser. Income received in support of programme production is also considered as income from commercial advertising. Literally, it is understood as amounts dedicated for production of a programme, however, the broadcaster refers to the sponsor in sub-titles or in the body of the programme. In this regard, Austrian

Supreme Court has clearly formulated in its verdict (No.29/09/1992, 4 Ob 79/92): “Any compensation received by the organizer, in a way, covers part of production expenses.” As an example, the court also mentions that, inter alia, “compensation for commercial advertising also includes compensation for promotion of newspaper.”

The above interpretation of income complies with provisions of LCMC, Article 32, Section two, Paragraph 1, reflecting it directly. Also, such a method of calculation (application of steps of share of musical works and a specified percentage of EM income) responds to the economic value of the services rendered by AKKA/LAA as an organization of collective management as stipulated by ACMS, Article 32, Section two, Paragraph 3. Such a finding is explicitly expressed at the ruling of ECJ: Kanal 4 and TV3 AB vs. STIM<sup>11</sup>.

### **Use of Authors’ Works in Co-broadcasting on Line**

In compliance with the tariffs stipulated for broadcasting of musical works in EM, AKKA/LAA has defined tariffs for “internet radio as co-broadcasting” along with traditional radio transmissions. When defining the royalties for use of this kind, AKKA/LAA considers the following criteria:

- 1) co-broadcasting is an auxiliary use added to existing broadcasting, consequently it is not a primary method of work usage, however, without doubt, it targets extra audience;
- 2) co-broadcasting on line unquestionably is a new method of work exploitation, and the authors have rights to receive royalties for such work exploitation, while the work users are bound to obtain licenses for such use of works;
- 3) the increment of audience is not so significant as to be regarded a separate technique of usage that generates revenue per se, since the most of the audience is covered by the original broadcasting, consequently the royalties should be proportionally smaller, however, the size of audience is not only enlarged by penetration into Latvian market but also by the territorial aspect, and the programme service is made available internationally, outside the territory of Latvia, wherever the Internet is available.

The fact that this manner of use should be considered as exploitation of a separate category of rights of the authors, emanates from the Copyright Law, Article 15, Section one, Paragraph 7, the verdict of the Supreme Court of the Republic of Latvia in case No. SKC 136/2017

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<sup>11</sup> ECJ ruling of December 11, 2008 in the case No. C-52/07, Kanal 5 Ltd, TV 4 AB vs STIM, para [37].

AKKA/LAA vs. STAR FM<sup>12</sup> and ECJ ruling in the case of ITV et al vs. Catchup TV<sup>13</sup>. Although the circumstances reviewed by the ECJ ruling over ITV et al vs. Catchup TV differ from co-broadcasting practised by EM, the court finds that “in contrast, the relevant basic case refers to broadcasting of such works that are included in terrestrial broadcasting and the usage of the same works in the Internet. As it is evident from Recitals 24-26 of the document, “EU legislation intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question”, since each form of broadcasting takes place under special technical conditions using different ways of broadcasting of protected works, and each is targeted at public. Under such circumstances it is no longer necessary to consider the provision for communication to a new sector of public which could be meaningful in situations that the Court has already addressed under the cases of SGAE, conjoined cases of Football Association Premier League etc, as well as the conjoined cases of Airfield and Canal Digital”.<sup>14</sup>

### **Economic Justification and Proportionality of AKKA/LAA Tariffs in the Light of Changes in Legislation Governing Collective Management of Copyright**

Taking into account that on June 14, 2017 LCMC took force and replaced, concerning organizations for collective management of copyright, the Copyright Law that, until then, governed the sector in question, AKKA/LAA has done an analysis to find if its tariffs for electronic media comply with the new regulation by normative acts.

When making the above analysis, AKKA/LAA considered:

- 1) In principle, LCMC does not assign new criteria for tariffs of organizations for collective management of copyright (see comparison of LCMC, Article 32, section 2 with Copyright Law, Article 66, section one<sup>1</sup> as well as the commentary in annotation to LCMC, regarding Article 32 of LCMC bill). Namely, the criteria are defined in compliance with the provisions Article 16, section 2 of EC **Directive 2014/26/EC of February 26, 2014 of the European Parliament and Council on collective management of copyright and neighbouring rights and multi-territorial licensing of rights for musical works for**

<sup>12</sup> Latvijas Republikas Augstākās tiesas 2017.gada 29.novembra spriedums lietā SKC 136/2017 (C29422807), AKKA/LAA vs STAR FM, para [16].

<sup>13</sup> ECJ ruling of March 7, 2013 in the case No. C-607/11, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd vs TVCatchup Ltd, para [39].

<sup>14</sup> Ibid.

**on-line use**, as well as Article 66 of (Latvian) Copyright Law <sup>1</sup> i.e. the lawmakers do not create new norms but expand an adjusted pre-existing set of regulations to cover a wider sphere of tariffs.

- 2) In a similar way, AKKA/LAA finds that following the ECJ ruling in the case AKKA/LAA vs. Competition Council<sup>15</sup>, under which ECJ expressed an opinion concerning proportionality and justification of tariffs imposed by organizations for collective management of copyright: “the difference between the compared tariffs shall be regarded as remarkable if it is significant and permanent. Such a difference is a sign of abuse of the dominant position, and the organization for collective management of copyright finding itself in a dominant position, must prove that its prices are fair, referring to objective factors that modify either management costs or remunerations to subjects of rights”.
- 3) In the case in question, the Competition Council of the republic of Latvia has already analyzed the AKKA/LAA tariffs in the framework of its decision No. 20 of February 13, 2008, and found through comparison with other Baltic countries and other nations of the European Union, that “the royalties tariffs stipulated by AKKA/LAA are not believed to be the lowest (but they are among the lowest), and they are seen as compatible with the royalties’ tariffs stipulated by other organizations for collective management of copyright”.

The above finding is confirmed by rulings of the District Court evaluating AKKA/LAA tariffs in essence, the Senate, Department of Administrative cases, under the Supreme Court of the Republic of Latvia, – both courts have approved the decision of the Competition Council in their conclusions. Inter alia, the Senate, Department of Administrative cases, under the Supreme Court of the Republic of Latvia has found in its ruling of November 15, 2010 in Case No. SKA-0370/2010 that “The Court of Appeal has verified if the Competition Council has analyzed the justification of tariffs stipulated by a third person (AKKA/LAA). The court has learned that the Council has compared tariffs of various countries, and that the tariffs stipulated by the third person are not excessive”.<sup>16</sup>

Thus it should be concluded that under the circumstances where the existing tariffs are among the lowest and they are considered compatible with tariffs imposed by organizations for

<sup>15</sup> ECJ ruling of September 14, 2017 in the case No. C-177/16, AKKA/LAA vs Competition Council.

<sup>16</sup> Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departaments 2010.gada 15.novembra spriedums lietā Nr.SKA-0370-2010 (A43000108), para [19.4.].

collective management of copyright of other countries, there is no basis to diminish or change them as they are in line with the relevant economic situation today.

It follows from above that the AKKA/LAA tariffs for use of musical works in broadcasting by electronic media of communication are developed in full awareness of three criteria among four criteria prescribed by LCMC, Article 32, Section two: 1) direct commercial gain received by the user of a work or an object of neighbouring rights as a result of the relevant usage; 2) the objective, scope and significance of use of the work or the object of neighbouring rights depending on the manner of use within the confines of economic activities or other efforts; 3) the economic value of the service rendered by organizations of collective management to the users of authors' works. As regards the fourth criterion stipulated by the above article of LCMC as one that should be kept in mind when developing tariffs, i.e. financial resources invested in creation of a work or object of neighbouring rights and other parameters characterizing the economic justification, it is not applied in this case since AKKA/LAA is only an organization for collective management of economic rights and assessment and evaluation of financial and other resources invested into creation of an author's work does not fall within its scope.

However, in line with Article 32, Section 3 of LCMC, in definition of minimum tariffs AKKA/LAA takes into consideration the share of musical works as well as the territorial coverage of EM as objective ancillary criteria, setting the level of minimum payment so that, making the distribution of collected royalties for the respective manner of work use, it would be technically possible to distribute and actually pay the royalties.

Such are the considerations for AKKA/LAA to maintain the existing tariffs regarding use of authors' works in broadcasting by electronic media of communication, as far as broadcasting of musical works is concerned.