

Principles and Criteria for Tariff Development: Audiovisual Works

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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”¹

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).”²

Basic Principles of Tariff Development

The tariffs are set on the basis of recommendations by the International Confederation of Societies of Authors and Composers (hereinafter CISAC), where AKKA/LAA is a member, in view of the economic situation of Latvia, prices of commodities, as well as the tariffs regarding the use of audiovisual works of other member countries of the European Union.

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 audiovisual works on international basis as well as concerning local legislation”, therefore CISAC monitors the work of its members in development of tariffs, however, it must be remembered that according to the provision of the Statutes, Article 20.a), except purely administrative issues, all the rules adopted in compliance with the provisions of the present Statutes, are, in character, mere recommendations”.

Most of the decisions adopted by CISAC stay within the boundaries of defining the basic principles, which are applied for all the tariffs stipulated by the society „Copyright and Communication Consulting Agency” (hereinafter – AKKA/LAA),

¹ M. Grudulis. Ievads Autortiesībās., Rīga: Latvijas Vēstnesis, 2006., P. 111

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

considering the fact that the rights-holders have rights to receive equitable remuneration for use of their works, and the authors as rights-holders have rights to determine the royalties for use of their works. Moreover, the national affiliation of authors cannot be an excuse for receiving reduced royalties (the above principle emanates from the reciprocal agreements between AKKA/LAA and foreign organizations for collective management of copyright):

- 1) „The tariffs shall be determined by the authors themselves” (9th Congress, Warsaw, 1934.)
- 2) „The authors shall always have a share in the distribution of income generated by their work, and this principle includes any single payment” (12th Congress, Paris, 1937; CIAD – Monte Carlo, 1971.)
- 3) „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.” (12th Congress, Paris, 1937).
- 4) „Performance of foreign works cannot be an excuse for application of tariffs of lower percentage than those applied to national works” (13th Congress, Stockholm, 1938).

When stipulating its tariffs, AKKA/LAA not only considers the basic principles encompassed in the CISAC recommendations but also complies with the normative acts and case law valid for the Republic of Latvia: the case law from Latvia as well as the relevant case law from the European Union.

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.

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.

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.

The Choice of the Tariff Category Applicable to Use of Audiovisual Works

In line with the experience of other countries, the system of royalties' tariffs in the case of audiovisual works is either modelled taking into account the link between the

use of works and the receipts from the use of works, or, alternatively, defined as a lump sum.

Application of percentage-based tariffs complies with the provisions of Article 32, Section 2 of the 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.

The tariff is defined as a lump sum:

- In the form of minimum tariff in cases when work use is non-commercial, however, identical in its form to a model where revenue might be generated (e.g. a gratis demonstration of film).

-in cases when the link between the usage and the receipts is indirect, (e.g. communication of works on interactive multimedia stands or touch-sensitive screens at exhibitions or displays, where a fragment of an audiovisual works is incorporated into another work)

With regard to the methods of usage that are not restricted to collective management only, AKKA/LAA manages the use of the following audiovisual works: 1) works created in the territory of Latvia before 1993, 2) works created in the territory of Latvia after 1993, whose producers and authors have agreed that royalties for their use shall be payable via an organization for collective management. Since such a repertoire is a limited part of audiovisual works used by electronic media of communication, (hereinafter – EM) lump sum is admitted to be the most suitable tariff category for EM.

Minimum Payments

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 payment with the size of the audience;
- 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).

When stipulating the minimum payment of copyright, AKKA/LAA, on the basis of 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. The norms for minimum royalties for use of audiovisual works have been developed by a working group set up of representatives of authors and movie studios, in line with internationally recognized benchmarks of the audiovisual industry.

Techniques and Criteria for Computation of Royalties

Taking into account the above, the following techniques are employer and the following criteria considered in computation of royalties:

I Public Performance

Public performance at cinema halls

- The duration of audiovisual work in minutes
- The category of audiovisual work (feature film, documentary or animation)
- Whether the show charges an admission fee or not

- For shows free of charge, the number of visitors (audience) is noted
- For shows with admission fee, the receipts from ticket sales are noted

Public performance at permanent expositions and exhibitions at museums

- Receipts from sold tickets
- The number of days of exposure

Public performance at one-off events, where the diagonal of the screen at the venue does not exceed 100 cm

- Programme length in hours;

Use of film fragments for educational programmes of museums

- Programme length in minutes
- The number of classes

Public performance at concerts, balls and similar events for which a license for public performance of music has already been obtained

- The category of audiovisual work (feature film, documentary or animation)
- The number of demonstrations of audiovisual work
- The number of visitors (audience)

Public performance of an audiovisual work incorporated in a work for stage

- The number of demonstrations
- Duration of the work or its fragment in minutes

II Broadcasting

- The scope (footprint) of broadcasting – international, national, regional or local

- Duration of the work in minutes
- The category of audiovisual work (feature film (it shall be specified if the work is a screen version of a literary work), documentary or animation (it shall be specified if the work is a screen version of a literary work))

III Communication by means of incorporation of an audiovisual work into another work

When the work is incorporated in a stage work or a new audiovisual work

- The length of the used fragment in minutes

IV Reproduction

Reproduction in data carriers where only audiovisual works are reproduced

- The number of film copies
- The wholesale price of a film copy

Multimedia

- The length of the used work or fragment in minutes
- The number of multimedia copies

V Communication by making available to the public

Online communication

- The category of audiovisual work (feature film, documentary or animation)
- The length of the used work in minutes
- The receipts of the content provider from end users and from commercials
- The number of streaming episodes (consumption) of the work

Downloading

- The category of audiovisual work (feature film, documentary or animation)
- The length of the used work in minutes
- The receipts of the content provider from end users and from commercials
- The number of downloads

Interactive multimedia stands or touch-sensitive screens at exhibitions and displays

- Total time of the work or its fragments in minutes
- Duration of exposure

Management Costs for Audiovisual Works

Management costs are composed, on the one hand, of direct management expenditure, such as the salary of the licensor's staff and compensation to other involved employees, mail costs, stationery, telephone costs, costs associated with running time of computers, electricity, communal costs attributable to the workstations, development of the database of author's works, as well as provision for access to international databases, etc.

A second large part of management costs refers to indirect costs, e.g. the share of total costs of administration, supporting functions provided by other relevant departments including the input from the legal department, department of documentation and distribution, accounting and clerical work; also, the costs of the services of the yard-keeper, security personnel, transportation and house maintenance belong here.

The AKKA/LAA contract for management of authors' economic rights stipulates that the costs of management of rights shall not exceed 25 (twenty five) per cent of the collected amounts.

All costs are documented in the accounting files of AKKA/LAA and audited on annual basis. They are reflected in annual financial reports of the society, and their authenticity is confirmed by reports of a sworn auditor.

Admittedly, the management costs are the lowest possible and answer the principles of efficient business and good governance.

Summary

The tariffs developed by AKKA/LAA comply with the recommendations of CISAC and the WIPO guidelines for tariff development. They are commensurable with the tariffs of authors' organizations of other countries.

All tariffs are endorsed at sessions of the council of authors.

The activities of AKKA/LAA are supervised by the Ministry of Culture, which is the national institution responsible for the industry of copyright and neighbouring rights. The Ministry of Culture delegates a representative to participate in AKKA/LAA council sessions and the general assembly of authors.

The tariffs are available at the AKKA/LAA website.

