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Contractual Relations with Participation of Performers, Producers of Phonograms and Broadcasting Organizations



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Abstract

In the creative industry, performers' interests cannot be met solely through their own actions and the realization of their own creative abilities. Coordinated interaction of representatives of creative professions and show business is necessary. In this area, various kinds of agreements are concluded, which do not always relate to the exercise of intellectual rights. The Civil Code of the Russian Federation regulates in more detail the contractual relations associated with the use of works of authorship, without paying due attention to contracts with performers, producers of phonograms and broadcasting organizations, which leads to the problem of double interpretation in the process of law enforcement. Performers, producers of phonograms and broadcasting organizations conclude not only agreements on the disposal of exclusive rights, but also agreements on the distribution of remuneration for use, on the management of rights, and others. The article examines some types of civil contracts concerning the objects of related rights. Some contractual relations concerning related rights, both those named in Chapter 71 of the Civil Code of the Russian Federation, and not named in it, but occurring in practice, are analyzed. A comparison is made of similar contractual relations concerning objects of copyright and objects of related rights. It is important to distinguish service contracts involving performers, phonogram producers, and broadcasting organizations from contracts for the exercise of intellectual rights. If in the contracts of the first group special attention deserves the beneficial effect achieved from the actions of the service provider, then

in the second group of contracts the personality of the right holder as a party to the contract, as well as special characteristics of the result of intellectual activity, are of significant importance in the execution of the contract. The user (service recipient) must determine what is of paramount importance to him, since the essence of the contract with the performer, its subject matter and content will depend on this.



Keywords

author, intellectual right, exclusive right, performance, performer, license contract, neighboring rights, phonogram

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Introduction

In an age when scientific progress creates new information technologies and ways of interaction between people, novels poems, songs, musical compositions, scripts and other works would dust on the shelves of libraries, archives and home collections, if performers, phonogram producers, broadcasting organizations could not present it to the public both live, recorded and broadcast.

But involving the exclusive rights to works of art in commercial circulation, interested parties enter into legal relations with their authors, including concluding various agreements with them.

As to the results of the intellectual activity of performers, producers of phonograms, broadcasting organizations, producers of databases and publishers, in accordance with the Civil Code of the Russian Federation, related (neighboring) rights are recognized on the territory of the Russian Federation, and a certain procedure for using objects of related rights is established. Chapter 71 of the Civil Code is devoted to related rights. It reflects some provisions concerning agreements on the disposal of the exclusive right to objects of related rights (agreements on alienation of exclusive right and a license agreement on granting the right to use). General provisions on civil obligations (Articles 307–419 of the Civil Code) and on the contract law (Articles 420–453 of the Civil Code) apply to such agreements. Other types of contracts relating to neighboring rights, in the Chapter 71 of the Civil Code are not mentioned. At the same time, the results of intellectual activity can be created jointly by several persons, and the

rightholders, by agreement of the parties, can determine the procedure for exercising their intellectual rights. The exercise of intellectual rights belonging to the copyright holder is also possible through his representative. In addition, performers give concerts to the public, phonogram producers produce master cassettes, and broadcasting organizations broadcast feature films and other audiovisual works.

But will all contractual legal relations deal with the exercise of the related rights of performers, producers of phonograms, broadcasting organizations and other holders of related rights?

1. Contracts with performers, phonogram producers and broadcasting organizations: some classifications

Legal doctrine provides a wide range of classifications of contracts in the field of intellectual property. For example, some experts identify a system of contracts ensuring the circulation of exclusive rights, which includes contracts for the alienation of exclusive rights¹, contracts for the transfer of exclusive rights, contracts for the provision of services in the field of intellectual property, contracts for representation and management.

E.A. Morgunova, in addition to agreements on the disposal of exclusive rights, distinguishes four more groups of agreements in the field of intellectual property:

contracts directed or related to the creation of results of intellectual property ;

contracts aimed at exercising other intellectual rights;

contracts for the provision of legal services in the field of intellectual property;

agreements on the procedure for the exercise of intellectual rights between their co-holders ”[2019: 87]².

Are all these groups of agreements related to the objects of neighboring rights?

When concluding contracts, one should take into account, in particular, the legal nature of the result to be achieved by the contract, its legal

¹ Agreements providing for the circulation of exclusive rights. Ed. by Sannikova L.V. Moscow, 2018. 184 p.

² Intellectual property: issues of legal protection. Moscow, 2019, p. 87.

characteristics, legal facts that are the basis for the provision of particular rights, rights and obligations of the parties and the amount of transferred or granted rights.

It is possible to distinguish a separate group of contractual relations with the participation of performers and publishers, which are aimed at the use of objects of related rights. And it is advisable to distinguish such a group from contractual relations with the participation of these persons for the provision of services in the field of show business.

On the one hand, if a viewer buys a ticket for a performance, he enters into a contractual relationship with the performer for the provision of a service. As a result of the provision of such a service, the result of intellectual activity arises — a performance. But the legal relationship between the viewer and the performer for the provision of the service does not apply to the further public use of such a performance. The same situation arises when a performer or his producer is interested in popularizing a performance and enters into an agreement with a broadcasting organization for broadcasting this performance on radio or television. On the other hand, if a broadcasting organization or other person has an interest in using, for example, by recording and / or broadcasting or by cable, a performance, it needs to conclude an agreement with the performer on the disposal of the exclusive right to the performance.

In the first example, we can talk about a service contract in the field of show business, and in the second one, about an agreement on the disposal of an exclusive right. In an agreement on the disposal of an exclusive right (in relation to the cases described above), the subject is the object of related rights.

In the contract for the provision of services, as a subject should be considered the activity of performers, broadcasting organizations, or the publisher (in some countries, this category of subjects also includes producers, organizers of entertainment events), aimed at the intangible effect arising when presenting performances. At the same time, in such a group of contracts, there is a connection between the provided service and the personality of the performer, the result of the performed activity itself does not exist in isolation from the performer under the contract. Agreements for the provision of services in the field of and show business (in this article, this concept is used in a broad sense) can conditionally include an agreement on the creation of a master cassette, an agreement for the provision of services to subscribers by a cable operator, a trust management agreement, a receipt agreement, an agency contract and others.

The practical value of the division of contracts concerning the results of intellectual activity into the two indicated groups is expressed, for example, in some differences in the methods of legal protection used in cases of violation of rights during the execution of contracts.

Let us consider in more detail some types of these contracts in relation to performances, phonograms, databases, broadcasting and works made public after the death of the author.

2. Contracts on the disposal of exclusive rights

Agreements on the disposal of exclusive rights include agreements on the alienation of exclusive rights, a license agreement on the grant of an exclusive right, a pledge agreement, and a commercial concession agreement. The agreement on the alienation of the exclusive right presupposes the transfer of the exclusive right to the results of intellectual activity and means of individualization in full (Article 1234 of the Civil Code of Russia). The transfer of exclusive rights is allowed in relation to all objects of related rights (Article 1307 of the Civil Code); restrictions on such transfer are not provided by law. As to inventions, utility models, industrial designs or trademarks, their legal protection is limited to the territory of the state or region in which such an object is registered.

With regard to an object of copyright, when concluding an agreement on the alienation of an exclusive right, the parties often indicate in the texts of agreements the transfer of exclusive rights on the territory of the whole world, meaning by this the states where copyright protection of such a work is in effect, and these are 177 states parties to the Berne Convention on the protection of literary and artistic works, including the Russian Federation³. As for the objects of related rights, the approach to the transfer of exclusive rights requires additional attention. Objects of related rights created in the Russian Federation are protected not only in the Russian Federation, but also in other countries, including on the basis of the principles of reciprocity and in accordance with international treaties. There is no single international treaty concerning all objects of related rights. The provisions on the rights of performers, producers of phonograms and broadcasting organizations are enshrined in several multilateral international treaties that provide provisions on national treatment to be accorded to foreign

³ See: Berne Convention for the Protection of Literary and Artistic Works. Contracting Parties. World Intellectual Property Organization. Available at: <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> (accessed: 01.09.2019)

rightholders. Such international treaties include the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, October 26, 1961, hereinafter referred to as the Rome Convention,⁴ Article 2), the WIPO Performances and Phonograms Treaty (Geneva, December 20, 1996,⁵ Article 4), Agreement on Trade-Related Aspects of Intellectual Property Rights (Article 3).⁶

The Convention on the Distribution of Program-Carrying Signals Transmitted by Satellite (Brussels, May 21, 1974) and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, October 29, 1971) do not grant international legal protection to the broadcasts of broadcasting organizations and phonograms, respectively, but only provide legal guidance for such protection at the national level of the contracting parties through the adoption of remedial measures in case of violations. Since the Russian Federation participates in multilateral international acts including, the above mentioned in the field of intellectual property, the performance of Russian artists, the phonograms of Russian phonogram producers and the broadcasting of broadcasting organizations are protected, and the rights to them can be transferred by agreement in those states where such objects are granted security.⁷

At the same time, the international treaty providing for special international legal protection of databases, which in Russia are recognized as objects of related rights, remained at the stage of the project considered by the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization. Also, there is no international protection of the publisher's rights, although a number of European countries provide legal protection to the publisher. In this regard, the rights of producers of databases and publishers are recognized in various countries and protected on the basis of the principle of reciprocity.

⁴ 94 participating states as for March 2019: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Contracting Parties. World Intellectual Property Organization. Available at: <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/rome.pdf> (accessed: 01.09.2019)

⁵ 102 participating states as for May 2019: WIPO Performances and Phonograms Treaty. World Intellectual Property Organization. Available at: <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wppt.pdf> (accessed: 01.09.2019)

⁶ National regime for performers, manufacturers of phonograms and broadcasting organizations by agreement Agreement on Trade-Related Aspects of Intellectual Property Rights applies only to the rights provided for by this Agreement. (164 WTO member).

⁷ At the same time, it is necessary to take into account the features of the transfer of rights provided for by national legislative acts of participants in international treaties.

In the legislation of other countries with respect to objects of related rights, a different (compared to that provided for in the Russian Federation) legal regime may be granted, for example, in Great Britain, broadcasting is considered as an object of copyright. In addition, in various countries, approaches to the disposal of exclusive rights differ. For example, in Japan related rights can be transferred in full or in part (Articles 103 and 61 of the Japanese Law of May 6, 1970 «On Copyright» as amended), in Germany, as a rule, they talk about licensing agreements. In addition, with regard to performers, §§ 78 and 75 of the German Act of 9 September 1965 on Copyright and Neighboring Rights stipulates that the rights of recording, reproduction and distribution, as well as the right to receive remuneration for the rental and provision of video or audio carriers for free use cannot be ceded.

Thus, the scope of legal protection, one of the characteristics of which includes the territory of validity of the exclusive right, will be subject to clarification each time. So, for example, experts propose, when alienating the exclusive right to a database, to indicate all states on whose territory this right is transferred, since if the corresponding state is not indicated, the exclusive right in such a state will not transfer [Kalyatin V.O., 2018: 107]. This position seems to be debatable, since in order to alienate the exclusive right, the copyright holder must define in the contract all those countries where his object is protected. Otherwise, it cannot be said unequivocally that the exclusive right will pass to the acquirer in full, and any limitation of the right under the contract gives grounds to be considered in accordance with the Civil Code of the Russian Federation as a license agreement (clause 3 of Article 1233).

In some cases, the legislator made the moment of transfer of related rights dependent on the need and possibility of state registration of the result of intellectual activity. The right to use the object of related rights is granted, and the exclusive right to the objects of related rights is transferred, as a rule, at the time of signing the agreement or within the period specified in the agreement. For the provision of legal protection to objects of related rights, the exercise and protection of rights to them, as well as to objects of copyright, no state or other registration, deposit or any other formalities are required. At the same time, if the object of related rights is a database, its rightholder, if he so wishes, can register such a database with the federal executive body for intellectual property, the functions of which are performed by Rospatent (Russian Federal Service for Intellectual Property). Such registration can serve in court in the event of litigation as one of the proofs of the existence of this database. In addition, the fact of state registration of a database as an object of related rights is the basis for the

application of the provisions of Articles 1232 and 1262 of the Civil Code of the Russian Federation to it, namely: the alienation of the exclusive right to such a database under an agreement is also subject to state registration, otherwise the transfer of an exclusive right is not considered held (clause 6 of Article 1232 of the Civil Code). This requirement is due to the need to maintain the Register of Databases of the Russian Federation, which is maintained by the Federal Service for Intellectual Property, in an up-to-date state in terms of information about rightholders. The right to such a database passes at the time of state registration. The requirement for state registration does not apply to license agreements on granting the right to use a registered database.

There are also no legislative restrictions on the granting of the right to use objects of related rights in Russia. Provided by Article 1236 of the Civil Code, types of license agreements are applicable to all objects of related rights. Granting the right to use an object of related rights is possible both under the terms of a simple (not exclusive) license, and under the terms of an exclusive license (without the licensor retaining the right to issue licenses to other persons). There is no information on the provision of compulsory licenses in the Russian Federation in relation to objects of related rights (Article 1239 of the Civil Code). Since 2014, the Civil Code has been supplemented with provisions on open licenses for objects of related rights. An open license for an object of related law presupposes the conclusion of a license agreement under the terms of a simple (non-exclusive license) in a simplified manner (clause 2 of Art. 1308), to which the provisions of Art. 1286.1 Civil Code. At the same time, some experts question the possibility of extending, apart from works of science, literature and art, provisions on open licenses for other results of intellectual activity, including objects of related rights, noting that currently the subject of open licenses in the sense of Article 1286.1 of the Civil Code of the Russian Federation can only be the right to use works of literature, science or art.⁸ A licensing agreement such as an open license is considered an «adhesion contract»⁹. An open license may provide for the conditions that the acceptance of such an agreement by the licensee may be expressed in the performance of implicit actions defined in this license (para 2 of clause 1 of Article 1286.1 of the Civil Code). The terms of an open license must be available for review by

⁸ Kalyatin V.O. Development of a system for regulating the disposal of intellectual property rights in Russia // SPS Consultant Plus.

⁹ An adhesion contract is under Russian law a contract, the conditions of which are determined by one of the parties in standard forms, in which the second participant of the agreement cannot make changes.

an indefinite number of persons (for example, the packaging of the copy, the website of the copyright holder, information accompanying the object when trying to download it to a computer), and the licensor must provide the licensee with the opportunity to familiarize the licensee with such a license prior to using the protected object. An example of such licensing agreements are «packaging licenses», known since the adoption of the Law of the Russian Federation of September 23, 1992 «On the legal protection of programs for computers and databases» (clause 3 of Article 14), where all the essential terms of the license agreement were stated on the packaging of a computer program or database, and it is considered that the user, by opening the packaging, agrees to the terms of the license.

In Article 1286.1 of the Civil Code of the Russian Federation the legislator developed the idea of “packaging licenses”, providing the copyright holder with wider opportunities to conclude licensing agreements for various types of models, including the increasingly used on the Internet licensing under the terms of “Creative Commons”.¹⁰

According to the general rule established by clause 3 of Article 423 of the Civil Code, a civil contract is assumed to be compensated, unless otherwise follows from the law, other legal acts, the content or essence of the contract. However, there is a different rule for open source licenses. In para 1 of p. 3 Article 1286.1 of the Civil Code established a rebuttable presumption of gratuitousness of such an agreement, that is, if the agreement does not provide otherwise, an open license is considered gratuitous. The scope of the powers granted to the licensee may also include the right to use the work belonging to him to create a new result of intellectual activity. Failure to indicate the territory of the permitted use of the protected object implies the possibility of its use throughout the world.

Such a license should not be considered as a waiver of the right holder from his rights, since he retains control over the use of the protected object, the right to exercise and dispose of an exclusive right and the right to prohibit the use of the object outside the granted rights. The copyright holder also has the right to apply for the protection of his rights in cases of their violation and to demand the application of protection measures in accordance with Article 1252 of the Civil Code. It may seem that certain elements concerning the procedure and conditions for the conclusion of open licenses are disclosed in Article 1233 of the Civil Code. However, as follows from para 9 of p. 5 of Article 1233, the provisions of the specified paragraph

¹⁰ At the same time, it is necessary to make a reservation that in each particular country the possibility of such use and its limits is subject to clarification

of Article 1233 does not apply to open source licenses. Applications for providing any person with the opportunity to use free of charge the objects of related rights belonging to him on conditions determined by the rightholder and during the period specified by him differ from open licenses. The placement of the application is the basis for the rightholder's obligation to refrain from granting the right to use the corresponding result, and to a third party the right to use this result. For the copyright holder who made a statement, regardless of the use by a third party or consent to use the result of intellectual activity specified in the statement, legal consequences occur, in particular, those given in para 7 p. 5 Article 1233, as well as the impossibility of the subsequent conclusion of license agreements, on the conditions specified in the application.

In Article 1233 of the Civil Code of the Russian Federation, the legislator provided for an independent way of disposing of the exclusive right to works and objects of related rights. Some experts regard the provisions of para 5 of Article 1233 of the Civil Code as introducing a unilateral restriction by the rightholder of his exclusive right in order to expand the possibilities of using objects of copyright and related rights on the Internet.¹¹

Such a statement should not be considered as a public offer of the accession agreement on the granting of the right to use on a gratuitous basis. Having made the statement provided for in para 5 of Article 1233 of the Civil Code, the copyright holder cannot provide third parties under a license agreement with the right to use the result of intellectual activity in relation to those uses that are indicated in the application. However, the wording of clause 5 of Article 1233 allows different interpretations.

During the period specified by the rightholder, any person has the right to use this work or this object of related rights on the conditions specified by the rightholder (clause 5 of Article 1233). The statement of the copyright holder is an action that is considered as a unilateral transaction, and not a legally significant message (Article 165.1 of the Civil Code). The statement is addressed to everyone who is interested in using the object specified in the statement. It should not be sent anywhere and, unlike legally significant messages, does not have specific addressees.

The statement is made by posting a message on the official website of the federal executive body on the Internet. The federal executive body responsible for the placement of the relevant applications, as well as the procedure

¹¹ Commentary on the part 4 of the Civil Code of Russia. E.A.Pavlova (ed.). Moscow, 2018, p. 86. (In Russ.).

and conditions for their placement, are determined by the Government of the Russian Federation. However, such a body has not yet been appointed. It seems that the statement made by posting information on the website of the federal executive body is remotely similar to the open licenses provided for objects of patent law (Article 1368 of the Civil Code). Although with regard to inventions, utility models and industrial designs, this is not a unilateral transaction, as follows from Article 1233 of the Civil Code, but on a license agreement concluded subsequently with the patent holder.

According to O.M. Kozyr, the statement provided for in para 5 of Article 1233 of the Civil Code, «is essentially a» directed «refusal of a person to exercise the right to an object belonging to him.»¹² This approach seems to be ambiguous. Such a statement should not be considered as a waiver of the exercise of the exclusive right, since such a statement does not restrict the right to use independently (the rightholder can use the results of intellectual activity on his own), to dispose outside the granted rights (the rightholder can grant the right to use under the contract in ways that do not named in the application, or on the territory not specified in the application), to prohibit unlawful use of rights, and to protect violated rights including in court (as evidenced by para 8 of clause 5 of Article 1233), etc. Perhaps it makes sense to combine the provisions of para 5 of Articles 1233 and 1286.1 into a unified legal structure that allows one to conclude licensing agreements for the granting of the right to use objects of copyright and related rights in a simplified manner. Recently, many objects of copyright and related rights are placed by copyright holders in «cloud technologies» with the provision of access to them via the Internet. There is a debate in legal doctrine as to whether the provision of access to such objects via the Internet is a use (and therefore requires the conclusion of licensing agreements) or we are talking about contracts for the provision of services, since objects are not downloaded directly to the user's computer, and therefore it is not advisable talk about reproduction as one of the ways to use the result of intellectual activity. In this regard, many questions arise regarding the legal regulation of the use of objects of intellectual activity on the Internet.

Chapter 71 of the Civil Code of the Russian Federation does not mention a pledge agreement in relation to related rights. In this regard, some researchers, for example, Yu.S. Kharitonova does not consider the objects of related rights to be those results of intellectual activity, the exclusive rights to which can be the subject of a pledge.¹³ However, this is refuted, in

¹² Ibid.

¹³ Agreements providing for the circulation of exclusive rights. P., 184.

particular, by the provisions of Article 1319 of the Civil Code, from which it follows that the performer can conclude a pledge agreement, the subject of which will be the exclusive right to a specific performance specified in the agreement and belonging to this performer. That is, if the object is sufficiently concretized in the contract, and the rightholder is directly the pledger, there is no reason not to conclude agreements on the pledge of the exclusive right to them with respect to the objects of related rights.

According to Ch. 23 of the Civil Code, the pledge refers to the methods of securing the fulfillment of obligations, while the pledge of the exclusive right has greater legal significance, since it is also an independent contract. A separate Article 358.1 of the Civil Code is devoted to the pledge of exclusive rights. The subject of pledge may be the exclusive right to any result of intellectual activity or means of individualization, in respect of which disposal is allowed. Neither the Civil Code nor other legislative acts of the Russian Federation provide for a prohibition on the disposal of the exclusive right in relation to objects of related rights, therefore, there are no restrictions on pledge with respect to objects of related rights. As follows from Article 358.1, a pledge of exclusive rights is possible, as well as a pledge of rights under an alienation agreement or under a license agreement. The general provisions on pledge (Articles 334-356 of the Civil Code) apply to the pledge agreement of the exclusive right to performances, phonograms and other objects of related rights. The Civil Code allows the use of a performance, phonogram and other object of related rights by the pledger, but, unless the contract provides otherwise, alienation of the exclusive right without the consent of the pledgee is not allowed.

Based on the provisions of para 5 of Article 346 of the Civil Code, which apply to agreements on the pledge of exclusive rights, the pledgee has the right to use, in the cases provided for by the agreement, the result of intellectual activity, defined as the subject of pledge, regularly submitting a report on such use to the pledger.

However, the commercial interest in such treaties in relation to related rights will not be as high as it is in relation to the exclusive right to trademarks.

3. Agreements related to the creation of the results of intellectual activity

Contracts directed or related to the creation of the results of intellectual activity include, in particular, an agreement on the creation of an audiovi-

sual work (clause 4 of Article 1317 of the Civil Code). In contracts for the creation of the results of intellectual activity, an important aspect is the conditions for the distribution of rights.

When creating an audiovisual work (for example, a feature, animation or other film), the producer enters into agreements for the creation of such a work with the scriptwriter, the author of the dialogues, the production designer, the composer, the performers, etc. When concluding such an agreement in accordance with para 4 of Article 1317 of the Civil Code, it is presumed that the performer gives his consent to the use of his performance as part of such an audiovisual work. A different approach, for example, the need to conclude an additional license agreement on the granting of the right to use the performance after the filming, should be directly stipulated by the contract between the producer and the performer. With regard to the separate use of sound or images that have been recorded in an audiovisual work, the performer's consent to their use must be also expressed in the contract.

In practice, actors conclude, for example, contracts for the participation in shooting, which include, among other things, the alienation of the exclusive right to the performance.

Inattentive study by the performers of the terms of such contracts may lead to the fact that the performer was filmed to create one audiovisual work, and his image and fragments of the performance were used in another audiovisual work, as is the case with the actress who played the role in the film «The New Year's Rate Plan (2008)». The actress did not appear in commercials before and did not give consent to the use of her performance in the advertising clip «The New Year's Rate Plan», however, frames from this film were used to create another audiovisual work.

In September 2008 an agreement was concluded between the actress and the company producing the film, according to which the actress transferred to the company the exclusive right to use the results of the services (performance of the role) in full, in any form and by any means. The contract stated that the actress ceded to the company the exclusive right to the performance in full. At the same time, under the contract, the company also had «the right to change the sequence of frames, change the content and title of the film, use the film (including its title) or its individual parts (any fragments of the film) to create new audiovisual and other works».¹⁴

¹⁴ Resolution of the Moscow District Arbitration Court 19.01.2011 No. KT-A40/17146-10 on the case No. A40-168251/09-26-1216 // SPS Consultant Plus.

In this regard, all the attempts of the actress to judicially recognize the exclusive related rights to use her performance in the advertising clip «The New Year's Rate Plan» and oblige the defendant to publish the decision on the violation committed were unsuccessful. The court dismissed the claim.

Objects of copyright can be created as a result of work under contracts, in particular, under an author's contract, a research contract, a state or municipal contract. The author's contract may also determine the procedure for the distribution (transfer or grant) of rights to a work that must be created under such an agreement. Since, according to the general rule (clause 3 of Article 1228 of the Civil Code), the exclusive right initially arises with the author, and the author's contract may provide for the alienation or granting of the right to use the work, the creation of which is determined by the contract.

The Civil Code provides for provisions related to contracts for ordering works of science, literature and art, as well as industrial designs (Articles 1288, 1372 of the Civil Code). However, with regard to objects of related rights, the legislator did not provide for special provisions in the Civil Code concerning type of contracts, as is the case with objects of copyright and patent rights. Can objects of related rights be created under an author's contract?

Author's contract, which is an independent type of agreements aimed at creating a result of intellectual activity, is often considered as a work agreement, since it must indicate the result of the work performed (in this case, the result of intellectual activity), recorded on a tangible medium, and indicate the main characteristics of such a result. For works of science, literature and art, the volume, type, genre, scope, name [Gavrilov E.P., 2005: 206], topic, summary, problematic issues, plot, etc. can be determined.¹⁵

It seems problematic to preset the exact characteristics for some objects of related rights. The customer is less interested in the process of performing the work itself. In this regard, for such objects as performance and broadcasting, which are in themselves a process, the application of the provisions of the order agreement is excluded. In relation to these objects, we can talk about the results of the provision of services.

I believe that the author's contract occupies a borderline place. It can be classified as mixed contract and contain elements of various types of contracts. Many conditions in this type of agreement are left to the discretion of the parties. However, when performing it, the personality of the per-

¹⁵ Civil Code of the Russian Federation: Copyright. Neighboring Rights. Commentary to Chapters 69-71. P.V. Krashenninnikov (ed.). Moscow, 2014, p. 335. (In Russ.).

former is important. The subject of such an agreement can be considered the commission of certain actions that have a useful effect. Such results of intellectual activity as performances and broadcasting can be created in the process of providing services under a contract. The main goal of such agreements is not to create a protected result of activities, but to obtain a different positive effect as a result of such activities. As noted by E. Morgunova, a service is «an action that benefits the counterparty.» [Morgunova E.A., 2008: 71] With regard to objects that can be created when rendering a service, it is difficult to foresee the result in advance.

At the same time, even at the stage of pre-contractual disputes, the possibility of recording the performance, its broadcasting on the air or by cable should be discussed. For example, by concluding an agreement on the provision of musical accompaniment for a children's matinee, the performer can grant the organizer of the event (or another person) the right to record his performance and then use the recording of the performance on the terms specified in the contract.

At the same time, it is impossible to exclude the possibility of creating a database under such type of contract, which will be recognized as an object of related rights.

4. Contracts aimed at the exercise of other intellectual rights

Before talking about contracts aimed at exercising other intellectual rights, one should analyze what other intellectual rights may be applicable to the objects of related rights.

These rights include the right to receive remuneration for performance (Articles 1320 and 1295 of the Civil Code). With regard to the amount and procedure for its payment, an agreement on remuneration for performance may be concluded between the employer and the performer. Although some experts believe that in cases when it comes to official results of intellectual activity, the creator of the result of intellectual activity receives remuneration for the creation of such a result in the form of wages, which is fixed in an employment contract or civil law contract, and not in an independent (additional) agreement between the employer and the contractor.

At the same time, we do not consider it correct to attribute to other rights the right to remuneration for the free reproduction of phonograms and audiovisual works for personal purposes (Article 1245 of the Civil Code), the right to remuneration for the public performance of a phono-

gram published for commercial purposes, the right to remuneration for broadcasting on the air or by cable of a phonogram published for commercial purposes (Article 1326 of the Civil Code).

These rights are elements of the exclusive right of performers and producers of phonograms, in respect of which the Civil Code has established a restriction. I believe that treaties for the exercise of such rights should be separated into a single subgroup in the category of treaties for the exercise of intellectual rights.

Despite the fact that the remuneration is paid in favor of the rightholders, in accordance with the legislation, agreements on the payment of remuneration for public performance and broadcasting or by cable of a phonogram published for commercial purposes are concluded between users and an accredited organization for the management of related rights on a collective basis. At present, such an organization is the Russian Organization for Intellectual Property (VOIS). The exercise by the user of his right to use the result of intellectual activity in the above ways, arising from the restriction of the exclusive right of the rightholder, creates an obligation for the user to conclude an agreement with the collective management organization and pay remuneration, the same obligation to conclude an agreement arises simultaneously with the collective management organization [Valdez-Martinez E.R., 2012: 111].

Under such agreements, the user (for example, theater, cinema, cafe, restaurant, etc.) undertakes to pay remuneration for the use of phonograms published for commercial purposes. The contract determines the amount of remuneration (for example, “0.5% for each act of a performance in which a phonogram is publicly performed, from the gross fees received from ticket sales”)¹⁶, payment terms (for example, remuneration is paid “based on a certificate prepared by the user on publicly performed phonograms”)¹⁷ and the procedure for payment of remuneration (in particular,» monthly, no later than the 20th day of the month following the reporting period «)¹⁸.

Contracts on the payment of remuneration for the free reproduction of a phonogram for personal purposes are concluded between an organization for the collective management of copyright and related rights on a collective basis (currently such an organization is the Russian Union of

¹⁶ Resolution of the Intellectual Property Court 31.07.2017. No A11-6529/2016 // SPS Consultant Plus.

¹⁷ Ibid.

¹⁸ Ibidem.

Right Holders) and manufacturers and importers of equipment and material carriers used for the reproduction of phonograms or audiovisual works for personal use.

Organizations for the collective management of copyright and related rights on a collective basis, in accordance with the powers granted to them by rightholders, may also conclude licensing agreements with users on the granting of rights transferred to the management of rightholders for the respective ways of use. At the same time, agreements on the payment of remuneration should be distinguished from licensing agreements on the granting of the right to use the result of intellectual activity, since the right to use itself is granted to users on the basis of the law, the agreement determines the amount, conditions and procedure for payment of remuneration.

However, if in relation to service results the exclusive right to it, in the absence of other regulation stipulated by the contract, belongs to the employer or the person to whom he transferred it, then when playing a phonogram for personal purposes, during public performance, broadcasting or by cable, a phonogram published for commercial purposes, the exclusive right remains with the performer or producer of phonograms (or the persons to whom it was transferred under a contract or passed in succession), and the use of the protected result is carried out as an exception or limitation of the exclusive neighboring right.

5. Agreements on the exercise of intellectual rights to joint results of intellectual activity

Often, performers are united in creative groups: musical groups, ensembles. To manage their rights, they can invite a producer, they can choose a head of the creative team from among the members of the creative team, or they can exercise their rights together and without outside help.

The participants of this group may conclude agreements on the disposal of rights to jointly created results of intellectual activity. The agreement between the members of the team of performers (Articles 1229, 1314 of the Civil Code) determines the procedure for exercising rights, distributing income from the use of joint performance. The members of the creative team can decide on the joint disposal of rights and fix it in an agreement or choose a person who will dispose of the rights on their behalf. The agreement may also specify that each member of the creative team has the right to conclude agreements on the disposal of rights to joint results (in particular, performance).

6. Contracts for the provision of services in the field of show business

Obligations to provide services in relation to objects of related rights may arise, in particular, in an agency agreement (for example, for filing an application for registering a database with the federal executive body for intellectual property), an agency agreement (the producer of the performer acts as his agent), an agreement on the transfer of powers for the management of rights and others.

Exclusive related rights can also be the object of trust management (Article 1013 of the Civil Code). Such a situation is possible when the right-holder cannot independently exercise his rights, and at the same time intends to receive remuneration from the introduction of exclusive rights to the results created by him into civil circulation, in this regard, a trust management agreement is concluded.

Trust management may also be required due to certain life circumstances, for example, when a minor performer was left without parents and guardianship was established over him, or patronage was established in relation to the performer.

It seems that in addition to the exclusive right, other intellectual rights can be transferred to trust management, for example, the right to receive remuneration for performance.

Ye. A. Sukhanov considers a trust management agreement as an independent type of a civil law contract that engenders obligations to provide services.¹⁹

The trustee performs both actual and legal actions in relation to the rights granted to him, acting on his own behalf, but with an indication that he is a trustee.

At the same time, the opinions of experts regarding the transfer of exclusive rights to a trustee under a trust agreement differ. According to A. Anikin, the transfer of exclusive rights under a trust agreement does not take place [Anikin A.S., 2008: 193-197], but, for example, S. Grishaev has a different opinion.²⁰ There are no special provisions in the Civil Code of the Russian Federation on this issue. At the same time, the Code does not also prohibit the alienation of the exclusive right and the granting of the right to

¹⁹ Civil Law. Vol. 2. E. A. Sukhanov (ed.). Moscow, 2000, 544 p. (In Russ.).

²⁰ Grishaev S.P. Trust property management // SPS Consultant Plus. (In Russ.).

use under the contract by the trustee on his own behalf, if such a ban is not provided for by the trust agreement.²¹

At the same time, if we proceed from the position according to which an exclusive right is transferred to the trustee under a trust agreement or the right to use an intellectual property object is granted, then such an agreement concerning registered results of intellectual activity, in accordance with the provisions of Art. 1232 Civil Code is subject to state registration.

A trust agreement should be distinguished from an agreement with an organization for the management of copyright and related rights on a collective basis. Under an agreement with an organization for the collective management of copyright or related rights, such an organization acts and performs legal actions not only in the interests, but also on behalf of the copyright holder. Collective management organizations cannot perform actions related to the exercise of the intellectual rights of rightholders on their own behalf.

Let's also pay attention to some aspects of the agreement with cable operators. This agreement is an agreement for the provision of services for the maintenance of a collective antenna and / or the provision of communication services, concluded between cable operators and users (subscribers). As a result of the provision of such a service, the operator makes it possible to receive, on a technical device of a subscriber, a radio or television program transmitted over the air or by cable by the broadcasting organization.

Such contracts do not belong to contracts for the disposal of the exclusive right to communication over the air or by cable, since cable operators are not the original owners of the exclusive right to communication over the air or by cable. These organizations obtain the right to use a radio or television broadcast message under license agreements with broadcasting organizations. Such a service is especially in demand in large cities where there are multi-storey buildings that create interference that impede the quality reception of signals carrying radio and television broadcasts.

Conclusion

As we can see, in the creative industry, in which performers, producers of phonograms of broadcasting organizations are involved, contracts of various types are concluded: these can be both contracts for the provision

²¹ Anikin A.S. (2018) Legal risks associated with the use of a trust agreement for the commercialization of intellectual property. In : Increasing the efficiency of judicial protection of rights to the results of intellectual activity and means of individualization. Moscow, 2018, pp. 192–196. (In Russ.).

of services in the field of show business, and contracts for the exercise of intellectual rights. In addition to agreements on the disposal of exclusive rights, one can note an agreement on remuneration for performance, agreements on the payment of remuneration for public performance and broadcasting or by cable of a phonogram published for commercial purposes, agreements on the exercise of intellectual rights for joint performances, an agency agreement with a producer performer, an agreement on the transfer of powers to manage the rights of related rights and others.

Contracts concerning the rights of performers, producers of phonograms and broadcasting organizations can be directly indicated in part four of the Civil Code (for example, an agreement on alienation of an exclusive right, a license agreement on the grant of an exclusive right), or contractual relations are governed by other provisions of the Civil Code (in particular, a pledge agreement, commercial concession agreement).

It should be borne in mind that the service as an action is of a utilitarian nature, and the contract for its provision is aimed at obtaining a useful effect, which can be achieved not only through the actions of a specific service provider, but also with the involvement of third parties. When exercising intellectual rights to the results of intellectual activity, including when using such results, the personality of the creator of the result and its uniqueness and irreplaceability are put forward in the first place. In this regard, when concluding contracts, it is important to clearly define its essence, since the subject and its content will depend on this.



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