

# PHONOGRAMS AS AN OBJECT OF RELATED RIGHTS

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**Abstract:** *the issues of a phonogram as an object of related rights are analyzed and investigated in this article. The legal protection of a phonogram is carried out independently of the protection of the original work. This means that a composer who has written a musical work or a writer who has created a literary work will have all the rights (if they are not transferred to another person) to this work, and the studio or the person who has recorded the phonogram will receive the rights only to this recording itself. For the legal protection of a phonogram, it is necessary to study the concept of a phonogram from the point of view of science, as well as taking into account the legal regulation of this issue.*

**Keywords:** *phonogram, object, legal bases, regulation, concept, related rights, author's rights, legislation, intellectual property.*

## ФОНОГРАММЫ КАК ОБЪЕКТ СМЕЖНЫХ ПРАВ

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**Аннотация:** *в данной статье анализируются и исследуются вопросы фонограммы как объекта смежных прав. Правовая охрана фонограммы осуществляется независимо от охраны оригинального произведения. Это значит, что композитор, написавший музыкальное произведение, или писатель, создавший литературное произведение, будут обладать всеми правами (если они не переданы другому лицу) на это произведение, а студия или человек, осуществившие запись фонограммы, получают права только на саму эту запись. Для правовой охраны фонограммы необходимо изучить понятие фонограммы с точки зрения науки, а также учитывая нормативное правовое регулирование данного вопроса.*

**Ключевые слова:** *фонограмма, объект, правовые основы, регулирование, понятие, смежные права, авторское право, законодательство, интеллектуальная собственность, смежные права.*

The legislation of the Republic of Tajikistan, the Russian Federation and the Republic of Kazakhstan recognizes only a sound recording of performances or other sounds and displays as a phonogram [1]. As the development of technology has shown, it does not matter how such a recording is made, what methods and formats are used – the only important thing is that with their help it is possible to repeat the sound. Sound is understood as propagating waves (waves of the medium), which propagate with a certain force of sources in the atmosphere (in air, liquids, etc.) and are perceived and felt by the hearing organs. Recording is the fixation of sounds and (or) images or their displays using technical means in any material form that allows their repeated perception, reproduction or communication.

The rights to a phonogram may apply both to citizens of the Republic of Tajikistan and foreigners, and to stateless persons. The producer of a phonogram can be either an individual or a legal entity. As it is established in paragraph 9 of Article 3 of the Law of the Republic of Tajikistan “On author’s and related rights”, that “the producer of a phonogram is an individual or legal entity that has taken the initiative and responsibility for the first sound recording of any performance or other sounds, or displays of sounds ; in the absence of evidence to the contrary, the producer of a phonogram is the person whose name or designation is indicated on this phonogram and (or) on the case containing it in the usual way.

It should be noted that if the legislation of the Republic of Tajikistan uses the term “producer of a phonogram”, then the Russian legislator refers to the term “producer of a phonogram”, which, in accordance with part four of the Civil code of the Russian Federation, means “a person who has taken the initiative and responsibility for the first the recording of performance sounds or other sounds, or displays of those sounds. In the absence of evidence to the contrary, the producer of a phonogram is recognized as a person whose name or title is indicated in the usual way on a copy of the phonogram and (or) its packaging or otherwise in accordance with Article 1310 of this Code” [1].

The main requirement for the objects of protection is that the recording should be only audio. Also in article 3 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) of October 26, 1961, “phonogram means any exclusive fixation of the sounds of a performance and other sounds” [2]. Therefore, if there is a combination of video and audio recording, then there is another object - an audiovisual work, which, in accordance with paragraph 2 of Article 3 of the Law of the Republic of Tajikistan “On author’s and related rights”, is an object of copyright. Similarly, a phonogram is a recording based on a piece of music by an artist.

From the provisions on phonograms given in Article 3 of the Law of the Republic of Tajikistan “On author’s and related rights”, it follows that their content

is either the performance of a voice or the addition of any other sounds. As already explained in the literature, certain sounds can be formed as the effects of various sounds, animal sounds, birds singing, etc. [3]. It should also be borne in mind that such a recording in a phonogram can lead to the appearance of authorial oral works: speeches, lectures, sermons, etc. Thus, phonograms can be divided into two groups according to their content:

1) phonograms made up of author's recordings, as well as fixed oral works of the author;

2) phonograms of any sound, the origin of which is not related to the use of the results of human creative activity.

Such a classification is of great importance for determining the state of the object of protection and the scope of legal authority to use it. The aim is that the objects belonging to the first group have already been created as a result of the use of existing protected objects. The generally accepted classification is to create an object in this way.

For producers of phonograms, this means, first of all, the need to obtain the consent of the author and performer to distribute their creative result in the form of a sound recording. Such permission is a legal fact, and its presence is important and necessary for the emergence and implementation of the protection of the created phonogram and related rights of its creator. This principle follows from paragraph 3 of Article 35 of the Law: "The performer exercises the rights provided for by this chapter, subject to the rights of the authors of the performed works".

Secondly, the nature of the derivation of the object determines the scope of legal powers based on its use. The producer of a phonogram has the right to reproduce, remake, distribute, rent and remake the phonogram only if each of these rights has been specifically agreed in advance with the author and performer. Publication permission alone is not enough for this use [4]. Reproduction and distribution, rental, alteration of the work are independent legal powers of the author.

The performer has the right to permit the pre-recording of an unrecorded performance, the right to permit the rental or rental of recordings of his performance, their reproduction and distribution, and independent legal powers. However, since the use of the phonogram and the use of the results of the creativity of these subjects are carried out simultaneously, the permission of the author and the performer is important and necessary for each method of using the phonogram.

Thus, for the producer of a phonogram, the possibility of using the phonogram by means of repetition, distribution, rental, re-creation depends on the content of the contract with the author and performer. These rights are derivative for him, since the phonogram producer acquires them not upon the fact of creating the phonogram, but under an agreement between the author and the performer.

At the same time, from the moment of creating a phonogram, its producer has a number of rights that have a certain peculiarity. They are not the subject of a contract and do not depend on the wishes of the author and performer. Its occurrence is associated with the fact of the creation of an object protected by law, as well as another object with an indication of the law that these rights belong to their creator.

The process of creating and preparing a phonogram is based on a certain technology and requires special equipment for production and commercial success. According to the general procedure, the primary vote count (original) is carried out first, which will later be used to create the required number of copies. But a phonogram may exist in the form of a single copy, and this does not change its legal nature. Then the material base does not have an entity on which such a record is created.

The producer's non-property rights include the right to mark copies of a phonogram (in a cover or volume), to indicate his name and designation, the right to protect the phonogram from distortion during use. Publication (release) is the distribution of copies of a phonogram with the consent of the manufacturer in a certain amount to meet the reasonable needs of the audience (listeners).

It should also be said that the right to a phonogram is granted to a person regardless of the presence or absence of creative content in his activity. In order to acquire the right to a phonogram, it is enough to take the initiative and undertake the obligation to first record the performance or other sounds or to reflect these sounds. However, the reference to “initiative and obligation” means that in order to obtain the rights of the creator of the phonogram, it is not always necessary to take the actual steps of making the phonogram. The production of a phonogram can be ordered for another person, this practice is very common. In such cases, “taking the initiative and responsibility” should be in certain legal forms: for example, in the form of a contract for the creation of a sound recording of a concert. If the person himself prepares the recording, then “showing initiative and responsibility” is reflected in the actual actions associated with the implementation of the recording [5].

Keep in mind that this is only the first entry. Any other re-recording of the phonogram does not entail the emergence of new rights to the phonogram. For example, if a live broadcast of a concert is broadcast, then the person who made the original recording may acquire the rights to the created soundtrack. But if a recording of such a performance was made between the performance and the broadcast and then released to the air (that is, even if there are some slight changes in time between performance and broadcast), then the person recording the concert “off the air” does not have rights to the soundtrack.

In practice, the recording can be made simultaneously by several people (in particular, the speech of a political figure is recorded in parallel by several news agencies). Since in this case the recording is made independently and simultaneously by such persons (that is, all homogeneous recordings are “first”), then the rights of such persons to create a phonogram become independent of each other.

However, in our opinion, V.A. Khokhlov is right that it is necessary to abandon the uniform assessment of phonogram objects and ordinary works of authorship and, in particular, to try to create a single legal regime and uniform payment conditions for them [6]. After all, it is well known that the activities of phonogram producers and the final effect depend to a decisive extent on technical issues, the details of creativity here are either minimal or completely absent.

Further, the law states that, unless otherwise provided by this agreement, the remuneration for this right will be distributed in the following ratio: 40% – to authors, 30% – to performers, 30% – to phonogram producers. However, the amount of remuneration and the terms of its payment are determined in accordance with the agreement between the creators and the indicated exporters, and on the other hand, if the parties do not receive such an agreement, this will be determined by the authorized body. Compensation will not be paid for the equipment and material coverings specified in this article, as well as for professional equipment not intended for use in the home [7].

According to the method of using the phonogram, the translation is not shown in accordance with the rules of copyright. This is not accidental, because a phonogram is just a list of other objects that can already be reflected in a certain language [8]. The concept of language is not applicable to the phonogram itself, when, for example, the song contained in the phonogram can be written in a certain language; this song (but not the phonogram) can be translated, but in this case such a translation is already subject to author's law.

The literature notes that “if the term of the exclusive rights of the performer has expired, the producer does not lose his rights to the corresponding phonogram. The effect of this norm is understandable if we take into account that the right to a phonogram exists even when the work does not exist (for example, when recording the sound of a waterfall)” [6].

Thus, the producer (developer) of a phonogram has the exclusive right to the phonogram and a set of personal non-property rights: the right to depict his name or designation on the copies of the phonogram and (or) on their cover (cover), the right to protect the phonogram from distortion (violation) when it use, the right to bring the phonogram to the public (publication). Granting non-property personal rights to the creator of a phonogram is one of the main issues that are not regulated either in part three of the Civil Code of the Republic of Tajikistan, or in the Law of the Republic of Tajikistan “On author's and related Rights”. Therefore, it is necessary to improve the legislation in this area.

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