



Payments for use of IP rights to certain holders subject to special temporary restrictions

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On 27 May 2022 the Russian President has signed Order no. 322 “On temporary procedure of fulfillment of obligations to some rightholders” (Order). The Order is effective from the date of its signing, and is already applicable and in force.

More particularly, special rules are temporarily imposed with respect to all financial obligations connected with the use of any intellectual property rights by Russian authorities or residents, as concerns certain owners of IP rights. There are 6 categories of rightholders falling under the Order:

1. Foreign rightholders connected with (having citizenship, registration, domiciliation) States taking unfriendly actions against Russia, or rightholders that are under the control of any such foreign entities;
2. Rightholders, which publicly support and commit to the bringing and extension of foreign politic or economic sanctions

against Russia, its governmental bodies, legal entities or citizens;

3. Rightholders, which prohibited the use of their rights in Russia after 23 February 2022 in compliance with foreign sanctions, restrictions or other non-economic reasons;

4. Rightholders that stopped, suspended or limited the production of goods or the providing of services in Russia after 23 February 2022, if this was based on foreign sanctions, restrictions or other non-economic reasons;

5. Rightholders, which took public positions aimed at the defamation of the employment of Russian armed forces, and/or at actions of the Russian authorities outside of Russia, or spreading fake information about the employment of the Russian armed forces and/or actions of the Russian authorities outside of Russia;

6. Rightholders, who published in the media or the Internet information in “indecent” form showing evident disrespect to the Russian public, the Russian State, state symbols, the Russian constitution or Russian State authorities.



Foreign rightholders of the kind specified under item 1 above will not fall under the scope of the Order if they fulfill their obligations under existing contracts with their Russian counterparties.

All debtors of sums to IP rightholders who are aware of the facts qualifying the rightholder as falling under the scope of the Order, shall pay all consideration and sums (including royalties for licenses, payments on collective management of rights or payments under other agreements) connected with use or protection of IP rights to a special type "O" account (see below). The payment obligation of the debtor is deemed discharged upon payment being made to a type "O" account in Rubles, and any other form of payment to the rightholder are prohibited.

The Order furthermore provides that the debtor shall be deemed aware of the qualifying special status of the foreign rightholder, once the relevant information is published in mass media or on official Internet sites of the State bodies and agencies. It is unclear based on the language of the Order, if the fact qualifying the IP rightholder as falling under its scope must be certified by a governmental authority or may also derive from open-source information and the debtor's own assessment.

The "O" type account must be opened by the debtor at an authorized bank in the name of the relevant foreign rightholder. The opening of such type "O" account does not require the presence of the owner/creditor or its representative, and is effected at the request of the debtor. According to the Order, only one type "O" account can be opened for each rightholder, so the bank concerned will either open the account, or provide the details of an existing account to the debtor.

Upon the opening of a type "O" account the bank will notify the owner/creditor or its representative and provide the banking details of such account, if the bank holds true information about the postal and/or electronic address or phone number of the rightholder or

representative. Furthermore, the rightholder will need to give the debtor its consent for payment to relevant type "O" account, whereupon the debtor will be obliged to make the payment, but cannot be held liable for non-payment until receipt of the relevant consent from the account-holder. Besides, the Order obliges the rightholder to provide details of its type "O" account at the request of the debtor.

The special regime summarized above shall apply to rightholders who conclude an agreement with any potential user of the IP right at his/her request, or in case the right can be used by any person subject to payment of a fee, like music right owners. These kind of rightholders must provide information and details about their type "O" account on their website on the Internet. The publication of such details of the type "O" account shall be deemed a due authorization for the making of the payment by the debtor and the rightholder will not need to provide a separate consent.

According to the Order, there is another restriction applicable to the operation of type "O" accounts. The rightholder and owner of the account will need to obtain the approval of the Government Commission on Monitoring Foreign Investment in the Russian Federation for any transfer of monies from the special account to any other account of the rightholder opened in Russia or abroad. Transfers from type "O" accounts without such approval will not be possible.

The Russian Central Bank is authorized to issue regulations on type "O" accounts with detailed procedures for the carrying out of operations with such accounts and providing other clarifications.

The Russian Government shall nominate the authorized bank or banks within 10 days from the date of the Order, namely by 07 June 2022.

The Order moreover identifies the following subjective and objective exclusions from the scope of the Order:

1. Foreign rightholders meeting cumulatively both the following criteria, namely,

a. It is under the control of Russian legal entity(ies) or person(s), who are the ultimate beneficiaries, despite the fact that the controlling entity(ies)'s place(s) of registration may be located in unfriendly foreign countries;

b. The relevant information about the control over the foreign company(ies) concerned was disclosed by such Russian legal entity(ies) or person(s) to the competent Russian State tax authorities.

2. Agreements granting rights for use of IP rights owned by foreign rightholders covering

- the import into Russia of pharmaceutical and medical products, industrial and agricultural products, food products;
- telecommunication services, including data transfer and Internet services;
- the creation or use in Russia of computer programs;
- the personal use of IP right by Russian residents involving the payment of amount not exceeding 100 thousand Rubles (about 1550 Euro at the current official exchange rate);
- the grant of IP rights, which are duly performed by foreign rightholders.

The political driver of the Order is quite clear and consistently fits with Russia's counter-sanctions programme and, at the same time, its policy in defense of the national currency. The identification of the qualifying foreign rightholders falling within the scope of the Order, besides objective elements, presents broad margins of political discretion in appreciating subjective concepts such as support, defamation, fake information, indecency or disrespect. The certainty of the law is inevitably flawed in consequence.

At the same time, the Order shows a quite realistic approach, exempting from its scope, on the one side, foreign corporate structures that can be traced up to a foreign Russian beneficial owner or entity and, on the other side, IP contracts and transactions whose objects involve key-industry sectors. There is also a de minimis clause exempting money transfers for personal use of IP rights below a certain threshold.

Although the Order admittedly establishes a temporary procedure, it does not set a timeframe, so the conclusion is that it will remain in force until its cancellation by a source of law of equal rank, i.e. by another order of the Russian President.

The effects of the Order in real life remain to be discovered. To exemplify, the Russian press reported that Russian shopping malls and restaurants ceased to apply their contracts for the use of foreign music. Industry experts said that this was caused by the exit from Russia of the majors, namely Universal Music Group, Sony Music and Warner Music Group. The users' unilateral cancellation of music use contracts in the absence of the impossibility to pay for remuneration can hardly be legally correct, as there was no change in Russian substantive law and free use is not allowed in Russia apart from common copyright exclusions (e.g. for educational purposes). The newly adopted payment procedures may have added some complexity and uncertainty on the execution of payments, but certainly do not legalize the general free use of music in Russia.



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