

# New provisions of Decree 22/2018/ND-CP

Copyright and related rights are an intellectual property protected in Vietnam under the Bern Convention to which Vietnam is a member; Law on Intellectual Property of 2005, amended and supplemented in 2009 (the “IP Law”); and subsidiary legislation guiding the IP Law. Previously, regulations on protection of copyright and related rights were detailed in Decree No. 100/2006/ND-CP dated 21 September 2006 (“Decree 100”) and Decree No. 85/2011/ND-CP dated 20 September 2011 (“Decree 85”).

However, after more than 10 years of implementation, some provisions of the IP Law need to be more specifically detailed, such as the operational mechanism, rights and obligations in relation to the activities of the copyright collective management organizations.

Based on the grounds and requirements of development practice, on 23 February 2018, the Government issued Decree No. 22/2018/ND-CP, detailing a number of articles and measures to implement the IP Law with respect to copyright and related rights (“Decree 22”). This Decree will officially come into force on 10 April 2018 and replace Decree 100 and Decree 85.

Compared with previous Decrees, Decree 22 contains some new contents as follows:

1. Decree 22 no longer guided the Civil Code as its predecessors, this Decree only regulates some articles and measures to implement the Law on copyright and related rights.
2. Decree 22 also expands the scope of applied subjects, accordingly the Decree applies not only to organizations and individuals having activities related to copyright and related rights but also to authors, copyright owners, performers and

related rights holders according to the provisions of the IP Law and the competent State management agencies in charge of copyright and related rights.

3. The new Decree also clarifies and adds some legal terms; including:

- Anonymous work: It is not only the work of which the author's name is unknown but also the work of which the author's name is not yet identified.
- A copy of the work is a direct or indirect copy of the whole or part of the work by any means or in any form.
- A phonogram or visual recording is a fixation of sounds or images of a performance, or of other sounds or images, or of the reproduction of sounds or images not in the form prescribed, pictures associated with cinematographic works or works created by the same method.
- A copy of a phonogram or visual recording is a direct or indirect reproduction of part or whole of a phonogram or visual recording by any means or in any form.
- Applied artwork is a work characterized by lines, colours, shapes, or layouts with useful features that may be associated with a useful, crafted or industrial item, such as: Graphic design, fashion design, product design, interior design, decoration.
- Re-broadcast is the transmission, transmission or broadcast of a broadcasting organization's program.
- A programmable satellite signal carrying a coded program is a transmitted programmable satellite signal of which either or both of the two audio and visual characteristic properties that have been altered or modified for preventing people without legitimate satellite signal receivers from illegally transmitting the signal in that signal. Royalties mean the

amount of money paid by the work users to the authors or owners of copyright in cases where the copyright holders are not concurrently authors.

- Remuneration is the amount of money paid by the work user to the copyright owner; users of performances paid to performers or owners of performances.

- Other material benefits are material benefits that the author, copyright owner or related rights holder receive in addition to royalties, remuneration, material benefits such as the receipt of prizes and gifted books upon publication, receipt of tickets for viewing performances, screenings of cinematographic works, display and exhibition of works.

4. Regarding the State's policies on copyright and related rights, Decree 22 clarifies the following policies:

- Investment priority, application of science and technology in the protection of copyright and related rights;

- Media promotion raising consciousness and awareness of the laws on copyright and related rights. Intensification of the education of knowledge on copyright and related rights in schools and other educational institutions suitable to each educational degree and training level;

and supplements the policy on mobilizing the resources of society to invest in enhancing the capacity of the copyright and related rights protection system to meet the requirements of socio-economic development and international integration.

5. In respect of the responsibilities for and contents of State management on copyright and related rights, Decree 22 supplements the following tasks of the Ministry of Culture, Sports and Tourism:

- Managing and exploiting copyright over works, related rights to performances, phonograms, visual recordings, and broadcasts

belonging to State ownership; Receiving the transfer of copyright of organizations and individuals to the State according to the provisions of law;

- Managing the activities of collective management organizations of copyright and related rights, consultancy organizations, copyright and related rights services.

6. On the author's side, the new Decree also added provisions on the protection of copyright and related rights, partly guiding the resolution of disputes on copyright and related rights.

With regard to copyright, Decree 22 further provides for a new subject "co-authors" being those who directly create a part or the whole of a literary, artistic or scientific work. Persons who support, contribute opinions or provide materials to other persons to create works shall not be recognized as authors or co-authors.

According to this Decree, subjects not covered by copyright protection include: pure news and administrative documents; in which the news is daily short news, of informative nature only, not being creative; administrative documents include documents of State agencies, political organizations, social organizations, etc. and units of the people's armed forces.

Copyright for cinematographic works, theatrical works, architectural works, computer programs are specified in each particular article (Articles 11, 12, 15 and 17).

Transfer of rights to anonymous works: According to the new Decree, for anonymous works, organizations or individuals managing anonymous works may transfer the rights to these works to other organizations or individuals. and be entitled to remuneration from the transfer of such right; They also enjoy the rights of the owner until the identity of the author is determined. This is also a new content not defined in the two previous Decrees.

In the provisions on property rights there is a small but significant change in the definition of the right to perform a work in the public domain. According to Article 23 of Decree 100, *“performance of a work before the public includes the performance of a work at any place except at home”*. Meanwhile, Article 21 of Decree 22 states that *“performance of a work before the public includes the performance of a work in any place accessible by the public.”*

The new provision reflects a change in the views of the State management agency on copyright and related rights in order to adapt to the advances of technology that allow any organization or individual to actually present copyrighted works to the public anywhere including their office or home. This change is important for protecting and enforcing copyright and related rights in the network environment.

For Related Rights: The rights of performers such as the right to direct or indirect copying, etc. must first be the right performed by an exclusive performance' owner.

These changes are expected to help resolve the difficulties and disputes in protecting and enforcing copyright and related rights in Vietnam.

Regarding procedures for registration of copyrights and related rights as well as the grant, re-grant, renewal and revocation of Copyright registration certificates and Related rights registration certificates (“Certificates”), they are clearly defined in Chapter IV of this Decree. However, the authority to grant, re-grant and revoke the Certificates in the new Decree is unclear. According to Decree 100, the name of the State agency responsible for carrying out these procedures is clear – the Copyright Office of Vietnam. The new Decree states that “the Ministry of Culture, Sports and Tourism (the Copyright Office)” may lead to confusion about the authority of the Copyright Office and the Ministry of Culture, Sports and Tourism until a guiding document is

issued.

Another new point of Decree 22 is to create favorable conditions for organizations and individuals to register copyright. Specifically, such as the time-limit for completion of the formalities is fixed at 7 working days for re-grant of a Certificate and 12 working days for the re-grant of a Certificate from the date of receipt of the valid application dossier, and the reduction of application dossier-related procedures.

This Decree also regulates with more details the cancellation of the Copyright registration certificates and Related rights registration certificates by the Copyright Office in the cases stipulated in Clause 3, Article 55 of the IP Law. Accordingly, within 15 working days after receipt of one of the following papers, the Copyright Office shall issue a decision to invalidate a Certificate:

- An effective judgement or decision of a court or a decision of a competent authority to deal with the infringement act as provided for in Article 200 of the IP Law on the invalidation of the Certificate;
- Documents of the organization or individual who has been issued with the Certificate sent to the Copyright Office proposing for revocation of the issued Certificate.

7. Particularly, Decree 22 has dedicated Chapter V for copyright collective management organizations, consultancy organizations, copyright and related rights services. In general, the new Decree has slightly amended the provisions of Decree 100 on the role of copyright and related rights collective management organizations, thereby contributing to solve the difficulties in exercising these rights in practice by such organizations. However, certain issues arising from these organizations' protection and enforcement of copyright and related rights, in particularly their collection and

distribution of royalties, remuneration and other material benefits to the owners of copyright and related rights, raise a number of differences in viewpoints and concerns about abuse of power by these organizations, which need to be addressed.

According to Decree 22, collective management organizations of copyrights and related rights are required to set up their own tables of royalties, remunerations and other material benefits to be applied to collect the royalties and remuneration from the subjects who intend to use works protected in Vietnam.

Royalties, remuneration and other material benefits must be agreed between the copyright owners/ related rights holders and those who are interested in the use of their protected works. For the purpose of limiting the difference among these parties during negotiations, the new Decree also stipulates the principles for determining royalties and remuneration as follows:

- The payment of royalties, remunerations and material benefits must ensure that the interests of creators, exploiting organizations and individuals, and enjoying public are in line with socio-economic conditions of the country.
- The amounts of royalties, remunerations and material benefits shall be determined on the basis of type, form, quality, quantity or frequency of exploitation and use.
- The co-owners of copyright and co-holders of related rights agree on the proportion of royalties and remunerations according to their level of creativity and being suitable with the form of exploitation and use.
- The amounts of royalties, remuneration and material benefits shall be determined in a written contract in accordance with the laws.

Collective management organizations of copyright and related rights shall have the responsibility to draw up their lists of

members, works, phonograms, video recordings and broadcasting programs of their members and take responsibility when executing contracts to authorize collective management organizations of copyrights and related rights to receive delegations for negotiation on agreements, and collection of royalties, remunerations and material benefits.

Collective management organizations of copyright and related rights shall only be responsible for negotiating agreements on the collection of royalties, remunerations and material benefits according to their lists of members, works, performances, phonograms, visual recordings, and broadcasting programs as provided for in the authorization contract.

The new Decree also amended and supplemented the provisions on the collection and distribution of royalties, remunerations and material benefits (Article 44). Accordingly, the collection and distribution of royalties, remunerations and material benefits shall comply with the provisions in the Charter on operations of the collective management organization of copyright and related rights and the written power of attorney of the copyright owners or related rights holders, which agree on the level or percentage, mode and time of distribution of royalties, remunerations and material benefits.

The collection and distribution of royalties, remunerations and material benefits by collective management organizations of copyrights and related rights shall be based on the principle of publicity and transparency of works, phonograms, visual recordings, and broadcasting programs exploited and used in accordance with the provisions of law.

In the case of works, phonograms, visual recordings and broadcasts related to the rights and interests of several collective management organizations authorized for representing a right or a specific group of rights, it is possible to agree for an organization to negotiate on behalf

of the licensor(s) for licensing the use of work, collection and distribution of funds in accordance with the Charter and the authorization document.

The collection and distribution of royalties, remunerations and material benefits from corresponding foreign organizations or international organizations shall comply with regulations on foreign exchange control.

Added provisions on the exploitation and use of phonograms and visual recordings (Article 45) is one of the important contents of Decree 22. Specifically, organizations and individuals directly or indirectly using phonograms and visual recordings for commercial purposes as provided for in Clauses 1 and 2, Article 33 of the IP Law must pay royalties, remunerations and material benefits to copyright owners or related rights holders. Collective management organizations of copyright and related rights may agree, unanimously agree on, authorize the negotiation on, collection of royalties, remunerations and material benefits in accordance with the provisions of law. The share ratios of collected royalties, remunerations and material benefits shall be self-agreed by these organizations.

This Decree also specifies the use of phonograms and visual recordings, which have been published in commercial and commercial activities, means that organizations and individuals directly or indirectly use phonograms and visual recordings already published for use in restaurants, hotels, shops, supermarkets; establishments providing karaoke services, postal, telecommunications and digital environment services; in tourism, aviation and public transport (Article 32.3).

This provision creates a safe legal corridor encouraging creative activities, protecting the achievements of creative activities, and promoting the protection of copyright and related rights, which is more and more improved.

Organizations and individuals that exploit and use works, phonograms, visual recordings, and broadcasting programs in Vietnam are required to communicate directly with the copyright owners, related rights holders or collective management organizations of copyright and related rights on their exploitation and use. In case where direct communication with copyright owners or related right holders is impossible, such organizations or individuals must make announcement on the mass media.

Even if the organization or individual who wishes to use the work in Vietnam has successfully contacted the collective management organization of copyright or related rights, they are still required to notify their intention on the media. This is a new obligation of the person who intends to use works, phonograms or visual recordings. Persons who do not perform this obligation shall be deemed to have infringed upon copyright or related rights. More guidance is needed on what kind of media can be used for publicity.

To further clarify the activities of the collective management organizations of copyright and related rights, Decree 22 provides new obligations for these organizations. Accordingly, these organizations must publicly disclose on their websites information about the name of the author, copyright owner, related rights holder, name of the work or related rights' object, and scope of authorization. In addition, these organizations are also required to build their websites connected with State management agencies in charge of copyright and related rights, and collective management organizations of copyright and related rights. Database systems of copyright and related rights of these organizations must be linked to the national database on copyright and related rights.

Decree 22, which shall take effect on 10 April 2018, will contribute to strengthening the capacity and activities of organizations protecting copyright and related rights,

creating an environment for individuals and enterprises to compete fairly and to raise their business ethics, and protecting copyright in a manner which is more stringent and in line with international practices./.