

Frequently Asked Questions (FAQs) Regarding The Legality of the ALLOFMP3 pay service

1. Is the ALLOFMP3 pay service legal?

Yes; we believe it is legal in Russia under Articles 44 and 45 of the Law of the Russian Federation No. 5351-1 “On Copyright and Related Rights” dated July 9, 1993, as amended, (the “Copyright Law”), which authorizes Russian non-profit Russian organizations for collective management of copyrights (“Russian Licensing Societies”) to grant licenses to entities such as ALLOFMP3. ALLOFMP3 has up-to-date licenses from the Russian Licensing Societies, which includes license no. 006/3M-05 from the Federation of Rights Holders for Collective Management of Copyright with Respect to the Use of Musical Works in Interactive Regime (“FAIR”) and license no. LS-3M-05-03 from the Russian Organization on Collective Management of Rights of Authors and Other Right Holders in Multimedia, Digital Networks & Visual Arts (“ROMS”).

Article 44 of the Copyright Law allows holders of intellectual property rights to establish non-profit organizations such as ROMS. The Russian Copyright Law provides non-profit Russian Licensing Societies with a right to grant licenses and to collect royalties for the use of music without necessarily obtaining permission from the copyright owners, as stated in Article 45(3):

Such licenses grant the right to use (in a manner permitted by such licenses) all works of art and objects of related rights and are issued on behalf of all authors and related rightholders, including those who did not give an authorization to the organization [Russian Licensing Societies] as described in Section 2 of this Article. (emphasis added).

2. Is it legal to use the ALLOFMP3 pay service in the United States (US)?

Although to our knowledge there is no direct precedent on the legality of accessing a service like ours from the US (i.e., using a legal music download service located outside of the US), we, however, do believe that there are at least several statutes, each of which, should allow users to access our service in the US; such as 17 U.S.C. §§ 602(a) (the “Importation for Private Use Exception”); 1008, 1001 (the “iPod Exception”); 109 (the “First-Sale Doctrine/Anti-‘Double-Dip’ Exception”); 107, 117 (the “Fair-Use/Backup Exception”); among others.

§ 602. Infringing importation of copies or phonorecords (the “Importation for Private Use Exception”)

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive

right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to — ...

(2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage ... (emphasis added).

Viewed one way, § 602(a)(2) says if you obtain a copy of music legally in a foreign country, there is a personal exemption to bring that copy into the US. So you should be OK if you buy a legal CD in Russia or some other country, and bring it back to the US. We think three examples may be helpful in understanding our view as to how this statute applies to the ALLOFMP3 service:

Example 1. If you were in Russia and used ALLOFMP3 to make a CD, which is legal for you to do in Russia (see the answer to Question 1, above), and you then bring that legally procured CD back to the US for your own personal use, we see that as being within the scope and spirit of what is allowable under §602.

Example 2. If you were in Russia and used ALLOFMP3 to download music to your iPod, which is legal for you to do in Russia, and you then bring that legally procured music back to the US for your own personal use, we see that as being within the scope and spirit of what is allowable under §602.

Example 3. If you owned an apartment in Moscow and another in New York, and if you downloaded music to your Moscow home computer from ALLOFMP3, which is legal to do in Russia, and then you later connect to your Moscow home computer from your home computer in New York so that you can move your legally obtained music to New York, we see that as being within the scope and spirit of what is allowable under §602.

As such, our view is that § 602 allows for the importing of a legally purchased music selection from a user's ALLOFMP3 space into their private music library. As part of the ALLOFMP3 service, with every download item you purchase, you also obtain personal space (for up to two weeks) from which you can download your selected items. As this is a user's personal space located on servers in Russia, the user's downloaded items are legally procured and held in that space under Russian Law. When a user selects to retrieve music from ALLOFMP3, it is not merely streamed, but it is downloaded by the user as the file is ultimately dislocated from the user's personal storage space in Russia and moved to

the user's storage space in their personal library. It is important to note that when a user downloads music from ALLOFMP3, the music in their personal space on the ALLOFMP3 server in Russia is simultaneously deleted as soon as the download completes into the user's private music library; as such, there is only one copy of the work that exists.

§1008. Prohibition on certain infringement actions (the “iPod Exception”)

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings. (emphasis added).

§ 1001. Definitions

... (2) A “digital audio interface device” is any machine or device that is designed specifically to communicate digital audio information and related interface data to a digital audio recording device through a nonprofessional interface. (emphasis added).

(3) A “digital audio recording device” is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for... (emphasis added).

Additionally, to the extent users download from ALLOFMP3 directly to their digital audio players (e.g., their iPod), it is our view that 17 U.S.C. § 1008 prevents infringement actions against such users.

Viewed one way, § 1008 says if a consumer downloads music straight to their digital audio recording device (e.g., an iPod) through a digital audio interface (e.g., your computer, which is the only interface specifically made for digital audio devices like the iPod) for your noncommercial use, then no infringement action should be brought against you for such personal use. Unlike in A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), MP3 players such as the iPod are not general purpose computers, but are designed specifically for music, and as such, there is an argument that § 1008 would apply to protect those that download music from ALLOFMP3 directly to their MP3 player's storage space; i.e., users space-shift their music from their legal ALLOFMP3 space to their MP3 player. The case of the RIAA v. Diamond further supports the proposition

of space-shifting a legal copy to a more portable device as being legal activity:

In fact, the Rio's operation [which is an MP3 Player] is entirely consistent with the Act's main purpose--the facilitation of personal use. As the Senate Report explains, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use." S. Rep. 102-294 ... The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord (the "First-Sale Doctrine/Anti-'Double-Dip' Exception")

(a) Notwithstanding the provisions of section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A (e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on ... (emphasis added).

With regard to 17 U.S.C. § 109 (a), in general, it is a codification of the first-sale-doctrine. Loosely, it provides that if an individual lawfully obtains a copyrighted work, then the copyright owner cannot further restrain the subsequent distribution of the copyrighted work, and that work may be lawfully imported into the US. See 17 U.S.C. § 109(a). Or more simply put, once you buy a music CD, a copyright owner cannot stop you from selling that CD yourself; i.e., the copyright owner cannot "double dip."

As a user lawfully obtains a copy of music from ALLOFMP3 under Russian law in their personal space on our servers in Russia, our view is that no further authorization is required from the copyright owner under § 109(a) for the user to move that music into their personal music library. Again, it is important to note that when a user downloads music from ALLOFMP3, their copy in Russia is simultaneously deleted as soon as the download completes into their private music library, which exhausts the Russian copy.

§ 107. Limitations on exclusive rights: Fair use (“Fair Use Exception”)

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. (emphasis added).

§ 117. Limitations on exclusive rights: Computer programs (“Backup Exception”)

(a) Making of Additional Copy or Adaptation by Owner of Copy. Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided...

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful... (emphasis added).

Finally, we believe that it is fair use under 17 U.S.C. §§ 107 and 117, among other sections of the statute for any user to make backup copies of their music. As the music obtained by the user in their personal space on the ALLOFMP3 servers in Russia was obtained legally, we believe it is only fair to allow users to backup copies of their MP3s. The purpose and character

of such a backup is not of a commercial nature or for the user's profit; instead, it is merely for their private use and security. Also, the act of backing-up does not affect the potential market for the copyrighted work as the work has already been legally procured. 17 U.S.C. § 107. Further, we believe users have a right to backup music under § 117 because it is essential to actually use the MP3 § 117 (a)(1), and because the users are entitled to a backup copy in case their original copy is destroyed § 117(a)(2). For example, to use your MP3s on your iPod, the MP3s must be backed-up from your computer to the iPod. In fact, if such backup of music is not fair use, then every citizen in the US that ever ripped their CD collection (for use on their MP3 players) would be guilty of copyright infringement. In fact, since your ALLOFMP3 purchase entitles you to a space on our servers for only two weeks, after which your files will be deleted, you must backup your purchased files to prevent their destruction. It should be noted that we believe an MP3 should be considered a computer program as it is used to instruct a computer for a specific result; i.e., the MP3 is constructed of headers and frames, each of which interact with and instruct the computer on: how to assemble a bitstream, how to allocate storage space to be used as between frames (i.e., one frame will help to instruct how much memory to allocate to subsequent frames), etc. All of which instructs the computer how to play music.

Nevertheless, as there are great political pressures at play, and as there is no direct precedent or case law on these issues, no one (including us) can guarantee that these circumstances would be viewed and/or interpreted as legal by US legal institutions. As such, it is important to know that we are in no way indemnifying or suggesting that use of our service definitively is legal; we are simply presenting information that we believe is supportive. Therefore, the user bears sole responsibility for any use and distribution of all materials received from ALLOFMP3. Please consult your local laws and counsel to determine the legality of using our service before engaging in this service and do not rely on any of the suppositions in these FAQs.

3. Is the ALLOFMP3 pay service legal to use in other countries?

We do not definitively know if importation of music from ALLOFMP3 is legal in your country. The user bears sole responsibility for any use and distribution of all materials received from ALLOFMP3. This responsibility is dependent on the national legislation in each user's country of residence. The Administration of ALLOFMP3 does not possess information on the laws of each particular country and is not responsible for the actions of foreign users. Please consult your local laws and counsel to find out before engaging in this service.

4. Do you pay artists?

We pay Russian Licensing Societies 15% for all music. The Russian Licensing Societies will in turn pay the copyright owners, not necessarily the artists. Despite no legal requirement to do so, we are currently considering paying original performing artists 5%, regardless of who owns the copyright to the underlying work.

5. Can the copyright owners actually collect from Russian Licensing Societies like ROMS.

Yes. Similar to Music Licensing Societies in other countries (like ASCAP and BMI in the US), all a copyright owner needs to do is contact the Russian Licensing Societies (e.g., ROMS) and show proof that they own a copyrighted work; after which they can collect accumulated proceeds.

6. Do you have the authority to sell downloads?

Yes we have the authority. We have licenses from the Russian Licensing Societies (see the answer to Question 1, above).

7. But do the Russian Licensing Societies have the authority to license downloading to you?

Yes. Both ROMS and FAIR have the authority. They were both formed under the authority of the Russian Copyright Law (see the answer to Question 1, above).

8. Isn't it illegal to sell downloads without permission from the copyright owner? The International Federation of the Phonographic Industry (IFPI) stated "*Under the copyright laws of virtually every country in the world, including Russia, it is illegal to distribute recordings without the permission of the rights owners*" <http://www.ifpi.org/content/section_news/20061018.html>

No; in Russia it is legal to sell downloads without permission from the copyright owner (see the answer to Question 1, above).

From the above quote by the IFPI it seems that they are unaware of: (a) the Russian Copyright Law (see the answer to Question 1, above), (b) the notion of sovereignty of a nation state, and (c) the Berne Convention Article 9(2), which supports such sovereignty.

As a matter of Russian legislation, the Russian Copyright Law Article 45(3) allows a non-profit organization like ROMS to include artists works for licensing to third parties without authorization from the artists (see the

answer to Question 1, above). Russia has every right to pass laws that benefit its people as it sees fit, and not as the IFPI sees fit.

The Berne Convention for the Protection of Literary and Artistic Works, Article 9 (2) states:

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (emphasis added).

9. But didn't a Danish court just block your service?

Yes. Again, we do not know if our service is legal in every other country (see the answer to Question 3, above). We understand and support the move by the ISP Tele2 to appeal the lower court decision and hope their view prevails. However, if the Danish courts and government ultimately decide that such importation is illegal in their country, they are well within their rights as a nation state to decide what is and is not legal for their people. Although we do not agree with their stance, we absolutely support their national sovereignty (see the answer to Question 8, above) and decisions to run their government in a manner of their own choosing.

10. But didn't a Spanish court just say downloading private copies was OK in Spain; what's Visa's problem?

According to certain reports, it appears that charges were dismissed against an individual that downloaded copies for private use where the individual's aim was not to gain wealth. http://www.theregister.co.uk/2006/11/03/spanish_judge_says_downloading_legal/ While we cannot begin to comment on what Visa's problem is, we have heard reports that payment services are being pressured by the IFPI <http://arstechnica.com/news/ars/post/20061019-8029.html>, which claims that such activities are illegal in "virtually every country in the world." http://www.ifpi.org/content/section_news/20061018.html Apparently, they are unaware that Russia and other countries have chosen not to be legislated by outside cartels. They, apparently, are also unaware that many people, companies and banks are uncomfortable with a payment service acting as an adjudicating body, which ultimately controls who can and cannot enter the stream of commerce. http://blogs.usatoday.com/maney/2006/10/visa_mastercard.html We believe it is inappropriate for them to wield their market position, make arbitrary decisions and take on a role as arbiter of the legality of our (or anyone else's) services. We believe such adjudication falls within the purview of the government of each nation, and there is a chance they

are exposing themselves to greater liability by taking on the role of an international monitoring and adjudicating body.

11. Doesn't ROMS need approval from the IFPI or the RIAA to authorize downloading? They stated "ROMS has no mandate from international rights holders to license the site in or outside of Russia" <<http://www.nytimes.com/2006/10/18/technology/18musiccnd.html?bl&ex=1161748800&en=2281c87fc53b9c22&ei=5087%0A>>

No. To our knowledge, the IFPI and RIAA are not licensed in Russia, and do not have the authority to dictate Russian policy. Groups like the IFPI seem to be working under the misunderstanding that it is within the purview of a private cartel outside of a sovereign nation to dictate the laws for the nation state and be the arbiter of fairness and prices for foreign governments. We would argue that such cartels have done a poor job of arbitrating fair returns to the artists or to the enjoyment of the public at large within their own countries, and as such, should refrain from attempting to dictate the policies of foreign governments. Were that the standard, then we are sure French farming coalitions, equally, would like to dictate the subsidies that the US provides to its farmers "just because they say so."

12. Under the Russian Copyright Laws, do Russian Licensing Societies have to gain approval from the copyright owners to include their works for licenses to others such as ALLOFMP3?

No. Russian Copyright Law allows non-profit groups such as ROMS to include those works without going to every copyright owner and obtaining explicit approval (see the answer to Question 1, above).

13. Is it fair that Russia has laws that allow Russian Licensing Societies like ROMS to include the works of copyright owners without the owner's approval?

Although fairness is a difficult and very subjective issue, we believe, yes, it is fair. ROMS is fair and so is the Russian Copyright Law for at least three reasons: (1) The law promotes the arts by providing enough incentive for artists to create artistic works, and maximizes enrichment of the people by allowing them to benefit from a wide array of artistic works, (2) this law advances enjoyment for the arts by lowering logistical barriers, and (3) copyright owners are compensated or may opt-out.

1. First, it is important to realize that the average yearly income level of a Russian person is the equivalent of \$4,521 (USD) (or \$86.94 a week), and the average download cost from ALLOFMP3 (approximately \$0.10) represents a more significant percentage of their weekly wage. That is like a US citizen paying \$0.88 (USD) per song (based on a gross

average salary of \$39,795). ROMS and all groups that are authorized under the Russian Copyright Law are non-profit groups. They were formed by Russian artists and copyright owners for collecting money for the use of their works. In fact, ALLOFMP3 sells many downloads of the works of Russian artists, and those artists do receive compensation from the Russian Licensing Societies. There has been no trouble with this arrangement for the vast majority of works being carried by ALLOFMP3 and ROMS as it compensates artists while trying to make the works accessible to as wide an audience as possible.

2. Second, the Russian legislature understood that it is difficult-to-impossible to contend with the bureaucracies of 200+ countries (i.e., every country on earth) with regard to licensing. As is the goal of every country, Russia's goals of a) broadening the views of its people, b) providing access to the greatest variety of quality works that intellectually improve its people, c) improving accessibility to works that foster the intellectual improvement of its people, etc., all would be stymied without its Copyright Law. For example, each foreign country may have one or more music licensing societies, numerous conglomerate copyright holders (e.g., labels), countless individual artists that must be approached, and/or a rat-and-hornet infested nest of contract rights and negotiations that must be contended with. Without a progressive Copyright Law, this complexity leads to an almost infinite number of permutations of regulations that would otherwise make the vast majority of works intractable to the people at large. Further, most of these works would otherwise become unavailable as no one is maintaining them because of such bureaucracies. As such, the vast majority of these works will fade into history and most people will be denied ever experiencing them, and their artists will likely be denied the audience that they wished would experience their works.

Thus, it is with great foresight that the legislators of the Russian government created a legal copyright structure that allows Russian Licensing Societies to make artistic works available to the widest possible audience; this further helps to prevent these works from fading into history and preserves them for posterity and furthers culture. And in foreseeing this logistical problem, the Russian legislature provided a mechanism that is similar to the way that libraries work, whereby non-profit organizations could license these far-flung works without the authorization of the author.

This quagmire of bureaucratic incertitude benefits no one: not the people, not the artists, and with rare exception, even the vast majority of copyright owners are stunted with regard to clearing, exploiting and otherwise making creative works available widely, regularly, in multiple formats and with certainty. This logistical mire, were it a standard used for books in libraries, would mean the public could not enjoy the vast majority of books as no library could surmount such bureaucracy. The Russian Copyright Law is fair in that it allows Russian Licensing Societies like ROMS to make such works available so that people can actually enjoy and use these works, rather than have them lost to history because of logistical red-tape that makes the majority of such works unavailable.

We understand that this logistical problem of dealing with orphaned works is so great that the US congress is considering addressing it with the proposed legislation in H.R. 543 <<http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.05439>>.

3. Finally, the Russian legislature was farsighted enough to understand that copyright owners did deserve compensation, and thus the Copyright Law and Russian Licensing Societies allow owners to get their fair share or opt-out. A legitimate copyright owner may request to have their works removed from a Russian Licensing Society, or alternatively, they may request their fair share of the collections. To do so, the owners must simply prove they own the copyrights to such artistic works.

As such, it is our view that this is a very fair system that does promote the advancement of arts for the enjoyment of the people while compensating legitimate copyright owners.

14. If a copyright owner asks to remove a work from a Licensing Society, would ALLOFMP3 remove that work so it could not be downloaded?

Yes. ALLOFMP3 follows all applicable laws and removes works that are no longer offered under license from the Russian Licensing Societies.

15. If a copyright owner can ask to remove a work, how come the major record companies have not simply asked to remove them? Why all the fuss?

We are unsure. However, if the record companies were not able to prove they owned the copyrights to the works they wanted removed, then they would not be able to have them removed from the Licensing Societies.

16. Why wouldn't the record companies be able to and/or not want to prove they have ownership in the copyrights?

We are unsure. In CJSC "Universal Music" v. LLC "Media Services" and LLC "Samsung Electronics Rus", CJSC "Universal Music" (a Russian subsidiary of the Universal Music Company) initiated a suit against Media Services. Ruling of the Arbitration Court of Moscow No. A40 -35850/05-5-275 dated November 1, 2005. ALLOFMP3 and LLC "Samsung Electronics Rus" acted as the co-respondents. Universal Music asked the Russian court to prohibit ALLOFMP3 from allowing third parties to download Music from the Internet site owned by Samsung. The Universal Music Company failed to prove in court its intellectual property rights to the music and revoked its claim. This fact prevents Universal Music Company from initiating any further court cases in Russia with regard to the music in accordance with Article 150 of the Arbitration Procedure Code of the Russian Federation. As a consequence of not being able to prove ownership, they were not able to pull "their" works from ROMS.

Also, as we understand it, if artists do not expressly give up digital distribution rights, rights to use their music in a movie or DVD, or foreign rights, then such rights would not have been transferred. Thus, if the record companies have old contracts where such rights were not expressly granted to them, then they may not own such rights. We understand that the logistics of clearing such rights have created problems making it impossible, in some instances, for certain music (which was licensed for one medium (e.g., music for a TV show)) to be made available in another medium (e.g., music on DVDs).
<<http://www.wired.com/news/digiwood/0,1412,66696,00.html>>

Again, we must re-iterate, as there are great political pressures at play, and as there is no direct precedent or case law on these issues, no one (including us) can guarantee that these circumstances would be viewed and/or interpreted as legal by US legal institutions. As such, it is important to know that we are in no way indemnifying or suggesting that use of our service definitively is legal; we are simply presenting information that we believe is supportive. Therefore, the user bears sole responsibility for any use and distribution of all materials received from ALLOFMP3. Please consult your local laws and counsel to determine the legality of using our service before engaging in this service and do not rely on any of the suppositions in these FAQs.