

A-PRAVA MONTENEGRO
Number 27/01
Podgorica, 06-03 2014

Coat of Arms

Montenegro

Intellectual Property Office

Number: 01-147
Podgorica, 04-03-2014

Acting upon the application for the issue of licence for the conduct of the activity of collective exercise of rights of film producers, No. 02-3973 of 06-08-2013 and supplement to the application No. 01-82 of 18-02-2014 submitted by the Organisation for the protection of rights of film producers in Montenegro A-PRAVA MONTENEGRO (*hereinafter: "Organisation A-PRAVA MONTENEGRO"*), Josipa Broza Tita 17, Podgorica, in accordance with Articles 148, 149, 150, 153 and in connection with Articles 155 and 163 paragraph 1 item 2 of the Law on Copyright and Related Rights („Official Gazette of Montenegro“ No. 37/11) (*hereinafter: "Law"*); Articles 196 and 214 of the Law on General Administrative Procedure („Official Gazette of Montenegro“, No. 32/11) and Article 40 of the Decree on Organisation and Method of Operation of State Administration (“Official Gazette of Montenegro” No. 05/12), the Intellectual Property Office of Montenegro (*hereinafter: "The Office"*), on 03-03-2014 hereby issues

DECISION

- I. THE APPLICATION of *the Organisation A-PRAVA MONTENEGRO* FOR THE ISSUE OF LICENCE for conduct of activity of collective exercise of rights of film producers **IS APPROVED.**
- II. The licence is issued for the conduct of activity of collective exercise of rights:
 - a) **to cable retransmission of the subject matter of protection**, except for the shows of broadcasting organisations from own production, regardless of whether these are their own rights or rights acquired from other right holders;
 - b) **to the fee for the reproduction for private and other internal use**, in accordance with the provision of Article 163 paragraph 1 item 2 of the Law.
- III. The licence is issued for the conduct of activity of collective exercise of property rights as per paragraph II of the enacting terms, for the period of **five years.**
- IV. This decision shall be published in the “Official Gazette of Montenegro”.

Explanation

On 01-08-2013, the *Organisation A-PRAVA MONTENEGRO*, in the letter number 02-3973 sent the application to The Office for the issue of licence for the conduct of activity of collective exercise of rights of film producers in Montenegro. Acting upon the

application, The Office established the existence of formal defects for the deliberation in this legal matter and therefore, did not consider the existence of material conditions for the issue of licence for the conduct of activity of collective exercise of copyright and related rights. Namely, in the procedure, it was established that the applicant failed to enclose to the application for the issue of licence for the conduct of activity of the collective exercise of rights, the evidence as per Articles 148 paragraph 2 and 149 of the Law. The Article 148 paragraph 2 of the Law stipulates that a legal entity shall submit, together with the application, the Memorandum of Association, Statute, preliminary contracts for representation of members, evidence of payment of mandatory stamp duty and other evidence of fulfilment of the conditions as per Article 149 of the Law. Article 149 of the Law stipulates that collective copyright and related rights may be exercised by the person who: has in place the Statute which meets the conditions as per Article 160 paragraphs 1 and 2 of the Law; is registered in the registry of non-governmental organisations kept by a competent authority; concluded preliminary contracts for representation of majority of domestic holders of rights to the subject matter of protection to which the business activity relates; employs minimum one person with university education in the field of laws; has business premises in ownership or leased, is equipped with necessary IT and communications equipment; has in place drafted rules on transparent, complete, timely and proper work method and conduct of the organisation.

The Office established that the applicant encloses to the application: the Agreement on Amendments to the Memorandum of Association of 02-07-2013; Decision on the registration in the Registry of non-governmental organisations number 05-006/13-41607/1 of 22-07-2013; preliminary contracts for the representation of members and the Statute of 02-07-2013 which does not meet the conditions as per Article 160 paragraphs 1 and 2 of the Law, and in particular does not define the types of rights and subject matter of protection which this organisation plans to perform collectively, on its own behalf and for the account of the members. In addition to the Statute which did not meet the conditions, the applicant omitted to submit other evidence of the fulfilment of the conditions for the conduct of activity as per Article 148 paragraph 2 and Article 149 of the Law, and in particular to submit the evidence that he employs minimum one person with university education in the field of laws; has business premises in ownership or leased, is equipped with necessary IT and communications equipment; has in place drafted rules on transparent, complete, timely and proper work method and conduct of the organisation, and evidence of payment of the mandatory stamp duty. Acting upon the application and with a view of the provisions of Articles 127 paragraph 3 and 128 paragraph 2 of the Law on General Administrative Procedure, The Office took into account particular facts whereof it keeps official records and invited the applicant to submit certain evidence as per Article 149 paragraph 1 item 4, 5 and 6, having in mind that particular facts were changed in the Registry of non-governmental associations, which could affect the deliberation in this matter. Namely, in the procedure upon the application for the issue of licence for collective exercise of copyright and related rights number 01-8019 of 18-12-2012 (previous procedure for the issue of licence), The Office obtained a part of evidence which may be used as relevant in the new case for the issue of licence for the conduct of activity of collective exercise of copyright and related rights to the same person, that is, to the applicant. However, having in mind that the data were changed in the Registry of non-governmental associations, the other evidence could not be taken into account as relevant, whereof the representative of the applicant was explicitly warned in the oral communication. The omissions identified in the invitation were not eliminated in the defined period and The Office rejected the application for the issue of licence.

On 29-10-2013, in the appeal number 02-5571 to the conclusion of The Office number 02-5226 of 15-10-2013 to reject the application, the *Organisation A-PRAVA MOTENEGRO* points out that the decision of The Office is unfounded. In the particulars of the appeal, the appellant refers to the material breaches of the procedure, erroneous establishment of facts and erroneous application of substantive law to the detriment of the *Organisation A-PRAVA MOTENEGRO*. In the statement of The Office about the particulars of the appeal number 02-5707 of 06-11-2013, it is said that the *Organisation A-PRAVA MOTENEGRO* did not submit the application in accordance with the provisions of Article 148 paragraph 2 and 149 of the Law. The Office found that the particulars of the appeal in which appellant states that the rules of the procedure were violated are unfounded. In the appeal, the applicant, *Organisation A-PRAVA MOTENEGRO*, alleged that the challenged decision was unlawful in its entirety and that the applicant had submitted all documents in accordance with the Law. The Office held that the applicant had not submitted all evidence of the fulfilment of conditions for the issue of licence for the conduct of the activity of collective exercise of rights of film producers in accordance with the provisions of Article 148 paragraph 2 and Article 149 of the Law and thus, it sent an invitation number 04-4210 of 05-08-2013 for the remedy thereof. Namely, the provisions of Article 148 paragraph 2 of the Law stipulate that a legal entity, together with the application, shall submit the Memorandum of Association, Statute, preliminary contracts for representation of members, evidence of payment of the mandatory stamp duty and other evidence as per Article 149 of the Law. Together with the application, the applicant submitted: the decision of the Ministry of Internal Affairs number 05-006/13-41607/1, Statute of 02-07-2013, the Agreement on Amendments to the Memorandum of Association of 02-07-2013 and preliminary contracts for representation of members, which means that he did not submit all evidence which represent a formal condition that an organisation has to meet to qualify for the issue of licence for conduct of activity. Despite the fact that particular facts, which were collected based on the application for the issue of licence for collective exercise of copyright and related rights number 01-8019 of 18-12-2012 were presented to The Office, other evidence as per Articles 148 and 149 of the Law, the submission of which was required in the invitation number 04-4210 of 05-08-2013, was necessary to be submitted for the reason of change in the facts which are registered in the Registry of non-governmental associations. The organisation for copyright protection of audiovisual work and holders of related rights in Montenegro, the *Organisation A-PRAVA MOTENEGRO*, changed its name into the Organisation for the protection of rights of film producers in Montenegro *A-PRAVA MOTENEGRO*. The Office could not accept as relevant the evidence obtained based on the previous application for the issue of licence, that is, such evidence relate to the activity of collective exercise of copyright and related rights, which is contrary to the provisions of Article 150 paragraph 2 of the Law. In the oral communication held in the premises of The Office, the authorised person of the *Organisation A-PRAVA MOTENEGRO* was particularly warned about the fact that The Office took into account the provisions of Article 128 of the Law on General Administrative Procedure and that the evidence submitted with the application for the issue of licence for the conduct of business activity number 01-8019 of 18-12-2012, which was submitted by the organisation for copyright protection of audiovisual work and holders of related rights in Montenegro, the *Organisation A-PRAVA MOTENEGRO*, was represented by the person who submitted the application for the issue of licence for the activity which completely differs from that of the applicant, and thus could not be taken into account as relevant in this case. It can be concluded that in the particulars of

the appeal, the appellant abused the reference of The Office to Article 128 of the Law on General Administrative Procedure, to which this administrative authority referred in the oral communication. Namely, the applicant for the issue of licence for conduct of activity of collective exercise of copyright and related rights of the authors of audiovisual work and holders of related rights was another person who applied for the issue of licence for the conduct of activity of collective exercise of copyright and related rights. In the procedure initiated upon such application, and in the procedure upon the appeal against the decision of The Office number 02-2376 of 29-04-2013 rejecting the application for the issue of licence, based on the decision number 1609-5/2013 of 11-06-2013 rejecting the appeal in the second-instance procedure of the Ministry of Economy, it was established that the previous applicant did not meet all the conditions for the conduct of activity. We particularly note that, on more than one occasion, in the procedure upon the previous application, the person authorised for representation of the applicant was instructed how to make an application, in invitations and at meetings, whereof minutes were kept which can be found in the case files. The Office also considers that the allegations of the applicant that substantive law was breached and that the facts were established erroneously are unfounded. The Office did not examine material conditions for the conduct of activity of collective exercise of rights of film producers, because the procedure for the examination of material conditions represents a separate procedure. In addition, The Office did not establish the facts, but based on the inspection of presented documents, it was established that the applicant failed to submit the Statute which meets the conditions as per Article 160 paragraphs 1 and 2 of the Law, which represents one of the formal conditions for the issue of licence for the conduct of activity of collective exercise of copyright and related rights. In addition, the draft rules on transparent, complete, timely and proper work method and conduct of the organisation, which is also a formal condition as per Article 149 paragraph 1 item 6 of the Law, could not be taken into account, because the draft rules, which are submitted together with the previous application for the issue of licence for the conduct of activity of collective exercise of copyright and related rights number 01-8019 of 18-12-2012, relate to the activities of the person who did not obtain the licence for the activity conduct. In addition, the facts collected by The Office based on the previous application for the issue of licence, in connection with the evidence as per Article 149 paragraph 2 item 5 of the Law, relate only to the information of the possession of operating equipment and not to the evidence of the possession of operating equipment. Namely, the applicant omitted to submit the evidence that he is equipped with necessary IT and communications equipment (e.g. the evidence of procurement of necessary hardware and software based on which the organisation will be able to track data on right holders, users, foreign organisations, their members, etc.). The Office particularly points out that the Statute of 02-07-2013 is not in compliance with the provisions of Article 160 paragraphs 1 and 2 of the Law. Namely, the appellant omitted to define the types of rights and subject matter of protection, despite the fact that in Article 128 of the Statute it mentions, in a separate Chapter VII, "Types of rights and subject matter of protection which are collectively exercised and rules in relation to the members and users of the subject matter of protection". In ten items of Article 160, paragraph 1, the Law defines the content of the Statute of an organisation applying for the conduct of activity of collective exercise of copyright and related rights. The Office holds that it is not sufficient just to copy the items of the Law and enter them in the Statute, but it is necessary to precisely define the rules, particularly in relation to the types of rules and subject matter of protection for which licence is requested, which is the reason why this condition is stipulated in the Law as a formal condition for the issue of licence. Namely, the issue of licence to the organisation which does not clearly define the types of rights for which it holds the licence to carry on the activity of fee collection from the users of

the works from its repertoire would lead to the legal uncertainty in the system of collective exercise of rights of film producers. In such legal and factual situation, there are no clear indications as to who is the user of the subject matter of protection, from which users the fee may be collected, which user is obliged to enter with the organisation into a contract on non-exclusive representation, the association of which users is obliged to negotiate about the amount of fee rates and enter into joint agreement with the organisation, etc. In addition, the applicant omitted to submit the evidence of payment of mandatory stamp duty for the issue of licence as per Article 148 paragraph 2 of the Law, whereof he was expressly warned in the invitation number 04-4210 of 05-08-2013. Further, The Office holds that all other particulars of the appeal are unfounded and cannot be taken into consideration, having in mind that as the only argument in his favour, the applicant alleges that the first-instance authority has violated the rules of the administrative procedure, obviously without taking into account the oral and written advice and suggestions provided to date by The Office about the manner of preparing the application for the purpose of obtaining an affirmative decision from this authority. Having in mind the aforesaid, The Office stated that in the procedure of licence issue the appellant did not prove or made credible the existence of violation of the rules of procedure, breach of the provisions of substantive law and the fact that this authority has erroneously established the facts. The Office proposed to the Ministry of Economy to reject as unfounded the appeal against the conclusion in which the application for the issue of licence for conduct of activity of collective exercise of copyright and related rights was rejected. Under the Decision number 1609-25/2013 of 28-11-2013, the Ministry of Economy revoked the conclusion of The Office number 02-5226 of 05-10-2013 and remanded the case for renewal procedure. Under the decision of the Ministry of Economy, The Office sent to the *Organisation A-PRAVA MOTENEGRO* an invitation number 04-7233 of 20-12-2013. The Office invited the applicant to submit the evidence as per Article 149 paragraph 1 item 1 of the Law, that is, the Statute which meets the conditions as per Article 160 paragraphs 1 and 2 of the Law; evidence as per Article 149 paragraph 1 item 3 of the Law, that is, the evidence that the *Organisation A-PRAVA MOTENEGRO* entered into the preliminary contracts for representation with the persons who are holders of the right to the subject matter of protection – videogram, that is, that the persons with whom the preliminary contract for representation was concluded are film producers; inventory of works-repertoire represented by the organisation on its own behalf and for the account of the members with whom it entered into a preliminary contract for representation; evidence as per Article 149 paragraph 1 item 6 of the Law, that is, draft rules on transparent, complete, timely and proper work method and conduct of the organisation; evidence of payment of mandatory stamp duty for the submission of application for conduct of activity of collective exercise of rights as per Article 148 paragraph 2 of the Law, and it defined the period for the submission of evidence, which was 30 days from the receipt of the invitation. Upon the said invitation, the *Organisation A-PRAVA MOTENEGRO* submitted the supplement to the application number 02-206 of 21-01-2014, that is: the Agreement on Amendments to the Memorandum of Association of 02-07-2013; the Statute of 16-01-2014; the draft rules on transparent, complete, timely and proper work method and conduct of the organisation of 10-01-2014; information on the possession of operating equipment; agreement for sub-lease of business premises; fixed-term employment contract; annex to the employment contract of 15-10-2012; decision of the Ministry of Internal Affairs number 05-006/13-41607/1 of 22-07-2013; application for the registration of the change of data sent to the Ministry of Internal Affairs of 20-01-2014; preliminary contracts for representation of members; inventory of works which comprise the repertoire of the organisation, and the evidence of payment of mandatory stamp duty within the defined period. Upon the inspection of the submitted documents, The

Office established that the submitted evidence is still not complete for passing the decision upon merits and again, in its letter number 01-75 of 03-02-2014, it invited the *Organisation A-PRAVA MOTENEGRO* to submit: the evidence that the *Organisation A-PRAVA MOTENEGRO* entered into the preliminary contracts for representation with the persons who are the majority of domestic holders of rights to videograms, that is, that the persons with whom the contract for representation is concluded are film producers; evidence of being equipped with necessary IT and communications equipment and the Statute which is in compliance with the provision of Article 160 paragraph 1 and 2 of the Law. In its official letter number 01-82 of 18-02-2014, the *Organisation A-PRAVA MOTENEGRO* submitted to The Office the supplement to the application for the issue of licence. The *Organisation A-PRAVA MOTENEGRO* enclosed to the official letter the repertoire which it represents; the letter of the Agency for Electronic Media number 02-229/1 of 17-02-2014, new preliminary contracts for representation of members and videograms the right to which hold the members of this organisation.

In the procedure of deciding upon the application for the issue of licence for conduct of activity of collective exercise of rights of film producers, The Office particularly took into account the procedure for the issue of licence upon the application of the Organisation for the protection of copyright to audiovisual works and holders of related rights in Montenegro, number 01-8019 of 18-12-2012, which in administrative procedure was rejected in the final decision of the Ministry of Economy number 1609-3/2013 of 11-06-2013. In the said procedure, in the course of establishing the decisive facts, respecting all the principles of administrative procedure, particularly the principle of assistance to the Party, which is further connected with the principle of protection of citizens' rights and protection of the public interest and the principle of efficiency, The Office provided, directly and indirectly, professional, legal and other assistance for the purpose of foundation of the organization, which eventually resulted in the issue of license for the conduct of activity.

The provision of Article 155 of the Law defines that the holder of copyright or related rights may exercise the right to cable retransmission of the subject matter of protection only collectively, except for the shows of broadcasting organisations from own production, regardless of whether those are their own rights or rights acquired from other right holders, and the right to the fee for the reproduction for private and other internal use. These rights are the rights enjoyed under the Law by film producers as the holders of the right to audiovisual work, in accordance with legal presumption of assumption of rights as per Article 106 of the Law. Other rights of film producers are exercised individually. **This means that the *Organisation A-PRAVA MOTENEGRO* is not authorised to collect the fee from other users, except from cable operators, because film producers have exercised such rights individually, through the contracts concluded with users.**

The provision of Article 36 paragraph 1 and 2 of the Law stipulates that the author has the right to a part of fee for sound and visual recording or photocopying of his work, which is exercised in accordance with Article 52 of the Law. The fee for sound and visual recording is charged from the first sale or import of new technical equipment for sound or visual recording and blank sound or image carriers.

The provision of Article 163 paragraph 1 item 2 of the Law defines that the revenues made from the fees as per Article 36 paragraph 2 of the Law are distributed from the fees for technical equipment and blank image carriers as follows: 50% to co-authors of audiovisual works and authors of contributions to audiovisual works; 25% to interpreters

and 25% to film producers. **In view of the fact that in Montenegro there are no organisations which collectively exercise the rights of co-authors and interpreters of a film work, the Organisation A-PRAVA MOTENEGRO has the right to collect a single fee under this licence. Part of the fee as per Article 163 paragraph 1 item 2 of the Law, that is, the amount of 50% of the collected fee which belongs to the co-authors of audiovisual works and authors of contributions to audiovisual works and the amount of 25% which belongs to the interpreters, the Organisation A-PRAVA MOTENEGRO is obliged to keep at the separate account and distribute to all the aforementioned right holders.** Part of the fee amounting to 25%, which belongs to the film producers, shall be distributed to the members of this organisation in accordance with the rules defined by the internal act on the distribution of funds.

The provision of Article 150 paragraph 1 of the Law stipulates that the licence for the conduct of activity of collective exercise of right is issued under this decision for the period of five years.

The provision of Article 153 paragraph 3 of the Law defines that the competent authority shall publish the final decision on the issue or revocation of the licence in the "Official Gazette of Montenegro". In accordance with the foregoing, after the decision becomes final, it shall be published as defined in paragraph IV of the enacting terms.

Taking into consideration all facts established in the procedure upon this application, it was decided as in the enacting terms of the Decision hereof.

Legal remedy: An appeal against the decision hereof may be lodged to the Ministry of Economy, through this Office, within 15 days from the date of its receipt.

Processed by:
Milojević Emina (signed)

DIRECTOR

Novak Adžić (signed)
Round stamp: Intellectual Property Office, Podgorica, Montenegro

To be submitted to:

- Applicant
- "Official Gazette of Montenegro", Novaka Miloseva 10/I, 81000 Podgorica;
- Registry office of the Office;
- Case files.

I, Vera Madžgalj, permanent court interpreter for English language, appointed by the Decision of the Ministry of Justice of the Republic of Montenegro, Decision number 03-8658/08 dated 14th October 2013, hereby certify this text is a true copy of the original written in Montenegrin language. 30.05.2016.