

Bosna i Hercegovina

1427-UP/15
31.12.2015

**Court of Bosnia and
Herzegovina**

Number: S1 3 U 010641 12 U
Sarajevo, 29.12.2015

The Court of Bosnia and Herzegovina in Sarajevo, in the administrative dispute council, which consists of Jadranka Brenjo, the judge and president of the council, Mirsada Džindo and Maida Bikić, as council members, with participation of Žanka Bajić, as minutes-keeper, in the administrative proceeding of the prosecutor Udruženje Sine Qua Non za zastupanje i zaštitu autorskih i srodnih prava (*eng.Sine Qua Non Association for Representing and Protecting Copyright and Related Rights*), Branilaca Sarajeva Street 21, represented by the proxy Džemil Sabrihafizović, the lawyer from Sarajevo, Koste Hermana Street 11, Sarajevo, against the ruling no.: IP-03- 47-5-12-06059/12 VT dd 21.06.2012 against the defendant Institut za intelektualno vlasništvo BiH(*eng.Institute for Intellectual Property of BiH*), Mostar, Kneza Domagoja b.b., in the administrative case of issuing the authorisation for collective management of copyrights over musical works, at the non-public meeting held on 29.12.2015, took the following:

J U D G E M E N T

The claim is rejected.

R e a s o n i n g

According to the ruling of the defendant no.: IP-03-47-5-12-06059/12 VT dd 21.06.2012, Item 1 states that the request by the Association of Composers – Musical Creators of BIH (AMUS) was approved and the authorisation for collective management of copyrights over musical works was granted, according to the Item 2 the authorisation was taken from Sine Qua Non, *Association for Representing and Protecting Copyright and Related Rights* issued by the *Institute for Intellectual Property of BiH* in the ruling no.: IP-5694/02SŽ dd 04.06.2002 in the part which relates to management of author's rights based on the power of attorney of the author, power of attorney of organisation of authors or other holders of copyrights, according to the

Item 3 the authorisation has been taken from ELTA KABEL d.o.o. Dobož, preduzeće za prenos zvuka, slike ili ostalih informacija kablovima, issued by the *Institute for Intellectual Property of BiH* in the ruling dated 06.05.2006 in the part which relates to management of copyrights, the Item 4 defines that a special agreement shall regulate mutual relations on takeover of relevant documentation necessary for collective management of copyright over musical works between AMUS and Sine Qua Non within 30 days from the date of taking this judgment, according to the Item 5 the ruling shall become effective as of the date of its taking and the Item 6 defines that the above shall be published in the Official Gazette of BiH.

The prosecutor filed a claim against this ruling of the defendant for starting the administrative dispute due to reasons defined in Article 11, Items 1,3 and 4 of the Law on Administrative Disputes, and denies the disputed ruling completely, except for Item 3 of the enacting terms of judgment which relates to a third legal party. The prosecutor further states that in the administrative dispute that preceded taking of the disputed ruling, no legal assumptions existed to implement the summary procedure, and the defendant failed to listen to the prosecutor or to give him any possibility to state the important facts and circumstances of importance to make the ruling, which is the breach of oral evidence. The prosecutor said that, in addition to, documents he attached along with the application, the defendant collected evidences at his own will and made finding of facts on which he based the disputed ruling and not offering the possibility to the prosecutor to declare himself. He also added that he failed to schedule or hold an oral hearing, and withholding the possibility to declare oneself on issues of importance for making the ruling is contrary to provisions of Article 126, Item 1 and Article 134 of the Law on Administrative Procedure. Furthermore, revoking of the authorisation is a drastic final measure and with declaring such measure the defendant acted contrary to Article 13 of the Law on Collective Management of Copyright and Related Rights. The prosecutor stressed out that if any irregularities were found, the defendant had to instruct the prosecutor to eliminate those, and accordingly, the defendant could not take a decision to revoke the authorisation from the prosecutor without prior notice to the prosecutor to eliminate the shortcomings. He further stressed out that the statement of the defendant is incorrect as for saying that the prosecutor failed to adjust its status form according to the new Law and that he failed to submit the application for renewal of the authorisation since the prosecutor, along with the Sine Qua Non Association, submitted the application for issuing the authorisation for collective management of copyright over musical works within legal framework on 05.06.2012 and the application was received by the defendant, and according to the Conclusion of the defendant dd 18.06.2012 the procedure was stopped upon the notice sent by AMUS to the Ministry of Justice of BiH for deleting the Sine Qua Non Association from the registry of associations. Three days upon making the conclusion on termination of the procedure upon the defendant's request, the defendant makes decision upon the AMUS's request and takes the disputed ruling in which the authorisation is issued to AMUS and revoked from the prosecutor, while the Ministry of Justice acting under the request by AMUS takes the conclusion on 25.06.2012 in which it rejects

the AMUS's request for deletion of the prosecutor from the registry of associations. According to the reasoning of the conclusion by the Ministry of Justice, the request of AMUS for deletion of the prosecutor from the registry of associations was rejected since no conditions existed for starting the procedure since AMUS could not be a party in the procedure. Accordingly, the acts of the defendant are completely contradictory since the defendant, upon AMUS's request, terminated the procedure under the prosecutor's request for issuing the authorisation and continued with the procedure for issuing the authorisation under the request made by AMUS. He also pointed out that the defendant's view is incorrect with respect of the prosecutor's Statute that is not adjusted with Article 10, Item 2, Paragraph d of the Law on Collective Management of Copyright and Related Rights. He claimed that the association carries out its only registered activity of the collective management of copyrights and related rights through administrative and professional services: a) Secretary of the Association and b) Professional Service of Article 42 of the Statute, which is closely specialised in professional and administrative-technical tasks of collective management of copyright and related rights, and which carries out these tasks as a regular member of the Association. He added that the reasoning for the disputed ruling failed to outline as to why the professional service, defined as the Secretary under the Statute, with at least one employee who meets the prescribed conditions, does not meet the legal criteria and failed to outline based on which fact he took the conclusion that the defendant shall transfer all its business to Sine Qua Non d.o.o. although it is evident that the prosecutor has a professional service-the Secretary. Furthermore, the claim says that the defendant disputes the validity of the agreements concluded by authors with the prosecutor and he found that 239 agreements were not signed by authors but the old authorisations granted to the Agency Sine Qua Non d.o.o. were used. He further outlined that the defendant said that there are 16 duplicate agreements, since authors first concluded their agreements with the Sine Qua Non Association and later on with AMUS, and added that the reasoning of the disputed ruling introduced a completely new fact that AMUS, at the date of taking the disputed ruling, had 274 agreements concluded with authors, and that this number includes 16 authors which previously concluded agreements with him, while it is not evident based on which evidences the defendant determined these facts. That the defendant's view is unsustainable is especially evident as regards 47 confirmations of foreign companies on the concluded bilateral agreements on mutual representation which he said are not legally valid, since they were concluded before the local contractual party had the authorisation issued by the Institute, and added that the conclusion missed the fact that the subject-matter agreements with foreign companies were concluded much earlier than the defendant started its operations on 01.01.2007. He further stressed out that the defendant incorrectly determined the factual state as regards meeting of conditions which relate to business premises, equipment, financial funds, that is existing of satisfactory economic basis of the defendant to carry out collective management of copyright over musical works. He also declared that based on all evidences enclosed, he meets conditions of Article 5 of the Rulebook on the Manner and the Form of Meeting Conditions for Issuing the Authorisation to Legal Entities for Collective Management of Copyright and Related Rights. Furthermore, the claim also outlines that the defendant has different standards which he applies in his practice

and accordingly states the ruling according to which the defendant granted the authorisation for managing collective rights over musical works to AMUS, and he paraphrases conditions further in the claim which he accepted as satisfactory. He also claims that he failed to consider his business plan although according to Article 11, Item 2 of the Law and Article 8 of the Rulebook, it is one of significant elements for making a legal decision in the procedure for issuing the authorisation, which indicates that the factual state has not been completely and correctly determined. He pointed out that biasness and partiality, malice and discriminatory actions of the defendant affected numerous violations of the rules of the procedure, incorrectly determined factual state and accordingly incorrectly applied the substantive law. Finally, he recommends accepting of the claim and revoking the disputed ruling of the defendant and returning the case to the defendant for re-procedure.

In his response to the claim, the defendant completely supports the disputed ruling and recommends that the claim is rejected as groundless.

The court investigated regularity and legality of the disputed ruling within the limits of Article 35 of the Law on Administrative Procedure of BiH („Official Gazette of BiH" no.: 19/02 do 74/10), and took the decision as in the enacting terms of judgment due to the following reasons:

According to this file's administrative case, the defendant, acting upon the request by the Association of Composers-Musical Authors of BiH, for issuing the authorisation for collective management of copyrights over musical works, and considering both the application-supporting documentation and additionally delivered documentation, upon the defendant's request, and under the provision of Article 11 of the Law on Collective Management of Copyright and Related Rights („Official Gazette of BiH", No. 63/10), and Article 18 of the Rulebook on the Manner and the Form of Meeting Conditions for Granting the Authorisation to Legal Entities for Collective Management of Copyright and Related Rights — hereinafter the Rulebook („Official Gazette of BiH" no. 44/11) and Article 193, Item 1 of the Law on Administrative Procedure („Official Gazette of BiH" No. 29/02 dd 93/09), after the procedure has been implemented, it was concluded that the applicant AMUS meets the requirements as defined under Articles: 8, Item 1, 9 and 10, Item 2, Paragraph d of the Law on Collective Management of Copyright and Related Rights and Article 3 of the Rulebook, which is the reason why it adopted the request by AMUS with the disputed ruling and simultaneously revoked the authorisation to the prosecutor „ELTA KABEL" d.o.o. Doboj due to reasons defined under Article 6, Item 3 of the Law on Collective Management of Copyright and Related Rights.

This Council agrees with such conclusion of the defendant.

Collective management of copyright and related rights according to the Law on Collective Management of Copyright and Related Rights is an arranged system of managing copyrights and titulars of related rights in Bosnia and Herzegovina collectively. Collective management of copyright and

related rights shall mean management of these rights for a number of works of a larger number of authors collectively through legal entities specialised in such activity only, who fulfill all the conditions under the provisions of this Law and have the authorisation granted by the Institute for Intellectual Protection of Bosnia and Herzegovina. This means that collective management of copyright and the related rights is possible only if the following conditions have been cumulatively met: that it is a legal entity specialised only for such activity, that it meets all the conditions as defined under the Law and that it obtained the authorisation for these activities from the Institute for Intellectual Protection of Bosnia and Herzegovina. Considering that a collective organisation is established by authors, it has mandatory relations with authors and shall carry out the activity in their name and for their account, which is one of the most important characteristics of the whole system of collective management of rights.

The Law on Collective Management of Copyright and Related Rights, Article 3 restricts works that a collective organisation may deal with and simultaneously sets what a collective organisation shall perform. A legal form of a collective organisation is defined in Article 8, Item 1 of the Law, which defines that a collective organisation is a legal entity having the status of an association operating within the entire territory of Bosnia and Herzegovina and which is registered with the Ministry of Justice of Bosnia and Herzegovina. The procedure of issuing the authorisation is determined under Articles 10 and 11 of the Law and the Rulebook. One of benefits of the system of collective management of rights is introduction of so called legal monopoly to one organisation for collective management of rights which relate to the same type of right at the same type of actions. According to this ruling, only one organisation may issue the authorisation for one type of rights at the same type of works (Article 6, Item 3 of the Law).

Moreover, the Law sets out in details the relations between a collective organisation and authors. Article 15, Item 1 of the Law defines that a collective organisation may not refuse a request for the conclusion of contract for the collective management of rights in the area of its activity, while Article 16 of the same Law defines that the authors who have entrusted the management of their rights to a collective organisation shall be the members thereof. Introduction of a legal monopoly system for one organisation, creates the obligation of such organisation to act for the account of all authors within the type of rights and category of works for which it is specialised (both members who signed contracts and those who have not). The presumption of collective management of rights of all authors as defined in Article 18, Item 1 of the Law enables authors who do not wish their rights to be managed collectively to make a written notification and exempt themselves from the system of collective management of rights.

In the specific case, the defendant, based on evidences delivered by the applicant and their conscious and prudent assessment and based on the fact that the defendant determined *ex officio*, found that the applicant meets conditions for issuing the authorisation for collective management of copyright over musical works. By determining that the applicant AMUS meets conditions for issuing the

authorisation the defendant had to make the decision on previously issued authorisation to the prosecutor, all in line with the provision of Article 6 Item 3 and Article 11 of the Law on Collective Management of Copyright and Related Rights. Namely, Article 6, Item 3 of the Law on Collective Management of Copyright and Related Rights prescribes that there may be only one collective organisation for the collective management of copyright and related rights relating to the same type of rights in the same category of works. Article 11, Item 4 of the same Law defines that in the case of granting an authorisation to a new collective organisation, a decision to that effect shall also contain a declaration on the revocation of the authorisation for carrying out such tasks from the former collective organisation. Against this background, the council makes the conclusion that, in the specific administrative case, it was acted in line with the Law on Collective Management of Copyright and Related Rights and the Rulebook.

With respect to the prosecutor's allegations stating that the defendant terminated the procedure arbitrary under the prosecutor's request for issuing the authorisation for carrying out collective management of copyright over musical works to enable the organisation AMUS to get the stated authorisation is groundless since the documents of the case state that the prosecutor had the right to contest the conclusion on termination of the defendant's procedure and upon the decision by the Ministry of Justice of BiH on termination of the procedure, the prosecutor even with making the disputed ruling, should require from the defendant to make decision on fulfilling the prosecutor's conditions for granting the authorisation.

Furthermore, Article 10 of the Law on Collective Management of Copyright and Related Rights defines that the procedure for granting the authorisation to carry out the tasks related to the collective copyright management shall be initiated by the written request of a legal entity filed with the Institute and all other what has to be submitted is stated orderly in order to evidence meeting of the conditions, while Article 11 of the same Law outlines the procedure for granting the authorisation. Against this background and in accordance with the opinion of this Council, the law does not forbid to any organisation to file the request for issuing of authorisation when legal conditions are met, but legal limitations include only granting of authorisation to a new organisation. In that case, the decision on granting the authorisation has to contain a statement on revocation of the authorisation from the previous collective organisation.

The Council refutes statements by the prosecutors which include non-objectiveness, biasness, malice and discriminatory actions of the defendant during implementation of the administrative procedure and making decisions in the subject procedure, as being stated arbitrarily.

The complaint by the prosecutor that the defendant has incorrectly and incompletely determined the factual state is groundless, due to the reason that there is no contradiction in the document with respect to the determined facts, since according to the opinion by the court council, the determined factual state is grounded in the results of the implemented administrative

procedure, and accordingly the defendant made a correct conclusion on important facts out of the factual state to which it correctly applied the substantive law.

In line with the above stated and considering the fact that the disputed ruling includes valid reasons on the facts whose reasons are completely adopted by the Court, and since the disputed ruling is based on correctly determined factual state, regular implementation of the rules of procedure which preceded making of the disputed final administrative decision and regular implementation of the law, the claim is completely groundless and with respect to the provision of Article 37, Items 1 and 2 of the Law on Administrative Procedure 131H, the decision was taken as in the enacting terms of judgment.

MINUTES KEEPER

Žanka Bajić

PRESIDENT OF THE COUNCIL

J U D G E

Jadranka Brenjo

Signature illegible

The round and rectangular seals were duly affixed.

I, Irma Žiga, certified court interpreter for the English Language, certified by the Ministry of Justice of the Federation of Bosnia and Herzegovina, *do hereby certify that the present English translation is a true and faithful rendering of the Judgment written in Bosnian.*
 Issued in Sarajevo, 3 February 2016

