COU23-0649

ქალბატონ ელისო ბოლქვაძეს
თავმჯდომარე
საქართველოს პარლამენტის კულტურის კომიტეტი
რუსთაველის გამზირი 8
0118 თბილისი
საქართველო

ნუი სუღ სენ/ ბრიუსელი, 30 მაისი, 2023
ელ ფოსტა: culture@parliament.ge

ძვირფასო ქალბატონო ბოლქვაძე,

დაუყოვნებლივი საჭიროება საქართველოს საავტორო უფლებების კანონმდებლობაში კოლექტიურ მართვასთან დაკავშირებით წარმოდგენილი ცვლილებების გამოთხოვის და ახალი კანონპროექტის მომზადების შესახებ, რომელიც შესაბამისობაში იქნება საუკეთესო საერთაშორისო და ევროპულ კანონმდებლობასა და პრაქტიკასთან.

მოგმართავთ CISAC-ის (ავტორთა და კომპოზიტორთა საზოგადოებების საერთაშორისო კონფედერაცია) IFFRO-ს (რეპროდუცირების უფლებათა ორგანიზაციების საერთაშორისო ფედერაცია) და SCAPR-ის (შემსრულებელთა უფლებების კოლექტიურად მმართველი საზოგადოებების საბჭო) როგორც მსოფლიოს ავტორთა და შემსრულებელთა უფლებების დამცველი მთავარი საერთაშორისო ქოლგა ორგანიზაციების სახელით.

CISAC-ი, IFRRO და SCAPR-ი მადლობას გიხდით საქართველოს პარლამენტის კულტურის კომიტეტს და ინტელექტუალური საკუთრების ეროვნულ ცენტრს - საქპატენტს, საავტორო და მომიჯნავე უფლებების შესახებ საქართველოს კანონში შესატანი ცვლილებების კანონოპროექტზე კომენტარების წარმოდგენის შესაძლებლობისთვის.

ჩვენი ორგანიზაციები მხარს უჭერენ ნებსიმიერ საკანონმდებლო ინიციატივას, რომლის მიზანია საერთააშორისო სტანდარტებისა და საუკეთესო პრაქტიკის შესაბამისად განავითაროს და გაამლიეროს საავტორო უფლებების კოლექტიური მართვის სისტემა საქართველოში. გამომდონარე აქედან, CISAC-ი IFRRO and SCAPR-ი მიესალმება კანონპროექტს, როგორც ამ მიმართულებით გადადგმულ პირველ ნაბიჯს.

თუმცა, ჩვენი ანალიზით სახეზეა კანონპროექტის ნაკლოვანებები, მისი შეუსაბამობა და წინააღმდეგობრიობა საერთაშორისო სამართალთან და პრაქტიკასთან, რაც, გამლიერების ნაცვლად, დაასუსტებს კოლექტიური მართვის არსებულ სისტემას. შედეგად, დაზარალდებიან როგორც ადგილობრივი, ასევე უცხოელი უფლების მფლობელები, რომელთა ნაწარმოებებიც გამოიყენება ქვეყანაში და ვისი კეთილდღეობაც დამოკიდებულია საქართველოში კოლექტიური მართვის სისტემის ეფექტიან ფუნქციონირებაზე.

ამიტომ, ჩვენი გლობალური გაერთიანება მკაცრად აკრიტიკებს არსებულ კანონპროექტს და გასცემს რეკომენდაციას, საქართველოს კულტურის კომიტეტმა და საქპატენტმა გახსნან ახალი საკონსულტაციო პროცესი, რაც შესაძლებლობას მისცემს ადგილობრივ და საერთაშორისო დაინტერესებულ მხარეებს, იმსჯელონ, დასახონ გზები და, სფეროში აღიარებული უცხოელი ექსპერტების დახმარებით, შეიმუშაონ ახალი კანონპროექტი.

ჩვენი ღრმა შეშფოთება, წარმოდგენილი კანონპროექტის დებულებების შესახებ, ძირითადად, შეიძლება შეჯამდეს შემდეგი სახით:

- უნდა შენარჩუნდეს და გაძლიერდეს არსებული სისტემა, როცა მხოლოდ ერთ კოლექტიურ მართვის ორგანიზაციას შეუძლია უფლების ერთი კატეგორიის ადმინისტრირება. გარდა ამისა, წარმოდგენილი, „ვარაუდზე დაფუძნებული“ მოდელის ნაცვლად, უნდა დაინერგოს გაფართოებული კოლექტიური ლიცენზირების სისტემა და სპეციფიკური უფლებების სავალდებულო კოლექტიური მართვა, როგორც ეს ფართოდ გამოიყენება ევროპასა და სხვა ქვეყნებში.
- უნდა გადაიხედოს წარმოდგენილი აკრედიტაციის პროცედურა და შეიქმნას მყარი გარანტიები, რომ მხოლოდ საერთაშორისოდ აღიარებული და ჭეშმარიტად წარმომადგენლობითი ორგანიზაციები ჩაითვალონ კოლექტიური მართვის ორგანიზაციებად.
- ჰონორარის შეგროვების და განაწილების წესები არ უნდა იყოს მიკერძოებული, დამაზიანებელი და უნდა შეესაბამებოდეს ევროკავშირის 2014/26 CRM დირექტივას.
- უნდა გადაიხედოს შემოთავაზებული კანონპროექტით გათვალისწინებული ტარიფების დადგენის მექანიზმი, რადგან იგი აზიანებს როგორც კოლექტიური მართვის ორგანიზაციებს, ასევე მოსარგებლეებს, არ შეესაბამება CRM დირექტივას და საუკეთესო საერთაშორისო პრაქტიკას.
- უნდა გადაიხედოს კოლექტიური მართვის ორგანიზაციის წევრად მიღების წესები, რადგან მიკერძოებულია და ეწინააღმდეგება CRM დირექტივას.
- უნდა გადაიხედოს საქპატენტისთვის, კოლექტიური მართვის ორგანაზაციის ზედამხედველობასა და ტარიფების დადგენასთან დაკავშირებით მინიჭებული კონტროლის ახალი მექანიზმები, რაც სრულიად აცდენილია საერთაშორისოდ აღიარებულ საუკეთესო პრაქტიკას და წარმოადგენს გაუმართლებელ ჩარევას კერძო საკუთრებაში.

აღნიშნული მოსაზრებების უკეთ გაგებისთვის, დანათის სახით, წარმოგიდგენთ დეტალურ ახსნას. გთხოვთ გაითვალისწინოთ, რომ ჩვენი ანალიზი ემყარება საავტორო უფლებების კანონმდებლობის მხოლოდ კოლექტიური მართვის ნაწილში შესატან ცვლილებებს. ამასთან, მზად ვართ, შესაძლებლობის შემთხვევაში, წარმოვადგინოთ ჩვენი მოსაზრებები კანონის სხვა ნაწილებთან დაკავშირებითაც.

ყოველივე ზემოაღნიშნულის გათვალისწინებით, სამივე ორგანიზაცია დაჟინებით მოვითხოვთ, მიმდინარე საკანონმდებლო ინიციატივის დაუყოვნებლივ გამოთხოვას და შემდგომი განხილვისთვის დაბრუნებას, რომ, სფეროში აღიარებული საერთაშორისო და ევროკავშირის ექსპერტების დახმარებით, გარანტირებული იყოს მისი შესაბამისობა ევროკავშირის და საერთაშორისო ნორმებთან, ასევე მოემსახუროს ადგილობრივი და უცხოელი უფლების მფლობელების ინტერესებს.

CISAC-ი, IFRRO და SCAPR-ი, როგორც ყოველთვის, მზად არიან შემოგთავაზონ მხარდაჭერა ამ პროცესში, უფლებების კოლექტიური მართვის საუკეთესო პრაქტიკის გაზიარების ჩათვლით, რაც სარგებელს მოუტანს ქართველ და საერთაშორისო შემოქმედებით საზოგადოებას.

წინასწარ გიხდით მადლობას CISAC-ის IFRRO-ს და SCAPR-ის მიერ წარმოდგენილი საერთაშორისო შემოქმედებითი საზოგადოების ღრმა შეშფოთების გათვალისწინებისთვის

გულწრფელად თქვენი

გადი ორონი	რემი დისროსიერსი	სამანტა ჰოლმანი
გენერალური დირექტორი	მმართველი დირექტორი	ბორდის პირველი ვიცე-პრეზიდენტი
CISAC	SCAPR	IFRRO

ასლი: ბატონ სოსო გიორგაძეს. თავმჯდომარე. საქართველოს ინტელექტუალური საკუთრების ეროვნული ცენტრი - საქპატენტი

COU23-0649

Mrs Eliso Bolkvadze
Chairperson
Culture Committee of the Parliament of Georgia
8 Shota Rustaveli Avenue
0118 Tbilisi
Georgia

Neuilly sur Seine/ Brussels, 30 May 2023

By email: culture@parliament.ge

Dear Mrs Bolkvadze,

Pressing need to withdraw the proposed draft amendments to the Georgian Copyright Law regarding collective management of rights and to prepare a new Bill, in accordance with best international and EU norms and practices in the field

We are writing to you on behalf of CISAC (the International Confederation of Societies of Authors and Composers), IFFRO (the International Federation of Reproduction Rights Organisations) and SCAPR (the Societies' Council for the Collective Management of Performers' Rights), as the leading international umbrellas for the protection of the rights of authors and performers worldwide.

CISAC, IFRRO and SCAPR would like to thank the Culture Committee of the Parliament of Georgia and the National Intellectual Property Centre of Georgia (Sakpatenti) for the opportunity to provide comments on the draft law on "Introducing amendments into the Law of Georgia on Copyright and Related Rights" ("the Bill").

Our three organizations would support any legislative initiative aimed at developing solutions in line with internationally accepted standards and best practices, to enhance the system of collective copyright management in Georgia. In this regard, CISAC, IFRRO and SCAPR welcome the Bill as a first step in that direction.

However, our analysis has identified several shortfalls, deficiencies and inconsistencies that would place the Bill out of step with international law and practices. As a result, the Bill would weaken the existing system of collective rights management, instead of strengthening it. It would thus be detrimental to both local and foreign rightsholders whose works are used in the country and whose livelihood depends on the good functioning of the collective management system in Georgia.

For this reason, our global membership strongly objects to the current Bill and recommends the Culture Committee of the Parliament of Georgia and Sakpatenti to open a new consultation process allowing local and international stakeholders an opportunity to discuss the Bill properly and paving the way for a new draft to be produced, ideally with the assistance of internationally renowned expert(s) in the field.

Our main concerns with the current provisions of the Bill can be summarized as follows:

- The current system whereby only one CMO can administer the same right(s) should be preserved and strengthened. Further, an extended collective licensing ("ECL") system and mandatory collective management for specific rights should be introduced, as widely used in Europe and other countries, instead of the proposed "presumption-based" model.

- The proposed accreditation procedure should be revised to unequivocally guarantee that only internationally recognised and truly representative societies can operate as CMOs.
- The rules for collection and distribution of royalties should not be arbitrary and excessive but should closely follow the 2014/26 EU CRM Directive (CRM Directive) and best international practices.
- The tariffs-setting mechanism should be revised, since the one defined in the current Bill is cumbersome for both CMOs and users, and is not in line with the CRM Directive and best international practices.
- Certain CMO membership rules should be reviewed as they are arbitrary and contrary to the CRM Directive.
- Several newly established powers of Sakpatenti in the area of supervision of CMOs and tariffs-setting should be revised as they extend well beyond best international practices in the field, amounting to an unjustified interference with the private nature of the rights at stake.

For ease of reference, we attach to this letter an Annex with more detailed explanations of the above concerns. Please bear in mind that our analysis is based only on the proposed amendment to the collective management part of the Copyright Law, but we are ready to provide our expertise if other parts of the Law would be open for revision.

Considering all the above, our three organisations urge your timely intervention to ensure that the pending legislative proposal is withdrawn and returned for further revision with the assistance of renowned international and EU experts in the field, in order to guarantee due compliance with EU and international norms, as well as to safeguard the interests of local and foreign rightsholders.

As always, CISAC, IFRRO and SCAPR are ready to offer their support in this process, including sharing best practices in collective management of rights to the benefit of the Georgian and international creative community.

We thank you in advance for your consideration of these concerns of the international creative community represented by CISAC, IFRRO and SCAPR.

Yours sincerely,

Gadi Oron	Rémy Desrosiers	Samantha Holman
Director General	Managing Director	First Vice President of the Board
CISAC	SCAPR	IFRRO

cc: Mr Soso Giorgadze, Chairman, LEPL National Intellectual Property Center of Georgia -Sakpatenti

Annex

CISAC, IFFRO and SCAPR's observations on the draft law amending the collective management part of the Georgian Copyright Act

- **Accreditation procedure**

Article 64 of the Bill defines the process for accreditation of CMOs and lays down the criteria to be met by the applicants. We would like to underline the importance of facilitating a trustworthy and effective accreditation process for CMOs. In this respect, the international representativeness of a CMO, based on the number of reciprocal agreements it has concluded with similar societies around the world, should serve as a key factor. Such a requirement, which follows best international practices in the field, aims at ensuring that only legitimate and sufficiently representative CMOs can operate in the best interests of rightsholders and users of their works. In this regard, we detail our concerns in the following points.

- Arbitrary requirement of an audit by an authorized firm as a requirement to obtain accreditation

Article 64.1.b requires that the applicant CMOs present an audit by an authorized firm as a requirement to obtain authorization. This audit should attest that the applicant CMO has the necessary human and technical resources to provide collective management services.

We strongly oppose this requirement since audit firms lack knowledge on the minimum resources that are needed for effective management of authors' rights and neighbouring rights. Rather, we suggest that the suitability of a candidate CMO be evaluated by Sakpatenti based on the recommendations provided by the international organizations representing CMOs. This would ensure that the decision is based on a proper assessment of the compliance of any candidate CMO with the requirements of the international network of CMOs in terms of good governance, financial transparency, efficiency and technical expertise.

- Key relevance of sufficient representativeness of both local and foreign repertoire

The requirements for accreditation of a CMO laid down in Article 64.1.b are not sufficient. In accordance with international practice, the main criterion is the representativeness of the CMO, which is assessed based on the number of local authors and rightsholders represented by the CMO and the number of reciprocal representation agreements with foreign CMOs. This requirement is absent from Article 64.1.b and should be introduced. The Bill should guarantee that, for a CMO to be considered sufficiently representative, it shall:

  - have a repertoire of a significant number of rightsholders;
  - have representation agreements with those foreign CMOs the repertoires of which are the most used in Georgia.

- Provisional six-month accreditation

Article 64.3 introduces an unprecedented and dangerous provision according to which any CMO would be first accredited on an interim basis and would then have six months to submit representation agreements with foreign CMOs to obtain permanent accreditation.

This provision raises concerns for the following reasons:

  - It may pave the way for rogue CMOs to operate in the market for six months without having to prove sufficient representativeness of both domestic and foreign repertoire.
  - It would undermine the ability of legitimate CMOs to properly operate in the market. The possibility of parallel administration of the same rights by several organizations in Georgia, even if for a limited time, would lead to confusion among users and a race to the bottom for tariffs to the detriment of local and foreign rightsholders.

- It may lead to a situation where for six months there would be no CMOs managing the world repertoire.

We therefore strongly recommend clarifying in the Bill that the *already existing* broad representativeness of the relevant foreign repertoire of the candidate CMO shall be a criterion to be met *at the time of the application*, along with the representativeness of the domestic repertoire.

We further recommend clarifying in the Bill that an existing CMO should be allowed to continue its management activities as an authorized and registered CMO during the accreditation process until Sakpatenti's decision on whether such CMO maintains its accreditation. Otherwise, the exercise of the rights concerned would not be ensured within that period.

- Competing applications

In the event of competing applications in relation to the same rights, categories of rights or groups of rightsholders, Article 64.6 establishes that the decision shall be made in favour of the applicant "*with the better conditions*". We are of the view that this wording can be improved by replacing it with "*the applicant that complies with the conditions most fully*", according to the suggestions to be made by international experts and stakeholders.

- **Extended collective licensing**

Article 66.4 introduces a "presumption-based" model as a legal foundation for the blanket licensing system in Georgia. In this regard, we align ourselves with the opinion of Professor Mihaly Ficsor as it seems more appropriate to implement blanket licensing in Georgia through extended collective licensing (ECL) schemes.

Under ECL, a scheme widely used in many European countries and recognized under Article 12 of the EU Digital Single Market Directive 2019/790/CE (DSM Directive), the licence granted by a representative CMO on behalf of its members, is extended by law to also cover non-member rightsholders of the same category. Such an arrangement would both preserve the high level of copyright protection already achieved in Georgia and allow at the same time the necessary flexibility for rightsholders who decide to "opt out" from the ECL system.

At the same time, certain caution is needed with the application of ECL schemes. According to the conditions of applicability of ECL schemes laid down in Article 12 of the DSM Directive, ECL may be applied (i) within well-defined areas of use, (ii) where obtaining authorizations from rightsholders on an individual basis is onerous and impractical, and (iii) ensuring that the extended collective management mechanism safeguards the legitimate interests of rightsholders. These safeguards include:

- the CMO in charge of granting licences must be sufficiently representative and guarantee equal treatment to all rightsholders;
- that rightsholders who have not mandated the CMO should be able to opt out of the extended collective management system easily and at any time.

We therefore recommend implementing ECL schemes in accordance with the principles laid down in the CRM Directive. In particular, we suggest that the Bill lists in an exhaustive manner the areas of use and the rights concerned by ECL, as provided in the national laws of EU member countries. This would lead to much better legal certainty and would prevent misuse of the system.

- **Rules for collection and distribution of royalties**

- Very tight deadline for royalties' distribution

Article 66^2.4 provides that CMOs shall be obliged to pay the collected royalties to rightsholders no later than within six months from the end of the financial year in which the royalties were collected.

Such a requirement is not realistic, particularly for those CMOs that manage big domestic and international repertoires with an extended effect or in a presumption-based system. These CMOs are required to distribute royalties to non-members, which is a complex task and requires a more reasonable deadline.

We respectfully point out that the deadline for royalties' distribution proposed in the Bill is even shorter than the one provided in the EU Collective Rights Management Directive 2014/26/EU (CRM Directive). Indeed, Article 13.1 of the CRM Directive prescribes a nine-month deadline. It does not seem to be justified to prescribe shorter distribution deadline to Georgian CMOs than what is provided under the CRM Directive.

Although the language of Article 66.4. is formulated after the wording of Article 13.1. paragraph two of the CRM Directive, when listing the most likely causes of a delay in distribution it conspicuously replaces the term "in particular" with "specifically", making thus the list exhaustive. We recommend following the wording the Directive as well in this respect. As experience shows and as European legislators are well aware of, delays in distribution may occur for objective reasons other than expressly mentioned here (e.g., a recent change in the rules of distribution decided by the general meeting of a CMO).

- Cap on CMO's management fees

Article 66^2.16 of the Bill sets caps on the level of CMOs' management fees, establishing that these should not exceed 20% of the collected royalties.

While all three of our organizations promote efficiency and low administrative costs among its members, we believe that setting arbitrary caps on societies' costs in legislation is unnecessary and unhelpful. Other laws, including EU rules, avoid stipulating specific levels of acceptable management fees for the same reason. For example, Art. 12.3 of the CRM Directive establishes that "*Management fees shall not exceed the justified and documented costs incurred by the collective management organization in managing copyright and related rights*."

In our view, the management costs of a CMO shall be decided and approved in a transparent way by a society's democratically elected body, based on economic factors and costs of operations of their CMO. Under article 8.5 of the CRM Directive, the General Assembly of the CMO is the body in charge of deciding on any policy regarding deductions on rights revenues, including management fees. Therefore, we would suggest that such a cap be eliminated or at least redrafted as a mere recommendation.

- **Tariffs-setting**

  - Unnecessary detailed regulation of the tariffs-setting methodology

Article 66^6 of the Bill contains an extremely detailed list of criteria to be considered in the tariffs-setting process. Those criteria are highly problematic for several reasons:

- concrete methodologies like those mentioned in the Article are only valid for certain uses but are not applicable to others;

- those criteria are too specific, and their application may run against the principle laid down in the CRM Directive that tariffs should reflect the economic value of the rights in trade, as they could become outdated or not be fit for purpose for certain uses, also considering the fast pace of technological progress;

- some of the criteria laid down in the Bill appear to be arbitrary, such as the one that refers to *the geographic location of the use of the work which may affect the intensity of its use and/or the financial situation of the users*;

-Tariffs-setting is an extremely complex area that requires a great deal of experience and up-to date knowledge of the specific sectors;

-such a detailed regulation of the tariffs-setting criteria is not aligned with the principles laid down in the EU Collective Rights Management Directive (2014/26/EU). The Directive only requires that tariffs should be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, as well as in relation to the economic value of the service provided by CMOs. Under the CRM Directive principles, CMOs shall be free to negotiate the methods, the tariffs-setting criteria and the basis of calculation of the tariffs for each type of

exploitation, taking also in consideration the nature of the rights at stake, e.g., exclusive rights or mere rights of remuneration.

For these reasons, we recommend deleting the criteria to be considered in the tariffs-setting process criteria from the Bill. Alternatively, if a decision is made to keep them, we suggest that they are sufficiently general and defined as a non-exclusive list.

- Exemption of payment for non-commercial uses

We are seriously concerned about the provision (Article 66^6.1) exempting non-commercial uses from the payment of the tariffs. Such exemption would significantly and unreasonably limit the scope of rightholders' exclusive rights, resulting in substantial losses of revenue for rightsholders. The not-for-profit nature of the use should not affect the principle that rightsholders should be fairly and proportionately remunerated for any exploitation of their works. Further, this exemption would be a clear infringement of the so-called "three-step test" outlined in international treaties (Article 9.2 of the Berne Convention, Article 16(2) of the WPPT and Article 13(2) of the Beijing Treaty, and reinforced by Article 13 of the WTO TRIPS Agreement) and in EU law (Article 5.5 of the 2001/29/CE InfoSoc Directive), which determines the limits for national laws in establishing exceptions and limitations.[1]

Therefore, we recommend removing any reference to certain uses being exempted from payment or subject to a reduced rate based on arbitrary criteria.

- Tariffs disputes

Article 66^6.10 provides for a mechanism to address situations in which CMOs and users fail to reach an agreement. We are of the view that this provision could be improved by introducing safeguards preventing the abuse of such mechanisms by users as a strategy to reduce tariffs, and delay or avoid payments.

We recommend clarifying that the users should be deemed liable and be obliged to keep the amount requested in trust until the dispute is resolved by the competent authority. Further, the Bill should clarify that the new tariffs to be decided by Sakpatenti (or by the competent Court in case of appeal) should also reflect the economic value of the use of the rights in trade and the economic value of the service provided by CMOs.

- Sakpatenti power to establish new tariffs

Article 66^6.11 grants Sakpatenti the power to change and establish, at its own initiative, a new royalty tariff in the case of examining the annual report of the CMO or being contacted by the rightsholders.

We strongly oppose this provision which appears to be an unjustified and arbitrary interference by the state body with the private and exclusive nature of rights protected by authors' rights and neighbouring rights. We believe that rightsholders and their organizations shall have the sovereign right to elaborate, propose, negotiate, and enforce their tariffs, both in case of exclusive rights and rights to remuneration. Based on international practice, normally a state body cannot define or reject the tariffs proposed by a legitimate CMO, but can at best express its authoritative opinion. We therefore recommend deleting this provision.

- **Membership rules of CMOs – decisions of the General Assembly**
  - Decisions of the General Meeting subject to enter into force only upon approval of Sakpatenti

[1] Under the "three-step test", an exception must be (1) confined to certain special cases which (2) do not conflict with normal exploitation of the work and (3) do not unreasonably prejudice the rightsholder.

Article 66[13].2 of the Bill makes the entry into force of any amendment of the CMO Statute or membership terms subject to prior approval from Sakpatenti. This provision appears as an unjustified and arbitrary interference of the state body with the private nature of authors' rights and neighbouring rights. Amendments to the statute or membership rules should be approved by the General Assembly as the body representing democratically the members of a CMO. Rather, Sakptatenti should only be able to intervene in situations where a specific amendment to the statutes or membership terms is found in breach of the Law on Copyright and Related Rights, in the course of the exercise of its supervisory functions.

- Decisions of the General Meeting by the majority of its members

Article 66[13].1 of the Bill requires that the General Meeting shall be authorized only if it is attended by the majority of the total number of its members. This requirement is not realistic. The CRM Directive does not refer to any majority requirements for the vote to be valid. The common practice is that CMO lays down in the Statutes the rules on the functioning of the General Assembly and the voting regime of the members, which may be established considering weighting criteria that reasonably limit the plural vote, guaranteeing, in any case, an equitable and proportionate representation and participation of all members.
