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nickelodeon

MTV Networks**address**MTV Networks AB, Lumaparksvägen 7
120 31 Stockholm, Sweden**numbers**tel +46 (0)8 506 780 00
fax +46 (0)8 506 780 01**net**www.mtv.se
www.comedycentral.tv
www.nickelodeon.se
www.mtvnetworks.se

Kulturdepartementet
Postboks 8030 Dep
0030 Oslo
Norway

This letter will be also sent to postmottak@kud.dep.no

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**Response Letter – Transitional regulation as regards changes in the Copyright Act
(No: Forskrift om overgangsregler til lov om endringer i åndverksloven).**

Introduction

Reference is made to the Ministry of Culture's (No: Kulturdepartementet) request for response (No: Høringsvar) dated 18 November 2011 suggesting a new transitional regulation as regards changes in the Norwegian Copyright Act (the "Transitional Regulation"). Please find below MTV Networks AB's brief response to such request.

MTV Networks AB ("MTV") is a Swedish limited liability company and broadcaster operating various TV-channels and connected services, such as MTV, Nickelodeon and Vh1, in *inter alia* Norway. As such, MTV is closely following the current dispute between the collecting society Norwaco and certain of the Norwegian television operators, such as Canal Digital Kabel AS and Get AS. It is of great importance to MTV that any aspect of such dispute is treated in accordance with the applicable legislative frame work, as well as with the correct facts.

MTV's Response to the suggested Transitional Regulation

1. The Copyright Act and transitional regulations

The Norwegian Copyright Act (the "Act") § 38 a sets out two requirements for Norwaco to be able to act as the representative organization on the subject matter at hand; 1) approval from the Ministry of Culture and 2) the actual ability to represent in reality a substantial amount of the

right holders whose works are used in Norway. Even though Norwaco failed to prove that it fulfilled the second requirement according to the decision of the Kabeltvistnemnda (as further stated below), there is nothing in the Act that makes it legally possible for the Ministry of Culture to make any exception from the second requirement. On the contrary, both requirements have to be fulfilled for Norwaco to be able to act on the basis of the Act. According to MTV, the problem with Norwaco's lack of mandate can further not be solved by enforcing the Transitional Regulation as the applicable rule at hand in the Act came into force about six (6) years ago. Transitional regulations of any kind have to be presented within a reasonable time frame set from the date on which the applicable rule came into force, and also with a legal aim of being an actual transitional regulation – not to amend a problem that has arisen six years later and which basis has little to do with the applicable rule itself. Six years is not a reasonable time frame and the problem at hand is not legally suitable for a transitional regulation.

Furthermore, the suggested Transitional Regulation will have the practical outcome that Norwaco will be given a mandate that does not correspond to its actual authority to collect remuneration and re-distribute this to its rightful owners across the globe. MTV believes it is reasonable to state that in no situation would any company pay any kind of money or remuneration to an organization knowing that such organization can in reality not claim mandate to collect the money in question, nor re-distribute such money to its rightful owners. However, if enforced the Transitional Regulation will in reality force the operators to do exactly just that, which has to be viewed as going against common sense and practice.

In light of the above, the Transitional Regulation can hardly be viewed as legal in this sense, nor can it be viewed as a suitable solution to the situation at hand.

2. EEA principles and requirements

The Transitional Regulation is in MTV's opinion contrary to the European Economic Area principles and requirements, *inter alia* against discrimination based on territoriality (article 4). The background to the change of § 38 a within the Act made in 2005, was in fact that the rule as it appeared before 2005 was discriminating against non-Norwegian right holders. Therefore the rule was changed from:

"representing a substantial part of Norwegian right holders" to

"representing a substantial part of right holders whose works are used in Norway".

Should the Transitional Regulation come into force as it now appears, it would again bring on an actual discrimination against non-Norwegian right holders as Norwaco's mandate will then in reality more or less only comprise Norwegian right holders.



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MTV operates through its company group within a majority of the various countries across our globe and deals on a daily basis with rights clearances with a number of right holders and their organizations for a number of its services across several media platforms. Therefore, MTV is confident that it is incorrect to assume that just because Norwaco represents a substantial amount of Norwegian right holders, it will also represent a substantial amount of non-Norwegian right holders. The truth lies more with the opposite as also proven by the investigation made within the dispute before the Kabeltvistnemnda.

3. Dispute before the Kabeltvistnemnda

MTV believes that the question of Norwaco's mandate has already rightfully been investigated within the dispute before the Kabeltvistnemnda and set out in its decision dated 28 June 2011. This was a thorough investigation which led to the conclusion that Norwaco in fact lacked the majority of the necessary representation as regards the subject matter at hand. Therefore, from 2005 and onwards, Norwaco was not able to act as the organization it was set out to be in this respect. This decision can be appealed and re-tried with the District Court and further on within the judicial court system, which should be the only possible way in which such decision can be altered. MTV believes it to be remarkable that the Ministry of Culture seems to be of the opinion that it is legally able to in reality alter such decision by presenting the Transitional Regulation – and doing do with retroactive effect and after a decision in the case already has been made. In MTV's opinion, this should not be occurring in a private dispute already connected to the judicial court system, nor in a society founded on a principle of the security and rule of law (Sw: Rättsäkerhet).

It is further incorrect to state that the dispute between Norwaco and the operators is only about which organization that shall receive the extra remuneration claimed. In MTV's opinion, all copyright within its broadcasts are fully cleared for *inter alia* retransmission in Norway, with the exception of the communication to the public of any music to be cleared with the relevant performing rights society representing composers and authors of lyrics (i.e. Tono in Norway. Such music clearance has already taken place for a long time through Norwaco and is not included within the relevant dispute).

Therefore and more rightfully, the relevant dispute concerns if any piece of content within any of the broadcasted channels retransmitted in Norway by any of the operators concerned, is cleared or not for the retransmission at hand. As stated above, MTV believes that all content within its broadcasts are in fact cleared for this purpose, also within a chain of acquisition, by way of agreements, of the relevant and necessary rights originating from the actual right holders themselves. However, should any competent court find that any rights or content are not cleared, then it becomes a question also for such court to decide how much such uncleared copyright is worth financially. Therefore the dispute could potentially have a financial impact on the parties concerned. In light of this, it would in MTV's opinion be illegal to give the Transitional Regulation retroactive effect (see further below).



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In addition, the Transitional Regulation only creates a vast amount of confusion as regards Norwaco's mandate. The Act § 38 a sets out the two requirements as mentioned above, the Transitional Regulations would – illegally and against common sense - set one of those aside, but the decision of the Kabeltvinstemnda still states that such requirement was not fulfilled. The Transitional Regulation is simply not helpful, but merely creates more confusion to an already complicated situation that needs to await the decision of any of the Court of Appeal as well as the High Court (should the latter be relevant) before creating any kind of other solution to the problem regarding Norwaco's lack of mandate.

4. Retroactive effect and effect going forward

As mentioned above, it appears as contrary to statutory law as well to common sense to create this kind of regulation with retroactive effect. Especially since the Transitional Regulation, should it be enforced, would materially affect the dispute at hand already within the judicial court system.

In addition, it is not stated in the Transitional Regulation for how long it shall be in effect going forward, which also has to be contrary to the relevant judicial framework. This leaves Norwaco's counter parties, the operators, and their counter parties, the broadcasters, in a difficult and unforeseeable position as it will be unclear for how long the Transitional Regulation is in effect and effectively further unclear how Norwaco's mandate will appear or change over time.

The above stated must simply be unacceptable to any commercial company acting within the territory of Norway. It has undoubtedly brought on serious questions within the international management of MTV as to *inter alia* how the principle of security and rule of law is actually treated in Norway.

Conclusion

In light of the above, it is MTV's opinion that the Transitional Regulation cannot and shall not be enforced in any way.

Yours sincerely

Andrea Sahlgren

VP, Commercial Director

MTV Networks AB