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By e-mail with original sent by post

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Comments on the proposals made by The Ministry of Culture for transitional regulation in relation to changes in the Copyright Act

We write with reference to The Ministry of Culture's request for comments, dated 18th November 2011, regarding suggested changes in the Norwegian Copyright Act ("the Act") that would be effected by way of a new transitional regulation ("the Transitional Regulation").

Media Matrix LLP (a limited liability partnership established under UK law) either directly or through its sister organisation, Footprint Music Limited (a private limited company registered in the UK) which is a consultancy specialising in music copyright and ancillary rights, represents a number of international broadcasters whose services are, inter alia, re-transmitted via cable in Norway by cable operators. In that capacity, we advise our clients on developments in the area of authors and neighbouring rights in various European countries, including Norway and, consequently, retain a close interest in the developments in the dispute between Norwaco and certain Norwegian cable operators, including Cabal Digital Kabel AS and Get AS.

Although the following brief comments are made in our own capacity, they are made with the knowledge that our clients will also regard any developments in the dispute with great interest, for reasons outlined below.

The Legal Framework

It is our understanding of §38 of the Act that one of the two absolute requirements that must be achieved in enabling an organisation such as Norwaco to represent rights holders, whose works are used in Norway, is that they must have an authorisation from The Ministry of Culture.

The other absolute requirement is that the relevant organisation be able to demonstrate that it has an actual and real mandate to represent the rights of the rights holders that it purports to represent. We take it that this requirement must relate both to Norwegian and international rights holders.

The decision of the Kabeltvistnemnda on 28th June 2011, having undertaken a detailed examination of Norwaco's claims to represent a number of rights holders on whose behalf it was asserting claims for remuneration, concluded that Norwaco had failed to establish that it did, indeed, have the necessary mandates to support the majority of its claims. Therefore, Norwaco could not assert these claims, presently or retrospectively.

This decision can be challenged within the judicial system but this should be the only way that it can be altered. We are concerned that the proposed Transitional Regulation would, indeed, have the effect of altering that decision outside of the judicial process and of giving Norwaco a mandate that it has otherwise failed to establish.

Furthermore, it is our understanding that both requirements of §38 of the Act have to be satisfied for Norwaco to assert its claims and, if Norwaco has failed to meet the representation requirement, the Act does not make it possible for this failure to be overridden by The Ministry of Culture granting an authorisation.

Whilst we do not have intimate knowledge of the Norwegian constitution or judicial system, in any other country of which we are aware it is not possible for legislation or statutory instruments to apply retrospectively. In this case, bearing in mind that the proposed Transitional Regulation seeks to redress a problem that came about 6 years ago, i.e. when the Act passed into law in 2005, we would be surprised if its enforcement would be deemed as constitutional.

The rights cleared by international broadcasters

In the context of the proposed Transitional Regulation, we regard it as relevant to mention that it affects international broadcasters we advise. The business model for those broadcasters is based upon the acquisition, under assignment or licence of rights cleared at source by the producers, of broadcasting, cable retransmission and, increasingly, other media rights. These rights apply to all territories in which the broadcasters' channels are distributed, including Norway. This business model is underpinned by a generally accepted system of warranties and indemnities given by the producers or licensors in respect of the rights granted. The only exception to this is with respect to the communication to the public of any musical works which are cleared with the relevant performing right organisation representing composers and lyricists. These are generally cleared in the country in which the communication takes place. With respect to cable retransmission in Norway, these are rights controlled by Tono, although they have been administered by Norwaco, on Tono's behalf, for some years.

Norwaco's position regarding their so-called "supplemental claims" and the dispute about the extent of the mandate that is held by Norwaco goes to the core of this well established business model and the well established flow of rights between the producers or licensors of content and the broadcasters on one hand and then the broadcasters and the cable operators on the other. In doing so it creates unacceptable commercial uncertainty within the Norwegian market. The effect of the

Transitional Regulation would be to prolong that uncertainty both going forward and, if retrospectively applied, going backwards also. We do not imagine that this is The Ministry of Culture's intention.

Conclusion

In summary, for the reasons stated above, it is our opinion that the proposed Transitional Regulation should not come into force.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'PKempton'.

Paul Kempton
Partner
For Media Matrix LLP