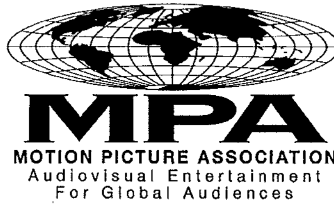


Ministry of Culture
Ms. Thorhild Widvey
postmottak@kud.dep.no
P.O. Box 8030 Dep
NO-0030 Oslo, Norway

Brussels, 11 September 2014

RE: Ministry of Culture Green Paper: Proposed Amendment to the Norwegian Copyright Act for a General Extended Collective License (ECL) (14/3035 SFA: MK)

Dear Ms. Widvey:

The Motion Picture Association (MPA) is a trade association representing the interests of six major international producers and distributors of films, home entertainment and television programmes.[1] The MPA has been advised of a proposed amendment to Section 36(2) of the Norwegian Copyright Act to create a General ECL. The amendment has been put forward, we understand, in the 1 July, 2014, Green Paper, your reference 14/3035 SFA: MK, of which the MPA has not been able to review a full translation. However, we are advised that the Ministry proposes the following provision for Section 36(2) (unofficial translation from MPA local counsel):

> "*Extended collective license may also be utilized in situations not covered by the sections referred to in the first paragraph, when a user within a more closely defined area has entered into an agreement with an organization referred to in section 38a regarding use of a published work (general extended collective license). This does nonetheless not apply if the author with regard to any of the parties to the agreement has prohibited use of the work, or if there otherwise is particular reason to believe that he opposes use of the work.*"

In our view, in the Green Paper, the Ministry has interpreted Recital 18 of the Copyright Directive in an overly broad manner. Whilst Recital 18 provides comfort for existing national

---

[1] Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

"arrangements" such as extended collective licenses, it does not exempt them from application of the three-step test as per EU and international law.[2] An ECL can of course operate as a limitation on the scope of exercise of an exclusive right, which is normally exercised individually, and such a limitation is always subject to the three-step test.

Moreover, we are advised that the Ministry envisages that the new ECL provision could apply to Over-the-Top (OTT) exploitation such as network or remote PVRs (nPVRs), catch-up TV (CUTV) and internet retransmission services. We further understand that the Ministry hopes to facilitate the requisite authorisations for collective management organisations ("**CMOs**"), such as Norwaco, in the licensing of audiovisual content to OTT service providers. The MPA Member Companies urge extreme caution in the application of ECLs as a means to authorize use by on-line services including OTT providers of audiovisual content, who are entering the market as commercial enterprises and as such, as individual potential licensees. We therefore appreciate the opportunity to share our concerns and comments in this regard in advance of the 12 September deadline.

The MPA is supportive of any initiative intended to enable CMOs to better serve their members. Facilitation of collective licensing, however, should not undermine opportunities for holders of exclusive rights to license those rights individually, in particular in relation to a recently developed exploitation means. Strong protection for individual exercise of exclusive rights is, we believe, the most effective way for rights holders to respond to consumer demand and to derive value from their creative works, particularly in the audiovisual sector.

The MPA is aware that similar legislative approaches to ECL – referred to as General ECLs – have been followed in Denmark, in 2008 (with apparently more legislation adopted this year), and just recently in Sweden.[3] The Green Paper refers to the Danish Ministry of Culture's approval of ECLs for "Start from the Beginning" (rewind to the beginning of an ongoing show except live sports) and "Last 24 Hours" (catch up service covering all shows broadcasted the last 48 hours except live sports and cinema films) on pages 52 and 53. The Danish approach is by definition relatively narrow. We also note that it is still too early to discern the impact of such ECLs on the marketplace but we are concerned about their potential to discourage the development of new on-demand services based on individual licensing which will enable us to meet consumer expectations. In particular, ECLs in the on-line environment weaken the value of content in the wider marketplace and diminish opportunities for those rights holders who seek to exercise their rights individually and thereby secure a fair return on their investments, which is in turn necessary to remunerate authors and performers as well as invest in future production.

Our principal concern is the impact of ECLs of online services (live and/or on-demand) which could undermine individual licensing; an established and viable norm for such services.

[2] See Article 5(5) of Directive 2001/29/EC, Article 13 TRIPs and Article 10 WIPO Copyright Treaty.

[3] We are aware of that ECL is a long standing mechanism in Norway and the Nordic region dating back to the 1960s. The main areas of use have been for licensing certain music rights, educational uses, uses by libraries/archives, reprography and cable retransmission. It is our understanding that ECL has been used in the past to license ancillary or secondary mass uses of works where it is, in practice, not possible to license individually.

Indeed, we believe there is a substantial risk that the application of ECLs in the on-line space will depress the value for creative works not only online but throughout its value chain. ECL tariffs effectively set what could be understood to be a market tariff "norm" which can undermine licensing terms for rights holders who choose to exercise their exclusive rights individually, undermining both the contractual freedom of licensors and licensees and, ultimately, the quality of consumer offerings.

EU and international law allow limitations of the exclusive rights in audiovisual rights holders in certain limited situations only. ECLs may not seem at first glance to diminish exclusive rights exercise where opt-out is possible, however, opt out rights do not cure the market impact problem described above. At a minimum they must be clear and easy to exercise as described in more detail below.

As a general legal matter, the MPA considers that the imposition of an ECL in the OTT space raises serious questions under EU and international law. At the EU level, nPVR and CUTV services, for example, require, licensing pursuant to the exclusive right of reproduction (Article 2 ECUD) and the making available right (Article 3 EUCD)[4]. The notion that an ECL would function to limit the ability of right holders to exercise not *one* but *two* exclusive rights raises serious questions for compliance with applicable copyright law including in particular the three-step test.[5]

Copies made for subscribers by CUTV and nPVR services, which obviously operate for commercial gain, are not covered by the private copy exception (Article 5(2)(b) EUCD). Indeed, such services generally operate as video on-demand platforms in competition with similar services that are licensed directly. As the Ministry is no doubt aware, the making available of content on VOD platforms is emerging as an important new form of primary exploitation in the audiovisual sector, which should be and can be licensed individually. OTT operators offer interactive services through internet platforms, and new technologies facilitate the individual licensing of the relevant rights in audiovisual works offered by these services. ECL is ill-suited and unnecessary in this environment. Such licensing risks dis-incentivising the creation of new content for on-demand services, to the detriment of rights holders, consumers and cultural diversity, and hampers the direct commercial relationship which should be fostered between rights holders and those with new distribution models that enable the evolution of the audiovisual marketplace.

The general ECL will, like the existing ECLs, be used to extend the effects of a licencing agreement to include non-represented right holders (RHs), many of which may be from other EEA Member States or third countries. Although RHs retain the right to be remunerated and the right to opt-out of the system, the ECLs are still a form of a limitation on what is normally the individual exercise of rights – and here we are considering two

---

[4] *ITV Broadcasting Limited et al v TVCatchup Limited*, Case C-607/11, Judgment of the Court (Fourth Chamber) of 7 March 2013. This recent judgment provides useful guidance on the concept of communication to the public in the context not only of internet retransmission, but also catch-up and nPVRs. See paras 32-34, 36 in particular.

[5] See Article 5(5) EUCD. Recital 18 EUCD and similar provisions in more recent Directives may permit the use of ECLs at national level but such mechanisms remain subject to the three-step test. See also, Report of the Panel of 15 June 2000, United States – Section 110(5) of the US Copyright Act, WT/DS160/R at §6.181.

important exclusive rights, namely reproduction and making available. This is especially problematic with respect to uses of audiovisual works that can be licensed individually.

While the Ministry clearly envisages non-represented RHs would retain the possibility to opt-out of the ECL, we remain concerned that the value of their content would be adversely affected. Moreover, we believe that to operate effectively, the Government must ensure that such licenses are offered only where individual licensing cannot viably be effectuated and where an effective opt-out mechanism for each license is in place. Opt out rights, if appropriate at all where individual licensing is possible, must be clear and widely understood, with terms and conditions for exercise of such opt out rights that are well-defined, transparent and easily invoked by rights holders. Otherwise, the opt out rights become illusory and the ECLs can impose undue hardship for affected rights holders – particularly those based in other countries who may find it difficult to monitor ECL activity. Moreover, in order for a CMO to avail itself of an ECL and license affected rights to a service operator on that basis, it should have Ministry authorization for each license agreement. That authorization should require that the CMO give notice in advance to all affected rights holders (whether represented or not) of the intended ECL to that operator, giving all relevant information about the license including the licensee and the requested tariff and other commercial terms. The CMO should not be able to license rights to any platform operator for any right holder who has given notice of opt out and should be required to expressly carve out of its license agreement all repertoire of any right holder who has provided opt out notice to the CMO. New digital technologies will enable the easy implementation of these important safeguards.

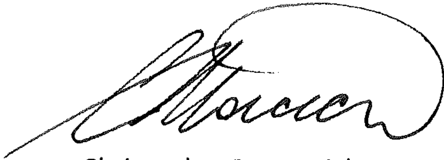
Our concerns about the impact on non-represented – particularly non-EEA – rights holders are not without foundation. In the past, the Ministry has taken the view that MPA represented right holders should be excluded from the distribution of remuneration for the legal copying of copyright protected works for personal use (see section 12 of the Copyright Act). The exclusion of U.S. rights holders even though their works represent a significant part of the works which are copied legally for personal use in Norway is completely unjustified and heightens our concern about how the proposed provision for a general ECL in Norway would function in practice.

As we understand it, the Ministry also proposes to introduce compulsory dispute resolution with regard to extended collective licenses covered by Section 13b of the Copyright Act (use of works in educational activities). While the scope of Section 13b is relatively narrow (and not referred to in the intervention mechanism established by Section 53b), we have some concerns about the implication that a rights holder might be forced to license the work on terms and conditions determined by the committee in situations where the parties have failed to reach a voluntary agreement. This approach is potentially inconsistent with the three-step test and indeed seems to be a de facto compulsory license. We share the view of the Ministry that it is vital to the fields of training and education to ensure appropriate access to copyright protected works and we recognize that this proposed mechanism will have limited or no impact on the audiovisual sector, at least in the short term. However, we must register our view that compulsory dispute resolution of this nature is not the best means to restore the purported imbalance between licensor and licensee.

While we have not been able due to time constraints to review and fully understand the proposed implementation of the Orphan Works Directive, we urge the Ministry to respect the carefully crafted compromise embodied in that instrument.

We appreciate this opportunity to share our views and remain at the Ministry's disposal to answer any questions or provide further information on the points raised above.

My best regards,



Christopher P. Marcich
President & Managing Director EMEA
MPA
Avenue des Arts 46
B-1000 Brussels

Cc: Mr. Bengt O. Hermansen, Acting Secretary General, Ministry of Culture;
Stanford McCoy, SVP Stanford McCoy, SVP & Regional Policy Director EMEA