



Ministry of Culture
Ms. Linda Cathrine Hofstad Helleland
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Brussels, 1 September 2016

RE: Ministry of Culture Green Paper: Proposed revision of the Norwegian Copyright Act

Dear Ms. Helleland:

The Motion Picture Association (MPA) is a trade association representing the interests of six major international producers and distributors of movies, home entertainment and television programs.¹ The members of the MPA have for a number of years produced many of the most popular movies in Norwegian cinemas and in the homes of the Norwegian people, and is thus an important contributor to the commercial cultural industry in Norway. MPA's members have many years of experience developing a sustainable industry based on private funding that delights, inspires and moves a large audience in Norway.

MPA appreciates the invitation to present its members views on the Green Paper issued as part of the revision of the Norwegian Copyright Act. MPA is aware that a number of stakeholders have urged the Ministry not to rush the legislative process and to ensure that both stakeholders and the legislator is given sufficient time to assess the proposal and its potential impact on the cultural industry. MPA shares this concern as some of the proposed legislation is potentially far-reaching and thus should be thoroughly considered before the legislation is adopted. Moreover, the EU Commission is expected to present a Communication as well as draft copyright legislation on 21 September 2016. It will be important for the Ministry to consult Norwegian stakeholders on the Communication and the draft legislation, and reconsider the proposals in the Green Paper in light of this initiative.

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.

Our main comments to the Green Paper are summarized below.

1. General concerns

As a general concern, MPA notes that the Green Paper as a whole seem to imply a need to strengthen the current position of original authors and performers. There is little or no substantiation in the Green Paper that there is a need for such strengthening, and more importantly, there is little or no assessment of the possible negative impact on the sector as a whole including in particular with respect to investment in content creation and distribution.

MPA would like to emphasize that possible negative impact on investments in content creation in particular will hurt the original authors and performers as well most other stakeholders in the creative industry. MPA urges the Ministry to analyze the possible negative impacts of the proposed changes before presenting a bill to the Parliament.

2. Communication of works in classrooms

The Green Paper proposes to maintain the stance that the use of works in "classrooms" is private and does not implicate copyright.

We are concerned that the provision is general and apparently not delimited at all, for example, "class" is not defined. In addition, given that teaching and education these days are not necessarily confined to a classroom, we are concerned that this provision could be used to enable access to works in the context of teaching of education outside physical classrooms.

The MPA is of the view that it is important that this provision be clarified and fleshed out, so that it cannot be used for the provision of access to works in a general teaching and education context, where specific licenses exist. We also suggest that the Norwegian government take into consideration the fact that the Commission will likely propose legislation in this area.

3. Linking

MPA supports the Ministry's position that the issue of linking should not be subject to specific regulation at the time being. Indeed, further development of EU law should be awaited including in particular pending decisions by the Court of Justice of the EU. We expect that the Court will confirm that linking to infringing content is in fact communication to the public as is confirmed by recent Norwegian case law, cf. TOSLO-2016-72899 and TOSLO-2015-67093.

4. Illegal streaming

When it comes to the act of streaming content from an illegal source the legislation has been unclear and has thus amongst many in the general public created the impression that streaming – due to the fact that only temporary and not fixed copies of the work are produced – is legal. This has led to an incomprehensible distinction between downloading and streaming without the rightholders' consent, both of which 1) undermines legal services, 2) causes the rightholders great loss, and 3) threatens the livelihood of many in the creative industry.

Clear legislation that prohibits streaming of creative content from illegal source is necessary in order to maintain respect for the legislation and to help shape an attitude amongst users based on respects for the fundamental rights of the author. The focus here is not on end user liability but rather the need to enable action against intermediaries who are best placed to bring infringing activities to an end (see Article 8(3) of Directive 2001/29/EC which requires that the intermediaries services be used to infringe (i.e., an underlying infringement). MPA and its members therefore fully support the Ministry proposal to clarify that streaming creative content from illegal sources is in fact illegal.

The proposed legalisation set out in the Green Paper, sends an important signal to the general public. However, MPA and its members are of the view that it is important that the requirements are as clear as possible in order to educate a greater audience. Taken this into account, we believe that the requirements should be made even more clear-cut, as is the case for the current Section 12 fourth paragraph (proposed Section 4-3) which applies to downloading of content from illegal sources.

We believe that the message will come across in an even clearer and more convincing manner if the requirements are changed so that it is sufficient that the content has been *unlawfully* communicated to the public instead of *evidently unlawfully* communicated to the public ("som åpentbart er gjort tilgjengelig for allmennheten"). We understand the Ministry's reasoning that only the intentional and notorious individuals should be covered by the proposed legislation. However, we believe this concern is addressed by the requirement of willful breach ("forsett") which implies that individuals acting in good faith will not be held responsible for penalties or compensation.

On the same note, MPA is of the view that it should be sufficient that the act of streaming content from an illegal source is suitable for damaging the author's economic interest. We believe the message that streaming creative content from an illegal source is unacceptable will be more effectively communicated if *substantial extent* ("vesentlig grad") is left out of the wording.

MPA and its members believe that clear cut requirements that leave no doubt about the illegality of streaming from illegal sources, is the preferable solution. However, if the Ministry is of the view that the requirements should be kept as is, we urge the Ministry to consider including not only willful, but also gross negligent breaches. This will strengthen the message that streaming creative content from illegal sources is unacceptable, too.

5. Amendment to the Private Copy Exception

5.1. External Assistance

The Green Paper proposes to remove the prohibition on external assistance ("fremmed hjelp") for the purpose of the private copy exception in respect of copies made of music and audiovisual works.

The Proposal requests the views of stakeholders in terms of the practical consequences of the proposed amendment (page 128).

The Motion Picture Association is concerned that the amendment of the exception such as to permit external assistance in the making of private copies would have highly negative consequences not only for rightholders but also ultimately consumers. This amendment would have the effect of enabling digital distribution platforms offering network or personal video recording services to invoke the exception and thereby avoid negotiating licenses, clearing the necessary rights and paying license fees. Instead remuneration will be provided for through collective management organisations; thereby removing the possibility for rightholders to negotiate the terms for distribution of their content at arm's length. Such a limitation on the exercise of exclusive right amounts to a conflict with the manner in which rightholders normally derive economic value from their works. It devalues the exclusive rights which form the basis for investment in the audiovisual sector.

The proliferation of cloud services has given rise to a multitude of new opportunities for the audiovisual sector to license new services delivering content directly; thereby enabling them to invest in and attract invest for new content. This in turn has benefitted these new services as well as consumers.

The issue of whether the private copy exception extends to the cloud has not been directly addressed by the Court of Justice of the European Union. However, it is currently before the Court in Case C-265/16 VCAST. Before proceeding with legislative reform on this matter, it would be preferable to consider the eventual judgment in that case.

In addition, while the CJEU has not addressed the matter, the European Commission entrusted former Commissioner António Vitorino to consider private copying levies, and in his Recommendations, Vitorino noted:

"These complex new services have in common that they need to be based on licensing agreements with rightholders, as only very few elements of the service are potentially covered by an exception. The numerous examples of licensed services existing today prove that such licensing agreements are a reality in the market, benefitting consumers, rightholders and service providers alike.

Some of the operators in the market may attempt to broaden the interpretation of the private copying exception, with a view to bypassing the necessity to conclude licences with rightholders. In this context, one should keep in mind that the private copying exception is limited to the private sphere, and that its intended purpose was never to serve as a basis for the commercial activities of third parties. Such attempts are therefore not only to the detriment of rightholders and legal offers based on licence agreements, but also legally questionable and should, in my view, not be supported. Moreover, they could bring along, as a logical counterpart, more and higher levies."²

The MPA agrees. We believe that the private copy exception should not be capable of being invoked by commercial actors to avoid acquiring licenses, especially in the online context. A levy system is also not appropriate for these new services. Instead, the delivery of content to consumers by cloud, recording and storage services must take place on the basis of exclusive rights, contractual freedom and direct licensing.

² Recommendations resulting from the Mediation on Private Copying and Reprography Levies, 31 January 2013

This is particularly important in the online context, including cloud recording and storage, as the internet has become the most important means of delivery of content. Jeopardising rightholders' ability to effectively exploit the licensing of content in this context means jeopardising the future of financing and producing content. It also creates the possibility for pirate websites to seek to invoke exceptions related to levy systems.

Further, as the European Commission has made clear in a letter to the Italian Government, on the extension by Italy of the private copy exception to the cloud, network/personal video recording services cannot be considered private copying under Directive 2001/29. It is thus clear that to ensure compliance with Directive 2001/29, it must be made clear that the removal of the prohibition on external assistance does not extend the private copy exception to operators and/or users of network/personal video recording services.

The proposed amendment concerning external assistance would undermine the ability of rightholders to effectively license this crucial means of exploitation and stunt the development of platform offerings. The only real beneficiaries of such an extension are collective management organisations. In this context, we note the lack of compensation in Norway for rightholders outside the European Economic Area.

Indeed, a situation whereby rightholders cannot directly license their content while at the same time do not receive fair compensation for its use, is clearly in contravention of Directive 2001/29 and international law, in particular the three-step test. In effect, it amounts to an expropriation of property.

Finally, we note that such services invariably also implicate the making available right.

5.2. Private Professional Use

We note that the Ministry has made some statements going to the assessment of whether the use by an employee of copyright material is a reproduction for private use. Currently the law recognises that a license agreement covering use by employees is a relevant factor in considering whether the use falls within the private copy exception. The Green Paper appears to indicate that it wishes to revise this position. The MPA is not at all clear on the justification for revisiting this position. That a particular use is covered by a license is a further indication that such an exploitation is covered by the exclusive right – it is capable of being licensed and rightholders are able to derive economic value from that licensing. Any limitation on that capacity would fall afoul of the second step of the three-step test in Article 5(5) of Directive 2001/29/EC and Article 13 TRIPs. We are aware that in the Green Paper, the Ministry refers to the fact that many employees only have access to computers at work (not home) and therefore should not be put in an unequal position as against persons who can make private copies at home with their computers. We fail to see how this is at all a relevant consideration given the different contexts.

6. Exhaustion of rights

MPA and its members support the Ministry in that there should be no exhaustion of rights to digital transfers. Any change in this regard would violate international and EU law.

7. Quotations

MPA and its members support the Ministry in that the current regulation of quotations should continue. MPA agrees that the general courts are well suited to weigh and balance freedom of speech against the interests of rightholders and other interests such as privacy. In general, MPA and its members are of the view that the three step test, set out in among others the Berne Convention, sets important boundaries that don't leave room for expansions of the current regulation of quotations. It should also be remembered that copyright is itself also an important driver for free speech that provides economic incentive to create and disseminate works.

8. Extended Collective License Provision for Audio Visual Works

The Green Paper proposes a new and technology neutral extended collective license provision for the clearing of rights for audio visual productions and radio transmissions, replacing the existing provisions in §§ 30, 32 and 34 on extended collective licenses ("ECL"). The revision is necessary, according to the Green Paper, to ensure that any making available of works to the public, regardless of the technology used, is caught under the provision (page 199).

Further to EU and international copyright law, the Motion Picture Association notes that direct licensing is generally the default model for all modes of exploitation of copyright content with only rare exceptions countenanced by EU and international norms. As such, we welcome the recognition in the Green Paper that direct licensing should remain the rule (pages 199 and 201). We note that Recital 18 of Directive 2001/29/EC does not provide Member States with carte blanche to adopt all manner of ECLs; these mechanisms must still operate in compliance with EU and international norms.

We are concerned that the revised provision on extended collective licensing will operate in practice to the detriment of rightholders as well as consumers. We note that the imposition of a wider ECL provision (see page 202), covering new technology and means of delivery, may have a negative impact on the value of creative content, in particular given that commercial terms are not yet fully established in respect of new technology and new means of delivery. Direct licensing is the prevailing model for the exploitation of content for a variety of new over the top services including nPVR and catch-up. By introducing a general ECL instead of individual licensing at an early stage, there is a risk of jeopardising the opportunity to explore whether a market approach can work and whether the market for on-line services could generate more revenue for producers and other rightholders than collective licensing, thereby safeguarding future investment in content.

At any rate, should an ECL be introduced, it must, unlike the proposed provision, be limited to situations where individual licensing for all practical purposes is impossible and not be used in situations where individual licensing is simply impracticable. It must be made clear that the conditions for using the ECL are not met where individual licensing has been shown to be possible.

In addition, it is important to safeguard that extended collective license agreements are not authorised in markets that are about to be established or that already exist. In such cases, the ECL enters into competition with either proposed or actual commercial terms. All stakeholders must be given the opportunity to comment on intended licenses prior to

authorisation. As such, the Motion Picture Association is of the view that the provision on the conditions of imposing and ECL (§36) ought to be amended such as to require notification to affected rightholders, insofar as is practicable, of a proposed ECL. This is particularly important for foreign rightholders.

Finally if implemented an ECL must operate in a manner consistent with EU and international norms, including the three-step test. As such, we welcome the inclusion of the opt-out provision and the recognition in that provision that works must not be included where there is particular reason to presume that the relevant rightholder would be opposed to such use (page 201). We emphasise that the exercise of the opt-out right must be clear and straightforward. As you know, there must be no undue formalities imposed on the exercise of exclusive rights under international copyright law. We would welcome an amendment to §36 to clarify that rightholders can exercise a blanket opt out of all works controlled by them from all future ECLs by means of notifying the Ministry of Culture (or other appropriate entity) who can maintain a list of rightholders who have opted out.

9. Organisations' right to bring legal actions before courts

The Ministry request feedback on whether organisations authorised under the general ECL regime should be able to initiate legal proceedings on behalf of rightholders. MPA and its members strongly oppose this proposition. The combination of lack of notification when organisations are approved under the general ECL and a general right to initiate legal proceedings, would imply that legal proceedings could be initiated on behalf of rightholders with no knowledge of the organisation and thus no possibility to opt out of the ECL regime or legal action.

10. Transfer of rights

We note that a number of unwelcome amendments are proposed in the area of transfer of rights. In terms of codifying the principle of specialty, we see no need to do so. In terms of introducing a statutory right for authors to terminate certain agreements if the transferred rights are not exercised. First, we note that the wording *use* is not clear and neither is clarified in the Green Paper. Furthermore there may well be perfectly reasonable reasons why a rightholder does not exercise acquired rights within a certain period of time. At any rate, the agreement will have provided consideration (most likely remuneration) for the author regardless of whether the rights are exercised or not. Moreover, as noted above, it must be clear that any legislation in this area recognises – and indeed incentivises – collective bargaining agreements (CBAs). Where CBAs are in place, such rules should not apply as remuneration and other forms of protection are ensured.

11. Equitable Remuneration

In terms of equitable remuneration for authors for transferral of rights, we understand that the Ministry wishes to amend the current law, and has proposed a general provision in the Green Paper. As the Ministry knows, this is an area in which the European Commission is considering action as part of its Digital Single Market agenda – indeed, the Government cites a DSM document in the Green Paper. The MPA is of the view, therefore, that it would be

preferable for the Ministry to wait for EU/EEA-level action before moving ahead with amendments itself.

Should the Ministry nevertheless move ahead with its proposed action, we wish to highlight the following:

- Any action to limit contractual freedom, including in particular creating a statutory remuneration right, would undermine the value of copyright by fuelling the often-echoed misconception that copyright is a mere right to remuneration. We note that the vast majority of works produced and distributed by our Member Companies are "covered" by so-called collective bargaining agreements ("CBAs") with unions representing directors, writers and performers. These CBAs are worldwide in scope and provide for the direct payment of residuals (or royalties) for legal secondary exploitations including in Norway. Any legislation in this area must recognise the operation of such mechanisms as a legitimate means of ensuring equitable remuneration. There is no need for a right to equitable remuneration where agreements are negotiated collectively.
- Additionally, in many Member States, "art-house movies" and other independent films, but also bigger budget productions are financed, inter alia, through accruals. This refers to agreements made by authors and performers to accept lesser remuneration than they might otherwise command under "normal" circumstances in return for various other (sometime intangible) benefits, such as the opportunity to be associated with a desirable screen-play, or to support an upcoming director or to have the chance for a quality role that might lead to further roles or artistic success or to be given a chance to direct for the first time.
- Finally, MPA is concerned that a general right to equitable remuneration may undermine predictability which is likely to have a negative impact on investments in content creation. In particular, this would be the case if a demand for equitable remuneration could be addressed towards others than the contracting party.

Prohibition of certain clauses could thus undermine established practices in the film sector, which are routinely agreed by authors, performers, directors and producers alike. These practices actually enhance artistic production and creativity. Freedom of contract and personal autonomy should be valued most highly in this respect.

12. Agreements regarding the production of motion pictures

The Ministry have requested feedback on whether existing exemptions from the current Section 39f should be removed, which would entail a broadening of the scope of the provision. The provision remains, however, less suitable for the kinds of works that are currently exempt, and MPA and its members thus recommend that the exemptions are kept as is.

13. Enforcement

13.1. General

MPA and its members are pleased to see that the Ministry proposes a strengthening of the enforcement of copyright in the same manner as has previously been done for the industrial property rights in 2013. The penal and indemnity provisions of the Copyright Act are

important signals to society about the seriousness of copyright infringement. It also determines the risk taken when breaking the law and is thus an important means of discouraging copyright infringement in general.

13.2. Criminal sanctions

The Ministry requests feedback on certain proposed changes to the wording of the current Section 54, for instance on the need to keep the clarifications in *litra c-e*. MPA and its members consider these provisions as important clarifications that should be kept in the new legislation. The case law from the European Court of Justice regarding importation of infringing products is limited and thus it would be useful to keep *litra c* and *d* for educational purposes.

Litra e is of particular importance to rightholders outside of EEA such as MPA's members. Although distribution of music is predominantly online, the same cannot yet be said for movies. Movies are still distributed as DVDs and Blu-rays, and where such movies are being launched e.g. in the US before in Europe, the provision remains important to rightholders.

13.3. Compensation

MPA and its members support the Ministry's proposal that in cases of wilful or negligent infringement the rightholder should be able to claim the most favourable of either (1) compensation corresponding to a reasonable license fee for the exploitation, as well as damages for any loss caused by the infringement that would not have arisen in connection with licensing, (2) damages for loss resulting from the infringement or (3) compensation corresponding to the gain obtained due to the infringement. Furthermore, we also support that for infringements conducted in good faith the rightholder may, to the extent it is not unfair, claim equitable remuneration or net profits of the use in question.

MPA and its members also support that the rightholder may claim compensation corresponding to twice as much as a reasonable license fee for the use in question if the infringer acts wilfully or in gross negligence. There seem to be an error in the wording of the proposed new Section 9-3 (formerly Section 55) second paragraph. We assume that the rightholder won't have to choose between twice as much as a reasonable license fee or compensation for non-economic damages. We believe the correct wording should be *and* ("og") instead of *or* ("eller"), as these two grounds cover compensation for different kinds of damage.

13.4. Permission to use

MPA and its members urge the Ministry to reconsider the proposed general provision that enable courts to issue permission to use works (the proposed new Section 9-5). We believe such a general provision would limit the authors' exclusive rights and thus have to comply with EU and international law.

Furthermore, it should be emphasised that an author's exercise of his or her exclusive rights does not hinder the productivity or the flow of information in today's society, as may be the case for other industrial rights. First, copyright law is already limited in many aspects in order not to inhibit important aspects of public interaction and debate (e.g. provisions

regarding quotations or that laws and judgements are except from copyright). Secondly, copyright law does not hinder the creation of new works based on the same ideas or information as an existing work. The situation is therefore not comparable to many of the industrial property rights.

14. The prohibition of use of a title that may be confused with the title of an existing work

The Ministry asks for feedback regarding the need for the existing Section 46. MPA and its members are of the view that the provision is an important part of the protection of works and that it reduces the potential for disputes regarding the use of titles. We therefore request that the provision should be continued in the new Copyright Act as proposed by the Ministry.

15. Legal venue for infringements lawsuits

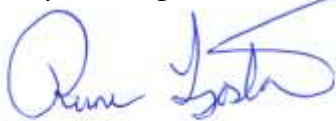
MPA and its members support the Ministry in that the legal venue for infringements lawsuits should be set to Oslo District Court. This will increase the number of cases and thus the experience with copyright related matters among the judges at Oslo District Court. We believe the result will be increased quality and efficiency in these matters.

16. Closing remarks

MPA and its members appreciate this opportunity to share our main views and concerns regarding the proposed new Copyright Act and we remain at the Ministry's disposal to answer any questions or provide further information on the points raised above.

We believe that further dialogue between the Ministry and relevant stakeholders is key to ensure that the new legislation doesn't negatively impact investments in content creation and distribution. We therefore request a meeting with representatives of the Ministry at your earliest convenience to discuss our concerns.

My best regards,



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