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CALL FOR COMMENTS TO THE GREEN PAPER ON COPYRIGHT IN THE KNOWLEDGE ECONOMY

Norwaco is a copyright management organisation in the audiovisual field representing more than 37.000 rights holders. Norwaco licences uses of these works, such as audiovisual retransmission rights or recording and use of broadcasts by educational establishments.

We welcome the opportunity offered to give our views on the very important correlation between copyright as a proprietary good and the public interest in accessing knowledge.

We agree with the drafting authors under point 1.2 of the Green Paper that "*A high level of copyright protection is crucial for intellectual creation. Copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large.*" The statement which paraphrases recital 9 of Directive 2001/28/EC (the Copyright Directive)[1] has omitted to mention performers and we hope therefore that in the later codification this is amended.

Intellectual property recognised as an integral part of property is the ABC of the development of arts and sciences in any society; securing authors, inventors and others involved in the creative process exclusive rights to their works, discoveries, trade signs, recordings, performances. The remuneration ascribed to these rights is fundamental for maintaining and incentivizing innovation and thereby expanding the value of the knowledge economy.

Intellectual property law plays a fundamental role in this type of economy as a normative tool governing the relations that arise from the interaction between users and providers of knowledge. It is an economy which was analysed in a study published by United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2005 that gives some indications of the value of cultural goods and services in international trade.[2]

Word-wide exchanges in core cultural goods (i.e., printed books, sound recordings, pictures, maps) in 2002 amounted to US$ 60 billion or €56.7 billion, based on customs data. The 15

[1] Official Journal L 167 , 22/06/2001 p. 10-19.
[2] International flows of selected cultural goods and services, 1994-2003. Defining and capturing the flows of global cultural trade, UNESCO Institute for Statistics, available at <www.uis.unesco.org/template/pdf/cscl/Intl Flows_EN.pdf>

member states of the European Union, before enlargement, had a market share of ca. 52% of all exporting countries comprised in the study.

Trade in cultural services (audiovisual, theatres and copyrights) in 2002 was also considerable. European societies within CISAC, alone collected almost US$ 3.8 billion or €3.6 billion in copyright royalties, which represented 57% of the world's total.
In 2003, the motion picture industry generated US$ 21.8 billion or €24.7 billion in revenues from cinema ticket sales across the world while the secondary exploitation of movie features in the form of different types of licensing, videos and DVD generated revenues of US$ 55 or €62.3 billion.

At the same time the data revealed an important EU trade deficit in exports of television programs where North American undertakings in 2000 earned ca. 4.4 US$ billion or €4 billion from sales of broadcasts in the European Union compared to a meagre 275 US$ million or €254 million gained by European companies in North America during the same year.

A report published by the European Commission in 2003[3] showed that the development of a copyright industry contributed to more than €1.2 trillion to the economy of the European Union and produced value added of €450 billion, employing 5.2 million persons in 2000.

These figures presumably would have been considerably smaller without a robust copyright regime. Relevant data such as that mentioned above should backdrop any regulation efforts in the European Union.

We wish to emphasize that Directive 2001/28/EC (the Copyright Directive)[4] currently affords a solid framework for the purpose of regulating the public dissemination of copyright goods in a knowledge economy.

The European Commission, the European Parliament and the European Council in 2001 made a set of policy choices reflected in the wording of the Directive which deliberately weighed any opposing interests and left member states a certain margin of manoeuvrability in their implementation, pursuing to the principle of subsidiarity.[5]

The consciously broad language favoured therein enabled in Norway an implementation of article 5 of the Directive which did not call for a major legal reform since those policy choices had previously been considered and regulated in the Norwegian Copyright Act.[6]

We would hence like to say a few words about the current Norwegian legislation for it deals, in our opinion, with several points raised in the Green Paper.

[3] http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf
[4] Official Journal L 167, 22/06/2001 p.10-19.
[5] Article 5 of the EC Treaty.
[6] Norway has implemented the Directive pursuing to the Agreement on the European Economic Agreement concluded between Norway, Iceland and Lichtenstein, on one side, and the member states of the European Union on the other.

Norway's Copyright Act has established a system of "*extended collective agreement*" for the benefit of the public and rights-holders in areas related to education and research, in general, and archives, museums and libraries, specially, which is adapted to modern times.

The said system, alluded to in the Green Paper, is a legal construction which over the years has become an indispensable tool for clearing intellectual property rights for mass uses where individual licensing is burdensome, ineffective and expensive.

Organisations which represent a considerable number of rights-holders to those works used in Norway can conclude extended collective agreements provided there is a legal precept in the Copyright Act foreseeing this possibility. The legal concept differs from a compulsory licence insofar the overriding principle remains the freedom of contract between the parties.

The agreement binds right holders who are not members of the signatory organisation, which in return has a legal duty to treat all rights holders equally in compliance with national and international law. This type of licensing permits a rapid, economic and unhindered usage of copyright cultural goods and services.

The Norwegian legislator has in this regard provided for extended collective agreement provisions in the Copyright Act[7] as a means of drawing an equilibrium line between interests akin to copyright and those linked to the public's undisputed right to gain access to education.

General Issues (Questions 1-5)

Every nation is intrinsically attached to its legal tradition. Contracts more often than not mirror such tradition. Recommending solutions based on certain customs or uses does not automatically entail that stakeholders will adopt them as these may prefer managing their interests in accordance with the rules they are familiar with. We welcome, at the same time, the conducting of independent studies on the use of contract practices over time and their effects vis à vis copyright owners and users.

Aside this, we think that encouraging the utilization of soft law as regulatory vehicle to address copyright exceptions and limitations in not the appropriate option. Exceptions and limitations are per se encroachments in the property rights of authors, performers and producers.

The prevailing principle, enshrined in the EC Community's *acquis*, should remain the freedom of contract within the boundaries determined by law. There is not an immediate need to curtail copyrights due to technological changes and new uses. Practices and contracts change at the same pace as technology evolves without need for further public regulation.

At the same time we should emphasize that the *exhaustive* character of the list enumerated in article 5 of the Directive is the most adequate approach to dealing with exceptions or limitations, and a fundamental method for achieving a harmonised copyright legislation across the European Economic Area (EEA) countries.

[7] The provisions are discussed below in our answers to the consultation.

Limitations or exceptions for libraries and archives (Questions 6-8)
As stated earlier the current legal framework is most suitable for handling these concerns because they leave sufficient leeway to member states to adapt the law and take due consideration of the policy alternatives at stake in the national law.

Efforts here should focus on ensuring that a harmonised implementation of the Directive has taken place across Europe. We are confident that available mechanisms in the Community law, such as Article 220 of the EC Treaty, provide a firm legal basis for guaranteeing that copyright related matters are interpreted consistently in the 27 member states.

To illustrate the foregoing it merits some attention to point out that in Norway archives, museums and public libraries benefit from a legal licence which provides them with a right to reproduce, in the same or in a different format, a few copies of protected works for the sole purpose of preservation.[8] The law opens for digitising for preservation, only when the relevant public institutions are not able to acquire a digital sample of the protected work through normal sale outlets or directly from the right owners.

Furthermore, these establishments can, with an extended collective licence model, reproduce, irrespective of the technique, copies of published works they have in their collections and make them available to the public. Home users may, on this basis, access copyrighted content online.[9]

Also broadcasters, with an interest in offering a highly educational audiovisual service to the public, can benefit from an archive provision, following the same regulatory pattern. It gives them the right to rebroadcast and make available on-demand documentaries, films and other protected material that they initially broadcasted before 1997 which the said broadcasters produced or co-produced and as long as they possess the relevant recordings in their archives.

The audiovisual works contained in those broadcasts have a historical value and are considered to be part of the national cultural heritage.[10] Rights-holders with proprietary interests in the broadcast content have the opportunity to prohibit this type of use in respect of specific works or material.

[8] Section 16 of the Copyright Act and section 1-3 of Regulation 23/11/2007 No. 1281.
[9] Section 16a.
[10] Section 32.

Databases (Question 9)
We believe that the existing legal regime is satisfactory for resolving the underlined issues.

The scanning of literary and artistic works for digitizing purposes is a reproduction which may, subject to the conditions laid by article 9 (2) of the Berne Convention, benefit from limitations and exceptions. At the same time any indexation of information akin to making a catalogue has to comply with Directive 96/9/EC (Database Directive)[11], especially articles 5 and 7.

Orphan works (10-12)
We esteem greatly current efforts made in the framework of the i2010 digital libraries initiative endorsed by the EC Commission. We agree that culture in a historical perspective is a common good that the public at large must have access to as a step towards making the XXI century the second Enlightenment.

Intellectual property rules governing the delicate subject of orphan works should be the object of debate and negotiation in international, regional and national fora, as it could affect widely accepted provisions provided for in international treaties and conventions, particularly, articles 3 and 7 of the Berne Convention.

The extended collective agreement model solves in national law the problem of orphan works, to the extent that certain rights-holders cannot be identified, since the effects of the contract automatically expand to and benefit non-parties. There would thus not be a need for authorisation from non-localizable rights holders. Furthermore, a rights holder making an unexpected *rentrée* may claim any remuneration due to the relevant collecting society.

We would like to draw the attention to the fact that alternative suggestions which rely on a compulsory registration of works would *de facto* introduce a new requirement currently inexistent in international intellectual property law.

Limitations or exceptions to the benefit of people with a disability (15-17)
Any person with physical disabilities hindering them to enjoy works in their normal marketed form should have a right to access those works.

The particular legislative decision should, however, be taken at a national level as we think the EC internal market is not really affected in any considerable degree. It is our opinion that the individual beneficiaries of the exception or limitation should not be the ones who bear the costs of adapting the protected works, but third parties who undertake the conversion of works into an accessible format.

In Norway, for instance, people with disabilities benefit from a limitation in the Copyright Act that warrants, for ends that are not commercial, the mechanical copying of books, scientific texts and musical works, and, for special types of works also the digital (i.e. audio books that may be wired

[11] OJ L 77, 27/03/1996 p. 20-28

to the user by internet), in order to adapt them to the needs of blind people or any other person with a disability impeding him to enjoy the work in a usual manner (for instance dyslexics).[12] Rights-holders can also choose the extended collective licensing model to allow the copying, analogue and digital, of motion picture films, silent or not, and the recording of broadcasts in order to adapt them to the needs of dysfunctional people.[13]

Dissemination for teaching and research (19-23)

While we agree with the Green Paper that "*different treatment of the same act in different Member States may lead to legal uncertainty with regard to what is permitted under the exception*"[14] we think that the Copyright Directive, interpreted consistently, adequately tackles with any irrupting matters.

We do encourage interested parties to sit around the table and enter into licensing agreements. There are today many examples of licensing of protected works for research purposes.[15]

When it comes to the issue of granting exceptions or limitations for the purpose of research we would like to reiterate that these should be in conformity with the three-step doctrine previously cited.

Universities gain commercial advantage by trading the knowledge they create, through borrowing bits of information from others, and therefore do not require the benefit of a limitation recognised in law.[16] The normal practice today is that universities licence the use of protected works from rights holders.

In Norway rights-holders and educational institutions have the possibility of licensing through an extended agreement the analogue and digital reproduction of copies of published works, and their subsequent communication for use in educational activities. The licence may also authorise the transmission of the recordings through the institution's own network to an end-user located anywhere in Norway as in distant education.[17]

In practice this means that schools and other educational establishments do not need worrying about infringing copyright laws. Rights-holders, on the other hand, are remunerated financially and rewarded intellectually by the public dissemination of their work to students and researchers.

[12] Sections 17 and 17a of the Copyright Act. The State pays remuneration to rights holders pursuing to section 17a.
[13] Section 17b. The Ministry of Culture has not yet provided for a specific Regulation concerning this section.
[14] Page 17 of the Green Paper.
[15] See <//x-port.uio.no/V/?func=find-ej-1> as example. Students and researchers within the University of Oslo can access all these scientific publications on the internet for free all the time the University has subscribed to the relevant publications.
[16] Oxford University cashed in 453 million sterling pounds in revenues in the year ended 31 March 2007 from Oxford University Press. See page 36 of the financial statements available at http://tiny.cc/OUP.
[17] Section 13b of the Copyright Act.

If in any event an agreement is not concluded, the parties can refer disputes to Mediation and, in case this fails, to a Commission appointed by the Ministry of Culture which may, in a binding manner, determine the conditions for use. This represents a swift resolution mechanism which in our opinion rebuts the *"legal uncertainty"* argument pointed out on page 16 of the Green Paper.

User created content (Questions 24-25)

The "*obligation to clear rights before any transformative content can be made available" as mentioned in the Green Paper"*[18] is in our opinion a natural consequence of Copyright laws. Experience shows that any such *"barriers"* may easily be overcome when stakeholders discuss the controverted points in good faith.[19]

Adopting new provisions providing for a *numerus clausus* list of permissible and forbidden acts may well impinge on people's creativity. Stakeholders often establish communication channels informing users of the practical sides of copyright.[20]

Particularly, as regards user-created content our view is that practices that become customary in time such as sampling in Hip Hop music mentioned in the paper are already regulated in copyright laws, i.e. when you adapt a work you need the authorisation of the copyright owner.

Copyright grants exclusive rights to promote creation and innovation. The recognition of a specific exception for user-created content online such as material disseminated through YouTube would in our opinion entail bypassing copyright law without any reasonable ground.

Yet we support the *mis-en-scene* of awareness campaigns informing internet creators who express ideas in the web that their contributions to public culture may enjoy copyright protection if they fulfil the criteria required by Copyright law.

Respectfully submitted,

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C.c.: Ministry of Culture

[18] Page 19.

[19] See for instance the deal reached by MySpace with Viacom Inc. owned MTV Networks where the parties will share add revenues from clips of the network's shows that users upload to MySpace. The news is available at http://tiny.cc/87ofc.

[20] The Norwegian organisation Clara has set up an online information centre for copyright and clearance. See www.clara.no. Commercial users could finance the costs of information campaigns telling their users what they can or cannot upload in their webpages.