



Ministry of Culture
Mr. Abid Q. Raja
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P.O. Box 8030 Dep
NO-0030 Oslo, Norway

Brussels, 7 February 2020

RE: Ministry of Culture Green Paper: implementation of Directive 2014/26/EU and other matters

Dear Mr. Raja:

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 and distributed many of the most popular films and television programmes in Norwegian cinemas and in the homes of the Norwegian people, and is thus an important contributor to the 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 share its members' views on the Green Paper issued by the Ministry of Culture regarding the implementation of Directive 2014/26/EU and other matters. Our main comments on the Green Paper are summarized below.

1. General concerns

By way of brief introductory comments, the MPA notes that where producers of copyright works can rely on strong exclusive rights and have freedom of action in the market; efficient licensing solutions follow. The consolidation of rights in the hands of the producer is crucial to the effective financing, production and distribution of audiovisual works. In introducing legislation allowing for extended collective licensing or other limitations on the individual exercise of rights, European and international norms require that such mechanisms do not enter into economic competition with direct licensing. ECLs must be limited to circumstances

¹ Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc.

where direct licensing does not work. In addition, it is crucial that ECLs provide appropriate safeguards, in particular an effective opt-out mechanism that can be exercised without undue administrative burden and that actually works in practice. In this regard, we would like to reiterate the importance of strict adherence to the key principles of the Directive including in particular the right of rightholders to choose how they wish to exercise their rights and that CMOs must act in the best interests of rightholders.

2. The proposed implementation of Directive 2014/26/EU

2.1. Management of rights revenue

Articles 11-13 of the Directive are implemented in the new Act Section 15-21. The implementation of Article 12.4 of the Directive states that any social, cultural or educational services funded through deductions shall be provided on a fair basis to rightholders. However, the Ministry has left out the following clarification in the Directive: "*in particular as regards access to, and, the extent of, those services.*" The MPA would like to emphasise that non-discriminatory access to those services must not be limited to Norwegian or EEA rightholders, but comprise all rightholders from countries that are party to international copyright and related rights treaties.

Articles 13.4 and 13.5 of the Directive state that the general assembly may decide on the use of non-distributable funds, i.e. amounts that still cannot be distributed after three years, e.g. because the rightholder is unknown. This is implemented in Section 20.4 of the proposed Act. The Ministry does not mention, however, that this is "*without prejudice to the right of rightholders to claim such amounts from the collective management organisations in accordance with the laws of the Member States on the statute of limitation of claims*", cf. the clarification in Article 13.5 of the Directive. The MPA requests that the Ministry clarifies that the rightholder also after three years can put forward a claim as long as this is allowed under the statute of limitation of claims.

2.2. Relations with users

The Ministry suggests implementation of Articles 16 and 17 of the Directive in Section 25-29 of the proposed Act. The Ministry acknowledges that one of the purposes with these rules is to strengthen the position of users vis-à-vis Collective Management Organisations (CMOs), since CMOs often have a dominant market position. Nevertheless, the Ministry does not consider the provisions to notably affect the principle of contractual freedom, i.a. because the parties will also in the future negotiate terms of use and because the Directive does not impose a duty to negotiate on either party. Even if that is true, the MPA request that the Ministry makes it clear that the Act will operate to ensure a balance given the position of CMOs.

3. Proposed changes to the ECL approval mechanism

3.1. The MPA encourages the Ministry to proceed with alternative I

Reference is made to Section 2.12.4 of the Green Paper. In this Section, the Ministry discusses the approval scheme set out in Section 63.3 of the Norwegian Copyright Act for organisations that can enter into extended collective licensing ("ECL") agreements. The Ministry asks for

stakeholders' views on two alternative proposals. The MPA members consider this matter to be of great importance and appreciate the opportunity to present their views.

The MPA members encourage the Ministry to proceed with alternative I, i.e., to keep the requirement of prior approval of organisations that can enter into ECL agreements. The MPA members agree with the Ministry that this requirement increases predictability and reduces the risk of disputes related to ECL agreements and the organisations competent to enter into such agreements. However, the main reason for the MPA members' position is that this requirement is an important safeguard against ECLs which do not respect the pre-conditions and safeguards for the conclusion of agreements with extended effect and therefore would have many negative effects on the marketplace.

In the audiovisual sector, direct licensing is generally the default model for all modes of exploitation of copyright protected works, with only rare exceptions permitted under EU law and international norms, including the three-step test. A key reason for this is that direct licensing is the only way to establish a market price for individual works. A collective approach, which treats all works the same, will generally result in rates for popular content below what could be achieved in the marketplace. Even where an opt out-mechanism is available, the individual rightholders who opt out will be affected by the existence of an ECL since it will work as a benchmark, thereby making it difficult to secure a fair return. This is especially important in the audio-visual sector where high up-front investments are needed to finance the making of new works, even before they enter into production. It is therefore of paramount importance that the use of ECL is reserved for the appropriate situations where direct licensing is not possible. Moreover, we note that in many cases opt-out is not effective in practice. It is absolutely crucial that individual rightholders maintain their right to opt-out as required by EU law and international norms.

The MPA would like to highlight that the overly broad use of ECL will harm the value of creative content in ways that cannot be reversed. This is particularly the case with respect to new areas of use where commercial terms are not yet fully established. Compromising the environment for individual licensing at an early stage may destroy the opportunity to explore whether a new market approach can work, and thereby prevent the introduction of new services to consumers and new revenue streams to rightholders. Such new revenue streams could generate more revenue for producers and other rightholders than collective licensing, thereby enabling further investment into new content.

In the Green Paper on page 84, the Ministry points to the long processing time as an argument against the approval mechanism. The MPA assumes however that this aspect will improve when the Patent Office becomes the new approval authority, cf. below. In any respect, the MPA is of the view that the negative effects entailed by ECLs that do not meet the relevant criteria and respect the applicable safeguards by far outweighs this argument.

The MPA is concerned that ECLs depress the market value for content and opt-out is often ineffective in practice. Indeed, in certain cases, rightholders have actually been told that they have to bring legal actions to enforce opt-out. This is clearly unacceptable from both a legal and commercial perspective. The lack of effective approval mechanism or any notification

mechanism poses serious risks to rightholders that ECLs overreach and do not respect required safeguards.

3.2. The approval authority

The Ministry proposes that the Patent Office becomes the new approval authority, which must be seen in light of the proposal that the Patent Office shall become the supervisory body to the proposed new Act implementing Directive 2014/26/EU. Subject to our comments above, the MPA agrees that it is reasonable that the same entity handles the approval function and the supervisory function. The MPA does not have objections to the Media Authority Board (Medieklagenemnda) becoming the appeal body. The MPA, however, emphasises that it is crucial that the approval authority is familiar with the applicable national, European and international requirements and safeguards as well as the relevant creative content industries and marketplaces, when approving new ECL agreements. It is crucial that real world market impact is considered. Finally, where ECLs are approved, opt-out has to work in practice – not just on paper.

3.3. The requirements for obtaining an approval

The Ministry proposes to keep the existing requirements for obtaining approval set out in Section 63.3 in the Copyright Act. The Ministry notes that whether the CMO fulfils the requirements in the proposed new Act implementing Directive 2014/26/EU, will be one of many factors to be taken into account when considering whether an organisation is "suited" to manage rights in the specific area in question. In the Green Paper, the Ministry asks for stakeholders' views regarding whether the relevance of Directive 2014/26/EU should be made more apparent in the wording of Section 63.3.

The MPA agrees that compliance with the requirements set out in Directive 2014/26/EU is relevant in the assessment of whether approval should be granted, and believes that it would be preferable that this is made clear in the legal text, especially in light of Article 12.1 of Directive (EU) 2019/790.

3.4. Comments to alternative II

The MPA strongly cautions against the adoption of alternative II as described in the Green Paper on page 82-85. The main reason is that MPA fears that this will increase the risk of ECLs, which may negatively affect the value of creative works, especially in new markets.

According to the Green Paper, the Patent Office shall have the possibility to impose sanctions if it is later uncovered that the requirements for entering into an ECL were not fulfilled. However, and as noted above, it is often very difficult to unring the bell. An ECL which does not respect the relevant conditions and safeguards may harm the value of creative content in ways that cannot be reversed. It is therefore important that approval is obtained *before* ECLs enters into force in order to ensure market impact and respect for conditions and safeguards.

The Ministry refers on page 83 to the possibility of making notifications available to the public and possibly combining the notification mechanism with a standstill period. It is not clear from the Green Paper how this would work in practice, e.g. what information would be made available, if stakeholders would be allowed to provide comments as to whether the

requirements are fulfilled, and how the Patent Office will process or evaluate such comments. It is difficult for the MPA to comment on this proposal without any further details. In general, the MPA would however like to point out that it is the Ministry's responsibility to ensure that the ECL mechanism is used in accordance with the law including EEA and international norms. A development that in practice transfers this duty to private parties would be unfortunate. The CMOs that want to enter into ECL agreements are not neutral and impartial when it comes to the evaluation of whether the legal requirements are fulfilled or not. The MPA disagrees with the Ministry when the Ministry on page 84 assumes that the approval mechanism is less important after the implementation of Directive 2014/26/EU. As noted above, the Directive reaffirms important principles that require that ECL mechanisms function in a manner consistent with the best interests of rightholders and subject of course to EEA and international norms.

On a general note, the MPA welcomes the idea of a notification and standstill period, but does not consider it appropriate as a *replacement* for the approval mechanism. A notification and standstill-mechanism should be considered as a *supplement* to the approval mechanism that would ensure the opportunity of parties to be heard and the best possible basis on which the Patent Office can make a decision concerning approval.

A notification and standstill mechanism would also go some way towards ensuring that individual rightholders have a real opt-out possibility from ECL agreements, cf. Directive (EU) 2019/790 Article 12.3 (d)- (c). It is evident that a rightholder cannot opt out from an ECL agreement of which she is unaware. In order to be effective, notification should be given to rightholders before a new ECL agreement enters into force or before the entry into force of amendment to existing agreements that in effects increases the scope of the ECL agreement.

The MPA also strongly encourages an amendment to clarify that rightholders can exercise a blanket opt out of all works controlled by them from all current and future ECLs by means of notifying the Patent Office, which can maintain a list of rightholders who have opted out. The MPA cannot see that it would be costly or burdensome for the Patent Office to maintain such a list.

3.5. Summary

In summary, the MPA encourages the Ministry to keep the existing approval mechanism and to supplement it with a notification and standstill period. The latter will allow opposition regarding whether the requirements are fulfilled and also, if approved, allow individual rightholders to exercise their right to opt out effectively.

4. Proposed changes to the Gramo and FFUK compensation schemes

The MPA is of the view that the proposed amendment to Section 114 of the Copyright Act is misplaced and fundamentally unfair. Where remuneration is collected for the use of someone's intellectual property, that person should receive that money. The proposed amendment would result in discrimination against non-EEA producers in a manner to that is contrary to EEA norms as well as the Rome Convention and the WIPO Performances and Phonograms Treaty. In essence, it would operate to deny phonograms producers national treatment as generally required by international related rights treaties. We note that a

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reference for a preliminary ruling from Ireland is currently pending before the European Court of Justice, which may have a bearing on this issue as well. We would suggest that Norway refrain from taking any further steps until the Court of Justice has made a ruling in the *RAAP* case (Case-C265/19).

My best regards,

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