Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

NORWAY
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A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):

   i. Offering of hyperlinks to works

Cf. explanation below re deep links.

   ii. Offering of deep links to works

Since Norway is a member of the EEA, the ECJ judgement in case no. C-466/12 *Svensson et al* is bound to set the framework for the interpretation of the right of communication to the public which is provided in the Copyright Act.

Prior to that judgement the positions was as follows:

In a judgement January 27th 2005 the Supreme Court held that the holder of the website *napster.no* where users were invited to provide web addresses to music files, made a contributory copyright infringement in that he, knowing that many of these files were illegally uploaded, by increasing the availability of the music files amplified the effects of the illegal uploading. The web page containing a link “Add an mp3” where users could provide information such as the name of the artist, the title and the web address to the file, whereupon there was automatically created a new page under napster.no containing a deep link to the music file.

The court avoided taking a stance as to whether deep linking should be considered an act of making available to the public and thus as such subject to the exclusive rights. There was a parallel drawn to that of making a reference to a work, which may be copied and used to access the work, and mention is made of technologies that automatically change the reference into a link, and the court found it difficult to treat the two ways of referring to a work differently. It found it equally difficult – if linking were to be classified as an act of making available the material to which the link leads – to apply an ‘implied licence’ approach in order to handle the issue of whether or not an act of linking is permitted.

The exclusive rights are thus set out in Section 2:

> "*Subject to the limitations laid down in this Act, copyright shall confer the exclusive right to dispose of a literary, scientific or artistic work by producing permanent or temporary copies thereof and by making it available to the public, be it in the original or an altered form, in translation or adaptation, in another literary or artistic form, or by other technical means.*
>
> *The transferring of a work to any device by which it can be reproduced shall also be considered a production of copies.*
>
> *The work is* ***made available to the public*** *when*
> *a) copies of the work are issued for sale, rental or lending, or otherwise distributed to the public,*
> *b) copies of the work are displayed publicly without the use of technical aids, or*
> *c) the work is performed publicly.*
>
> *As public performance is also included broadcasting or other transmission by wire or wireless means to the public, hereunder when the work is made available in such a way that the individual can choose the time and place of access to the work.*"

In the preparatory works there are remarks, which the Supreme Court referred to in the Napster case, stating that the third paragraph is not meant as a statutory definition; "making available to the public" is an overarching concept and is technology neutral.

The terms used in Section 2 have the same meaning when used in the context of related rights.

For performers; Section 42 first paragraph:

> *"Subject to the limitations laid down in this Act, a performing artist has the exclusive right to dispose of his performance of a work by*
>
> *a) making temporary or permanent fixations of the performance,*
> *b) producing permanent or temporary copies of a fixation of the performance, and*
> *c) making the performance or a fixation of the performance available to the public. For the public performance of sound fixations the provisions in section 45b nonetheless apply, unless the performance is done in such a way that the individual can choose the time and place of access to the fixation."*

For producers of films and of phonograms; Section 45 first paragraph:

> *"Subject to the limitations laid down in this Act, a producer of sound fixations and films has the right to dispose over the fixation or film by making permanent or temporary copies of it and by making the fixation or film available to the public. For the public performance of sound fixations the provisions in section 45b nonetheless apply, unless the performance is done in such a way that the individual can choose the time and place of access to the fixation."*

Section 45b which is here referred to provides a statutory licence – or remuneration right – how to label this Section is debatable, however, in the present context I will place it in the statutory remuneration category.

For broadcasting organisations; Section 45a first paragraph:

> *"A broadcast or a part thereof may not, without the consent of the broadcasting organisation*

a) be fixed on a device which can reproduce it,
b) be transmitted by wireless diffusion or retransmitted to the public by wire or
c) otherwise be made available to the public for purposes of gain."

For databases; Section 43, first and second paragraph that apply regardless of whether the database qualifies for copyright protection:

"A person who produces a formula, catalogue, table, program, database or a similar work in which a large number of items of information has been compiled, or which is the result of a substantial investment, shall have the exclusive right to dispose of all or a substantial part of the contents of the work through the producing of copies thereof or through making it available to the public.

The exclusive right under the preceding paragraph applies correspondingly when insubstantial parts of works as mentioned, are repeatedly and systematically reproduced or made available to the public, if this constitutes acts conflicting with a normal exploitation of the work or which unreasonably prejudices the producer's legitimate interests."

Section 43 provides for protection of photographic pictures regardless of whether the picture qualifies for copyright protection:

"A person who produces a photographic picture shall have the exclusive right to make copies thereof by photography, printing, drawing or any other process, and to make it available to the public."

iii. Framing/embedding of works

Adding then the ECJ order in C-348/13 BestWater, I refer to the explanations above.

iv. Streaming of works

Covered by the exclusive rights of making available to the public as set out in the Copyright Act, cf. the above mentioned provisions in the act.

v. Download of works

Covered by the exclusive right of reproduction, cf. the above mentioned provisions in the Copyright Act.

In Section 12 there is an exception for reproduction for private use which applies provided that the reproduction is made from a lawful rendering of the work etc., but which does not permit the making of "machine-readable" copies of computer programs nor "machine-readable" copies of "machine-readable" databases.

vi. Upload of works

Covered by the exclusive right of reproduction as well as of the exclusive right of making available to the public, cf. the above mentioned provisions in the Copyright Act.

vii. Supply of a platform for 'user-generated content

Depending on the circumstance; either covered by the exclusive right of making available or to be judged as a contributory act to use that is subject to the exclusive right of making available.

viii. Other novel forms of use on the internet

As mentioned above (under *ii*) the exclusive rights of reproduction and of making the work available to the public are technology neutral in that all manners of reproduction and *all manners in which a work may be made available to the public,* are covered; such uses being *exemplified* in Section 2. However, in order that a use shall be classified as subject to the exclusive right of making available to the public, it is required that there is a fairly close and direct connection between the act that is carried out and the access to the work. When this criterion is not met, any claim that there is an infringement must rely on it being contributory, cf. answers under *3. below*.

NB. I do not understand this question as an invitation to analyze the consequences of the ECJ decisions in the Svensson case and the BestWater case mentioned above.

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (e.g. users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

From TONO (The Norwegian performing rights organisation) I have received the following information: To the extent that services are constructed for the purpose of offering content uploaded by end users, TONO will seek to license the service rather than the individual end user. In general, the current safe harbor legislation will often lead to the service provider refusing to take responsibility for uploaded content, unless the service provider itself actually curates or otherwise involves itself with particular content. This can be illustrated by the YouTube case, where Google objects to taking responsibility for uploaded content in general, referring to standard notice and take down procedures for infringing content, but takes responsibility for content that Google chooses to monetize by linking videos to advertising.

My understanding is that in this latter case, the right owners obtain a share in the income from the advertising that is connected to their content.

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under *1. above*, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

- for content providers

The law provides for holding a person who contributes to an infringement of copyright, liable for contributory infringement. There is no specification in the Copyright Act as to what acts can be considered a contributory infringement. As for criteria etc. see answer under *letter b) below*.

- for host providers

See the general observation in the answer above re content providers. However, the E-commerce Act Section 18 implements provisions such as required in Directive 2000/31/EC (the E-commerce Directive) Art. 14. In Section 18 is stated that a host provider can be held criminal liable for storing illegal information or complicity in illegal activities by storing information, only if he has acted willfully, and can be held civil law liable for storing illegal information or complicity in illegal activities by storing information only if he has acted willfully or with gross negligence, however, he shall not be punished nor be held liable if he upon obtaining such knowledge or awareness of the illegal activities without undue delay takes the necessary measures to remove or block access to the information. The host provider is not exempt from liability if the recipient of the service is acting on the host provider's behalf or under his control.

- for access providers

See the general observation in the answer above re content providers. The E-commerce Act Section 16 implements provisions such as required in Directive 2000/31/EC (the E-commerce Directive) Art. 12. In Section 16 is provided that an access provider that transmits information to a recipient in a communication network, is not criminal or tort liable for the content of the information transmitted, provided that the provider does not initiate the transmission, does not select the recipient of the transfer and does not select or modify the information which is transmitted. The acts of transmission referred to in this section also include the automatic, intermediate and short term storage of the information transmitted in so far as the storage takes place for the sole purpose of carrying out the transmission and lasts no longer than is necessary for such transmission. The provisions in Section 16 apply correspondingly to service providers whose service consists in providing access to a communication network.

- for others?

See the general observations in the answer above re content providers. As for transmissions services the E-commerce Act Section 17 implements the Directive 2000/31/EC (the E-commerce Directive) Art. 13 pertaining to caching.

b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

The Copyright Act does not set out the criteria that shall be applied when deciding whether there is an act of contributory infringement. The case law as regards

contributory infringement of copyright is scant. When addressing this issue the courts have looked to the law regarding accomplice liability and negligence liability.

For *criminal* liability there is the requirement that the person shall have acted wilfully or negligently, i.e. that he has been or should have been aware of a particular infringement or the occurrence of infringements and has by his action(s) or failure to act contributed to or facilitated the infringement(s); the person's own conduct shall be unlawful. There is a judgement by the Oslo District Court ("*Direct Connect*" in 2005) regarding a hub – "Jazzgroove" – where jazz enthusiasts shared music and film files, in which the person operating the hub was held liable for contributory infringement. He argued that his only involvement was to be a "caretaker" and see to it that the server functioned, that he used the hub for chatting with friends and was not in a position where he could observe the files that were shared. The court found that the predominant function of the hub was to share copyright protected material and that he was aware that it would be used for illegal sharing of files, and held him liable for contributory infringement by reason that although he played a very active role in operating the hub, he had done nothing to prevent illegal sharing. The defendant was sentenced to community service and the computer equipment used was confiscated.

For *tort* liability the same criteria apply, however, then also acts that have not directly contributed to or facilitated the infringement, only amplified the effect thereof, may qualify as a contributory infringement, cf. the Napster case described above in the answer to *A.1*. The tort liability encompasses damages.

The Copyright Act contains provisions according to which at the request of a right holder the court may order a provider of electronic communication services to disclose information that identifies the holder of the subscription that was used when the infringement was made. (There are also provisions that allows for the court to order that a provider shall block access to sites where on a large scale obviously infringing material is made available.)

4. In these cases of infringement, who has standing to sue:

- the author: Yes – including then anyone to whom the copyright has been transferred.
- the exclusive licensee: Yes.
- the non-exclusive licensee: No.
- the employer of the author: No, except if the rights concerned have been assigned to the employer
- the CMO that manages the exclusive right? Yes. There is a Supreme Court order in 2010 in which a company that was mandated by newspapers to on its own manage on their behalf their rights (including rights acquired from the journalists) in regard to digital uses, was approved as claimant in a case

against Meltwater. This was based on The Dispute Act (Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes) Section 1-3 which sets out the criteria that have to be met in order for a party being allowed to sue. There the second paragraph reads: "*The claimant must show a genuine need to have the claim determined against the defendant. This shall be determined based on a total assessment of the relevance of the claim and the parties' connection to the claim*." The existence of the rules in the Copyright Act Section 38b according to which a CMO that is entitled to issue licences that entail an extended collective licence may act as a claimant, were not considered to pose any restriction in this regard. In Section 38b is provided that a CMO that is entitled to issue licences that within a field as specified in a provision in the Copyright Act entail an extended collective licence may, in the absence of any objection from the right holder, sue where the infringing use is made within that field (cf. the answer to *Question C. 2. below* where the criteria for such entitlement are explained and the uses to which extended collective licences may apply, are listed). In the Copyright Act Section 38b is provided that such organisation may demand that a user who has not entered into such a licence agreement shall be prohibited by a court judgment from unlawfully using a work in a manner that may be allowed by way of such licence. It may also, in the absence of any objection from the right holder, submit a claim for compensation and may moreover demand that copies thus illegally made be confiscated or destroyed. (If the person who has unlawfully exploited a work has satisfied the organisation's claim, the right holder's claims as regards the same use may only be directed to the organisation, which is then obliged to pay the right holder what he is entitled to.) In Section 54 eight paragraph is provided that such organisation, as long as the aggrieved party does not object, may demand public prosecution if the Copyright Act has been infringed through use of a work in a manner as specified in a provision in the act which allows for an extended collective licence to accompany a licence issued by that organisation.

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

   - as a general rule for all kinds of contracts;

   No

   - as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);

No

- in the case of oppressive contracts;

The Act relating to the conclusion of agreements etc. Section 36 provides that a contract may be fully or partially set aside or modified insofar it would be unreasonable or contrary to good business practice to apply it. The same applies to unilaterally binding dispositions. In deciding thereon shall be considered not only the content of the agreement, the parties' situation and the circumstances when the agreement was entered into; also facts that occurred thereafter and other circumstances shall be taken into account. Section 36 applies correspondingly when it would be unreasonable to assert trade customs or other contractual customs.

- in other cases;
  and if so, under what conditions?

For the rental of films and phonograms the Copyright Act Section 39m provides that if an author or performer has assigned to a film producer or phonogram producer the right to make a film or phonogram available to the public by way of rental, he or she shall retain the right to obtain an equitable remuneration from the producer (comp. the Rental and Lending Directive 2006/115/EC Art. 5).

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

No

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

The impact of Section 36 of the Act relating to the Conclusion of Agreements etc. is typically that it is taken into consideration when agreement terms are negotiated. I know of no court case where it has been applied to contracts pertaining to copyright or related rights.

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

   – Public lending rights: The Library Remuneration Act, 1987-05-29-23. The remuneration – which is decided after negotiations between right holders organisations and the Government (see below) – shall be paid collectively and be distributed to special funds for allocations to the benefit of authors or for the benefit of objectives relating to the group of authors (cf. *D. 3 below*).

   – Remuneration for the public display of copies works of art and of handicrafts that are in public ownership or are owned by institutions that obtain public grants: The Act on Remuneration for the Display of Works of Art and Handicrafts, 1993-05-28-52. The remuneration which is decided after negotiations between artists organisations and the Government (see below) – shall be paid collectively to special funds for allocation to artists as grants and project support and to the collective benefit of artists in this field (cf. *D. 3 below*).

   – Compensation for private copying: The Copyright Act Section 12 provides that authors shall receive fair compensation through annual grants via the State Budget. The compensation is divided so that part of it is distributed to individual right holders (through the CMO Norwaco), part of it to a public fund for audio and visual media which is managed by the Norwegian Arts' Council (Kulturrådet).

   – Resale rights – The Copyright Act Section 38c.

   – Remuneration to performers and producers for public performance and communication to the public of sound fixations of the performances of performing artists except when the communication is made in such a manner that members of the public may chose the time and the place to access the fixation – The Copyright Act Section 45b (which, as mentioned in the answer to Question A, may be labelled a statutory licence). Hereinafter this will be referred to as '*45b-remuneration to performers and phonogram producers'*. This remuneration right to the benefit of individual performers and phonogram producers co-exists with a cultural policy scheme in the form of the Fund for Performing Artists – http://www.ffuk.no/about-the-fund-for-performing-artists.70865.en.html – that is financed by way of a fee as provided for in the

> Act no. 4 of 14 December 1956 relating to a levy on the public presentation of recordings of performers' performances, etc. The fee is charged for the above mentioned use of non-protected phonograms (i.e. phonograms to which the remuneration right does not apply by reason that the phonogram is in the public domain, or that in respect of such use the national treatment obligation does not apply). The Fund's revenues shall be used to support professional performers who live and work in Norway, and the making of Norwegian recordings of performances. In its role as a cultural fund, the Fund must ensure that there is a wide diversity of cultural expression. The Fund also has a commitment within the present financial framework towards the population as a whole to ensure that people throughout Norway can enjoy live performances within all genres and with all categories of performing artists.

I shall here also mention *remuneration that on the basis of agreements the State has made with authors' organisations* is paid to individual authors for use of works that is not covered by the exclusive rights, such agreements having as a starting point The Regulatory Agreement of 1978 made between the State represented by the Ministry of Culture and the nationwide arts' organisations. In this agreement the State and arts organisations that were recognised by the State as being mandated to conduct negotiations on behalf of their members, took on a mutual obligation to enter into negotiations on the conclusion of agreements inter alia on remuneration for the use of works that are copyright protected or for the manufacture and use of materials containing performing artists' performances to which the performers have rights according to the Copyright Act. This agreement crowned a protracted effort and extensive activities carried out by the organisations as through the Artist Action of 1974 and thereafter, calling for the recognition of their being entitled to a negotiation right on a par with that of the labour unions. I know of two such agreements by which the State is obliged to pay remuneration for the use of protected works:

There is the agreement made with TONO (The Norwegian performing rights organisation) which obliges the State to pay to TONO a yearly amount (a lump sum) as *remuneration for the performance of music at religious services which is permitted under an exception in the Copyright Act* Section 21, the remuneration to be distributed by TONO to the authors of the musical works.

The other agreement – the Agreement on *remuneration for the exhibit of works of visual art, handicraft and photographic art owned by the artist* – made with seven artists' organisations obliges the State to pay remuneration to artists when their works, i.e. works *made and owned* by the artist, are used at state exhibitions in Norway or abroad. Remuneration shall also be paid when the State makes direct grants to the exhibition or to the organiser's overall operation of exhibition activities. It is the organiser that shall make the payments – from said grants – to of the artist. (For exhibitions abroad the payments are made by the Ministry of Foreign Affairs.) Eligible for remuneration are

artists who are Norwegian citizens or live permanently and work in Norway, as well as citizens of a country where the state provides exhibition compensation under similar principles. Remuneration shall be paid for the time the artist does not have the work at her disposal, i.e. from the date of delivery of the work to the date the artists receives the work returned. The remuneration is calculated per month, a commenced month to be deemed an entire month. The remuneration is composed of three elements; 1) as remuneration for the exhibit as such: a monthly amount as specified in said Agreement (and subject to indexing); 2) as compensation for the work not being at the disposal of the artist: a monthly amount as specified in said Agreement (and subject to indexing); 3) a monthly royalty of 1.5 % of the (market) value of the work exceeding NOK 2000. However, the minimum payment shall equal remuneration for two months.

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

There are **statutory licences** set out in the Copyright Act:

– Copies of a published work, a phonogram or a film and recordings of a broadcast may be made for use in connection with public exams – Section 13a.

– In a collective work intended for use in religious services or in education, consisting of works by a large number of authors, minor parts of literary or scientific works or musical works or short works of this kind may be reproduced if five years have elapsed since the expiry of the year in which the particular work was published – Section 18. In connection with the text of such works, works of art and photographic works may also be reproduced if five years have elapsed since the expiry of the year in which the work was issued (i.e. lawfully made available to the public). A work created for use in education shall not be reproduced in a collective work compiled for the same purpose. The licence does not apply to reproduction in machine-readable media.

– Issued photographs may be reproduced in critical or scientific treatises of a generally informative character and in connection with the text in works intended for instructional us – Section 23 second paragraph. The licence does not apply to reproduction in machine-readable media.

– Issued works of art and issued photographic works may be reproduced in newspapers, periodicals and broadcasts in connection with the reporting of a current event – Section 23a first paragraph. The author is entitled to remuneration except in the case of a current event related to the work that is reproduced. This licence does however not apply to works that are created with a view to reproduction in newspapers, periodicals or broadcasts.

– As provided for in the Copyright Act Section 17a the Government has in the Regulations to the Act set out a statutory licence according to which libraries, archives and museums as there mentioned as well a particular organisations as decided by the Ministry of Culture, have the right, for gratuitous use by people who because of disability cannot access the work in the usual manner, to make copies of published literary or scientific works by making a fixation on a device that can render them, and in connection with the text render issued works of art and photographic works (Section 1-11).

Furthermore I shall mention here **extended collective licences**, since they are a source of remuneration for use of protected material which is permitted without the consent of the owner of the rights. The extended collective licence provisions permit that when there is a licence agreement with an organisation which in the field represents a substantial part of the authors of works used in Norway, and which is approved by the Ministry concerned (presently the Ministry of Culture), a user who is covered by the agreement shall have the right to use – in the same field and in same the manner as permitted in the agreement – the same kind of works of right holders that are not represented by the organisation, provided that the use in made in accordance with the terms of the agreement. In the Copyright Act there are provisions allowing for extended collective licences that permit:

– That copies of published works and fixations of broadcasts are made for use within the licensee's own educational activities – Section 13b.

– That public and private institutions, organisations and commercial enterprises for use within their own activities make copies of published works and make fixations of broadcasts – Section 14.

– That archives, libraries and museums that satisfy certain criteria set by the Government make copies of published works in the collections and make such works available to the public – Section 16a.

– That the Norwegian public broadcaster (the Norwegian Broadcasting Corporation – NRK) on payment of remuneration broadcast published works, issued works of art and issued photographic works (issued = that have lawfully been made public) – Section 30. The Government may decide that other broadcasting organizations shall be likewise entitled to obtain licences that entail an extended collective licence.

– That the Norwegian Broadcasting Corporation and others who are licensed to operate a broadcasting organisation may use issued works in their collections in connection with new broadcasts and for transmission in such a way that

members of the public may access the work from a place and at a time individually chosen by them – Section 32. This section applies only to works that were broadcasted prior to 1st January 1997 and that are included in the broadcasting organisation's own productions.

– That works that are lawfully included in a broadcast, by simultaneous and unaltered retransmission be communicated to the public – Section 34.

The extended collective licence provisions apply correspondingly to the related rights of performers and producers, but not to any of the rights of broadcasting organisations (including then their acquired rights).

In the Copyright Act there is also a section that allows that the Government issue regulations according to which extended collective licences can apply to certain specified organisations and libraries, permitting that they for the purpose of free use by the disabled make a fixation of a published film or picture, with or without sound, and of a transmitted broadcasting program not essentially consisting of musical works – Section 17b. So far no such regulations have been issued.

3.

i. For which statutory remuneration rights does your law provide for obligatory collective management?

In the *Library Remuneration Act* and in the *Act on Remuneration for the Display of Works of Art and Handicrafts* is provided that the remuneration shall be paid collectively and be distributed to special funds managed by the authors' organizations in the areas covered by the act. The statute of the funds shall be approved by the Ministry concerned (presently the Ministry of Culture).

The *remuneration for resale* shall according to the Copyright Act be collected by a collection and distribution organisation that is approved by the Ministry concerned (presently the Ministry of Culture). The only organisation thus approved is BONO – The Norwegian Visual Artists Copyright Society – www.bono.no.

The *45b-remuneration to performers and phonogram producers* shall according to the Copyright Act be collected by a collection and distribution organisation that is approved by the Ministry concerned. The organisation thus approved by the Ministry of Culture is Gramo which is the joint collecting society in Norway for musicians, performing artists and phonogram producers – www.gramo.no. (Gramo is also mandated to make the collection for the Fund for Performing Artists.)

The *compensation for private copying* that is to be distributed to individual right holders is on the basis of a Government Decree paid by the State to Norwaco, which is the CMO that is mandated by organisations of right holders as regards audio and film media – www.norwaco.no.

As concerns remuneration for use of works that is permitted by way of an **extended collective licence**, it is provided in the Copyright Act Section 37, first paragraph that whatever the agreement or the organisation receiving the remuneration for such use determines with regard to the collection and distribution of remuneration shall also be binding on the right holders who are not represented by the organisation. Thus in respect of *deciding the amounts to be paid by the user*, the law provides for obligatory collective management. Most licence agreements that entail an extended collective licence provide that the remuneration shall be collected by the organisation that issues the licence, the exception being that in some licence agreements that permit that works be broadcast and to which an extended collective licence according to Section 30 applies, is provided that the broadcasting organisation shall pay remuneration directly to the individual right holder. Section 37, second paragraph provides that non-member right holders shall have the same rights as right holders who are members of the organisation to share in the funds and benefits that are distributed or largely financed from the remuneration. It is there also provided that irrespective of what is decided as regards the distribution of the remuneration, a non-member right holder who can substantiate that his work has been used pursuant to an extended collective licence, may demand that remuneration for such use shall be paid to him. Such demand shall be addressed to the organisation that has collected the remuneration from the user.

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

For all **statutory remuneration rights** the law provides for obligatory collective management, cf. the answer to *Question 3 i. above.*

Since in Question 2 you ask about **compulsory licences**, I will mention here that the remuneration for use under the statutory licence in Section 13a permitting reproduction for use in connection with exams is paid by the State to the CMO Kopinor. This arrangement is based on a contract according to which Kopinor shall make the payments to all individual rights holders concerned (www.kopinor.no). This arrangement is not provided for in the Copyright Act; it represents a solution to a practical task. The same is true for the remuneration for use made under the statutory licence in the Regulations Section 1-11 as provided for in the Copyright Act Section 17a Compulsory license for the production and use of fixations for the disabled. The remuneration for such use is paid by the State. The State has made a contract with the Norwegian Publishers Association and all Norwegian writes' associations in which standard rates

are set, the payment to be made to Kopinor which shall manage the contract and carry out payments to the individual right holders.

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

Public lending rights, Remuneration for the public display of copies works of art and handicrafts, Compensation for private copying: Tax payers.

Resale rights: Sellers and agents who are market professionals are jointly and severally responsible for paying the resale right remuneration. If neither the seller nor the agent is an art market professional, the buyer is responsible for paying the remuneration.

*45b-Remuneration to performers and phonogram producer*s (as well as the fee to the Fund for performing artists): The user.

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

In the *Library Remuneration Act* is provided that the compensation shall be calculated by way of a rate per lending unit, the rate to be determined by contract between the Ministry concerned (presently the Ministry of Culture) and a joint association which is approved by the Ministry and which consists of organisations that in the field concerned represent a substantial part of Norwegian authors. If the parties cannot agree on the rate to be paid, each of the parties may demand mediation according to rules set out by the Ministry. (Mediation is carried out by the National Mediator which is the entity that mediates labour disputes where collective bargaining fails.) According to the Act the lending unit for books is one volume, while it is for the Ministry to decide what shall otherwise be reckoned as lending units. The lending units to be counted when calculating the remuneration to be paid by the State are works that are published in Norway, the calculation to be based on statistics of the number of lending units that are available for lending at each and every library that is to be included in the statistics. The Ministry shall decide which libraries, collections etc. are to be included in the statistics. They shall all be public libraries. The contracts are made for a limited period, ranging from one to four years, and normally the remuneration is indexed.

The *Act on Remuneration for the Display of Works of Art and Handicrafts* provides for a system which is close to that of the Library Remuneration Act. The compensation is to be calculated at a rate per display unit. The compensation rate and the number of display units to be taken into account when calculating the remuneration that the State

shall pay, are to be determined by contract between the Ministry concerned (presently the Ministry of Culture) and a joint association which is approved by the Ministry and which consists of organisations that in the field concerned represent a substantial part of Norwegian authors. If the parties cannot agree on remuneration to be paid, each of the parties may demand mediation according to rules set out by the Ministry. (Again, mediation is made by the National Mediator.) What shall be considered as a display unit shall be decided by the Ministry, and the number of units shall be calculated on the basis of statistics of the number of works that are used for public display. The Ministry may decide which displays and which collections etc. shall be included when making this calculation (cf. the criterion the display units are in public ownership or are owned by institutions that obtain public grants). However, identifying display units and the number thereof turned out to be difficult, and the parties – the State and the joint association of artists' organisations – have hitherto concluded by agreeing on a lump sum per year, to be indexed so as to take into account probable increase of the number of display units and general price and wage inflation as relevant parameters. The contracts are made for a limited period, ranging from one to four years.

Private copying:
The compensation is a separate item on the Fiscal Budget, the Budget being adopted by the Parliament.

Resale rights:
The remuneration tariffs are determined in the Copyright Act Section 38c, in accordance with Article 4 of the Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.

45b-Remuneration to performers and phonogram producers:
The remuneration is set by contract between Gramo – the collection and distribution organisation that is approved by the Ministry of Culture – and the user. However, for many fields of use the rate is negotiated between Gramo and a confederation or amalgamation of entities in the particular field (such as local radios stations; shops; hotels; cafés and restaurants; etc.), the agreed rate then to be applied to all entities within that field. If the user and Gramo cannot agree on the amount to be paid, the matter is handled according to rules set out in the Regulations Chapter 4 as provided for in the Copyright Act Section 35. The rules are as follows: Upon request by one of the parties, the Ministry of Culture may be set the remuneration to be paid or leave the matter to be decided by a commission. Unless the fee may be inferred from an earlier decision by the commission, the latter is the norm. Whenever a governmental body is party to the dispute over the amount to be paid, the Ministry is obliged to leave the matter to the commission. Each party may anyhow on its own demand that the commission handle the case. The commission is appointed by the Chief Justice of the Oslo District Court for a period of five years. (The fees to be paid to the Fund for Performing Artists are set by the Ministry of Culture within the framework of maximum

rates adopted by the Government, such fees not to be taken into account when determining the remuneration to be paid according to the Copyright Act.)

Remuneration for use under a **statutory licence**: The remuneration is set by contract. If the parties cannot agree on the amount to be paid, the matter is handled according to rules set out in the Regulations Chapter 4 as described above. Some rates have been set in agreements with CMOs. There are the two examples mentioned in the answer to *ii. above*. Another example is that The Norwegian Publishers Association has entered into standard agreements with organisations representing fiction writers setting the rates for use of works that is made according to the statutory licence in Section 18 for anthologies for teaching. It has also made an agreement with BONO – The Norwegian Visual Artists Copyright Society – in which inter alia are determined the rates to be applied when works of the artists that are represented by BONO are used in educational material for primary schools and secondary schools.

Remuneration for use under an **extended collective licence**: The *remuneration to be paid by the user* is set by way of negotiations between the CMO and the user. The licence agreements are often based on model agreements that result from negotiations between the CMO and a confederation or amalgamation of users in the field to which the licence shall apply. If a party refuses to open negotiations on an agreement that shall entail an extended collective licence or such negotiations fail, each party may demand mediation in accordance with rules set out in the Regulations, Chapter 4 (cf. the Copyright Act Section 38, first paragraph). Such mediation is handled by the National Mediator. If the parties do not by way of negotiations – including mediation – reach an agreement, the commission established according to Chapter 4 as provided for in Section 35 in the Copyright Act (cf. the description above re the remuneration to performing artists and producers) may on the joint request of the parties act as an arbiter as mandated by them. The *remuneration to be paid by the collecting organisation to a non-member right holder* who can substantiate that his work has been used pursuant to an extended collective licence, and who demands that remuneration for the use shall be paid to him as provided for in Section 37, second paragraph (cf. the description in the answer to *i. above*) is determined by contract with the organisation that collected the remuneration from the user. If the parties cannot agree on the amount to be paid, each party may demand that the remuneration be determined according to rules set out in the Regulations Chapter 4 as provided for in the Copyright Act Section 35 (see the description above).

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

No (except that where on the request of party the remuneration may be determined by the Ministry or a commission as provided for in Chapter 4 of the Regulations, there is an

element of control). However, CMOs are typically subject to The Competition Act which prohibits abuse of a dominant position.

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

Please see the answers to *iii. above* re the payment of the remuneration. As regards the remunerations rights problems in asserting a claim will typically not occur, the exception being the 45b-remuneration to performers and phonogram producers for which, however, the rules pertaining to statutory licences apply, facilitating the determination of the amounts that are to be paid, cf. the description in the answer to *iv. above*.

As regards remuneration to be paid under the **statutory licences**, the procedures for setting the remuneration are such that typically there will not occur protracted proceedings in regard to establishing the amount that the user is obliged to pay (cf. the answer to *iv. above*). However, there have been court proceedings regarding the scope of the provisions in Section 45b; i.e. whether a particular activity is subject to the obligation to pay such remuneration. (A recent case concerning the rental of cars equipped with a radio the court held that the car rental company was not obliged to pay remuneration.)

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

Cf. the answer to *vi. above*. There are the general rules on provisional security that are laid down in The Dispute Act (Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes). Provisional security can be obtained by petition, upon which the court *may* decide that there shall be an attachment in the assets of the debtor. This requires that the debtor's conduct gives grounds to fear that enforcement of the claim would otherwise be evaded or considerably impeded, and that this condition and the claim in respect of which the petition is made are proven on a balance of probabilities. Attachment may be obtained notwithstanding that the claim has not fallen due or is conditional, provided that the claim is not for this reason worthless. If delay poses a risk, the court may order attachment notwithstanding that the petitioner's claim is not proven. In that case the court shall as a condition for the execution of the attachment require the petitioner to provide security.

As regards remuneration to be paid under a **statutory licence**, including here the 45b-remuneration to performers and phonogram producers, right holders may obtain that the Ministry of Culture issues a prohibition against continued use of such licence: The Regulations Section 4-2 provides that if the user fails to pay remuneration as agreed by the parties or decided according to the Regulations, the Ministry may, on request from the right holders who are entitled to remuneration, issue a prohibition against continued use. Entitled to make such request is the individual owner of the rights to the work or production which is subject to the use that is permitted under the Copyright Act, or an organisation that on the basis of an agreement with the right holder manages the remuneration right in regard of such use. However, for the 45b-remuneration right such request may be made only by a collection and distribution organisation that is approved by the Ministry (the only such organisation being Gramo). The procedural rules that apply to the making of such decision are the same as for deciding the remuneration to be paid (cf. the answer to *iv. above*).

As for the **extended collective licences** there are the provisions in the Copyright Act Section 38b, which are described above in the answer to *Question A*. *4.* The provision therein according to which an organisation may, in the absence of any objection from the right holder, demand that a user shall be prohibited by a court judgment from using a work in a manner that may be allowed by way of an extended collective licence, applies also when a user who is party to a such a licence agreement with the organisation fails to pay the agreed remuneration.

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

The remuneration paid according to the *Library Remuneration Act* and *The Act on Remuneration for the Display of Works of Art and Handicrafts* is made to funds for the benefit of authors only, cf. answer to *Question C. 3. i. above*. The statutes of the funds shall be approved by the Ministry concerned (presently the Ministry of Culture). The Ministry may issue rules on the allocation to the funds and the use of the funds. This the Ministry has not done. (The distribution between different groups of authors is not determined in the respective acts or in regulations thereto; it is determined by way of

negotiations between the organisations that manage the funds, cf. explanation in the answer to *3. below*.)

The *remuneration for resale* is calculated for each individual sale at rates that are set out in the Copyright Act and is distributed to the author of the work or his heirs. The right can be neither waived not transferred. If the author has no heirs, resale right remuneration that falls due after the death of the author becomes the property of the organisation approved for collecting the remuneration.

According to the Copyright Act Section 45b the Government may issue regulations regarding the collection and distribution of the *remuneration to performers and phonogram producers* there provided for. In the Regulations to the Copyright Act is provided that the gross charged remuneration shall be divided equally between the right holder groups (i.e. 50 percent to performers and 50 percent to producers).

As regards the *compensation for private copying* Section 12 provides that the Government may issue regulations governing the distribution of the compensation. This has not been done. In the award letter to Norwaco the Ministry states that the compensation shall be equally divided between the three right holder groups, i.e. authors, performers and producers (of films and phonograms) and thereafter divided according to the types of works. As for this distribution the Ministry refers to the Bill to Parliament in which the provision on compensation for private copying was proposed. In the Bill was stated that it will to a large extent be possible to determine which works have actually been copied for private use and adapt the distribution of compensation accordingly; the compensation shall be distributed to the individual right holders to sound recordings and to film, and this distribution shall be made on the basis of statistical information and any other sources that provide a basis for determining the extent of copying for private use.

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

Please see answers to Question 1 above.

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

Remuneration for public lending: The distribution of the remuneration between the (25) funds that are approved by the Ministry as recipients of the remuneration is fixed in an agreement between the authors' organisations that are represented in the joint board that is approved for negotiating the rate that is to be paid per lending unit. (The organisations have made an arbitration agreement so that if they do not reach an agreement on the distribution to the funds it may be decided by arbitration.) The distribution is set as percentages of the gross yearly remuneration amount that is paid. The funds, the statutes of which are approved by the Ministry, are administered by authors' associations. Some funds are administered by two or more organisations jointly. In the Library Remuneration Act is provided that the funds may make allocations to the benefit of authors or for the benefit of objectives relating to the group of authors, and that as regards payment to individual authors shall not be taken into account organisational affiliation, and that there shall be a limit as to the amount that may be paid to a single author. In the guidelines issued by the Ministry is stated that the remuneration shall not be related to the use of the work of the individual author; it shall ensure/guarantee authors as a group compensation for the use the public makes of their works in the libraries and be allocated so as to stimulate creative activities, primarily writers, to work on new projects. The percentages applied are at present: 85 % is allotted to authors of literary works, 60 % of which is paid to Norsk forfatter- og oversetterfond (The Norwegian Fiction Writers' and Translators' fund) and 40 % to Det faglitterære fond (The Norwegian Non-Fiction Writers' and Translators' fund), 1 % to Samiske kunstneres og forfatteres vederlagsfond (Sami Artists' and Writers' Fund) and the remainder 15% is divided between a number of funds for authors of music compositions or authors of works of art or photographic works. The amount to be paid as remuneration for the public libraries' lending of films is negotiated between the Norske Filmregissører (Directors Guild of Norway) and Norsk Filmforbund (Norwegian Film Workers' Association) and the Ministry, the remuneration being paid to Filmvederlagsfondet (The Film Remuneration Fund).

Remuneration for the public display of works of art and photographic works: The distribution is set by a process similar to that used for the remuneration for public lending, i.e. by way of an agreement between the authors' organisations that are represented in the joint association that is approved for negotiating the rate that is to be paid per display unit. (The organisations have made an arbitration agreement so that if they do not reach an agreement of the distribution to the funds it may be decided by arbitration.) At present the distribution is as follows: 84.30 % to Billedkunstnernes Vederlagsfond (The Pictorial Artists' Remuneration Fund), 12.47 % to Kunsthåndverkernes fond (The Handicrafts Fund) 2.23 % to Norsk Fotografisk Fond (The Norwegian Photographic Fund) and 1% to Samiske kunstneres og forfatteres vederlagsfond (The Sami Artists' and Writers' Fund). The money is paid to the funds to be distributed to the artists as grants and project support and purposes to the collective benefit of artists in this field.

The *45b-remuneration to performers and phonogram producers* is distributed by the collection and distribution organisation that is approved by the Ministry, which is Gramo, such distribution to be made to the individual right producers and performers. According to Gramo's statutes the distribution criteria for performers shall be decided by the performers' group and the distribution criteria for the producers by the producers' group, the criteria to be set independently of the criteria set by the other group. Thus the performers group decides the criteria and percentages according to which the performers' share of the remuneration collected per sound fixation shall be divided between the performers concerned. In the Regulations to the Copyright Act is provided that when the yearly remuneration to a particular performer or producer is below 0.5 % of the national Insurance base amount, there shall be no payment; the remuneration shall then be at the disposal of the organisation to be used for purposes as determined by the organisation. In the Regulations is provided that remuneration that is due to foreign right holders shall on the basis of reciprocal agreements with similar collection and distribution organisations be either transferred to such organisation or retained on a reciprocal basis.

In the award letter re the *compensation for private copying* which is paid to Norwaco, the Ministry provides that the compensation shall be handled as referring to the actual extent of the private copying of films and sound recordings and be equally divided between the three right holder groups, i.e. authors, performers and film and phonogram producers. Thereafter it shall be divided according to the types of works etc., the addressees for the remuneration being the original right holders, not the right owners. (Derived rights are thus not to be taken into account.) This latter division is made by Norwaco on the basis of statistics and investigations regarding the productions used during the period to which the remuneration relates. However, remuneration that broadcasters shall receive on the basis of said criterion is transferred to UBON – Union of Broadcasting Organizations in Norway – which is responsible for making the distribution to the thus entitled broadcasting organisations. The ensuing procedure in Norwaco is as follows: 1) The Distribution Committee of that section in Norwaco which deals with private copying (which is elected by the organisations that are members of the section) makes a proposal as to how the remuneration shall be shared between the different categories of authors, performers and producers. 2) The proposal is put to a vote in the sector, and if the proposal is unanimously accepted, this is used for the distribution. 3) If the committee's proposal is not accepted, the committee shall conduct mediation between the member organisations. 4) If the mediation does not succeed, the committee shall execute a written decision, which is final unless a member organisation within a month after the decision was sent to the member organisations, brings the matter to Norwaco's Arbitration Commission the members of which shall be external to Norwaco and are elected by the AGM for a period of two years at a time. Decisions of the Arbitration Commission are binding and may not be appealed. Norwaco then carries out the distribution to the member organisations, Norwaco's board being responsible for making the distribution to foreign right holders organisations. The member organisations

take care of the distribution to individual Norwegian right holders. The Norwaco board makes the distribution to foreign right holders, relying on agreements with foreign right holders' organisations to carry it out.

The remuneration that is collected by an organisation on the basis of a licence agreement which entails an *extended collective licence* is distributed by the organisation. It may be distributed on a collective basis, or individually. When this is a CMO that is mandated by organisations that each represent different right holders in the field concerned and the CMO collects the remuneration, there is a system of collective distribution, so that the CMO distributes the remuneration to the right holders organisations representing the categories of right holders concerned, applying keys that have been set by way of a procedure in which these organisations take part as provided for in the bye-laws of the CMO. For some licences this system is combined with the CMO making distribution to individual right holders. Agreements with foreign right holders organisations are designed partly for the purpose of exchanging rights portfolios, and partly to regulate whether and how the transfer of remuneration shall take place, the remuneration then to be distributed as decided by the organisation making the distribution.

As for remuneration that is obtained from the licences that are issued by Norwaco or Kopinor, which entail an extended collective licence, the distribution is decided by way of procedure involving the member organisations that represent the categories of right holders concerned. If a final decision as to the distribution is not reached by way of this procedure, the distribution that has not thus been decided is in the last instance decided by arbitration.

The system used in Norwaco is described above, there being different sectors for the different fields of use that are licensed.

The remuneration that Kopinor obtains by way of its licencing activities that entail extended collective licences is on the basis of statistics ascribed to different categories of publications and works respectively. The distribution is negotiated in two stages; first there is the split to be made between authors and publishers, which depends on the type of publication and the type of works rendered therein,
cf. http://www.kopinor.no/en/rightsholders/distribution. The next step is the distribution between the different categories of publishers and authors respectively. The procedure and the system for deciding the distribution when the negotiations fail is described at http://www.kopinor.no/en/rightsholders/distribution/documents/distribution-procedures.
The final resort is that the distribution is decided by Kopinor's Arbitration Tribunal which is appointed by the AGM, one member is to be nominated by the member organisations that organise authors and one member to be nominated by the publishers' organisations, and the third member to be nominated by the first two and become the Arbitration Tribunal's Chairperson. Decisions of the Arbitration Tribunal are binding and

may not be appealed. As for the distribution to be made to foreign right holders, this is a matter that is dealt with by the foreign CMOs to which Kopinor forwards the remuneration which on the basis of statistics are allotted to foreign publications and works.

In TONO the members are individual authors and publishers, and the distribution is made on the basis of a distribution plan that is adopted by the AGM, the amendment of which is subject to the same rules as amendments to the statutes of TONO.

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

Please see answer to *Question 3. above*.

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

In the Copyright Act Section 38c is provided that the *remuneration for resale* shall be collected by a collection and distribution organisation that is approved by the Ministry concerned (presently the Ministry of Culture). This allows for the Ministry applying mechanisms of supervision, typically that the organisation shall send its annual reports and audited financial statements to the Ministry.

In the Regulations to the Copyright Act is provided that the Ministry concerned (presently the Ministry of Culture) shall approve the statutes of the organisation that is approved for making the collection and distribution of *remuneration to performers and phonogram producers according to Section 45b*, and any amendments of the statutes, and that the organisation shall send its annual report and audited financial statements to the Ministry by May 1st in the following year.

As provided for in the Copyright Act Section 38a, second paragraph, according to which an organisation in order to be entitled to issue licences that entail an *extended collective licence*, shall be approved by the Ministry concerned, the Government has issued provisions regarding the supervision of organisations and the funds which receive remuneration for further distribution. In the Regulations to the Copyright Act is provided that the Ministry of Culture may decide that such organisations and funds shall provide such access as is necessary to verify that the compensation funds are managed in a satisfactory manner. For the same purpose the Ministry may stipulate or modify

conditions for approval as mentioned. I am not informed that the Ministry has made any such decisions.

Finally I shall here mention that any company or amalgamation which – itself or by proxy – for commercial purposes or constantly acts as an agent for authors to collect remuneration for the recording or public performance or communication to the public of musical works, shall according to *The Act on Remuneration to the Norwegian Composers Fund*, 1965-04-09-1, obtain a licence from the Government and is obliged to pay a fee to the Fund as provided in the act. The fee is set at 2 % of the gross remuneration income of the organisation. The fund shall be used to support composers who live and mainly work in Norway, their dependents and purposes that promote Norwegian music art. (The Fund's assets are primarily used to support ordering new musical works.) The Government may require that the entity applying for a licence issue a guarantee for the payment of the fee and for any liability towards the authors for which it acts, and may set also other conditions for granting the licence. TONO (The Norwegian performing rights organisation) is thus licensed, presently for a period of 10 years. There are no particular conditions attached to the licence. I shall add that TONO is one of the organisations that have been approved according to the Copyright Act Section 38a, first paragraph for issuing licences that may entail an extended collective licence.

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

   Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

SPOTIFY, WIMP, TIDAL, BEAT.NO + more of the same. All are music streaming services offered to individual subscribers. Subscribers pay a monthly fee to the service provider. Right owners get a cut from the subscription fee. When the subscribers have access also to downloading, this is subject to payment per download.

ITunes – subscription service for downloading, payment per download. For AV productions it is possible to subscribe for a short period (48 hours) or "forever".

Netflix – subscription service for streaming of films

Storytel – subscription service for streaming of audiobooks and e-books. Subscribers pay a subscription fee per month and may then listen or read, and switch between e-books and audiobooks, as much as they like.

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

No legal issues have occurred so far. The main problem is, as always, what to pay as remuneration to right owners.

3. In your country, are there offers that are based on flat rates, ‘pay-per-click’ or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

Most services based on permanent downloads have such a transactional pay-per-click payment solution versus the end users (buyers), so this is the general rule for MPRT (Mobile Phone Ring Tones), DPD (Digital Phonogram Delivery – a la carte downloads as offered by iTunes, Google Play etc.) and for EST (Electronic Sell Through – online video purchase). Transactional payment has been common also for VoD (Video on Demand – streaming/rental) services, although there is now a significant growth in subscription based VoD-services. User paid music streaming services are generally subscription based.

(There are ‘pay per click’ services offered by television services, for instance to watch a sports events.)

4. Within these business models, how do authors and performers get paid?

Right owners get a cut from the subscription fee. When it comes to so called “freemium” services, right owners get paid out of a cut from the advertising income.

The music streaming services are licensed by TONO (The Norwegian performing rights organisation) which collects payment for authors and music publishers, and by the producers representing in this regard also the performers and being thus responsible for making such payments to the performers as are required in their contracts. There are examples that producers have done the licensing through an organisation representing them, as in the case of WiMP which is licensed by IFPI. As an example of the share to authors and producers and performers I mention that for WiMP the income from the subscriptions fees is as a rule shared so that TONO receives approximately 12 %, the producers receive approximately 65 % to be shared with the performers as provided in the contracts with the performers, while WiMP keeps the remainder.

Netflix is licensed by film distributors. Producers complain of lack of insight and poor transparency. The remuneration received by producers is in the form of a flat fee, to be shared with the authors and performers as provided in their contracts with the producer.

The streaming service Storytel is as a rule licensed by publishers. The publishers get a cut of the total subscription income. The procedure for establishing the cut is as follows: The number of ‘sales’, defined as a reading/listening, is counted. The income from each sale is found by dividing the total income with the number of ‘sales’. When only 20 % of the book is read or listened to, this counts as 1/5 of a sale, 40 % counts as 2/5 of a sale, etc. The publisher’s share of the income from a ‘sale’ of a book depends on the publisher’s contract with Storytel. The author’s share is calculated from the publisher’s net income from the service, the publisher being obliged to pay royalty to the author from this net income (ex. VAT). The Norwegian Publishers' Association (NPA) has made a standard agreement with the Norwegian Authors´ Union (fiction writers) which sets terms for the assignment of the right to use e-books in subscription services, including royalty terms (the royalty basis and rates) and a minimum royalty per reading of a work. There is as yet no such agreement for audiobooks.

Please send your completed questionnaire to elisabeth.amler@ip.mpg.de by 15 March 2015