140 YEARS LATER, LOOKING AHEAD

WHOSE RIGHT IS COPYRIGHT?

OWNERSHIP AND TRANSFER OF COPYRIGHT AND RELATED RIGHTS

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Opatija, Croatia

QUESTIONNAIRE

Introduction:

This questionnaire is based on the Congress program and follows its structure:

- *Day 1 – Discussion of principles of copyright ownership*
- *Day 2 – The practical implementation of these principles*

The first day – and therefore the first part of the questionnaire – is divided into three sections corresponding to Sessions 2, 3 & 4 of the Congress program:

- *1 – Original ownership (To whom are copyright and neighbouring rights attributed?)*
- *2 – Transfer of Ownership (How are rights granted or transmitted?)*
- *3 –What corrective measures, subsequent to transfers of rights, do laws accord authors or performers in view of their status as weaker parties?*

The second day focuses on the practical implementation of these rights, particularly in relation to the question of streaming (Session 5).

Each reply to these questions should indicate if the answer is the same or different (if so, how) with respect to neighbouring rights compared with authors' rights.

I. INITIAL OWNERSHIP [SESSION 2]

A. To whom does your country's law vest initial ownership? (Please indicate all that apply.)

1 — The author (human creator) of the work

Answer: The Norwegian Copyright Act vests the initial ownership to the person(s) who created the work.

a. Does your country's law define who is an author?

Answer: Section 2 first paragraph of the Copyright Act reads (in English translation):

«He who creates a work of art has copyright in the work and is referred to as the author".

b. For joint works (works on which more than one creator has collaborated), does your law define joint authorship? What is the scope of each co-author's ownership? (may joint authors exploit separately, or only under common accord)?

Answer: According to Section 8 of the Norwegian Copyright Act, two or more authors enjoy joint ownership of a work when the work is created by their joint creative efforts, and the contribution of each author cannot be separated as individual works.

When a work is subject to joint ownership, consent of all owners is necessary for the first communication of the work to the public, unless the authors have expressly or implicitly consented to the publication in advance. Such consent from all the authors is also necessary before the work can be communicated to the public in another way or in another form than previously. On the other hand, one only needs consent from one of the co-authors for a new communication to the public in the same way as previous communications. Each of the co-authors may initiate legal action against an infringer.

2 — Employers

a. Under what conditions, e.g., formal employment agreement, in writing and signed? Creation of the work within the scope of employment?

Answer: Norwegian law does not vest initial ownership to an employer, unless the employer has contributed to the work by her own creative effort, cf. question 1.b above. However, there is a legal presumption that employees transfer copyright to their works to their employers, cf. question II below.

3 — Commissioning parties

a. All commissioned works, or limited to certain categories?

b. Under what conditions, e.g., commissioning agreement, in writing and signed by both parties?

Answer: Norwegian law does not vest initial ownership with commissioning parties either, unless the said party has contributed to the work by her own creative effort, cf. question 1.b above. However, the commission agreement will often contain provisions on transfer of copyright, and such a transfer may often be implied in the agreement even if not explicitly articulated. Cf. question II below.

4 — The person or entity who takes the initiative of the work's creation (e.g. Producers; publishers) of certain kinds of works, e.g., audiovisual works; collective works

a. scope of ownership of, e.g. all rights, or rights only as to certain exploitations; what rights do contributors to such works retain?

Answer: Taking the initiative to creating a work will in itself not be sufficient to be regarded as a '(co)creator' of work (ref. the idea/expression dichotomy). (The situation may be different for the neighbouring 'producer's right' under Section 20 of the Copyright Act, cf. the Norwegian Supreme Court's decision of 5 December 2023, HR-2023-2282-A)

5 — Other instances of initial ownership vested in a person or entity other than the actual human creator? (Other than 6, below.)

6 — If your country's law recognizes copyright in AI-generated works, who is vested with original ownership? (e.g., the person providing the prompts to request an output? The creator of the LLM model and/or training data? someone else?)

Answer: The question is not addressed in the Copyright Act nor the *travaux préparatoires* of the Act, and has yet not been raised before Norwegian courts. Legal doctrine has assumed that prompting *may* in certain instances be sufficiently creative in forming the expression of the output to vest copyright protection to the prompter. (But the ambit of protection of such a work is very unclear).

[b. For presumptions of transfers, see II (transfers of ownership, below)]

B. Private international law consequences

1 — To what country's law do your country's courts (or legislature) look to determine initial ownership: Country of origin? Country with the greatest connections to the work and the author(s)? Country(ies) for which protection is claimed?

Answer: The question has not been addressed in neither Norwegian statutory, nor, to the knowledge in this author, case law. For cinematographic works, we will probably apply *lex protectionis* pursuant to art. 14 bis of the Berne Convention. For other types

of works, legal doctrine seems to be uncertain as to whether *lex protectionis* or *lex orignis* should apply.

II. TRANSFERS OF OWNERSHIP [SESSION 3]

A. Inalienability

1 — Moral rights

a. Can these be granted to the grantee of economic rights? To a society for the collective management of authors' rights?

b. May the author contractually waive moral rights?

Answer: According to Section 5 3rd paragraph of the Norwegian Copyright Act, the author may not waive her right to be named as an author according to "good customs" or the right to prohibit changes to the work that are detrimental to the reputation or the characteristics of the work or the author, unless the waiver concerns a use of the work that is limited in type and extent.

The author may transfer the right to make changes to the work to the grantee of economic rights to the same extent that the author may waive the moral rights to prohibit changes. In principle the author may also grant such rights to a society for the collective management of author's right, but the undersigned is not aware of any Norwegian society that has obtained such rights from authors.

2 — Economic rights

a. May economic rights be assigned (as opposed to licensed)? May an author contractually waive economic rights?

b. Limitations on transfers of particular economic rights, e.g., new forms of exploitation unknown at the time of the conclusion of the contract.

Answer: Economic rights may be assigned as long as the author receives an appropriate remuneration. This also applies to new forms of exploitation unknown at the time of conclusion of the contract. However, if the extent of the assignment is unclear, courts may interpret it narrowly.

B. Transfers by operation of law

1 — Presumptions of transfer:

a. to what categories of works do these presumptions apply?

b. are they rebuttable? What must be shown to prove that the presumption applies (or has been rebutted)?

c. Scope of the transfer: all rights? Rights only as to certain forms of exploitation?

d. Conditions for application of the presumption (e.g. a written audiovisual work production contract; provision for fair remuneration for the rights transferred)?

2 — Other transfers by operation of law?

Answer: The Norwegian Copyright Act contains two presumptions of transfer:

i) **Under Section 71, the copyright in a computer program created by an employee under the execution of her duties in the employment, or following the instructions given by her employer, is transferred to the employer, unless otherwise agreed. The provision implements article 2.3 of the EU Directive on the legal protection of computer programs (dir 2009/24) and should be interpreted in line with this directive. The undersigned is not aware of any Norwegian legal sources addressing the question of how easy it will be to establish that the parties have agreed that the rights shall not be transferred, or transferred to a more limited extent than stated in the act. It can be noted, however, that there are no *formal* requirements for such an agreement.**
The presumption entails a full transfer of all economic rights to the computer program, but not moral rights under Section 5 of the Copyright Act, cf. question II.A above. However, a program developer's moral rights to a computer program are not strong. She will seldom be able to claim that "good customs" requires her to be named, or that amendments made to the program by the employer are detrimental to her reputation or the characteristics or reputation of the work.

ii) **When a contract concerning an *audiovisual production* is concluded (the Act says "film work", but this is understood to include audiovisual works in general, e.g. also TV productions), for instance between a script writer or a costume designer and the film producer, Section 72 2nd paragraph of the Copyright Act states that the contract is presumed to encompass a transfer of rights to a) make copies of the film, b) make it available to the public through distribution of the copies, or by communication to the public or public performance of the film, c) add subtitles or translated speech to the film. The presumption applies to all contributors to the audiovisual work, also to script writers and directors, but not to creators of musical works. This means that Norway has availed itself of the opportunity to make the presumption somewhat broader than set out by article 14bis (2) and (3) of the Berne Convention. The reason that the presumption does not apply to musical works is that Norwegian legislators considered the system for**

collective management of musical works to work so well that one did not need a presumption of rights transfer.
Under Section 16 4th paragraph, a contract concerning film production between a film producer and a performer (typically an actor) is presumed to encompass a transfer of the performer's rental rights to the fixation of the performance (performers do not have exclusive rights, only rights to appropriate renumeration, when it comes to public performance and linear broadcasting of the fixation of their performances). This is line with EU Directive 206/115 (on rental and lending rights) article 3.4.

iii) **In addition, Norwegian copyright law contains an unwritten presumption of transfer in employment relationships *in general* (the statutory rule is, as mentioned above, confined to computer programs). Pursuant to the unwritten rule, the employer obtains rights to her employees' works "to the extent this is necessary and reasonable for the employment contract to reach its purpose". The textbook example is that a news media corporation by virtue of this rule will acquire the exclusive rights to publish the works that the journalists create in course of their employment in the normal ways of news publishing (it should be mentioned however, that there are detailed provisions about this in the collective agreements entered into between the biggest Norwegian news coroporations and the journalists' labour union).**

C. Transfers by contractual agreement

1 — Prerequisites imposed by copyright law to the validity of the transfer, e.g., writing, signed, witnessed, recordation of transfer of title?

Answer: The are no formal requirements under Norwegian law.

2 — Do these formal requirements include an obligation to specify what rights are transferred and the scope of the transfer?

Answer: No formal requirement to specify, but a court may interpret a vague and general transfer narrowly, if it finds that the agreement would otherwise be unbalanced.

3 — Does your country's law permit the transfer of all economic rights by means of a general contractual clause?

Answer: In principle, yes, but cf. question 2 just above. Cf. also question II A on moral rights. Under Section 69 of the Copyright Act, the author has a right to "fair remuneration" when she assigns or gives a license to exploit her work, and this provision becomes particularly important for agreements that entail a transfer of all economic rights.

4 — Does your country's law permit the assignment of all rights in future works?

Answer: Norwegian law permits the assignment of rights to future works (for example in an employment relationship), but cf. question 2 and 3 above. It should also be mentioned that Norwegian courts have the authority (though very limited) under Section 36 of the Contracts Act to set aside or amend contracts that are grossly unfair or contrary to morality. A contract whereby an author assigns all rights to the works she will create for the rest of her life (also after an employment or a co-operation between the parties has ended) will most likely be set aside under this provision. In a proposal for amendments in the Copyright Act, the Ministry of Culture and Equality has proposed to introduce a revocation right for authors in line with article 22 of the EU DSM Directive.

D. Private international law

1 — Which law does your country apply to determine the alienability of moral or economic rights and other conditions (e.g. the country of the work's origin? The country with the greatest connections to the work and the author(s)? The country(ies) for which protection is claimed?)

Answer: Parties are generally free to choose the applicable law in their contracts. Employment and consumer contracts are important exceptions. The limitations on transfers of moral rights', as well as the protection against grossly unfair contracts, may also be regarded as mandatory by Norwegian courts, regardless of the parties' choice of law. If the parties have not chosen the applicable law, and they are not both Norwegian, the choice of law for a transfer of copyright may be uncertain (the undersigned is unaware of any relevant Norwegian case law). The undersigned presumes that a Norwegian court will apply the *lex protectionis* if the case concerns the exploitation of the work in a particular country, but if it concerns the exploitation of the work in several jurisdictions, the court will probably apply the law of the country with, all in all, the greatest connections to the work and the author(s).

III. CORRECTIVE MEASURES, SUBSEQUENT TO TRANSFERS OF RIGHTS, ACCORDED TO AUTHORS OR PERFORMERS IN VIEW OF THEIR STATUS AS WEAKER PARTIES [SESSION 4]

1 — Does your law guarantee remuneration to authors and performers?

a. By requiring payment of proportional remuneration in certain cases (which)?

b. By a general requirement of appropriate and proportionate remuneration?

c. By adoption of mechanisms of contract reformation (e.g., in cases of disproportionately low remuneration relative to the remuneration of the grantees?

d. By providing for unwaivable rights to remuneration in the form of residual rights?

b. What remedies are there if the grantee does not exploit the work?

Answer: Section 69 of the Copyright Act generally states that when an author who is not a consumer has wholly or partially transferred her right to exploit a work, the author is entitled to 'fair remuneration' from the transferee. The assessment of what amounts to a 'fair remuneration' shall, among other things, take into account the kind of rights that have been transferred, what is usual in the relevant sector and the specific circumstances of the case, including the parties' negotiating power and the purpose of the use for which the rights have been transferred. If the transfer concerns commercial use, due account shall be taken to the probable value of the transfer. The section also applies to performers' rights.

Section 69 explicitly states that the assessment shall be based on the situation at the time of the transfer. Section 69 is thus no "best seller clause". Section 36 of the Contracts Act, mentioned under II.C above, which gives courts the authority to set aside or amend grossly unfair contracts, may in theory give a basis for adjusting the remuneration if the value of the work turns out to be so high for the transferee that the agreed remuneration is disproportionately low. The threshold for interfering with contractual freedom under this provision is, however, considered to be so high that it does not comply with article 20 of the DSM directive, so a new provision in line with this article will probably be introduced in the Copyright Act. The new adjustment mechanism will not apply to agreements on exploitation of works made by collective management organisations.

The right to fair remuneration under Section 69 can, unless the parties have agreed otherwise, only be invoked against the person to whom the author or performer has transferred her rights. If this person transfers the rights to another party, the provision does not give the author/performer a right to raise a claim for remuneration against this party.

Chapter VIII of the Copyright Act on 'droit de suite', implementing EU directive 2001/84, may be seen as a sort of 'residual remuneration right'. Furthermore, Section 18 gives performers who participated in a recording, whose term of protection was extended by virtue of EU directive 2011/77, a right to additional remuneration from the producer. Apart from this, the Copyright Act does not explicitly grant unwaivable remuneration rights. It should be mentioned, however, that many forms of use of copyright protected subject matter are regulated by collective agreements in Norway, either between users and CMOs or between producers and various unions/guilds, and these agreements often provide for some sort of residual remuneration.

2 — Does your law require that the grantee exploit the work?

a. Does your law impose an obligation of ongoing exploitation? For each mode of exploitation granted?

Answer: At present, there are few provisions in the Copyright Act that explicitly require the grantee to exploit the work. Under Section 72, a person who has been granted rights to exploit a work for the making of a film (typically a film producer), is obliged to finish the film and make it available to the public 'within reasonable time'. If this obligation is manifestly breached, the grantor (for example the author of the novel on which the film is based), has the right to terminate the contract, keep any remuneration she has received and also claim compensation for financial loss that is not covered by this remuneration. Under Section 17 a performer who has participated on a recording, may terminate the agreement with the producer when 50 years have passed since the recordings first publication (or, if the recording has not been published, from the time it was made publicly available), unless the producer makes a sufficient number of copies of the recordings available for sale or makes it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.

In addition to this, an obligation to exploit the work may often be inferred from an unwritten 'principle of loyalty' in Norwegian contract law. A breach of this duty will probably have the same consequences as a manifest breach of the duty to exploit the work under the above-mentioned Section 72 of the Copyright Act.

As a consequence of the DSM Directive (article 22), a more general duty of exploitation will probably be introduced in the Copyright Act.

3 — Does your law impose a transparency obligation on grantees?

a. — What form does such an obligation take (accounting for exploitations, informing authors if the grantee has sub-licensed the work, etc)

b. — What remedies are available if the grantee does not give effect to transparency requirements?A

Answer: Section 70 contains some transparency provisions that will apply if the parties have agreed that the author's remuneration will depend on 'turnover, sales figures or similar' (e.g. royalty). The Section states that the author may require that the remuneration is calculated at least once a year. The author may also require that each payment is followed by 'necessary information' on the circumstances on which the calculation is based. Furthermore, the author may require that the grantee's 'accounts, bookkeeping and inventory, as well as attestations from those who have

used the work, is made available to a state-authorized accountant appointed by the author. Section 70 also applies to performers' rights.

The Section does not state what remedies are available if the grantee does not give effect to these transparency requirements, but a manifest breach of them will give the author right to terminate the contract under general contract law rules.

As a consequence of the DSM directive, a new provision on transparency has been proposed, which will also apply when the parties have agreed on other kinds of remuneration than royalty or similar. According to the proposal, the grantee shall give 'updated, relevant and exhaustive information on the use of the work'. The information shall at least include information on how the work has been used, the extent of the use, and income aggregated from the use of the work.

4 — Does your law give authors or performers the right unilaterally (without judicial intervention) to terminate their grants?

a. Under what circumstances?

i. After the lapse of a particular number of years?

ii. In response to the grantee's failure to fulfil certain obligations, under what conditions?

iii. As an exercise of the moral right of "repentance"? (Examples in practice?)

Answer: Section 72 and 17 of the Copyright Act, described under III.2 above, are the only provisions in the Act that give authors and performers an explicit right to terminate their grants. However, authors and performers may also terminate their grants under general contract law rules if the grantee commits a manifest breach of her obligations. Such obligations could for instance be obligations to exploit the work specifically set out in the contract, obligations to exploit the work inferred from the general principle of loyalty (cf. III.2 above) or the obligations to pay for the grant that follows from the contract.

IV - STREAMING, TRANSFER OR RIGHTS, AND THE MANAGEMENT OF LARGE CATALOGUES [SESSION 5]

1 — Applicable statutory right

a. What specific statutory right applies to licensing the streaming of works and performances?

i. Is it the right of communication to the public modelled after Article 8 of the WCT for authors, and the right of making available modelled after Articles 10 and 14 of the WPPT for performers and phonogram producers?

Answer: Yes, Section 2 (copyright), 16 (performers' rights) and 20 (producers' rights) give the same exclusive rights as WCT article 8 and WPPT article 10 and 14, as well as article 3 of EU directive 2001/20 (infosoc). When it comes to communications such as linear broadcasting, where the works are *not* made available in such a way that members of the public may access the works from a place and at a time individually chosen by them, performers and producers do not hold exclusive rights and may not prohibit such use, but they have a right to renumeration for such use under Section 21 of the Copyright Act.

ii. Another right or a combination of rights?

b. For authors, does this right cover both musical and audiovisual works? For performers, does this right cover both performances fixed in phonograms and audiovisual fixations?

Answer: Yes

2 – Transfer of rights

a. Are there any regulations in your country's law that limit the scope of a transfer or license to the forms of use already known at the time of the transfer or license?

Answer: No specific regulation on streaming, but cf. question II.C above.

b. If there are such regulations, when the statutory right referred to in section 1 was introduced into your law, was it considered a new form of use to which the limitation in subsection 2a. above applies?

NA

c. Are there any cases in your country's law when the statutory right referred to in section 1 is presumed to have been transferred to the producer of a phonogram or audiovisual fixation?

Cf. question II.B above.

3 — Remuneration

a. Are authors/performers entitled to remuneration for licensing the streaming of their works/performances?

Answer: As mentioned under question I.IV, both authors and performers have the exclusive right to the communication to the public of their works/performances in such a way that members of the public may access the works from a place and at a

time individually chosen by them, which is typical for streaming. This gives the authors and performers, at least on paper, the possibility to claim remuneration for granting others the right to stream their works/performances.

b. Do authors and/or performers retain a residual right to remuneration for streaming even after licensing or transferring the statutory right referred to in section 1?

Answer: Cf. question III.1 above.

4 — Collective management

a. In your country's law, is collective management prescribed or available for managing the right referred to in section 1? If so, what form of collective management is prescribed (e.g. mandatory or extended)?

Answer: For the remuneration rights for performers and producers under Section 21 of the Copyright Act (cf. IV.1 above), i.e. 'linear' communications, collective management is mandatory. Collective management is also mandatory for the authorisation of *retransmissions* of broadcasts, cf. Section 57 3rd paragraph of the Copyright Act.

For the typical streaming services, however, that are communicated to the public in such a way that the public may access the works from a place and at a time not individually chosen by them, the only statutory provision that particularly addresses collective licensing is Section 57 1st paragraph, which opens up for *extended collective licenses* for the communication to the public of broadcasts that have earlier been made available to the public. The Norwegian state broadcaster, NRK, has in place an agreement with a CMO that has made it possible to establish a streaming service for broadcasts in the broadcaster's archive ('NRK Arkiv').

Based upon authorisations from their members, the Norwegian CMO for composers and other holders of copyright in musical works has established collective management for streaming services. Performers in the audiovisual sector is working to establish the same.

b. If authors and/or performers retain a residual right to remuneration (ss 3 b.), is collective management prescribed for managing this residual right to remuneration? If so, what form of collective management is prescribed (e.g. mandatory or extended)?

Answer: As mentioned under III.1 above, the Copyright Act provides for explicit residual rights in a very limited number of cases. Collective management (mandatory) is prescribed for the 'droit de suit' right, but not for the other cases.

5 — Transparency and the management of large catalogues

a. Does your law (or, in the absence of staory regulations, industry-wide collective agreements) guarantee that authors and performers regularly receive information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights? If yes, what is the guaranteed periodicity and content of such information?

Answer: Cf. question III.3 on proposed legislation following the DSM directive. Transparency is an issue in the negotiations that CMOs is currently undertaking with the streaming services.

b. Are you aware of any case law where the complex chains of copyright titles, typical of large streaming catalogues, have made the management of works or performances non-transparent or otherwise challenging, such as, for example, the case of Eight Mile Style, LLC v. Spotify U.S. Inc. (https://casetext.com/case/eight-mile-style-llc-v-spotify-us-inc-1)?

Answer: CMOs has complained that complex chains of copyright titles make management of works and performances difficult. The decision of Oslo City Court of 20 November 2012 concerns a claim from the company TMS Management OU against the CMO Gramo. TMS Management claimed to be authorised by Raymond Dorset ('Mungo Jerry') to receive remuneration for broadcasts of Dorset's works (particularly 'In The Summertime'), but the claim was denied by the court. Furthermore, a dispute between Warner Music and two of Norway's most famous rock musicians, Åge Aleksandersen and Terje Tysland, which also involved the CMO Gramo, got much attention in Norwegian media for a number of years. Court proceedings were initiated, but the dispute was settled in 2023, before the start of oral hearings.