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THE ADMINISTRATION OF REPROGRAPHIC RIGHTS AND THE ESTABLISHMENT AND ROLE OF REPRODUCTION RIGHTS ORGANIZATIONS (RROS)

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1. Introduction

By way of introduction I wish to provide you with information about one of the most important advancements for authors and publishers in recent decades: Reproduction Rights Organisations (RROs). The explosive development of RROs worldwide during the 1980s and 1990s is a stunning example of the power of collective action in response to the challenges of technology. Allow me to say a few words about the success of RROs and of IFRRO.

1.1. What are RROs?

RROs began in response to the need to license wide-scale photocopy access to the world's scientific and cultural printed works. RROs are "collecting societies" which license the reproduction of copyright-protected material whenever it is impractical for rightsholders to act individually. RROs derive their authority from contracts with national rightsholders and/or from legislation. Each year, national RROs license hundreds of thousands of users to copy from millions of titles published throughout the world.

RROs licences typically grant authorisations to copy a portion of a publication, in limited numbers of copies, for the internal use of institutional users. Some RROs are also authorised to license other copyright uses, such as those related to electronic distribution via networks. Some RROs also function in other areas of collective administration, such as cable retransmission.

In order to collect fees and convey authorisations internationally, RROs enter into bilateral agreements with each other. Bilateral agreements provide for the exchange of licensing authority (as needed) in national repertoires of works. They also allow for the conveyance of fees back to the rightsholders via their national RROs. These agreements are based upon the principle of national treatment, as found in international copyright conventions.

1.2. IFRRO: The international link

The International Federation of Reproduction Rights Organisations links together all RROs as well as national and international associations of rightsholders. At a meeting of RROs in Oslo in 1984, an informal consortium called the International Forum for Reproduction Rights Organisations was established. In 1988 in Copenhagen, IFRRO became a formal federation eligible to speak on behalf of its constituents before various international bodies such as WIPO, UNESCO, the European Community, and the Council of Europe. In 1998, the IFRRO Secretariat established its headquarters in Brussels, Belgium. IFRRO has three primary purposes:

(1) to encourage the creation of RROs worldwide;
(2) to facilitate formal and informal agreements and relationships between and on behalf of its members; and
(3) to increase public and institutional awareness of copyright and the role of RROs in conveying rights and fees between rightsholders and users.

1.3. RROs and IFRRO today and in the future

National RROs have made enormous strides in providing effective photocopy access to users along with equitable remuneration for rightsholders. In 2002 they collected fees of approx.

US$ 450 million. Collecting bodies have been set up in 49 countries[1], and efforts are under way in many more.

IFRRO's informational and educational programs have increased awareness and respect for copyright by governments, users and rightsholders throughout the world. Nevertheless, illegal copying is still widely practiced in many countries.

Rightsholders in developing countries and countries in transition are also faced with massive outright piracy. This poses an additional challenge to RROs in such countries. While copying for internal, institutional uses can be licensed, piracy – the selling of illegal copies in the market place – erodes the very basis of the publishing industry and must be stopped by all available means.

IFRRO has created working groups and committees to assist rightsholders in setting up collecting societies in countries where they as yet do not exist. Presently working groups for the following regions are in operation:

Asia/Pacific
Africa and the Middle East
Europe (and the CIS)
Latin America & the Caribbean

The emergence of newer technologies further intensifies the importance of organised and timely responses to the needs of both users and rightsholders. For this reason, IFRRO's mission and the growth and solidarity of its members continue to be vital. Today many RROs are, in addition to dealing with reprography, actively licensing digital copying. The challenges and opportunities presented by the rapid advance of digital technology are constantly monitored and assessed by IFRRO.

2. RROs and collective management of rights

Before we go into our main theme, permit me to say a few general words about RROs and collective management of rights.

While IFRRO is a rather young organisation, our colleagues within *The International Confederation of Authors and Composers (CISAC)* have a wealth of experience stretching back to 1850 when the first music performing rights society was set up in France. CISAC was established in 1926. IFRRO, on the other side, became a formal federation only in 1988.

The CISAC societies in 2002 collected approx. US$ 6 billion for the public performance and broadcast of musical works in more than 103 countries. They represent more than 2 million creators world-wide, and their work is well known.

As mentioned earlier, the IFRRO societies were mainly set up as a result of the proliferation of the photocopying machine in the 1980s and 1990s. While there are many similarities

[1] *RROs have been set up to collect for reprography in 49 countries:* Argentina, Australia, Austria, Belgium, Brazil, Canada, Czech republic, Columbia, Denmark, Finland, France, Germany, Ghana, Greece, Hong Kong SAR, Hungary, Iceland, India, Ireland, Italy, Jamaica, Japan, Kenya, Lithuania, Malawi, Malta, Mexico, Mozambique, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Romania, Russia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Trinidad & Tobago, USA, United Kingdom, Uruguay & Zimbabwe.

between the two types of societies, permit me also to point out some differences, with the aim of clarifying what RROs are.

CISAC societies operating in the performing rights field mainly manage only performing rights to one type of work - musical works, and one category of rightsholders.

IFRRO societies, on the other hand, manage rights to many types of works, which appear in print form, including text, music, photographs, illustrations, visual art etc. which are reproduced as sheet music, in books, journals, newspapers and other printed material. RROs have to deal with many different categories of rightsholders.

CISAC societies have over a long period of time been able to build a vast repertoire of rights.

While IFRRO societies also assemble large repertoires of rights, they cannot acquire rights from a large number of countries because rights holders either are poorly organised, or have not begun to organise. Legislators, as we shall see, have enacted special legislation in some countries to deal with this problem.

CISAC societies operating in the music field represent the only means through which composers and songwriters can collect remuneration for the use of their works.

IFRRO societies represent rightsholders who collect their main income through the sale of print products. Sale of these products is, however, undermined by unauthorised photocopying and outright piracy. The remuneration, which RROs collect, represents only part of the income of the rightsholders in their field of operation. According to some estimates the approx. US$ 450 million, which RROs collected in remuneration for photocopying in 2002, might be equivalent to the sale of print products with a value of approx. US$ 9 billion.

CISAC music rights societies mainly collect for the public performance of music in the private sector and from private broadcasting companies, even if some broadcasting companies are publicly owned or parastatal.

IFRRO societies find that the photocopying of protected works takes place in the private sector (businesses and industry, educational establishments), but users are also educational institutions and other institutions owned or operated by governments.

Finally, let me underline that collective management of rights takes place not only for

- public performance and broadcast of musical works, and
- photocopying and digital copying of printed works.

In addition we have organisations operating in a number of other areas, such as

- mechanical rights of musical works (sound recordings)
- rights of performing artists and producers for the broadcasting and public performance of their sound recordings
- rights for re-transmission of audiovisual works on cable networks and for recordings of audiovisual works for educational purposes
- rights in dramatic works
- rights of visual artists in regard of the re-use of their works and the resale right (droit de suite)
- remuneration for private copying

In conclusion of this section I would like to mention that the convergence of technology and new unauthorised uses on the Internet, and not the least on closed networks and intranets, pose new and important challenges to rightsholders worldwide. This situation will, in my view, force rightsholders and their collective management organisations to cooperate in new ways in the future.

3. The legal framework of RROs

We shall now move to a description of the basic legal framework influencing the methods of operation currently being used by Reproduction Rights Organisations (RROs) around the world to license photocopying and similar uses. As we shall see, RROs operate within very different legal, cultural and economic environments.

3.1. The right of reproduction

The right of reproduction is an exclusive right under the international conventions[2] and under copyright laws in most countries. This right constitutes the basis for the work of all RROs. Once the RRO has collected a sufficient number of authorisations or mandates from rightsholders, it can commence collective administration of reprographic reproduction rights **on a voluntary basis**. It issues licences on behalf of the rightsholders, collects remuneration, and distributes it to the rightsholders. However, limitations in copyright laws on this exclusive right can constitute a major hurdle for the RRO.

3.2. Limitations or exemptions in copyright laws

Most copyright laws contain limitations on this exclusive right of the author. Some examples of such limitations are free reproduction in libraries, and free reproduction for «fair dealing», «fair use» or «private use». Many users who photocopy copyright protected works, believe that they can do so with reference to the limitations on the author's exclusive right laid down in law. This confusion arises because many laws in operation today were created at a time when copying was done by hand or typewriter, and before the arrival of the copying machine.

Imposing limitations on the author's exclusive right is restricted under international law in two respects**. The Paris Act (1971) of the Berne Convention for the Protection of Literary and Artistic Works**[3] and the **Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS)**[4] within the Uruguay

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[2] Art. 9 (1) of the Berne Convention provides that

> *Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.*

[3] Art. 9 (2) of the Berne Convention provides that

> *It shall be the matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*

[4] Article 13 of TRIPs (in a way repeating the wording of Art. 9 (2) in the Berne Convention) provides that:

> *Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the interests of the right holder.*

Round of the General Agreement on Tariffs and Trade, administered by the World Trade Organization (WTO).

It is therefore an obligation for the member states of the Berne Convention and the WTO to prescribe limitations on the exclusive right of reproduction only if three conditions are fulfilled. These three conditions are:

1. That they concern only «special cases» and are not generalized,
2. they do not conflict with a normal exploitation of the work,
3. and if they do not conflict with a normal exploitation, that they do not unreasonably prejudice the legitimate interests of the author.

The criteria for restricting the exclusive right are cumulative. They must all be met in order for the restriction to be admissible.

In most countries reprographic reproduction takes place within educational institutions, within the offices of local authorities as well as the central government, and within public and private enterprises. We also find such reproduction taking place religious congregations and in libraries and other institutions providing information.

Schools and students may copy to avoid paying for a book. Articles in newspapers are copied to avoid having to buy an extra copy. Private businesses involved in research and development copy articles in scientific journals so as to reduce costs for subscriptions. In educational institutions multiple copying for classroom use is frequent. The cumulative effect when a whole educational system uses the copying machine can be that many thousand copies of a single work are reproduced.

Often the economic aspect is less direct: Through copying, the employer provides valuable information to the employee, increasing his or her knowledge and competence to the benefit of both.

Photocopying and similar reproduction of copyright protected works today takes place on a scale, which clearly conflicts with the normal exploitation of works. Governments in many countries recognise this.

Legislators have adopted various approaches to reprographic reproduction. The basic approaches are, briefly stated:

- **free reproduction** (reproduction is allowed without authorization and without remuneration, but then limited to copying in the private sphere of family and friends);

- **statutory licenses** (statutory provisions about reproduction without authorization but against a remuneration determined either in the law or by a public authority);

- **compulsory licenses** (statutory provisions allowing reproduction without authorization but against remuneration which is negotiated between rightsholders and users);

- application of the principle of individual authorization but **with mandatory collective administration** (authorization must be given through a collective administration organisation which is also the only one entitled to collect and distribute the remuneration);

- application of the principle of **individual authorization** under which rights are exercised either voluntarily through a collective administration organisation or individually by the rightsholder.

Mr. Henry Olsson, formerly one of the Directors of WIPO, and Special Government Adviser on Copyright in the Ministry of Justice in Sweden, comments on these alternatives by stating that:

"In the choice between the various alternatives the national legislator has to find the delicate balance between a number of conflicting interests. On the one hand are various public, consumer, competition or information policy aspects which would speak in favor of widest possible free access to protected material. On the other hand there is the definitive need to secure the authors', producers', publishers' and other right-owners' interest of protection; if the balance is shifted too far to their disadvantage there is a risk of ruining investments made and, in the long run, the creativity itself. (...) The Berne Convention and the TRIPS Agreement try to take those interests into consideration in setting out the various considerata which must form the basis for any national legislation on limitations on authors' rights be it in the context of reprography or otherwise."

3.3. Voluntary licensing and legal backup systems

A collecting society in the field of reprography can never achieve total coverage in the form of mandates from rightsholders nationally or internationally. In order to solve the problem of the rights of rightsholders *outside* the RROs and who are not directly bound by the agreements between RROs and users, various solutions are being employed:

Through **indemnity clauses** in the agreements between the RRO and the users, the RRO assumes the financial responsibility for claims from outsiders. This can, however, usually not remove the criminal responsibility of the user. (This solution is typical in states where voluntary licensing takes place, such as the United Kingdom.)

We also find countries where **provisions** in the law give **an extended effect** to collective agreements (the so-called extended collective license system). This system is applied in Denmark, Finland, Iceland, Norway and Sweden. The Russian Federation, Ukraine and Malawi have somewhat similar systems. When a collective agreement between one or more users and an RRO representing a substantial number of national rightsholders is, by operation of law, under certain conditions for the safeguarding of outsiders' interests, made applicable also to rightsholders who are not represented by the RRO. This usually implies that foreign or non-represented rightsholders must be given access equal to rightsholders who have mandated the RRO, to fees which are distributed, and also that they under certain circumstances shall have the right to claim an individual remuneration for reprographic reproduction. The system benefits the user, in that the risk of prosecution and criminal responsibility is removed if the user copies the works of non-represented rightsholders within the limits of the agreement.

We are in this case speaking of the application of the principle of **individual authorisation but with partially mandatory collective administration** mentioned above. Such legal back-up systems clearly benefit both rightsholders and users.

In 1995, legislation in France introduced for the first time the concept of **Obligatory Collective Management** into the administration of reprographic reproduction rights. The administration as such is based on exclusive rights and voluntary licensing. Even though the administration of rights is voluntary, rightsholders are legally obliged to be represented by and make claims through a collective administration organisation. This safeguards the

position of users because an outsider cannot make direct claims against them. Agreements with users can only be concluded by a society approved by the Ministry of Culture.

3.4. Legal licenses

As mentioned above, when non-voluntary licensing systems are in operation, no authorisation from the rightsholders is needed. Permission to copy is granted by law, hence the name "legal licence".

If the royalty rate is also determined in the legislation, the system can be called "a statutory licence". If rightsholders can negotiate the royalty rate with the users (although they are not able to refuse authorisation), the term "compulsory licence" can be used. Both statutory licences and compulsory licences fall under the broader term of legal licences, and the administration of rights thus falls under non-voluntary licensing systems.

In countries with legal licenses a **legal presumption** in the law may state, unless differently proven, that the RRO is actually administering the rights, which it claims. RROs must generally be approved by the authorities. We shall give some examples of legal licenses:

The RRO in the Netherlands, Stichting Reprorecht**,** administers a non-voluntary licensing system for reprographic reproduction rights. Dutch law grants a legal licence to users to copy small parts of printed works. The royalty fee is established by government regulation. Stichting Reprorecht is authorised to collect and distribute the remuneration. Statistical surveys are carried out to determine the quantities of copyright-protected works being copied by category of work and to provide the information needed to make distributions to authors and publishers.

In Australia there is a statutory licence for copying in schools, universities, tertiary colleges and other educational institutions. In 1990 the Attorney-General declared that the Copyright Agency Limited was authorised to administer the legal licences contained in the law on behalf of rightsholders having rights in printed works. The Copyright Tribunal determines the level of remuneration. In Australia, licensing outside the educational sector is carried out on a voluntary basis.

Levy systems: Reproduction for private and personal use is a special case. Traditional licensing systems would not be workable. In many countries the legislation states that copying for private use is free. However, reproduction for private use can be compensated indirectly. Equitable remuneration through levies on equipment is one possible solution. There can, in addition, be a levy on the underlying material, i.e. paper. The first country to introduce this kind of levy system on equipment was Germany, in 1985. The levy is paid on copying and fax machines, reader printers and scanners. A levy is paid by the manufacturer or importer of the equipment. In addition to this, a so-called "operator levy" is paid by large-scale users, such as schools, universities, research institutes and copy shops. The tariffs for both the equipment levy and the operator levy are determined in the legislation. The German RRO, Verwertungs-gesellschaft WORT collects the levy on behalf of all authors and publishers of different types of materials.

The equipment levy approach is based on the notion that remuneration is payable for all uses of copyright material, but that single copies for private and personal use cannot be tracked. Payment for this type of copying is made possible by imposing a levy on equipment. Equipment levy schemes have been adopted by legislators in a large number of countries,

including Austria, Spain, Poland, The Czech Republic, Slovakia, Romania and Nigeria. For uses not permitted by law, the RROs must manage rights on a voluntary basis.

4. The relationship between RROs and the state

In his important work *Collective Administration of Copyright and Neighboring Rights*, Dr. Mihály Ficsor, former Assistant Director General of the World Intellectual Property Organization (WIPO), defines collective management as follows:

"In the framework of a collective administration system, owners of rights authorize collective administration organizations to administer their rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licences against appropriate fees and, under appropriate conditions, collect such fees and distribute them among the owners of rights. This can be considered as the definition of collective administration.[5]"

4.1. Basic rights

Through international conventions and national legislation, creators, performers, producers and publishers are given economic and moral rights to their creations, performances and products. Authors and other creators generally administer their rights on an individual basis by entering into contracts with producers and publishers in regard of use and dissemination of their work.

4.2. RROs are private sector institutions

In many cases rights given by law can only be administered collectively, typically when vast numbers of rightsholders and users are involved. Rightsholders will in such cases authorise a collective management organisation to do so. The rightsholders and RROs cooperating within IFRRO will generally only authorise an organisation in a foreign country to manage their rights if this organisation is owned, managed and controlled by rightsholders of the territory in which it operates.

4.3. Legislation in support of collective management

As we have explained above, legislators in many countries have adopted laws with the aim of facilitating the work of RROs. Such legislation can, as illustrated, take many forms. A major aim of such laws is to assist users in achieving easy access to copyright works.

4.4. State supervision and control

One of the shared characteristics of copyright management organisations is that they operate as *de facto* monopolies in numerous countries. State supervision, which varies in level from country to country, is regarded as justified by this "monopolistic" position. In some countries, especially where legal licenses are in operation, this may even translate into a control on tariffs by an autonomous government body. In other countries, the state provides support mechanisms for mediation when RROs and users cannot agree on licensing terms.

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[5] Dr. Mihály Ficsor, *Collective Administration of Copyright and Neighboring Rights* (Geneva: WIPO, 1990.)

Sometimes the state also controls and oversees the creation of RROs and/or certain aspects of their activities. The state may even issue licenses for the RRO to operate, and may wish to review such licenses at regular intervals.

RRO members of IFRRO generally accept supervision and control by the state because they by nature are committed to transparency and they also find that this gives the RRO legitimacy with users as well as rightsholders.

RROs, however, attach great importance to the form and function of such state intervention. Governments are major users of copyright protected works both in their own educational institutions as well as in government offices. The role of the state in regard of RROs must therefore be conducted by autonomous government bodies.

4.5. Statuory collecting societies

In some developing countries statutory (parastatal) collecting societies have been created, sometimes as an integral part of the government's Copyright Office. Over the years IFRRO has discussed this situation.

IFRRO holds the general view that RROs should be firmly planted in the private sector and be owned and managed by national rightsholders. Only then will RROs abroad feel that they can entrust their portfolios of rights to an RRO in the other country.

However, IFRRO also recognises that there may be a role for governments in regard of funding, promotion and management of rights in some of the least developed countries, provided that rightsholders play an active role in the management of such bodies. We recognise that government involvement may be the only option in countries with weak copyright industries. Cooperation with such bodies will be considered on a country-by country basis. Typically, IFRRO has already included BUTODRA in Togo and COSOMA in Malawi, both parastatal societies, within its fold.

This cannot, in IFRRO's view, apply to developing countries with relatively strong economies. In Sub-Saharan Africa Kenya, Nigeria, South Africa and Zimbabwe clearly fall into that category.

4.6. IFRRO's members and developing countries

In conclusion, I would also like to mention that RROs in many countries are prepared, as an act of solidarity, to enter into so-called Type B bilateral agreements with RROs in developing countries, through which repertoires are exchanged, but with the provision that remuneration collected for the use of their works in the developing country, remains in the country, and vice versa. This will enable RROs in developing countries to distribute both local and "foreign" royalties to their own rights holders.

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Coming from a small country in the North, I would like to end my presentation by stating that it is my firm belief that as long as massive unauthorised reproduction of books and other publications is allowed, the basis for national production of works – works, which uphold our identity and heritage – is being eroded and exhausted. Fighting piracy as well as illegal photocopying is cultural self-defence. I urge both rightsholders and government to involve themselves in such defence through the establishment of systems for effective collective administration of rights in Ethiopia.

Thank you for your attention.

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Information about IFRRO can be found at **www.ifrro.org**.

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