

# IFRRO GENERAL PAPERS

## II

### Reprographic Reproduction

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## 1 The Berne Convention and National Laws

The foundation of modern copyright law is the Berne Convention of 1886. In June 1997, 124 countries adhered to the [Berne Convention](#).

According to Article 9 of the Berne Convention the author of a literary and/or artistic work has the exclusive right of authorising the reproduction of his work "in any manner or form". This includes traditional photocopying, digital copying or other form of copying.

As regards the possibility of imposing limitations on this exclusive right, [Article 9 \(2\)](#) of the Berne Convention provides that "It shall be a 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 the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

The scope of limitations is also restricted by the contents of the Agreement on Trade-Related Aspects of Intellectual Property Rights ([TRIPS](#)), a part of the Final Act of the Uruguay Round together with the revised General Agreement on Tariffs and Trade (GATT). The TRIPS agreement is administered by the World Trade Organization (WTO). By October 1996, 120 countries had signed the TRIPS agreement. [Article 13](#) of the TRIPS Agreement 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".

In the light of these regulations the members of the Berne Convention and the WTO may prescribe limitations on the exclusive right of reproduction only if three conditions are fulfilled, namely that:

- the limitations concern only "special cases" and are not generalised,
- the limitations do not conflict with the normal exploitation of the work,
- the limitations do not unreasonably prejudice the legitimate interests of the author.

The criteria for restricting exclusive rights must all be met in order for restrictions to be permissible.

## **2 Different Models of RRO Operation**

### **Basic definitions**

Since the right of reproduction is an exclusive right, it is natural to establish collective administration of reprographic reproduction rights on a voluntary basis. In voluntary licensing systems the collective administration organization issues licences on behalf of the rightholders, collects remuneration and distributes it to rightholders.

Non-voluntary licensing systems can be stipulated in national legislation whenever this is permitted by the international conventions. The implications of [Article 9 \(2\)](#) of the Berne Convention and [Article 13](#) of the TRIPS Agreement have been described in Section 1 of this paper. In non-voluntary licensing systems the consent of rightholders is not required, but they have a right to remuneration. Collective administration is required to collect and distribute this remuneration.

A collective administration organization can only administer the rights of its members, i.e. the rights of those who have given the organization a mandate to act on their behalf. Foreign rightholders normally mandate the organization through reciprocal agreements between RROs. There are different support mechanisms in copyright legislation which facilitate voluntary licensing systems. The rationale of these legal back-up systems is to make it possible for the organization to grant a fully comprehensive licence on behalf of non-represented rightholders.

### **Different systems in operation**

#### **Non-voluntary licensing**

In non-voluntary licensing systems no authorisation from the rightholders 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 rightholders 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.

Reproduction for private and personal use is a special case. Traditional licensing systems would not be workable. In many legislations 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.

### **Voluntary licensing with back-up systems in legislation**

Prima facie, a collective administration organization can only administer the rights of those who mandate it to do so. However, it is impossible for an organization to obtain mandates from all national and international rightholders whose works are reproduced in its territory of operation. There are different legal techniques which support collective administration and make it possible that the licences issued by the copyright organization also cover the rights of non-represented rightholders.

These legal techniques are:

- Extended Collective Licence
- Obligatory Collective Management

### **Voluntary licensing systems**

RROs in the Anglo-American tradition are based in the main on systems of voluntary contracts. These RROs obtain licensing authority from mandates given by individual rightholders. In some countries there are statutory provisions that encourage users and rightholders to enter into voluntary agreements. In the United States the licensing system is based only on contracts with rightholders who decide which of their works they wish to include within licensing schemes.

## **3 Groups of Rightholders**

It is in the users' interest that they obtain permission to copy different types of material. It is in the rightholders' interest to allow copying within reasonable limits and on reasonable terms. It is often impracticable for users to request, and for rightholders to grant, permissions on an individual basis. The solution is administration of rights through an RRO.

Besides literary works, works of visual art and photography as well as musical works can be copied. All authors and publishers whose works can be copied can benefit from the collective administration of rights.

Rightholders can be listed as follows:

- non-fiction authors including authors of teaching material
- fiction and drama writers
- journalists, editors, critics
- translators
- visual artists:
  - painters, sculptors
  - graphic designers
  - illustrators
- photographers
- composers and lyricists
- publishers of books, newspapers, magazines, periodicals and sheet music

In most countries special conditions apply to the copying of sheet music, if this is permitted at all.

The author-publisher relationship is important. Authors and publishers are partners; both should participate jointly in the administration of rights.

In every country, a part of the copyright works in circulation, and therefore photocopied, are foreign works. It is important that RROs are able to license such works and that foreign rightholders are able to obtain payment for the use of their works abroad. Reciprocal agreements between RROs allow these goals to be achieved.

## **4 Licensing**

Categories of users can be listed as follows:

- education at all levels
- government, regional and local public administration
- trade and industry
- publicly-funded bodies
- church administration
- professions
- public and research libraries
- cultural institutions
- research bodies
- copy shops and other places with photocopying machines open to the public

When deciding which category of user to target, consideration should be given to existing legislation and its interpretation in the country concerned. Different regulations usually apply to the different categories of user and different categories of use. Some countries allow free copying, i.e. without authorisation and payment, in education, government administration and for private use. Justification for such free copying is usually based on the argument that unrestricted access is necessary in certain instances.

As to copying for private use, normal licensing schemes are not applicable. In some countries an equipment levy is paid by the manufacturer or importer.

## 5 Extent of Copying

In order to get an idea of the quantities, figures from the Nordic countries in the mid 1990s can be used. Denmark, Finland, Norway and Sweden have some 23 million inhabitants, and a total of more than 3,000 million pages are copied each year in education.

DENMARK	FINLAND	NORWAY	SWEDEN
5.1 million people	4.9 million people	4.2 million people	8.6 million people
1100 million pages	740 million pages	540 million pages	650 million pages
Schools & Universities	Schools & Universities	Schools	Schools

Of course, not all these copies are being made from copyright material. The proportion of protected material being copied in the educational sector is as follows:

DENMARK	FINLAND	NORWAY	SWEDEN
38%	31%	35%	20%

The proportion of protected material being copied is usually highest in universities. According to an investigation made in Germany, 49% of all copies made in universities and university libraries were made from material protected by copyright.

The share of protected material being copied naturally varies a great deal in different sectors. But in all the sectors the total amount of protected material that is copied far exceeds what could be described as "a few harmless copies".

In Finland KOPIOSTO has made statistical investigations in all the licensing areas, i.e. education, national administration, municipal administration, church administration and private corporations.

The following table shows the proportion of protected material being copied in these sectors (figures for the mid 1990s):

Education	31%
National administration	10%
Municipal administration	7.5%
Church administration	11.9%
Private corporations	5-15%

## 6 Tariffs

Regardless of the system of operation chosen, the following should be considered when setting tariffs:

1. Basic rates: these differ according to the type of material being copied i.e. books, journals, newspapers and sheet music.
2. Categories of user: different users i.e. education, government, trade and industry, usually pay different rates.

A rate per page is commonly used. Rates naturally vary greatly between countries and reflect national circumstances. Fees are collected on the basis of information relating to the extent of actual, estimated or possible copying.

## 7 Distribution

One of the basic principles of collective administration is that remuneration should be distributed individually to rightholders according to the actual use of their works. This general principle also applies to remuneration for reprographic reproduction.

The following methods of distribution are used:

- individual distribution on the basis of full reporting
- individual distribution on the basis of sampling
- individual distribution on the basis of objective availability
- distribution for the collective purposes of rightholders

Full reporting means that users record details of every copyright work that is copied. The advantage of full reporting is that the collected data provides an accurate basis for the distribution of revenue to rightholders. Many licensing programs in the United States are based on full reporting.

Sampling is a technique that is often used in the schools sector. A defined number of users report their actual use at agreed intervals. In Denmark, for instance, 5% of all schools regularly report their copying to the local RRO.

Since all material existing on the market can be copied, in some countries the assumption is made that at some stage it probably will be copied. The principle of objective availability, i.e. "availability on the market" can therefore form a basis for individual distribution, as is the practice in Germany. Authors and publishers report their publications to the local RRO and receive their share of the distribution accordingly.

In Norway, Finland and Sweden, fees are distributed for the collective purposes of rightholders. This is the solution which the rightholders themselves have chosen. It applies only to the rightholders represented by the organization in the country concerned. According

to the extended collective licence in the Nordic countries, non-represented rightholders always have a legal right to individual remuneration on an individual basis.

### **Foreign rightholders**

Licence fees are also distributed to foreign rightholders. Reciprocal agreements between RROs are based on the principle of national treatment, i.e. that in respect to the use of their works in a particular country, foreign rightholders should be treated in the same manner as rightholders who are nationals of that country. Remuneration is collected by the RRO in the country where the works are copied.

In the case of Type A reciprocal agreements, the proportion of such remuneration which relates to works of rightholders represented by a partner RRO is paid to that RRO for distribution.

Some RROs have chosen to conclude Type B reciprocal agreements where no transfer of remuneration between countries takes place. This may, for example, apply where the amounts collected on behalf of rightholders in the other country are relatively small.

### **Author-Publisher shares**

The participation of authors and publishers in the collective administration of reprographic reproduction rights is fundamental. Different approaches exist.

In some countries the division of remuneration between authors and publishers is regulated by legislation. In other countries it is regulated by the statutes or rules of the RRO. A 50/50 division is the most common.

The traditional approach in common-law countries allows authors and publishers to order their own affairs through individual contracts. For example, in the United States individual authors and publishers decide on the division of royalties for each type of use of each type of work.

As there is no single objective basis for the split of remuneration between authors and publishers, in some countries such division is decided by arbitration or an equivalent procedure.

Sharing of remuneration between authors and publishers can differ according to the type of material. The German example is an illustration of this:

	<b>Authors</b>	<b>Publishers</b>
Non-Fiction	50%	50%

Fiction	70%	30%
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## 8 Concluding Remarks

The purpose of this paper has been to give a general description of the collective administration of reprographic reproduction rights.

In areas of massive use such as reprography, collective administration has been an appropriate and very successful response. In 1995-96, RROs collected about DEM 300 million (USD 200 million). In the same year they distributed DEM 252 million (USD 166 million) to authors and publishers.