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### **IFRRO Submission on private copying and reprography**

This submission is made by the International Federation of Reproduction Rights Organisations (IFRRO). IFRRO represents and links Reproduction Rights Organisations (RROs) world-wide. RROs administer reproduction and other relevant rights in copyright text and pictorial works on behalf of creators and publishers. These rights are normally referred to as reprographic rights. Members of IFRRO are also national and international associations of creators and publishers, such as the Federation of European Publishers, the European Writers Congress, European Visual Artists, the European Newspaper Publishers Association, the International Federation of Journalists, the Publishers Licensing Society, the Authors Licensing and Collecting Society and the Design and Artists Copyright Society in the UK, as well as the Syndicat National de l'Édition, the Société Civile des Auteurs Multimédia, and the Société des Auteurs dans les Arts Graphiques et Plastiques in France.

Our comments are made in the view of the current discussions on levies and cover the topics that were on the agenda for the European Commission consultation on 11 October 2004 and currently being discussed at the Contact Committee set up by Article 12 of the 2001 copyright and related rights in the information society Directive. They are also relevant to the considerations that the Commission will be making in conjunction with the forthcoming studies that are about to be commissioned on the 2001 / 29 Directive.

IFRRO favours and defends strongly the rights of creators and publishers to use or not to use DRM (Digital Rights Management) and TPM (Technical Protection Measures) in deciding to manage their rights either collectively or individually.

We will develop in this paper the following arguments which are relevant to this debate

- **Relations between Article 5.2.a (reprography) and Article 5(2)b (private copy)**
- **Relations between these Articles and Article 5.5.**
- **Article 5.3.a. (sole purpose of illustration for teaching or scientific research)**
- **Various scenarios involving copying in the sense of Articles 5.2.a and 5.2.b**
  - copying from paper to paper
  - copying from digital to paper
  - copying from paper to digital
  - copying from digital to digital
- **Fair compensation**
  - the modalities, form; detailed arrangements and level of fair compensation
  - coexistence of different licences
  - criterion of possible harm to the right holder
  - the availability at Community Level of effective TPM and DRM and the digital market for works protected by copyright and related rights

### **Conclusions**

### - Relations between Article 5.2.a (reprography) and Article 5(2)b (private copy)

*Article 5.2.a. In respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rights holders receive fair compensation.*

*Article 5.2.b In respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rights holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;*

Article 5.2.a. refers to copying on paper or similar medium and, therefore by definition, is only relevant to reprography and not to the copying of audio or audio-visual works, or music.

There are currently legal provisions for remuneration or levy schemes for reprography in 16 EU Member States (some other Member States have opted for allowing reprography through contractual licences between users and the RRO). Both the legal and the contractual licences are fully supported by rights holders in the respective countries.

When reprography is dealt with via a legal licence, the permitted copying covered by these schemes often includes “private copying” in the sense of article 5(2)b of the 2001 Directive (other uses might also be covered by the legal licence).

Therefore, when a private individual makes a paper copy for his/her private use, both Articles 5.2.a and 5.2.b. may be of application.

### - Relations between these Articles and Article 5.5.

Both Article 5(2)a and Article 5(2)b of the Directive which define the scope of exceptions to the reproduction right, are subject to the three step test (article 5.5) and to fair compensation:

*Article 5.5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*

This provision is crucial as it means that the exceptions when drafted in national legislations have to be limited to certain special cases, not conflict with the normal exploitation nor unreasonably prejudice the legitimate interests of the rights holders. If an exception does not meet the three conditions of Article 5.5, it should not be applied.

### - Article 5.3.a. (sole purpose of illustration for teaching or scientific research)

Apart from private copying the most important other provision in the Directive which could involve reprography is Article 5.3a, which allows exceptions to both the exclusive rights of reproduction and of communication to the public/making available to the public for the sole purpose of illustration for teaching or scientific research. We wish to stress that while Article 5.3.a. has some relevance for all types of protected works, both educational use and research are mainly concerned with text and still images.

**Various scenarios involving copying in the sense of Articles 5.2.a and 5.2.b**

We would have appreciated a definition of the word digital in the text of the Directive. Indeed, today all devices used for copying are digital in the sense that they use digital rather than analogue technology.

We assume that what characterises an analogue reproduction is the end result i.e. in this field, a paper copy, while digital reproduction would involve an electronic copy whether on a tangible electronic medium such as a CD or a CD ROM, or in the memory of a computer when it is an integral part of the computer.

We further assume that even if the intention of the user is to make a final paper copy (thus an analogue copy), if he/she makes a digital copy in a computer for example, he/she also makes a digital copy.

We will now consider the different scenarios which may be undertaken by a user when making a copy.

- copying from paper to paper

The scenario is very classic; the user wants to copy a few pages from a book, or an article from a newspaper. He uses a photocopy machine or a multi-function machine which produces a paper version of the book or newspaper article. It is for the foreseeable future, the way most reprography will continue to be carried out i.e. from a paper original to paper. Admittedly the production of paper copies from paper originals will increasingly involve the production of intermediate digital copies (as foreseen in Article 5.1. of the Directive).

These intermediate digital copies for the sole purpose of making a copy should not serve as the basis of uses which infringe copyright—for example electronic transmission to a third party outside the circle of family, posting on the internet etc.

In this scenario, TPM (technical protection measures) and DRM (Digital Rights Management) will not play a role and therefore, the only way to compensate the loss for the rights holders is to provide for fair remuneration.

- copying from digital to paper

The second scenario is now a fairly classical one in view of the wide usage of internet. The user finds information/text/image on the internet which is interesting, for example an article of a newspaper (often offered as a printable version). He/she prints it out with his/her printer. The end result is a paper copy and in a number of legal licences schemes (with fair compensation to rights holders), this would be regarded as reprography.

The other consumption model (in the case of copying from digital to paper) could be that the user has uploaded a document (information/text/image) in the memory of his/her computer via a scanner and then prints it out with his/her printer.

In this case, the production of paper copies from digital originals will involve the production of both intermediate digital copies (as foreseen in Article 5.1. of the Directive) and permanent copies (included in the scope of the exclusive right of reproduction as foreseen in Article 2 of the Directive).

In the first case, copy on paper of a document obtained from an outside source, TPM and DRM might (and should) play a role (probably invisible to the user).

In the second case, where the user has uploaded his/her own document, TPM and DRM will not play a role in this process and therefore, the only way to compensate the loss for the rights holders is to provide for fair remuneration.

- copying from paper to digital

Here we return to the scenario of the user who uploads a printed document (information, text, image) in to his/her computer memory. He/she might never make a paper copy of the work and may limit himself/herself to storing the copy of the printed document in the memory of the computer.

In this case, copying from printed documents into digital files will involve the production of both intermediate digital copies (as foreseen in Article 5.1. of the Directive) and permanent copies (included in the scope of the exclusive right of reproduction as foreseen in Article 2 of the Directive).

Again, where the user has uploaded his/her own document, TPM and DRM will not play a role in this process and therefore, the only way to compensate the loss for the rights holders would be to provide for fair remuneration.

- copying from digital to digital

Last scenario and the one which will probably apply increasingly in the future. The user copies an article from a newspaper or an abstract of a book into the memory of his/her computer and ,probably within a few years, into the memory of his/her ebook device.

This involves the production of both intermediate digital copies (as foreseen in Article 5.1. of the Directive) and permanent copies (included in the scope of the exclusive right of reproduction as foreseen in Article 2 of the Directive).

Here we are clearly in the field of digital copying and the user will have to demonstrate that the copy is for private (and non commercial) use.

TPM and DRM might (and should) play a role.

**- Fair compensation**

The application of the uses listed in both Articles 5.2.a and 5.2.b. are subject to fair compensation for the rights holders. Recital 35 gives some limited guidance to how Member States might provide provisions on fair compensation:

*(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.*

In the analogue world, fair compensation schemes linked to exceptions for private copying and reprography were meant to find pragmatic solutions for uses of works while remunerating the creators. In the digital world, there might be also other means to remunerate the rights holders via digital rights management.

**- The modalities, form, detailed arrangements and level of fair compensation**

Remuneration schemes vary as between Member States. Firstly, there are variations as to the exceptions which they cover. This is an inevitable consequence of the fact that what exceptions to permit, within the overall framework of the Directive, is left to individual Member States in accordance with the principle of subsidiarity.

Secondly, the basic form of the schemes varies. Thus concerning remuneration schemes for reprography, ten Member States have both an equipment and an operator levy, three have an equipment levy only and two have an operator levy only. (The form of the scheme provided for in the legislation of one Member State, Luxembourg, remains to be determined by secondary legislation).

Thirdly there are differences as to which devices are subject to equipment levies. In our view it is logical that where a levy scheme has been established, remuneration should be paid for any device which can produce private copies of protected works, either alone or in conjunction with other devices. At the same time the rights holders should be at liberty to control the copying of their works by means of any such devices through DRMs or TPMs where this is possible and appropriate, as previously indicated.

Fourthly, there are differences as to the level of equipment levies and the way they are set. The tariffs may be set in the law they may be set by secondary legislation, by special tribunals, by negotiation, or by the courts. The tariffs themselves may be related to the capacity of a machine or other factors.

We consider that as long as national remuneration schemes follow certain basic principles which are stated, or at least implied, in the Directive, then the differences between them are not significant. Thus in all cases transparent, objective and non-discriminatory criteria must be met. What is important is that the details and scope of each national scheme should be clearly, and publicly, stated.

The interests of relevant stakeholders need to be taken into account, including those of industry and consumers, in determining the level of fair compensation. However, it must not be overlooked that the purpose of remuneration schemes is to provide fair compensation for the rights holders.

- **Co-existence of different licences**

Recital 35 states that, where the rights holders have received payment in another form, for example as a licence fee, no further payment may be due. This is perfectly reasonable, but it cannot apply where the other payment has been made for a different right. For example the purchase of a book does not exempt the owner from payment for copying from it, and a licence fee covering the making available of works in an intranet does not necessarily cover print outs.

An example of the co-existence of legal and voluntary licences with respect to the same rights is the situation where an RRO licences educational use of works which goes beyond a legal exception----- for example the legal exception allows the making of one copy of one article from a journal issue but the licence permits the copying of up to ten copies of two articles from a journal issue. Whether a double payment is involved here depends on how the licence fee was calculated. If it was calculated without any allowance for the copying permitted by law then it is correct that no further payment is due. But if the permitted use has already been discounted in determining the licence fee then it should be paid for under the remuneration scheme.

- **Criterion of possible harm to the rightholder**

We fail to see why the Business Software Alliance in its studies places such a strong focus on harm as a criterion for fair compensation. “Harm” is mentioned in recital 35 only as one possible criterion for fair compensation. The reference is to “possible harm” not, as some maintain, “actual harm” i.e. it is not incumbent upon rights holders to prove actual loss before they become entitled to compensation

- **The availability at Community Level of effective TPMs and the digital market for works protected by copyright and related rights**

IFRRO favours and defend strongly the rights of creators and publishers to use DRM and TPM.

In our view, DRM has a broader scope than TPM, which could be included in DRM. We also hold that double payments to the rights holder (payments on the basis of a levy and payments on the basis of a licensed use) should be avoided and that levy systems will have to take into account the “application or non application” of technological measures. The key issues of adapting existing levy systems are where, when, how, and to what extent to adapt the systems.

#### - Conclusions

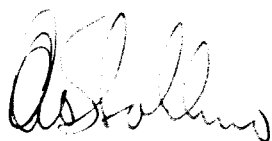
For the moment, the application of TPM and DRM is still limited. And yet, the new digital technology offers facilities to copy protected works easily and in greater quantities.

While therefore it is legitimate to expect fee-setting bodies under remuneration schemes to take this factor, amongst many, into account, it does not automatically lead to the conclusion that existing tariffs are too high.

Remuneration schemes in the field of reprography from paper to paper represent the only way of ensuring that the rights holders obtain fair remuneration for uses of their works permitted by Article 5.2.a., in accordance with the 2001 Directive.

In order to ensure compliance with the Directive, the Commission should consider taking action against those Member States which continue to permit unfair competition with the normal exploitation of rights holders via free uses without remuneration to rights holders in contravention of the 2001 Directive, rather than concentrating its efforts on schemes which function and which were put in place in accordance with the Directive.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Olav Stokkmo'. The signature is fluid and cursive.

Olav Stokkmo  
Secretary General

cc. Business Software Alliance