

Rue du Prince Royal 87
B-1050 Brussels
Belgium

President
Magdalena VINENT

Chief Executive & Secretary General
Olav STOKKMO

Honourable Juca Ferreira
Minister of Culture
Diretoria de Direitos Intelectuais do
Ministério da Cultura
Brazilia
Brazil
cgda.cadastro@cultura.gov.br

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PUBLIC CONSULTATION ON PROPOSED AMENDMENTS TO THE COPYRIGHT LAW (LAW No. 9.610/98)

The International Federation of Reproduction Rights Organisations (IFRRO) is an international, non-governmental organisation representing national Reproduction Rights Organisations (RROs) world-wide. RROs act on behalf of authors and publishers of text and image based works whenever the individual exercise of their rights is impracticable. These organisations began their activities originally in response to the need to license wide-scale photocopy access to the world's scientific and cultural printed works. Today RROs in membership of IFRRO collect and distribute remuneration for reprographic reproduction and certain digital uses.

Members of IFRRO also include national and international creators' and publishers' associations such as the European Writers Council (EWC), International Publishers Association (IPA), International Association of Scientific, Medical and Technical Publishers (STM), European Visual Artists (EVA), European Newspapers Association (ENPA) and International Federation of Journalists (IFJ) on the international level.

General

IFRRO supports the submissions on the Consultation Document made by our Brazilian RRO member ABDR (Associação Brasileira de Direitos Reprográficos). One of IFRRO's primary objectives is to promote an awareness of and respect for copyright and ensure that legal developments world-wide in the area of copyright and intellectual property laws support and encourage the activities of its member organisations. We appreciate that the government's intention is to improve Brazil's legislative regime for protecting copyright. However, we feel that the Consultation Document needs to pay more attention to actively maintaining the balance between the rights of copyright holders and the needs of users.

Article 88-A on Reprography – Chapter IX

IFRRO notes the proposal to introduce a system of Compulsory Collective Management of certain secondary uses of text and image based works and that this is also supported by ABDR and Brazilian rightholders. The proposal is also in step with systems to facilitate the

collective administration of reprographic reproduction rights in other countries. Compulsory Collective Management of reprographic reproduction rights exists, for instance in France.

We question, however, the proposal in Article 88-A,II to limit the obligation to take up a license or ensure remuneration to those who offer copying services against payments, such as copy shops. In line with what is practice in other countries, any institution responsible for providing reprographic copies, whether against payment or not, should be covered by Article 88-A. We understand that the government's proposal might address adequately the current situation but legislation must also take into consideration possible future changes. That can be done by deleting "mediante pagamento pelo serviço oferecido" in the first line of the proposed Article 88-A, II.

Article 52-B, III – on Orphan Works

The proposed Article 52-B, III on orphan works legislation seems to meet the concerns of the rightholders including observing moral rights and can be supported by IFRRO.

Basic principles in respect of making limitations to the Exclusive Rights

On the other hand we have concerns regarding some of the proposed exceptions and limitations to the exclusive rights in articles 46 and 52-B of the Copyright Law. IFRRO acknowledges that in some cases exceptions from the reproduction rights might be justified. However, such exceptions must be based on the so called 3-steps test in the Berne Convention. We are therefore surprised that there are cases where the Copyright Bill seems to omit this important test, i.e. that exceptions may be allowed only in certain special cases when they do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author, taking into account that the three steps are cumulative:

We read the **párrafo único** to state *inter alia* that, in addition to the exceptions provided for in article 46, it shall be allowed to reproduce, distribute and communicate to the public copyright works without the authors' prior consent and without remuneration when the use is for educational, didactic, informative purposes, or for a creative resource made to the extent required for the end to be achieved, without affecting the normal exploitation of the work and causing unreasonable prejudice to the legitimate interest of the work. According to Article 9.2 of the Berne Convention exceptions should be limited to special cases. It is difficult to see how a broad exception for education, instruction and information as well as creation could be considered to be sufficiently specific to meet the criteria of the Berne Convention, especially when they are considered cumulatively. Moreover the proposal, if passed, would bring legal uncertainty.

IFRRO therefore respectfully urges the Brazilian Government to ensure that priority be given to its international copyright obligations and adequate protection be provided to copyright holders by refraining from introducing the proposed "párrafo único".

Article 46 on exemptions and limitations

The concept of private copying cannot be considered independently of the possibility offered to users through technical development to consume copyright works. This fundamental principle forms the basis for provisions in, for instance, European Union directives and court decisions in other regions. Rightholders must be put in a position to play an active role in the market. This requires adequate protection of their rights in an environment that makes it constantly easier to infringe them. Exceptions must therefore be clearly defined and carefully balanced between user requirements and the rights and needs of copyright holders. We feel that some of the proposed amendments disrupt the balance:

Article 46, I states that some acts do not constitute an infringement of copyright and do not require the prior consent of the author nor remuneration in the case of private copying. Whereas the current law authorises reproduction of extracts of a work for private purposes only, the proposed amendment would allow any act of copying by the copyist for his private and non commercial use of a work acquired legitimately, and without prior consent or remuneration to the rightholders.

As a minimum, the rightholders should be ensured fair remuneration under such an exception. This would also be in line with international legislation such as the European Union Directive 2001/29, under which exceptions and limitations to allow reproduction for private purposes is made subject to the payment of “fair compensation” to rightholders (Article 5.2 (b)). In respect of reprography, this Directive further obliges the EU Member States to either remove any exception to the exclusive right in respect of reprography or, alternatively, ensure that the rightholders are guaranteed a fair compensation (Article 5.2 (a)). Alternatively the wording of article 46 should be kept unchanged.

Article 46, VIII introduces an exception to allow the use of snippets or integral visual arts as long as it does not prejudice the legitimate interests of the author. This may prejudice the interests of journalists as well as newspaper and magazine publishers as it would enable search engines including commercial ones such as Google to compile information from different sources and make them available to the public. Press cutting services are regularly licensed including by RROs in many countries. Subject to the interest of the rightholders this should also be the case in Brazil and the proposed amendment would interfere with this right of ensuring remuneration to rightholders for uses of their works.

Furthermore, in the case of books, the proposed amendments also create legal uncertainties: For instance how many snippets can and will be made available; what is the length of a snippet, etc.? In respect of visual works, the proposed amendment would result in visual artists no longer having the choice to decide whether or not to disseminate their works.

It is difficult to see how this meets the requirement of the three steps test of the Berne Convention. We therefore respectfully urge that the Brazilian government refrains from proposing the amendment in article 46, VIII.

Article 46, XVI introduces an exception for communication and making available to the public of copyright works which are included in the collection of libraries, archives, museums, etc. As the making available is not limited to dedicated terminals on the institution's premises but extends to their internal networks, and is without prior consent from or payment to the rightholders, it will have an impact on authors and publishers' revenue and in particular on Scientific, Medical and Technical (STM) publishing.

We therefore urge that any limitation to the exclusive right for the making available of copyright works by libraries, archives and museums be limited to dedicated terminals on the premises of public libraries, archives and museums for non direct or indirect commercial use, as is the case, for instance, in the EC Copyright Directive Article 5.3 (n).

Article 46, XVII proposes to allow the reproduction of out-of-print works where the latest edition is no longer for sale and the work is no longer in stock. There are numerous examples of works that have been out of print for some time which have regained sales, for instance as a result of an award to the author. Furthermore, the proposal relates to the basic core of copyright, namely the author's right to authorise or not the reproduction of a work and to make an income from it, especially as the proposed modification does not seem to be limited to non commercial exploitation of the work.

For instance in Europe, authors and publishers through their associations and RROs work actively with libraries and other public cultural institutions to find practical solutions to digitising and making available the cultural heritage including out-of-print works. There are examples for instance from Germany and Norway which can be shared.

We respectfully submit that the modifications in Article 46, XVII be withdrawn. Rather the government should facilitate dialogues between rightholders and their associations, RROs and cultural institutions to find practical solutions to the issues addressed in this proposed article. IFRRO will be pleased to assist and share experience.

Article 52-B. – Chapter VII – on compulsory licensing against remuneration

IFRRO further fails to see that the proposed Article 52-B, I and II which introduces compulsory licences when a work is not available in the market (I) or when rightholders refuse or create barriers to allow exploitation of their works (II) are in conformity with international treaties that Brazil is party to. There are different reasons why the rightholder does not want a work to be reproduced, made available or distributed to the public: there may be moral rights involved as the author no longer defends or upholds certain ideas, the old edition may compete with a new one, etc.

Whatever the reason, it is a fundamental principle in copyright legislation embedded in international treaties as well as in national copyright legislation in countries parties to them, that the author shall have the exclusive right to reproduce or authorise the reproduction of the work and that exceptions are allowed under certain conditions only. It is difficult to see how a general authorisation by law to make use of a work on the basis of the conditions stipulated in Articles 52-B, I and II, avoids prejudicing unreasonably the legitimate interest of the authors or conflicting with the normal exploitation of the work. As previously stated

we will offer to share information from other countries where stakeholders have developed solutions to address similar issues on a voluntary basis.

We therefore respectfully urge that the Brazilian government refrains from introducing Articles 52-B, I and II in the copyright legislation and rather stimulates and facilitates stakeholder dialogues in which RROs should be included to devise voluntary solutions to address the issues raised in those articles.

Article 52-B, IV, seems to be superfluous as the issues addressed are sufficiently dealt with in Article 88-A and we ask for its deletion.

Conclusion

IFRRO recognises the increasing demand by legitimate users to have access to copyright works, also in digital formats. To that end, IFRRO and our member organisations work to facilitate legitimate legal access to such works. We would respectfully urge that the Brazilian Government exercises caution in introducing any new legislation, and ensures that legitimate intellectual property rights of creators and producers are maintained in any amendment to the existing legislation.

Yours sincerely



Olav Stokkmo
Chief Executive