

Toolkit for agreements between RROs

Introductory Remark

The purpose of this toolkit is to inspire and assist RROs in their negotiations and drafting without limiting them in any way. They might, for example, use the *Headings for an agreement between RROs* as a starting point and use the below as pointers on how to flesh them out. In the digital realm the licences RROs issue are likely to differ from one another to a significantly greater degree than for their analogue licences. It is therefore probable that no two agreements between RROs will be alike. It is also quite likely that one RRO will give the other something different from what it receives.

RROs may find different ways to structure their agreements, from a simple exchange of the licences each authorises the other to include its repertoire in to more elaborate agreements.

RROs will therefore have to customise these pointers to their particular needs. The most important concern is that each RRO receives the mandates and authorisations it needs for its licences and that the other RRO receives payments for the rightsholders it represents and sufficient information to properly assess the licences and efficiently process the related payments.

Preamble

The preamble sets out the background to the agreement and can expressly mention guiding principles such as National Treatment, the *IFRRO Principles for the Operation of Digital Repertoire Exchange Mandates (REM)*, the *IFRRO Code of Conduct* and that RROs serve rightsholder communities by complementing rightsholders' businesses. RROs may undertake to comply (and thereby reassure rightsholders) with the REM and the Code of Conduct in several ways. One way to demonstrate the compliance and to render it enforceable viz-a-vis the other RRO and the rightsholders represented by that RRO is to include the IFRRO Code of Conduct in the agreement, for example in one of the general clauses which might refer to an annex.

Operative Part of the Agreement

The agreement will set out the parties and their contact information, the authorisations RROs give each other and define them and deal with ancillary issues such as tariffs, payments and deductions, the amount, type, frequency and form of information to be exchanged and general matters.

Parties

A clause can for example read as follows:

"This agreement is made on [insert date]

BETWEEN

RRO A

[Name of the organisation, address, acronym and by whom represented]

AND

RRO B

[Name of the organisation, address, acronym and by whom represented]

[AND possibly RROs, C, D...if so, the necessary clauses in the agreement can simply be duplicated]

Together they are referred to as the 'Parties'."

Definitions

The agreement might have a definition section or it might include definitions throughout the text as and where needed. Items that need to be defined are likely to include: uses, rightsholder, user, territory/territories, repertoires. More items might have to be defined, depending on how the agreement has been drafted.

Uses might include the following. This list is for illustrative purposes only. Every licence will be different and it is therefore unlikely that any licence would include all of these uses or that this list could be exhaustive. Uses might also be defined using different concepts or more elaborate explanations, according to user and rightsholder needs.

- Scanning : converting a paper document into a digital document by producing i.a. a graphic file or a text file
- Digital reproduction: copying from digital to digital
- Internal distribution digital copies: transmission of a legally made digital copy through e-mail, fax or otherwise to employees or equivalent
- Distribution of digital copies: transmission of a legally made digital copy through e-mail, fax or otherwise
- Making digital copies available on an internal closed password-protected network to employees or equivalent
- View on screen
- Print from a digital version
- Storage on central intranet for the period of the licence
- Include in presentations
- Upload to internet

Users / User groups might be defined or might be listed in the authorisations.

An example might be:

The legal or natural person who purchases a licence from an RRO [AND/OR: the legal or natural person who benefits from the statutory exception to copyright under the law of [country] and more particularly described in the Annex User Definition.

This example requires more information in the annex.

Repertoire and territory can either be defined in the definition section, explained in an annex or defined in the authorisation.

The Authorisation

The authorisations do not have to match, i.e. RRO-A does not have to authorise RRO-B for the exact same items that RRO-B authorises it to. The only important issue is that each RRO receives the authorisations it needs to include the other RROs' repertoire in its licences. The authorisations can be included in one clause for both parties or they can be contained in several clauses.

The authorisation has been drafted to read as follows in some agreements:

*On behalf of its Rights holders, RRO A authorises RRO B to grant Users non-exclusive licences for Digital Uses of Repertoire A in Territory B and collect fees for such licences [**add if appropriate**: subject to the matters listed as special restrictions].*

No other use is included: the Parties may negotiate any additions or amendments in good faith and if they agree, amend this agreement or enter into separate agreements as may be appropriate.

This clause requires a definition of the following: (i) users, (ii) digital uses, (iii) repertoire A, (iv) territory B and (v) special restrictions. It can be repeated with the same wording for RRO B or it can be amended so as to accept payment for remunerations for statutory exceptions in RRO B's territory. In the latter case the agreement would have to stipulate what statutory exceptions are meant and how they work.

Another option is to draft as follows:

[to be added]

An example of a clause that includes both parties' authorisations is:

[to be added]

The agreement might be restricted to general definitions and more detailed information included in annexes to the agreement or made available online or in other databases.

Each authorisation might be subject to limitations which ought to be specified.

Pricing and tariffs

The RROs will negotiate the best solution, respecting rightsholders' instructions and decisions. A number of outcomes is therefore possible. The agreement needs to state the decisions clearly, whether the tariffs used by the RRO for its own repertoire should also apply to the other RRO's repertoire or whether certain instructions ought to be respected and if so what they are.

Territory

The agreement to allow the other RRO to license might extend to one or to several countries.

The agreement to allow the other RRO to license might, where appropriate, also deal with licensing users whose reach extends across borders (e.g. subsidiaries of multinational corporations established in one of these countries, distance learning institutions or libraries).

This might be dealt with as one issue and in the Authorisations and/or the Definitions and where appropriate be expanded upon or it can be dealt with as different issues: the territory in the Authorisations and multi-national licences separately e.g. only dealt with in Annexes.

Mechanisms to administer the agreement

- Payment of licence fees: when, how and how often to be transferred to the other RRO
This clause needs to determine how each RRO should allocate the funds to the other RRO, if it should use its own system.
The clause needs to contain payment circles and modalities or refer to annexes which contain them.

An example of such a clause is

[to be added]

It depends on how the agreement defines the repertoire whether it is appropriate to talk about publications or works or any other term and the type of uses (reproductions and which other uses if any).

The RROs need to agree how the payments should be made and which type of information should accompany them, according to their distribution systems to their own rightsholders. IFRRO has been developing standardised distribution messages based on ONIX to assist RROs with exchanging information that is as useful as possible to the other RRO.

An example for a clause for a title specific payment system:

[to be added]

An example that could also be used for a non-title specific payment system would be:

RRO A will apply the same system as it applies to its own repertoire to determine and allocate fees due to Rights holders for Digital Uses under this agreement for Repertoire B.

Each RRO will accept for its repertoire the system applied by the other RRO to determine and allocate the fees for Digital Uses under this agreement.

The fees collected by each Party shall be allocated to the classes of publications communicated in Annex A-4 respectively B-4 on the basis of their actual Digital Use.

Each Party shall collect data on their Users' activities with the reporting method it uses for its own repertoire and about which it will inform the other Party.

The frequency of payment could for example be expressed as follows:

Each Party undertakes to transfer the fees collected from Users for licences granted under this agreement at least once a year and as soon as practicable after collection in the way agreed.

Another example is:

[to be added]

- Deductions from these payments

The agreement needs to set out which types of deduction each RRO will make from the collections (administrative, cultural, social and taxes). Each RRO should strive to keep these reasonable (concerning its own fees and the aggregate fee to a rightsholder) and should treat the other RRO's rightsholders at least as well as its own. Cooperation to ensure that taxes are not paid when unnecessary is also useful.

An example for such cooperation could read as follows:

[to be added]

- Which information needs to be transmitted, how, in which format and how often

- On payments and deductions
- On usage of the repertoire
- On the repertoire
- On the licences
- On the RRO as an organisation
- And any changes to any of these items

The obligations to provide information and the ways in which this is to be provided can be included in one clause or the relevant information needs can be specified in each clause that triggers a need for information under the agreement. The important point is that each RRO receives all the information it needs so as to assess the services of the other RRO properly, to efficiently process the payment and to provide its rightsholders with such information on them as appropriate.

This section should not overburden the agreement and use should be made of annexes or other ancillary forms of information such as online databases etc. The information should be updated regularly without causing a need to change the agreement.

General Clauses

Miscellaneous clauses such as confidentiality, diligence and care, audits, no sub-contracting, applicable law, term and termination, severability and notices can follow ordinary boilerplates and

do not have any particular needs. They need to comply with the applicable law. Examples which need to be checked against applicable law are provided for illustrative purposes at the end of this section.

Enforcement

RROs should efficiently enforce and monitor their licences, according to the REM Principles. The parties therefore need to discuss how each RRO should enforce the terms of its licences with regard to the other RRO's repertoire. For example:

“Each Party undertakes to protect the repertoires subject to this agreement, monitoring compliance with its licences/schemes. However, neither Party is entitled to take legal action in the name of a Rights holder represented through this agreement without the express written consent of the other Party and the Rights holder concerned. [OR: Each are only entitled to take legal action in the name of the Rights holder represented through this agreement provided that [add details]....]”

Non-exclusive nature of the agreement

The following example should be carefully considered:

This agreement as well as the mandates received from Rights holders are non-exclusive.

This agreement does not prevent a Rights holder represented through this agreement from exercising its right to grant authorisations to Users anywhere. It further does not prevent any Rights holder registered or domiciled in the same country as any Party under this agreement to join any other RRO whether under this agreement or otherwise.

The agreement and any practices between RROs must be carefully assessed against applicable anti-trust and competition law.

Warranties and indemnities

Each RRO needs to rely on the other that it does actually have the authority to enter into the agreement on behalf of the rightsholders that it purports to do. Warranties and indemnities to this effect might therefore be desirable.

An example would be

Each Party warrants and represents to the other that it has the full right and power to enter into this agreement and to grant all those rights and powers which are hereby granted.

Each Party shall indemnify the other against all actions, judgments, costs and expenses legal and otherwise which may arise out of any Rights holder represented through this agreement taking action, proceeding or making demand against the other Party in relation to the exercise of the rights granted under this agreement or to the payment of fees transferred to the Party which was directly mandated by the Rights holder.

Another example would be

Each RRO warrants and represents to the other RRO that it has the full right and power to enter into this Agreement and to grant the other RRO all rights granted under this Agreement. RRO A shall indemnify RRO B against all judgments, costs and expenses, legal and otherwise, which may result from any successful action by a rightsholder of RRO A against RRO B for the payment of compensation for the defined uses in territory B or from a settlement approved by RRO A.

The RROs might include language so as to be able to set such claims off against other sums due.

Copyright Education and Awareness Raising

Each RRO usually carries out such activities in one way or another. The agreement might deal with them.

Applicable forum and/or alternative dispute resolution

The parties should not only agree on applicable law but also on a forum (i.e. the place in which a trial would take place). They may consider alternative dispute resolution. There are many forms in which this might be possible, one of which would be WIPO's procedures (www.wipo.int/amc/en/expert-determination/what-is-exp.html) . If parties come to the conclusion that they would like to use WIPO's expert determination procedure, at the time of writing the following was the recommended clause:

*Any difference between the Parties arising under, out of or relating to this agreement, including the rights and liabilities of the Parties thereto, and any subsequent amendments of this agreement shall in the first instance be referred to expert determination in accordance with the WIPO Expert Determination Rules. Unless the Parties have expressly agreed otherwise, the expert's determination shall not be binding upon the Parties nor prevent either Party from pursuing its interest further in court as specified above. The costs of the expert determination shall be borne by the Parties in such proportions as the expert may determine to be fair and reasonable in the light of all the circumstances and the outcome of the expert determination, or, if no such determination is made, in equal portions. The language to be used in the expert determination shall be **[SPECIFY LANGUAGE]**.*

Example miscellaneous clauses

These clauses are for illustrative purposes only. Not every agreement will contain all of them and some agreements may need additional clauses. In any event, they will need to be adapted and amended for individual agreements as desired.

Confidentiality

Confidential information, including the documents and information exchanged in relation to this agreement shall not be disclosed to any third parties without prior written consent

of the other Party. The Parties permit each other to communicate information from the other Party relating to a specific Rights holder/publication to that Rights holder.

Diligence and Care

Each Party will exercise the same diligence and care with respect to the other Party's repertoire as it applies to its own repertoire. In particular will each Party use reasonable endeavours and sound commercial practice to exploit the rights, to grant licences to Users within the scope of this agreement and to promote awareness of the existence of such licences.

No sub-contracting

Other than for the purposes of the management of collection or for central licensing, no assignment or transfer of all or any part of the rights and privileges granted to one Party under this agreement is permitted without the express written authorisation of the other Party.

Warranties and indemnities

Each Party warrants and represents to the other that it has the full right and power to enter into this agreement and to grant all those rights and powers which are hereby granted.

Each Party shall indemnify the other against all actions, judgments, costs and expenses legal and otherwise which may arise out of any Rights holder represented through this agreement taking action, proceeding or making demand against the other Party in relation to the exercise of the rights granted under this agreement or to the payment of fees transferred to the Party which was directly mandated by the Rights holder.

Applicable Law

This Agreement shall be subject to the law of the country in which the Party is incorporated against whom the claim giving rise to the dispute is directed.

Severability

If any provision of this agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable but which provision would be valid and enforceable if it were varied or modified then such provision shall apply with such variation or modification as shall be necessary to make it valid or enforceable. In case such variation or modification is not possible, the clause shall be struck out of the agreement. The fact that one clause has been held void or unenforceable, will not affect the validity of the remaining agreement in any event.

Term and duration

This agreement shall take effect on signature and shall be for an initial period ending on [date]. The agreement shall continue from year to year, unless the agreement is

terminated by either Party by advance written notice of not less than six months prior to the date of expiry of the then current period.

Each Party shall inform its Users of the termination of the agreement and the publications represented through the agreement shall be withdrawn from the repertoires included in the licences the earliest possible with respect to the licence terms and notices and in any event no later than six months after the agreement expiry date.

Notices

Notices under this agreement shall be in writing and may be communicated by prepaid recorded delivery, facsimile transmission or email to the address specified.

Whole Agreement

This agreement and the annexes hereto embody all the terms agreed between the Parties. The terms and conditions of this agreement may only be varied by documents in writing, in terms agreed between the Parties and any such documents shall be signed by both Parties hereto.

Annexes