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Legally Speaking / Licensing Agreements: The Nordic Track

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Legally Speaking

by Glen M. Secor, J.D. (Yankee Book Peddler, Inc.)

Fair Use: The Nordic Track

Recent editions of this column have addressed the problems of copyright management in the context of scholarly communication. In the September column, the tension generated by the all-or-none nature of fair use was examined. Again, fair use equals free use. Assuming a valid copyright, any unauthorized use which does not qualify as fair use is an infringement. Permissions are generally obtained from the copyright holder, and the copyright holder determines fees. This system is cumbersome and has caused friction between copyright holders and those who want to use copyrighted works. Some of that friction is probably healthy, but some clearly is not, as is shown by the continuing stream of litigation over fair use.

The Copyright Clearance Center provides a welcome alternative to the negotiation of rights and fees with each rights holder. Participation in CCC by copyright holders is not mandatory, and it is not clear yet just how much a voluntary reproductive rights organization (RRO) can do to reduce the tensions between rights holders and copyists. In this column, without necessarily endorsing the approach, I would like to examine one country's alternative to a purely voluntary system. (The following overview is culled from a paper entitled "Reproductive Rights Organizations: Their Role and Function . . . The Nordic Approach," presented by John-Willy Rudolph, Executive Director of Kopinor, at the annual meeting of the Professional & Scholarly Publishing Division of the AAP, in February 1993.)

Kopinor, the Norwegian RRO, was established in 1980. Membership in Kopinor is comprised of five publishers' associations and sixteen authors' associations. These associations obtain non-exclusive rights from their members, and then assign those rights to Kopinor for the purpose of having Kopinor collectively administer permissions and fees relating to third-party copying. Kopinor

focuses on photocopying of books, journals, and newspapers, but also administers rights for sheet music and other copyrighted material. Kopinor negotiates licenses with schools, businesses, libraries, copy shops, and others.

One key to the Norwegian approach, and a major distinguishing factor from the American system, is the "Extended Collective Agreement License." This statutory license, passed into law in 1979, brings many rights holders who are **not** members of the twenty-one Kopinor membership associations under Kopinor's administrative umbrella. Quoting from Mr. Rudolph's paper: "If the Norwegian Union of Journalists . . . is party to the agreement through the RRO, the user may legally photocopy works of all non-member journalists at home and abroad.

"This law . . . allows the RRO to concentrate on negotiating agreements with users rather than on soliciting authorizations by tracking down individual rightsholders . . . [f]urther, it allows the RRO to collect fees from all copyright works, thereby preventing the undermining of respect for copyright.

"From the user's perspective, the advantage is that as NO organization will ever be able to represent all relevant rightsholders, non-represented rightsholders are covered by the statutory license, and the user does not have to check if the rightsholder . . . is represented by the RRO . . .

"(speaking on the voluntary nature of the system) . . . The statutory license only takes effect if the organized rightsholders **choose** to license a user (emphasis added)."

Mr. Rudolph's presentation was late in the day, and not much time was left for Q&A. Thus, I do not profess to understand completely the interplay between the voluntary and compulsory aspects of the Norwegian system. What is most intriguing in this system is that it attempts both approaches — compulsory and voluntary. Also of interest is the fact that the statutory license kicks in when a rightsholder belongs to a certain profession or occupation for which there is a

professional association which belongs to Kopinor, even if the individual rightsholder does not belong to that professional association. Further, it covers only users with whom Kopinor has negotiated a license. Thus, it seems, if a rightsholder belongs to a professional category for which there is no professional association which belongs to Kopinor, or if the user seeking to copy a work has not signed a Kopinor license, then that user must obtain permission from the individual rightsholder. This is similar to the situation in the U.S. when a publisher/rightsholder does not participate in CCC, or when a user elects not to utilize CCC, and when the use is not fair use. One difference between Kopinor and CCC is that Kopinor secures rights through professional associations, while CCC obtains its rights from individual rightsholders. CCC, of course, has no statutory license authority under which it can claim rights which have not been expressly granted to it by the individual rightsholder.

Another difference between Kopinor and CCC is that Kopinor, like all Nordic RROs except Denmark's, practices collective distribution of fees. Fees are distributed through the 21 member organizations, and are split 50/50 between publishers and authors. Again to quote from Mr. Rudolph's paper: "The various authors' associations generally distribute to individual authors in the form of grants. The publishers' associations tend to distribute to individual publishers according to sales figures for the relevant type of publication. Non-represented rightsholders are entitled by law to equal treatment with members when the associations distribute users fees. Funds may also be used by an association for activities which benefit the whole group of rightsholders which the association serves."

Clearly, this approach places a considerable economic power in the hands of the professional associations. No suggestion is being made here that this system would work in the U.S., as such is

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not generally the nature of our publisher and author associations. Still, there is an intriguing practicality to the idea of collective distribution. It may offend certain of our individualistic and capitalistic values, but could it be that some curtailment of those values would be in the best interests of society and scholarly communication?

One final note about Kopinor: Norwegian educational institutions are subject to Kopinor licensing procedures. Fair use, to whatever extent it exists in Norway, does not cover educational copying the way that it does in the U.S. Indeed, uncompensated use in the educational sector was the primary target of the "Extended Collective Agreement License" at the time of its passage into law.

The Norwegian model, while admit-

tedly not easily transferable to the U.S. system, provides some interesting alternatives to certain aspects of the U.S. approach to copyright. It grew out of a recognition on the part of Norwegian government officials, publishers, authors, *et al*, that too much uncompensated copying was being done, but that a system of purely individual rights and permissions would be cumbersome and inefficient. These are some of the very problems being faced in the U.S. today. Whether technology, the CCC, or other factors can come together to solve these problems without compromising our individualistic (market-based?) system to copyright remains to be seen. As we continue to assess the situation, we should not close our minds to some of the alternative approaches practiced elsewhere. Kopinor, through its use of statutory licenses and collective distribution, is a model worth studying. ☞

Gilles de La Rochefoucauld

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just finished Felicien Marceau's *La Terrace de Lucrezia*. It is fiction, an at times humorous story of a woman living in Italy as a concierge and the story is about all the people that live in the apartment building.

ATG: What does the future hold for AAL?

GLR: There is a very common proverb in France. It is "don't give up prey to chase a shadow." Our main market is the American market and we want to work hard to please that market. We believe that the dollar is undervalued compared to the European currencies. Obviously, we want to capture market share against our competitors. There is no question that it is easier to get French titles from a French bookseller. We have recently hired a representative in the United States. **Edna Laughrey** will represent AAL abroad. We are anxious to know what our customers think and we are always working to improve. ☞

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tion. Profs, CC: Mail, All-in-One, Vax-Mail, In-Box are some of the names you may have heard of. They are all different and some are easier to use than others. Be aware that whatever you are using may not be the only thing available at your institution or work place. Ask your systems people what the choices are and maybe you'll find one you like better. Where I work there are at least two different e-mail set-ups and some people prefer one over the other; some people despise both of them, and others don't even know the difference!

Meanwhile, the next piece of furniture that I suspect will leave my office will be my desk. That big, clunky piece of government-issued walnut-veneer has never been anything except a place to pile papers on anyway. If the sleek, functional computer table I requested ever gets ordered, the boxy old desk can go! ☞