

Training of copyright and related rights in sub-saharan Africa

A Case Study on Collective Management in Today's Reality

By Tarja Koskinen-Olsson, International Adviser

INTRODUCTION

Training of intellectual property rights has been close to the heart of Professor Marianne Levin and she has been a Master Trainer, welcoming participants from all corners of the world. This is why I have chosen the topic of training for my article, congratulating her on her anniversary.

Understanding how international copyright law and realities on the ground affect the functioning of the copyright market in a given country or region, offers a possibility to review and evaluate developments.

A well-functioning copyright market consists of three elements: legislation, enforcement and management of copyright and related rights. This article concentrates on management of rights, but deals also with some legislative and enforcement issues.

Management of rights takes place either individually by the respective rightsholder or by collective management organizations (CMOs). The latter is a feasible solution when individual exercise of rights is either impossible or impracticable.

BACKGROUND

This article is based primarily on the findings of a training session on collective management held in Nairobi, Kenya, in May 2022. The training was preceded by an intensive online session in November 2021. As the result of the online training each participant had chosen some development targets and key performance indicators (KPIs) to measure their fulfillment. This method of training points out to two pertinent issues that I consider as important:

- The hybrid training model is here to stay.
- Any training activity needs to define its goals and measurable results.

Participants from thirteen countries (Botswana, Burkina Faso, Cameroon, Ghana, Kenya, Malawi, Mauritius, Nigeria, Sierra Leone, South Africa, Uganda, Zambia and Zimbabwe) participated at this MasterClass training organized by the Norwegian Copyright Development Association (NORCODE), in cooperation with The African Regional Intellectual Property Organization (ARIPO), International Federation of Reproduction Rights Organi-

sations (IFRRO), The International Confederation of Societies of Authors and Composers (CISAC), The International Federation of the Phonographic Industry (IFPI) and The Societies' Council for the Collective Management of Performers' Rights (SCAPR).

The article also reflects previous developments in the region, based on my 20 years of involvement in training in the region.

HISTORY OF COLLECTIVE MANAGEMENT IN THE SUB-SAHARAN AFRICA

Collective management is common in all sectors of the creative industry. The first organization was established in France as early as in 1777 to defend playwrights in their fight to get paid for their plays in theatres. The first collective management organization for rights in musical works was established in 1852 also in France. STIM in Sweden was founded in 1923, and thus celebrates its 100th anniversary in 2023. European organizations can thus draw the benefits of a long history and experiences gained in the ever-changing technological environment.

In Sub-Saharan Africa, the first organization emerged in 1961 in South Africa when The Southern African Music Rights Organisation (SAMRO) was established. Many more organizations were established in early 1980s. For instance, Zimbabwe Music Rights Association (ZIMURA) was established in 1982. It is a small miracle that this organization has survived and developed during all the political and economic tumult in the country.

To take another creative sector, print and publishing, the first collective management organizations emerged in 1970s when widespread photocopying started. As it would not be feasible for educators to seek permissions for photocopying extracts of publications from all over the world, collective management was found to offer services to both rightsholders and users of copyrighted works.

In Sub-Saharan Africa, the first organization was again in South Africa, where Dramatic, Artistic and Literary Rights Organization (DALRO) was established in 1967. It functions as a multi-purpose CMO for dramatic, artistic and literary rightsholders. Later on, it started also to license photocopying.

Sweden was the first country where a Reproduction Rights Organization (RRO), called today BONUS Copy-

right Access, was established by authors and publishers in 1973, soon to be followed by similar organizations in neighboring countries. Different creative sectors have chosen to call their organizations by different names, the one in the text and image sector being an RRO. The Reprographic Rights Organization of Ghana (Copy-Ghana) was established in 2011 and it is an example of an RRO in the region that has managed to license educational institutions for their wide-spread copying. Successful litigation against a major university recently segmented the need to acquire permission from authors, visual creators and publishers through the services of CopyGhana.

These two examples offer a glimpse to the birth histories of collective management organizations in the world and in the Sub-Saharan region.

DIFFERENT TYPES OF CMOs IN THE REGION

In general, CMOs have two common characteristics:

- a) They are private organizations, established by rightsholders
- b) They are not-for-profit organizations.

In Sub-Saharan Africa, the status and legal nature of a CMO varies greatly, the main categories being:

- Governmental organizations, working as a branch of the relevant authority;
- Combination of a Copyright Office (as regulator) and a CMO
- Private multi-repertoire organizations
- Private organizations for a given group of rightsholders or rights.

Governmental organizations are common in Francophone Africa. In the case of Burkina Faso, for example, Bureau Burkinabe Du Droit d'Auteur (BBDA) was established in 1985 as a multipurpose CMO for all groups of rightsholders. The salaries of the staff, altogether 96 persons, are paid by the Government, in the same way as in other governmental branches. The major source of income comes from remuneration for private copying; an issue that I will describe separately.

Malawi offers an example of an organization which combines the Copyright Office (as the regulator is called in this text) and that of the CMO. The Copyright Society of Malawi (COSOMA) was established in 1992. This legal structure is currently under review and there is a possibility that the two tasks will be separated and as a consequence, COSOMA maybe continues as a CMO. This remains to be seen.

The Copyright Society of Botswana (COSBOTS) was established in 2008 as a multi-repertoire CMO. Due to a favorable legal structure and comparatively high GDP/capita, the collection of COSBOTS has been successful. Whereas the organization in practice started with management of rights in musical works, it has now expanded to reprography and looks forward to management of rights in audiovisual works.

Kenya offers an example that most resembles the structure in Sweden. The Music Society of Kenya (MCSK) is the oldest CMO which started in 1983. Later the management of rights in sound recordings became actual and two new CMOs were established for performers and music producers respectively. Performers Rights Society of Kenya (PRISK) and Kenya Association of Music Producers (KAMP) started functioning towards the end of 2000. It was not easy to explain for music users that they need three separate licenses to play music. As a consequence, all three CMOs founded a strategic partnership for joint licensing of background music, supported by the relevant ministry. The Kenyan structure has many similarities with the Swedish system with STIM, SAMI and IFPI, the two latter issuing joint licenses under agreed conditions.

The not-for-profit feature of collective management is valid in practically all CMOs in the region. It has in some cases been difficult for the regulator to understand the role of collective management. In best cases, they deal with a lot of revenue, but they are still not-for-profit. The revenue that a CMO collects for the use of its members' works is, however, not the money of the CMO. It only holds the money in trust before distributing it to the rightsholders. This feature is one of the reasons for necessary regulatory framework for collective management.



REGULATORY FRAMEWORK FOR COLLECTIVE MANAGEMENT

This is an area where the developments in Europe lag far behind what is customary in Sub-Saharan Africa. Almost all CMOs are regulated and provisions exist both in the copyright law itself and in implementing regulations.

The Collective Rights Management (CRM) Directive (2014/26/EU) offers nowadays a comprehensive legal framework for collective management in Europe, with designated regulatory bodies, like the Swedish Intellectual Property Office (PRV). Contrary to the rather late developments in Europe, the work of Sub-Saharan CMOs has in most countries been regulated since their establishment. Whereas the supervision is in most cases both necessary and beneficial, there are countries in the region where excessive interference by the regulator has led to the halt in activities. The longstanding wrangling between the Kenya Copyright Board (KECOBO) and the local CMOs has negatively affected the licensing landscape, leading to drastically decreased revenue to the rightsholders.

One of the key findings of the recent training which I use as the case study of this article is the following:

- Cooperation between the regulator and the CMOs is needed to achieve a conducive framework for collective management.
- There needs to be a clear separation of powers and roles between the Copyright Office and the CMOs. This leads to the best results for all stakeholders.

A more coherent regulatory framework for collective management, including the relationship between the regulator and the CMOs, would be a useful tool in many countries in the region.

GOOD GOVERNANCE OF CMOs

The single most important success factor in the work of any CMO is good governance. It is unfortunately also the number one reason for failure. Examples of poor governance have been experienced on all continents.

The main elements of good governance are the following:

- Clear governance structures
- Transparency
- Accountability

A solid governance structure ensures that there is clear separation of powers and role clarity between the Board and the management. The main principle is that the Board Chair leads the Board and the Chief Executive Officer (CEO) leads the management. Both the Board and the management have a common goal to serve the rightsholders in the best possible manner, but they have separate roles and responsibilities. The main tasks of the Board are the following:

- Strategic leadership
- Advisory role vis-à-vis the CEO
- Supervision of the activities

All too often do members of the Board and the Board Chair get involved in day-to-day managerial questions, instead of discussing strategic issues that have an effect in the longer run. There are also cases where a strong CEO imposes his/her decisions and the Board becomes a mere stamp. However, in the Sub-Saharan context there are more cases where the Board and in particular the Chair decides all details, acting as a dictator. The goal in the interaction between the Board and the management is strategic partnership.

Transparency and accountability go hand in hand, and it is difficult to be accountable without being transparent. Most CMOs need to provide audited accounts to the regulator, but transparency means a lot more than just posting the official documents on the webpage of the organization. In the European Union, CMOs need to publish yearly a fairly detailed transparency report and that might serve as a useful tool also for CMOs on other continents.

Accountability calls for actions. The organization needs to explain why certain measures have been taken and give justification for them. Accountability is particularly important in crisis situations, when things have gone wrong. Speedy action and explanation go a long way instead of trying to hide the failure and reasons thereof. This is equally true for all CMOs, irrespective of the continent.

The recent training in Nairobi stated in its Call for Action that training is needed on good governance, including the business of collective management. Board mem-

bers need to understand that the core business of a CMO is rights management. They handle other peoples' rights and money. There is a money-in (licensing and collection) element and a money-out (distribution) element in every CMO. The only true measure for success of a CMO is distribution of revenue to rightsholders.

COMMUNICATION AND REPUTATION MANAGEMENT

Communicating in an understandable and clear manner to all stakeholders plays a key role in collective management. Long gone are the days when experts could satisfy their audience by saying that “copyright is a very difficult and complicated field of law”, indicating that only the experts are capable of understanding the implications. There might be complicated issues involved in collective management, but they need to be communicated so that an ordinary human being can understand it. This is in many cases more difficult than using the jargon of the professionals.

The reputation of collective management organizations is not sufficient in many countries, and Sub-Saharan Africa is no exception in this regard. That is why building a reputation management plan as part of the communication strategy, planning and policies is important. The financial guru Warren Buffet has stated: “Building a good reputation takes 20 years, but it can be ruined in five minutes”. This is a message to all organizations, including CMOs. One cannot build a reputation on what an organization is going to do; reputation is built always on real actions on the ground.

Too often, unfortunately, emerging CMOs in the region suffer from rivalry and conflicting interests of different rightsholder groups, instead of solidarity and common action. In the field of music, for instance, elections for the Board have not always been held regularly. If the organization is not performing to the satisfaction of all its members, the first desire is to establish a second one; a solution that would create even more chaos in the marketplace. In such instances, it is clear that the reputation of the CMO suffers and it takes a long time to rebuild a good reputation again.

In the following sections, I will deal with sector-specific current issues and how they play out in Sub-Saharan Africa, as compared to other parts of the world. I will also describe some sources of revenue which could have a major impact on the sustainability of CMO operations.

MANAGEMENT OF MUSIC RIGHTS IN THE DIGITAL ENVIRONMENT

The digital environment and in particular licensing of digital service providers (DSPs) has led to great changes in how collective management functions in the field of music. While musical works are still to a large extent licensed collectively, rights in sound recordings are managed individually by music producers, also on behalf of music performers. Streaming services being the primary business of music producers, with fewer or practically no

CDs being sold, the streaming market is the focus of producers.

Multi-territorial licensing of musical works is a demand of DSPs, such as Spotify and Deezer. They are primarily wishing to deal only with CMOs that can offer multi-territorial licenses from one source. This is also the case in Sub-Saharan Africa. CAPASSO, the organization that manages the reproduction or “mechanical rights” in musical works, has created a Digital Rights Platform and can offer Pan-African licensing. Based on collaboration and reciprocal agreements with music CMOs of the region, the organization can license to DSPs a wide repertoire. As African music is on high demand on the marketplace, CAPASSO plays an important role side-by-side with foreign providers of multi-territorial licenses and direct licensing by big music publishers. Competition in the marketplace is a fact.

A crucial issue in digital rights management is proper data management and availability of metadata. Collection of revenue from DSPs takes place on a work-by-work basis, meaning that each musical work must be identified before invoicing. This makes it necessary that all countries in the region which participate in multi-territorial licensing must be able to demonstrate appropriate data for each of their members' works. There is much to be done on the continent to reach the full potential. Each CMO in the region needs to handle its backyard and improve its technical infrastructure. Technical tools and worldwide identifiers exist and need to be applied throughout the continent.

As said at the outset, licensing of sound recordings for streaming purposes takes place individually by the music producers. Public performances of sound recordings are customarily managed by CMOs, called Music Licensing Companies (MLCs) by IFPI. Collective licensing revenue has grown in importance as a source of income for record labels in recent years and that is why investment in the collective management infrastructure also in Sub-Saharan Africa has increased during the last years. It is important that each CMO has adequate information of each market sector, for example the retail stores. Having such statistics, the CMO can define its current market share and set development targets for each year, including KPIs to measure achievements. This is of course valid for all CMOs, not only for MLCs in the sound recording sector.

PRIVATE COPYING REMUNERATION

Private copying remuneration has proven to be a major source of income for the creative sector. It is important, therefore, to promote the implementation of private copying remuneration in all sectors in countries where such a system does not currently exist, or is not yet implemented.

It is important that the remuneration system is imbedded in copyright legislation, and preferably not called a levy on blank media. That refers to the market situation in the early stages. For instance, in Sweden the levy system was first introduced in 1999, the previous system being a tax-based solution. In Finland, the copyright levy was in-

troduced already in 1984, as the fifth country in the world.

Most copyright laws in the world include an exception or limitation in the exclusive right of reproduction to copy for one's private use. This possibility is included in Article 9.2. of the Berne Convention. There are three criteria for any permissible exception, the so-called three-step-test. The third criteria "does not unreasonably prejudice the legitimate interests of the author" is the most important one in this context. The total amount of everybody's copying for private use is so huge that it easily prejudices the legitimate interests of rightsholders. For that reason, solutions for an indirect compensation have been sought, the first implementation being in 1965 in Germany. A small copyright fee is paid for all blank devices and media that can be used for private copying. Customarily the fee is paid by the importers or manufacturers and collected by one CMO, such as Copyswede in Sweden. The fee is passed on to the retail price and consumers end up paying the remuneration. They are also the beneficiaries of free private copying. For the system to survive, it needs to be updated together with technological developments.

The Information Society Directive of the EU (2001/29) introduced the requirement of fair compensation for private copying. It has thereafter been reinforced by judgments from the European Court of Justice and introduced in the majority of the EU Member States.

Without going deep into the legal debates, the implementation in Sub-Saharan Africa is the focus of my article. The system has been introduced relatively early in certain countries, such as Ghana and Burkina Faso. In both countries it has functioned well, but to do so also in the future, the list of devices and media need to be updated regularly. Recent implementation of the system in Malawi serves as an example of the great importance of the revenue for the sustainability of the copyright infrastructure.

There are some countries where the compensation system has been included in the law for a long time, but the implementing provisions are missing. Examples are Nigeria and Kenya, and in these countries rightsholders lose substantial revenue every year due to the non-implementation.

Common action plan for certain Francophone African countries has led to the introduction of a remuneration system for instance in Ivory Coast and Senegal. Regional implementation and action plans are called upon also for English-speaking countries.

VISUAL ARTISTS' RESELL RIGHT

Many countries in Sub-Saharan Africa have not yet adopted the resale right in their legislation. As there is a reciprocity requirement in the Berne Convention, countries without the relevant stipulations lose out in cases where works of art of their nationals are being sold in European countries.

For example, at Sotheby's bi-annual Modern and Contemporary African Art action in 2021, Nigerian artist Ben Enwonwu's sculpture "Atlas" was sold for USD 519,826. No resale remuneration was paid for this sale due to the

lack of legislation in the country of the artist. This is just one single example of the popularity of African artwork at the international art market.

Whereas the Directive (2001/84/EC) on resale right ensured implementation in Europe, there are still major art markets on other continents without legislation, examples being the United States and Japan. The obligation of resale right in all countries of the Union has been among the issues debated in the Standing Committee on Copyright and Related rights (SCCR) at the World Intellectual Property Organization (WIPO) since a few years now. It was first introduced by the Governments of Senegal and Congo.

MANAGEMENT OF RIGHTS IN AUDIOVISUAL WORKS IN THE REGION

The Berne Convention leaves the question of authorship in audiovisual works for the national legislator to decide. This has also a bearing on how rights in audiovisual works are managed in different countries. Whereas the rights of authors in the digital environment were ensured and clarified by the WIPO Copyright Treaty (WCT) 1996, the legal position of audiovisual performers were left outside the scope of the WIPO Performances and Phonograms Treaty (WPPT). It took until 2012 when the Beijing Treaty on Audiovisual Performances (BTAP) became a reality. National implementation of the Beijing Treaty is a high priority in the region, and it can take place in such a form that it supports collective management of rights of audiovisual performers.

Contrary to many European CMOs in the audiovisual sector, there are joint CMOs in the region that manage the rights of all rightsholders, i.e., authors, actors and producers. Such organizations exist in Ghana, Nigeria and Uganda. The assistance that international organizations render to their members tends to be sector-specific, making it difficult for joint organizations to implement all the different tools and programs. Greater collaboration is called upon by CISAC, SCAPR and International Federation of Film Producers Associations (FIAPF) respectively.

It may be an African specialty to have joint CMOs in the audiovisual sector, but it is firmly believed that the marketplace would not be supportive to different actions by authors, actors and film producers. Film business is an expensive undertaking and every film needs in the input of creative collaborators (authors and actors) and the financial input as resources from producers. It is interesting to note that measured by numbers of films produced yearly, Nigeria with its Nollywood is a leading market, followed by Bollywood in India and Hollywood in the US.

MANAGEMENT OF RIGHTS IN THE TEXT AND IMAGE SECTOR

The COVID-19 pandemic has shown clearly that it is important to have quality educational materials available in both analogue and digital forms. Educational publishing is the motor of the publishing industry in many countries,

including Sub-Saharan countries. Therefore, the livelihood and working conditions of local writers and publishers should be high on the political agenda for creative industries.

On the contrary, many countries, including South Africa, have tried to push vast and unclearly defined exceptions and limitations to benefit educational institutions. While this may seem to be justifiable from a societal perspective, it would be detrimental to local authors and publishing.

Clear and precise legislative framework with exceptions and limitations, compliant with the three-step-test, as stipulated in the international treaties, is crucial in ensuring remuneration for rightsholders for mass uses of their works. The question of exceptions and limitations in education has for years now been on the political agenda for instance at the SCCR meetings of WIPO.

RROs in the text and image sector function in many countries in Sub-Saharan Africa, examples being Ghana and Zambia. Many multi-repertoire CMOs, such as COS-OMA in Malawi, have for years licensed the use of protected materials in higher education.

The importance of metadata, including the use of identifiers, needs to be fully recognized in the text and image sector, where RROs distribute collected revenue as title-specific remuneration to individual rightsholders, or plan to swift to an individual distribution system. The distribution of revenue to joint and collective purposes of rightsholders does not seem to be an adequate solution in the region.

Sustainability of the operations of the stand-alone organizations is high on the agenda of IFRRO as the international body grouping together RROs. While it may be important to encourage rightsholders in new countries to commence operations, sustainability of existing organizations needs to be ensured as the first priority. This also demands adequate technical infrastructure and WIPO's collaboration with IFRRO is hoped to result in workable systems to manage rights in the text and image sector.

IN CONCLUSION

It is my hope that my experiences in working with Sub-Saharan rightsholders and their collective management organizations has shed some light into developments of a region which is seldom on the radar in copyright discussions. So much is happening and there is a will to make a difference for the creative sector. African are definitely rich in creativity and their creative output has greatly increased in popularity also in our part of the world, be it music, works of art or other creative products.

It has been a pleasure to work together with colleagues from the region and to see how they make a difference in their daily work.



Ms. Tarja Koskinen-Olsson

My core competences include exercise and management of copyright and related rights in different creative sectors: music, audiovisual, literature and visual arts. Good regulatory framework, corporate governance and effective management of rights are of special interest to me. As International Adviser and Chairperson of the Board at OK Consulting, I serve creators and other rights holders worldwide.