

Ms Anita Huss-Ekerhult, Counsellor
WIPO Copyright Management Division
By email: anita.huss@wipo.int

Re: C.L. 2030 - Possible amendments to the WIPO Good Practice Toolkit for Collective Management Organizations (CMOs) (2018)

30th March 2021

Dear Ms Huss-Ekerhult,

On behalf of CFLA, EIFL, ICA, ICOM, IFLA and SAA, libraries, archives and museums welcome the opportunity to provide additional amendments to the World Intellectual Property Organization's [CMO toolkit](#).

Libraries, archives and museums hold vast collections of copyrighted materials. When they wish to use items in their in-copyright collections in ways not covered by exceptions and limitations, working with CMOs could offer an efficient alternative to attempting to identify and seek authorisation from individual rightholders.

However, in order to do this, libraries, archives and museums underline that the transparency and good governance of collective management organisations are essential in order to ensure not only the efficient and fair licencing of uses by libraries and archives and remuneration of authors, but also the credibility of the copyright system as a whole.

First, to increase its utility and ease of use, we recommend that the updated version of the toolkit be made available additionally as a clickable PDF or as a HTML file on WIPO's website.

0. Global considerations

Libraries, archives and museums encourage the work of WIPO on the issue of governance of collective management organisations, in order to set out clearly practices to which they should aspire.

This matters because of the unique role (and often monopoly powers) of CMOs in serving the interests of creators while also facilitating the development of societies through the dissemination of knowledge and information.

Given the importance of this role, we underline the value of regulation, with a view to achieving a balance between the remuneration of creators and simple, practical and cost-efficient access to copyright-protected content for users and institutions. Achieving this will be supported by efficient, effective and transparent administration.

Well-documented controversies and inadequate practices by CMOs not only risk leading to the wasting of the public money that often funds libraries, archives and museums, but also, the dispossession of authors and other creators. This undermines the credibility of the copyright system as a whole, and those who promote collective management as a solution.

As a result, we suggest deleting the sentence ‘This document should not be perceived as being normative in any way’ (p5) because the purpose and role of the Toolkit is clearly explained. It also risks detracting from its relevance as a tool for governments in promoting the best possible practice by CMOs.

Glossary

We suggest including definitions of terms ‘fees’ and ‘remuneration’ (as used in p6) in the glossary. We also recommend to include a definition of General Public (as used in section 1.2 Information for the general public) to clarify the role of the different stakeholders and to distinguish from Licencees and Users.

Section 1. Providing information about the CMO and its operations

1. 1 The role of the CMO and its primary functions:

“1. A CMO is an organization with a primary responsibility towards the rightholders it represents. A CMO should always act in the best interest of those rightholders, in accordance with applicable law and its Statute.”

Libraries, archives and museums would welcome a clear statement that CMOs also have a responsibility towards licensees and users, in much the same way as any business has a responsibility towards its customers.

“4. CMOs play an important role in copyright and as promoters of culture, by providing social, cultural and educational services for the benefit of rightholders.”

We note that many CMOs do have a core role in providing services to rightholders.

However, not all CMOs have this role, and indeed there may be strong arguments for ensuring that activities outside of the collection and distribution of money should remain under public control or supervision. Therefore, we suggest that a ‘may’ be added, i.e. ‘CMOs may play an important role...’.

“7. Within the limits of its mandates and in the interest of the rightholders it represents, a CMO may engage in activities aimed at increasing public awareness about copyright and related rights, collective rights management and CMOs, as well as their positive effect on the national economy and on cultural diversity, including its cultural and social activities.”

We recommend making clear that any claims made by CMOs as to the effect of their activities on economies and cultural diversity should be based on evidence that considers overall surplus and efficiency. Transparency regarding the methods used and the criteria and choices made in gathering data is essential.

Section 1.2 Information for the general public

Libraries, archives and museums welcome the recommendations made on information for the general public. We suggest that it could be valuable to add that CMOs should publish annual reports, highlighting how they are fulfilling the recommendations established by the WIPO toolkit. We also suggest that as strong as possible direction be given to set up websites or web pages where this information can be published and easily accessed be all.

“8. A CMO should regularly publish (where possible, on the CMO’s website) and keep up to date:

“(a) its Statute, membership terms and rules on termination of membership;

(b) its tariff structure;

(c) its general distribution policy;

(d) its policy on deductions (such as any administration, social, cultural or educational deductions);

(e) its policy on the use of non-distributable Rights Revenue;

(f) its annual accounts;

(g) its complaint and dispute resolution procedures;

(h) a list of the persons who manage its business and who sit on its board; and

(i) the total amount of remuneration paid, and other benefits provided to the persons who manage the business of the CMO”

Libraries, archives, museums would like to add that, annual accounts include, specific information regarding details of revenues redistributed, broken down between types of rightholder (as for example recommended in the European Directive on Collective Rights Management in its Article 19 (2014/26/EU)), and between domestic and international beneficiaries.

Section 2. Membership: information, adherence and withdrawal

2.3 Non-discrimination of rightholders

“15. A CMO should not discriminate between rightholders it represents – either directly or indirectly – on the basis of: (a) nationality or place of residence or establishment; or (b) gender, origin, religion, disability, age or sexual orientation.”

We suggest that the reference to non-discrimination of rightholders be extended to all forms of discrimination, by making Recommendation 15 (p21) an open-ended list e.g. through adding ‘inter alia’.

Section 6. Relationship between CMO and Users

Since Section 6. Relationship between CMO and Users is in fact referring to Licensees (not Users as defined in the Glossary), the nomenclature should be changed to “Relationship between CMO and Licensees”.

“39. A CMO should provide a User (where possible electronically) with relevant background information regarding licenses and licensing schemes, where appropriate. Such information should include: [...] (b) if practicable, a list of the works and corollary rights in its repertoire available to Licensees; [...]”

We encourage the removal of the term ‘if practicable’ from Good Practice Tool 39 (p40). Where access to such a list is not possible, it cannot be possible for licensees or users to know if the CMO is able to offer licences or not.

“41. A CMO should license rights to Users on the basis of objective, fair and nondiscriminatory criteria, taking into account national copyright law, including applicable limitations and exceptions.”

Concerning Good Practice Tool number 41 (p. 41), we consider that the cited exceptions should be defined as unremunerated. We also recommend adding the following Good Practice Tool 17a (p. 23): ‘Where legislation allows for extended collective licensing or similar, CMOs should respect the desires of rightholders who have made their works available under open licences, and therefore not demand royalties for their use of these works.

“46. A CMO should establish tariffs which may be based on cross-sectoral tariff comparisons, economic research, the commercial value of the rights in use, the benefits to Licensees, or other relevant criteria”

Libraries, archives and museums consider that there is a need to clarify that CMOs should take account of different uses and users, including different purposes, contexts and manners of use. For example, libraries, archives, and museums are non-profit institutions with an established public interest mandate, working according to codes of ethics.

We therefore suggest that the following text be added to Good Practice Tool 46 (p. 46): A CMO should establish tariffs which may be based on cross-sectoral tariff comparisons, economic research, the commercial value of the rights in use, the benefits to Licensees, or other relevant criteria *such as the nature of the activity including education, research and other non-commercial, public interest activities*. Article 5 of the EU Directive on Copyright in the Digital Single Market (Directive (EU) 790/2019) sets out specific conditions for licensing

to schools for educational uses, making explicit the principle that different licensing approaches are relevant for different users (see [document](#)).

Section 8. Financial administration, distribution of revenue and deductions

“58. In respect of each financial year a CMO should distribute or make available an Annual Report to its membership well in advance of its General Meeting.”

Libraries, Archives and Museums welcome the emphasis in the toolkit on providing accurate and up-to-date information on the distribution of remunerations to creators, administrative costs of the structure as well as non-allocated royalties. We believe that such reporting should be made public. Those paying for licenses have a clear interest in knowing how their money is spent. As such, Good Practice Tool 28 should be updated to include a recommendation to publish annual reports, in a timely fashion, on the website,

“59. The Annual Report should contain:

(a) a financial statement, which should include a balance-sheet or a statement of assets and liabilities as well as an income and expenditure account for the financial year;

(b) a report of the CMO’s activities in that financial year;

(c) a statement of Rights Revenue broken down per category of rights managed and per type of use including the total amount of Rights Revenue collected, but not yet attributed to rightholders, and the total amount of Rights Revenue attributed but not yet distributed to rightholders;

(d) a breakdown of the Operating Expenses;

(e) a breakdown of the deductions for the purposes of social, cultural and educational services in the financial year and an explanation of the use of those amounts, with a breakdown per social, cultural and educational expenditure;

(f) information on the total amount of remuneration paid, and other benefits granted to, the persons who manage the business of the CMO and the board members in the financial year;

(g) a general statement setting out, in respect of the transactions between a CMO and each partner CMO with which it has a Representation Agreement, the:

(i) name of such partner CMOs, and the dates of the relevant contracts;

(ii) total amount paid in the financial year to the partner CMOs;

(iii) total management fees and other specified deductions; and

total amount received from the partner CMOs.”

As highlighted above, financial reporting should be clear about funds distributed to different types of rightholder, as well as the share going to foreign rightholders. We would therefore recommend making it explicit that such a breakdown should be provided.

Finally, in addition to details about deductions for social and cultural activities, we believe that the toolkit should highlight the need for transparency on the amounts deducted from creators' remuneration for lobbying purposes.

Section 12. Supervision and monitoring of CMOs

“79. In both the case of self-regulation and monitoring, and by provision in national laws, the provisions should include sections on at least:

- (a) the role and functions of CMOs;*
- (b) transparency;*
- (c) accountability and consultation;*
- (d) governance structures;*
- (e) licensing policies;*
- (f) distribution policies;*
- (g) Operating Expenses and deduction policies;*
- (h) data protection;*
- (i) dispute resolution*

In addition to self-regulatory approaches, libraries, archives and museums underline the importance of independent regulation of CMOs by the government. This should serve to support good governance, as well as give assurances to rightsholders and users alike.

We believe that CMOs should be independent of government. Therefore, where CMOs are organised as part of government, we suggest that the Good Practice Toolkit should recommend that a roadmap be in place towards independence. In the meanwhile, there should be clear provisions in place to prevent undue influence on government policy to the detriment of the interests of users of in-copyright materials.

We hope that our comments are helpful. Please do not hesitate to contact us if you have any questions.

Canadian Federation of Library Associations (CFLA) - Victoria Owen

Electronic Information for Libraries (EIFL) - Teresa Hackett

International Council of Archives (ICA) - Jean Dryden

International Council of Museums (ICOM) - Morgane Fouquet-Lapar and Marion Torterat

International Federation of Library Associations and Institutions (IFLA) - Stephen Wyber and Camille Francoise

Society of American Archivists (SAA) - William Maher