

Mr. Kevin Fitzgerald, Director, Office of the Director General
Ms. Anita Huss-Ekerhult, Counsellor, Copyright Infrastructure Division
World Intellectual Property Organization (WIPO)
By email: kevin.fitzgerald@wipo.int, anita.huss@wipo.int

31 August 2018

Re: C.L. 1992 – Additional submission on an updated draft of the WIPO Good Practice Toolkit for Collective Management Organizations (CMOs)

Dear Mr Fitzgerald and Ms Huss-Ekerhult,

The International Federation of Library Associations and Institutions (IFLA), the International Council of Archives (ICA) and Electronic Information for Libraries (EIFL) welcomes the opportunity to send additional comments on an updated draft WIPO Good Practice Toolkit for Collective Management Organizations (CMOs).

Libraries and archives hold large quantities of copyrighted material. In order to make certain uses of the material, libraries and archives frequently need to request permission or to clear rights, at least where the uses are not already covered by limitations or exceptions. As such, our institutions have a strong interest in effective, well-run and credible CMOs. Too often, CMOs cannot provide the solutions needed, or we cannot be sure that the money we spend is fairly and properly re-distributed.

The CMO with which a library or archive is likely to have the most dealings is a Reproduction Rights Organisation (RRO). Libraries also deal with CMOs charged with collecting money from remunerated copyright exceptions or other purposes such as public lending rights in certain countries.

We appreciate the amendments in the updated version of the Toolkit that address a number of concerns expressed by the library and archives community in the previous consultation. However several important issues remain outstanding. The issues include:

- Context of the Toolkit;
- Importance of exceptions and limitations;
- CMOs and governments;
- Clarifying the licensees, users, the general public;
- CMOs and lobbying activities;
- Fee structure;
- Legislative v voluntary codes;

- Suggested textual changes.

We believe it is essential to resolve these issues if the Toolkit to be of maximum benefit and used by all stakeholders, including the library and archives communities. Unless these matters can be addressed, our sector may not be in a position to recommend the Toolkit to our communities.

We hope that our additional comments are helpful.

Please do not hesitate to contact us if you have any questions.

Yours faithfully,

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EIFL Copyright & Libraries
Programme Manager

Stephen Wyber
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Jean Dryden
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Context

The usefulness of the Toolkit would be enhanced if the following information is included:

- How does the Secretariat plan to promote the Toolkit e.g. will it feature in WIPO national and regional seminars on the collective management of copyright and related right?
- What is the relationship between the Toolkit and Collective Management Organizations – Tool Kit Neighboring Rights published by WIPO in 2016?

Importance of exceptions and limitations

As underlined by the Berne Convention, copyright exceptions are an essential part of any copyright system. The Toolkit should make clear at the outset that a well functioning collective management system should take account of national exceptions and limitations so that licences do not take away policy space granted by legislators to users of the copyright system, nor overreach to works not suited to commercial licensing.

Examples of works not suited to licensing are works in libraries and archives that are unpublished, not created for commercial purposes, or are orphan works (not subject to legislative solutions). Libraries and archives depend on a robust set of exceptions and limitations in order to fulfil their mandate to make works of this nature available.

Furthermore, with the growing popularity of Creative Commons licences, as well as of the open access movement, many works are now explicitly being made available free of charge. Such works are therefore not suited for collective licensing. While it is not in the remit of this Toolkit to warn against unwaivable remuneration provisions in copyright law, CMOs should respect the will of rightsholders as far as possible.

Fully acknowledging the importance of exceptions and limitations also provides context for Good Practice Tool 41 (p. 39).

We propose the following four amendments:

1. Introduction (p. 5) Include the following text as an example: ‘This guide is not intended to prejudice in any way the operation of exceptions and limitations to copyright as they may exist in national law’.
2. Section 1.1 The role of the CMO and its primary functions (p. 6) Collective management is an important part of a functioning copyright and related rights system, complementing individual

licensing of rights, resting on robust substantive rights, *exceptions and limitations*, and corresponding enforcement measures. (Addition in italics)

3. Section 1.1. Good Practice Tool 2 (p. 8) With respect to certain uses and/or rights *and/or exceptions and limitations*, collective management may be the most cost effective mechanism for ensuring the effective exercise of copyright and related rights, in order to make these rights work in practice. (Addition in italics)

4. Add the following Good Practice Tool 17a (p. 23): ‘Where legislation allows for extended collective licensing or similar, CMOs should respect the desires of rightsholders who have made their works available under open licences, and therefore not demand royalties for their use of these works.’

CMOs and governments

The Toolkit does not address the important relationship between CMOs and governments. The Toolkit must set the objective that CMOs be independent of government. In order to have the full confidence of all stakeholders, the government and its agencies should be, and should be seen to be, independent and not tied to the interests of any one group of stakeholders. Where a new CMO is established as part of the copyright office or other government body, for example, to help get it off the ground, it should endeavour to become a separate entity within the private sector as soon as feasibly possible.

Clarifying Licensees, Users, and the general public

We appreciate the amended definition of Licensee, but the concept of User is much more complex than set out in the Toolkit. In order to make the Toolkit usable to stakeholders, the terms Licensee, User, and the ‘general public’ must be clarified by adding examples and further explanation. The amended definition of Licensee is better, but there is still confusion between the definitions of Licensee and User, especially in an institutional setting. For example, is a university library considered to be a Licensee or a User? Is an individual who uses the library’s holdings (with whom the CMO has no contractual relationship) considered a User? In another example, Good Practice Tool 39 states . “A *CMO should provide a User (where possible electronically) with relevant background information regarding licenses and licensing schemes. Such information should include:.... details of how a Licensee can cancel a license, any notice provisions which may apply, and any periods during which the right to cancel may subsist.*”

We would suggest replacing all references to ‘users’ in chapter 6 of the Toolkit with ‘licensees’.

A library or archive in an institutional setting, such as a university, is not usually a separate legal entity. For licences that involve library or archival content, it is important to include the library or archive in the licence negotiations. Responsibility for managing, complying with and/or paying for the licence will likely fall to the library. In the interests of good customer relations and the smooth running of the contract, it is essential that the library understands and agrees to the terms of the licence, including authorized uses, reporting obligations, etc. In addition, only the library has the information needed to make an informed decision about the appropriateness of the licence for the library and the institution.

For example, Section 8.3 (p. 53) (Distribution policies) states “Noting that CMOs’ distribution policies are based on the usage of licensed works, CMOs should include in their licenses a requirement to provide accurate and timely information on their usage of works licensed by the CMO.” It is the library who will provide these usage statistics. Only the library can advise if the reporting requirements set out in the licence are reasonable, practical and possible.

We therefore propose a new Good Practice Tool 45a (p. 40): ‘Where the signatory to a licence is someone other than the department responsible for the day-to-day management of the licence, that department should be closely involved in the licence negotiations. For example, when a university official signs on behalf of a library, the library should be engaged in the negotiation process.’

CMOs and lobbying activities

The Toolkit includes a provision that prohibits the use of rights revenue for any purpose other than distributions to rightholders, “*unless specifically authorized by the General Meeting or its Statute, or provided by law.*” (Good Practice Tool 57, p. 51). However, CMOs may wish to allocate financial resources to raise awareness of their role in the copyright system. If, however, such activities extend to lobbying for policy changes that are inimical to a substantial number of a CMO’s customers (i.e., public interest users such as cultural heritage and educational institutions), such activities must be strictly controlled or prohibited entirely.

We suggest that the following text be added to Good Practice Tool 57, p.51:
“Allocation of rights revenue to activities such as lobbying governments for policy changes that work against the interests of cultural heritage and educational institutions must be strictly controlled.”

Fee structures

A CMO’s tariff structure must reflect lower fees for non-commercial, public interest activities. We therefore suggest that the following text be added to Good Practice Tool 46 (p. 44). 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*. (Addition in italics).

Legislation v. voluntary codes

The examples do not distinguish between voluntary codes and legislation. For example, in Section 1.1 (p. 6) The role of the CMO and its primary functions lists in the following order: EU, SCAPR Code of Conduct, China. We therefore request that voluntary codes be clearly differentiated from legislation in the examples.

Additional textual changes

In conclusion, we draw to your attention some proposed additional textual changes and questions:

p.3. In definition of Annual Report, what does ‘channel’ mean?

p. 6. We propose the following amendment: In this vein, CMOs ~~are a helpful~~can provide a bridge between rightholders and Users, facilitating both access and remuneration.

p. 14. Good Practice Tool 8 – Add percentage of Operating Expenses (overheads). (Referred to in Section 4.1 on p.28).

p. 38. We propose the following amendment: Experience shows that an open and professional approach makes it easier for Users to ~~accept~~understand a CMO’s licensing policies and allows a CMO to market itself in a more effective and productive manner.

p. 40. Good Practice Tool 43 would be clearer if it were stated positively (rather than having 3 negatives), i.e. *Best practices of acting impartially, fairly and on the basis of objective criteria, ~~nonetheless permit do not prevent~~ a CMO ~~to refuse from refusing~~ to grant a license to a User for objective reasons, such as ...*



International Federation of
Library Associations and Institutions

About IFLA

IFLA is the global voice of the library profession, representing all types of library around the world. With around 1300 members in over 130 countries, it works both to build capacity within the field, and advocate for stronger support for libraries and library services with stakeholders.

About ICA

The International Council on Archives (ICA) is dedicated to the effective management of records and the preservation, care and use of the world's archival heritage. With more than 1900 members in 199 countries, the ICA advocates for good archival management and the physical protection of recorded heritage, as well as standards and best practices that support access to archival holdings across national borders.

About EIFL

EIFL works with libraries to enable access to knowledge in over 50 developing and transition economy countries in Europe, Africa, Asia Pacific, and Latin America. In a highly networked digital world our activities help people to access and use information for education, learning, research and sustainable community development.