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EIFL and Library Group Comments on Updated Draft WIPO CMO Toolkit (2021)

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Recommended Citation

Electronic Information for Libraries, "EIFL and Library Group Comments on Updated Draft WIPO CMO Toolkit (2021)" (2021). *Testimony and Submissions*. 1.
<https://digitalcommons.wcl.american.edu/pijip-righttoresearch-testimony/1>

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Ms Anita Huss-Ekerhult, Counsellor
Copyright Management Division
World Intellectual Property Organization
By email: anita.huss@wipo.int

30 June 2021

Re: Updated Draft WIPO Good Practice Toolkit for CMOs, 27 May 2021

Dear Ms Huss-Ekerhult,

The international library, archives and museum community welcomes the opportunity to provide additional comments on the updated draft of the WIPO Good Practice Toolkit for Collective Management Organizations (CMOs), released on 27 May 2021¹.

As noted in our previous submission², libraries, archives and museums may need to work with CMOs when they wish to use copyright-protected material in their collections in ways not covered by exceptions and limitations in copyright law, or other licences. The CMO with which a library usually has the most dealings is a Reproduction Rights Organisation (RRO).

Given the fact that CMOs operate as a de facto legal monopoly, and cultural heritage institutions are for the most part funded from the public purse, issues of transparency, good governance and fair licensing are paramount.

We appreciate that a number of issues raised in our previous comments have been taken into consideration in the updated draft text.

We do have some outstanding concerns, however, that we outline below. In particular, we are concerned at the new additions in Section 13 'Supervision and monitoring of CMOs'.

We hope our comments are useful, and will be taken into account in the final, updated version of the Toolkit.

Canadian Federation of Library Associations (CFLA) Victoria Owen
Electronic Information for Libraries (EIFL) Teresa Hackett
International Federation of Library Associations and Institutions (IFLA) Stephen Wyber and Camille Francoise
International Council of Archives (ICA) Jean Dryden
International Council of Museums (ICOM) Morgane Fouquet-Lapar & Marion Torterat
Society of American Archivists (SAA) William Maher

¹ https://www.wipo.int/copyright/en/news/2021/news_0002.html

² Written submission Dated 30 March 2021

Point 1. Hyperlinks in the PDF document

Comment: To increase its utility and ease of use, it would be very helpful if the final, updated PDF version of the CMO Toolkit contains hyperlinks to enable navigation around the document, for example, from the Table of Contents to the relevant sections. It would also make the document accessible.

Point 2. Glossary - Definition of Licensee p.12-13

A User who is licensed by a CMO to make copyright-protected uses of copyright works or other subject matter is a Licensee of a CMO. Typically, such a Licensee is responsible for payment of licensing fees or statutory remuneration *and to provide CMOs with accurate and timely usage information.*

Comment: The text in italics was added to the updated version of the Toolkit. However, it goes beyond the definition of Licensee, and should be removed. Further, the point about usage information appears already three times in the document - Section 6.3.1 Distribution policies, Section 8.2.3 Principles governing licensing of Users/Licensees Tool 70, and Section 8.4.3 Obligations of Users/Licensees Tool 74. (8.4.3 was added in the updated version).

Point 3. Section 1. Providing information about the CMO and its operations p.14

Comment: While the primary responsibility of a CMO is towards the rightholders it represents, we strongly believe that CMOs also have a responsibility towards licencees and users, in much the same way as any business has a responsibility towards its customers. In fact, the Toolkit's new sub-title, 'A Bridge between Rightholders and Users', highlights the fundamental relationship between CMOs and users. We would continue to welcome a clear statement, at the outset, of this responsibility that should in our view be part of any toolkit setting out good practices for CMOs.

Point 4. Section 8.2 Principles governing licensing of Users/Licensees

8.2.1 Explanation p.133

The following sentence has been added to the Explanation: *CMOs may voluntarily decide to cooperate with other CMOs, with a view to increasing efficiency, reducing costs and to simplify the acquisition of licenses.*

Comment: Section 8 deals with the relationship between CMOs and Users/Licensees, and how a CMO should interact with potential and existing customers. As such, the new sentence doesn't appear to belong in Section 8, and would fit better in Section 7 Relationship between CMOs p.124. Alternatively, it should be made clearer that such cooperation should serve to simplify the offer of licences to users.

Point 5. Section 8.2 Principles governing licensing of Users/Licensees

8.2.3 Good practice tools 71 p.135

The following Good practice tool has been added to the updated draft: *A CMO also fulfills an important role towards Users/and Licensees, by offering licensing solutions for rights managed collectively.*

Comment: Unlike the other tools in the Toolkit, that exhort action, this new item is simply a statement and so it is not a tool. We suggest either to delete it or make it into a tool by changing the wording to say "CMOs may offer licensing solutions for rights managed collectively."

Point 6. Section 8.4 Obligations of Users/Licensees

8.4.1 Explanation p.140

Users/Licensees should provide CMOs with the information required for the purposes of licensing rights, *as well as collection and timely and accurate Distribution of the revenues for the use of rights represented by the CMO...* Users/Licensees must, in particular, report the works and other protected subject matter they use in a timely and accurate manner, as well as any data or information allowing the CMOs to calculate the license fee, which is essential to enable the CMOs to operate efficiently *and distribute collected revenues timely to the correct right holders.*

Comment: Section 8.4 Obligations of Users/Licensees is a new sub-section. The text above in italics essentially repeats the same point in the same paragraph. In addition, the first sentence, as written, is misleading because it inadvertently implies that Users/Licensees are responsible for the collection and distribution of rights revenues. Consequently the second clause in the first sentence should be deleted. It would also help to add that the sharing of information should be in line with the terms of the licence agreement, as far as practical.

Point 7. Section 8.4 Obligations of Users/Licensees

8.4.3 Good practice tool 74 p.145

Comment: Tool 74 is a new item in the updated draft. Any information required by the CMO should be agreed with the licensee, and set out in the licence agreement. Therefore we recommend the following changes to tool 74 (in italics):

Users/Licensees should provide a CMO with information on the use of works and other subject matter in an agreed format and in a timely and accurate manner as well as any *agreed* data or information to enable a CMO to calculate the license fees, *as set out in the licence agreement.*

Point 8. Section 13. Supervision and monitoring of CMOs.

13.1 Explanation p.161-162

Original text: “CMOs should be governed, and the CMO management supervised and controlled, by the right holders who own the rights and who have made a decision to entrust the management of their rights to the CMO.

Governments play an essential role in introducing the regulatory framework for the establishment and operation and supervision of CMOs, including standards for good governance, financial management, transparency and accountability. This is essential to make sure that the CMOs operate in the best interest of their members and right holders they represent.

It is equally essential that the regulators or supervisory bodies’ role is limited to creating the right framework for efficient, transparent and accountable collective management. Governments should not unnecessarily interfere in the operation of CMOs, which manage right holders’ property rights on their behalf. Supervision of CMOs should be fair, transparent and proportionate, and governments should avoid setting requirements which place disproportionate administrative and financial burdens on CMOs.

CMOs, Users and Governments can also put in place a supervisory and monitoring mechanism by mutual agreement. In this scenario, it is customary that a code of conduct will be published, to ensure that all relevant parties clearly understand their obligations and rights”.

Proposed amendments (in bold/grey):

“CMOs should be governed, and the CMO management supervised and controlled, by the right holders who own the rights and who have made a decision to entrust the management of their rights to the CMO. **Notwithstanding, proper and impartial governmental supervision and regular auditing should be always in place to protect members and the public interest.**

Governments play an essential role in introducing the regulatory framework for the establishment and operation and supervision of CMOs, including standards for good governance, financial management, transparency and accountability. This is essential to make sure that the CMOs operate in the best interest of their members and right holders they represent **as well as users, and mismanagement of funds or other abuses to the detriment of their members or the public are prevented.**

It is equally essential that the regulators’ or supervisory bodies’ role [is limited to creating] **reflects the fact that CMOs are entities that manage other people’s funds - including in some cases public funds - and duly create and maintain** the right framework for efficient, transparent and accountable collective management. Governments should not unnecessarily **become involved** [interfere] in the operation of

CMOs, which manage right holders' property rights on their behalf **but should be active to prevent mismanagement through impartial and transparent means.**

Supervision of CMOs should be fair, transparent and proportionate, and governments should avoid setting requirements which place disproportionate administrative and financial burdens on CMOs.

CMOs, Users and Governments can also put in place a supervisory and monitoring mechanism by mutual agreement. In this scenario, it is customary that a code of conduct will be published, to ensure that all relevant parties clearly understand their obligations and rights”.

Comment: The 2018 version of the Toolkit provided a general explanation of how supervision of CMOs may be undertaken either on the basis of statutory provisions or by self-regulation and a monitoring scheme mutually agreed between CMOs, users and governments. This single paragraph has been supplemented by three new paragraphs expanding on the role of governments.

Paragraph 3 is very concerning, both in terms of substance and tone.

First, we do not accept that the role of governments should be limited to introducing and creating the regulatory framework. Governments have a legitimate and important role in overseeing the management and operation of CMOs, in particular to guard against corruption and mismanagement.

Second, terminology such as ‘interfering’ to describe a government’s intervention in this regard is, in our view, deeply inappropriate. It is also unhelpful to governments that are acting in the public interest to improve corporate governance where needed, stamp out fraud, and prevent abuses under competition law in the sector, while still respecting the functional independence of CMOs.

Third, it is disappointing and concerning that WIPO, as an intergovernmental organisation made up of member states, would include such language in an official publication. It also appears to fly in the face of the purpose of the guide and would risk undermining WIPO’s wider reputation - if CMOs cannot at the end of the day be held accountable by governments, the Toolkit is undermined and even fatally flawed.

Point 9. 4.2 Notification of changes in the CMO Statute and other pertinent rules

4.2.1 Explanation

A CMO should notify its Members and Rightholders about changes in its Statute and about other pertinent changes that may affect their respective Members’ rights and/or obligations.

Comment: The following sentence was deleted in the updated version: ‘Other rightholders that may not be the CMO’s Members should be informed about any changes that may affect their rights and/or obligations.’ With the spread of Extended Collective Licences, it would seem to make sense that changes in terms and conditions are widely published in the rightholder community. We suggest that the sentence is reinstated.

Point 10. Good practice tool 43 p.100

43. A CMO should be governed independently and transparently, based on an appropriate legal structure, focusing on Licensees and intermediaries on behalf of the Rightholders it represents, and distributing remuneration to them.

Comment: Good practice tool 43 is very unclear.

Point 11. Good practice tool 58 p.128

58. CMOs should be governed by a Representation Agreement.

Comment: Good practice 58 doesn’t seem to make much sense.

Point 12. Section 1.1.3. Good practice tools p.21-22

Comment: the text “...as well as highlight evidence...” should read “highlighting”.