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WIPO Good Practice Toolkit for Collective Management Organisations 2021: Suggestions for Possible Amendment

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WIPO GOOD PRACTICE TOOLKIT FOR COLLECTIVE MANAGEMENT ORGANISATIONS 2021: SUGGESTIONS FOR POSSIBLE AMENDMENT

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ABSTRACT

Drawing examples from national and international legal instruments, and based on existing studies, this comment makes suggestions for possible amendment of the World Intellectual Property Organization's Good Practice Toolkit for Collective Management Organisations 2021 (CMO Toolkit). The suggestions are for inclusion of good practices in the CMO Toolkit that can inform the regulation of CMOs to prevent them from constituting obstacles to open access non-commercial licensing and L&Es-enabled access for education and research. The suggestion also covers good practices that will prevent CMOs from impeding the smooth and effective development of artificial intelligence systems. Recommendations include protecting rightholders' ability to make their work available via open access, ensuring that licenses granted by CMOs do not override existing L&Es, and ensuring that CMOs are entitled to a single equitable remuneration without requiring that AI companies to seek authorisation from CMOs for the direct or indirect use of copyright-protected works.

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ABSTRACT.....	1
INTRODUCTION.....	2
I. PROPOSALS.....	3
A. CMOs, Open Access Non-commercial Licensing and L&Es.....	3
1. Explanation.....	3
2. Examples.....	4
3. Proposed Good Practice Tools.....	5
B. CMOs AND AI SYSTEMS.....	6
1. Explanation.....	6
2. Examples.....	6
3. Proposed Good Practice Tools.....	9

INTRODUCTION

The World Intellectual Property Organization’s Good Practice Toolkit for Collective Management Organisations (CMOs) 2021 (CMOs Toolkit) contains eighty-five (85) model good practices to help ensure accountability, transparency, good governance, and effective financial management of CMOs. The 85 model good practices are drawn from laws, regulations, and codes of conducts relating to CMOs from WIPO member states, and regional and international organisations. The good practices are clustered into thirteen (13) broad categories of key issues relating to collective management of copyright and related rights as follows:

- Cluster 1 – Information about CMOs and its primary functions
- Cluster 2 – Membership: information, adherence and withdrawal
- Cluster 3 – Members’ rights to fair treatment; their position in the CMO
- Cluster 4 – Particular issues concerning the CM –Member relationship
- Cluster 5 – Governance
- Cluster 6 – Financial administration, distribution of revenue and deductions
- Cluster 7 – Relationship between CMOs
- Cluster 8 – Relationship between CMO and User/Licensee
- Cluster 9 – Processing of Members’ and Users/Licensees’ data
- Cluster 10 – Importance of IT infrastructure
- Cluster 11 – Development of Staff skills and awareness
- Cluster 12 – Complaints and dispute resolution procedures
- Cluster 13 – Supervision and monitoring of CMOs

This submission is in response to the call for suggestions for possible amendment of the CMO Toolkit dated 18 January 2024 (C. L

2044). The following suggestions are for inclusion of good practices in the CMO Toolkit that can inform the regulation of CMOs to prevent them from operating as impediments to open access non-commercial licensing and L&Es-enabled access for education and research. The suggestion also covers good practices that will prevent CMOs from impeding the development of artificial intelligence (AI) systems. The suggestions are drawn from the findings of existing studies on collective management of copyright and related rights.²

I. PROPOSALS

If properly regulated, based on well-thought-out models of good practices, collective management of copyright and related rights can provide effective legal and economic infrastructural support for national and cross-border access to copyright-protected works, especially for educational and research purposes as well as the development of AI systems. The following amendments to the CMO Toolkit are, therefore, proposed.

A. CMOs, Open Access Non-commercial Licensing and L&Es

1. Explanation

Collective management of copyright and related rights operate through CMOs. CMOs are organisations involved in activities, including negotiation of licenses with users such as libraries, archives and museums (LAMs); collection of licensing fees (in the form of royalties) on behalf of rightsholders such as authors, composers, and performers; and distribution of the collected royalties among rightsholders. Such rightsholders are usually, but not always, the members of the CMOs.

CMOs are established to assist users of copyright works, such as LAMs, to get access to protected works through licensing for educational and research purposes, while enabling rightsholders to derive fair and adequate remuneration for the use of their works by the public. In this regard, CMOs deploy the economies of scale, scope and network to reduce licensing transaction cost for both users and

² DO Oriakhogba COPYRIGHT, COLLECTIVE MANAGEMENT ORGANISATIONS, AND COMPETITION IN AFRICA: REGULATORY PERSPECTIVES FROM NIGERIA, SOUTH AFRICA AND KENYA (Juta, 1st ed., 2021); DO Oriakhogba, Strengthening the Regulation Regimes for Collecting Societies in South Africa and Nigeria: Any Room for Competition Law? (July 2018) (PhD Thesis, University of Cape Town), <https://open.uct.ac.za/items/0a6bd3dd-6b57-4f6f-8c66-b7fbc8eef63>; DO Oriakhogba and CI Okorie, *Multi-territorial Digital Copyright Licensing within the AfCFTA: Considerations for Appropriate Guiding Principles* 43(11) EUROPEAN INTELLECTUAL PROPERTY REVIEW 710 (2021); DO Oriakhogba and D Kawooya, *The Status of Reproduction Rights Organisations (RROs) in Africa* JOINT PIJIP/TLS RESEARCH PAPER SERIES No. 81 (2022), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1083&context=research>.

rightsholders; and also cross-subsidise small and emerging rightsholders.

However, by their nature and purpose, CMOs are supposed to operate outside the purview of access enabled by copyright limitations and exceptions (L&Es), which are germane to the work of LAMs for the promotion of access to information for educational and research purposes. Even so, there are strong indications of CMOs acting as impediments against LAMs' ability to take advantage of relevant L&Es to provide access to information for research and education.

Indeed, CMOs have the capacity to restrict their members' (rightsholders) ability to make their work available through open access non-commercial licenses. Also, through their licensing activities, CMOs have the propensity to take advantage of the lack of technical know-how on the part of LAMs to contract out of L&Es.³ In other words, the tariffs upon which CMOs issue their blanket and other licenses to LAMs do not often take into consideration the existing user rights covered by L&Es.

Thus, unless regulated by specific rules informed by good practices, the licensing and monitoring activities of CMOs have enormous potential to impede and constrain the capacity of LAMs to take advantage of L&Es for effective services delivery, and prevent rightsholders from making their work available through open access non-commercial licenses, especially in this digital era. Therefore, it is important to include good practice tools relating to open access non-commercial licensing and contract override of L&Es.

2. Examples

i. Open access and non-commercial licensing

Kenya:

“A collective management organisation shall ensure that — (a) its members have the right to authorise to the collective management of — (i) members' rights; (ii) categories of rights; and (iii) types of works; [...] (c) its members have the right to grant licenses for non-commercial uses of any of the matters specified in paragraph (a).”

Regulation 13, The Copyright (Collective Management) Regulations, 2020.

European Union:

“Rightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.”

³ IFLA, *Protecting Exceptions Against Contract Override: A Review of Provisions for Library* (2019) https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitatio ns/documents/contract_override_article.pdf.

- Article 5(3), Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online use in the Internal Market*
- ii. *Contract override of L&Es*

Nigeria:

“Any contractual term which purports to restrict or prevent the doing of any act permitted under this Act shall be void.”

Section 20(3), Copyright Act 2022.

Germany:

“The rightholder may not invoke agreements which restrict or prohibit uses permitted in accordance with sections 60a to 60f and such restriction or prohibition is to the detriment of the persons entitled to such use.”

Article 60g(1), Act on Copyright and Related Rights 1965 (as amended)

For further examples, see the annexures to IFLA⁴ study titled “Protecting Exceptions Against Contract Override: A Review of Provisions for Library”:
https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/to pics/exceptions-limitations/documents/contract_override_article.pdf

3. Proposed Good Practice Tools

CMOs should not include conditions in their membership requirement that restrict the capacity of rightholders to grant non-commercial licenses for the use of works over which copyright vests in the members.

Rightholders should be at liberty to make their work available online on open access basis use terms subject to terms determined by them.

CMOs should ensure that licenses granted by them do not override existing L&Es. Accordingly,

- a. in developing tariffs, CMOs should consider existing user rights as defined under L&Es, and structure the tariffs to limit costs to only uses of works not covered by L&Es.
- b. before granting licenses, CMOs should inform users of their rights as defined under L&Es.

⁴ International Federation of Library Associations and Institutions.

B. CMOs and AI Systems

1. Explanation

The rise and spread of generative and creative AI systems developed by AI companies demonstrate the significance of access to information in the digital space and the importance of CMOs in this regard. Generative and creative AI are designed to automatically access big data in the form of texts, images, videos, etc for their development, training, and deployment. Access by generative and creative AI systems may require CMOs' authorisation or be covered by copyright L&Es. Currently, it is not settled whether access to, and use of, text, images and videos online by AI systems is infringing and thereby require authorisation. This issue is at the heart of ongoing litigation in USA, for instance.⁵

What is certain, however, is that generative and creative AI would, by their nature and design, always access copyright-protected works in the digital space. Indeed, generative and creative AI systems are designed to constantly, and speedily access data even across borders with high-levels of unpredictability as to the time and space of such access, the particular content accessed, and the determination of which particular CMO to approach for authorisation. In practical terms, the access and use of content online by AI systems may be akin to the exploitation of sound recordings by broadcast houses.

Thus, like in the case of broadcasting, CMOs licensing and monitoring activities have the propensity to hinder smooth and effective development, training and deployment of generative and creative AI systems. To prevent this, therefore, it is important to include good practise tools designed as statutory license modelled after article 12 of the Rome Convention and similar provisions in national copyright legislation. This would also require extended collective management of copyright and related for effective implementation.

2. Examples

Nigeria:

“(1) Where a sound recording has been published for commercial purposes, the performer and owner of copyright of such sound recordings shall enjoy the right to equitable remuneration for any broadcast of the sound recording.

(2) The remuneration referred to in subsection (1), shall be paid by the person who uses the sound recordings or copies.

(3) The amount of remuneration and the conditions of payment shall be as agreed between the users of sound recordings on the one hand, the performer and owner of copyright in sound recordings on the other hand or their representatives; and where

⁵ For instance, see *The New York Times Company v Microsoft Corporations & others*, https://nytco-assets.nytimes.com/2023/12/NYT_Complaint_Dec2023.pdf.

the parties fail to reach an agreement, it shall be determined by the Commission.

(4) Unless otherwise provided for in an agreement, the distribution of the remuneration referred to in subsection (1) between the performer and the owner of copyright in the sound recording shall be determined by the Commission.

(5) Where remuneration is to be received on behalf of a performer and the owner of copyright in the sound recording by more than one collective management organisation, the collective management organisations concerned shall agree on which of them shall collect such remuneration on their behalf, failing which the Commission may specify accordingly.

(6) The provisions of subsection (1) shall be exercised without prejudice to the right of a copyright owner to obtain remuneration for the use of his work fixed in such sound recording.

(7) For the purposes of this section, sound recordings made available to the public by wire or wireless means in such a way that members of the public may be accessed from a place and at a time independently chosen by them shall be deemed as published for commercial purposes.

(8) In the exercise of the rights under this section, the performer and owner of copyright in a sound recording shall have a right to the logs, statements and information relating to the broadcast of the sound recording.”

Section 15, Copyright Act 2022

WIPO:

“If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.”

Article 12, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961

“Contracting Parties may in a notification deposited with the Director General of WIPO declare that, instead of the right of authorization provided for in paragraph (1), they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration.”

Article 11 (2), Beijing Treaty on Audiovisual Performances 2012

“(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.”

Article 15, WIPO Performances and Phonograms Treaty (WPPT) 1996

European Union:

“1. Member States may provide, as far as the use on their territory is concerned and subject to the safeguards provided for in this Article, that where a collective management organisation that is subject to the national rules implementing Directive 2014/26/EU, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter:

(a) such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or

(b) with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.

2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.

3. For the purposes of paragraph 1, Member States shall provide for the following safeguards:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;

(b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;

(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism established in accordance with this Article; and

(d) appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the licence, to inform rightholders about the ability of the collective management organisation to license works or other subject matter, about the licensing taking place in accordance with this Article and about the options available to rightholders as referred to in point (c). Publicity measures shall be effective without the need to inform each rightholder individually.

4. This Article does not affect the application of collective licensing mechanisms with an extended effect in accordance with other provisions of Union law, including provisions that allow exceptions or limitations.”

Article 12, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

3. Proposed Good Practice Tools

CMOs should be entitled to a single equitable remuneration where works forming part of the repertoire are accessed, in circumstances deemed infringing, by AI companies for the development, training and deployment of generative AI. In the absence of agreement between relevant CMOs, the remuneration should be shared according to the conditions stipulated by national law. The establishment of extended collective licensing should be encouraged. In view of this, AI companies should not be required to seek authorisation from CMOs for the direct or indirect use of copyright-protected works by AI systems online.