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

30 March 2018

Re: C.L. 1983 - Written comments on a draft Good Practice Toolkit for Collective Management Organizations (CMOs)

Dear Mr Fitzgerald, Ms Huss-Ekerhult,

Electronic Information for Libraries (EIFL) works with libraries to enable access to knowledge in developing and transition economy countries in over 55 countries in Europe, Africa, Asia Pacific, and Latin America.

EIFL welcomes the opportunity to send written comments on a draft Good Practice Toolkit for Collective Management Organizations (CMOs). While libraries may need to acquire licences from a variety of collectives during the course of their work, the CMO with which a library is likely to have the most dealings is a Reproduction Rights Organisation (RRO).

To assist librarians in partner countries, EIFL produced a guide on how to negotiate with an RRO¹. Our comments are drawn both from the EIFL guide and from experience of librarians in the EIFL network.

We hope our comments are useful. We look forward to attending the consultation meeting on May 31, 2018 in conjunction with SCCR/36.

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

Yours faithfully

Teresa Hackett
EIFL Copyright and Libraries Programme Manager

¹ How to negotiate with your national Reproduction Rights Organization - an EIFL Guide
www.eifl.net/resources/how-negotiate-your-national-reproduction-rights-organization-eifl-guide

Questions

Draft Good Practice Toolkit for Collective Management Organizations (CMOs)

- Who is the main intended audience for the Toolkit? How do you envisage it will be used?
- How does WIPO plan to promote the Toolkit when published?
- What is the relationship between the Toolkit and Collective Management Organizations – Tool Kit Neighboring Rights published by WIPO in 2016?

General Principles

Have a firm legal basis. A CMO should be established by law, as an association, a limited company or partnership, for example.

Publicly funded institutions, such as libraries, are obliged to ensure that the spending of public funds is undertaken with due diligence and bona fide organizations.

Be independent of government. Where an emergent CMO is established as an integral part of the copyright office, for example, it should endeavour to become a separate private sector entity as soon as feasibly possible.

To have the full confidence of all stakeholders, the copyright office and other government agencies should be, and should be seen to be, independent and not tied to the interests of any one group of stakeholders.

The licence on offer should extend copying permitted by national law. The licence on offer from the CMO should extend, not substitute for, copying permitted by national law under an exception or limitation.

Uses intended by the legislator to be free should not be subject to a licensing scheme that would use up (often scarce) public funds, that could otherwise be used by the library to purchase new books.

Include the library in licence negotiations. It is not sufficient for the CMO to deal only with the strict legal entity that signs the licence agreement e.g. university management, in cases when the licence directly concerns others, such as the library. If the licence concerns library content, the library must be included in negotiations.

This is because responsibility for managing, complying with and/or paying the licence fee will inevitably fall to the library. In the interests of good customer relations and the smooth running of the licence agreement, it is essential that the library understands and agrees to the terms of the licence such as 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.

**Comments on the
Draft Good Practice Toolkit for Collective Management Organizations (CMOs)²**

Clarify usage of the terms Licensee, User and public.

The terms Licensee and User are defined in the glossary. In some sections, Licensee rather than User seems to be what is meant.

Suggestion: Section 6 ‘Relationship between CMO and User’: replace ‘User’ with ‘Licensee’ in the title and the text. The explanations and examples in Section 6 discuss topics directly related to licenses and licensing schemes, tariffs, invoicing procedures, etc.

Suggestion: Section 9 Processing of Members’ and Users’ data and Section 11 Complaints and dispute resolution procedures: replace User with Licensee, that also seems more appropriate in this context.

Suggestion: Section 1.2 Information for the public: add ‘general public’ as mentioned in the explanation. Consider adding a definition of General Public in the glossary to distinguish from User.

Section 6. Relationship between CMO and User [Licensee]³

Section 6 is a key section for libraries. We support the goal that potential Users/Licensees should take an informed decision about the benefits of an appropriate licence.

However in order to achieve this goal, we believe that Section 6 should be deepened. While the CMO naturally seeks to look after its members, it makes business sense to pay equal attention to its customers, who after all collectively pay large sums of money and are main source of revenue for the CMO. The fact that the CMO benefits from operating in a monopoly situation does not detract from the importance of adopting a professional approach and fostering good long-term customer relations.

Therefore we make the following suggestions to ease the process, especially when the CMO makes its first approach to a potential Licensee.

² http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=397438

³ ‘Licensee’ in square brackets is based on Suggestion 1.

Suggestion: Expand paragraph 39 Good Practice Tools of Section 6.1 CMO’s information to Users [Licensees], so that the CMO provides the Licensee with the following additional background information:

- The legal authority under which the CMO is established.
- Who owns the CMO and which national rightsholders it represents.
- Which foreign rightsholders it represents (if any).
- How licence are fees spent e.g. how much is distributed to rights holders (national and foreign), what happens to monies that cannot be distributed because the rightsholders cannot be located, administrative and overhead costs.
- Any major works, authors or publishers that are excluded from the licence.
- An undertaking that the CMO can provide full warranties and indemnities in respect of copies made under the terms of the licence.
- Licence term.

Suggestion: Expand Good Practice Tools of Section 6.2 Principles governing licensing of Users [Licensees] to enhance the open and professional approach of the CMO.

We welcome the emphasis on treating Users fairly on the basis of objective licensing criteria. The suggestions below contain practical examples to help realize this objective.

Paragraph 40. “A CMO should license rights to Users [Licensees] on the basis of objective and non-discriminatory criteria *taking into account national copyright law including limitations and exceptions.*” (Addition in italics).

New paragraph 45A. A CMO should endeavour to engage with all relevant parties such as the legal entity and those with day-to-day responsibility for managing the licence agreement.

Suggestion: Expand Good Practice Tools of Section 6.3 Rules for setting of tariffs for criteria that are clear, objective and reasonable.

Paragraph 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.* (Addition in italics).

New paragraph 47A. The fee, fee calculation formula and payment currency should be acceptable to the CMO and the Licensee.

Section 8. Financial administration, distribution of revenue and deductions

We support maximum efficiency and fair distribution of revenue to CMO members. As mentioned in Section 1.1 (The role of CMOs and its primary functions), some CMOs provide social, cultural and promotional services.

In addition, other CMOs may engage in pro-active enforcement activities, campaigns that offer reward money, or lobbying to influence copyright legislation.

We recognize the tension that can arise between public interest limitations and exceptions and the desire of CMOs to maximize their revenues. However CMO activities in this regard should be funded by sources other than Rights Revenue, especially if the revenue comes from the self-same public institutions that depend on exceptions to properly fulfil their mission.

For this reason Paragraph 57 (that sets out that a CMO should not be allowed, unless specifically authorized, to use Rights Revenue for any purpose other than distribution to rightsholders) is particularly important.

Section 12. Supervision and monitoring of CMOs

Independent supervision and monitoring of CMOs is essential to foster trust and confidence in the system. A structure mutually agreed by CMOs, Users and Governments is to be welcomed.

Suggestion: Since the supervision structure can be on the basis of statutory provisions or by self-regulation, for completeness the Good Practice Tools should include examples of statutory provisions, as well as self-regulation.

Suggestion: Since government has an authorization and supervisory role to ensure the good operation of CMOs, a new section on the relationship between CMOs and government would be helpful.

All sections

Suggestion: ‘Examples in codes or legislation’. For clarity, streamline the examples of legislation and voluntary codes with (1) legislation in alphabetical order by country name, (2) voluntary codes in alphabetical order by name of organization. (In some instances, the voluntary code example is prefixed by the country name).

END