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The Executive Director
Kenya Copyright Board
NHIF Building, Ragati Road
P.O. Box 34670-00100
Nairobi, Kenya
By email: info@copyright.go.ke

18 January 2021

Re: Request for Comments on the Draft Medium Term Collective Management Organizations (CMOs) Policy Framework

Dear Mr Sigei,

EIFL (Electronic Information for Libraries) and our partner, the Kenya Library and Information Services Consortium (KLISC), appreciate the opportunity to provide comments on the Draft Medium Term Collective Management Organizations (CMOs) Policy Framework¹.

We support comments submitted by the International Federation of Library Associations and Institutions (IFLA).

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

Yours faithfully

Teresa Hackett
EIFL Copyright and Libraries Programme Manager

cc: Prof. Joseph Kavulya, Chairperson, Kenya Library and Information Services Consortium (KLISC), Janegrace K.Kinyanjui, Vice-Chairperson

¹ <https://copyright.go.ke/downloads/download/10-public-notice-cmos/169-cmos-policy-2020.html>

1. RROs should be included in the CMO policy framework

1.1. While libraries may need to acquire licences from a variety of collectives during the course of their work, the CMO with which a library has the most dealings is usually a Reproduction Rights Organisation (RRO).

1.2 It is therefore critically important that any RRO operating in Kenya is included in the CMO policy framework, and is subject to the same scrutiny as other CMOs including best corporate practices, systems and policy standards in key areas of their operation including the management of royalties. RROs should also avail of the monitoring tools being developed by KECOBO.

1.3 In addition, song lyricists and writers of sheet music are represented by the Reproduction Rights Society of Kenya (KOPIKEN) through the Music Copyright Society of Kenya (MCSK), that is covered by draft policy framework².

1.4 While KOPIKEN was not part of the recent audit review, in 2016 a registration renewal application by KOPIKEN was not approved by KECOBO, who undertook to hold consultations to determine its future³.

2. Relationship between CMO and Users should be included in the policy framework

2.1 The draft policy framework states “The Collective Management Organizations (CMOs) have in the recent past been accused of failing to fulfil their function of collecting and distribution of royalties by both members *and users* of copyright works” (our emphasis, p.1).

2.2 Yet the relationship between CMOs and users (such as libraries) is not covered in the policy. This important relationship is covered substantively in the WIPO Good Practice Toolkit for CMOs⁴, and it should be part of this document too. Otherwise, it would be a missed opportunity to include a central aspect of CMO operations.

2.3 Libraries in Kenya have previously expressed concern about areas such as setting of licensing fees and distribution, perceptions of unfair licensing practices (failure to take into account works that are in the public domain, or uses covered by copyright exceptions), and an over-emphasis on enforcement actions⁵.

2.4 Recommendations in the WIPO Toolkit include provisions that would, inter alia, help to address some of these concerns. For example, providing a list of the works and corollary rights in its repertoire available to licensees, if practicable; treating users fairly; licensing rights on the basis of objective, fair and non-discriminatory criteria, taking into account national copyright law, including applicable limitations and exceptions; and criteria for setting tariffs that are clear, objective and reasonable.

² <https://www.ifrro.org/members/reproduction-rights-society-kenya>

³ <https://ipkenya.files.wordpress.com/2016/02/kecobo-public-notice-on-renewal-registration-license-kamp-prisk-mcsk-kopiken-february-2016-collecting-society-kenya-copyright-board.jpg>

⁴ WIPO Good Practice Toolkit for CMOs (The Toolkit) (2018)

⁵ J. Otike (2012) “Copyright: The Challenges Posed By Reproduction Rights Organizations (RROs) In The Provision Of Information To Users With Special Reference To Kenya

3. The level of operating expenses should be included in costs

3.1 The report makes detailed recommendations on financial management and reporting.

3.2 The financial reporting template (Annex seven) includes personnel costs, board expenses, board loans and advances, and other domestic subsistence costs. We recommend having a category of total operating expenses (overheads) to include rents, utilities, and other expenses directly relating to the running of the operation⁶.

3.3 The inclusion of operating expenses would assist transparency, and encourage efficiency in the running of the organization. It would also enable helpful comparisons with CMO operations in other countries.

4. Transparency on tariff-setting should be included

4.1 Section 7. Operations (licensing & distribution) (p.15) says the Board shall guide the approval of tariffs as presented by management, as well as public participation on tariffs before gazettelement.

4.2 The section on tariff-setting should be expanded to include the criteria for tariff-setting so that they are clear, objective and reasonable⁷, thus providing users with greater confidence that the licence fee is fair and that it provides value for money (for publicly funded institutions, this means public funds).

4.3 Typo. Delete ‘Participate in’. b) Participate in public participation on tariffs before gazettelement;

5. Strengthening the board of directors

In Section 2, Board and Corporate Governance, we have the following additional recommendations:

5.1 A Board Evaluation Policy should be established to guide an assessment of board operations.

5.2 A Board Charter should also be established as a way of evaluating the board on an annual basis, both at individual board member and whole board levels;

5.3 In appointing the board of directors, due care must be taken to ensure a broad mix of skill. This will improve the quality of deliberations and decisions made by the board.

5.4 There should be a way of vetting those nominated to be elected/appointed as board of directors, to ensure that those elected to the board have integrity;

6. Broaden the risk policy

6.1 In Section 13, New Policies Required, the Risk policy (f) should be renamed to read ‘Audit and Risk Management Policy’, to broaden its mandate.

⁶ WIPO Toolkit Recommendation 68

⁷ WIPO Toolkit 6.3 Rules for setting of tariffs