



WORLD CONGRESS 2019
EDINBURGH

IFRRO Bilateral Agreement Toolkit and Sample Agreement

IFRRO World Congress 2019

IFRRO World Congress and Annual General Meeting 2019

4- 7 November

Edinburgh, United Kingdom

IFRRO Bilateral Agreement toolkit and Sample Agreement
October 2019

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1. Introduction to Bilateral Agreements

Collective management organisations (CMOs) operating in the text and image sector¹, enter into *bilateral agreements* or *representation agreements* to establish the framework for exchange of rights, data and monies. This framework allows rightsholders to claim revenue (referred to below as “monies”) for the use of their works in countries served by RROs around the world.

There are many differences in legal frameworks and the practical operations between RROs which can create difficulties of understanding and interpretation. With the aim of assisting its members in negotiations towards and the drafting of bilateral agreements IFRRO, the International Federation of Reproduction Rights Organisations, has developed several tools over the last three decades, which are made available to members on the IFRRO website.

However, changes in the expectations of rightsholders, the development of technology and communication tools, the increasing prevalence of new markets for digital content and licensing and changes in the regulatory environment, such as the implementation of the Collective Rights Management Directive (CRM Directive)² in the EU, make a holistic revision of the existing IFRRO tools necessary.

In particular, collective management of rights is increasingly being viewed by governments and policy makers as a solution to various issues such as out of commerce works licensing, document delivery licensing, and remuneration for rightsholders under the Marrakesh Treaty³. IFRRO’s updated sample bilateral agreement for the exchange of collective licensing rights between RROs (referred to as the “sample agreement”) and this accompanying toolkit are not tailored in such a way as to be used for these specific new licensing areas and remuneration exchanges, but rather should be considered as a foundation bilateral agreement for the management of blanket licensing agreements.

The sample agreement has been updated to accommodate new legal obligations, the expectations of users and the business models of rightsholders. In the future, IFRRO plans to develop specific tools to build on this platform agreement for these new licensing areas.

The toolkit focuses on what are known as “Type A” agreements – that is, those agreements through which mandates, information about usage and payments are exchanged to facilitate blanket licences and remunerated exceptions.

IFRRO members can and do also enter into what are known as “Type B” Agreements⁴. Under these type of agreements mandates are exchanged however fees typically are not. There are also other variations, such as:

- “hybrid” agreements, in which one party may be exempted from the obligations to transfer fees to the other RRO for a certain period of time, often used when an RRO is being established; and
- “milestone” agreements, in which certain agreed actions have to be taken or deliverables have to be met for the agreement to continue after an initial term.

¹ CMOs operating in the text and image sector are referred to as Reproduction Rights Organisations (RROs)

² Directive 2014/26/EU on *collective management of copyright and related rights and multi territory licensing of rights in musical works for online use in the international market*. Text at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026>

³ https://www.wipo.int/marrakesh_treaty/en/

⁴ IFRRO’s Board statement of 31 October 2016 highlights important points for RROs to take into consideration when either signing Type B Agreements or reviewing their existing Type B Agreements. See: http://ifro.org/sites/default/files/bilateral_agreements.pdf

The choice of which type of agreement to use is one for the RRO and the rightsholders it represents to make. Many of the drafting suggestions and sample clauses proposed here can equally be used when negotiating Type B or other types of bilateral agreements.

The materials comprise:

- In this toolkit, a summary of the overarching principles and values set out in IFRRO and WIPO (World Intellectual Property Organization) instruments which underpin relationships between RROs; commentary on each clause and other aspects of the sample agreement, explaining what each clause seeks to address and the key considerations which may arise in its negotiation; and
- The aforementioned sample agreement (annexed).

The sample agreement is structured so that the broad obligations and benefits are set out in clauses 2 -19; and detailed descriptions of mandate, licensing restrictions and licence schemes can be included in the schedules. Where CMOs base their negotiation on the sample agreement, it is anticipated that there will be only minor variations to clauses 2 – 19 in most agreements, but the content of the schedules may vary considerably according to the licensing activities due to the variability of the authority or mandate granted to each CMO by their rightsholders or national laws.

Of course, this toolkit cannot be fully comprehensive or account for all variations in national circumstances. It is provided to assist, inspire and provide examples for RROs when negotiating or drafting bilateral agreements, without having any binding character. While it is intended to guide negotiating parties on compliance with international and national legislation, it should not otherwise constrain those negotiations.

2. Principles and Values

IFRRO recommends that when negotiating a bilateral agreement, members ensure respect of and adherence to the overarching international principles and values listed below. This is acknowledged in the recitals to the sample agreement and underlies many of the mutual obligations set out in the agreement.

2.1 IFRRO Voluntary Code of Conduct for RROs

In 2007 IFRRO adopted a voluntary Code of Conduct for RROs, which sets out the standards of service that rightsholders and users can expect to receive when dealing with RROs. Its objective is to develop confidence in and promote best practice in the operations of RROs and it embodies the principles and values which IFRRO believes all RROs should uphold. The Code was expanded in 2010 by the IFRRO document “Relationships between RROs”⁵.

Given the importance of bilateral agreements to the relationships, not only between RROs but also to rightsholders, IFRRO is of the view that the values and principles in the Code should be adhered to and reflected in bilateral agreements in both the written agreements and in the manner in which the respective RROs acquit their responsibilities and duties to rightsholders and users.

The values in the Code of Conduct require RROs to act fairly and honestly, not to discriminate, respect copyright, contracts and applicable law, act with integrity, minimise costs and provide efficient services. In developing the Code of Conduct, IFRRO had regard to the view that collective management does not always sit comfortably with national competition laws.

Such competition concerns highlight the need for good governance and transparency, and an international standard for these matters is set out in IFRRO’s Code of Conduct for RROs. Accordingly, the IFRRO Code of Conduct is not intended as a maximum standard, but rather as a generally accepted minimum commitment to benefit the community.

2.2 IFRRO REM Principles

In the digitally connected world rightsholders have a greater choice of licensing opportunities, including direct licensing in some instances. The principle of rightsholder choice in licensing secondary uses requires high standards of probity, efficiency and transparency by RROs.

This principle is also recognised in IFRRO’s Principles for the Operation of Digital Exchange Mandate (the REM Principles)⁶ adopted by the IFRRO Board in 2007, which provide:

.... RRO will grant licences that are specific and circumscribed in a way that neither conflicts with the primary uses and markets for the works in question, nor with the normal exploitation of the works or the legitimate interests of the rightsholder.

IFRRO recommends the application of the REM Principles to bilateral agreements, in particular to support this underlying principle of the exchange of digital repertoire under a bilateral agreement: that the rights granted do not impede the primary exploitation of the work by the mandating rightsholder.

⁵ Text at <https://www.ifrro.org/content/relationship-between-reproduction-rights-organisations>

⁶ Text at <https://www.ifrro.org/content/digital-repertoire-exchange-ifrro-principles>

2.3 WIPO Good Practice Toolkit for CMOs

National and regional governments, recognising the role and importance of collective management, have also taken steps to set standards for collective management in their legal frameworks. The WIPO Good Practice Toolkit for CMOs⁷ explains these initiatives, provides examples and sets out best practice guidelines from different parts of the world. In drafting this toolkit, and the attached sample agreement, IFRRO has sought to follow those guidelines.

2.4 The CRM Directive

In Europe, the CRM Directive sets out the framework for collective management of rights in countries that are members of the European Union (EU), and in the European Economic Area (EEA) countries. It is important to the IFRRO community that the toolkit and sample agreement reflect the service standards set out in the CRM Directive. It is of course open to two RROs, neither of which are in the EU, to negotiate a different level of service standards. Similarly, RROs in EU Member States should be aware that it is open to them and or to their national governments to set higher standards in relation to CMOs than those in the Directive, provided that those standards are compatible with EU law.

Best Practice Recommendations

- Reflect and adhere to the values and principles set out in IFRRO's Code of Conduct for RROs
- Apply the current REM Principles to the scope of the rights exchanged
- Use the WIPO Good Practice Toolkit for CMOs as a reference point for best practices in addition to this guide
- Refer to the CRM Directive as a benchmark for standards for EU/EEA CMOs.

⁷ Text at https://www.wipo.int/edocs/mdocs/copyright/en/wipo_ccm_ge_18/wipo_ccm_ge_18_toolkit.pdf

3. Definition of a CMO

This toolkit assumes that, in the usual situation, the parties to the agreement are each a Collective Management Organisation (CMO) and are also members of IFRRO. CMOs operating in the text and image sector are called Reproduction Rights Organisations or RROs. In this toolkit, both terms are used, but the sample agreement uses only the term CMO. This is because RROs may also enter into bilateral agreements with organisations that may not be RRO members of IFRRO, such as CMOs representing visual creators.

There are a number of national and international instruments that seek to define the key functions of a CMO. For example, the CRM Directive says:

...Management of copyright and related rights includes granting of licences to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightsholders. (Recital 2, EU Directive 2014/26/EU)

These instruments also acknowledge that the role of a CMO may also include education and information activities:

... Within the limits of its mandates and in the interest of the rightsholders it represents, a CMO may engage in activities aimed at increasing public awareness about copyright, collective rights management and CMOs, as well as their positive effect on the national economy and on cultural diversity, including its cultural and social activities. (WIPO Toolkit)

The sample agreement confirms in recital A that each party to the agreement is a CMO and briefly lists the key functions of a CMO in recitals A and B. Further, for bilateral agreements between EU/EEA CMOs, the parties may choose that the agreement specify in recital A that each CMO meets the definition of a CMO in the EU CRM Directive (Article 3), while bearing in mind the effect on the validity of the agreement and exchanged rights if one party no longer meets that definition:

... 'collective management organisation' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightsholder, for the collective benefit of those rightsholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis.

4. Parties, Territory and National Treatment

It is important to clearly specify who the parties to the agreement are, and the geographic territory covered by the grant of rights in the agreement. The sample agreement begins with the description of each party; territory is defined in clause 1 - Definitions and in the schedule for each party and the principle of National Treatment is confirmed in recital F. Later sections of this toolkit will deal in more detail with specific aspects of the authorisation – which rightsholders, and which rights, users and uses are permitted or authorised under the sample agreement.

4.1 National Treatment

The principle of National Treatment derives from international law, but here is understood as a useful approach to structure, construe and interpret bilateral agreements. National Treatment means that works in respect of which a grant of rights or representation is received under a bilateral agreement must be treated at least as favourably as works each RRO is mandated to represent by rightsholders directly. The principle of National Treatment derives from the Berne Convention for the protection of Literary and Artistic Works⁸ (the “Berne Convention”) and the TRIPS Agreement, and also underpins EU law generally and the CRM Directive specifically:

...a collective management organisation should not, when providing its management services, discriminate directly or indirectly between rightsholders on the basis of their nationality, place of residence or place of establishment. (Recital 18, CRM Directive)

What this has come to signify in practice is that RROs should offer an equivalent level of service to all rightsholders they serve, irrespective of the status of the works RROs represent as “foreign” or domestic works under their national laws. Examples include applying the same tariffs and means of collection and allocation of monies, and the supply of information about the RRO’s activities, finances and policies. This is commented on below under chapters 9, 10 and 11.

The information exchange and data provision clauses of the bilateral agreement and the schedules should set out what these expectations mean on a practical level, and as such should be consistent with the obligations to domestic rightsholders.

Because of the importance of National Treatment to bilateral agreements, recital F in the preamble of the sample agreement reiterates each party’s commitment to observing and implementing National Treatment obligations and confirms that National Treatment and non-discrimination are understood as having an equivalent meaning.

4.2 Parties to the Agreement

The contracting parties are best initially described in the agreement by their full legal name and registered address, plus any identifier required by local law and the acronym or other short name that will be used in the rest of the agreement.

The usual approach is that rights are exchanged between one CMO for each territory. Therefore, rights exchange agreements are referred to as “bilateral agreements” – that is they are made between two parties, in the sample agreement referred to as **Society A** and **Society B**.

⁸ Text at <https://www.wipo.int/treaties/en/ip/berne/>

It is important to recognise that more than one CMO may represent different rights, or different uses of rights, and rightsholders in a territory; for example, the rights in newspapers or visual artworks are held by different CMOs in many territories and in some countries authors and publishers may be represented by separate CMOs.

This raises the question of how rights and monies due to rightsholders in a country where there is more than one CMO can be most efficiently and effectively conveyed and distributed to another CMO.

There are different solutions to these issues. For example, the multiple CMOs in a territory may agree amongst themselves that one CMO will enter into bilateral agreements with foreign CMOs on behalf of them all, or a cross section of them.

An alternative approach, but more complex, is for the relevant organisations to all enter into a single agreement, for example the visual CMO and the RRO from one territory may jointly enter into an agreement with a CMO from another territory.

Where neither of these alternatives is possible and the CMO cannot obtain a grant of the full rights required, then the solution is careful drafting of exclusions in the definition of Licensed Works.

4.3 Territory

For most bilateral agreements this is a simple matter, and the territories in which the agreement will apply reflect national boundaries.

However, some CMOs have been authorised to represent and license the works of rightsholders in smaller territories for which they have oversight. For example:

- The Italian CMO, SIAE, includes Vatican City and San Marino in its definition of Territory for all matters covered by its bilateral agreements;
- DALRO (South Africa) and OSDEL (Greece) seek rights in their bilateral agreements to license defined uses and sectors in the territories of eSwatini (formerly known as Swaziland) and Cyprus, respectively.

An expanded definition of Territory may be accompanied by a duty to exercise that permission in a manner that will support an emerging CMO in that expanded territory. For example, the following could be added to an expanded definition of Territory:

Society A acknowledges that it will exercise the Licensed Rights granted by this agreement in collaboration with any national CMO established or emerging in the Territory and will otherwise act to support the development and efficient operation of any such CMO.

It is also important to consider if there is a need to specify the licensing of users whose reach extends across national borders. Examples of this are national companies with overseas subsidiaries or educational institutions with distance learning facilities in multiple countries.

Best Practice Recommendations

- Clearly specify the details of the parties to the agreement, including their full legal name, acronyms, address, and any other identifiers.
- Establish that both parties are CMOs (sample agreement, recital A), define CMO (sample agreement, clause 1 - Definitions), and the parties' key functions (sample agreement, recitals B and C).
- For bilateral agreements between EU/EEA CMOs, the agreement may specify that each CMO meets the definition of a CMO under the CRM Directive, Article 3 (in which case it would be important to notify the other CMO should that situation change at a later date).
- Clarify the geographic territory covered by the grant of rights and whether the licensing of users whose reach extends across national borders needs to be specified (sample agreement, schedule A, section 5).
- Respect the principle of National Treatment by including e.g., sample agreement recital F, clauses 3.1 and 3.2 (Exercise of Rights) and the obligations set out under clause 6 (Covenants and Undertakings).

5. Applicable Law

It is essential that the choice of which national laws apply to interpretation and resolution of any disputes which may arise under a bilateral agreement are clearly set out. Unfortunately, this is often considered a “boilerplate” clause and not given proper consideration as a result.

Many current agreements merely specify that, in the event of a dispute, the relevant law is that of the territory of the party against whom the claim giving rise to the dispute is directed. It is important to consider the issues that may result in a dispute and assess which additional provisions may be needed.

A common way of managing this question is to apply the law of the country where the right is exercised to issues concerning the exercise of rights, and, in respect of distribution issues, apply the law of the country where the payment is being made.

The different laws and legal concepts applied in different countries must be given proper consideration in prescribing applicable law in bilateral agreements. Some examples of issues that may have to be addressed are:

- CMOs in the EU/EEA are required to comply with EU law, including the requirements of the CRM Directive, the EU General Data Protection Regulation (GDPR)⁹, the Copyright in the Digital Single Market Directive¹⁰ and decisions of the Court of Justice of the European Union (CJEU).
- In some EU Member States, clauses in rightsholder mandates and/or publishing agreements were found to be void that would have enabled publishers to share in the distribution of levies. As a result, it is important to clarify which law applies to claims against a CMO’s distribution - the law of the country where the monies were collected or the law of the country where the monies are distributed. In the sample agreement, IFRRO has chosen to apply the law of the country where the monies are distributed.
- The national laws of one territory may specify the payment shares of all or some classes of licensing revenue. For example, in Australia, the Copyright Act provides that journalists are to be paid for paper to paper reproduction of their articles, while newspaper publishers receive monies for digital use.
- Definitions of key terms and legal concepts may differ under the national laws of each party. For example, in some territories the different classes of trusts are key to whether a foreign CMO is eligible for the lower rates of royalty withholding tax.

One party may be operating under a broad remunerated legal licence which allows much wider use than the mandate granted by the other party’s rightsholders. This can result in misunderstanding by those rightsholders when they receive payments by foreign CMOs for uses they have not authorised their national CMO to license. The sample agreement in clause 5.4 includes an “avoidance of doubt” clause to address this issue in the indemnity provisions.

Given the variety of these issues, it is important to carefully review the complaints and dispute resolution clauses to make sure that each CMO is satisfied that the agreement properly reflects their wishes (see sample agreement Clause 14 for further details). If it is considered necessary, it would also be possible to include sub-clauses addressing any overriding legal obligations under the national laws of each party including, where appropriate, those regarding distribution recipients.

⁹ https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en

¹⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1562143371819&uri=CELEX:32019L0790>

A related issue is the importance of informing the other CMO about any aspect of their national (or regional, such as the EU) law of which it needs to be aware – such as whether rights are managed under a legal licence, an extended collective licence, mandatory collective management and any legal presumptions of representation. The sample agreement clause 6.4 includes a positive obligation to inform the other party about the requirements of national law at the time of entering into the agreement.

Best Practice Recommendations

- Ensure the applicable law clause addresses overriding legal obligations under the national laws of each party, including regarding distribution recipients - sample agreement clause 14.4 (Complaints Procedures and Dispute Settlement Mechanism).
- Include “avoidance of doubt” clauses to cover situations such as where one party operates under a broad remunerated licence allowing wider use than the mandate granted by the other party’s rightsholders - sample agreement, clause 5.4 (Indemnity).
- Include an obligation to ensure that the other CMO is informed about any aspect of their national law of which it needs to be aware - sample agreement, clause 6.4 (Covenants and Undertakings).

6. Mandate and Representation

It is important when considering mandate and representation to keep in mind that they are actually two different concepts. Representation refers to the rightsholders represented, while the term mandate refers to the grant of rights from those rightsholders. For example, a CMO may represent rightsholder Y, but the CMO's mandate from rightsholder Y could be limited to certain categories of publications.

A bilateral agreement should ideally specify the categories of works for which rights are exchanged between the parties. The agreement should also require each party to share with the other the mechanism by which each CMO associates rights and works with rightsholders and shares of distributions, so as to enable a transparent flow of rights, data and monies under the agreement. In the sample agreement, the specification of works is briefly referred to in clause 2 and set out in detail in section 1 of the first two schedules.

The first part of section 1 also encourages the CMOs to provide details about the collective licensing system / legal schemes under which they operate, and the legislation on which they are based, as well as other details including where to find specifically excluded works and other restrictions on the mandate. This sort of information helps to provide further clarity in relation to representation and mandate.

Importantly, the rights exchanged under these agreements are usually restricted to those controlled by rightsholders domiciled in the territory of the relevant CMO (sample agreement clause 1 - definition of Rightsholders).

In this context, CMOs need to be aware that while the operative clauses exchanging rights (sample agreement clauses 2.1 and 2.2) are restricted to the rightsholders each CMO is authorised to so represent, the term "Rightsholders" is more broadly defined in sample agreement clause 1 to include both represented and unrepresented rightsholders domiciled in a CMO's territory.

This structure was adopted because some clauses of the sample agreement necessarily refer to both represented and unrepresented rightsholders in a CMO's territory (e.g., clause 9). However, a CMO can only grant the rights to another CMO that it has itself been authorised to represent.

This structure can also be a useful means of efficiently paying monies to foreign rightsholders not represented by the relevant CMO.

Similarly, clause 4 of the sample agreement prohibits the parties from assigning or transferring the rights granted under the agreement. The terms "assignment" and "transfer" do not of course include the collective licensing permissions that are the subject of the agreement.

The method of representation can vary greatly: from voluntary agreements, a legal licence, an extended collective licence, and mandatory collective management. The sample agreement therefore refers in recitals B and C to both direct representation (as members or through affiliate organisations) or representation through law. In the sample agreement, the term *rightsholder* is used rather than *rightholder* (which is commonly used in the EU). The two terms are considered to have a consistent meaning. The term includes:

.. any person or entity, other than a CMO, that holds a copyright...or under an agreement for the exploitation of rights or by law, is entitled to a share of rights revenue. (Article 3, CRM Directive)

Authors and publishers in the book, music, journal and newspaper industries can be included as rightsholders in a bilateral agreement if the relevant CMO represents those works and rights. The sample agreement has been structured so as to allow each CMO to list in the schedules the classes of works it represents and to exclude those it does not. In addition, the definition excludes rightsholders domiciled in the territory of one CMO who have directly authorised another CMO to represent them.

The sample agreement does not list musical works in schedules A and B, as many RROs do not represent that class of work and are therefore unlikely to exchange the relevant rights with other RRO members of IFRRO. If they are represented, and the agreement is intended to include them, they should be added. For further details about licensing of musical works, see Chapter 7.

The authorisations by each CMO set out in schedules A and B need not be reciprocal, or for the same rights. Section 1 of schedules A and B to the sample agreement allow the flexibility to list the classes of work each RRO represents either in detail or generally; and includes prompts to list any restrictions on the CMO's mandate for national newspapers, for artistic works and for consumable publications such as single use workbooks or examination sheets. Further details about different categories of works, including newspapers and artistic works can be found in Chapter 7 below.

Although this is not explicitly required by the bilateral agreement, it is important for CMOs to maintain communications with their own domestic rightsholders to explain which bilateral agreements have been entered into on their behalf. This will enable those rightsholders to decide to what extent they want to participate in bilateral agreements, and whether they would want to opt out of the agreement for any reason. As best practice, this communication should be contemporaneous and include the information necessary to fully inform rightsholders about the bilateral agreement.

As stated in the REM Principles, it is important that the CMO has the general support of rightsholders for the bilateral agreements entered into on their behalf.

6.1 Acquiring Mandate

Except for CMOs operating under an authority or legal licence granted by national law, the key objective for each party to the agreement will be to obtain authorisation to include the repertoire of the other party in the licences it offers to users in the territories in which it operates. IFRRO members usually seek to obtain a grant of mandate from their rightsholders on a non-exclusive basis. That is, the rightsholder retains control over other licensing of their works and may opt out of any of the licence schemes offered by the CMO – see also under 6.3 below, Impact of the CRM Directive.

CMOs operating under levy schemes or a legal or other compulsory licence will have the necessary mandate for licensing in their own territory under those schemes; but those CMOs will still need a mechanism for efficiently distributing monies collected for foreign rightsholders. Moreover, such CMOs typically also seek to receive fees from outside their territory on behalf of the rightsholders they represent and for this reason frequently obtain a contractual mandate to represent their rightsholders in dealings with foreign CMOs (“authority to collect”). Finally, newly formed CMOs seeking approval to operate under a compulsory scheme may also have to demonstrate to their government that they are authorised to represent works from other countries by virtue of agreements with foreign CMOs.

As a result, many CMOs operating under these systems have also acquired the mandate of individual rightsholders to allow them to enter into bilateral agreements and accordingly to receive fees from foreign CMOs on their behalf.

Some CMOs also acquire additional mandates to license use beyond their legal or compulsory schemes. For example, the Singapore and Australian remunerated schemes are for education and government uses only, and the RROs in those territories rely on bilateral agreements and the additional mandates granted by their national rightsholders to license their corporate sectors.

Only the rightsholder can authorise licensing in foreign territories, and that authority is usually granted either directly to the CMO by the individual creators and publishers (referred to as a membership model); or indirectly by a grant by a body which has entered into affiliation or other agreements with organisations representing publishers, authors or other specific classes of rightsholders (referred to as an affiliation model).

The principle of rightsholder choice requires CMOs to allow rightsholders to be able to opt out of nominated licence schemes. Sometimes this is a generic opting out – for example, rights to authorise licensing of digital uses of newspapers in foreign territories are excluded from some foreign rights exchange agreements. This is because some newspaper publishers may prefer to grant licensing rights to specialist newspaper licensing services.

The mandate each party to a bilateral agreement holds is usually described in detail in sections 1 and 2 of the schedules in the detailed descriptions of “Repertoire and Works” and “Licensed Rights”. In addition, many CMOs commit to providing inclusion or exclusion lists to other parties. This is usually done by including reference to inclusion or exclusion lists published on their website or listing carve-outs, opt-ins or exceptions in the agreement with a right to vary by notice from year to year.

Exclusions and opting out can also be addressed in the indemnities included in the agreement – see chapter 13 below.

6.2 Representation by more than one CMO

In the IFRRO community most agreements between rightsholders and CMOs are non-exclusive, and more often than not the same may be said in relation to bilateral agreements. This means that rightsholders are legally able to vest the authority to manage the same rights with several CMOs, or to contract with partners in any country including direct mandates to CMOs in other countries or CMOs operating internationally to manage their rights.

For example, an Australian publisher could grant a mandate to both CA (the Australian CMO) and directly to a foreign CMO in whose territory their works are frequently used. It is also possible that a rightsholder may appoint a CMO merely to receive levy or copy fee distributions on the rightsholder’s behalf, but without granting a mandate to license any rights.

In the EU, it is not unusual for a rightsholder to be a citizen of one country and a resident for tax purposes of another EU country. A further layer of complexity is added where the relevant publisher operates in a third territory.

Some older agreements included restrictions on recruitment of member in foreign territories, but such restrictions are now prohibited under most competition laws. In order to avoid

breach of competition or other laws, members are advised to carefully draft the agreement recitals and definition of represented works.

Bilateral agreements have not, to date, required a party to notify the other of multiple representation. This would in any case be difficult to enforce, particularly with multinational publishers. Moreover, bilateral agreements sometimes split claims relating to distribution schemes into author and publisher monies and this may sometimes lead to multiple cross border channels through which international distributions will find their way to the right beneficiary.

On this issue of multiple representation, CMOs should respect the overriding aim of enhancing transparency and cooperation acknowledged in recital G and other parts of the sample agreement, in IFRRO's Code of Conduct for RROs, and under part 5 of the IFRRO document "Relationships between RROs".

CMOs should inform their bilateral partners where they have already obtained the mandate of rightsholders resident or registered in the territory of the other CMO, or where one of their rightsholder constituent bodies has entered into agreements with other such bodies from other countries and obtains a partial mandate.

Ultimately, the rights flow, data flow and money flow should follow a transparent, efficient and, in an accounting sense, reconcilable path.

6.3 Impact of the CRM Directive

The CRM Directive expands and clarifies the principle of rightsholder choice by requiring EU CMOs to allow rightsholders to opt out of any of their licence schemes, to manage their own licensing for non-commercial uses, and to specify that consent to a licence scheme must be specific and documented.

These additional obligations are not restated in the sample agreement, but all CMOs need to be aware that the requirements of the CRM Directive will frame the process an EU CMO must put in place for licence participation by their rightsholders. This includes:

- That nomination by rightsholders of participation in licence schemes must specify each scheme and be documented.
- The required period of notice for rightsholders to terminate inclusion of their works in a licence scheme cannot exceed six months, except where this is necessary to align non-participation with the financial year.
- A CMO cannot require a rightsholder to transfer the rights to another organisation following termination.
- EU CMOs must inform their rightsholders of these obligations, including existing members/rightsholders.

6.4 Notifying Changes to Mandate over Time

Each party is expected to keep its bilateral partners and IFRRO informed of current and proposed changes to its mandate over time. Clause 6 of the sample agreement includes a general obligation to this effect, and clause 15 makes specific provision for notification to existing licensees of withdrawal of mandate.

In addition, the information sought by IFRRO for its annual Directory provides an opportunity for members to advise the IFRRO community of proposed legislation and mandate changes.

6.5 Non-Represented Rightsholders

The CRM Directive effectively requires EU/EEA CMOs to communicate with and provide information to rightsholders whose mandate they hold, but not to the same extent as to their own members. This includes making available their complaints process to those rightsholders.

Best Practice Recommendations

- Clarify whether the parties' mandates are based on direct representation or law - sample agreement, Recitals B and C.
- Define and clarify Rightsholders - sample agreement clause 1 (Definitions) and schedules, consider the definition in the CRM Directive, Art. 3.
- Clarify the importance for the parties to have the support of rightsholders for the bilateral agreements entered into on their behalf - REM Principles, paragraph e.
- Clearly describe the mandate that each party holds (see the sample agreement recitals and the detailed descriptions of Works and Licensed Rights in the sample agreement schedules) respecting the principle of rightsholder choice to opt-out.
- Ensure compliance with competition laws in recruitment of members and define rightsholders so as not to exclude multiple representation - sample agreement, clause 1.
- Acknowledge overriding obligations of transparency and cooperation - sample agreement Recital G and IFRRO Code of Conduct.
- Consider how to best clarify the principle of rightsholder choice (an EU/EEA CMO must comply with the provisions of the CRM Directive).
- Include an obligation for the parties to keep bilateral partners informed of current and proposed changes to their mandate over time - sample agreement clause 6.4 (Covenants and Undertakings).
- Bear in mind that the CRM Directive (articles 18 and 20) effectively requires EU/EEA CMOs to communicate with and provide certain information to rightsholders whose mandate they hold.

7. Categories of Work Represented

This section is intended to highlight particular classes of works which may be authorised for collective licensing subject to quite detailed exceptions. In the sample agreement, this area is covered in sections 1 and 2 of schedules A and B, including in the prompts for exceptions.

The text in the definition of Repertoire and Works in section 1 of schedules A and B of the sample agreement assumes general repertoire coverage, subject to listed exceptions. Most CMOs represent rightsholders in books and journals published in both physical and digital formats in their country, and many seek to acquire mandate for internet content originating in their territory.

Some common categories where it is important not to assume the works are represented are listed below. This issue is commonly addressed by careful investigation and definitions in the schedules as working drafts of an agreement are exchanged.

7.1 Artworks

The issues around the authority to represent illustrations and other works included in a publication were mentioned in chapter 6. One issue that requires consideration is that even if a CMO has a mandate for artistic works, it would generally not include licensing of the use of a stand-alone artwork (e.g., in a catalogue or an annual report), as that type of usage is usually licensed via the network of bilateral agreements between visual arts CMOs.

7.2 Newspapers

Collective licensing of newspapers can also raise representation issues - for example, in some territories, the relevant collective licensing rights may be controlled by a specialist licensing agency or CMO.

7.3 Government Publications

Copyright does not attach to the works of many national governments. However, the mechanism for this exemption varies and it is essential to check whether the exemption applies to all uses, to uses within the territory of that nation and the levels of government and/or types of government publications to which it applies.

For example, all US government works are declared to be public domain, but with a warning that this exception does not apply to works included in a government publication with the consent of the relevant owner.

7.4 Musical Works

Many RROs do not represent or license musical works, and national and cross border licensing rights in those works are usually managed via specialist CMOs or by music publishers directly. However, a small number of IFRRO members also represent rights in musical works – e.g., Kopinor and Bonus Copyright Access – and many represent the rights for photocopying sheet music.

It is important to ascertain whether the other CMO represents and licenses rights in musical works and if so, which rights and which works. If neither party licenses rights in musical works, then that class of works should be listed as an exclusion in the schedules.

Collective management of musical works is subject to additional restrictions in the CRM Directive - Title III and Articles 34(2) and 38 apply to CMOs representing authors rights in musical works for online use in multiple EU territories.

Best Practice Recommendations

- Ensure that the text defining Repertoire and Works (sample agreement schedules A and B, section 1) clearly defines the works covered by the agreement and provides details of any exceptions, paying particular attention to national arrangements concerning artworks, newspapers, government publications and musical works.
- Ensure compliance with the specific requirements for the collective management of musical works under the CRM Directive (Title III and Articles 34(2) and 38).

8. Permitted Users and Uses – applying the principles of independence of protection & respecting normal exploitation

An overarching principle of collective licensing is that it should not conflict with the primary market for sales of and subscriptions to published works. This means that the users who are authorised to obtain a collective licence and the quantities and other restrictions on that licensed use must be defined so as to distinguish licensed secondary use from those primary markets.

Another important copyright principle is that every country treats all works as having the level of copyright protection as is provided in the law of that country, regardless of the level of protection in the country from which the work originated. This principle is necessary because different countries can and do describe the same ‘uses’ differently in their copyright law. So, for example, the uses included under the reproduction right in one country may vary significantly from the uses included under the reproduction right in another country.

As a result, it is easier and more stable over time as laws and court rulings change to define the scope of uses by referring to “uses” rather than “rights”, and this is the approach we have adopted in the sample agreement.

The schedules describe three broad categories of permitted uses: Paper Copies, Digital Copies and Digital Use. Those broad terms are further clarified by detailed definitions for each class of use, to be completed by each party according to their understanding of what their national rightsholders have authorised.

Because national laws vary, the mandates from rightsholders may also vary between rightsholders represented by different CMOs. The bilateral agreements, through the usage of the terms Paper Copies, Digital Copies, Digital Uses and “copying” and “reproduction”, are intended to allow the parties to clarify these differences in the schedules.

However, this structure assumes both CMOs are operating in territories with legal systems that recognise the communication right as a right of copyright. The legal systems of IFRRO members’ States are not all at the same stage of development and a further layer of complexity is added by the definitions of “copying” or “reproduction” in national laws.

For example, in many national copyright laws, copying/reproduction includes all paper to paper copying, printing from a digital copy, creation of a new electronic copy including by transfer to a USB and electronic storage. This broad definition does not always fit the mandate some rightsholders will allow to be the subject of bilateral agreements for licensing in foreign territories.

Some rightsholders also seek to distinguish the sectors in which the rights they grant may be the subject of a collective licence. In particular, some CMOs will have limited mandate to license the corporate sector.

Communicating in detail as regards permitted users and uses is key to clarifying these issues.

8.1 Permitted Users

The uses and sectors which are the subject of collective licensing can vary between territories.

Again, careful definition of the uses, including proportions of works permitted for each sector is therefore required.

Clause 2.5 of the sample agreement clarifies that any usage limits in the rights granted under a bilateral agreement shall not restrict either CMO from licensing more widely in its territory under its normal licensing agreements and such licensing shall not be considered a breach of the bilateral agreement. The permitted percentages vary from country to country, so a common amount may have to be agreed upon, which might be higher than in some countries or lower than in others. This can be clarified in Schedules A and B of the sample agreement, under Section 2 “Licence Limits”.

For the avoidance of doubt, it is important that the bilateral agreement includes a clause which confirms that the parties do not provide an indemnity for licensing activities pursuant to any legal licence or remunerated exception in national legislation. See sample agreement clauses 2.5 and 5.4.

8.2 Permitted Uses/Digital Use

Since IFRRO members first acquired mandates for digital use, the IFRRO Board and Secretariat have worked to clarify the different types of digital use and encourage consistent definitions in rights exchange agreements.

Increasingly, national governments are implementing or proposing legislative solutions to user demands to access out of commerce works and for speedier electronic document delivery. IFRRO’s position for over a decade is that these should be remunerated solutions, and that CMOs can assist in providing the infrastructure for collection and distribution of revenue for those uses.

The REM Principles were developed as a tool for IFRRO members that sought to exchange digital rights. The digital publishing market presents increased potential for overlap between the primary publishing market for digital works and the collective licensing arrangements which users seek from CMOs. The REM Principles sought, among other matters, to distinguish the primary market for digital sales and subscriptions from the rights which CMOs have licensed nationally and exchanged for cross border licensing. For example, the major STM publishers now offer to subscribing education institutions the types of online uses by students which might previously have been included in a CMO licence.

The definition of Digital Use included in section 3 of schedules A and B of the sample agreement is intended merely as a starting point and is modelled on the permissions commonly exchanged in current Type A agreements.

Additional permissions may also be added where appropriate and where specifically agreed. This might be appropriate, for example, for the supply of digital copies to external clients under some corporate or business licences.

8.3 Relationships with Licensees/Users

Other than for limited outsourcing of some administrative tasks - e.g. distribution calculation - the rights granted under a bilateral agreement are particular to each CMO and cannot be assigned or transferred without consent.

In addition, each CMO should ensure that the licences it offers are consistent with its obligations to other CMOs under both its bilateral agreements and the IFRRO and WIPO documents listed in chapter 2 above. For example, licences to users must include the ability to promptly notify licensees of excluded works and of changes to mandates as advised by other CMOs; and invoicing and usage monitoring must align with the “short payment cycles” required by para (l) of the REM Principles.

Best Practice Recommendations

- Carefully define the copying limits under the licence and whether those limits are prescribed by legislation - sample agreement, schedules A and B, section 2.
- Carefully define permitted uses, ensuring consistency of use of definitions and paying particular attention to clarifying digital uses - sample agreement, schedules A and B, section 3 (Licensed Rights).
- Carefully define the categories of licensees covered, plus a brief description of each licence offered by the CMO and the major restrictions and exclusions - sample agreement schedules A and B, section 4 (Licensees).
- Include an “avoidance of doubt” clause where necessary to clarify that the parties do not provide an indemnity for licensing activities pursuant to any legal licence or remunerated exceptions contained in their national legislation - sample agreement clause 5.4 (Indemnity).
- Each CMO must ensure that the licences offered are consistent with the rights obtained from other CMOs, e.g., the ability to promptly notify licensees of excluded works and changes to mandate, as advised by other CMOs.
- Check that the class of users, copying limits, licensed rights and other restrictions in the collective licence properly distinguish the licensed secondary use from primary markets - REM Principles paragraph d).

9. Distribution Obligations

It is important that each CMO acts in accordance with the Principle of National Treatment, including that there can be no discrimination against any rightsholders whose rights a CMO manages under a bilateral agreement in particular with respect to applicable tariffs, management fees and the collection and distribution of monies due to rightsholders (sample agreement clause 9 and CRM Directive article 14).

A CMO might be asked to distribute monies to rightsholders in its territory that it does not currently represent. Good practice is to hold those monies in trust for a specified period while trying to reach agreement on distribution with the identified rightsholders. If agreement is not reached by then, the CMOs must settle whether those monies are to be repaid to the transferring CMO or applied to an agreed collective purpose of benefit to the class of the identified rightsholders (sample agreement clause 9.3).

9.1 Timely Distributions

The REM Principles include efficiency, which is interpreted to include short payment cycles, and the WIPO Principles refer to distributions being made *efficiently, diligently and expeditiously* (WIPO Toolkit page 31).

The CRM Directive imposes a strict timeframe on distributions of nine months from the end of the financial year in which the rights revenue was collected. Exceptions to the rule are made only for objective reasons such as the need for data provisions or identification

...no later than nine months from the end of the financial year in which the rights revenue was collected, unless objective reasons relating in particular to reporting by users, identification of rights, rightsholders or matching of information on works or other subject matter with rightsholders prevent... (Article 15, CRM Directive).

Clause 11.1 of the sample agreement and the schedules allow non-EU CMOs to specify when and in what currency monies are to be transferred to the other party. For EU/EEA CMOs, an alternative clause 11.1 reflects the rules set out in the CRM Directive.

Once the monies are received, they are then required to be distributed to the rightsholder as soon as possible but no later than six months from receipt.

9.2 Deductions

Bilateral agreements must authorise and set out the types of deductions that each CMO will make from the revenue it receives from the other. Common practice has been to include separate authorisations for deductions for administrative purposes (including taxation) and for cultural and social purposes.

The CRM Directive imposes strict requirements on deductions that can be made in *representation agreements* (which includes bilateral agreements):

...a collective management organisation does not make deductions, other than in respect of management fees, from the rights revenue derived from the rights it manages on the basis of a representation agreement, or from any income arising from the investment of that rights revenue, unless the other collective management organisation that is party to the representation agreement expressly consents to such deductions. (Article 15(1), CRM Directive)

As a result, in the updated sample agreement, the categories for which deductions can be made are now described as **Management Fees** (clause 12) and **Other Deductions, including Cultural Deductions** (clause 13).

In all circumstances, deductions must be reasonable and based on objective criteria. In the case of Other Deductions, the consent of the other CMO is required to the making of such deductions.

It is explicit in the CRM Directive (articles 12(2) and 12(3)) that deductions for management fees and any social cultural or educational deductions be reasonable in relation to the services provided by the CMO and that the management fee must not exceed the actual (*justified and documented*) costs incurred.

It is an important principle of CMO operations that CMOs must seek to minimise their costs while providing efficient services. Similarly, transparency as to the costs and deductions made before payment to the other CMO is also important. Finally, the principle of National Treatment means that deductions from monies due to foreign rightsholders must not be greater than deductions from monies due to domestic rightsholders.

In the WIPO toolkit, it is considered important that the mandating rightsholders have the power to decide on all deductions made from monies collected on their behalf, in particular in respect of any deductions for social, cultural and educational purposes.

Bilateral agreements generally deal only with the deductions made by the CMO collecting the monies (which it transfers to the receiving CMO). Other deductions can be made by the distributing CMO before passing on monies to its domestic rightsholders – to cover the costs of distribution.

This last set of deductions are not dealt with in the bilateral agreement, as they are agreed by the distributing CMO with their domestic rightsholders. It is a matter for each CMO to make its own deductions, from either domestic or foreign sources, as agreed with its own rightsholders. However, and again in the interests of transparency, the two CMOs entering the agreement may agree to share that information.

9.3 Management Fees

In the sample agreement (clause 12) we have chosen to use the term *Management Fee* rather than administrative costs. This is for consistency with the terms used in the CRM Directive (article 3(i)) and the term is defined with reference to the CRM Directive.

As the practice or approach to making deductions varies from CMO to CMO, the method of making the deduction for the management fee is not defined. Some CMOs deduct a floating percentage which reflects the actual amounts incurred in collecting and distributing the monies. Other CMOs deduct a fixed percentage amount for administration. Although the sample agreement does not prescribe an approach to the deduction of the management fee, what is important is that the principles of National Treatment, efficiency and transparency are applied, and that information about how the deductions are made is shared with the other CMO.

As the CRM Directive provides, it is also important that the deductions are reasonable in respect to the services and based on objective criteria.

Permitted deductions appear to include setting aside a proportion of all revenue (including foreign revenue) to provide a fund for litigation or lobbying in the event of anticipated

adverse legislative change. What is important here is that the allocations are the same for foreign and domestic rightsholders and that the domestic rightsholders have agreed that a deduction for these purposes can be made.

A related matter is the situation where emerging CMOs may seek authorisation to retain a high proportion of revenue collected to cover their administrative costs for a fixed period as they establish their operations. This is not unusual and is a matter for negotiation between the two CMOs as to what percentage is acceptable and over what period. If the other party to the agreement is an EU CMO, then the additional amounts must be considered as part of the additional deductions for social and cultural purposes.

Deductions may also be made to comply with the foreign withholding tax rules of each territory (sample agreement clause 11.2.3 or 11.2.6) and it is good practice to include a formal statement that each party will assist the other to complete documents and provide information to ensure that those taxes are charged at the lowest permissible rate.

9.4 Other Deductions including Cultural Deductions

Social and cultural purpose deductions are permissible within reasonable limits according to the particular national legal, cultural or political context. Generally, deductions are usually made before a payment fund is established. If the deduction is made after a payment fund is established, then the principle of National Treatment must be observed (see chapter 4.1 of this toolkit for further details) and the deduction should be consistent with the deduction from monies due to national rightsholders.

Social and cultural deductions are made for a wide range of social and cultural purposes, including a pension fund or charity for writers who are no longer able to support themselves and funds which support literary projects, prizes and events. Generally, the purpose and scope of such deductions are agreed between the CMO and its mandating rightsholders.

Where the deductions are allowed, CMOs should try to keep the deductions proportionate and reasonable. A CMO must be even-handed in making cultural deductions, which should apply to or impact local rightsholders and foreign rightsholders in the same way. Care must be taken to avoid making deductions that can be indirectly discriminatory, such as making deductions from monies allocated to a particular category of works or uses that might be largely non-domestic repertoire (sample agreement, clause 13).

Not all CMOs make deductions for social or cultural purposes and, for transparency, the CRM Directive and sample agreement clause 13 require that deductions other than management fees under representation agreements require the consent of the other CMO, except where those deductions are mandated by legislation.

Best Practice Recommendations

- Respect National Treatment and non-discrimination obligations (sample agreement, clause 9).
- Make provisions to ensure timely distributions of rights revenues from one CMO to the other and then, subsequently, from the receiving CMO to rightsholders.
- Ensure that there is transparency around the amount and purpose of other deductions and around management fees (sample agreement clauses 11-13).

10. Information about each RRO

The development of the internet and digital information exchange has transformed the way in which information can be exchanged between CMOs. In this section of the toolkit we consider information about the CMO itself, and its operational context. There are two ways of communicating this information – directly (via email for example) or by posting the information on the public website of the organisation.

Previous sample agreements have always required each CMO to make available to its partner CMOs documents and information regarding its mandate, current and proposed legislation, the collective licensing system in place, its licence agreements and the results of any statistical investigations. The new sample agreement broadens these obligations in clauses 7 and 11 and in section 10 of schedules A and B by also requiring the sharing of information relevant to the management of the licensed rights, including types of licensed users, licensing methods and relevant resolutions adopted by its general assembly of members.

The new sample agreement also includes the current general obligation to keep the other party informed about changes and proposed changes to those systems (sample agreement, clause 6 and schedules A and B). As well as information about the operating environment, information about the activities and status of the CMO from time to time (such as financial information, key licensees and its distribution policy) are also useful in enabling the other CMO to report to the rightsholders it represents and to assess the way its rights are being managed under bilateral agreements.

In addition, for EU/EEA CMOs, the CRM Directive requires each CMO to make the following information publicly available:

- its statutes (Art 21(1)(a))
- its membership terms (Art 21(1)(b))
- standard licensing contracts and standard applicable tariffs (Art 21(1)(c))
- the names of its business managers (Art 21(1)(d))
- its general distribution policy (Art 21(1)(e))
- its general policy on deductions such as social, cultural or educational deductions (Art 21(1)(f), (g))
- the names of the other CMOs with which it has representation agreements (Art 21(1)(h))
- its general policy on use of non-distributable monies (Art 21(1)(i))
- its complaint handling and dispute management policies (Art 21(1)(j))

EU/EEA CMOs must also make an Annual Transparency Report for each financial year which comprises financial information, and information about the monies paid to and received from other CMOs, including the deductions made (CRM Directive Art 22). Such transparency reports are a valuable source of information.

IFRRO encourages its members that are not subject to the CRM Directive to meet the same standards of transparency, but also acknowledges that legal systems, disclosure requirements and even the stage of maturity of the CMO concerned will impact on the ability of the CMO to do so.

Best Practice Recommendations

- Include obligations in the agreement to supply the other CMO with key information, as set out under sample agreement, Clause 6 (Covenants and Undertakings) including about different CM systems, allocation and distribution policies (which can be included in a statement under Schedule A, section 1).
- Include a provision ensuring that the CMO parties to the agreement keep each other informed about subsequent changes - sample agreement, Clause 6(2).
- EU/EEA CMOs must meet the standards of transparency as required under the CRM Directive, including the provision of a transparency report (see CRM Directive, Article 22), but all CMOs are encouraged to meet these standards, where possible.
- Use reasonable efforts to observe and comply with REM Principles.

11. Information and Data Exchange

Trust and transparency within the IFRRO network are supported by exchange of information about and practices for revenue allocation and distribution policies. In addition, information needs to be provided at the time of distribution of monies to enable the other CMO to distribute the monies they have received, and report to the rightsholders they represent as to the management of their rights. Clause 11 of the sample agreement adds to the information obligations included in the equivalent of clause 6 in current Type A agreements.

11.1 Operations and Policies

Bilateral agreements should continue to include obligations to share information about the methodologies and policies on collection of usage data, revenue allocation and payments to rightsholders. This information is useful to the other CMO in making decisions about distribution of the monies received under the agreement, and in reporting to their rightsholders about the bilateral agreements they have entered into.

Information of this nature can include:

- how usage data is collected (such as sampling or surveys, voluntary data reports by licensees or extrapolation from other data, extrapolation from sales);
- whether payments of licensing revenue are made to individual rightsholders or an organisation representing each class of rightsholders;
- where this data can be collected, proportions of payments to nominated rightsholder classes – e.g., payments for use of artworks;
- pricing of licence fees or tariffs, and whether they are set by national legislation, government negotiation or by negotiations with key rightsholders;
- frequency of payments to rightsholders;
- any legal obligation to pay licensing revenue or a class of revenue to a group of rightsholders, such as a statutorily mandated payment share.

Such information exchange is of particular importance where a CMO is required – legally or as a term of general or particular grant of mandate – to pay foreign revenue to local rightsholders other than in reliance on the usage data supplied by the transferring CMO.

This information is also sought each year in the reports IFRRO requires of each member in the months before its annual meeting, thus providing a centralized source of information.

11.2 At Distribution

Sufficient information must be made available at the time of distribution of monies, to enable the accurate on-distribution of monies received, and the timely reporting to rightsholders. (sample agreement clause 6.3)

The WIPO Toolkit suggests that the information to be provided to all rightsholders should include:

- a) a statement of monies attributed to such Member, including information on Operating Expenses and deductions and the amounts subsequently paid to the rightsholder;*
- b) a breakdown of Rights Revenue per main category of rights managed and per type of use;*
- c) a distinction between Rights Revenue earned nationally and Rights Revenue received on the basis of Representation Agreements; and*

- d) *information regarding any amounts attributed to the rightsholder which are outstanding for the period concerned.*

The CRM Directive has specific requirements for information provision to other CMOs regarding distributions, which are to be made electronically, and which include:

- *the rights revenue attributed, the amounts paid by the collective management organisation per category of rights managed, and per type of use, for the rights it manages under the representation agreement, and any rights revenue attributed which is outstanding for any period;*
- *deductions made in respect of management fees;*
- *deductions made for any purpose other than in respect of management fees (social and cultural deductions);*
- *information on any licences granted or refused with regard to works and other subject-matter covered by the representation agreement;*
- *resolutions adopted by the general assembly of members in so far as those resolutions are relevant to the management of the rights under the representation agreement.*

The suggested obligations in each of the WIPO Toolkit and the CRM Directive are broadly consistent, save that it has not been the practice of RROs to exchange information on “any licences granted or refused” and many CMOs will not have systems in place to provide that information.

As a result, schedules A and B of the sample agreement provide similar obligations for information exchange at the time of distribution, with the information on licences granted or refused listed separately. This information will normally be extremely sensitive and must be kept secure. Sections 10 and 11 of schedules A and B of the sample agreement acknowledge both the obligation to disclose and the sensitivity of the disclosed information.

Best Practice Recommendations

- Ensure that the agreement includes an obligation to share information - sample agreement clause 6 and section 10 of schedules A and B.
- Establish systems to collect and provide information at the time of distribution in line with the WIPO toolkit and, for EU/EEA CMOs, as required by the CRM Directive.
- Ensure the confidentiality of information supplied - sample agreement clause 7 and section 11 of schedules A and B (and see chapter 12 below).

12. Data protection and privacy

Respect for the privacy and data protection laws applicable to each party is critical for member-based organisations such as CMOs. Most CMOs are legally obliged to protect the privacy and data of the rightsholders they represent and the users they license, to restrict the uses of the data they collect and to obtain consent for some uses. In addition, the EU GDPR creates a number of new obligations for CMOs, which affect international data transfer.

CMOs, as data controllers, must comply with the GDPR if they have an establishment in the EU/EEA, and also if they offer goods or services to EU citizens or monitor such EU citizens. In effect this means that all bilateral agreements where one of the parties is based in, or has operations in the EU/EEA, must include a reference to GDPR compliance.

The sample agreement includes in clause 7 a set of alternate clauses that can be tailored according to whether parties to the agreement are based in the EU, not based in the EU or based in a territory benefitting from an “adequacy agreement”.

It is therefore essential for current bilateral agreements to include obligations around information provided by and to rightsholders, the consents which may have to be obtained from rightsholders, the obligations which may have to be required from those who supply usage information and other privacy and data security measures – sample agreement clause 7 and section 11 of schedules A and B.

This is one area where detailed schedules to the agreement are particularly useful, allowing the differing national obligations and, for EU/EEA CMOs, their overarching regional obligations, to be described in section 11 of Schedules A and B.

When entering into an agreement the parties must know and state if they are considered to be data controllers or otherwise under the applicable law. This is important in order to be clear about the parties’ obligations. As regards application of the GDPR, it is generally considered that when exchanging data with other CMOs under a bilateral agreement each CMO is acting as a data controller. This is reflected in sample agreement clause 7.4.

It is also important that a CMO ensures that they have the technical means to fulfil obligations, such as giving access to such data, before accepting such an obligation.

A clause explaining liability for breaches of the GDPR and other applicable data protection rules is also important. Clause 7.3 states that “*Each CMO is liable to the other for any consequence of a failure to comply with, where applicable, the GDPR or any other applicable data protection laws or regulations.*” This clause could alternatively be replaced by a different provision on the parties’ respective liability. This is ultimately a commercial decision to be made on a case by case basis.

Best Practice Recommendations

- Ensure that there are obligations to respect data privacy/protection of any rightsholder, member or affiliate in line with applicable data protection laws - sample agreement clause 6.5.
- Pay particular attention as to what additional provisions might be needed in order to ensure compliance with the GDPR, where applicable - sample agreement clause 7.
- Cooperate wherever necessary in order that each CMO is able to fully comply with its obligations under the GDPR.
- Ensure that there is clarity as regards liability for breaches of the GDPR and other applicable data protection rules.

- Provide detailed information about specific national / regional obligations in the schedules.

13. Indemnities

The purpose of indemnities is to share the risks associated with granting rights, licensing and payments to rightsholders. Simply put, an indemnity is a promise by one party to pay for the losses of the other party suffered in the event of certain agreed events happening.

The sample agreement includes several strategies to share risks of licensing the repertoire which users demand, and those which necessarily flow from cost effective payments to rightsholders.

Risk sharing strategies employed by CMOs include publication of a list of excluded works, and restrictions and waivers in the licence agreements and in the agreements entered into with domestic rightsholders on granting mandate or on receiving payments.

A modern bilateral agreement should include tailored indemnities for both licensing and payments to rightsholders, including the ability to set off payments due under those indemnities against future transfers of monies to the other CMO.

13.1 Licensing Risk

It is not uncommon for the quantities of a work one party is authorised to collectively license to be different from that authorised by the licence agreements of the other party. One specific example would be where one RRO is authorised by their rightsholders to license use of only 5% of works, whereas another is authorised to license 10% of a work.

These mandate gaps are best addressed by an indemnity which acknowledges that if one CMO has purported to license in excess of what the other RRO has authorised, then the licensing CMO will indemnify the other CMO for any payments to settle claims by those rightsholders.

13.2 Distribution Risk

Sometimes, a receiving CMO may elect to pay foreign revenue other than in accordance with the usage data provided by the paying CMO. In this case, it is reasonable that the CMO electing to pay other than in accordance with that usage data should bear the risk [and grant an indemnity] for any claims by the rightsholders identified in the usage data.

Best Practice Recommendations

- Tailor the indemnity clause in order to share the risks associated with cross-border licensing, where CMOs rarely have comparable digital mandate.
- Ensure that the clauses cover complex issues which might arise, encompassing both licensing and distribution risks.
- See suggestions for clauses under sample agreement, Clause 5 (Indemnity).

14. Complaints Handling and Dispute Resolution

In the context of any commercial agreement, it is important to have a procedure in place to deal with a situation where a complaint or dispute arises.

As set out in WIPO's CMO Toolkit¹¹, as a matter of good practice a CMO “should make available to its Members, rightholders and other CMOs with whom they have a representation agreement, information on complaint and dispute resolution procedures, which should clearly describe to whom the complaint should be addressed, at which address (or e-mail address), and describe the timescales and stages of appeal.”

It is important to note that the complaints handling and dispute resolution procedures which each CMO has as part of its internal rules should also be open to the CMOs with which bilateral agreements are in place. Many issues can be resolved by simple information exchange, or a clearer understanding facilitated by a straightforward complaints handling mechanism, reducing the need for referral to formal mediation or arbitration procedures.

The approach in the sample agreement is that ‘any dispute as to the interpretation or application of the sample agreement not thus settled shall be resolved by mediation, or if the mediation is unsuccessful, by arbitration, by a person or persons knowledgeable in relevant copyright matters’ (clause 14.3).

Mediation and arbitration are defined by WIPO as follows:

Mediation: “a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute. Depending on the parties' choice, mediation may be followed, in the absence of a settlement, by arbitration, expedited arbitration or expert determination.”

Arbitration: “A consensual procedure in which the parties submit their dispute to one or more chosen arbitrators, for a binding and final decision (award) based on the parties' respective rights and obligations and enforceable under arbitral law. As a private alternative, arbitration normally forecloses court options. Depending on the parties' choice, arbitration may be preceded by mediation or expert determination.”

The sample agreement specifies that the place and rules of mediation shall be that of the territory in which the Licensed Right was exercised. It also clarifies that if the dispute is independent of the Licensed Right exercised, it shall be subject to the law of the territory of operation of the RRO against whom the claim giving rise to the dispute is directed. This is important insofar as it means that in effect a CMO need only to worry about having knowledge of their own national rules.

In light of the establishment of the WIPO Arbitration and Mediation Center¹² the sample agreement has been updated to include an optional clause which states that where the parties fail to agree on a mediator or on the outcome of a mediation, they shall refer the matter to the WIPO Arbitration and Mediation Center. The Center has the benefit of being open to any person or entity, regardless of nationality or domicile and dispute resolution procedures may be held anywhere in the world, in any language and under any law that the parties choose.

¹¹ <https://www.wipo.int/publications/en/details.jsp?id=4358>

¹² <https://www.wipo.int/amc/en/neutral>

The Center also provides a range of recommended contract clauses¹³ in relation to future disputes and parties can also request arbitration for existing disputes in the absence of a mediation agreement. Where an agreement provides for WIPO arbitration, the WIPO Arbitration Rules are deemed to form part of that agreement and the dispute shall be settled in accordance with these Rules, as in effect on the date of the commencement of the arbitration, unless the parties have agreed otherwise. The parties are advised to check these rules before making such an agreement.

Best Practice Recommendations

- A practical complaints-handling and dispute resolution process is essential - sample agreement clause 14.
- Conciliation between the parties is recommended as the first choice to resolve a dispute. Where the parties cannot be reconciled, then external mediation is the next step (sample agreement clauses 14.1 – 14.3).
- Where the parties fail to agree on a mediator or on the outcome of a mediation, they should consider referring the matter to the WIPO Arbitration and Mediation Center (sample agreement clause 14.5).
- Ensure that the applicable law clause is clear (sample agreement clause 14.4) and consider further tailoring to address any legal obligations and assumptions under relevant national laws if this is deemed necessary.
- EU/EEA CMOs must ensure compliance with the CRM Directive provisions (arts 33-35).

¹³ <https://www.wipo.int/amc/en/clauses/index.html>

15. Taxation and Related Issues

Just as national copyright laws derive from international copyright treaties, there is also a network of international bilateral tax treaties, under which some governments require that a portion of royalties paid to foreign organisations and individuals be retained and paid to that government. For example, foreign royalty withholding tax is retained from payments to foreign individuals or organisations by CMOs in most EU territories, in USA, UK, Australia, New Zealand and in Japan.

Royalty withholding tax is usually retained at differential rates, and eligibility for a lower rate varies between treaties. Each CMO should help its partners navigate their tax rules and maximise the benefits to rightsholders (sample agreement clause 11.3). Transferring CMOs should provide a statement to receiving CMOs listing deductions for tax, and assist other CMOs to minimise such reductions, for example, by providing a link to the relevant tax forms plus instructions for completion.

Best Practice Recommendations

- Ensure that parties are informed about any tax deductions required under national laws.
- Include a mutual obligation to assist the other party in seeking to minimize deductions for taxation (sample agreement clause 11.3).
- Ensure that a statement is submitted to a receiving CMO regarding any amount the transferring CMO was required to deduct in respect of taxation (sample agreement clauses 11.2.3 or, for EU CMOs, 11.2.6).

* * *

ANNEX A: SAMPLE BILATERAL AGREEMENT

SAMPLE BILATERAL AGREEMENT TYPE A

DATE OF AGREEMENT AND PARTIES

Following the full names, addresses, any numeric identifiers and acronyms of each party, the agreement should acknowledge that the parties are collectively referred to as “CMOs” or “each CMO”.

RECITALS

A. Society A and Society B are Reproduction Rights Organisations and CMOs and are RRO members of the International Federation of Reproduction Rights Organisations (IFRRO).

B. Society A through its members, affiliate organisations *[and/or the legal framework in its Territory]* represents the rights to re-use print and digital works of certain individual rightsholders resident in or citizens of or incorporated in its Territory and collects and distributes fees, negotiates licensing terms and/or grants licences for those rights in that territory.

C. Society B through its members, affiliate organisations *[and/or the legal framework in its Territory]* represents the rights to re-use print and digital works of certain individual rightsholders resident in or citizens of or incorporated in its Territory and collects and distributes fees, negotiates licensing terms and/or grants licences for those rights in that territory.

D. Each CMO desires to discharge its obligations to the Rightsholders of the other CMO and is also willing to act as non-exclusive agent to receive monies due to non-represented rightsholders in the same categories of rightsholders that it represents in its Territory.

E. Further, each CMO is willing to represent other categories of rightsholders in its Territory (if agreed with those rightsholders) and to receive on behalf of such rightsholders from the other CMO monies due to rightsholders in those categories.

F. Each CMO supports the principle of National Treatment and agrees not to discriminate against any rightsholder whose right they manage under this Agreement, in particular with respect to applicable tariffs, management fees, and the conditions for the collection of the rights revenue and distribution of monies to rightsholders. Each CMO also supports the principles set out in the Repertoire Exchange Mandate (REM) adopted by IFRRO.

G. *[Where monies for Public Lending Right are to be paid under the agreement]* [Society # also collects and distributes monies in its Territory for the Public Lending Right, and the parties acknowledge that clauses 7, 9, 10 and 11 of this Agreement shall also apply to such payments made and received under this Agreement.]

H. The systems and legal structures employed by Society A and Society B in the collective administration of rights vary. These variations present practical difficulties and the parties have entered this Agreement in a spirit of co-operation and goodwill and in the interests of securing and maintaining strong and effective copyright laws of benefit to all rightsholders.

AGREEMENT

1. DEFINITIONS

The following words and phrases shall have the meaning set out opposite them.

Adequacy Decision means a decision of the European Commission which establishes that a non-EU country ensures an adequate level of protection of personal data;

Agreement means this agreement including its schedules;

CMO means an organisation which is authorised to act as an intermediary or facilitator between rightsholders (including publishers, authors and other creators) and users for reprographic reproduction and certain digital uses;

Confidential Information means the information of each CMO listed in schedule A or B;

CRM Directive means Directive 2014/26/EU on collective management of copyright and related rights and multi-territory licensing of rights in musical works for online use in the international market;

Digital Copies has the meaning for each CMO set out in schedule A or B;

Digital Use means the making available of Digital Copies by Licensees by way of transmission or communication in the manner specified in the description of Digital Use for each CMO in schedule A or B;

GDPR means the EU General Data Protection Regulation 2016/679/EU;

Licensees means, for each CMO, the individuals or organisations which are licensed or authorised within the categories described in schedules A or B, or which may become licensed or authorised;

Licensed Rights means the rights and authority to collect granted to each CMO under clause 2 of this Agreement;

Management Fees means the amounts charged, deducted or offset by each CMO from its revenue in order to cover the costs of its management of copyright or related rights and does not include deductions for social, cultural or educational purposes;

Paper Copies has the meaning for each CMO set out in schedule A or B;

Public Lending Right refers to the entitlement of authors and other rightsholders to receive payment to partly compensate for the otherwise unremunerated public use of their work in libraries;

REM Principles means the IFRRO Principles for Repertoire Exchange Mandate, which is available on the IFRRO website;

Rightsholders means persons owning or controlling copyright in published works and Society A's Rightsholders and Society B's Rightsholders (and related expressions such as "its Rightsholders") shall mean the rightsholders domiciled in the Territories of Society A or Society B except that this term shall not include any rightsholder who may be domiciled in

the Territory or Society A or Society B but has directly authorised another CMO to represent it;

Standard Contractual Clauses means the conditions recommended by Decision 2004/915/EC of the European Commission, set out in schedule D to this Agreement;

Territory means for each CMO the territory specified in schedule A or B.

Works means for each CMO the works in which copyright subsists described, listed or referred to in schedules A or B for the making of Paper Copies, Digital Copies or Digital Use.

2. LICENCE/AUTHORITY TO COLLECT

2.1. On behalf of its Rightsholders, as specified in Schedule A, Society A hereby grants to Society B the non-exclusive right to enter into licensing agreements with and to collect fees from Licensees for the making of Paper Copies, Digital Copies and Digital Use of Works in Society B's Territory.

2.2. On behalf of its Rightsholders, as specified in Schedule B, Society B hereby grants to Society A the non-exclusive right to enter into licensing agreements with and to collect fees from Licensees for the making of Paper Copies, Digital Copies and Digital Use of Works in Society A's Territory

2.3. The grant of non-exclusive rights to license and/or to collect fees by Society A in clause 2.1 shall be subject to the terms, usage limits and other restrictions set out in schedule A; and the grant of non-exclusive rights to license and/or to collect by Society B in clause 2.2 shall be subject to the terms, usage limits and other restrictions set out in schedule B. Each CMO may change those terms and restrictions by providing three months' written notification to the other CMO and a replacement schedule.

2.4. If either CMO fails to use any of the rights transferred by this Agreement, then the other CMO may by six months' notice in writing withdraw those rights from this Agreement.

2.5. Any usage limits in the rights granted under this Agreement shall not restrict either CMO from licensing more widely in its Territory under its normal licensing agreements and such licensing shall not be considered a breach of this agreement. However, that licensing shall be undertaken by the relevant CMO at its own risk and the indemnity provisions of clause 5 shall not apply to that licensing.

3. EXERCISE OF RIGHTS

In consideration of the above grant, each CMO hereby undertakes within the limits of the grant of Licensed Rights and of its own articles of association or rules and of the governing law of its Territory to:

3.1. exercise the Licensed Rights of the other CMO's Rightsholders in the same ways and to the same extent as it exercises the rights of its Rightsholders;

3.2. apply to the Licensed Rights of the other CMO's Rightsholders the same tariffs, methods and means of collection and allocation of fees as those applied to its Rightsholders providing it does not contravene any governing law;

3.3. make available for exploitation, and to use all reasonable endeavours to exploit the Licensed Rights granted by this Agreement in accordance both with its normal procedures and sound commercial practice;

3.4. use all reasonable endeavours to collect fees from its Licensees at regular intervals;

3.5. use all reasonable endeavours to promote public awareness of the need, where appropriate, to obtain licences for the exercise of the Licensed Rights,

3.6. co-operate with the other CMO in co-ordinating efforts to raise the level of and to increase the effectiveness of copyright protection in their respective Territories.

4. NO ASSIGNMENT

Other than for limited administrative purposes, no assignment or transfer of all or any part of the Licensed Rights granted to one CMO under this Agreement is permitted without the express written authorisation of the other CMO.

5. INDEMNITY

5.1. Subject to subclause 5.3, Society A indemnifies and agrees to keep indemnified Society B against all judgments and legal costs which Society B may be legally required to pay as the result of any of Society A's Rightholders taking action, proceedings or making demands against Society B for the payment of compensation for the exercise of the Licensed Rights by Society B in the manner authorised through this Agreement. This obligation includes monies payable under a negotiated settlement of such action, proceeding or demand.

5.2. Subject to subclause 5.3, Society B indemnifies and agrees to keep indemnified Society A against all judgments and legal costs which Society A may be legally required to pay as the result of any of Society B's Rightholders taking action, proceeding or making demand against Society A for the payment of compensation for the exercise of the Licensed Rights by Society A in the manner authorised through this Agreement. This obligation includes monies payable under a negotiated settlement of such action, proceeding or demand.

5.3. A CMO who seeks to claim on the indemnity granted by subclauses 5.1 and 5.2 must:

(a) notify the other CMO promptly of any claim against it by a Rightsholder for the purported exercise of that Rightsholder's Licensed Rights;

(b) keep the other CMO informed of the progress of the action including settlement negotiations and give them an opportunity to defend or negotiate at their own cost.

5.4. For the avoidance of doubt, the indemnity granted by subclauses 5.1 and 5.2 does not include any claim, judgment or legal costs which arise as a consequence of:

(a) the licensing or administration activity of one CMO pursuant to any legal licence or remunerated exception contained in the national legislation of that party; or

(b) any disclosure to a CMO's affiliate organisations made in reliance on clause 7.5.3.

5.5. This Agreement does not relieve either CMO of any obligation under the law of their respective Territories to meet claims for compensation from individual rightsholders whose

works were used by a Licensee whether or not the individual rightsholder is a member or affiliate of the other CMO or its affiliated organisations. The CMO against which such a claim has been made will provide all relevant information to the other CMO and consult with the other CMO on any litigation and settlement to be made with the individual rightsholder.

5.6. Subject to clause 5.5, whenever any claim for compensation is made by a Rightsholder for exercise of the Licensed Rights by a Licensee for which one CMO receives a transfer of fees from the other and which claim the recipient CMO or its affiliated organisations is legally obliged to meet, the transferring CMO may set off money paid on such claim (including legal and other costs connected therewith) against the next transfer of fees from that CMO to the other CMO. The transferring CMO will provide the other CMO with complete information as to the payment made as well as costs.

5.7. Clause 5.6 shall also apply when either CMO is obliged under a licensing agreement to meet a claim for redress from a Licensee who is required to pay compensation to a Rightsholder of the other CMO. Each CMO which includes such provisions in its licensing agreements shall inform the other CMO.

6. COVENANTS AND UNDERTAKINGS

During the term of this Agreement each CMO covenants and agrees, subject to the confidentiality restrictions set out in this Agreement and its schedules:

6.1. to supply the other CMO with copies of statutes, by-laws, contractual forms, privacy policies, data protection policies or other documents setting out the conditions under which it represents its Rightsholders;

6.2. to notify the other CMO in writing from time to time of any changes in its mandate from its Rightsholders which may be relevant to this Agreement, including but not limited to changes to or withdrawal of authorisation for categories of rights and works;

6.3. to provide the other CMO with information relevant to management of the Licensed Rights including but not limited to information about the types of its Licensed Users, its method of licensing, statistical investigations by that CMO of the exercise of Licensed Rights and any relevant resolutions adopted by the general assembly of members;

6.4. to inform the other CMO of any aspect of national law of which it needs to be aware, including but not limited to any existing or anticipated national arrangement concerning the management of rights, such as legal licences, extended collective licensing, mandatory collective management and legal presumptions of representation, and to co-operate with the other CMO in amending this Agreement to accommodate those changes;

[WHERE AN AGREEMENT DOES NOT INCLUDE CLAUSE 7, THE FOLLOWING SUBCLAUSE SHOULD BE INCLUDED AND THE SUBSEQUENT SUBCLAUSES RENUMBERED.]

6.5. to respect the rights to private life and personal data protection of any rightsholder, affiliate, member, user or other natural person whose personal data it processes, and to provide appropriate information to that person about the processing of their data, the recipients of those data, time limits for the retention of such data in any database, and the way in which that person can exercise their rights to access, correct or delete their personal data;]

6.5. subject to clause 7 and to the restrictions on use of Confidential Information in the schedules, to allow the other CMO to consult its records of the collection and allocation of the monies but only so far as is necessary to monitor use of the Works it represents; and

6.6 to use reasonable efforts to observe and comply with the REM Principles.

7. DATA PROTECTION AND CONFIDENTIALITY (GDPR CLAUSES)

7.1. Each CMO acknowledges that as part of the performance of this Agreement personal data must be exchanged and therefore recognizes in this context the importance of protecting the personal information of its Rightsholders and undertakes to respect the rights to personal data protection of any rightsholder, member or affiliate rightsholder or other natural person whose personal data they process. This may involve information obligations, duties towards Rightsholders, data governance obligations, notification of data breaches and cooperation with competent authorities.

[**Optional:** As a consequence, each CMO shall cooperate wherever necessary in order that each CMO is able to comply with its obligations under the GDPR.]

7.2. Each CMO shall at its own cost take all necessary measures to be compliant with the provisions of, where applicable, the GDPR and of any other applicable laws or regulations governing the processing of personal data in its performance of this Agreement.

7.3. ***[This clause can alternatively be replaced by a different provision on the Parties' respective liability for breach of the GDPR]*** Each CMO is liable to the other for any consequence of a failure to comply with, where applicable, the GDPR or any other applicable data protection laws or regulations.

7.4. Each CMO is to be regarded as an independent data controller within the meaning of the GDPR when they process personal data for their own purposes in the field of their activities. This applies to the exchange of personal data from one CMO to the other in the performance of this Agreement.

7.5. Each CMO shall keep the Confidential Information of the other CMO confidential. A CMO shall not disclose beyond its organisation information obtained under this Agreement as to the exercise of the Licensed Rights in the Territory of the other CMO unless:

7.5.1 so, but solely to the extent, required by law or ordered by a court or administrative or regulatory body of competent jurisdiction;

7.5.2 the information becomes part of the public domain through no fault by either CMO; or

7.5.3 such disclosure is made to the CMO's affiliate organisations to support distribution to Rightsholders and is made under similar obligations of confidentiality.

7.6. Each CMO acknowledges the importance of complying with the GDPR and any other applicable laws or regulations governing the processing of personal data and each CMO warrants that they have:

7.6.1 carefully assessed whether and to what extent the provisions of the GDPR and other laws or regulations governing the processing of personal data apply to its operations; and

7.6.2 taken all necessary steps to comply with the provisions of the GDPR and other laws or regulations governing the processing of personal data and obtaining informed consents, where required.

Optional Clause: Where one of the CMOs is located outside the EU/EEA, but in a country benefiting from an Adequacy Decision

7.7. In the event either CMO is located outside the European Union or European Economic Area (EU/EEA) and processes personal data from a data subject resident in the EU or EEA for the offering of goods or services or for the monitoring of their behaviour, or otherwise falls under the scope of Article 3 of the GDPR, each CMO agrees that the provisions of the GDPR shall be fully applicable to that CMO's operations in addition to clauses 7.2 to 7.5.

Optional Clauses: Where one of the CMOs is located within, and the other located outside the EU/EEA but not in a country benefiting from an Adequacy Decision

7.7. In the event either CMO transfers personal data within the meaning of article 44 of the GDPR to the other CMO, the parties agree and undertake to enter into the Standard Contractual Clauses.

7.8. The Standard Contractual Clauses shall apply to all data transfers between the CMOs and replaces and supersedes any previous contractual provisions regarding transfers of personal data between the CMOs.

7.9. Each CMO transferring personal data shall, at its own cost, file the executed version of the Standard Contractual Clauses with the competent data protection authority, whenever there is a legal obligation to do so.

7.10. The CMO located outside EU/EEA and outside a country benefiting from an Adequacy Decision acknowledges and agrees that it will indemnify the other CMO located within the EU/EEA of the consequences of any material infringement of any provisions of Chapter 2 or Chapter 3 of the GDPR that arises as a consequence of a wrongdoing or gross negligence of that CMO.

8. MEMBERS

Each CMO agrees that:

8.1. Its Rightsholders and affiliates will be represented by the other CMO for the purposes of this Agreement without any additional formalities or authorisations.

8.2. The Rightsholders whose works form the subject matter of this Agreement do not include any Rightsholder represented by virtue only of agreements that the CMO holds with CMOs not party to this Agreement.

8.3. Any dispute between the parties to this Agreement in relation to the representation of a rightsholder by either CMO shall be settled in a spirit of compromise and in the best interests of the rightsholder concerned.

9. MONIES - ALLOCATION

Each CMO agrees that:

9.1. In accordance with the principle of National Treatment, the monies collected in respect of the Licensed Rights shall be determined and allocated to Rightsholders in accordance with the system used and applied by the receiving CMO on collecting monies on behalf of its Rightsholders.

9.2. Monies transferred under this Agreement may be distributed by the receiving CMO in accordance with the principles and systems which the receiving CMO applies to the distribution of monies for relevant categories of Works. Where the transferring CMO is unable

to identify particular rightsholders or specific amounts due to particular rightsholders, the receiving CMO shall use its best judgment to make an equitable distribution to rightsholders or to otherwise apply those monies to a collective purpose of benefit to that class of rightsholders.

9.3. When monies transferred under this Agreement are collected and allocated by the transferring CMO to rightsholders in categories of works or rights which the receiving CMO does not at the time represent, the receiving CMO will hold those monies in trust for the rightsholder(s) or the organisation(s) representing the rightsholders until such time as the receiving CMO and such rightsholder(s) or organisation(s) shall have agreed on distribution of those monies. If agreement on distribution is not reached within [insert period], then the receiving CMO may, subject to the consent of the transferring CMO, apply those monies to a collective purpose of benefit to that class of rightsholders.

10 MONIES – PAYMENT OBLIGATIONS FOR EU CMOs

10.1. The receiving CMO shall distribute and pay the amounts due to its Rightsholders as soon as possible but no later than six months from receipt of those amounts, unless objective reasons relating in particular to reporting by users, identification of rights, rightsholders or matching of information on works and other subject-matter with rightsholders prevent the receiving CMO from meeting that deadline. The transferring CMO shall not be liable for any undue delay in the distribution by the receiving CMO. The receiving CMO shall hold harmless the transferring CMO for any claims by the Rightsholders of the receiving CMO for any untimely distribution.

10.2. Unless otherwise provided in schedules A or B, monies allocated and distributed under this Agreement shall include the respective income arising from the investment of the monies.

11. ACCOUNTS

For non-EU CMOs

11.1. Each CMO shall transfer the fees due to the receiving CMO each year at the times and in the currency set out in schedules A and B.

Alternative clause 11.1 for EU CMOs

11.1. Each CMO shall transfer the monies due to the receiving CMO as soon as possible but no later than nine months from the end of the financial year in which the monies were collected, unless that transfer is delayed for demonstrable causes relating to reporting by users, identification of rights or rightsholders, or matching of information on works and other subject-matter. The financial years for each CMO are set out in schedules A and B.

For non-EU CMOs

11.2. When remitting the payment, the transferring CMO shall submit a statement to the receiving CMO which includes:

11.2.1. a summary of the monies collected by the transferring CMO on behalf of the other CMO's Rightsholders since the previous allocation of monies;

11.2.2. all information in the possession of the transferring CMO which will enable the receiving CMO to distribute the monies to its Rightsholders including but not limited to the information specified in schedules A and B of this Agreement; and

11.2.3. a statement of such amounts, if any, as each transferring CMO is required by law to deduct in respect of taxation (such as, but not limited to, withholding tax) and of the amounts deducted for administration purposes in accordance with clause 12.

Alternative for EU CMOs

11.2. When remitting the payment, the transferring CMO shall submit a statement to the receiving CMO which includes:

11.2.1. a summary of the rights revenue attributed, the amounts paid by each CMO per category of rights managed, and per type of use, for the rights it manages, and any other monies attributed, which is outstanding for any period;

11.2.2. the amounts deducted for management fees and other consented fees, in accordance with clauses 12 and 13, with a breakdown per category of rights;

11.2.3. the amounts deducted for any purpose other than management fees in accordance with clause 12, with a breakdown per category of rights;

11.2.4. all information in the possession of the transferring CMO in order to enable the receiving CMO to distribute the monies to its Rightsholders including but not limited to the information specified in schedules A and B of this Agreement;

11.2.5. an indemnity and undertaking in the form annexed as Schedule E for execution by the receiving CMO; and

11.2.6. a statement of such amounts, if any, as each transferring CMO is required by law to deduct in respect of taxation (such as, but not limited to, withholding tax).

11.3. Each CMO as receiving CMO hereby undertakes to make any necessary application to the taxation authorities in the Territory of the transferring CMO for consent to receive all payments of monies under this Agreement without or at the lowest rate of deduction of tax in that territory. The transferring CMO undertakes to provide the receiving CMO with all necessary information and assistance in connection with such application.

12. DEDUCTION OF MANAGEMENT FEES

12.1. Each CMO shall be entitled to deduct from the monies it collects on behalf of the other CMO an amount necessary to cover its effective Management Fees. This amount shall not exceed:

12.1.1. the justified and documented costs incurred by the transferring CMO in managing the Licensed Rights; or

12.1.2. the percentage which is deducted for this purpose from monies collected by the CMO for its Rightsholders.

Each CMO shall endeavour to keep such deductions within reasonable limits having regard to local conditions within its Territory. Any other deduction, being occasional or not, shall be subject to the express consent of the receiving CMO, as well as any change in those deductions.

13. OTHER DEDUCTIONS, INCLUDING CULTURAL DEDUCTIONS

13.1. Each CMO shall be entitled to deduct a proportion of the monies it collects for other purposes, including social, cultural or educational purposes, only with the express written consent of the receiving CMO as set out in schedules A and B. This amount shall not exceed in percentage terms that which is deducted for this purpose from monies collected by the CMO for its Rightsholders. Each CMO, within the limits of its national legislation, shall endeavour to keep such deductions within reasonable limits, having regard to local conditions within its Territory.

14. COMPLAINTS PROCEDURES AND DISPUTE SETTLING MECHANISM

14.1. Each CMO has entered into this Agreement in good faith and in the spirit of co-operation and will use its best endeavours to resolve by conciliation any disputes that may arise in relation to the interpretation of this Agreement.

14.2. Each CMO shall make available to the other CMO effective and timely procedures for dealing with complaints and disputes, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, the collection of monies due to the other CMO's Rightsholders, deductions, distributions and payments. Each CMO shall respond to a complaint by the other CMO in writing and, if it rejects a complaint, give reasons.

14.3. Any dispute as to the interpretation or application of this Agreement not thus settled shall be resolved by mediation [or if the parties cannot agree by arbitration], by a person or persons knowledgeable in relevant copyright matters].

14.4. Each CMO agrees:

14.4.1. that the place and rules of mediation shall be that of the territory in which the Licensed Right was exercised.

If the dispute is independent of the Licensed Right exercised, it shall be subject to the law of the territory of operation of the RRO against whom the claim giving rise to the dispute is directed. The mediation shall take place in the territory the law of which is to be applied. The mediation shall be composed in accordance with the rules applying in that territory and the mediation shall be conducted in accordance with the law and custom of that territory.

14.4.2. When a dispute, or several disputes which are dealt with simultaneously, would involve mediation in both territories, the mediation shall take place in the territory of the party against whom the claim which originally gave rise to the dispute is directed, and the procedure shall be according to the rules applied in that territory.

14.4.3. This clause shall be without prejudice to any administrative procedures either party may engage pending any arbitration proceeding before any competent authority, including any supervisory authority or court of accounts.

[14.5. **Optional:** In the case that the parties fail to agree on a mediator or on the outcome of a mediation, they shall refer the matter to the WIPO Arbitration and Mediation Center.]

15. TERM

15.1. This Agreement shall take effect on signature and shall be for an initial period ending on [insert date] and shall continue from year to year, unless the Agreement is terminated by either

CMO by a notice delivered at least six (6) months prior to the date of expiry of the then current period.

15.2. Where this Agreement has been terminated, any licence with users in place at the date of termination shall include the rights, works and publications of the other CMO for the unexpired period of such licence or for three years from the date of expiry of this Agreement, whichever period is the shorter (the "Relevant Date"). The obligations of the parties under this Agreement shall continue in respect of such licences.

15.3. Where this Agreement has been terminated, each CMO shall take reasonable steps to inform its Licensees that the rights, works and publications of the other CMO will not be covered by its licences with users after the Relevant Date, and will not be included in any new or renewed licences with users.

15.4. In the event one CMO notifies the other during the term of this Agreement of a significant variation in the rights they administer, and further notifies that they require that such a variation is to be treated as a termination of the Agreement in respect of those rights, the other CMO shall comply with clauses 15.2 and 15.3 in respect of that notified variation of rights.

16. NOTICES

16.1. Notices under this Agreement shall be in writing, including by electronic means, and shall be deemed served as follows:

16.1.1. If sent by prepaid post, on the tenth business day following sending of the notice to the relevant address below; or

16.1.2. if sent by email, on the third business day following transmission to the relevant address below:

Postal addresses

Society A

<Chief Executive>

CMO name

Postal address

Society B

<Chief Executive>

Electronic addresses

Society A

<Chief Executive's email address recommended>

Society B

17. TERMINATION OF PREVIOUS AGREEMENTS

This Agreement replaces [*LIST FORMER AGREEMENTS*] which shall be of no future effect but without prejudice to any existing or accrued rights and obligations regarding licence fees collected or payable or in respect of licences granted under previous agreements.

18. WHOLE AGREEMENT

This Agreement and the schedules hereto embody all the terms agreed between the parties relating to the grant of Licensed Rights. The terms and conditions of this Agreement may only be varied in writing signed by both parties.

SCHEDULE A – Society A

1 Repertoire and Works

[STATEMENT EXPLAINING THE COLLECTIVE LICENSING SYSTEM / LEGAL SCHEMES UNDER WHICH SOCIETY A OPERATES – LEGAL LICENCE, ECL, VOLUNTARY LICENCE AND VARIATIONS, - AND THE LEGISLATION ON WHICH THEY ARE BASED

DIRECTIONS AS TO WHERE TO FIND SPECIFICALLY EXCLUDED WORKS AND DETAILS OF OTHER RESTRICTIONS ON THE MANDATE (E.G. A PARTICULAR WEBSITE)

WHERE WORKS PUBLISHED BY THE GOVERNMENT OF A PARTY ARE PUBLIC DOMAIN, THIS SHOULD BE STATED IN THIS PART OF THE SCHEDULE]

The works covered by the grant of Licensed Rights in this Agreement will vary according to whether the proposed use is making Paper Copies, Digital Copies or other Digital Use of that work, where Paper Copies, Digital Copies and Digital Use have the following meanings.

Paper Copies

Literary, artistic or dramatic works controlled or represented by the members of Society A and the members of Society A's affiliates, subject to the following exceptions:

- *[restrictions on artistic works, illustrations or diagrams, if any]*
- *[restrictions on single use works or test sheets, if any]*
- *[printed music? music lyrics?]*
- *[newspaper restrictions, if any]*
- *[specific exclusions of works of major national publishers, if any]*
- any work in which the copyright owner has stipulated that it may not be reproduced under a collective licence;
- any work identified as one of the excluded works or categories of works on Society A's website or as otherwise advised to Society B by Society A.

[Where Society A represents classes of work which are not the "norm" - e.g., three dimensional artworks – these can be listed as follows:]

Without limiting the generality of the description of above, Society A represents the following particular classes of work for the purposes of licensing under this Agreement:

- *[insert by way of example a schedule which indicates the classes of work a CMO representing rightsholders through ECL represents]*

Digital Copies and Digital Use

for Digital Copies made by scanning, as for Paper Copies;

for Digital Copies made in the course of or as the result of access or Digital Use of works distributed in electronic form, those works specifically advised by Society A as authorised for Digital Use under this Agreement.

2 Licence Limits

[SPECIFY COPYING LIMITS AND WHETHER THOSE LIMITS ARE PRESCRIBED BY LEGISLATION]

3 Licensed Rights

When used in reference to the grant of Licensed Rights by Society A to Society B:

Paper Copies means reproduction of extracts of works as hard copies, including by photocopying, printing, or rekeying;

Digital Copies means electronic copies of extract of works (a) made by scanning or similar processes or (b) made in the course of or as the result of access to a work in electronic form;

Digital Use means:

- (a) accessing, displaying, uploading and downloading a Digital Copy to and from a Licensee-controlled secure network accessible only to persons authorised by a Licensee (which may include intranets, password protected sites such as course and learning management systems, extranets and electronic reserves);
- (b) saving, storing or caching a Digital Copy on a Licensee-controlled secure network or device; and
- (c) distributing and transmitting (including by email) a Digital Copy between the secure networks of Licensees.

[WHERE BOTH CMOs LICENSE THE CORPORATE SECTOR AND ARE SO AUTHORISED BY RIGHTSHOLDERS, IT MIGHT BE APPROPRIATE TO INCLUDE THE FOLLOWING SUBCLAUSE:]

- (d) distributing and transmitting (including by email) a Digital Copy externally to customers of a Licensee where separately authorised by a licence issued by Society A.

For the avoidance of doubt, the Licensed Rights do not include other rights of copyright, such as rights of translation or adaptation.

4 Society A Licensees

[LIST OF CATEGORIES OF LICENSEES PLUS A BRIEF DESCRIPTION OF EACH LICENCE OFFERED BY Society A AND THE MAJOR RESTRICTIONS AND EXCLUSIONS. CONSIDER WHETHER MANDATE FOR EXCHANGE IMPOSES RESTRICTIONS ON CLASSES OF LICENSEE.]

5 Territory

For Society A, Territory means:

- <territory A – e.g., France;>
- *(list other territories in which Society A is offering collective licences)*

6 Payments

[STATE FREQUENCY OF PAYMENTS – E.G., AT LEAST 12 MONTHS FROM THE END OF THE FINANCIAL YEAR IN WHICH THE MONIES WERE COLLECTED.]

7 Currency

8 Deductions of Management Fees

Society A may deduct up to #% for Management Fees.

9 Other Deductions, including for Cultural and Other Purposes

Society A has been authorised by its members to deduct up to *% for social welfare, cultural or educational purposes and Society B consents to that deduction by its endorsement at the foot of this page.

WHERE A CMO IS REQUIRED BY NATIONAL LAW TO RETAIN A PERCENTAGE OF ITS REVENUE FOR PURPOSES OTHER THAN MANAGEMENT FEES, THIS SHOULD BE STATED IN THIS PART OF THE SCHEDULE.]

10 Information to be supplied by Society A

[INFORMATION ADDITIONAL TO THAT LISTED IN THE ALTERNATE VERSIONS OF CLAUSE 11 SHOULD BE LISTED HERE. FOR EXAMPLE, INFORMATION ON LICENCES GRANTED OR REFUSED WITH REGARD TO WORKS COVERED BY THIS AGREEMENT.]

11 Confidential Information of Society A

Notwithstanding that some of the information listed below may be required to be provided to Society B when transferring fees, the following information is the confidential information of Society A and must be protected as required by clause 7 – Data Protection and Confidentiality.

- Information relating to Society A's Licensees
- Survey and other monitoring information relating to the copying and communication activities of Society A's Licensees
- Information relating to payments by Society A
- Other information which requires protection under the laws applicable to Society A.

SCHEDULE B – Society B

1 Repertoire and Works

[STATEMENT EXPLAINING THE COLLECTIVE LICENSING SYSTEM / LEGAL SCHEMES UNDER WHICH SOCIETY B OPERATES – LEGAL LICENCE, ECL, VOLUNTARY LICENCE AND VARIATIONS - AND THE LEGISLATION ON WHICH THEY ARE BASED.

DIRECTIONS AS TO WHERE TO FIND SPECIFICALLY EXCLUDED WORKS AND DETAILS OF OTHER RESTRICTIONS ON THE MANDATE (E.G. A PARTICULAR WEBSITE)

WHERE WORKS PUBLISHED BY THE GOVERNMENT OF A PARTY ARE PUBLIC DOMAIN, THIS SHOULD BE STATED IN THIS PART OF THE SCHEDULE]

The works covered by the grant of Licensed Rights in this Agreement will vary according to whether the proposed use is making Paper Copies, Digital Copies or other Digital Use of that work, where Paper Copies, Digital Copies and Digital Use have the following meanings.

Paper Copies

Literary, artistic or dramatic works controlled or represented by the members of Society B and the members of Society B's affiliates, subject to the following exceptions:

- *[restrictions on artistic works, illustrations or diagrams, if any]*
- *[restrictions on single use works or test sheets, if any]*
- *[printed music? music lyrics?]*
- *[newspaper restrictions, if any]*
- *[specific exclusions of works of major national publishers, if any]*
- any work in which the copyright owner has stipulated that it may not be reproduced under a collective licence;
- any work identified as one of the excluded works or categories of works on Society B's website or as otherwise advised to Society A by Society B.

[Where Society B represents classes of work which are not the "norm" - e.g., three dimensional artworks – these can be listed as follows:]

Without limiting the generality of the description of above, Society B represents the following particular classes of work for the purposes of licensing under this Agreement:

- *[insert by way of example a schedule which indicates the classes of work a CMO representing rightsholders through ECL represents]*

Digital Copies and Digital Use

for Digital Copies made by scanning, as for Paper Copies;

for Digital Copies made in the course of or as the result of access or Digital Use of works distributed in electronic form, those works specifically advised by Society B as authorised for Digital Use under this Agreement.

2 Licence Limits

[SPECIFY COPYING LIMITS AND WHETHER THOSE LIMITS ARE PRESCRIBED BY LEGISLATION]

3 Licensed Rights

When used in reference to the grant of Licensed Rights by Society B to Society A:

Paper Copies means reproduction of extracts of works as hard copies, including by photocopying, printing, or rekeying;

Digital Copies means electronic copies of extract of works (a) made by scanning or similar processes or (b) made in the course of or as the result of access to a work in electronic form;

Digital Use means:

- (a) accessing, displaying, uploading and downloading a Digital Copy to and from a Licensee-controlled secure network accessible only to persons authorised by a Licensee (which may include intranets, password protected sites such as course and learning management systems, extranets and electronic reserves;
- (b) saving, storing or caching a Digital Copy on a Licensee-controlled secure network or portable device; and
- (c) distributing and transmitting (including by email) a Digital Copy between the secure networks of Licensees.

[WHERE BOTH CMOs LICENSE THE CORPORATE SECTOR AND ARE SO AUTHORISED BY RIGHTSHOLDERS, IT MAY BE APPROPRIATE TO ADD THE FOLLOWING SUBCLAUSE:]

- (d) distributing and transmitting (including by email) a Digital Copy externally to customers of a Licensee where separately authorised by a licence issued by Society A.

For the avoidance of doubt, the Licensed Rights do not include other rights of copyright, such as rights of translation or adaptation.

4 Society B Licensees

[LIST OF CATEGORIES OF LICENSEES PLUS A BRIEF DESCRIPTION OF EACH LICENCE OFFERED BY SOCIETY B AND THE MAJOR RESTRICTIONS AND EXCLUSIONS. CONSIDER WHETHER MANDATE FOR EXCHANGE IMPOSES RESTRICTIONS ON CLASSES OF LICENSEE.]

5 Territory

For Society B, Territory means:

- <territory B – e.g., South Africa>;
- *(list other territories in which Society B is offering collective licences)*

6 Payments

[STATE FREQUENCY OF PAYMENTS – E.G. AND FOR NON-EU RROs, AT LEAST 12 MONTHS FROM THE END OF THE FINANCIAL YEAR IN WHICH THE MONIES WERE COLLECTED.]

7 Currency

8 Deductions of Management Fees

Society B may deduct up to #% for Management Fees.

9 Other Deductions, including for Cultural and Other Purposes

Society B has been authorised by its members to deduct up to *% for social welfare, cultural or educational purposes and Society A consents to that deduction by its endorsement at the foot of this page.

WHERE A CMO IS REQUIRED BY NATIONAL LAW TO RETAIN A PERCENTAGE OF ITS REVENUE FOR PURPOSES OTHER THAN MANAGEMENT FEES, THIS SHOULD BE STATED IN THIS PART OF THE SCHEDULE.]

10 Information to be supplied by Society B

[INFORMATION ADDITIONAL TO THAT LISTED IN THE ALTERNATE VERSIONS OF CLAUSE 11 SHOULD BE LISTED HERE. FOR EXAMPLE, INFORMATION ON LICENCES GRANTED OR REFUSED WITH REGARD TO WORKS COVERED BY THIS AGREEMENT.]

11 Confidential Information of Society B

Notwithstanding that some of the information listed below may be required to be provided to Society A when transferring fees, the following information is the confidential information of Society A and must be protected as required by clause 7 – Data Protection and Confidentiality.

- Information relating to Society B's Licensees
- Survey and other monitoring information relating to the copying and communication activities of Society B's Licensees
- Information relating to payments by Society B
- Other information which requires protection under the laws applicable to Society B.

SCHEDULE C – REM PRINCIPLES

SCHEDULE D – STANDARD CONTRACTUAL CLAUSES

SCHEDULE E - DISTRIBUTION INDEMNITY AND UNDERTAKING