

March 10, 2023

Mary Critharis  
Chief Policy Officer and Director  
Office of Policy and International Affairs  
U.S. Patent and Trademark Office  
Madison East Building, Concourse Level  
600 Dulany Street  
Alexandria, VA 22314

Dear Ms. Critharis:

USTelecom – The Broadband Association (“USTelecom”), ACA Connects – America’s Communications Association (“ACA Connects”), Consumer Technology Association (“CTA”), Computer and Communications Industry Association (“CCIA”), CTIA, and NTCA – The Rural Broadband Association (“NTCA”) (together, “the Associations”) are writing to follow up on our December 6, 2022 letter expressing numerous concerns with the WIPO Broadcasting Organizations Treaty (“the Treaty”).<sup>1</sup> We have reattached that letter here to enable easy reference to the concerns previously articulated.

In light of these concerns, we urged the United States to oppose the adoption of the Treaty entirely in the letter and in follow-up meetings with U.S. government representatives. As we explained, a rights-based broadcasting treaty is unnecessary and counterproductive. To the extent that signal theft remains a problem in other jurisdictions, it can be addressed through a treaty narrowly focused on signal theft, consistent with the approach taken in the United States that has proven effective. Indeed, as we understand it, the United States’ longstanding position has been to oppose a rights-based approach in favor of a more targeted approach, a position the Associations support.

The Associations therefore are troubled that the U.S. delegation appears likely to take a new position on the Treaty at the upcoming WIPO SCCR meeting. Specifically, our understanding is that the United States delegation may be flexible in accepting certain new exclusive and broadly defined IP-like rights for broadcasters as part of its negotiating strategy at the upcoming WIPO SCCR meeting. The Associations are not aware of any justification for this significant change in U.S. position.

In fact, since our December 6 letter, the Treaty text has been revised in a manner that poses even greater harm to U.S. interests. The text now contains new, additional IP-like rights for broadcasters (e.g., the right of fixation) with no set term. These new rights, unnecessary to address signal theft, could theoretically create rent-seeking opportunities in perpetuity. Moreover, the highly controversial notion of “webcasting” is once again in scope. None of the changes to the Treaty text address the substantive concerns we outlined in our previous letter.

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<sup>1</sup> The December 6, 2022 letter is attached. Civil society groups shared the same concerns, which they addressed in a separate letter, also attached. Letter from Access to Knowledge Coalition to Michael Shapiro, U.S. Patent & Trademark Office (Feb. 20, 2023).

The Associations again reiterate our opposition to the Treaty, as it is unnecessary and counterproductive. We therefore urge the U.S. to oppose the Treaty at WIPO and ensure that any new treaty is appropriately constrained to a signal theft approach only. We stand ready to support the U.S. government on such an approach.

Sincerely,

ACA Connects – America’s Communications Association  
Consumer Technology Association  
Computer and Communications Industry Association  
CTIA  
NTCA – The Rural Broadband Association  
USTelecom – The Broadband Association

CC: Michael Shapiro, U.S. Patent and Trademark Office  
Brian Yeh, U.S. Patent and Trademark Office  
Maria Strong, U.S. Copyright Office  
Andrew Foglia, U.S. Copyright Office  
Chinyelu Lee, U.S. Department of State  
Robert Tanner, Office of the U.S. Trade Representative  
Thomas Sullivan, Federal Communications Commission  
Olga Madruga-Forti, Federal Communications Commission

December 6, 2022

Mary Critharis  
Chief Policy Officer and Director  
Office of Policy and International Affairs  
U.S. Patent and Trademark Office  
Madison East Building, Concourse Level  
600 Dulany Street  
Alexandria, VA 22314

Dear Ms. Critharis:

USTelecom – The Broadband Association (“USTelecom”), ACA Connects – America’s Communications Association (“ACA Connects”), Consumer Technology Association (“CTA”), CTIA, and NTCA – The Rural Broadband Association (“NTCA”) (together, “the Associations”) respectfully submit this letter to express concerns about renewed efforts at the World Intellectual Property Organization (WIPO) to introduce an international Broadcasting Treaty.

The concept for an international Broadcasting Treaty was introduced at WIPO in 1998, and various proposals have been discussed and debated repeatedly since then. The treaty has been, and continues to be, highly controversial. As a non-governmental observer at the WIPO, USTelecom has raised numerous concerns about the scope and potential harms of a broadcasting treaty that the Associations share. The Associations are therefore disappointed that the treaty continues to progress. We have reviewed the current draft and unfortunately the concerns flagged regarding prior iterations remain, including that it would cause significant harm to the U.S. communications industry, deter U.S. broadband deployment, and harm Internet growth and innovation and, ultimately, consumers

We understand that it is the position of the U.S. Government that the treaty, if adopted, would not require changes to U.S. law. Because the rationale is unclear to us, we would appreciate the opportunity to more fully understand the reasoning that supports this position. Even if it is the position of this Administration that the treaty would not require changes to U.S. law, broadcast organizations could nonetheless use it as a basis for arguing to Congress and future Administrations that U.S. law in fact needs to be amended to conform to the treaty. Such arguments, however weak, would nevertheless be a huge distraction at a minimum. Additionally, expanding the definition of broadcasting – purportedly only with respect to the additional rights that would be granted by this treaty – would almost certainly lead to confusion and require courts and federal agencies to devote scarce time and resources attempting to differentiate between definitions of broadcasting, including the circumstances under which each one applies.

In particular, broadcast organizations could argue that the treaty creates a broad new set of exclusive IP-like rights for broadcast signals, and that corresponding new IP-like rights for broadcasters under U.S. law will later be necessary to reflect the same. These new broadcasting rights would provide an excessive 20-year term of exclusive protection, under which broadcasters could demand undue payments from third parties, including internet service providers (“ISPs”), related to accessing their broadcast signal.<sup>1</sup> These new broadcasting rights could pose an existential threat to the entire ecosystem of internet intermediaries,

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<sup>1</sup> In addition, Article 7 would establish a controversial right of “making available” in the context of deferred transmission of stored programs. The right of “making available” is not an enumerated exclusive right under U.S. copyright law. It, however, also could nevertheless be used to demand unreasonable payments from or enforcement by third parties.

harming innovation and deterring the growth of broadband deployment and, ultimately, consumers. For instance, a 2021 survey of one trade association's members found that for nearly 20% of member ISPs, more than 75% of households in their service area cannot receive an over-the-air broadcast signal.<sup>2</sup> As a result, these households are dependent upon their ISP or cable service provider to deliver the local broadcast programming pursuant to a retransmission consent agreement between the ISP/cable provider and the broadcaster. Yet, even in cases like these, video distributors have faced escalating fees for retransmission consent. It is not difficult to foresee that granting additional rights to program signals would result in even higher retransmission consent fees, to the detriment of consumers.

Additionally, the language in Article 12 on technological measures could be used to impose burdensome, and potentially duplicative, technological measures. The U.S. Copyright Office already has an ongoing rulemaking proceeding to implement the technological provisions created by the Digital Millennium Copyright Act (DMCA) in 1998.<sup>3</sup> Creating new laws aimed at technological measures while the DMCA's technological provisions continue to be worked through is premature. Likewise, language in Article 17 regarding "expeditious remedies" for broadcasters to combat infringement echoes ongoing discussions in the copyright policy arena and could make way for technical mandates and overbroad remedies that would shift costs and impose unreasonable burdens and new forms of liability on intermediaries.

Broadcast organizations could seek to exploit the treaty by interpreting it as creating a new, wholly unnecessary and counterproductive broadcasting right, layered on top of existing copyright rights in the underlying content. Broadcast organizations could argue that a signal that is broadcast – even for a few seconds – would be entitled under the treaty to 20 years of exclusive IP-like protection. Such a new right would be unnecessary to protect the underlying content and could force traditional and online content distributors to clear a thicket of broadcast treaty rights. This would add to the already complex and costly processes of licensing copyright-protected content and obtaining retransmission consents for each piece of content they wish to distribute. The United States should not sign onto a treaty that could invite these complexities and confusion.

The treaty's overbroad definitions and rights could compound its other defects if implemented in the United States. For example, the draft includes an expansive definition of "broadcasting" that would cover all transmission types, including cable, satellite, computer networks and by any other means. This definition goes far beyond live broadcasts and would inappropriately capture stored programs such as catch-up services, video-on-demand (VOD) services and previously broadcast programs. Article 6 likewise proposes a sweepingly broad right of retransmission under which "[b]roadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their program-carrying signals by any means." The explanatory notes go even further, indicating that the proposed right protects broadcasters "against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks, when done by any another [sic] entity." The breadth of this right exacerbates liability and cost risks.

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<sup>2</sup> NTCA Broadband/Internet Availability Survey Report, Dec. 2021 at p. 29, available at <https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf> (2021 Survey Report).

<sup>3</sup> See, e.g., Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention. Recommendation of the Register of Copyrights, Oct. 2021, p. 4, available at [https://cdn.loc.gov/copyright/1201/2021/2021\\_Section\\_1201\\_Registers\\_Recommendation.pdf](https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf) ("Title I of the DMCA added a new chapter 12 to title 17 of the United States Code, which prohibits circumvention of technological measures employed by or on behalf of copyright owners to control access to their works.").

Even if the treaty would not lead to changes in U.S. law, it could have a negative impact on the U.S. communications industry by precipitating the adoption of problematic laws in other countries. Given the international nature of ISPs' operations and those of ISPs' international business partners, this treaty would result in ISPs having to navigate complex new regimes.

\* \* \*

In sum, the draft treaty in its current form remains overbroad and harmful. It has the potential of creating a thicket of unnecessary rights, which would have the effect of chilling broadband development and imposing new costs and liabilities on large and small U.S. communications providers and online intermediaries, including ISPs, ultimately harming consumers and other end-users and their access to critical information.

We understand an interagency team is currently reviewing the treaty for possible effects on U.S. interests. Given the concerns above, the United States should oppose the adoption of this treaty, and instead should offer alternatives more narrowly focused on signal theft that cannot be used to press for counterproductive changes in U.S. law. Should WIPO nevertheless pursue the treaty, it is essential that Article 10 of "Limitations and Exceptions" be drafted as mandatory, not optional, and that online intermediaries, including ISPs, have a complete carve-out from the scope of this treaty and the liability it would impose. Otherwise, U.S. ISPs and other online intermediaries will be left to battle for limitations and exceptions in national laws of every country that becomes a signatory.

We would appreciate the opportunity to meet with you and your team to discuss our concerns and hope the U.S. will actively engage at WIPO to ensure the scope of the Broadcasting Treaty is appropriately constrained. Please contact Morgan Reeds, Director of Policy & Advocacy at USTelecom, at [mreeds@ustelecom.org](mailto:mreeds@ustelecom.org) with questions.

Sincerely,

ACA Connects – America's Communications Association  
Consumer Technology Association  
CTIA  
NTCA – The Rural Broadband Association  
USTelecom – The Broadband Association

CC: Michael Shapiro, U.S. Patent and Trademark Office  
Brian Yeh, U.S. Patent and Trademark Office  
Maria Strong, U.S. Copyright Office  
Andrew Foglia, U.S. Copyright Office  
Michael Aktipis, U.S. Department of State  
Robert Tanner, Office of the U.S. Trade Representative  
Thomas Sullivan, Federal Communications Commission  
Olga Madruga-Forti, Federal Communications Commission

February 20, 2023

Subject: Next Steps for WIPO SCCR/43

Dear Mr. Shapiro,

We write on behalf of the undersigned members of the [Access to Knowledge Coalition](#), which represent educators, researchers, students, libraries, archives, museums, other knowledge users and creative communities around the globe.

We wish to share with you our views on the [agenda](#) of the 43rd meeting of WIPO's Standing Committee on Copyright and Related Rights ([SCCR/43/1](#)) that will take place in Geneva from 12-17 March 2023. In brief:

- The **African Group Draft Work Program on Exceptions and Limitations (SCCR/42/4 REV.) should be approved in its current state**, as it provides a solid framework to continue building on previous substantial work of the committee and advance the discussions on exceptions and limitations. It could be beneficial for the Committee to set specific timelines for the performance of these tasks, similar to those that guided the implementation of the Action Plans on Limitations and Exceptions in 2019.
- The Coalition opposes the proposed **Broadcasting Treaty (SCCR/43/3)**, which continues to raise substantial issues of concern for public interest and access to knowledge communities. There is no rationale for an anti-piracy treaty for content that is already protected by three other WIPO digital treaties as well as by encryption of signals. We oppose creating a new layer of post fixation rights, particularly with no term of protection and that can apply to works that are not owned, licensed or compensated by the broadcasting organization, or are in the public domain. Any treaty must include mandatory exceptions, including extending all exceptions for copyright to broadcast rights; requiring implementation of all exceptions that are permissive under the Rome Convention; and requiring exceptions for preservation, online uses, and uses for libraries, archives, museums, education, research, and access to people with disabilities.

In the attachment, you find a briefing note with a detailed analysis of the agenda, which we hope will assist in your preparations for the upcoming SCCR. We would like to ask that you **forward this note to your delegation**

In addition, we would be pleased to **meet with your delegation before or during the SCCR/43** to discuss the points raised in the briefing note.

Best regards,

Article 19 México y Centroamérica (México)  
Association for Recorded Sound Collections (ARSC) (USA)  
Australian Libraries and Archives Copyright Coalition (Australia)  
Canadian Association of Research Libraries (CARL) (Canada)  
Canadian Federation of Library Associations (CFLA-FCAB) (Canada)  
Centrum Cyfrowe (Poland)  
COMMUNIA (Belgium)  
Creative Commons  
Creative Commons Italy (Italy)  
Datysoc (Uruguay)  
Derechos Digitales (Chile)  
Education International  
Electronic Frontier Foundation (EFF) (USA)  
Electronic Information for Libraries (EIFL)  
Fight for the Future (USA)  
Fundación Karisma (Colombia)  
Fundación Vía Libre (Argentina)  
Global Expert Network on Copyright User Rights  
Global Student Forum  
Hiperderecho (Perú)  
INNOVARTE (Chile)  
Instituto Brasileiro de Direitos Autorais (IBDAutoral) (Brasil)  
Intellectual Property Institute (Slovenia)  
International Council on Archives (ICA)  
International Federation of Library Associations (IFLA)  
InternetLab (Brasil)  
IP Justice (USA)  
Knowledge Ecology International (KEI) (USA)  
Knowledge Rights 21 (The Netherlands)  
Library Copyright Alliance (USA)  
Open Access India (India)  
Public Knowledge (USA)  
R3D (México)  
Software Preservation Network (USA)  
TEDIC (Paraguay)  
The Centre for Internet & Society (India)

## Access to Knowledge Coalition Position on the SCCR/43 Briefing Note

### Why is the SCCR important to us?

Access to knowledge is key to the fulfillment of the Rights to Education, Research and Culture, and is a core mission of libraries, archives, and museums. Yet access to knowledge is not enjoyed equally across the world. Crises, including the COVID-19 pandemic and the climate emergency, highlight the inadequacy of the current copyright system for those who learn, teach, research, create, preserve or seek to enjoy the world's cultural heritage.

We believe the SCCR has a unique role in responding to the need for clear guidance and robust exceptions and limitations to support education, research and access to culture, particularly in a cross-border and online environment.

### What are our views on the current discussions on L&Es?

The current discussions are focused on the revised proposal by the African Group for a Draft Work Program on Exceptions and Limitations (L&Es) ([SCCR/42/4 REV.](#))<sup>1</sup>, which spans agenda items 6. and 7.

The proposal re-affirms the mandate of the committee concerning L&Es, reflecting two key priorities identified in the Report on Regional Seminars And International Conference On Limitations And Exceptions ([SCCR/40/2](#)):

- preservation of and access to materials held by libraries, archives and museums, and
- online and cross-border uses of materials for education and research (including by libraries, archives and museums).

At SCCR/42, some interventions by Members concerning this proposal called for further specificity. A closer look into the document reveals, however, that it proposes a variety of specific actions. Two of those lines of action were already approved by the Committee and will take place at the next SCCR:

- the Secretariat will invite presentations “by experts and Members on the possible cross-border problems linked to specific uses of copyrighted works in the online cross-border environment, such as in an online educational class with students in multiple countries, or where collaborating researchers or the subjects of their research are located in different countries.”; and
- the Secretariat will present “(1) a scoping study on limitations and exceptions on research and (2) a toolkit on preservation.”

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<sup>1</sup> Section by section comments on the proposal are available at <http://infojustice.org/archives/44007>.



The Group further proposes two other actions:

- To convene working groups of member states, supported by experts, to prepare objectives and principles and model provisions on the priority issues identified in the Report (SCCR/40/2)<sup>2</sup>;
- To convene information sessions and exchanges, without pursuing guidance documents, on other issues, including the UNESCO Recommendation on Open Science (2021); limitations and exceptions for text and data mining research; models for protection of limitations and exceptions from override by contractual terms and technological measures; and safe harbor protections for educational, research and cultural heritage institutions.

In our view, the African Group Proposal thus provides a solid framework to continue building on previous substantial work of the committee on L&Es and advance the discussions on agenda items 6. and 7. It could be beneficial for the Committee to set specific timelines for the performance of these tasks, similar to those that guided the implementation of the Action Plans on Limitations and Exceptions in 2019.

## Item 6: Limitations and exceptions for libraries and archives

Point 2a. of the African Group proposal (SCCR/42/4) directly addresses agenda item 6 through the priority “to ensure that all laws enable the preservation activities of libraries, archives, and museums, including the use of preserved materials across borders”.

Long-term preservation ensures that the creators of tomorrow can build on the ideas and expressions of today. The report (SCCR/40/2) concludes that “technical and legal solutions must be put in place to safeguard cultural heritage, an invaluable and vulnerable common good”.

WIPO experts, Prof. Crews and Dr. Benhamou noted that preservation of heritage is important for all countries. The deterioration of physical media (such as paper and film), climate change, and natural and manmade disasters, can cause the loss of entire collections unless preservation is undertaken prior to such events. In 2021, for example, a unique African Studies collection was lost in a fire at the University of Cape Town Library. Due to copyright barriers, some items had no digital backup copies.

We therefore support the proposal by the African Group to include the issue of preservation and access to preserved works (including through digital means and across borders) as a priority for the SCCR. We further support the proposal to convene a working group of member states, supported by experts as appropriate and agreed, to prepare objectives and principles and model provisions on this issue.

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<sup>2</sup> The Group proposes to focus on the following priority issues: preservation activities of libraries, archives, and museums, including across borders; adaptation of exceptions to the online and cross border environment, such as by permitting teaching, learning and research through digital and online tools; and implementing the Marrakesh Treaty so as to ensure that people with other disabilities can benefit from similar protections.

## Item 7: Limitations and exceptions for educational and research institutions and for persons with other disabilities

Point 2b. of the African Group proposal (SCCR/42/4) directly addresses agenda item 7 through the priority “to promote the adaptation of exceptions to the online and cross border environment, such as by permitting teaching, learning, and research through digital and online tools”.

The report (SCCR/40/2) highlighted the increasing demand for digital and online classroom materials, and the need for effective exceptions for online uses for education and research. It also stated that WIPO should continue its work on L&Es in a “holistic and forward looking way”.

A number of WIPO-commissioned studies show that exceptions and limitations to copyright for teaching and learning across the world are often outdated. Copyright exceptions for research are also not-fit-for purpose, as shown by recent research by Prof. Flynn and others<sup>3</sup>. Inadequate laws create legal uncertainty and severely limit online and physical educational and research activities, as well as cross-border collaboration and exchange for educators, students and researchers located in different parts of the world.

We therefore support the African Group proposal to include the issue of adaptation of education, and research exceptions to the online and cross-border environment as a priority for the SCCR. We further support the proposal to convene a working group of member states, supported by experts as appropriate and agreed, to prepare objectives and principles and model provisions on this issue.

## What are our views on the current discussions on new rights?

### Item 5: Protection of broadcasting organizations

The Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty ([SCCR/43/3](#)) continues to raise substantial issues of concern for public interest and access to knowledge communities. The revised draft proposes a potentially perpetual term of protection for a new exclusive right of “broadcasters” (which may include content distributed over the Internet, such as Zoom meeting or user generated video) beyond that required by the Rome Convention on neighboring rights (1961) or the Brussels Satellite Convention (1974). The underlying justification for these expansions of mandatory exclusive rights in international law continues to be unresolved.<sup>4</sup>

<sup>3</sup> Flynn, Sean; Schirru, Luca; Palmedo, Michael; and Izquierdo, Andrés. "[Research Exceptions in Comparative Copyright](#)." (2022) PIJIP/TLS Research Paper Series no. 75.

<sup>4</sup> See Bernt Hugenholtz, [Groundhog Day in Geneva: The WIPO Broadcasting Treaty is on the Agenda Once Again](#), American University International Law Review Symposium (2022) (discussing the history, rationales, and substantive content of the draft treaty with a special emphasis on limitations and exceptions).

The Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty contains important, but ultimately inadequate, changes to the L&Es provision in current Article 11.<sup>5</sup> Some of the changes are positive. Article 11 now makes clear that countries can make use of some of the limitations allowed by the Rome Convention. Paragraph 2 permits countries to provide, in addition, “the same kinds of limitations or exceptions” as are provided for copyright “and the protection of related rights.” It also contains a new provision permitting exceptions for “(e) preservation in archives of the programme material carried by the programme-carrying signal.”<sup>6</sup> But the provision still has notable problems that make it fully inadequate for the protection of the public interest, including:

- It contains no mandatory exceptions, even for those issues mandated for copyright, such as for quotation, news of the day, and providing access for the visually impaired, much less for vital purposes such as education and research;
- It confines countries to a closed list of limitations and exceptions defined by paras (1) and (2) and requires, in addition, that the exceptions meet a three-step test. These features (closed list + 3-step) make it the most restrictive formulation of a limitations and exceptions provision in any copyright or related rights treaty;<sup>7</sup>
- It contains no limitations and exceptions for the exclusive rights in Articles 12 (technological protection measures) or 13 (rights management information).
- It omits from the Rome Convention the language that specifically authorizes uses of “compulsory licenses ... to the extent to which they are compatible with this Convention.”

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<sup>5</sup> New Article 11 provides:

“(1) Contracting Parties may, in their domestic legislation, provide for specific limitations or exceptions to the rights and protection guaranteed in this Treaty, as regards:

- (a) private use;
- (b) quotation;
- (c) use of short excerpts in connection with the reporting of current events;
- (d) use for the purposes of teaching or scientific research;
- (e) preservation in archives of the programme material carried by the programme-carrying signal;
- (f) access to cable of certain programme-carrying signals.

(2) Irrespective of paragraph 1 of this Article, Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.

(3) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the programme-carrying signal and do not unreasonably prejudice the legitimate interests of the broadcasting organization.”

<sup>6</sup> The similar permissive exception in the Rome Convention is more limited -- authorizing “(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts.”

<sup>7</sup> For example, the Rome Convention has a permissive specific list of exceptions, but no 3-step applied to them. The Berne Convention has an enabling version of the three-step test that is not limited to a specific list of authorized purposes.

Therefore we believe that the proposed treaty should not be moved forward based on the Second Revision. Any final draft, even if the major issues around scope of protection and term can be resolved, should include modern mandatory exceptions including requiring that all exceptions for copyright extend to broadcast rights; requiring exceptions for education, research and other purposes that are permissive under the Rome Convention; and putting in place mandatory exceptions for preservation, online uses, and uses for libraries, archives, museums, education, research, and to provide access to people with disabilities.

### Item 9: Other matters

The agenda includes a busy program of other matters, including a proposal on public lending right (PLR), a duty for libraries to pay rightholders for the public lending of books they have already acquired. Since PLR does not involve questions of international copyright law, we do not think that WIPO is the appropriate forum. We also believe that the proposal is likely to be divisive.

### Background Documents

- [Background to Discussions on Exceptions and Limitations at WIPO](#)