

## **Access to Knowledge Coalition Position on the SCCR/44** Public Briefing Note

This note was prepared by the undersigned members of the Access to Knowledge Coalition to describe the public positions that have been taken on the main agenda items before the Standing Committee on Copyright and Related Rights related to the agenda items on the 44th meeting of the WIPO Standing Committee on Copyright and Related Rights that will take place in Geneva from 6-8 November 2023 ([SCCR/44](#)). The [Access to Knowledge Coalition](#) is composed of organizational members that represent knowledge users and creative communities around the globe including educators, researchers, students, libraries, archives, museums, academic authors, performers, and artists of all kinds.

### **Why is the SCCR important to us?**

Access to knowledge is key to the fulfilment of the Rights to Freedom of Expression, to Education, and to benefit from Science and Culture, and is a core mission of libraries, archives, museums and education and research institutions. Yet access to knowledge is not enjoyed equally across the world. Global 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 that the Standing Committee on Copyright and Related Rights (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 at SCCR on L&Es?**

#### **Agenda items 6 and 7: Limitations and exceptions for libraries and archives; Limitations and exceptions for educational and research institutions and for persons with other disabilities**

This SCCR (SCCR/44) should adopt an implementation plan for the Proposal By African Group for A Draft Work Program On Exceptions And Limitations adopted by the Committee ([SCCR/43/8](#)).

The 43rd session of SCCR identified three “priority issues” for future work of the Committee:

- a. to promote the adaptation of exceptions to ensure that laws at the national level enable the preservation activities of libraries, archives, and museums, including the use of preserved materials;
- b. to promote the adaptation of exceptions to the online environment, such as by permitting teaching, learning and research through digital and online tools; and

c. to review implementation of the Marrakesh Treaty and how to ensure that people with other disabilities (also covered by the Convention on the Rights of Persons with Disabilities) can benefit from similar protections, in particular in order to benefit from new technologies.

The Committee also adopted a process for further work:

“The Chair should advance information sharing and consensus building ... between SCCR meetings through processes which are transparent and inclusive in conformance with WIPO Development Recommendation #44, such as working groups of member states, supported by experts as appropriate and agreed, preparing objectives and principles and options for consideration by the Committee.”

The Committee should create working groups to draft objectives, principles and options concerning the three priority issues identified in the work program. The “options” mentioned in the work plan should include potential provisions of an international instrument in whatever form, as has been considered in past SCCRs. See SCCR Chairs Charts [SCCR/26/8](#), [SCCR/27/8](#), and [SCCR/34/5](#).

We encourage the Committee to consider the following elements of a process for the working groups:

- The first working group meetings should begin with presentations of research and model principles, objectives and options by experts and beneficiaries, with balanced and diverse representation from different regions. The model might draw inspiration from the processes used in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).
- The working groups should meet before the next SCCR and report back to the Committee on progress. They should also propose a plan for further progress to be adopted by the Committee.
- SCCR accredited observers should be invited to participate in the meeting, at least as observers online.
- The drafts of the objectives and principles should be presented at SCCR/45 for consideration by the Committee. The Committee should decide on the next steps for the groups.
- Building on prior work of SCCR: The Working Groups should build upon the prior work of the Committee and existing SCCR documents on L&Es, including proposals and comments by member states, to ensure continuity and progress in Committee work on L&Es. The objective is to use established foundations as stepping stones while underscoring the importance of not prejudging the final outcomes.

#### **Agenda item 5: Protection of broadcasting organizations**

The proposed Broadcasting Treaty ([SCCR/43/3](#)) continues to raise major issues of concern for the public interest and access to knowledge communities. We oppose further work on the Treaty and propose that it be eliminated from the SCCR agenda. 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. If any treaty advances, it requires major revisions from the current Third Draft.

No major changes were made between the 2nd and 3rd Chair's drafts of the Broadcast Treaty. We appreciate that the previously closed list of exceptions in Article 11(1) is now open, but these exceptions remain permissive, not mandatory, even for uses required to be allowed by copyright. The end result would be a treaty mandating that related rights protections be stronger and with less exceptions than permitted for copyright protected works. This result must be rejected.

We urge the Committee to consult a broader range of experts on the Chair's Draft provisions. The Committee could set up a more diverse expert panel similar to that used by the IGC to offer concrete drafting proposals before each round.

#### *Signal piracy and the right of fixation*

The Chair's summary (document SCCR/43/SUMMARY) expressed the "common understanding amongst the Committee that any potential treaty should be narrowly focused on signal piracy," and "that the object of protection (subject matter) of any potential treaty should be limited to the transmission of programme-carrying signals and should not extend to any post-fixation activities, thus avoiding interference with the rights related to the underlying content." The restriction of the scope of protection of the treaty to a signal based instrument was also mandated by the 33rd meeting of the General Assemblies. Yet, the Second Draft Text (SCCR/43/3) proposed to add a right of fixation to the scope of protections mandated by the treaty. Adding a fixation right is inconsistent with the desire to avoid interference with the rights related to the underlying content of a broadcast signal.

The addition of a fixation right necessarily extends the scope of protection beyond the mere signal - requiring users, including subscribers or other lawful recipients, to obtain a license to record (fix) the content of a signal for another use. Extending to fixation rights creates overlapping rights with copyright holders since broadcasters could conceivably demand licenses for activities, such as quoting broadcasted content, that copyright holders cannot. Extending a right of fixation to broadcasts poses particular problems for the use of non-infringing copies of works permitted under copyright, including for the use of works in the public domain, for the use of works that are subject to open licensing, such as Creative Commons licenses, and for uses permitted by copyright limitations and exceptions. The Coalition submits that the fixation right should consequently be removed.

#### *Limitations and Exceptions*

In no case should the treaty permit broadcasters to exercise greater rights of control over the content of signals than copyright owners have. Even if a right of fixation and an exclusive rights approach is not mandated by the new treaty, such an approach will in all likelihood be permitted by the treaty and therefore limitations and exceptions provisions are necessary to guide countries in implementation. Past experience shows that many countries simply cut and paste limitations and exceptions provisions into their laws with the result that important exceptions not addressed in the treaty text will also likely not be addressed in many implementing laws.

Uses of broadcasts, including fixing the contents of a signal for later use, are essential for many important public interests. Recorded broadcasts are used by libraries, museums and archives to preserve history and culture, for example in the kind of African media collection that was destroyed in the University of Cape Town fire. Both recordings and retransmissions of live broadcasts are used in education, including in online education of the kind that proliferated during school closings forced by the COVID-19 pandemic. The ability to quote broadcasts is essential for political and academic commentary that lies at the core of freedom of expression rights. Broadcasts are used by researchers, including to enable media monitoring and analysis. Broadcasts and captioning are used to facilitate translation, including to increase accessibility for people with disabilities. The current draft's expansion of broadcasting rights beyond traditional over-the-air broadcasting to Internet streaming magnifies the potential impacts of the Treaty. Accordingly, the exceptions and limitations of the treaty are vital.

#### *Lack of mandatory exceptions*

The limitations and exceptions are all permissive, even for uses permitted in a country's copyright law and even for uses mandated to be permitted by international copyright treaties, such as for quotation. The Draft should add mandatory exceptions for all those areas subject to mandatory exceptions in copyright, including but not limited to quotation and the making of accessible formats for people with vision impairments.

#### *"Same kinds" of Exceptions as Copyright*

The Second Draft changed from the First Draft to clarify that the "same kinds" of limitations and exceptions in copyright may be provided for broadcast "irrespective of paragraph 1's" permissive list of exceptions. This change is not altered in the Third Draft. But the provision is permissive — a country may provide fewer exceptions than it provides for copyright. This enables countries to require licenses from broadcasters to make uses of the content of a signal that copyright permits. To prevent the countries from offering fewer exceptions for the uses of broadcast signals than for the copyrighted content those signals carry, the "may" in should be converted to "shall" to read:

"(2) Irrespective of paragraph 1 of this Article, Contracting Parties shall, 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."

#### *Requirement that Exceptions be "Specific"*

Article 11(1) confines countries to the provision of "specific" exceptions, stating: "Contracting Parties may, in their domestic legislation, provide for specific limitations or exceptions to the rights and protection guaranteed in this Treaty, as regards: ..." There is not a general obligation in other copyright or related rights treaties that limitations and exceptions be "specific." Indeed, Article 10(3) of the Marrakesh Treaty Article specifically recognizes the authorization to implement exceptions "specifically," "other limitations or exceptions, or a combination thereof," which "may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses." A similar affirmation of the ability to adopt open general exceptions, like fair use and fair dealing, should be included in the Broadcast Treaty. For example, it could provide:

“Contracting Parties may provide specific exceptions to broadcasting protections, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties’ rights and obligations under this or other international treaties.”

### *Removal of the three step test*

The three-step test should not be applied in the context of a broadcasting treaty. The Draft of the Treaty includes the most confining version of the three-step test - requiring that countries “shall confine” limitations and exceptions. *Compare* Article 10(1) of the WCT, 16(1) of the WPPT and 9(2) of the Berne Convention (“Contracting Parties may, in their national legislation, provide”).

The three-step test is not appropriate for broadcast regulation. As Professor Hugenholtz notes (<https://digitalcommons.wcl.american.edu/research/84/>):

“While the test has become a staple article in international treaties on copyright and neighboring rights, it is not immediately evident why it would be appropriate in the present treaty. First, the Rome Convention, on which much of the present text is built, does not include a similar test. Second, the alternative approaches towards signal protection expressly validated under Article 9 depart from the rights-based model on which the three-step test is grounded.”

Under TRIPS, broadcasters exceptions are covered by Article 14.6, where no three-step test is used. The proposed Broadcasting Treaty would thus be the first international treaty to impose the three-step test as confining countries’ ability to make exceptions for broadcasting restrictions. The three-step test should be removed from the third draft.

### *Missing exceptions from other treaties*

The list of permitted exceptions in Article 11(1) does not include all those permitted in the Rome Convention and Brussels Convention Relating To The Distribution Of Programme-Carrying Signals Transmitted By Satellite, 1974, the two most relevant international treaties. The Draft should include:

- from the Rome Convention, the exception in Article 15(1)(c) for “ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts.”
- the concept, in Article 15(2) of the Rome Convention, that “compulsory licences may be provided” to the extent to which they are compatible with the treaty as a whole.
- from the Brussels Convention Article 7, a provision on abuse of monopoly: “This Convention shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.”
- reference to the Agreed Statement concerning Article 10 of the WIPO Copyright Treaty: “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in

the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”

*Removed exception for technological protection measures*

The First draft contained one advance in international law on limitations and exceptions. The first draft stated:

“Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent third parties from enjoying content that is unprotected or no longer protected, as well as the limitations and exceptions provided for in this Treaty.”

This provision was based on the Agreed Statement to Article 15 of the Beijing Treaty. The mandatory provision in the First Draft obliged contracting states to ensure that anti-circumvention protection does not prevent users from enjoying public domain content or benefiting from limitations and exceptions. The mandatory TPM exception promoted the Development Agenda Recommendations, including:

16. Consider the preservation of the public domain within WIPO’s normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.
17. In its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries and LDCs.
19. To initiate discussions on how, within WIPO’s mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO.

The removal of the provision on exceptions for technological protection measures is a step backward for the public interest and the cause of promoting access to knowledge within the intellectual property system. The removed Article 12(3) should be returned in the Third Draft.

**Agenda item 8: Other matters**

**Proposal for Analysis of Copyright Related to the Digital Environment White Paper**

The Access to Knowledge Coalition supports the agenda item for a White Paper on Digital Copyright. We encourage the Committee to adopt a work plan for this issue similar to the Committee’s work plan for the L&E agenda that provides a process to move the agenda forward. The process for the issue of copyright in the digital environment may include intersessional work, such as a holding a meeting of experts or members to review research and policy options and begin drafting of principles, objectives and options for consideration by the Committee.

Any analysis on fair remuneration for authors, artists and performers should take into account the impact on the ecosystem of access to culture and knowledge on the Internet. Proposed solutions (especially those proposing mandatory remuneration rights) should

include exceptions for public interest uses, including uses by educational platforms, repositories, digital libraries and other non-profit sharing spaces. At the same time, the making available of works or fixations published under free licenses or not protected by copyright must not be affected.

### **Proposal for a Study Focused on the Public Lending Right**

Our members generally oppose spending valuable SCCR time on consideration of Public Lending Rights (PLR), meaning requirements that public libraries pay fees for the non-commercial lending of books and other works in their collections. PLR schemes only occur in a small number of countries concentrated in Europe, Australia, Canada, Israel and New Zealand, for example, and many of these schemes operate as part of state cultural policy, not copyright. In fact, due to the principle of national treatment, a copyright-based PLR scheme would mean payment of fees to foreign authors, as well as domestic. For developing countries this could mean payment of significant royalties to authors and publishers in the Global North. Therefore another forum that has a broad cultural policy remit, such as UNESCO, is a more appropriate forum to examine this topic. See [IFLA](#), [Latin American Civil Society Alliance for Fair Access to Knowledge](#), [EIFL Information note on the conflict between the Public Lending Right and national treatment under international copyright law](#).

*This statement was endorsed by the following members of the A2K Coalition:*

Article 19 Mexico and Central America Regional Office

Association for Recorded Sound Collections (ARSC)

Australian Libraries and Archives Copyright Coalition

Biblioteca y Ruralidad

Canadian Association of Research Libraries

Centrum Cyfrowe

COMMUNIA

Creative Commons

Creative Commons Italy

Centre for Internet and Society, India

Data and Society Laboratory (Datysoc, Uruguay)

Derechos Digitales (Latin America)

Education International (EI)

EIFL (Electronic Information for Libraries)

Electronic Frontier Foundation

Global Expert Network on Copyright User Rights

Educati

Hiperderecho

Innovarte

Instituto Brasileiro de Direitos Autorais (IBDAutotal)/Brazilian Copyright Institute

Intellectual Property Institute (IPI)

International Council on Archives (ICA)

International Federation of Library Associations and Institutions (IFLA)

IP Justice

ISUR (Rosario University, Colombia)

Karisma Foundation

Knowledge 21

Knowledge Ecology International (KEI)

Library Copyright Alliance (LCA)

Open Access India

Public Knowledge

R3D: Red en defensa de los derechos digitales

Society of American Archivists

Software Preservation Network (SPN)