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BRIEFING NOTE: 45TH MEETING OF THE WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

*Sean Flynn*¹

ABSTRACT

This analysis provides a historical and legal overview of the principle agenda items to be discussed at the 45th meeting of the Standing Committee on Copyright and Related Rights.

¹ JD Harvard Law School (Magna Cum Laude) 1999, Director and Professorial Lecturer, Program on Information Justice and Intellectual Property (“PIJIP”), American University Washington College of Law. This note draws on the work of many others who have been following and commenting on the agenda items of the WIPO SCCR for many years. A special note of thanks and attribution is due to Knowledge Ecology International and its Director James Love, who has been reporting on and analyzing the work of the SCCR from a public interest perspective since the birth of the Committee. Professor Flynn serves as counsel to the Access to Knowledge Coalition of organizations who benefit from limitations and exceptions to copyright and is Chair of the Global Expert Network on Copyright User Rights (“User Rights Network”). The views in this Note of the author’s alone. They are influenced by his work with the A2K Coalition and User Rights Network, but do not represent the positions of either group.

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EXECUTIVE SUMMARY

This note provides a historical and legal analysis of the three principle agenda items for the 45th Meeting of WIPO's Standing Committee on Copyright and Related Rights. There are several additional agenda items on the "other matters" section of the agenda, but in recent meetings none of those have generated substantial discussion in the Committee.

Agenda item 5: Protection of broadcasting organizations

The critical problem with the The treaty is justified as a piracy treaty. The intent is to protect broadcasters from signal interception. The two most pressing issues involve whether the treaty will focus on "traditional" broadcasting, or also extend to Internet-based "webcasting," and whether the treaty will enact IP-like exclusive rights, or only require "signal-based" prohibitions of signal theft. In 2006, during the construction of the Development Agenda, the General Assembly took a position on both of these issues and voted to limit the treaty to broadcasting "in the traditional sense" and to follow a "signal-based" approach. The current draft, however, continues to apply on its face to webcasting and follows a rights-based approach.

Agenda items 6 and 7: Limitations and exceptions

At SCCR 44, the African Group presented a Draft Proposal for the Implementation of the Work Program on Exceptions and Limitations (SCCR/44/6). The Implementation proposal includes a specific process for paragraph 4 of the Work Program toward the adoption of an instrument on objectives, principles and options on three priority areas identified by the Committee. The SCCR 44 Chair's Summary calls for the Secretariat to consult with member states on "a detailed implementation plan for the Work Program on Exceptions and Limitations." To date, such a plan has not been published on the SCCR 45 website. The Secretary was also called upon to hold an information session on cross border uses of copyrighted materials in education and research.

Proposal for Analysis of Copyright Related to the Digital Environment.

GRULAC proposed in SCCR 43 that Copyright Related to the Digital Environment become a standing agenda item (SCCR/43/7). The proposal was discussed in SCCR 44. The proposal focused exclusively on copyright and remuneration for music in the digital environment, with focus on artist remuneration in streaming platforms and for user generated content. Other delegations urged that the proposal be broader, including a proposal by Group B to include copyright and artificial intelligence. GRULAC pledged to propose a work plan for the item in SCCR 45.

ANALYSIS

I. DEVELOPMENT AGENDA RECOMMENDATIONS

The work of the SCCR implicates key provisions of the Development Agenda Recommendations which are supposed to guide all norm setting activities at WIPO. SCCR's agenda especially implicates recommendations concerning promoting developmental uses of limitations and exceptions and protection of the public domain.²

II. AGENDA ITEM 4: PROTECTION OF BROADCASTING ORGANIZATIONS

A. *Historical background*

One of the leftover items from the Diplomatic Conference of the 1996 Internet Treaties (WCT and WPPT) is a proposal to enact updated international norms on the protection of broadcasting organizations, often defined to include "cablecasting" and sometimes to "webcasting".³ Until 2006, the definition included webcasting and the negotiation was considering a rights-based approach. In part out of public interest advocacy in the period, and the increased attention to the Development Agenda, the 2006 General Assembly voted to limit the treaty to broadcasting "in the traditional sense" and to follow a "signal-based" approach. There has been increased pressure to conclude the treaty in the last few years. Almost all countries support concluding the treaty -- but only based on a "signal-based" approach. Public interest organizations criticize the current drafts as not being signal-based and extending beyond broadcasting in the traditional sense.⁴

² See The 45 Adopted Recommendations under the WIPO Development Agenda:

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.

³ On the history of the discussions regarding the broadcasting treaty see, e.g., Love, James, "The Trouble With the WIPO Broadcasting Treaty" (2023). Joint PIJIP/TLS Research Paper Series. 85. <https://digitalcommons.wcl.american.edu/research/88>. P. Bernt Hugenholtz, Groundhog Day in Geneva: The WIPO Broadcasting Treaty is on the Agenda Once Again. American University International Law Review Symposium on the Right to Research in International Copyright Law, (2) (2023), [Microsoft Word - The WIPO Broadcasting Treaty revisited.docx \(ivir.nl\)](#).

⁴ See, e.g., Access to Knowledge (A2K) Coalition, Comments on the Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty (SCCR/43/3) WIPO SCCR June 16,

B. SCCR 44 Conclusions

The SCCR [Chair's Summary](#) recorded that there will be a new revised Draft Text for the WIPO Broadcasting Organizations Treaty for SCCR 45. The Summary repeats the “common understanding amongst the Committee that any potential treaty should be narrowly focused on signal piracy, should not extend to any post-fixation activities and that it should provide member states with flexibility to implement obligations through adequate and effective legal means.” (Para 8). The Summary identifies “three main remaining decision points of this agenda item”:

1. Whether there should be a minimum level of protection for transmissions over computer networks; and if so, what kind and level of protection.
2. The scope of programme-carrying signals to be protected by any treaty, specifically pre-transmission access, catch-up (transmission of “stored programmes”) and pre-broadcast signals.
3. Striking the right balance concerning the approach to limitations and exceptions.

The Chair's summary notably did not identify as a remaining issue whether the Treaty should continue to follow a rights-based approach modeled on the Rome Convention, rather than the signal-based approach of the Brussels Convention, despite the 2006 mandate. It is also unclear why the Committee continues to consider text beyond broadcasting and cable casting in the “traditional sense” as required by the 2006 GA decision.

As promised in the Chair's summary, a new revised Draft Text for the WIPO Broadcasting Organizations Treaty was released on February 15, 2024: document SCCR/45/3. This text made modest changes and did not substantively address the three open issues identified above.

C. Application to transmissions over computer networks (“webcasting”)

Despite the 2006 GA mandate that the Treaty focuses on “traditional” broadcasting and cablecasting, the Committee continues to consider language that would apply the treaty to transmissions conducted entirely over computer networks. Including such transmissions forces difficult definitional questions. The 2006 GA agreed:

“The objective of this Conference is to negotiate and conclude a WIPO Treaty on the protection of broadcasting organizations, including cablecasting organizations. The scope of the Treaty will be

2023,
https://www.eifl.net/system/files/resources/202306/comments_a2k_coalition_sccr43_3.pdf.

confined to the protection of broadcasting and cablecasting organizations in the traditional sense.”⁵

Recent drafts of the treaty have radically departed from the 2006 mandate. As James Love describes, in the current draft (1) “very broad categories of information transmissions are defined as broadcasting and broadcast programmes, including information not disseminated through traditional radio or television mediums,” and (2) “point-to-point transmissions,” for example an email, text or call, “as opposed to point-to-multipoint transmissions, are inappropriately considered broadcasting.” Love has proposed specific changes needed to the scope and definitions to remedy these problems and return to the goal of covering only broadcasting and cablecasting “in the traditional sense.”⁶

D. Restricting the Scope of Protection to Signal Piracy

There is an expressed consensus, including in the 2006 GA decision and in the statements of the Chair and numerous member states at SCCR 44, that the Treaty should “be narrowly focused on signal piracy,” and “signal-based”.⁷ Calling for a signal-based treaty is meant to clarify that “the treaty should not be ‘rights-based,’ that is, grant exclusive rights in broadcasts similar to copyright,” and rather be focused on “the prevention of theft or piracy of pre-broadcast signals.”⁸

The primary example of an entirely signal-based treaty is the Brussels Convention Relating To The Distribution of Programme-Carrying Signals Transmitted By Satellite, 1974. The Brussels Convention is an anti-piracy treaty, not an exclusive rights treaty. It has no language requiring or promoting exclusive rights. It is a short and simple treaty that requires in its most relevant part (in Art 2) that each Contracting State “undertakes to take adequate measures to prevent the distribution on or from its territory of any

⁵ WO/GA/33/10.

⁶ James P. Love, Comments on the September 6, 2023 Draft of a WIPO Broadcasting Treaty, the Definitions, Scope of Application, National Treatment and Formalities, Joint PIJIP/TLS Research Paper Series No. 110 (2023), <https://digitalcommons.wcl.american.edu/research/110>.

⁷ WO/GA/33/10, para 107 (“It is understood that the sessions of the SCCR should aim to agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection”). See, Opening Statement of the African Group, in Sean Flynn and Izquierdo, Andres, “Excerpts of SCCR 44 Delegate Statements” (2023). Joint PIJIP/TLS Research Paper Series. 116 <https://digitalcommons.wcl.american.edu/research/116> (expressing support for “a signal-based framework based on a balanced approach that enhances the protection of the international system of broadcasting organisations and at the same time provides the necessary and appropriate [limitations] and exceptions to the right protection”).

⁸ Congressional Research Service, WIPO Treaty on the Protection of Broadcasting Organizations, RS22585 (January 26, 2007), <https://www.everycrsreport.com/reports/RS22585.html> (explaining the views of stakeholders with concerns about the Treaty).

programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.” The current Chair’s Text of the Broadcast Treaty continues to be based on the Rome Convention model, which is an exclusive rights treaty. The Draft Broadcast Treaty sets a number of exclusive rights as the default, with language primarily drawn from the Rome Convention. The treaty permits other regulatory approaches by virtue of Article 10. But Article 10 is an alternative approach. The thrust of the Treaty is to promote exclusive rights -- which were expanded in recent drafts to include an exclusive right of fixation and deferred transmission (Art 7 and 8). [SCCR/43/3](#)

The use of an exclusive rights model causes many of the public interest problems identified by beneficiaries of user rights and frustrates the objective of concluding a treaty with the consensus of all member states. The core problem is that using exclusive rights, rather than regulatory prohibitions on piracy, creates new obligations to license uses from a new entity. A broadcaster, for example, would have the right to refuse (or demand a license for) a recording of the signal, even to use the content for a purpose (such as quotation) which copyright permits. Returning to a pure signal-based treaty with no exclusive rights, as Professor Hugenholtz has recommended with specific textual amendments, would solve many of these problems.⁹

E. Limitations and Exceptions

Recording or retransmitting broadcasts are essential for many important public interests, including in research, education and preservation of cultural heritage.¹⁰ Currently, all the limitations and exceptions in the Draft are permissive, meaning a country could implement the treaty to require permission from a broadcaster for the use of broadcasted content, even if copyright would permit the same use (e.g. for quotation, etc.). The current Chair’s Draft lacks many of the limitations and exceptions in the Rome

⁹ See Hugenholtz, Bernt, "Simplifying the WIPO Broadcasting Treaty: Proposed Amendments to the Third Revised Draft" (2023). Joint PIJIP/TLS Research Paper Series. 111. <https://digitalcommons.wcl.american.edu/research/111>;

¹⁰ 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.

Convention and Brussels Convention,¹¹ and fails to include the digital rights provisions in the Agreed Statements to the 1996 WIPO Internet Treaties.¹² Professors Hugenholtz and Flynn have proposed new provisions on limitations and exceptions that would remedy these problems.¹³

The first draft contained one advance in international law on limitations and exceptions, which has been removed. The first Chair's Draft proposed for the first time to require limitations and exceptions to ensure that technological protection measures do not prevent uses permitted by copyright.¹⁴ This provision was based on the Agreed Statement to Article 15 of the Beijing Treaty.¹⁵ This exception was removed from the Second Draft and has not been added back or subject to debate in the Committee. It has not been explained by the Chair why this provision was deleted.

¹¹ E.g. Rome Convention Article 15(1)(c) (for “ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts”); Article 15(2) (“compulsory licences may be provided” to the extent to which they are compatible with the treaty as a whole); Brussels Convention Article 7 (“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.”).

¹² 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”

¹³ Bernt Hugenholtz, *Simplifying the WIPO Broadcasting Treaty: Proposed Amendments to the Third Revised Draft*, Joint PIJIP/TLS Research Paper Series No. 111 (2023), <https://digitalcommons.wcl.american.edu/research/111>; Bernt Hugenholtz, *The WIPO Broadcasting Treaty: Comments on the Second Revised Draft*, Joint PIJIP/TLS Research Paper Series No. 84 (2023), available at <https://digitalcommons.wcl.american.edu/research/84>; James Love, *The Trouble With the WIPO Broadcasting Treaty*, Joint PIJIP/TLS Research Paper Series No. 85 (2023), available at <https://digitalcommons.wcl.american.edu/research/88> (video); Sean Flynn, *Limitations and Exceptions In Second Revised Draft Text Of The Broadcast Treaty*, InfoJustice Blog (Mar. 6, 2023), <https://infojustice.org/archives/45112>. Flynn, Sean and Alvarenga, Miguel, “Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty, Annotated” (2023). Joint PIJIP/TLS Research Paper Series. 85. <https://digitalcommons.wcl.american.edu/research/85>

¹⁴ The first draft stated in Article 12:

“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.”

¹⁵ “Agreed statement concerning Article 15 as it relates to Article 13: It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law”

III. AGENDA ITEMS 5 AND 6: LIMITATIONS AND EXCEPTIONS

A. *Historical background*

One of the strategies animating the Development Agenda -- to shift toward a positive agenda of pro-development norm setting -- resulted in a standing agenda item on limitations and exceptions in the SCCR added in 2006.¹⁶ Before the adoption of the Marrakesh Treaty, the Committee considered wide-ranging instruments on limitations and exceptions for multiple purposes, including two full treaty proposals by the African Group.¹⁷ The disability issues in the proposals became the basis for the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled in 2013. While that Treaty was being advanced, the 2012 WIPO General Assembly endorsed the recommendation of the committee “to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms),” on the other issues, namely limitations and exceptions for libraries, archives, museums, educational and research institutions and persons with other disabilities.¹⁸ The agenda produced numerous drafts of potential texts for international instruments between 2012-2018.¹⁹ Progress toward terms of an international instrument halted between 2018-2020 while the Secretariat managed an “action plan” of regional meetings and conferences, reports, and a “toolkit”

¹⁶ The original proposal to create the L&E agenda was submitted by Chile at the 13th meeting of the SCCR in November 2005 (SCCR/13/5), and made a standing agenda item of the committee at SCCR 15 in 2006. See A2K Coalition, *A Short History of the Limitations and Exceptions (L&Es) Agenda at WIPO*, https://docs.google.com/document/d/17SMfcIyYPyCBZ_LaLx-Uih4pm1YGuBlfhNE_YvYSjiU/edit?usp=sharing.

¹⁷ SCCR/16/2, Brazil, Chile, Nicaragua, Uruguay; SCCR/20/11; SCCR/22/12, African Group. These proposals were often modeled in part on a 2005 proposal for an “Access to Knowledge Treaty” developed by CPtech/KEI, <http://www.cptech.org/a2k/a2k-debate.html>, which drafted at the time the Development Agenda was being actively considered in WIPO. See also Flynn, Sean, “Limitations and Exceptions in International Copyright and Related Rights Treaties” (2023). *Joint PIJIP/TLS Research Paper Series*. 86.

<https://digitalcommons.wcl.american.edu/research/86>

¹⁸ WO/GA/41/14.

¹⁹ The proposals included principles, objective and options for international instruments on libraries and archives (SCCR/23/8; SCCR/24/8; SCCR/26/3, consolidation), and on educational, teaching and research institutions (SCCR/24/7, Brazil; SCCR/24/6, Ecuador, Peru and Uruguay; SCCR/26/4, consolidation). The United States proposed instruments on objectives and principles for libraries and archives (SCCR/26/8) and on educational, teaching and research institutions (SCCR/27/8). In 2014, at SCCR29, the African Group, Brazil, Ecuador, India and Uruguay proposed texts for discussion around the eleven topics SCCR/29/4), which became the basis of two documents of the chair. SCCR/34/5 (,LAMs); SCCR/34/6, (education). Argentina made a proposal for provisions allowing for works to be used across borders (SCCR/33/4).

on preservation.²⁰

In SCCR 43, the African Group successfully proposed that the SCCR return to norm drafting through a “work program” on “priority issues”²¹ producing “objectives, principles and options”²² of an international instrument in whatever form.²³ At SCCR 44, the African Group presented a Draft Proposal for the Implementation of the Work Program on Exceptions and Limitations. [SCCR/44/6](#) The Implementation proposal includes a specific process for paragraph 4 of the Work Program toward the adoption of an instrument on objectives, principles and options on three priority areas identified by the Committee.²⁴

*B. SCCR 44 Conclusions*²⁵

The Chair’s Summary records agreement to request that the Secretariat undertake two key actions before SCCR 45.

- First, “the Secretariat should before the next SCCR organize a virtual panel discussion, using a case study approach, on cross-border uses of copyrighted works in the educational and research sectors, open to all member states as well as observers.”

²⁰ See SCCR/37/7 (“action plans”).

²¹ The priority areas in the work program are:

- 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.

²² “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.”

²³ “Proposal By African Group for A Draft Work Program On Exceptions And Limitations, adopted by Committee” (SCCR/43/8).

²⁴ SCCR 44/6, Para 5, proposes that the establishment of “working groups of Member States to prepare draft objectives, principles, and (implementation) options with respect to the three priority issues, and that “the Secretariat shall summarize the various objectives and principles relevant to the priority issues that have previously been presented to the SCCR.”

²⁵ For a short history of the L&E agenda, see A2K Coalition, A Short History of the Limitations and Exceptions (L&Es) Agenda at WIPO, https://docs.google.com/document/d/17SMfcIyYPyCBZ_LaLx-Uih4pm1YGuBIfhNE_YvYSjiU/edit?usp=sharing

- Second, “the Secretariat should present at the next SCCR a detailed implementation plan for the Work Program on Exceptions and Limitations taking into account comments from member states made at this SCCR session. The Secretariat should consult member states on a draft version of this implementation plan before presenting it at the next SCCR.”

C. Cross-border information session

To date, the Secretary has not announced the date or agenda of the information session on cross-border uses of copyrighted works. Civil society groups have published examples of cross-border uses of copyrighted materials for public interest uses.²⁶ PIJIP has also held private workshops of legal experts on cross border uses of copyrighted materials for research purposes and has begun a process of drafting principles for international law and policy on the topic.²⁷

D. Work Program on Exceptions and Limitations

The African Proposal was discussed in an informal session. As recorded above, the Committee approved a request to the Secretariat to take the next step in proposing, and consulting on, a new implementation plan for the Work Plan adopted by the Committee.

i. Examples of Objectives, Principles and Options

There are ample proposals of language for objectives, principles and options that could be used to begin consideration of a text. As described below, the US has offered a set of “Objectives and Principles” for libraries, archives and museums. Several of the previous SCCR documents contain principles, objectives and options for an international instrument and

²⁶ See IFLA Report, “Copyright & cross-border challenges in preservation: empirical evidence”.

<https://www.ifla.org/news/ifla-report-copyright-cross-border-challenges-in-preservation/>; PIJIP Developmental and Cross Border Uses of Copyright Limitations and Exceptions, <https://docs.google.com/document/d/1EM30DB2jM44qhjtktH3eaFp1Z0wgMEhiSoXYSJRfo7I/edit?usp=sharing>; EI, Higher Education in the International Digital Economy: Effects of Conflicting Copyright Regimes on Cross-Border Teaching <https://www.ei-ie.org/en/item/28031:higher-education-in-the-international-digital-economy-effects-of-conflicting-copyright-regimes-on-cross-border-teaching>; EIFL, The Internet is global - but copyright exceptions stop at the border. Why we need an international treaty for cross-border access to knowledge.

²⁷ Participants at PIJIP’s workshop included: Martin Senftleben, University of Amsterdam; Mike Carroll, American University; Mireille van Eechoud, University of Amsterdam; Christophe Geiger, Luiss Guido Carli University; Ruth Okediji, Harvard Law School; Marketa Trimble, William S. Boyd School of Law; Henning Grosse Ruse-Khan, Cambridge University; Thomas Margoni, KU Leuven; Arul Scaria, National Law School of India; Margo A. Bagley, Emory University; Chidi Oguamanam, University of Ottawa; Fred Abbott, Florida State University; Anthony Taubman, WTO TRIPS Division; Faith Majekolagbe, University of Alberta Faculty of Law; Jerome Reichman, Duke University.

domestic policy.²⁸ Civil Society groups have also published several models.²⁹

ii. Form of instrument

The Work Program is intended to further the mandate of the General Assembly “to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms)” on libraries, archives, museums, education, research and people with disabilities. [WO/GA/41/14](#). The African Group and many countries support developing a binding international treaty.³⁰ Group B has generally opposed any work toward a binding international instrument, but accepted the Work Program’s process to work on “principles, objectives and options.” One accepted model of non-binding legal instrument within WIPO is a Joint Recommendation.³¹ A Joint Recommendation may have language that is very similar to a treaty, including “shall” clauses. Some member states, including the EU, entered the Marrakesh Treaty negotiations committed only to endorsing a document as a Joint Recommendation, but later adopted the treaty.

iii. Intercessional work

Despite the Committee’s adoption of the Work Program, including Paragraph 4’s call for work “between SCCR meetings,” some delegations, in particular the U.S., continue to oppose intercessional work by delegates. The Chair has long organized intercessional working groups to advance the Broadcast Treaty negotiations and has been producing texts between rounds to advance the negotiations. Advancing the L&E agenda toward an

²⁸ See SCCR Chairs Charts SCCR/26/8

https://www.wipo.int/edocs/mdocs/copyright/en/sccr_26/sccr_26_8.pdf, SCCR/27/8
https://www.wipo.int/edocs/mdocs/copyright/en/sccr_27/sccr_27_8.pdf, and SCCR/34/5
https://www.wipo.int/edocs/mdocs/copyright/en/sccr_34/sccr_34_5.pdf; SCCR/34/CHART ON LIBRARIES AND ARCHIVES,
https://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_chart_on_libraries_and_archives.pdf;

SCCR/34/CHART ON EDUCATION AND RESEARCH,
https://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_chart_on_education_and_research.pdf; SCCR/29/4 (consolidation of texts 2014).

²⁹ See Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives (2009), developed by IFLA, EIFL and Library Copyright Alliance (LCA), <https://www.ifla.org/publications/statement-of-principles-on-copyright-exceptions-and-limitations-for-libraries-and-archives-2009/>

³⁰ See Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives, Proposal by the African Group (2011); Sean Flynn & Andres Izquierdo, "Excerpts of SCCR 44 Delegate Statements", Joint PIJIP/TLS Research Paper Series No. 116 (2023), <https://digitalcommons.wcl.american.edu/research/116> (quoting statements).

³¹ See, e.g. Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.

instrument that could be adopted by the Committee may be a prerequisite for progress on the Broadcast Treaty if countries resist advancing the latter without sufficient progress on the former. At SCCR 44, the primary intercessional work -- the creation of an implementation plan -- was assigned to the Secretariat.

E. US Principles and Objectives

In SCCR 44, the US tabled a revised version of its previously released Objectives and Principles for Exceptions and Limitations for Libraries and Archives ([SCCR/26/8](#)). One question for the Committee is whether to integrate consideration of the U.S. Objectives and Principles within the Work Program adopted by the Committee.

We offer the following substantive comments on the US proposal that derive from expert review of the draft:

1. SCCR 44/5 lacks a definition of “objectives” and “principles” and does not include “options.” The following definitions could be used:
 - a. An objective is a broad goal, such as “to encourage countries to xyz.”
 - b. A principle is a more defined purpose against which specific provisions of a law or instrument could be measured, such as “All exceptions for research uses should apply to sharing of works between researchers for collaboration.”
 - c. An option is a specific text of a domestic or international instrument, which could be a treaty, joint recommendation, or model law, such as “It shall be permissible to ...”
2. If the above definitions are adopted, the document could add a separate “Preamble” category that could include some of the current “principles” that fail to state a norm against which a law or instrument could be measured. For example, the first principle in the document states that “Exceptions and limitations, which are an integral part of national copyright systems, play a critical role in enabling” the work of LAMS. This is more of a preamble statement than a principle.
3. While it may make sense to limit the application of the Objectives, Principles and Options to public service and public interest activities, the term “non-commercial” is quite vague. For example, many laws permit libraries and archives to charge for copies and still take advantage of public interest exceptions.³² “Non-profit”

³² Canada Copyright Act 29.3 (“(1) No action referred to in section 29.4, 29.5, 30.2 or 30.21 may be carried out with motive of gain. (2) An educational institution, library, archive or museum, or person acting under its authority does not have a motive of gain

may sometimes be a better term. Note, however, that allowing commercial uses -- and thereby enabling competition -- may be very much in the public interest. The US uses a concept of open to the public rather than commercial or non-profit.³³

4. The principles currently do not address protections of exceptions from being overridden by contracts.³⁴ This issue is helpfully addressed in the Scoping Study On The Practices And Challenges Of Research Institutions And Research Purposes In Relation To Copyright prepared by Professor Raquel Xalabarder ([SCCR 44/4](#)).

F. Study on the Challenges of Research Institutions and Research Purposes

Professor Raquel Xalabarder's Study was subject to comments to the Secretariat through January 12, 2024. PIJIP submitted comments that were informed by several meetings with experts and stakeholders.³⁵

IV. AGENDA ITEM 7: OTHER MATTERS, PROPOSAL FOR ANALYSIS OF COPYRIGHT RELATED TO THE DIGITAL ENVIRONMENT

A. Historical background

The SCCR has had two major agenda items -- Broadcast, and Limitations and Exceptions -- since 2006. A series of other issues have been added to the agenda under an "other matters" item that is normally scheduled for the final day. In the last several SCCR meetings, only one of the other matters -- GRULAC's Proposal for Analysis of Copyright Related

where it or the person acting under its authority, does anything referred to in section 29.4, 29.5, 30.2 or 30.21 and recovers no more than the costs, including overhead costs, associated with doing that act").

³³ 17 U.S. Code § 108 (applying specialized exception to collections of a library or archives that "are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field").

³⁴ On the overridability of user rights, see, e.g., Lucie Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (2002) digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1066&context=scholarly_works. See also, Band, Jonathan. "Protecting User Rights Against Contract Override," PIJIP/TLS Research Paper Series no. 97. <https://digitalcommons.wcl.american.edu/research/97> (providing a compilation assembling "the copyright override prevention clauses adopted in 48 countries over the past 30 years")

³⁵ See Comments on the Scoping Study On The Practices And Challenges Of Research Institutions And Research Purposes In Relation To Copyright prepared by Professor Raquel Xalabarder (SCCR 44/4) <https://docs.google.com/document/d/1ZMEfn2RwiIRxARVDaUgMASYSK2mUDTUsbOjs37b-KWs/edit?usp=sharing>

to the Digital Environment -- has drawn the most considerable discussion. The other items tend to generate no discussion in the SCCR.

B. Proposal for Analysis of Copyright Related to the Digital Environment

The Proposal for Analysis of Copyright Related to the Digital Environment was originally submitted in 2015 by the Group of Latin American and Caribbean Countries (GRULAC) in SCCR 31 ([SCCR/31/4](#)). That original proposal called for three “areas of work to be discussed”: legal frameworks, discussion of the role of companies, and “management of copyright” to respond to concerns about low remuneration. GRULAC submitted a revised document in SCCR 43 ([SCCR/43/7](#)) focused exclusively on copyright and remuneration for music in the digital environment and requested that the issue be made a standing agenda item.³⁶ Each Proposal focuses on the problem of the growth of on-demand services, including in user-generated content, which has raised revenues for distributors, but has been accompanied by declining revenue for some artists.

i. SCCR 44 Conclusions

As reflected in the Chair’s Summary, at SCCR 44 the Secretariat described the Information Session on music streaming market held at SCCR 43, and offered: “The Secretariat stands ready to prepare a more detailed report of the information session.” (Para 20). Some members commented that the GRULAC proposal’s focus on music was too narrow. Group B tabled a Proposal for an Information Session on Generative AI and Copyright ([SCCR/44/8](#)). GRULAC and other members “suggested including the topic under Copyright in the Digital Environment.” Summary para 23. GRULAC endorsed “treating a wider range of topics” under the item and committed to “table a workplan on Copyright in the Digital Environment at the next committee meeting.” (Para 21).

ii. Remuneration in the Digital Environment

The 2023 GRULAC Proposal focuses on the plight of musicians in the streaming environment. It points to problems in market power and concentration, which are well documented.³⁷ This market power enables

³⁶ GRULAC “proposes the inclusion of the initiative, presented to become as a separate item, on the Agenda of the Standing Committee on Copyright and Related Rights and instruct the WIPO Secretariat to make proposals, searching effective and fair solutions to secure authors and performers’ rights in the digital environment.” (Para 8).

³⁷ The three major record labels control almost 70% of the world market and control almost 60% of the song rights. The four largest streaming platforms have 70% of the subscriptions in the world. Acceso Justo al Conocimiento: Alianza de la Sociedad Civil Latinoamericana. Documento de posición sobre remuneración a las personas autoras, artistas, intérpretes y ejecutantes en el entorno digital. <https://accesoalconocimiento.lat/2023/10/23/documento-de-posicion-sobre-remuneracion-a-las-personas-autoras-artistas-interpretes-y-ejecutantes-en-el-entorno-digital/>

large labels and distributors to contract with artists at low remuneration rates.³⁸

The Proposal calls attention to the policy solutions of harmonizing rights “to place artists, musicians and singers, rights holders in the musical arts, including traditional arts, on an equal footing.” It also expresses an interest in exploring rights to fair remuneration within international or domestic copyright law “to achieve fair remuneration for the use or exploitation of musical performances, remuneration that cannot be abrogated by contracts.” (Para 8).³⁹

Remuneration is often seen as a regulation of contract which some delegations (e.g. the U.S.) assert to be outside the province of copyright. To date, regulating contracts and remuneration do not feature in international copyright, “except for a few complicated rules on copyright ownership of cinematographic works in the Berne Convention.”⁴⁰ A number of countries, including the members of the EU, have begun including fair remuneration rights in Copyright law. These laws reflect the truth that “the lawmaker can seek to reduce the exposure [of creators] “to market forces and adopt measures that strengthen the position of creators vis-à-vis the creative industry.”⁴¹

³⁸ Para 7 (“there have been many complaints, since, faced with the risk of being left without remuneration, they have had to accept the producers' offer, signing real contracts of adhesion, which, in many cases, exacerbate relations, benefiting content aggregators or other intermediaries, but not the rights holders”). For a presentation linking the concerns of the GRULAC proposal to analysis of digital music economies, see Mariana Valente, University of St Gallen, Switzerland / InternetLab Brazil. [The GRULAC proposals and their legal aspects](#). See also UNESCO, VIALMA (Guillaume Descottes et al), Revenue distribution and transformation in the music streaming value chain (2022) [2-policy_perspectives_music_en-web.pdf \(unesco.org\)](#) (providing that “While music rights holders are collectively being remunerated more than ever before, the (re)distribution of revenue in the music streaming value chain remains extremely uneven and opaque”)

³⁹ On the discussion of the right to remuneration in the South African Copyright Amendment Bill, see Forere, Malebakeng Agnes. Reforming the Right to Remuneration in the South African Copyright Amendment Bill. (2021) PIJIP/TLS Research Paper Series no. 67. <https://digitalcommons.wcl.american.edu/research/67>.

⁴⁰ Hugenholtz at 468 (citing Art. 14bis(2) Berne Convention).

⁴¹ Martin Senftleben, More Money for Creators and More Support for Copyright in Society—Fair Remuneration Rights in Germany and the Netherlands, 41 (3) Columbia Journal of Law & the Arts (2018), <https://journals.library.columbia.edu/index.php/lawandarts/article/view/2020>. See EU CDSM Recital 72 (expressing the motivation for EU remuneration rules that “Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law”). See also Bernt Hugenholtz, *Regulating creator’s contracts under the DSM Directive. What we can learn from the Dutch*. <https://drive.google.com/file/d/1ACe8iPHpiC3R78MSGUcUeD74h6omL1fC/view?usp=sharing>; European Copyright Society, Comment on the Implementation of articles 18-22

1. Nonwaivable rights to remuneration

Nonwaivable rights to remuneration give the individual artist a right to be remunerated for uses of their work regardless of whether the economic rights have been sold to a label or other distributor. Legislation of this variety is in effect in Spain and is being considered in Uruguay. The value of such rules is that even if the artist signs away their copyright to a label under unfavorable terms, they will still have a right to a share of the revenue from streaming uses of their works.

2. Fairness of remuneration

The law can also permit artists to challenge contracts with unfair remuneration terms. Royalty rates granted by the major labels largely follow the pre-digital era rates.⁴²

“In 2002, an example of this kind of legislation (an Act on Copyright Contract Law) entered into force in Germany. This legislation confers upon authors a right to fair remuneration (in their contractual relationships with exploiters of their works) besides the grant of traditional exploitation rights. By virtue of § 32(1) of the German Copyright Act (Urheberrechtsgesetz; UrhG), as amended by the 2002 Copyright Contract Act, authors have the right to demand the modification of a contract about a work’s exploitation that fails to provide for a fair remuneration.”

The most recent Copyright Directive in the EU mandates that member countries adopt a right of creators to “appropriate and proportionate remuneration” (Art. 18) and enable contract adjustments to give “additional, appropriate and fair remuneration” in cases of “disproportionately low” payment (“bestseller rule”) (Art. 20).

Legislation guaranteeing fair remuneration contracts is being considered currently in South Africa.

3. Transparency of remuneration

Another frequent complaint of artists is that they do not have the means to know how much revenue their works create and what share of revenue they receive from those uses. This is especially true with regard to services where the revenue is created through advertising. One solution recently included in the EU Copyright in the Digital Single Market Directive, is to require that “authors and performers receive on a regular basis ... relevant

CDSM Directive, available at:

https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf; IViR, Study on Remuneration of authors and performers for the use of their works, European Commission, 2015, available at: <https://www.ivir.nl/publicaties/download/1593.pdf>

⁴² Susan Butler, Inside the Global Digital Music Market, Standing Committee on Copyright and Related Rights, Forty-first Session, Geneva, June 28 to July 1, 2021, https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_2.pdf.

and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights ... in particular as regards modes of exploitation, all revenues generated and remuneration due.” Art. 19. The transparency obligation is designed to enable enforcement of the fair remuneration and “best-seller” rights under Articles 18 and 20. Transparency may also include a window into the algorithms used by streaming services to prioritize and recommend authors. The need to promote transparency in remuneration has been reviewed by WIPO experts⁴³ and called for by member state delegations.⁴⁴

4. Performers rights

A third problem in the music industry is that many musicians are performers who do not hold copyright -- only the songwriter has copyright. Without performers’ rights, musicians who play songs written by others do not receive any right to a portion of the royalty that may be due to the songwriter. There is an international treaty on performers’ rights -- the Beijing Treaty.

5. Reversion and retention

A final set of policies that may promote more just compensation and rights holding among authors are those that require that authors retain or can receive back their rights after transferring them to a distributor.

Rights retention policies are designed primarily to ensure that authors of scientific works retain rights to freely distribute their works through open-access platforms even after transferring copyright to a publisher. The policies may be tied to government funding, as in the US.⁴⁵ Retention policies do not normally extend to musical works.

Reversion rights refer to the ability of a creator to call back their assignments of rights, which may be for a lack of effective marketing of their work or after a period of time. Article 22 of the EU CDSM is an example of the former, requiring that authors and performers be able to revoke assignments of their rights “where there is a lack of exploitation of that work or other protected subject matter.” US law allows original creators to revoke their assignments or licensing of copyrights 25 years after the

⁴³ See Susan Butler, INSIDE THE GLOBAL DIGITAL MUSIC MARKET, Standing Committee on Copyright and Related Rights, Forty-first Session, Geneva, June 28 to July 1, 2021, https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_2.pdf.

⁴⁴ See SCCR 39/8, 2019 at 65 (“The Delegation of Brazil (...) recognized and affirmed the need to respect contractual freedom and privacy and noted that while respecting freedom and privacy, it was possible to identify minimum patterns and transparency gaps that would provide an insight into the structure of the market”)

⁴⁵ See White House, OSTP Issues Guidance to Make Federally Funded Research Freely Available Without Delay <https://www.whitehouse.gov/ostp/news-updates/2022/08/25/ostp-issues-guidance-to-make-federally-funded-research-freely-available-without-delay/> (“to make publications and research funded by taxpayers publicly accessible, without an embargo or cost”).

execution.⁴⁶ The South African Copyright Amendment Bill proposes ending assignment automatically after 25 years, with no need for the author to petition for the revocation.

There are several possible elements of a work plan that flow from the analysis above. They could include:

1. The Secretariat could prepare a report on the results of the Information Session that was held on the music streaming market at SCCR/43, including identification of problems in the remuneration system from the perspective of creators and small publishers and identifying policy solutions implemented at the national level.⁴⁷ The report could be requested to include a draft work plan on the issue for consideration by the Committee, similar to that required in the L&E agenda.
2. The agenda item be expanded to include a broader range of copyright in the digital environment issues, including copyright and artificial intelligence as requested by Group B.
3. As in the L&E agenda, a set of priority issues could be identified to begin work, including, for example, remuneration for digital music uses and copyright and artificial intelligence.
4. A goal of the work plan could be to prepare for committee work toward an international instrument in whatever form, beginning with a process of drafting objectives, principles and options similar to the planned outcome of the L&E agenda.

⁴⁶ US Copyright Act Sec. 203.

⁴⁷ The SCCR 44 Chair's Summary notes that "The Secretariat stands ready to prepare a more detailed report of the information session." (Para 20).

APPENDIX: CHANGES BETWEEN THE SEPTEMBER 2023 DRAFT TEXT (SCCR/44/3)
AND THE FEBRUARY 2024 DRAFT TEXT (SCCR/45/3) OF THE WIPO
BROADCASTING ORGANIZATIONS TREATY⁴⁸

Article 1

Added in 45/3:

(2) Nothing in this Treaty shall interfere in the obligations of Contracting Parties under the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done in Marrakesh, June 27, 2013.

Article 2

Definition of “broadcasting” removed, and of “broadcasting organization” expanded

44/3:

(a) “broadcasting” means the transmission by any means, including by wire or wireless means, for reception by the public of a programme-carrying signal; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(e) “broadcasting organization” means the legal entity that takes the initiative and has the editorial responsibility for broadcasting, including assembling and scheduling the programmes carried on the signal; the programmes of a broadcasting organization form a linear programme-flow

45/3:

(a) “broadcasting organization” means the legal entity that takes the initiative and has the editorial responsibility for the transmission, by any means, of a programme-carrying signal for reception by the public, including assembling and scheduling the programmes carried on the signal; the programmes of a broadcasting organization form a linear programme-flow;

44/3:

(h) “stored programmes” means programmes, for which a broadcasting organization has acquired the transmission right with the intention of including them in its linear transmission, or which have originally been transmitted by a broadcasting organization, which are kept by the original broadcasting organization in a retrieval system, from which they can be transmitted for the reception by the public, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them.

45/3:

⁴⁸ This section was provided by PIJIP Counsel Jonathan Band.

(g) “stored programmes” means programmes, for which a broadcasting organization has acquired the transmission right with the intention of including them in its linear transmission, or which have originally been transmitted in a linear transmission by a broadcasting organization, which are kept by the original broadcasting organization in a retrieval system, from which they can be transmitted for the reception by the public, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them. The programmes may have been produced by a third party or by or on behalf of a broadcasting organization.

Article 5

44/3:

(1) A Contracting Party shall accord to broadcasting organizations that are nationals of other Contracting Parties the treatment it accords to the broadcasting organizations that are its own nationals with regard to the rights and the protection provided for in their domestic legislation.

45/3:

(1) A Contracting Party shall accord to broadcasting organizations that are nationals of other Contracting Parties the treatment it accords to the broadcasting organizations that are its own nationals with regard to the rights and the protection provided for in this Treaty.

Article 8 Transmission of Stored Programmes

44/3:

Broadcasting organizations shall enjoy a right to prohibit the unauthorized acts referred to in Articles 6 and 7 in respect of the transmission to the public by any means of the programme-carrying signal used when they provide access to the public to their stored programmes, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them.

45/3:

Broadcasting organizations shall enjoy a right to prohibit the unauthorized acts referred to in Articles 6 and 7 in respect of the transmission to the public by any means of the programme carrying signal used when they provide access to the public to their stored programmes, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them. This right of broadcasting organizations shall be applicable for a certain period of time from the original linear transmission of a stored programme, to be determined by the domestic legislation of each Contracting Party.

Article 10

44/3:

(3) Such means shall provide for the broadcasting organizations effective legal means enabling them to prevent the unauthorized or unlawful uses of their signal under Articles 6 to 9 of this Treaty.

45/3:

(3) The means referred to in paragraph (2) shall provide for the broadcasting organizations effective legal means enabling them to prevent the unauthorized or unlawful acts of use of their signals under Articles 6 to 9 of this Treaty

44/3:

(4) The notification referred to in paragraph (1) shall contain information on the relevant means of protection listed under paragraph (2). The notification shall be accompanied by a list of the relevant national laws and regulations and the titles and addresses of the appropriate authorities.

45/3:

(4) The notification referred to in paragraph (1) shall contain information on the relevant means of protection listed under paragraph (2). The notification shall be accompanied by a list of the relevant national laws and regulations and the titles and addresses of the appropriate authorities. Any changes in the relevant laws, regulations and procedures shall be notified without undue delay.