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Sean Flynn

American University Washington College of Law, sflynn@wcl.american.edu

Andres Izquierdo

American University Washington College of Law, andres@wcl.american.edu

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WIPO GENERAL ASSEMBLY 65TH: ISSUES AFFECTING THE RIGHT TO RESEARCH

Sean Flynn and Andrés Izquierdo¹

ABSTRACT

This paper provides background and options for countries to consider in relation to items on the agenda of the 65th meeting of the WIPO General Assembly. It is prepared by the Project on Copyright the Right to Research of the Program on Information Justice and Intellectual Property, which includes the goal of sharing information and technical assistance to governments in international policy deliberations that impact the rights of scientific researchers in the digital context. The work of the WIPO General Assembly Agenda includes several matters that impact the rights of researchers. These include review of the work and recommendations of the Standing Committee on Copyright and Related Rights (SCCR), Committee on IP and Development (CDIP), and Conservations on IP and Artificial Intelligence.

¹ Sean Flynn, JD Harvard Law School (Magna Cum Laude) 1999, Director and Professorial Lecturer, Program on Information Justice and Intellectual Property (“PIJIP”), Project on Copyright and the Right to Research, American University Washington College of Law; Andrés Izquierdo, PIJIP’s Senior Research Analyst

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SCCR

The Standing Committee on Copyright and Related Rights is the most relevant WIPO Standing Committee to the interests of researchers as it crafts and helps countries implement rules on copyright law. The most recent GA mandates to the SCCR include to develop a treaty on “the protection of broadcasting organizations, including cablecasting organizations,”² and the development of an “appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms)” on limitations and exceptions for libraries, archives, museums, educational and research institutions and persons with other disabilities.³ “Other items” on the WIPO GA 2024 SCCR’s agenda include the broad issue of copyrights in the digital environment, which is not subject to any GA mandates. Although the Committee’s report does not call for any GA decisions,⁴ there are several aspects of the SCCR’s work that

² WO/GA/33/10, Para. 107, WIPO General Assembly, Thirty-Third Session, Geneva, 2006. See also WIPO Press Release PR/2006/460 at

https://www.wipo.int/pressroom/en/prdocs/2006/wipo_pr_2006_460.html

³ WO/GA/41/14, Para. 19 “The Committee agreed to recommend to the WIPO General Assembly that the SCCR continue discussion to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms), with the target to submit recommendations on limitations and exceptions for libraries and archives to the General Assembly by the 28th session of the SCCR” and para 23 “The Committee agreed to recommend to the WIPO General Assembly that the SCCR continue discussion to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms), with the target to submit recommendations on Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons with Other Disabilities to the General Assembly by the 30th session of the SCCR.” at

https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_41/wo_ga_41_14.pdf

⁴ The SCCR’s Committee Report to the GA on the Broadcast Treaty is brief, advising that it will “consider during the 46th Session whether to recommend, or not, that the WIPO General Assembly convene a diplomatic conference.” at

https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_57/wo_ga_57_3.pdf (noting that the

would benefit from GA guidance and could impact the interests of researchers.

1. BROADCAST TREATY

It is widely believed that the SCCR will work toward a recommendation for the GA for a diplomatic conference on the broadcast treaty in 2025. Broadcasts of audio and visual materials are used by researchers and cultural heritage institutions in myriad ways, including for cultural preservation, media monitoring, and scientific, cultural and historical research.⁵ It could be useful for the GA to clarify the scope of the Broadcast Treaty it will accept for a diplomatic conference recommendation, including its limitations and exceptions.

A. Mandates that the Broadcast Treaty be “signal-based” and confined to “traditional” broadcasting.

The 2006 General Assembly approved of a Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations “confined to the protection of broadcasting and cablecasting organizations in the traditional sense,” and “on a signal-based approach.”⁶ But the special sessions that the

issue of protecting broadcasters has been on the agenda of the SCCR from the Committee’s inception in 1998, that the last meeting discussed and provided inputs on a “Chair’s Draft WIPO Broadcasting Organizations Treaty” (document SCCR/45/3)).

⁵ 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.

⁶ WO/GA/33/10, Para. 107

https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_33/wo_ga_33_10.pdf (“(i) The General Assembly approves the convening of the Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations under the conditions set out in paragraph (iv) below from November 19 to December 7, 2007, in Geneva. 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 confined to the protection of broadcasting and cablecasting organizations in the traditional sense. ... (iv) Two special sessions of the Standing Committee on Copyright and Related Rights to clarify the outstanding issues will be convened, the first one in January 2007, and the second one in June 2007 in conjunction with the meeting of the preparatory committee. 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 with a view to submitting to the Diplomatic Conference a revised basic proposal, which will amend the agreed relevant parts of the Revised Draft Basic Proposal referred to in paragraph (ii). The Diplomatic Conference will be convened if such agreement is achieved. If no such agreement is achieved, all further discussions will be based on document SCCR/15/2.”).

GA called for failed to agree to a base instrument.⁷ The 2007 GA accordingly “decided [to] consider convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved” in the regular meetings of the SCCR.⁸

The SCCR is close to concluding a basic instrument for a diplomatic conference recommendation that does not adhere to the 2006 GA mandate. Many delegations support the language of the GA that mandates that the treaty be restricted to a “signal-based” approach applicable to “traditional” broadcasters.⁹ An expert for the Committee commented in SCCR 45 that “after 17 years there are varying views as to whether the mandate is still relevant and valid,” but “because the general assembly has not [adopted] any mandate superseding that of 2006 and 2007, ... the view is that mandate is still relevant and applicable.”¹⁰ The Chair’s draft discussed in SCCR 45 includes several exclusive rights provisions (it is not signal-based)¹¹ and the Chair’s last summary expresses his view that the Treaty may extend to Internet-originated content, not only traditional broadcast.¹² Accordingly, it would be useful for the Assembly to clarify whether it still supports a diplomatic conference only if it is restricted to a signal-based approach applicable to traditional broadcasting.

⁷ Conclusions, of the Second Special Session of the SCCR on the Protection of Broadcasting Organizations, 18-22 June 2007,

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_www_79838.pdf

(“concluding that “it would not be possible to reach an agreement on the objectives, specific scope and object of protection with a view to submitting to a diplomatic conference a revised basic proposal as mandated by the General Assembly”).

⁸ WO/GA/34/16, Para. 228, WIPO General Assembly, Thirty-Fourth (18th Ordinary) Session, Report adopted by the Assembly, “The General Assembly: ... (v) decided that the subject of broadcasting organizations and cablecasting organizations be retained on the agenda of the SCCR for its regular sessions and consider convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved.”

⁹ Ghana, representing the African Group (AG), supported a “signal-based approach” that acknowledges broadcasters’ roles in disseminating information and rewarding creativity, advocating for an instrument that protects broadcasting rights while ensuring public access to knowledge. Iran advocated that the work of the committee should adhere to the 2007 General Assembly mandate focusing on broadcasting organization of “traditional sense”, meaning a signal-based approach. See document at WIPO General Assembly Sixty-Fourth, Day 5 Morning at https://webcast.wipo.int/video/A_64_2023-07-12_AM_120145

¹⁰ See Sean Flynn, James Love and Jonathan Band, *Whither A Signal-Based Broadcast Treaty? Wipo Negotiators Appear Prepared To Approve A Draft Broadcast Treaty That Is No Longer “Signal-Based” Or Limited To “Traditional” (Non-Internet-Based) Broadcasting.*, Infojustice.org, (Apr 18, 2024). (showing how the Draft Broadcasting Treaty goes beyond its original focus on traditional broadcast signal interception. This could lead to granting new exclusive rights to webcasters, diverging from initial mandates and raising concerns about its impact on copyright and internet content.)

¹¹ 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 (providing in Art 2 that each Contracting State “undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal ... for whom the signal ... is not intended”).

¹² *Supra* note 9

B. Limitations and exceptions to broadcast rights

The GA could also provide guidance on the limitations and exceptions provisions of the treaty. The SCCR 45th Chair's Summary notes that one of the points of disagreement on the Broadcasting Treaty involves its limitations and exceptions. The current draft promotes giving broadcasters exclusive IP-like rights, but does not mandate that exceptions for copyright, such as for quotation, apply to broadcast signals. Nor does the draft mandate any exceptions, including for research, cultural heritage or any other purpose.¹³ The GA could clarify an obligation of the SCCR on these matters.

2. LIMITATIONS AND EXCEPTIONS WORK PROGRAM

The 2024 GA provides a useful opportunity to update the mandate of the SCCR on limitations and exceptions. In 2012, the GA approved of the SCCR's recommendation that the Committee on limitations and exceptions for libraries, archives, museums, educational and research institutions, and for persons with disabilities other than visual impairments.¹⁴ Although it is clear under the operative rules of WIPO that the 2012 mandate of the GA is still active, some countries have claimed that it does not bind the committee "work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms)" any longer. It therefore may be useful to re-adopt or clarify the 2012 GA mandate to work toward an instrument. This is particularly important if there is an intent to balance any progress toward and instrument on broadcast, which is very advanced, with a product on limitations and exceptions.

The GA could also instruct the SCCR to accelerate work toward the drafting of such an instrument. In SCCR 43 (2022), the SCCR adopted a "work program" to craft provisions of an international instrument on

¹³ See Sean Flynn, *Limitations and Exceptions in Second Revised Draft Text of the Broadcast Treaty*, <https://infojustice.org/archives/45112> (proposing mandatory exceptions similar to copyright (e.g., quotation, accessibility for the visually impaired), changing "may" to "shall" in Article 11(2) to align broadcast rights with copyright exceptions, enabling discretion in Article 11(3) for national legislation, expanding exceptions in Article 11(1) to include references from treaties like Rome and Brussels Conventions (ephemeral fixation, compulsory licenses, etc.), and incorporating modern exceptions from recent agreements (balance promotion, data mining research, contract override protection))

¹⁴ WO/GA/41/14, Para. 19 and 23 (endorsing 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 limitations and exceptions for libraries, archives, museums, educational and research institutions and persons with other disabilities) at https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_41/wo_ga_41_14.pdf

“priority issues.”¹⁵ The work program includes that “[t]he Chair should advance information sharing and consensus building ... between SCCR meetings through processes ... 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.”¹⁶ An option for the GA could be to instruct the SCCR to begin the intersessional process approved in its work plan on L&E, for example by adopting aspects of the African Group’s Draft Proposal for the Implementation of the Work Program on Exceptions and Limitations [SCCR/44/6](#).¹⁷

3. COPYRIGHT IN THE DIGITAL ENVIRONMENT

A final issue in the SCCR that could impact researchers concerns the item in “other matters” on Copyright and the Digital Environment. This agenda item is still in flux. An original proposal from GRULAC was expansive, and included discussion of adapting L&Es to the digital environment, which could be useful for research interests. Currently, the agenda appears focused on (i) the copyright and AI and (ii) fair remuneration for artists (especially musicians) in light of new business models (such as streaming platforms).¹⁸ It would be useful to the interests of researchers if the GA instructed that this agenda item include the issue of adapting L&Es to the digital environment, such as through cross border uses of computational research methods relying on digital training materials.

4. SCCR MEETING SCHEDULE

From the beginning of the SCCR in 1998 until the COVID pandemic, the SCCR always met twice or more per year. During COVID, all normative work ceased and the Committee began meeting once a year. Since the end of COVID, debate over how many meetings should be held

¹⁵ SCCR/43/8 REV, Proposal By African Group for A Draft Work Program On Exceptions And Limitations, adopted by Committee, para 2 (defining priority areas for an instrument to include “preservation activities of libraries, archives, and museums, including the use of preserved materials”; “the adaptation of exceptions to the online environment”; and “review implementation of the Marrakesh Treaty and how to ensure that people with other disabilities ... can benefit from similar protections”) at https://www.wipo.int/edocs/mdocs/copyright/en/sccr_43/sccr_43_8_rev.pdf

¹⁶ *Id.* Para. 4

¹⁷ 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.”

¹⁸ SCCR/45/4, Draft Work Plan on Copyright in the Digital Environment submitted by the Group of Latin American and Caribbean Countries (GRULAC) (proposing to address the challenges faced by artists and performers in securing their copyright and related rights in the digital environment. It calls for discussions and studies within WIPO's SCCR on issues like transparency in digital content distribution, AI's impact on copyright, equitable remuneration frameworks, and the protection of audiovisual works.) https://www.wipo.int/edocs/mdocs/copyright/en/sccr_45/sccr_45_4.pdf

has consumes valuable time in the Committee. This year, the Committee is meeting only once. The GA could resolve this issue and mandate that the SCCR resumes to two meetings a year without a change by the GA.

CDIP

The Committee on Development and Intellectual Property (CDIP) is relevant to researchers in its promotion of projects promoting, and supervising the implementation of, the recommendations of the World Intellectual Property Organization (WIPO) Development Agenda (2007).¹⁹ Many of the Development Agenda recommendations promote uses of copyright limitations and exceptions to promote development goals.²⁰

1. BALANCE IN CDIP PROJECTS

The GA could mandate a better balance in the projects that the CDIP manages. The CDIP's recent work has consisted largely of proposing and reviewing projects that study uses of IP exclusionary rules to promote Development Agenda related goals. Very few projects have focused on copyright limitations and exceptions.²¹ This GA could instruct the CDIP to pursue a more balanced project portfolio with equity between studying developmental impacts of IP exclusionary rules and of uses of limitations and exceptions.

2. DEVELOPMENT AGENDA IMPLEMENTATION

The GA could also require the CDIP to take a more active role in guiding norm setting and other priorities of the Development Agenda. Brazil and GRULAC countries have proposed a new direction for the

¹⁹ The Development Agenda recommendations were adopted by the 2007 WIPO Assemblies, see background document at <https://www.wipo.int/ip-development/en/agenda/background.html>. Initial proposal was submitted by Argentina and Brazil, on behalf of the Group of Friends of Development, at 2004 WIPO General Assembly, calling for the establishment of a WIPO Development Agenda, see at WO/GA/31/11, p. 1. at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf.

²⁰ See WIPO, References to Flexibilities in Development Agenda Recommendations (last visited Apr 29, 2024), https://www.wipo.int/ip-development/en/agenda/flexibilities/flex_dev_agenda.html. (The Development Agenda contains 45 recommendations to enhance the development dimension of the Organization's activities. "Key among these are recommendations focused on enhancing the understanding and use of flexibilities in the intellectual property (IP) system.")

²¹ One recent project provides a useful counter example. The Committee approved a project to study enabling computational research with copyrighted materials in a selection of African countries, CDIP/30/9 REV. "The overall objective of the project is to increase awareness, provide networking opportunities and build capacities to use TDM in research projects undertaken by universities and other research-oriented institutions in Africa, in order to facilitate the use of AI tools." WIPO CDIP 30th, at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_30/cdip_30_9_rev.pdf

CDIP’s work on guiding norm setting.²² Many countries have also called for the CDIP to improve its work monitoring, assessing, and reporting on the implementation of the Development Agenda by pertinent WIPO bodies.²³

CONVERSATIONS ON ARTIFICIAL INTELLIGENCE

Artificial intelligence operations use the same computational research methods as scholars. Researchers therefore have an interest in ensuring that regulation of the use of materials to train commercial artificial intelligence do not unduly restrict research uses.

Artificial intelligence issues have been addressed by a wide variety of WIPO sectors. Member state led processes have occurred at the Standing Committee on Patents²⁴ the SCCR,²⁵ the Advisory Committee on

²² See Opening Statement by Brazil at the 31st WIPO CDIP Calls for Following UN Family’s Goals, Dec 5, 2023, at <https://infojustice.org/archives/45521> (“The central element of the development agenda was and still is the norm-setting one, not technical assistance and cooperation, though important these may be.”). See also GRULAC Opening Statement at CDIP 32, Infojustice, at <https://infojustice.org/archives/45712> (Brazil making similar call on behalf of all GRULAC countries).

²³ See, e.g., Carolyn Deere-Birkback, Ron Marchant *The Technical Assistance Principles of the WIPO Development Agenda and their Practical Implementation (ICTSD Programme on IPRs and Sustainable Development, March 2010)*, p. 11,

https://www.files.ethz.ch/isn/115434/deere_marchant_new2.pdf (noting that “the General Assembly urged the CDIP to develop a coordination mechanism for monitoring, assessing, and reporting on the implementation of recommendations.”); Nirmalya Syam, “Outcomes of the Nineteenth Session of the WIPO Committee on Development and Intellectual Property: A Critical Reflection”, Policy Brief No.40 (Geneva, South Centre, June 2017), p. 2, https://www.southcentre.int/wp-content/uploads/2017/06/PB40_Outcomes-of-the-Nineteenth-Session-of-the-WIPO-Committee-on-Development-and-Intellectual-Property_EN.pdf. (“In their general statements, developing countries stressed ... the effectiveness of the coordination mechanism between the CDIP and other relevant WIPO bodies through the General Assembly”).

²⁴ Report of the sharing session on the use of artificial intelligence (AI) for examination of patent applications, Document prepared by the Secretariat, SCP, WIPO, 2022, at https://www.wipo.int/edocs/mdocs/mdocs/en/scp_34/scp_34_4.pdf. (The Standing Committee on Patents began addressing the topic on SCP34, and during SCP35 a series of presentations took place, including a study developed by the SCP Secretariat addressing the current concerns and challenges that AI is bringing to the current Patent international and national system). See also Artificial Intelligence (AI) and Inventorship, Document prepared by the Secretariat, Standing Committee on the Law of Patents, Thirty-Fifth Session, October 16 to 20, 2023.

²⁵ At SCCR 44, Member States decided to explore AI in the context of copyright. The Chair’s Summary noted: “25. In light of the plenary discussion on copyright in the digital environment and the growing impact of artificial intelligence (AI) on the creative industries, the Committee invites the Secretariat to organize an information session on the opportunities and challenges raised by generative AI as it relates to copyright.” This led to an information session on generative AI and copyright at SCCR 45 (SCCR/45/8). Chair’s Summary of SCCR 44 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_44/sccr_44_summary_by_the_chair.pdf.

Enforcement,²⁶ and CDIP.²⁷ WIPO staff driven processes incoming AI include projects by the Alternative Dispute Resolution team,²⁸ and a group of WIPO divisions that launched an AI program to support SMEs,²⁹ and the WIPO IP and Frontier Technologies Division's eight AI public sessions and a recently published an AI policy toolkit.³⁰

The GA could consider a new standing committee on IP and AI to oversee all of these disparate processes, ensure that they all remain subject to member governance, and serve as a forum for consideration of international instruments on the topic. The GA could also consider reviewing the subjects of the conversations on IP and AI and giving guidance on the topics that should be considered in the future.

²⁶ WIPO, Artificial Intelligence and Intellectual Property Rights Enforcement, Contribution, 2024, at https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_16/wipo_ace_16_15.pdf; and WIPO, Artificial Intelligence in the Music Industry: its use by Pirates and Right Holders, 2024 at

https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_16/wipo_ace_16_15.pdf

²⁷ *Id.* note 20, CDIP/30/9 REV.

²⁸ WIPO Alternative Dispute Resolution (ADR) Services starting offering a framework to address AI-related disputes such as a dispute between “an online music dataset provider and an online platform over the unauthorized use of the dataset for training the platform’s AI tool,” or a dispute over the “incorporation of a book into a Generative AI platform” and the subsequent claim that the resulting output was an original creation.

<https://www.wipo.int/amc/en/center/specific-sectors/artificial-intelligence/#ai01>

²⁹ The IP for Business Division (IPBD), the Division for Arab Countries (DAC), and the IP and Frontier Technology Division (IPFT). Countries include Bahrain, Egypt, Jordan, Kuwait, Morocco, Oman, Saudi Arabia, Sudan, Tunisia, UAE. This project is supported by the Funds-In-Trust Japan Industrial Property Global. Intellectual Property (IP) Management Clinic (IPMC) Supporting SMEs from the Arab Region in the Area of Artificial Intelligence (AI), September 26, 2023,

https://www.wipo.int/sme/en/news/2023/news_0023.html.

³⁰ Getting the innovation Ecosystem Ready of AI, An IP Policy Toolkit, WIPO, 2024, at

<https://www.wipo.int/edocs/pubdocs/en/wipo-pub-2003-en-getting-the-innovation-ecosystem-ready-for-ai.pdf>. (The toolkit offers guidance on protecting AI innovations, considering AI as a potential inventor: “As AI is becoming more autonomous, policymakers will have to consider when AI may be considered as an inventor under IP law.”). See also summaries

of the second, third and sixth Sessions at https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_3_ge_20/wipo_ip_ai_3_ge_20_inf_5.pdf; and

https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_3_ge_20/wipo_ip_ai_3_ge_20_inf_5.pdf