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**Report: World Intellectual Property Organization
(Prepared by Bill Maher)**

The attached report was prepared by William J. Maher, SAA's representative to the World Intellectual Property Organization (WIPO)'s Standing Committee on Copyright and Related Rights (SCCR) meeting held in Geneva, Switzerland, November 21 – December 2, 2011.

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REPORT OF SOCIETY OF AMERICAN ARCHIVISTS OBSERVER

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0 EXECUTIVE SUMMARY:

The World Intellectual Property Organization (WIPO)'s Standing Committee on Copyright and Related Rights (SCCR) is the body authorized to draft language for international treaties on copyright. The agenda for the 23rd Session of the SCCR included multiple days dedicated to preliminary discussions of proposals for an international treaty to provide library and archives exceptions to copyrights. With funding from the Alfred P. Sloan Foundation, the Society of American Archivists commissioned Past-President William J. Maher to attend the 23rd meeting of the SCCR in Geneva to serve as an official Non-Governmental Organization (NGO) Observer of the proceedings and to provide a formal presentation to the SCCR. The following report provides a general account of the SCCR.

The background to the SCCR's consideration of library and archives exceptions is far-reaching, the number of individuals and organizations involved in moving the issue to this point is considerable, and the array of conditions determining how its members behave is extensive even if not always very apparent. Furthermore, deliberations within SCCR are unlike those of many other professional, academic, or policy-making bodies. Accordingly, the following report is necessarily detailed, and may even seem tedious to some. Thus, the reader's patience is needed. Even if the day-to-day and hour-to-hour unfolding of the meeting may seem rather unimportant, understanding how SCCR 23 arrived at its rather dramatic, within the context of SCCR, conclusions is essential to knowing SAA's part in the process and the conditions it needs to keep in mind to determine any future role it may wish to play in these matters. Those with limited time, might wish to start by examining sections 7.2, "Observations on the Closing Session," and 8.0, "Lessons for SAA."

1.0 BASIC CHARACTERISTICS OF SCCR: Those who have followed developments in copyright over the past two decades, especially at the international level, might imagine that deliberations at WIPO's Geneva headquarters include dramatic happenings on important matters. While what delegates do in Geneva is important to the content of treaties that WIPO member states must ultimately implement, attendance as the SAA's NGO observer at SCCR 23 from November 21 through December 2, 2011 revealed that things proceed at such a glacial pace that movement on actions that matter is quite subtle. The drama lies elsewhere, on a very different scale, and once understood on its own terms, is indeed important.

Nevertheless, deliberations of the SCCR are important because it is the body in which issues of copyright policy are examined. The Committee's national delegates respond to the competing interests of copyright holders, as represented by content industry associations for publishers, broadcasters, and motion picture producers, and consumers, often represented by NGOs speaking on behalf of libraries, library users, educators, disabled persons, and the public at large. This all occurs against the backdrop of differing stages of economic development throughout the world, which means that certain countries or regional groupings of countries have a stronger stake in the content versus the consumer side of the divide while others, because of national interests in education and science, may see their national interests as closer to those of the consumer. That there are such disparities should not be a surprise to any who have thought about the past battles between the public benefits and private interests in copyright's history.

There is, however, a unique characteristic of the WIPO SCCR that makes its work on policy issues a most unusual spectacle to an outside observer. Out of deference to the legitimacy of

each national or regional governmental delegate to SCCR, the Committee only takes action based on a distinct meaning of consensus. Nothing is adopted so long as there remains at least one delegate willing to express opposition or dissatisfaction with whatever proposal is on the table. While formal votes do not appear to be taken within the Committee, it thus seems that every delegate has the ability to veto any decision or action, and this “consensus mode” can become a recipe for endless debate leading to stalemate and inaction. However, SCCR is time-bound, and as the closing day of its session arrives, it must agree to a report or statement of “Conclusions” before midnight. Given the fundamental divergence in vested interests, it should be no surprise that any unresolved disagreements over policy directions can resurface when trying to agree on the Conclusions that identify what SCCR will discuss at its next session. In the most bizarre of circumstances, if agreement on a report cannot be reached by the end of the last day, the meeting expires with the official result that its discussions never existed.

In this context, SCCR 23, especially its deliberations on issues for a possible treaty on copyright exceptions for libraries and archives, exhibited what constitute some significant achievements. This is true even though, from an objective standpoint, all that was accomplished was the submission of some library- and archives-friendly proposals, a thorough airing of reasons for and against the proposals, and an agreement to continue discussion of the proposals at the next SCCR. On this basis, the SAA was privileged to be a contributor and observer at an historic meeting even if the actual creation of draft treaty language remains for a future meeting(s). Attendance at SCCR 23 also provided several insights into how things actually work in the unique world of WIPO if SAA concludes that it should remain active in advancing a proposal for international consistency on library and archives exceptions.

2.0 CONTEXT FOR SCCR 23rd SESSION: The most immediately relevant background elements for the November meeting of the SCCR are:

- 1) WIPO adoption of a “development agenda” in 2007 “. . . to ensure that development considerations form an integral part of WIPO’s work.”¹
- 2) A SCCR-commissioned report by Kenneth Crews, *Study of Copyright Limitations and Exceptions for Libraries and Archives* was released in 2008.² Crews analyzed the laws of 149 of the 184 WIPO member states, finding wide variations in national practice and a general lack of provisions for addressing library and archives needs in the current information environment.
- 3) The November 2010 SCCR 21 meeting’s Conclusion calling for the Committee to continue working on three development-related sets of limitations and exceptions: for visually impaired persons (VIPs) , libraries and archives, and education.
- 4) The June 2011 (SCCR 22) presentation of a text by the 41-member Africa Group of a “Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives.”³ This treaty proposal was heavily influenced by a 2010 International Federation of Library Associations and

¹See: <http://www.wipo.int/ip-development/en/agenda/>

²See: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf

³See: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf

Institutions (IFLA) document entitled “Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives” (TLIB) While TLIB was focused solely on library and archives provisions, the Africa Group June 2011 proposal also sought to address the exceptions needed for visually impaired persons.

- 5) Subsequent work by IFLA to refine and develop its TLIB proposal culminating in the November 17 release of TLIB 4.1 as a joint proposal from IFLA, the International Council on Archives (ICA), Electronic Information for Libraries (EIFL) and Innovarte, a library NGO.
- 6) The addition of extra days to the SCCR schedule, effectively doubling it in length.

2.1 Schedule for SCCR 23: The overall schedule for SCCR 23 called for three days (November 21-23) to be dedicated to libraries and archives exceptions, two days (November 24-25) for Visually Impaired Persons’ (VIP) exceptions, two weekend days (eventually truncated to just Saturday November 26) for “informal” discussions of a proposal for exclusive rights in broadcasting signals, two days (November 28-29) for formal discussions of a proposed text on broadcasting rights, two days (November 30-December 1) of closed session discussions to prepare for a forthcoming diplomatic conference for a treaty for protection of audio-visual performances, and one day (December 2) to create a statement of agreed-upon “Conclusions.” This report will focus on the November 21-23 and December 2 deliberations but will mention other matters as context, since the library and archives issues kept arising throughout the two weeks.

3.0 EXCEPTIONS FOR LIBRARIES AND ARCHIVES–NOVEMBER 21-23 SESSIONS: At the outset, the requests for accreditation from five Non-Governmental Organizations for observer status were approved by the SCCR.⁴ After a few other items of preliminary business, Mexico’s Manuel Guerra Zamorro, the Chair, requested any delegates wishing to make “general statements” do so.⁵ This resulted in a substantial number of the delegates congratulating the Chair on his election to the post and commenting on what they thought important about the work planned for the two week session. These remarks were largely of the sort that commended the WIPO Secretariat for setting the agenda while also noting which issue seemed most relevant to the speaker’s vested interest. Thus, developed countries seemed to stress the importance of preparations for a diplomatic conference on audiovisual performances, and developing countries stressed the urgency for action on exceptions for VIPs or libraries and archives, and to a lesser degree the creation of rights in broadcasting signals.

⁴In addition to the SAA, the organizations included: European Dyslexia Association, French-Speaking Union of the Blind, Genetic Resources, Traditional Knowledge and Folklore International, and the Indigenous People (Bethchilokono) of Saint Lucia Governing Council.

⁵Note: throughout this report, the terms “delegates” and “delegations” are used to refer to the official representatives of the nations/member states of WIPO as well as the spokespersons of the various regional groupings of the members states (e.g. Africa Group, Arab Group, European Union) that constitute “caucuses” of members. Only delegates have the right to make statements (interventions) and formally submit proposals for considerations. Accredited NGOs have status only as “observers” and can only speak when specifically recognized by the chair, normally in a portion of a meeting set aside for receiving NGO comments.

In a move generally not anticipated by the consumer-oriented NGOs, the chair concluded the morning by calling for general statements by NGOs. Thereupon, a number of the rights-holder organizations (e.g., International Association of Publishers (IAP), Motion Picture Association of America (MPAA), and International Association of Scientific, Technical & Medical Publishers (STM)) made statements congratulating the chair on his election and expressing hopes that SCCR 23 would advance the cause of culture and development through proposals that ensured that authors and creators had the protections of copyright. If they mentioned the need for exceptions and limitations at all, it was largely in contrast to their perception that a strong copyright regime inherently supported learning and development through a business model that enabled the companies represented by these associations to reach consumers. Others noted the voluntary efforts of their members to distribute scientific texts to the developing world, e.g. via STM's Research4Life and Outreach Program. The user/consumer group interventions in the general comments came from the World Blind Union, Knowledge Ecology International, University Center for Intellectual Property, and Internet Society. Insofar as the call for general comments were largely pro forma and insofar as we already had targeted remarks prepared for our particular issues, the NGOs representing archives and libraries deemed it best to defer our interventions to where they would be more germane to the Committee's actual work.

3.1 Introduction of Text on Library and Archives Exceptions: When the afternoon session convened, the Chair called upon Brazil to present what became called a "Background Document" (i.e., it had no formal standing as draft language that would have to remain on the agenda of this or future SCCR meetings). The document was basically the substance of the IFLA consortium's TLIB 4.1 suggestions for treaty language. Although the Chair had not yet given the national delegates an opportunity to comment on the Brazil "Background Document" or on the still pending Africa Group Proposal from SCCR 22, he invited IFLA to provide answers to questions posed from the representative of the Africa Group. This gave a small battery of IFLA speakers the opportunity to make formal statements on multiple aspects of the TLIB proposal.

3.2 NGO Statements on Library and Archives Exceptions: The floor was then given over to any other NGO observers wishing to speak to the issue of library and archives provisions. This was the sole opportunity that the observers from the International Council on Archives and myself for the SAA had to formally address the Committee.⁶ As soon as I delivered the SAA statement, I provided print copies to the NGO literature table where, eventually, over 110 to 120 copies were picked up by delegates and other observers.⁷

Other NGOs offering supporting comments included the Canadian Library Association, Library Copyright Alliance, Electronic Information for Librarians (EIFL.net), and Computer and

⁶See Appendix A for a copy of the ICA statement and Appendix B for the SAA statement.

⁷When, on November 28/29, there appeared a second possible opportunity to make an "intervention" (i.e., statement), I prepared a short comment to explain SAA's position on orphan works in cases where the presumed lost author actually reappears. Although the NGOs never had this second opportunity for statements, I provided over 60 print copies of the "second" statement to the literature table. I also subsequently merged these orphan works comments into the formal submission of SAA's statement made electronically to the Secretariat to form part of the permanent record.

Communications Industry Association. NGOs representing rights holders or expressing reservations or opposition included IAP, MPAA, STM, International Federation of Film Producers Associations (FIAPF),. The range of opinions in these interventions varied based on the group's specific expertise or vested interest. Thus, the library representatives stressed the need for exceptions to be able to provide access for education and preservation, especially in an era of changing technology. Publishers and other rights holders acknowledged that some exceptions might be needed but argued that these should be considered one-by-one, perhaps via national action following WIPO adoption of minimum guidelines (i.e., the "soft-law" approach) rather than a mandatory treaty. Describing its publisher members as "friends of knowledge," one of the rights holder organizations expressed the worry that the proposed exceptions would swallow the purpose of copyright—the generation of works and economic growth and destroy their business models.

3.3 Delegate Discussion and Debate on Library and Archives Exceptions: Once the NGO comments had been received there was then a succession of Latin American and African countries who praised TLIB provisions or said, without naming IFLA/TLIB, this or that library exception would be critical to development in their country. A statement from the US delegate then served as a bit of a "spanner in the works" by saying it would be submitting a "paper of objectives and principles." US argued that before SCCR could sort out the Africa Group June 2011 proposal vs. the Brazil "background document," the Committee needed to consider what should be the general guiding principles for how SCCR should proceed on the issue as a whole. The US suggestion was that these objectives and principles would then shape the development of any proposal language, and it promised to have its document ready at the beginning of the next day.

The second day started with this US submission of "Objectives and Principles for Exceptions and Limitations for Libraries and Archives."⁸ The US covered three areas—preservation, support for research and human development, and legal deposit—and in each stated a general principle and some ideas for objectives to encourage countries to adopt exceptions and limitations in their national laws. Its approach was to "encourage" (i.e., promote so-called "soft-law") rather than create mandatory treaty provisions. As an example, its section on preservation stated: "Objective: Enable libraries and archives to carry out their public service role of preserving works. Principles: Exceptions and limitations can and should enable libraries and archives to carry out their public service role of preserving works that comprise the cumulative knowledge and heritage of the world's nations and peoples."

While the US document was of a very different character than the Africa Group or TLIB proposals of specific language and provisions it had a generally constructive effect of eventually allowing discussion of the articles in the Africa Group proposal and the Brazilian background document. It also provided a way of getting around the persistent efforts of the a few other delegates to prevent a discussion of the Africa Group proposal by a filibuster of detailing provisions of their own laws, something seemingly unnecessary given the work already done in the Crews report.

The discussion of the US document also had the effect of opening up a general procedural debate as to whether the mandate from the November 2010 meeting (SCCR 21) required the Committee

⁸See: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_4.pdf

to move beyond discussion of general principles and instead engage in “text-based” discussions (i.e., develop specific language to be put into a treaty). In general, countries divided on this process matter according to whether their economic interests were closer to the user community (developing nations) or the copyright-holder community (US, EU, Canada, or Japan). The Chair’s efforts to resolve this procedural dispute, by proposing that a comparative table be prepared to show differences among the documents in parallel columns, only resulted in the discussion circling back to the substance of the proposed exceptions. Fortunately, after allowing ample time for voicing of conflicting views, the Chair declared an agreement on the use of a comparative table as a means to organize discussion.

3.4 Delegate Debate of Issue “Clusters”: The Tuesday afternoon session therefore focused on a review of a 17-page document with parallel columns showing what the Secretariat’s staff had determined were the four “competing” proposals (Africa Group, Brazil Background Paper, US Objectives and Principles document, and Brazil, Ecuador, and Uruguay). Nevertheless, it seemed that those who wanted to forestall any movement continued to quibble with what was in which column or cell. The advocates of a treaty on exceptions, however, were willing to acknowledge that the column representing the so-called Brazil-Ecuador-Uruguay proposal could be combined with the column showing the Brazil “Background Document.” Ultimately, the Chair and Secretariat adopted the position first voiced by a developing nation delegate that further deliberation should proceed not by columns or cells but by ten issue clusters: 1) preservation, 2) right of reproduction and supply of copies, 3) legal deposit, 4) library lending, 5) parallel importation, 6) cross-border uses, 7) retracted, withdrawn and orphan works, 8) liabilities of libraries, 9) technological protection measures (TPM), and 10) contracts.

As the Committee began discussion of the preservation cluster, the European nations filled the discussion with a country-by-country recitation of how their particular national legislation covered preservation. To an outside observer might have inferred that their message was that WIPO treaty action would be unnecessary since they had the matter covered. Of course, this overlooked the fact that the provisions they outlined were often dependent on a governmental subsidy to reimburse publishers or collective rights agencies when copying for preservation. It also overlooked the key finding of the Crews study that the current patchwork of exceptions was not a viable substitute for the uniformity and predictability needed to operate in today’s borderless electronic information environment.

The day closed with further procedural discussions over whether there should be subgroups working in parallel on each of the different clusters. Fortunately, enough delegates noted that parallel subgroups would only result in further competing proposals, and it was agreed the SCCR should continue working through the clusters one by one in plenary session.

As the last (Wednesday) of the planned three days dedicated to library and archives exceptions started, most NGO observers were skeptical that the SCCR would be able to get very far through the list of the 10 cluster topics. In the end, the Chair intervened at a few critical points to make sure the meeting discussed all ten regardless of squabbling and obstructionism from the delegates, and by the end of the day, the ten topics, plus an eleventh (translation) were covered, even though not all in much depth. Perhaps this progress was possible because the Chair had promised that all delegates would have the opportunity to provide written submissions for a midnight Friday, November 25, deadline, later supplemented by an extension into early 2012.

Once the procedural matter of extended deadlines was resolved, the Chair moved quickly to a

discussion of clusters 2-4, and much of the morning followed in the same mode as the Tuesday discussion of cluster 1: nations outlining how their particular national laws addressed the issue being proposed for a treaty. The discussion provided suggestions to add clarifying or limiting clauses to an exception (e.g., that backup copies be limited to only three) or that any work being backed up or preserved be a work that was obtained legally. When the afternoon discussion turned to the matter of library lending, the cultural and economic divide within the SCCR became quite apparent. European comments on lending emphasized the use of a fee system whereby every time a library makes a loan, a fee is assessed that then goes back to a rights management agency for distribution to authors or to some general national cultural fund. Even if the fee is paid out of government funds, some developing nations noted that this process was the exception rather than the rule worldwide and one characterized the approach as “turning our backs on the world and the development agenda.”

3.5 Technological Protection Measures: One of the more frustrating interventions during the day came in the discussion of the requests for libraries and archives to have an exception to allow circumvention of technological protection measures when engaged in otherwise non-infringing uses. The US delegate noted that US law did not include exceptions such as those anticipated in TLIB, but then he presented the convoluted and largely *ex poste facto* rule-making process provided by § 1201 (a)(1)(C) or the very limited access for acquisition purposes in §1201 (d)(1) in a way that might lead some to believe they were an alternative to as exceptions. This was unfortunate because it came across as if it were an example or perhaps a model for what countries might adopt in the way of a library and archives exception to resolve the problem of circumventing technological protection measures.

Unfortunately, the US Chapter 12 provisions are not general exceptions available under a set of general conditions, but merely the authorization for the Librarian of Congress/Copyright Office to identify specific circumstances to which its attention has been called where TPMs provide a barrier to non-infringing uses. The Chapter 12 provisions set a very high threshold and truly kick in only after an obstacle has developed to preclude normal use of a work by an archives or library. Considering the extent to which technological protection measures, such as copy protection devices, password locks, and the prohibition of reverse engineering can have a direct effect on the ability of archivists to capture and make accessible today’s documentary record, it was disappointing that there was no opportunity for a further statement from SAA on this issue to the SCCR. The misunderstanding of how TPMs create adverse impacts over the long time span common to archives was particularly apparent in the comment from another developed-world delegate, who noted: “If libraries are supposed to acquire works lawfully, then there is no need for them to circumvent the protections.” Clearly, such a presumption ignores the constantly changing dynamics of the publishing world, as well as the volatility of software used for modern office and communications purposes. Overall, this illustrates the need for SAA to develop a few choice examples of the archival problems that can arise if we are to adhere to provisions precluding circumvention of technological protections.

3.6 Orphan Works: The discussion of orphan works, a matter of particular interest to the SAA, was also troubling. Both sides discussed this only in the context of published books, with the archetype being an author writing a work, then working with an editor, and then a publisher. For example, one delegate, who was otherwise supportive of library and archives exceptions, seemed unready to accept the concept of “orphan,” noting that unlike human orphans where, once orphaned, parents would not reappear, books could have a parent (author) reappear. Needless to say, this scenario is not reflective of the kinds of orphan works that predominate in archives, but

such worries and concerns may not be surprising given the prominent place the Google Books Project can play in perceptions. A further worrisome sign was that some delegates from countries with strong authors rights/moral rights provisions had great difficulty with the possibility that an orphan work could be released without the permission of its author or heirs, thus abridging a *droit de divulgation*. The fact that such concerns were voiced by a vocal developing nation otherwise supportive of a treaty on library and archives exceptions means that substantial work will be needed to keep an orphan works provision in whatever document moves forward within SCCR. Further, the perspective I gleaned from other library and archives observers was that the moral rights matter made orphan works for unpublished materials too controversial, a virtual “third rail” that may have to be avoided if a library and archives treaty is to progress. That said, I do not think SAA should accept this perspective, unless it wants to use it as a “deal-breaker” to justify withholding its participation in future negotiations. Instead, we need to begin a multi-faceted strategy to neutralize and reframe this issue. First, while the Berne treaty does recognize, in a qualified way, some of the “moral rights” it does not include the *droit de divulgation*.⁹ Second, the SAA’s Intellectual Property Working Group (IPWG) statement on orphan works already provides a clear provision for respecting the rights of reappearing authors of orphan works, acknowledging their rights to withdraw the work or at least receive some compensation.¹⁰

3.7 Deadlines for Delegate Comments: As the afternoon progressed, the level of contention and detail diminished even though the complexity of the issues increased, and after all eleven clusters had been discussed, the Chair declared the work completed, while offering the delegates an opportunity to submit written comments against either the Friday midnight or post-SCCR 23 deadline. Reflective of the undertows of fundamental opposition to any movement toward a treaty draft, the question of whether the post-SCCR 23 deadline would be two or three months remained contentious through the remainder of SCCR 23, arising even in those times ostensibly dedicated to other issues.

Following the days formally dedicated to them, library and archives exceptions arose again during the SCCR. For example, although Monday November 28 was originally set aside to discuss rights for broadcasters, the Committee returned to the libraries and archives topic when the Secretariat distributed a 46-page “Compilation” document it had prepared combining the Africa Group Proposal and a Brazil, Ecuador, and Uruguay document from the November 22 meeting. These texts were both on right-facing pages, and on the left-facing pages were all the comments and questions from delegates on these provisions. When this compilation document was put for discussion on November 28, delegate comments were largely to correct those items that did not match their recollection of what they had said, rather than to debate the merits or faults of any provision. Most importantly, there was no attempt to reconcile conflicting

⁹See *Berne Convention for the Protection of Literary and Artistic Works*, Article 6bis: “Moral Rights: 1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author’s death; 3. Means of redress.” Available at: http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf. See also: *Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)*, Article 9, Paragraph 1. Available at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

¹⁰Reply Comment 5 in “Reply Comments by the Society of American Archivists to the Comments on Inquiry Concerning Orphan Works,” May 6, 2005. Available at: <http://www2.archivists.org/statements/response-to-statement-on-orphan-works-pdf>

comments or positions.

3.8 Digression into the Status of Library and Archives Document: Before the Tuesday meeting could begin to focus on broadcasting, controversy arose again over the library and archives provisions. Although the Chair's announcement that he would extend the deadline for written comments on the library and archives exceptions by a further month (to February 29, 2012), was well-received by those wishing more time or simply wanting to slow the process, the status of the November 29 library and archives compilation document was questioned. Of particular concern was whether the document would be given a formal number (e.g. SCCR 23/5). While in many other deliberative bodies one might take such an action as a forgone conclusion, the SCCR protocols are such that assigning the document a number elevates it to a formal status. That can be fraught with political implications because it can imply acceptance as language that would eventually be modified into text for a treaty. If a document does not become a formal agenda item, then it remains just evidence of a discussion the committee had without actually going anywhere. When this matter of rubrics is combined with the fact that SCCR proceeds entirely by the perception of consensus rather than by any voting, even such a minor act as assigning a number to a document can become a high stakes matter.

Those wishing to see a treaty develop argued that the extent of discussion and submitted comments made the library and archives proposal a *de facto* SCCR document. Those not ready to see a treaty develop argued that the mere discussion of the proposals did not make the document a text for consideration. The Deputy Secretary-General offered a compromise—the document with its current comments plus all those received by February 29 could be considered a “working document” for the next meeting of the SCCR. Unfortunately, the contending parties could not agree on that characterization and plan. They could, however, agree that they wanted to get to the broadcasting issue, so they decided to defer the question of the library and archives document's status to Friday's “Conclusions” report.

4.0 EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS (NOVEMBER 24-25): The Thursday and Friday (November 24-25) sessions focused on a “Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities.”¹¹ While not immediately related to archival issues, the so-called VIP matter has some relevance for the SAA because it illustrates the process that may eventually have to be followed if the libraries and archives provisions are to move forward to an actual treaty proposal. Stemming from concerns in the United Nations Convention on the Rights of Persons with Disabilities, some sort of a means to address the needs of the visually impaired has been on the Development Agenda, and by some reports, the World Blind Union (WBU) has been working on the issue and coming to WIPO for nearly 30 years.

While one-third of the world's countries have some copyright exceptions to allow the making of accessible copies of works, WBU estimates that only 5 percent of published books are made accessible in the richer countries and less than 1 percent in poorer countries.¹² A treaty drafted by the WBU and presented by Brazil, Ecuador, and Paraguay in 2009 would make it legal for print-disabled individuals and supporting organizations to make accessible copies of published

¹¹http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_16.pdf

¹²“Brief on WIPO Treaty,” available from link under “Right to Read” at:<http://www.worldblindunion.org/en/our-work/campaigns/Pages/default.aspx>

works in all countries.

The comments from the national delegates as well as from NGO observers on the VIP issues reflected some of the same divisions evident in the library and archives discussions. That is, developing countries expressed concern about the overall lack of an international framework for predictability and uniformity of exceptions across borders whereas developed countries stressed the need to let marketplace, technological, and national solutions guide a “soft law” approach to meeting the needs of the visually impaired.

The VIP NGO interventions, most of which were delivered by persons with visual impairment, expressed a great deal of passion and personal frustration with the lack of progress on a mechanism to make materials available. Indeed, given that many noted how their organizations represented hundreds of thousands, or even millions, of blind and visually impaired persons in their home countries or regions, the presentations tended to make the pleas of archivists and librarians look rather small. The crux of the problem needing an international solution was well explained by a representative of the French Union of Blind Persons, who noted that a blind person in France could read significant amounts of accessible books in French, but that without a treaty, the same visually accessible books could not be made available to VIPs in Francophone Africa, Quebec, or Latin America.

Although the Monday, November 28, session had been planned for formal discussions of text for the protection of broadcasting organizations, the Chair directed it to a discussion of a hybrid document on VIP exceptions. The document, prepared by the Secretariat, combined the earlier (June 2011) text with the critiques and commentaries that had been offered by delegates during the Thursday and Friday sessions or subsequently in writing. Following complaints about the lack of sufficient time to read and digest the 31-page document, the Chair led the Committee through the entire document in a one-hour afternoon session. However, the discussion was largely one of offering corrections to the recording of comments rather than reconciling differences. Eventually, it was agreed that once the comments were corrected it would be provided a formal SCCR number and placed on the agenda for the next SCCR. Clearly, this did not represent the substantive advance the VIP’s advocates were hoping for, but at least the issue would continue to be considered rather than disappearing. In WIPO SCCR terms, this constituted a victory, even if a seemingly minor one.

4.1 Concerns Arising in Consideration of the VIP Issue: Of particular note in regard to the VIP exceptions were three procedural issues. First, over the past year there had been efforts to have the WBU and other VIP groups meet directly with EU publishers and stakeholders to develop a means for access provisions other than a copyright treaty. However, the WBU had determined that these discussions were having the effect of deferring action on a treaty via promises that a gradualist technological and marketplace action would address their need. Whether the EU and publishers are just trying to block a treaty or simply trying to avoid further problems for their businesses in tough economic times, the effect on the user community is the same—lack of any meaningful change.¹³ The second issue is that there was a very strong effort by the WIPO

¹³Indeed, in February 2011, the World Blind Union publically withdrew from these “side” talks. See: “WBU Suspension of Activity on WIPO and EU Stakeholder Platforms,” available at the link below “The Right to Read” at: <http://www.worldblindunion.org/en/our-work/campaigns/Pages/default.aspx>

Secretariat to use “side” or “parallel” meetings of the WBU and the IAP to see if any agreement could be worked out on specifics while the SCCR 23 plenary meeting focused on general issues. From informal comments by NGOs representing VIPs, library, and access to knowledge groups, it seemed clear that there was the fear that these parallel sessions could undercut movement on treaty language.

Meanwhile, a further concern of the library representatives was that an agreement in such a parallel session might be pushed to limit any exceptions to instances only when there were no commercially available accessible versions of a work. To the library advocates, a “not-commercially-available” qualification on any new exception could be an unfortunate precedent that could undermine the kinds of exceptions needed for library and archives. The “not-commercially-available” qualifier may not be major hurdle for the VIP issues, since they have good evidence that the commercial market has failed them, but for library materials, the challenge would be determining what constituted “commercial availability,” especially when price is a major factor in the development aspects driving the agenda for TLIB. For archivists, the “not commercially available” provision should not be a great impediment for access to unpublished works, and thus this may be an example where our issues diverge from those of librarians. This difference makes clear that making common cause with the library community at WIPO will not always be a simple matter.

5.0 BROADCASTING RIGHTS (NOVEMBER 29): The original schedule for SCCR 23 called for two weekend days for “informals” for a broadcasting treaty followed by two full workdays for formal discussion of the types of provisions appropriate for broadcasters. “Informal” means that the discussion would proceed without reference to any particular draft treaty text. Instead, there could be free-ranging discussions of the issues involved.

A treaty on exclusive rights in broadcasting has been a concern for some time (at least since SCCR 12 in 2004), especially because some countries from both the developed and developing worlds are concerned about “signal theft.” However, the issue has been stalled because there is not a clear sense of whether one can have an instrument that grants an exclusive right in the signal apart from the broadcast content. If the right would somehow extend to include the content, it could conflict with the underlying copyright in the programs themselves. If a broadcasting right were to be restricted to the signal, there are questions about whether the signal would be considered sufficient expression as to be eligible for copyright in some countries.

Based on reports from an IFLA observer who attended the Saturday November 26 session, the discussion tended to circle around the logical problem of trying to determine what exactly to protect, and there was not enough compelling substance to hold a Sunday session. As noted above, the broadcasting issue was subsequently deferred from Monday’s (November 28) meeting to allow time for further discussion of VIP and library and archives exceptions.

5.1 Broadcasting Rights Document Review: The broadcasting discussions then opened with a round of comments from the document’s sponsors, South Africa and Mexico. Supporters as well as other delegates expressed a range of qualified support while reserving the right to comment later. In the NGO observer comments, IFLA and the Canadian Library Association argued that a treaty is not needed to protect broadcasts, but that if one does go forward, it must include exceptions to keep libraries from being impeded from providing access to broadcasts related to instructional activities. Broadcasting organizations spoke in favor of a treaty. Interestingly, while the MPAA indicated support for a balanced treaty, it expressed interest in the concerns

expressed by Knowledge Ecology International and Public Knowledge that an exclusive right in broadcasts might intrude on the rights in underlying works.

The afternoon article-by-article discussion of the proposal by national delegates made it clear that there is a fundamental divide between those advocating a treaty to protect the broadcast signal itself vs. those countries where it would be contrary to national legal traditions to provide copyright in something so ephemeral and lacking in expression as a signal when there is already a means to protect the content. The anomalous nature of the proposal was underscored by a comment made in regard to the recommendation of 20 years as the term of protection. One developing world delegate noted that the matter of a term was misplaced since “once the signal is received by the public, the term of protection does not matter.” If, indeed, the desired protection only matters for the immediate distribution (imagine the signal for cricket or football games being “hijacked”), and any subsequent control can be best exercised by a copyright on the program content, then the entire matter of the broadcast signal would seem not to really be a copyright issue.

Unlike the library and archives and VIP discussions, the broadcasting matter was relatively free of procedural wrangles and delays, nor did it exhibit a deep divide between developed and developing nations. The Chair closed the Tuesday session by announcing that the Mexico/South Africa document would be combined with comments received by February 29th as well as some of the prior broadcasting proposals to serve as the basis of discussion at the next SCCR. At the close, it appeared that the next steps on broadcasting were clear and agreeable.

6.0 AUDIO-VISUALS (NOVEMBER 30-DECEMBER 1): Rather than being regular SCCR sessions, Wednesday-Thursday (November 30-December 1) were given to a “preparatory committee” for a diplomatic conference on an audio-visual treaty that would give clearer protection to the rights of actors and others performing in audiovisual productions. The meeting was closed to NGO observers because it was a meeting to plan a high-level event at which final treaty language would be put forward and presumably finally agreed. There had been a major effort to get a treaty on A/V in the late 1990s, but the effort collapsed in 2000 when one provision out of 20 could not be agreed. At the June 2010, SCCR meeting, the Committee had been able to come to a compromise on the language for the lone disputed article from 2000, and thus SCCR 23 needed to work out final details for the conference.

7.0 “CONCLUSIONS,” CONTROVERSIES AND DRAMA AT THE CLOSING SESSION (DECEMBER 2): Given the diversity of issues covered over the preceding two weeks, the near constant disagreement on the particulars of preliminary documents, and the tendency of delegates to divert debate into procedural matters as surrogates for policy disputes, the arrival of the closing day offered little hope that there might be a sudden convergence on issues. Indeed, a last minute convergence would have been very much out of character, and it did not occur. Yet the closing day of an SCCR has some peculiar features that offer a drama of their own.

The purpose of the day is to wrap up any unfinished business, but primarily delegates must draft, review, and agree to a closing statement called “Conclusions.” The importance of the Conclusions cannot be overestimated. It reports on the issues discussed, notes any documents created, identifies documents that will be the subject of future SCCR meetings, and establishes the dates of the next meeting. All of this must happen within the limits of the clock since the meeting’s mandate, and thus its ability to conclude any business, ends at midnight. If not, in technical terms, nothing would have been accomplished, and it could be said that the meeting

either never existed or that the documents would have no standing for future deliberations. Given that SCCR proceeds only by a narrow definition of “consensus,” meaning no one voices disagreement, the possibility for difficulties can continue literally to the last minute.

Inauspiciously, the “morning” session did not begin until shortly after 12:00 noon. Aside from some opening announcements that the audio-visual diplomatic conference would occur during the spring in Beijing, there was disagreement from the outset over what were the appropriate next steps for broadcasting, including the timing of the next meeting and whether there should be a single consolidated text or a composite document containing multiple proposals and comments. This disagreement was central to what could be in the Conclusions. When, after an hour of discussion no consensus emerged, the Chair adjourned the meeting for lunch during which he planned to meet with various regional groups to try to work out a timetable and document for the next steps on broadcasting.

Given the differences evident over the entire two weeks, it was not surprising that the Chair’s plan to settle matters in a half-hour before the scheduled 3:00 p.m. reconvening actually took at least three times that amount of time and resulted in only partial success. Still, there was a positive stir when, shortly after 4:30, delegates and observers received a three-page draft “Conclusions” and the meeting reconvened. The draft “Conclusions” seemed to offer something to celebrate—it indicated that discussion of library and archives exceptions would be carried forward to the next SCCR, meaning that the work of the November 21-23, 28 sessions would not be dismissed as “never having existed.”

7.1 Controversy over words in document title: Unfortunately, it soon appeared that the backroom magic enabling the drafting of the Conclusions had not been enough to settle all issues. There were a handful of items on VIP and broadcasting issues, to which one delegate or another objected. Most of these were resolved with a minimum of discussion, and a few other points of disagreement regarding the library and archives paragraphs were also resolved without too much difficulty. One point, however, proved very controversial: a four-word modifier had been included in square brackets in the draft of the title of the document to be carried forward. This problem dogged the meeting for more than four hours.

This phrase occurred in the pivotal item on next steps—paragraph 4:

4. This compilation, including any further comment or correction on any of the above 11 topics sent by delegations to the WIPO Secretariat by February 29, 2012, will constitute a Committee document titled “Provisional working document [on an international instrument] *{square brackets in the original}* on limitations and exceptions for libraries and archives,” identified as document SCCR/23/8 Prov. This document will constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24th session.

On the one hand, it appeared that considerable ground had been given by those objecting to any work on this since the draft conclusion called for the “compilation document” to “constitute a Committee document.”¹³ Thus, the matter of library and archives exceptions would be kept alive

¹³The “compilation document” would be the IFLA/ICA/eIFL/INNOVARTE Background Paper put forth by Brazil, an Objectives and Principles document put forward by the U.S., and the proposal from Brazil, Ecuador, and Uruguay, plus all the commentary that had been made

for future debate even if there was opposition to some of its provisions, and this was a major victory for the initiative's advocates such as the SAA. However, there remained the not inconsequential dispute over what the document would be titled, as reflected by the square-bracketed text.

In short, those delegates who had argued that binding treaty language was not necessary or desirable found that accepting the words "on an international instrument" would concede too much ground to a process they wanted to stop. On the other hand, the treaty advocates saw the phrase as essential as well as consistent with the mandate given to SCCR by the WIPO Development Agenda. Thus, process again became the stalking horse for fundamental political divisions.

Despite multiple efforts by delegates from a veritable cornucopia of nations and regions to craft compromise language, reasonable suggestions were rejected one after the other by the contending partisans. Over nearly four hours of non-productive discussions, the Chair tried tactic after tactic, including a recess for the partisans to meet with their compatriots. Eventually, after a further recess, the delegation that had been resisting movement on a treaty put forward compromise language that the treaty proponents immediately accepted, and the body acknowledged this near miracle with a round of applause. In the context of the day, it was a tremendous achievement for those seeking the exceptions, although the prolixity of the result would hardly seem dramatic. The final wording of the paragraph was:

4. This compilation, including any further legal, textual or other comment or correction, on any of the above 11 topics sent by delegations to the WIPO Secretariat by February 29, 2012, will constitute a Committee document titled "Provisional working document containing comments on and textual suggestions towards an appropriate international legal instrument (in whatever form) on exceptions and limitations for libraries and archives," identified as document SCCR/23/8 Prov. This document will constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24th session.¹⁴

SAA was then privileged to participate in a co-authored press release to recognize the significant progress made by SCCR toward a global set of copyright limitations and exceptions for libraries and archives. Other participants in the news release were ICA, IFLA, Electronic Information for Libraries, the Canadian Library Association, the German Library Association, and the UK's Libraries and Archives Copyright Alliance.¹⁵

7.2 Observations on Closing Session: To the outsider, two weeks to arrive at only an agreement

orally in writing by delegates or which would be submitted by February 29, 2012. Of course, it should be noted that as a compilation, the document contained many competing, and in some cases, conflicting terms.

¹⁴The full text of the final agreed upon Conclusions are presented as Appendix C and also can be found at:

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf

¹⁵The news release is attached as Appendix D and can be found at:
http://www.ifla.org/files/hq/topics/exceptions-limitations/documents/IFLA_WIPO_SCCR23_3.pdf

to continue discussing a “provisional working document” toward an “appropriate” instrument “in whatever form” may not seem terribly significant. However, for WIPO SCCR this is an amazing step forward. It ensures that the issue of what kinds of exceptions are needed to advance the needs of archives and libraries in the digital era will remain before the international body that has the ability to set these provisions into a treaty to create international uniformity and facilitate access via today’s technology.

At the same time, a sober look at the two weeks makes clear that significant challenges lie ahead. On the one hand, there is entrenched opposition to any formal treaty requirements. On the other hand, the document going forward to SCCR 24 is a compilation of sometimes conflicting provisions. Nevertheless, the substantial need for libraries and archives exceptions has received recognition. Through the work of NGO observers from the library and archives communities and collaboration with delegates of friendly countries and regional groupings, these concerns are being taken seriously. Indeed, the NGOs represent a key mechanism for providing technical support to those national delegations wishing to move the cause forward. No better proof of this exists than the fact that the IFLA coalition, i.e., non-governmental organizations with the status of nothing more than SCCR observers, has managed to have the contents of its treaty proposal submitted, discussed, and retained for further consideration. Moreover, SCCR 23 showed that those developing nation delegations interested in and needing additional exceptions can, when provided with solid language and advice from librarians and archivists, champion the ideas in the face of very deeply entrenched opposition.

8.0 LESSONS FOR ARCHIVISTS AND THE SAA: As the first occasion for SAA to be represented at an international treaty-making body, and as a process connected to a policy area of concern to archivists looking for a liberalization of the means for US archivists to make their content more widely available, the experience at SCCR 23 provided several lessons which the SAA may find useful should it decide on continued engagement in this area.

1. Orphan Works. As difficult as the important matter of orphan works has been for archivists in the United States, progress on the issue at the international level faces particular challenges because of the possibility that moral rights/*droits d’auteur* may be raised to pre-empt inclusion of orphan works in any set of library and archives exceptions, especially in those countries regarding moral rights as inalienable and perpetual. However, we should not acquiesce to this as a monolithic barrier. Given the vast quantities of unique unpublished material held by archives that have not otherwise seen the light of day, archivists have a good case for making release of such material the subject of an exception. This is especially true of the vast majority of cases where there is no effect on the market for such works while there is a positive value to education and cultural preservation.

Importantly, the *droit de divulgation*, or right of first release to the public, which is often mentioned as a barrier, is not one of the moral rights supported by the Berne Convention Article 6bis or TRIPS. Furthermore, if SAA can provide the right examples, the case for release of unpublished orphan works can be made very compelling. In addition, SAA has already articulated provisions regarding the right for reappearing “lost authors” to have a right to withdraw their works or receive compensation. This enables us to argue that archivists are trusted stewards for such orphan works and their authors. Nevertheless, it will be incumbent on archivists to be vocal and strong advocates on this issue since it is one that many of the NGO representatives encountered at SCCR 23 seemed to regard as

insoluble and thus something that might have to be forfeited as deliberations proceed.

2. Other Library /Archives Issues that TLIB Would Benefit: Even for US archivists, in a country that already recognizes library and archives exceptions via §108, the orphan works provisions are not the only elements of the proposed treaties that can advance our position. In particular, any treaty developed along the lines of the Africa Group proposal or the Brazil, Ecuador, and Uruguay proposal (built from TLIB), would facilitate the efforts of American archivists to put more material online because it would provide uniformity across international borders. This is absolutely essential given the borderless nature of the internet which is the primary vehicle we have to expand education and access from our collections. Furthermore, some of the provisions in the TLIB draft are much more commodious than those in US law. For example, it would provide exceptions in regard to technological protection measures which would be a great advance on the anti-circumvention provisions currently in Chapter 12. Of course, such advances could disappear if such favorable elements are negotiated out of treaty language, just as might happen with orphan works. Action against such possibility will be very difficult without some continued engagement with the SCCR process.
3. Differing Librarian/archivist Priorities: Despite the enormous debt we owe to library organizations for their initiative and persistence on the issue of library and archives exceptions, and despite their efforts to address archival concerns, ultimately there are differences in our two professions, the materials with which we work, and the kinds of policy problems we face to meet our constituencies' needs. The driving concerns we have with unpublished orphan works or technological protection measures on administrative information systems may parallel the concerns of librarians, but our concerns are fundamentally different. Only a specific archival advocacy can make the case for the archival matters in an unqualified way to the national delegates at SCCR. Thus, instead of deferring representation of our issues to the admittedly quite accomplished library community, we need to leverage our identity as the "archives" part of the sought-after "library and archives" exceptions to secure a seat at the table and a place in the advocacy network. At the same time, we need to recognize the advantages of being part of the effective coalition that IFLA has initiated.
4. Effectiveness of IFLA: The success that IFLA and EIFL have had at WIPO is something that has taken time and a continued presence both at and between SCCR meetings to develop. Although they have had the good fortune of substantial foundation funding, their success has really depended on having clear goals, a strong network of experts to develop policy, and a readiness to build relations with national delegates by being responsive to the interests of those nations. Especially important has been their facility at articulating the impact that any particular policy or treaty provisions could have for the needs of those nations. At present, neither ICA nor SAA has the network to build these relations, but we can start if we have clear goals, modest foundation support, and a partnership with the ICA.
5. Solid Foundation Built by SAA: The work that the SAA has done to articulate public policy positions on intellectual property issues (20 statements since 1994/95) is a substantial sustained effort that supports our credibility in national and international forums, especially to the extent that we have built on a trio of principles: to respect the interests of rights holders, to support user access to collections, and to utilize technology

to preserve materials and advance education and cultural heritage. The position statements developed by the SAA Intellectual Property Working Group in particular were key tools in SAA being a credible agent both to the SCCR delegates and our fellow NGO observers.

6. Collaboration of SAA Leadership: For SAA to have an effective presence at an international body such as WIPO, six time zones away from the SAA President, seven zones away from the Executive Director, and nine zones away from the Chair of the SAA IPWG, there needs to be both very strong and active communications between the representative and key SAA players and the ability of those players to grant limited but sufficient authority to the representative to speak on SAA's behalf and make tactical decisions as the needs and opportunities arise in Geneva. The support and prompt responsiveness of Executive Director Nancy Beaumont and President Gregor Trinkaus-Randall were invaluable, and the patience and guidance from IPWG members leading up to and during the SCCR ensured that the representative was well prepared.
7. Personal Note: As a Past-President and long-time member of the SAA, and as one whose archival work has been constricted by copyright issues over three decades, it was privilege to be able to represent the SAA at SCCR. It was a great honor to have the Society entrust me with this role. I, the SAA, and American archivists owe a debt of gratitude to the Sloan Foundation which provided the support to enable us to advocate on behalf of all archivists and the publics we serve.

List of Appendices

- A. Statement made by SAA Observer to SCCR 23
- B. Statement made by ICA Observer to SCCR 23
- C. "Conclusions" issued by SCCR 23
- D. Joint News Release



**SOCIETY OF
American
Archivists**

**Statement of SAA Representative to WIPO
Standing Committee on Copyright and Related Rights**

William J. Maher (w-maher@illinois.edu)

November 29/December 2 2011

Thank you, Mr. Chairman, for the opportunity to speak on behalf of the Society of American Archivists, North America's oldest and largest professional archival association. Our more than 6,000 members in 41 countries provide leadership to ensure the selection, preservation, and use of records of historical value. By a conservative estimate, our members' repositories are responsible for nearly a billion copyrighted works. My archives alone holds the works of more than 13 million separate writers and rights holders.

Copyright has a history. This 18th century invention was created to provide a financial return to authors and publishers, and reading material to the public, thereby settling many long-standing market disputes. While the 1886 Berne Convention changed the basis of copyright from publication to authorship, the intent was the same—to provide for the active and professional writer or artist who created works for public dissemination.

The problem for archivists is that the vast majority of our collections were never written for public dissemination. They were not created by professional writers or artists. These mostly unpublished letters, diaries, emails, photos, and the like were simply byproducts of their creators' lives. Sometimes even the creators' names are a total mystery. These works are square pegs being pushed into the round hole of copyright, but they are invaluable to society. One need only look at Ken Burns' popular documentary series on the American Civil War, in which unpublished letters defined the narrative, to see that archival holdings are not esoterica meant only for obscure studies. Rather, they contain the threads needed to weave an authentic picture of society. Whether for documentaries like Burns's or books like Fernand Braudel's monumental work on the Mediterranean world in the age of Philip II, the copying and use of archives are essential to knowledge, culture, and education.

Copyright has adapted to new technologies, recently expanding to include born-digital materials. Archival documents in these new media are as essential as old paper to providing citizens with the information needed to hold their governments accountable and maintain society's heritage. Without appropriate exemptions, however, we cannot make born-digital documents available for use.

Meanwhile, digital technology holds the promise of liberating our collections from their physical location. Theoretically, it is now possible for even remote schools, satellite university students, and the general public to make use of these primary sources. Yet, copyright prevents this, limiting research only to those wealthy enough to travel widely.

In short, strict adherence to current copyright rules makes it virtually impossible for the world's archives to fulfill their educational and cultural missions. We preside over works rarely created for public dissemination or economic profit. For most works, there is no market structure for working with rights-holders. Yet copyright requires us to follow the same rules as commercial enterprises, thus preventing us from serving researchers, especially via new technology—our users' medium of choice.

The proposal for a library and archives exception for preservation is important to the mission of archivists. To be able to meet the needs of our users, whether established university professors or

school children, an exception for preservation is essential. By supporting the right to make preservation and safeguard copies, copyright exceptions and limitations will ensure that the children of these professors and children of today's school children will have access to the same rich sources of documents that can be found in archives today. This will enable a sustained understanding of society and transmission of cultural heritage.

Likewise, carefully crafted orphan works provisions are essential to our ability to fulfill the mission that society expects archives to pursue. Yes, an orphan works provision may be a difficult exception to draft. But it is both needed and possible. As the SCCR considers this issue, it is important to recognize that archivists assume that any such exception will include safeguards for circumstances when a rightsholder comes forward to assume ownership of the orphan. In such circumstances, the SAA is clearly on record that the appropriate response from an archives is to recognize the author's right to require termination of the use of the work or to be provided of a reasonable compensation. (See: *Response to Statement on Orphan Works* (May 6, 2005) www2.archivists.org/statements/response-to-statement-on-orphan-works-pdf.)

Without specific archives and library exemptions, we lack the means to pursue our research and educational missions. We need a robust set of library and archives exemptions at the international treaty level to render copyright vital and useful to the modern archival and information world, thus ensuring copyright's continued intellectual integrity.

The Society of American Archivists wishes to express its appreciation for the serious attention given to the matter of library and archives exceptions by the WIPO Secretariat and by all of the delegates to SCCR23.

Gregor Trinkaus-Randall President, 2011 – 2012 Nancy P. Beaumont, Executive Director

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WORLD INTELLECTUAL PROPERTY ORGANISATION
STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS
23rd meeting, November 2011

Statement by the
International Council on Archives/
Conseil International des Archives

Thank you Mr Chairman. May I, on behalf of the archives profession worldwide, congratulate you on the progress you have made in addressing the need for international instruments on limitations and exceptions to copyright, in recognition of the vital part they play in providing for the needs of societies around the world.

As you know, archives hold the unique materials that record the history of the peoples of the world, the decisions that have been made on their behalf by their leaders and the reasons for those decisions, and the history of the activities of governments, organisations of all kinds and individuals. Archives deal primarily with unpublished materials, and in that significant respect they differ from libraries. However, many of the public services that archives provide, with no commercial motivation, are very similar to those of libraries.

Some archival materials present no copyright problems, either because copyright has expired or because copyright is owned by the parent organisation. However, archival materials inevitably contain many works in third party copyright. Every letter received by an organisation, that ends up in its archive, was copyright of the sender not the recipient.

The International Council on Archives is grateful to the African Group for proposing a treaty containing limitations and exceptions in favour of libraries and archives, and to Brazil for putting forward further issues for consideration as presented by IFLA. It has worked closely with IFLA in the drafting of its proposal for a treaty. We look forward to real progress on these at this meeting. Three areas are of particular interest to archives:

- a preservation copying exception, which is the subject of article 14 of the African Group proposal, is vital. Without it, around the world paper records are decaying, films and sound recordings are becoming unplayable and in some cases becoming dangerous, and digital materials are becoming worthless as technology advances.
- the absence of exceptions permitting copying for users and the transmission of those copies electronically across frontiers, which are the subject of articles 11, 12, 13 and 15 of the African Group proposal, is hindering research and academic learning, because many researchers, especially in developing countries, cannot afford to travel to visit archival institutions.
- orphan works are a major problem for archives, which are the subject of article 21 of the African Group proposal. Papers such as unpublished letters and diaries written by private individuals almost inevitably become orphans. There is no commercial interest in such works but there is immense cultural value in them.

Archivists around the world are looking to the SCCR to make possible the preservation of the world's memory, as represented by archives, and the use of that memory to stimulate the creation of new works for the advancement of mankind.

Thank you Mr Chairman.

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World Intellectual Property Organization (WIPO)
 Standing Committee on Copyright and Related Rights (SCCR)
 Twenty-Third Session
 Geneva, November 21 to 25, 28, 29 and December 2, 2011

Conclusions

Limitations and Exceptions: Libraries and archives

1. The Committee took note of three new documents, namely “the Case for a Treaty on Exceptions and Limitations for Libraries and Archives: Background Paper by IFLA, ICA, EIFL and INNOVARTE, presented by Brazil (document SCCR/23/3); “Objectives and Principles for Exceptions and Limitations for Libraries and Archives,” presented by the United States of America (document SCCR/23/4); and the “Proposal on Limitations and Exceptions for Libraries And Archives,” presented by Brazil, Ecuador and Uruguay (document SCCR/23/5).
2. Delegations identified 11 common topics for discussion, namely: 1) preservation, 2) right of reproduction and safeguarding copies, 3) legal deposit, 4) library lending, 5) parallel importations, 6) cross-border uses, 7) orphan works, retracted and withdrawn works, and works out of commerce, 8) limitations on liability of libraries and archives, 9) technological measures of protection, 10) contracts, 11) right to translate works.
3. A compilation of the comments made by the delegations on the above topics, as well as the provisions on libraries and archives of the Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives, proposal by the African Group (document SCCR/22/12), and of the above documents SCCR/23/4 and SCCR/23/5; was prepared by the Secretariat.
4. This compilation, including any further legal, textual or other comment or correction, on any of the above 11 topics sent by delegations to the WIPO Secretariat by February 29, 2012, will constitute a Committee document titled “Provisional working document containing comments on and textual suggestions towards an appropriate international legal instrument (in whatever form) on exceptions and limitations for libraries and archives,” identified as document SCCR/23/8 Prov. This document will constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24th session.

Limitations and Exceptions: visually impaired persons/persons with print disabilities

5. The Committee took note of Chair’s proposal for an international instrument on limitations and exceptions for persons with print disabilities (document SCCR/22/16).
6. On the basis of this proposal and taking into account the various comments made, and text-based options presented, by delegations, a “Working document on an international instrument on limitations and exceptions for visually impaired persons/persons with print disabilities” was adopted by the Committee (document SCCR/23/7). This document will constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24th session, with an aim to agree and finalize a proposal on an international instrument on limitations and exceptions for visually impaired persons/persons with print disabilities.

7. The Committee encouraged the stakeholders to continue the work of the Stakeholders' Platform.

Limitations and exceptions

8. The Committee agreed that the item of limitations and exceptions will be maintained on the agenda of the 24th session of the SCCR.

Protection of Broadcasting Organizations

9. The Committee thanked the Secretariat for organizing the Informal Consultations on the Protection of Broadcasting Organizations in Geneva on November 26, 2011 which were attended by Members and observers of the SCCR, and thanked its Chair Ms. Alexandra Grazioli from Switzerland. The discussions contributed to progress the work on a draft treaty to update the protection of broadcasting and cablecasting organizations in the traditional sense. The outcome of the consultations was presented to the SCCR/23 session and the report of the meeting is contained in document SCCR/23/9.

10. The Committee took note of the draft treaty proposal presented by the Delegations of South Africa and Mexico (document SCCR/23/6). Members made comments and asked preliminary questions.

11. The Committee reaffirmed its commitment to continue work, on a signal based approach, consistent with the 2007 General Assembly mandate, towards developing an international treaty to update the protection of broadcasting and cablecasting organizations in the traditional sense.

12. The Committee approved the work plan as set out in the annex of these conclusions.

13. The protection of broadcasting organizations will be maintained on the agenda of the 24th session of the SCCR.

Annex

Protection of Broadcasting Organizations: work plan

1. To maintain the momentum regarding a draft treaty on the protection of broadcasting organizations and cablecasting organizations in the traditional sense, the Committee agreed to continue discussions on a signal based approach consistent with the 2007 General assembly mandate and agreed on the following work plan:

2. Members are invited to send textual, legal and other comments to the proposal of the delegations of South Africa and Mexico (document SCCR/23/6) to the WIPO Secretariat by February 29, 2012. These comments will be made available to the Delegations of South Africa and Mexico for their due consideration. The Delegations of South Africa and Mexico will, based on the comments received, revise the proposal. The Secretariat will make all the comments available on a SCCR Forum (www.wipo.int/copyright), as they are received, for discussion at the next SCCR.

3. In order to expedite discussions and with a view to making a recommendation to the 2012 WIPO General Assembly on the possible scheduling of a Diplomatic Conference, two working days of the SCCR/24 session will be dedicated to the protection of broadcasting

organizations with the objective of reaching agreement on a single text to pursue text-based discussions at the SCCR/24 session.

4. The following WIPO documents will also be used as a basis for discussions:

- Draft Treaty on the Protection of Broadcasting Organizations proposed by the Delegations from South Africa and Mexico on the protection of broadcasting organizations (document SCCR/23/6), taking into account the comments received by the WIPO Secretariat by February 29, 2012;
- Report of the Chair of the Informal Consultations on the protection of broadcasting Organizations held in Geneva On November 26, 2011, (document SCCR/23/9)
- Elements of the Draft Treaty on the Protection of Broadcasting Organizations prepared by the Chair of the Informal Consultations on the Protection of Broadcasting Organizations held In Geneva on April 14 and 15 April 2011 (document SCCR/22/11);
- Comments on the Draft Treaty for the Protection of Broadcasting Organizations: Proposal by the Delegation of Japan (document SCCR/22/7);
- Proposal on the Draft Treaty for the Protection of Broadcasting Organizations: Proposal by the Delegation of Canada (document SCCR/22/6)
- Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations (document SCCR/15/2);
- Protection of the Rights of Broadcasting organizations, submitted by the European Community and its Member States (document SCCR/6/2);
- Article 1*bis*, submitted by the European Community and its Member States (document SCCR/9/12); and
- Any other textual contributions.

Next Session of the SCCR

The 24th session of the SCCR will take place in July 2012, after the Diplomatic Conference on Audiovisual Performances. The dates will be announced by the Secretariat in due course.



International Federation of
Library Associations and Institutions



Canadian Library Association
Association canadienne des bibliothèques



Deutscher Bibliotheksverband e.V.



02 December 2011
Copyright

PRESS RELEASE

International Copyright Deliberations:

Library and Archive Groups Delighted by Progress on Copyright Limitations and Exceptions at WIPO

The Hague/Geneva: The 23rd session of the World Intellectual Property Organisation's Standing Committee on Copyright and Related Rights (SCCR) ended on 2nd December 2011. The International Federation of Library Associations and Institutions (IFLA), the International Council on Archives (ICA), Electronic Information for Libraries (EIFL), the Canadian Library Association (CLA), the German Library Association (dbv), the Libraries and Archives Copyright Alliance (LACA) and the Society of American Archivists (SAA) welcome the significant progress made by WIPO Member States towards achieving a global set of copyright limitations and exceptions for libraries and archives.

SCCR/23 concluded with agreement for further discussion on a list of topics relating to libraries and archives which includes preservation, right of reproduction and supply of copies, legal deposit, library lending, parallel importation, cross-border uses, orphan works, retracted and withdrawn works, liability of libraries and archives, technological measures of protection, and contracts. Member States have until the end of February 2012 to submit written comments to the WIPO Secretariat for inclusion in the document *Provisional Working Document containing comments on and textual suggestions towards an appropriate international legal instrument (in whatever form) on exceptions and limitations for Libraries and Archives (SCCR/23/8 Prov)* which will be discussed at SCCR/24 in 2012.

Library and archives groups have been advocating for an international treaty so that WIPO Member States establish a set of basic, minimum limitations and exceptions for the benefit of libraries, archives, and their users in their national copyright laws. Currently, libraries operate under a patchwork of provisions that differ from country to country that often do not meet the needs of libraries especially in the global, digital environment. For the first time, the WIPO SCCR,

the main body that shapes international copyright law, dedicated three extra days to discussion of limitations and exceptions for libraries and archives.

“The way WIPO Member States have engaged with library and archives issues has been very encouraging indeed” said IFLA President Ingrid Parent. “We feel that real progress was made during the SCCR that we hope will lead to an international solution to benefit libraries and archives, and their users, everywhere.”

ICA President, Martin Berendse, and past SAA President, William Maher, were especially appreciative of the attention given to the issue of library and archives exceptions at WIPO: “I was very pleased at the focus on issues important to archivists, such as orphan works, that gave us an opportunity to explain the problems we are facing”, Berendse said. Maher added: “The issues of copying for preservation, especially born-digital materials, and research and educational use of orphan works have been of great concern to archives for the past decade. SCCR’s consideration of prospective provisions for library and archives exemptions augurs well for researchers, students, and the public worldwide.”

Rima Kupryte, EIFL Director further stressed: “This was a unique opportunity to present library and archives copyright issues, in particular for developing and transition countries, at the highest international level, to engage with WIPO Member States on substantive issues for libraries and archives, and to share our specialist knowledge and experience to enhance the debate.”

IFLA, ICA, CLA, dbv, LACA, EIFL and SAA were heartened by the full and thoughtful discussion by Member States that took place over the three days dedicated to libraries and archives and particularly thank the African Group, Brazil, Ecuador, the United States of America and Uruguay for their proposals. The library and archives organisations will continue working with WIPO Member States to gain support for a binding international instrument on copyright limitations and exceptions to enable libraries and archives to preserve their collections, support education and research, and lend materials.

Notes to editors:

The **International Federation of Library Associations and Institutions** (IFLA) is the leading international body representing the interests of library and information services and their users. It is the global voice of the library and information profession. IFLA’s membership of around 1600 includes associations, organisations and individuals from over 150 countries worldwide. Website: <http://www.ifla.org>

The **International Council on Archives**, founded in 1948, is the voice of archive professionals on the world stage. Its fundamental aim is to improve the preservation of, and access to, public and private archives in traditional and electronic formats. ICA has about 1400 institutional and individual members in 195 countries and territories. It advocates the importance of effective archives

management as an indispensable prerequisite for democratic accountability, administrative transparency, and access to information by the citizen.

Websites: <http://www.ica.org> and <http://new.ica.org>

EIFL, **Electronic Information for Libraries**, is an international not-for-profit organisation based in Europe with a global network of partners. EIFL works in collaboration with libraries in more than 45 developing and transition countries in Africa, Asia and Europe, enabling access to knowledge for education, learning, research and sustainable community development.

Website: <http://www.eifl.net>

The **Canadian Library Association/Association canadienne des bibliothèques** (CLA) works to build the Canadian library and information community and the services it provides to society and acts as advocate and public voice, educator and network for a diverse membership of Canadian librarians.

Website: <http://www.cla.ca>

The **Society of American Archivists** (SAA) is North America's oldest and largest national archival professional association. SAA's mission is to serve the education and information needs of more than 6,000 individual and institutional members in 41 countries and to provide leadership to ensure the identification, preservation, and use of records of historical value.

Website: <http://www2.archivists.org>

The **German Library Association** (dbv) has been working over 60 years for libraries in Germany. The association has about 2,000 member libraries nationwide. Its concern is to make the impact of libraries in education and culture visible and strengthen their role in society.

Website: <http://www.bibliotheksverband.de>

The **Libraries and Archives Copyright Alliance** (LACA) is convened by the Chartered Institute of Library and Information Professionals. LACA unites the UK's major library and archive professional organisations and experts to advocate a fair and balanced copyright regime that delivers universally accessible information and knowledge services in the digital age.

Website: <https://www.cilip.org.uk/laca>

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