

**Society of American Archivists  
Council Meeting  
May 16-17, 2023  
Chicago, Illinois (Hybrid Meeting)**

**World Intellectual Property Organization  
Standing Committee on Copyright and Related Rights 43<sup>rd</sup>  
Session Geneva Switzerland March 13-17, 2023  
(Prepared by William J. Maher, SAA Representative)**

To advance archival advocacy for laws and policies that support preservation and expanded access, I represented SAA at the March 13-17 43<sup>rd</sup> session of the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) in Geneva. Although challenges remain in our call for copyright exceptions, this March's session saw progress toward the goal of an international legal instrument to address archives needs.

Those unfamiliar with the context and history of SAA's involvement in this advocacy should see "Context" below.

**SUMMARY OUTCOMES:**

1. Unlike many prior sessions, the March 2023 SCCR distinguished itself by substantive accomplishments that fit well with our agenda.
2. The Committee formally adopted the Africa Group's proposed work plan for exceptions and limitations, which aligns with archives goals.
3. The near-final version of the "Toolkit on Preservation" was presented and well-received. It contains useful provisions for amending national laws, and it articulates principles and clauses that could be used to lay a foundation for textual discussions of an international instrument on exceptions.
4. The WIPO Secretariat will be responsible for commissioning follow-on toolkits (on access for libraries, museums, and archives, and access for educational and research institutions).
5. Discussions of a new draft of the proposed text to create exclusive rights for broadcasters failed to resolve the long-standing stalemate among WIPO Member States. Issues of greatest concern to archives (an exclusive right to fixations of broadcasts and the lack of mandatory exceptions) proved to be those most central to the disagreements.
6. Member States and a range of NGOs have developed enough of an understanding of archives, and our particular needs and societal role, as to use the word "archives" freely to an extent unheard of in SAA's first several years at WIPO.
7. Despite the advance announcement of a one-minute limit on NGO interventions, SAA could make multiple statements sufficiently long to explain our agenda without having had time "called."
8. SCCR will meet again in early November 2023 for a shortened session, where our presence can help solidify and build on the gains of this March.

## CONTEXT FOR SAA'S ADVOCACY AT WIPO

In U.S. law, the essence of copyright is to provide an incentive for the production of new creative works, whether literature, music, images, etc., by authorizing exclusive rights to authors and other creators. In simple terms, to accomplish a public good, the law authorizes monopolies over the copying, distribution, adaptation, or performance of creative works. The scope of what may be subject to copyright is very broad, encompassing a large percentage of the never-in-commerce works found in American archives. Consequently, the preservation and use of even mundane administrative records may be constrained by these exclusive rights. Thus, unless one is ignorant of, or chooses to ignore, the law, the only recourse available to U.S. archivists is found in some modest exceptions in U.S. law for fair use, preservation, user service, and public display (U.S. Code, Title 17 Sections 107, 108, and 109).

However, the privileges we have in US law are rare compared to the laws of other countries, especially in the post-colonial nations of the Global South. This gap puts their citizens, as well as archivists, librarians, and research users, at a disadvantage when needing to work with materials from other countries. That is because there are many instances where archival documents relating to one country or culture are held elsewhere, including the U.S. The lack of international norms means that communication of archival content across national borders is fraught with difficulty for nearly anyone anywhere. Thus, American archivists can face barriers when responding to the needs of archivists and citizens in countries where copyright exceptions are totally lacking, very limited, inconsistent, and/or generally inoperable.

Since the mid-2000s, consistent with the United Nations' Sustainable Development Goals (SDG), a number of Global South delegates to WIPO have sought to address these issues by working to obtain a new international treaty that would define a base level of copyright exceptions for libraries, archives, museums (LAMs), and educational institutions. Since 2011, SAA has sent a delegate to the semi-annual meetings of WIPO's Standing Committee on Copyright and Related Rights in Geneva, where we have worked with civil society coalition partners (e.g., ICA, ICOM, IFLA, KEI) to emphasize how balanced exceptions can enable cultural heritage institutions to fulfill their mission of providing access to knowledge. Although our progress has been impeded by the commercial interests of publishers and fee-based licensing organizations, we have made WIPO Member States understand that archives and archivists must be treated as stakeholders in developing an international solution to the copyright barriers present under existing law.

After the Marrakesh treaty on copyright exceptions for the visually impaired was concluded in 2013, SCCR made progress in outlining the topical areas where exceptions were needed by libraries and archives. However, progress slowed following a 2016 transition in leadership of both the Committee and the WIPO Secretariat. The change led to calls for a workplan, studies by experts, and a new conceptual framework. In 2019, Regional Seminars in Asia, Africa, and Latin America, plus an International Conference in Geneva, provided a way for local area stakeholders to better understand the technical work and copyright needs of libraries, archives, and museums. The global climate crisis loomed large in those discussions and brought particular focus to the need for preservation exceptions. Then, the COVID-19 pandemic illustrated the urgency of further exceptions to support user access across borders.

Unlike a number of prior SCCR sessions, there was substantive progress at the March meeting, building on the studies and consultations that had been completed just prior to the COVID-19

pandemic. Against this backdrop and for the first time since before the pandemic, SCCR convened in person this past March for a full week's session. Unlike a number of prior SCCR sessions, there was substantive progress and very productive for the exceptions advocacy.

### SCCR43 CORE RESULTS:

Most Notable: The presentation and adoption of two Committee documents: African Group Work Program on Exceptions and Limitations (SCCR/43/8) and the Toolkit on Preservation (SCCR/43/4).

The Committee's adoption of the [Africa Group Work Program](#) underscores the need for WIPO to continue deliberations on copyright exceptions and limitations for multiple beneficiaries, including archives, libraries, and museums, as well as for education, research, and persons with disabilities not addressed by the Marrakesh treaty. Committee adoption of the workplan is a very reassuring outcome since it reinforces the 2012 WIPO General Assembly mandate to work towards a text on exceptions and limitations. Coming from the Africa Group, it reflects a continued interest by the Global South regional groupings to play an activist role in work that would ensure that international intellectual property policy is made consistent with the United Nations' [Sustainable Development Goals \(SDG\)](#).

The ["Toolkit for Preservation"](#) was warmly received. Although focused on model provisions for national legislation, a side benefit is that the "Toolkit" parses out a legal architecture addressing LAMs' preservation work, thus laying a foundation that could simplify future discussions of content for an international a treaty. SCCR action on the Toolkit also represents a first instance of the Committee adopting a document acknowledging the legal needs of libraries, archives, and museums. Moreover, the active discussion of this item helped advance understanding by Member States (MS) of specifics of what LAMs do and how our work intersects with and is frustrated by current copyright law.

Although the Toolkit's authors were unable to include provisions to support access to preserved copies, the Chair's concluding summary ([SCCR/43/Summary](#)) of SCCR43 reported that the Secretariat is to have toolkits prepared on access for libraries, archives, and museums, and on access for educational and research institutions. Regardless, the preservation toolkit is a concrete product and thus remarkable as a sign that movement and progress at SCCR are possible.

By contrast, SCCR43 discussions of a possible treaty to create a new set of exclusive rights for broadcasters did not resolve core issues, thus leaving this matter in a stalemate where it has been for several years. Substantive disagreements among several MS about its purpose and scope meant a lack of the consensus needed to schedule a broadcasters treaty conference in the next year or two. Because current draft text would have provided broadcasters with post-fixation ownership of program content and no real exceptions, the lack of progress on the topic at SCCR43 is a positive outcome.

On the other hand, the broadcasting discussions saw multiple instances of the word "archives" being used by Member States in a way that reflected a basic understanding of archives as socially valuable institutions. This became evident from how both Member States and NGO delegates referred to the need for "archiving" when talking about copyrighted works, even when the agenda topic under consideration was not directly about LAMS. While their archival knowledge was not terribly deep and their awareness may not yet mean readiness to support our agenda, the actual use

of the word throughout the week in a positive way illustrates how far we have come in gaining recognition of archives as important and relevant to intellectual property policy.

Despite the advanced announcements that NGO statements could not exceed one minute, the Chair allowed more time in nearly all instances, while still moving the committee even-handedly through the week's crowded agenda.

SAA was able to make four formal interventions/statements on topics of archival concern. These can be found in Appendices 1 and 2. This augurs well for the next SCCR in early November 2023. Note that the SAA statement on the proposed broadcasters right was issues as a joint statement on behalf of both ICA and SAA.

The [Chair's summary of the week's session](#) made clear that exceptions and limitations will be continued on the agenda, with no Member States' preemptive objections to future discussions, as had been voiced in some prior years.

Finally, the SCCR has scheduled an additional meeting this calendar year for early November. Although it will be limited to only three (rather than five) days and our interventions more limited, the additional meeting is good for our interests because it provides a timely opportunity for continued momentum on practically focused work.

## DEFINING CHARACTERISTICS OF SCCR43

The new Chair, Owen Ripley, directed the session's very packed agenda with efficiency, deliberativeness, balance and sensitivity to time. He exercised a light touch on areas where there has been a long-standing lack of consensus. Through his "readings of the room" at the conclusion of each agenda topic, he laid a foundation for at least a minimal consensus as to how a future SCCR should be talking about issues long in contention.

The very active engagement by civil society NGO delegates with all of the SCCR43 agenda topics left a clear impression that the public's interests were more central to the week's deliberations than the interests of publishers, collective management organizations, and rights holders.

There was a strong interest by Member States and several NGOs in the role that updated copyright policy needs to play in relation to research and education. Unfortunately, there remains divergent views on whether exceptions are needed to make the relationship work.

Regarding the effort to create new rights for broadcasters, the range of concerns expressed by a number of delegations dissolved any impression that the January 2023 issuance of a "Second Revised Draft Text for the Broadcasting Organizations Treaty" had been a turning point toward action on a Diplomatic Conference to agree on an actual treaty. The draft's sponsors offered thin answers to concerns relating to: broadcasters being given an exclusive right of fixation; the lack of a statement of a term for the new exclusive right; and the lack of mandatory limitations and exceptions. With the recent change in its government, the Brazilian delegation to SCCR was once again led by the strong advocates for exceptions who had contributed to much of the progress in the 2013- 16 period. They also emphasized the need for SCCR to act on their 2015 call for analysis of how the streaming environment results in unfair remuneration of artists and performers.

Although long a stated part of the SCCR agenda, exceptions and limitations for “persons with other [than visual] disabilities” has received little attention in the past four years. However, Brazil reminded the committee of the need to return to the topic. A few African countries, the US, Group B, and Central European and Baltic States made references that it was still a standing agenda item for SCCR.

The drumbeat that fee-based licensing was the answer to every copyright problem continued from the collective rights management organizations and a few EU nations.

WIPO’s predilection towards exclusive rights and licensing as the way to think about recorded knowledge was particularly evident in two panels organized by the Secretariat. At first, their hired expert consultant outlined a “scoping study on the interaction between copyright and research” while voicing her continued skepticism of the viability of exceptions. The second was a five-person panel of “researchers” explaining how they do their work. Still, it only dealt with the use of materials where authorized access is readily available either through library-purchased digital content or through collective licenses for the content. There was no acknowledgment that some content needed for research might exist in domains where licenses did not exist, or copyright owners were unfindable.

#### **SCCR AGENDA ITEM 9– “OTHER MATTERS”:**

As customary, the week-long SCCR session was divided into the first three and one-half days dedicated to regular agenda items for topics that Member States have agreed to discuss with the possibility they could lead to a treaty or other legal instrument. The remainder of the time was for “Other Matters”—topics for which a Member State or a Regional Group seeks WIPO involvement but for which there is insufficient support to be formal work items. Since 2014 these have grown to include: analysis of copyright in the digital environment; establishment of an international standard for artist resale rights; strengthening the protection of theatre directors’ rights; establishing a Public Lending Right.

1. [Proposal for Analysis of Copyright Related to the Digital Environment \(SCCR/31/4\)](#). The focus of discussion returned to the original concerns regarding the inequities of resulting from digital platforms not providing fair remuneration to creators, artists, and performers. This topic originated in late 2015 with a call from Brazil and the GRULAC regional group, but with the 2016 change in Secretariat and SCCR leadership, the focus had been sidelined. Instead, there were studies focusing on the music industry as a whole rather than on the effect of digital platforms on artists and performers. However, the original concerns received attention at this SCCR with one-half of Thursday session being dedicated to an “Information Session on the Music Streaming Market” with approximately [21 speakers including representatives of musicians, national cultural](#)

[ministries, labor unions, academia, and online music providers](#). The Information Session’s artists and performers and their concerns received a warm reception, but unfortunately, GRULAC’s new request that [the topic be made a permanent agenda item for SCCR](#), did not receive sufficient consensus in Friday’s follow-on discussion for it to be adopted by the Committee. Although Brazil and GRULAC will likely continue their advocacy for a study, the pace of the digital market makes it hard to imagine how WIPO can solve the problem.

2. Artist Resale Right. As commissioned by the Secretariat, Sam Ricketson (Melbourne University Law School) presented Part One of a toolkit on the artist resale and royalty right (ARRR) While the right is most often seen as relating to the resale of fine art at galleries and auction houses, the issue is relevant to archives because the toolkit as well as the [Berne Convention \(Article 14ter paragraph 1\)](#) connects the right not just to works of art, but also to literary and music manuscripts. Although a treaty or legislation for such new rights could have a spillover effect on archives, in practice it likely would only directly affect those archives that would choose to sell original physical original works from their holdings, which is not a very common practice.
3. Public Lending Right (PLR): Over the past few SCCR sessions, there have been calls for WIPO to do work on a “public lending right.” Rather than being something supportive of public interest, PLR would require libraries to pay a fee for each time a work is loaned to a user. As one might expect, the licensing management organizations spoke in support of PLR because they would be only too happy to manage the revenue. Library and civil society groups spoke against it because of the burden it would add to library budgets. At this stage, the Member States interested in PLR have said they are not seeking a treaty, only a study. The Chair’s summary indicated that once some differences among the proponents regarding scope and purpose can be reconciled, the Secretariat should be commissioning a study of PLR.

Overall, nothing was converted from the “other matters” category to the SCCR’s main agenda, meaning that time and attention to the exceptions and limitations topics will not necessarily experience a decrease in committee time.

As at the prior SCCR, Wikimedia Foundation’s request to become an accredited NGO observer to SCCR was again blocked by China.

## **NEXT STEPS**

In order to ensure continued momentum as well as maintenance of the positive image of the cultural heritage sector, especially regarding to preservation, SAA should begin planning for a presence at the next SCCR, scheduled for a shortened three-day session the week of November 6.

Since the March 17 closing of SCCR43, I have continued to participate in the coordination Zoom calls among our LAMS coalition partners. These intersessional calls are useful in identifying priorities and next steps to ensure that progress on LAMs-friendly outcomes of SCCR43

continues. Especially important is need for the Secretariat to select and commission authors for the toolkit on access for LAMs. We have also been looking for means to strengthen relations with those Member States and Regional Groups which, in the past, had been key players in calling for text-based work on exceptions (e.g., Colombia, Brazil, Chile, Ecuador, India, Indonesia, Iran, Kenya, and South Africa). Although there are limits as to what the Secretariat itself can do to effect action at SCCR, the coalition's members who have access to WIPO staff can provide opportunities to explain and emphasize professional issues and best practices in LAMs institutions. This has proved valuable in the past for its counterbalancing effect against lobbying efforts by the publishing and collective licensing industries.

In addition, it would be very useful for SAA's domestic public policy advocacy resources to be brought to bear on the U.S. delegation to soften its stance against normative work on international protocols for limitations and exceptions. My personal observation is that the U.S. delegation generally tends to refrain from positions that might set WIPO policy or support anything that would require modifications in U.S. law. They have been quite open to have anything discussed but have been frustratingly opposed to the SCCR engaging in any "normative work." Perhaps SAA could be useful in helping the delegation understand how much the mission of U.S. cultural heritage institutions requires interacting with our users and professional colleagues elsewhere in the world. At the least, it would be useful if the U.S. were to re-introduce its 2013 document, "[Objectives and Principles for Exceptions and Limitations for Libraries and Archives](#)," as basis for a "soft law" instrument. The preservation topic seems to be an ideal area for such an action because it is less controversial and therefore more prone to be effective. The ability of American archivists to respond to the research, educational, social, and cultural heritage needs of global citizens requires the kind of international instrument that only WIPO can develop, and the U.S.'s delegation should be encouraged to provide leadership, even if only by stepping back from being an impediment.

## Appendix 1: Oral Statements Submitted to WIPO

**SOCIETY OF AMERICAN ARCHIVISTS (SAA)**  
**ORAL Statement to WIPO SCCR43**  
**Opening Statement**  
March 13, 2023

The Society of American Archivists congratulates you on your election as chair. Our members are responsible for billions of works, largely never-in-commerce but still restricted by copyright. We are pleased to be back in-person, and we look forward to a productive week. In particular, SAA thanks the Africa Group for its proposed draft work program. The plan is eminently practical and elegantly calibrated. It balances Secretariat work on toolkits and technical assistance with consensus building by SCCR Member States toward an international instrument on exceptions and limitations.

The proposal's strengths are:

- " recognizing that a fair and balanced copyright system must advance public interest while supporting creativity;
- " presenting concrete and practical steps;
- " understanding that archives collections require cross-border work; and
- " making institutions the beneficiaries of exceptions.

SAA commends the Africa Group for identifying and promoting the correct outcome of the 2019 Regional Seminars and International Conference. Their work program supports the needs of archivists and the citizens we serve across the globe in the 21st century. SCCR should adopt it immediately.

\* Because of time limits on oral statements, these are condensations of much longer statements which were submitted to SCCR for the record. The full statements can be found in Appendix 2

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**SOCIETY OF AMERICAN ARCHIVISTS (SAA)  
INTERNATIONAL COUNCIL ON ARCHIVES  
ORAL Joint Statement to WIPO SCCR43 Regarding:  
Second Revised Draft Text for the WIPO Broadcasting Organizations  
Treaty March 13, 2023**

SAA and ICA have been following the multi-year discussions on a broadcasting treaty closely because broadcasts almost always provide the defining first records of major events, which archives must collect. In fact, we have made this kind of material part of our collections since the beginnings of audio/visual media. Our organizations, however, are deeply troubled by the latest draft text for three reasons.

First, while we support prevention of signal piracy, the inclusion of a fixation right goes way beyond signal protection. Article 7 adds new layers on copyrighted works that will lock up content that archives must acquire, preserve, and make available to the extent permitted by the underlying copyrights.

Second, the draft makes exceptions and limitations optional. Any new mandatory exclusive rights require balancing mandatory exceptions. Further, Article 11's suggested exceptions are too narrow to accommodate the work the world demands of archives.

Finally, by not stating the duration of the new right, the draft text opens the door to a perpetual term and thus threatens the central mission of archives.

**SOCIETY OF AMERICAN ARCHIVISTS (SAA)**  
**ORAL Statement to WIPO SCCR43**  
**Toolkit on Preservation**  
**15 March 2023**

The Society of American Archivists thanks the Secretariat for commissioning three experts to survey national laws with exceptions to support preservation copying of cultural heritage collections. The Toolkit for Preservation's statutory charts will enable national legislatures to immediately create laws supporting the urgent work of preservation. Its typologies also are a foundation for pursuing the 2012 General Assembly mandate for work on an international instrument that is essential to the cross-border preservation the world requires.

Unfortunately, the Toolkit avoided the issue of making preserved works available. That makes obtaining funds for preservation extremely difficult, thus rendering such a narrow exception rather pointless. SAA is therefore pleased the Secretariat may have a roadmap to close the access gap.

If fires, floods, and earthquakes are not enough to show the urgency of preservation exceptions, then consider COVID's lesson. When traditional methods of access were shut down, heritage professionals had to act immediately and use modern technology to make copies for the public. To preclude a situation where those wanting to preserve their heritage do so in contravention to the law. Thus, my question:

We've heard a number of voices claiming that the simple 'possibility' to pass limitations and exceptions, such as for preservation, is enough. The toolkit may reinforce this laissez-faire approach. Because that is not enough for the current crises, what more might be needed to effect change?

**SOCIETY OF AMERICAN ARCHIVISTS (SAA)**  
**ORAL Statement to WIPO SCCR43**  
**Exceptions and Limitations-Africa Group Proposed**  
**Workplan 15 March 2023**

Internationally consistent exceptions and limitations are essential to the work of all archivists. The members of the Society of American Archivists are responsible for billions of unique works, largely never-in-commerce but still restricted by copyright. Thus, SAA thanks the Africa Group for its proposed draft work program. The plan is eminently practical and elegantly calibrated. It balances Secretariat work on toolkits and technical assistance with consensus building by SCCR Member States toward an international instrument on exceptions and limitations.

The proposal's strengths are:

- recognizing that a fair and balanced copyright system must advance public interest while supporting creativity;
- understanding that archives collections require cross-border work;
- making institutions the beneficiaries of exceptions; and
- presenting concrete and practical steps for SCCR's work.

We keep hearing the mantra about the current international framework providing flexibility for each country to go its own way, but it makes no sense for content of archives or for an international body such as WIPO. It makes even less sense not that COVID and climate crises made clear that digital preservation and digital access is a global need.

Last May Professor Crews warned SCCR ". . . if we do not move forward we will not be in the room ..... It will be somebody else. It will be individuals within our own countries, other organisations, other influences . . . shaping the law." If someone else does it, ".....we won't see ourselves and our interests and our concerns in the result. .... "

Therefore, SAA commends the Africa Group for identifying and promoting the correct outcome of the 2019 Regional Seminars and International Conference. Their work program supports the needs of archivists and the citizens we serve across the globe in the 21st century. SCCR should adopt it immediately.

## APPENDIX 2: Written Statements Submitted to WIPO

**Society of American Archivists (SAA)**  
**Written Opening/General Statement to WIPO SCCR43**  
**on Exceptions and Limitations**

March 13, 2023

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

For more than ten years, the Society of American Archivists (SAA) has been attending SCCR on behalf of thousands of American archivists who collectively curate billions of works that are prevented from being preserved and made available because of copyright. SAA has tried to help you understand that our unique circumstances require corrections to prevent copyright law from impeding the needs of global citizens for archival works in the digital age. SCCR's continued stalemate on this problem suggests that WIPO either does not understand or chooses to ignore what a balanced copyright system means in today's world. If the COVID-19 pandemic has shown us nothing else, it has confirmed the need and ubiquity for functioning in a digital world.

Fortunately, the current SCCR agenda suggests that all may not be lost. SCCR43 provides Member States with two opportunities to chart a course returning to the public-benefit purpose of copyright. First, the Toolkit on Preservation (SCCR/43/4) outlines provisions that can adjust copyright law to facilitate digital preservation copying. Importantly, it also provides the methodology to fill the gap left by the Toolkit's failure to address the need for cross-border access to preserved archival materials. Second, the Africa Group's proposed work program on exceptions and limitations (SCCR/42/4 REV) provides specific steps for SCCR to address the many issues and tasks central to the recent expert studies commissioned by the Secretariat and the 2019 Regional Seminars and International Conference.

Adopting the Africa Group's work program, perhaps using the Toolkit's statutory suggestions to focus discussions on an international instrument, would provide a way for WIPO to remain relevant and credible in a rapidly changing world. Time is of the essence. COVID-19 may be receding from view but it has demonstrated that, when faced with a threat to the mission of providing access to cultural knowledge, cultural heritage and education professionals must abandon traditional means and apply what the public expects as standard practice in the twenty-first century, namely using current technology to provide access. That is because archivists know that their mission and credibility in the digital age is more important than making their 21st-century mandate fit within a copyright law designed for hardcopy and conventional postal mail. In other words, COVID-19 showed that, when faced with crises, conscientious and ethical professionals will act according to their societal mission. When the next crisis comes, they will not have the luxury to worry about whether SCCR has made any progress on the nearly two-decade effort to develop modern exceptions and limitations.

These crises also make clear that the world cannot wait another five or ten years for SCCR to fulfill WIPO's distinct role as the only international body to authoritatively address the inherently cross-border dimensions of copyright policy for cultural heritage. It needs to act now on the 2012 General Assembly's mandate (WO/GA/41/14). At the May 2022 SCCR, Professor Crews emphasized the urgency for SCCR to take the lead: ". . . if we do not move forward we will not be in the room with the same people. It will be somebody else. It will be individuals within our own countries, other organisations, other influences inside of our countries shaping the law. It

won't necessarily be you, it won't necessarily be me. .... if something else does it, we won't see ourselves and our interests and our concerns in the result of that."

Archives consist largely of unpublished works never intended for commerce, making our work on preservation especially urgent, given the multiple threats facing the world today. Now is the time for SCCR to demonstrate it can adapt to the modern world. Allowing archives to make preservation copies would have virtually no economic impact on the copyright system. This fact should give SCCR the space to take that first step in establishing good faith by contributing to global heritage through carefully tailored archival exceptions.

If WIPO is unable to create an international instrument to provide the clarity that professionals require in today's technological world, who will? It is to SCCR that archivists look to balance exclusive rights with the public-interest missions of heritage institutions. Only SCCR can enable the kind of preservation and access to culture that today's interconnected world expects and deserves from us.

But perhaps I am wrong about what WIPO is supposed to be. Maybe WIPO's mission is nothing more than to provide and protect a revenue stream to authors, creators, publishers, and distributors. If that is the case, then WIPO should just acknowledge that the largely never-in-commerce nature of archival materials means that the contents of the world's archives are entirely outside of copyright itself. If that is too radical a proposal, then WIPO should act now to acknowledge the negative impact that exclusive rights have on cultural heritage which is a human right.

The world and the crises we face will not wait. Neither will archivists, librarians, and museum curators, nor the citizens we serve. We refuse to be left behind. Our mission mandates that we move ahead either with you or without you. If disastrous fires, catastrophic flooding, and wars are not enough to convince WIPO of the immediate need for preservation and digital-sharing exceptions for archives, then apparently nothing will. The result will be what archivists found ourselves doing, regardless of copyright, during the pandemic. We knew we could only fulfill our mission by digitally preserving for posterity the one-of-a-kind items that hold the history of all our shared civilizations, and we provided them digitally across borders. This is the twenty-first century. Citizens of every nation expect and deserve this kind of access to their own cultural heritage. If SCCR cannot find a way to acknowledge this basic human right to cultural heritage, then you will indeed be on your way to oblivion.

**SOCIETY OF AMERICAN ARCHIVISTS (SAA)  
INTERNATIONAL COUNCIL ON ARCHIVES (ICA)  
Written Joint Statement on SCCR 43, Agenda Item 5  
Protection of Broadcasting Organizations**

March 13, 2023

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Try to think of a major event of the past 50 years—the fall of the Berlin Wall or the September 11 collapse of the Twin Towers or videos showing police inflicting excessive force on citizens—without the video images that came first from broadcasts. These audio-visual documents give substance and impact to history and society and can be emblematic of broad social changes.

Archives by their very nature must be comprehensive in what we collect, preserve, and make accessible. To be authentic, archives must include evidential material in all information formats. That includes sound and video recordings. They are an essential part of the human record, and archivists must be able to work with them. For many decades, these most compelling records have come to the public first via broadcasting. For this reason, the International Council on Archives and the Society of American Archivists have been concerned that past discussions of the broadcasting treaty seem to reach beyond what is needed to combat signal piracy. New broadcaster rights, even those in the pared down January 2023 draft text, will have a significant negative impact on archivists and the people who depend on us for an accurate and full record of the past. The proposed new right may also impede the accountability that can come from recordings of sound and images. These are invaluable documents that connect society with its past.

Both the public and the industry have a stake in ensuring that there are legal remedies for signal piracy, especially for the initial broadcasts of high-profile entertainment and sporting events. However, the many years of deliberation on modernizing protections for broadcasting organizations contain multiple examples of going beyond the core needs of broadcasting organizations. It is essential that any measures put in place to provide broadcaster signal protection do not add any further layers on existing copyright protections for content or extend that protection for more than just what is needed to deal with signal piracy. In that regard, the 11 January 2023 “Second Revised Draft Text for the WIPO Broadcasting Treaty” is particularly troubling because of its failure to state the term of protection raises the specter of an indefinite term.

Especially problematic is Article 7, which gives broadcasting organizations an exclusive right of fixation. Notwithstanding the circular logic and sheer casuistry of the Article’s Explanatory note 7.03 about the right of fixation applying to “the very act of fixation,” these provisions open the door for broadcasters to obtain and exercise exclusive rights over actual content. Any suggestion that such fixation would only apply to the signal is readily betrayed by Explanatory Note 7.02’s reference to the value of the signal being in the programme material itself. At the least, an

exclusive right to the fixation would create additional intricate layers for anyone seeking permission to use material that had been transmitted by a broadcaster, even public domain material. Because of the kind of uses that are of greatest concern to archivists and those whom we serve, we believe that Article 7 needs to be completely reconsidered to ensure that any exclusive right provided to the signal will not “bleed through” to the content of the broadcast.

Archivists are pleased that this draft no longer contains reference to durations of the exclusive right for 20 or more years. However, the lack of any mention of the duration of a broadcasting organization’s exclusive right to the signal leaves open another door for Contracting Parties to enact terms that would severely complicate how archivists can respond to the legitimate public interest in content held in archives as cultural heritage assets. Businesses disappear with regularity, but archivists are called upon to preserve these one-time records in perpetuity. Thus, when taken together with the fundamentally ambiguous fixation right, the lack of limitation to the very short duration necessary to protect against signal piracy will irresponsibly lock up program content. This will add immeasurably to the challenges archives already face in preserving and providing access to documents that are so important to society at large.

For archivists and the people we serve, all of these problems are compounded by weak text on exceptions and limitations. Although the January draft’s Preamble starts with the premise that the treaty desires to protect broadcasting organizations in a balanced manner, the failure to include mandatory exceptions and limitations undermines one of the most basic means by which intellectual property treaties can ensure balance. Merely asserting, as Explanatory Note 11.02 does, that balance is established by introducing the possibility of exceptions stretches believability.

If the treaty really seeks balance, its creation of mandatory new exclusive rights needs to be balanced by mandatory exceptions and limitations. Furthermore, the scope of possible exceptions a Contracting Party may apply is overly narrow, considering the extent of cultural and civil content that currently is delivered by broadcasters. This is especially problematic when presented as the only options a Member State might consider. From the perspective of archives it is very concerning is that the only reference to an archives exception (Article 11, paragraph 1(e)) relates solely to preservation, when what our institutional mandates emphasize is the importance of being able to make archival content available. Furthermore, in a treaty that has been promoted as interested in “future-proofing” paragraph 1(d)’s referencing to scientific research does not even recognize the developments in text and data-mining, a particularly important use for assessing news content and understanding political and social change.

**SOCIETY OF AMERICAN ARCHIVISTS**  
**Written Statement on SCCR 43, Agenda Item 6**

**Limitations and exceptions for libraries and archives:**  
***Toolkit for Preservation***  
**March 14, 2023**  
**William J. Maher (w-maher@illinois.edu)**

The Society of American Archivist thanks the WIPO Secretariat for commissioning three leading experts to survey national laws and create thoughtful and usable statutory typologies to for copyright exceptions to enable preservation of cultural heritage collections.

It is universally understood that archives consist of one-of-a-kind items and unique collections of extremely rare items. Thus, preservation is critical to the responsibility of archivists to our institutions and society at large. The new *Toolkit for Preservation* will enable national legislatures to immediately create laws to support the urgent need for preservation copying. Its typological charts can provide a template for SCCR's stalled work toward an international instrument as called for by the 2012 General Assembly. The uniqueness of our materials makes them resources for global heritage that urgently need copying to guard against deterioration and damage from fires, floods, and human threats.

SAA, therefore, is pleased that the Secretariat commissioned three leading experts on copyright as it affects archives, libraries, and museums. Their survey of national laws regarding exceptions for the preservation of cultural heritage shows that only action by an institution like WIPO's SCCR can create an international instrument to enable the kind of cross-border work needed for effective preservation in today's world.

First, however, a significant gap needs to be addressed, namely the ability to make preservation copies available to users. Unless there is legal clarity on how trusted institutions like archives, libraries, and museums can make preserved works available even across borders, then preservation only creates a near pointless security copy, locked away from the world. This gap seriously will undermine the ability to obtain funds. Governments, institutions, and philanthropists will not pay to have heritage and knowledge preserved only to be lost in the dark.

If disastrous fires in Brazil and South Africa and the climate crisis are not enough to show the urgency of preservation exceptions, then consider COVID's lesson. When the pandemic suddenly shut down traditional access to works, heritage professionals and the public knew they needed to take matters into their own hands and use modern technology to create copies and make them available.

The *Toolkit* charts a productive course for preserving these unique items that were never in commerce in the first place. Once the access gap is closed, SCCR can embrace it as a step forward and thereby avoid the irrelevance and obsolescence to which it is headed.



**SOCIETY OF AMERICAN ARCHIVISTS**  
**Written Statement on SCCR 43, Agenda Items 6 and 7**  
**Proposal by the African Group for a Draft work Program on Exceptions and Limitations**  
March 15, 2023  
William J. Maher (w-maher@illinois.edu)

The Society of American Archivists, the oldest and largest organization of professional archivists in North America, is pleased to participate in SCCR43. We are here to voice archivists' need for copyright limitations and exceptions that would promote the public interest, support creativity, and enable global citizen to access their heritage. Because SAA's members are responsible for billions of works, largely never-in-commerce but still restricted by copyright, we are especially appreciative of the Africa Group for its proposed draft work program. The plan is eminently practical and solidly based on nearly two decades of SCCR work. In particular, it calls SCCR's attention to activity in previous sessions, including the Chair's Chart (SCCR 34/5) outlining issues and options relating to 11 topical areas for possible exceptions, and to the findings and priority matters noted in the Secretariat's Report on Regional Seminars and International Conference on Limitations and Exceptions (SCCR/40/2).

Overall, the proposed work program is elegantly calibrated to balance Secretariat work on toolkits and technical assistance with SCCR Member States' consensus-building activities toward the 2012 General Assembly mandate for work on an appropriate international instrument on exceptions and limitations (WO/GA/41/14). Particular strengths of the current proposal include: recognition that a fair and balanced copyright system must advance public interest while supporting creativity; presentation of concrete and practical steps; understanding that the nature of archives collections requires cross-border work; and focus on making institutions the beneficiaries of exceptions.

SAA commends the Africa Group for identifying and promoting this most appropriate outcome of the 2019 Regional Seminars and International Conference. Their work program offers clear promise for the needs of 21st century archivists and the citizens we serve across the globe. It is particularly timely coming after over a decade of studies and discussion and at the same time as the issuance of the Toolkit on Preservation. If the workplan can merge the Toolkit's analysis and statutory typologies with further work to address the cross-border implications of making copies of preserved works available, the Africa Group's proposal will significantly advance the needs of archivists and the global community we serve for access to their history and social memory.