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**Report: World Intellectual Property Organization (WIPO)'s
Standing Committee on Copyright and Related Rights (SCCR) 33
(Prepared by SAA Representative William J. Maher)**

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TO: SAA Council

FROM: William J. Maher

SUBJECT: Summary Report on WIPO SCCR34

DATE: July 17, 2017

This memorandum constitutes my report on service as SAA's representative at the thirty-fourth session of the World Intellectual Property Organization (WIPO)'s Standing Committee on Copyright and Related Rights (SCCR). Occurring in Geneva Switzerland from May 1-5, 2017, SCCR34 was a continuation of sessions on issues of particular interest to archival work both within the US and Canada and globally. Since SCCR23 in November 2011, SAA's participation has been to support work advancing a proposal for an international treaty to establish consistent and predictable copyright exceptions for archives and libraries. Such an agreement would secure the legal space for our work in preserving, sharing of collections across borders, and providing reference copies to archives users.

Exceptions for archives may seem patently necessary and eminently reasonable given the very limited harm archives would have on markets when copying and distributing archival material. Nevertheless, in the global intellectual property market, any copyright exceptions are the target of stiff resistance from publishers and commercial agencies that license permissions. Thus, SAA has joined with a number of other national and international archives, library, and museum organizations to bring a coordinated and sustained advocacy to WIPO while speaking to the broad societal, educational, and cultural benefits of archives. Copyright exceptions will enable our institutions to take full advantage of the technological tools available in the networked world of the 21st century.¹

Inherent in international/UN-based organizations are protocols and deliberations that may inhibit

¹Libraries and museums, because of their relatively greater public visibility, have faced a lesser challenge than archives in making their case understood at WIPO. On the other hand, by contrast with libraries which are clearly part of the market for an entire industry, archives have had an outsized impact on the SCCR discussions once we can explain the nature of our unique collections and global user audience. In this way, by its continued involvement at SCCR, SAA has been able to not only help make archives better understood by the Member States whose support will be critical, but it has also bolstered the library sector's advocacy and caused international library organizations to give deference to our expertise, something I have not seen domestically.

quick results, especially when dealing with many any issues, whether affordable medicines or globalized access to books, manuscripts, and museum objects. Thus, work at the semi-annual SCCR sessions has been incremental. As with the prior session, the positive outcomes of SCCR34 may not be earth-shaking, but there were advances. Most significantly, momentum has been maintained through the transition from the prior SCCR Chair, who had been favorably inclined to library and archives over his four year term, to the new Chair. Indeed, considering that such a change could have provided an excuse for those nations opposed to any copyright exceptions to set aside all the work done since 2013, it is significant that the new chair, Darren Tang, maintained time on the agenda for libraries and archives despite the need to tackle a number of new issues, is significant.

1. General Context for SCCR34. As with prior sessions, library and archives exceptions have had to share SCCR's the time with a number of other matters. These include: proposals for new exclusive rights for broadcasters and cablecasters; exceptions and limitations for education/research; exceptions and limitations for persons with disabilities; establishing an international mandate for artists' resale rights (*droit de suite*); and generally analyzing the effect of the digital environment on artists, performers, and rights holders. Some awareness of these issues and how they are progressing (or stalling) is important to understand how archivists might best position themselves for success in their advocacy. This report notes these as context:

1.1 Broadcasting Treaty. A proposal for a new treaty to update the Rome convention and provide broadcasters/cablecasters an exclusive right over broadcast signals has been on WIPO's agenda for approximately 17 years although the accelerating pace of technology has continued to complicate the issue. Member States have been divided over whether the treaty should be narrow, focusing on traditional broadcasting organizations, or whether it should extend to the internet. The prior Chair created movement on the issue by working through definitions, scope of coverage, etc. and recording where he saw some consensus via a chart that could become elements in treaty text to be presented to a WIPO Diplomatic Conference (DipCon). There has been pressure to set a date for the DipCon in 2018, but the prior SCCRs could not agree that the issue was ready.

At the outset of SCCR34, the chatter among NGOs was that SCCR 34 (or failing that SCCR 35) would be a make or break time for broadcasting. This was also said with the expectation that action on broadcasting may be de-coupled from work on libraries and archives exceptions. Were that to happen, archives and libraries might be left without the leverage that currently exists to stay on the agenda.

The first two days of SCCR were dedicated to broadcasting, notably cut short from the prior routine of two and one-half days, thus ensuring time for libraries and archives, at the expense of broadcasting. The broadcasting discussion was held in "informals," working on language. Some progress was apparent, but there remained "an impasse" on whether the object of protection should extend to delayed and rebroadcasts. With no progress when time ran out, the Friday evening "Summary by the Chair" (i.e., Chair's Conclusions) indicated merely that the broadcasting topic would continue on the agenda but without any mention of a date for a Diplomatic Conference.

1.2 Artists Resale Right (*Droit de suite*). Many European countries and their former

colonies with “moral rights” regimes provide a perpetual and inalienable *droit de suite* so that artists and their heirs may receive a share of the profits that come from the resale of their works via future gallery and other sales as an artist’s reputation increases. However, the countries with some of the largest art markets, including the US, do not recognize a resale right. The issue bears watching because the Berne Convention’s text on *Droit de suite* contains a reference to “original manuscripts,” and an ill-formed proposal could sweep some archival material into its scope.

To help move work on resale rights out of doldrums where it has sat since 2012, WIPO held a conference on the topic a few days prior to SCCR34. One of its speakers, a Professor Kathryn Graddy of Brandeis, summarized her economic analysis of the right. She disputed the oft-voiced criticism that adopting the right in countries with major markets (e.g., the U.S.) would depress artists’ earnings. Discussion indicated U.S. and Japan remain the major opponents, with the Global South and the EU in support. There were few NGO comments, although the the Library Copyright Alliance, voiced clear support. The topic’s initiators (Senegal and Congo) and supporters would like to see this matter adopted as a formal part of the agenda of SCCR. However, the Friday evening “Summary by the Chair” indicated it would be maintained in its less formal status under “Other Matters” for SCCR35.

1.3 GRULAC Proposal for Analysis of Copyright Related to the Digital Environment.

In December 2015, the Group of Latin American and Caribbean countries asked for greater attention to the effect of the digital market on individual artists and performers.² In many ways, this was largely a critique of how the industries, especially music, are structured to preclude equitable compensation getting to the actual individual artists. Last November, it was decided that a “scoping study” was needed to better understand the issue and perhaps identify a methodology for future work. However, at the end of SCCR33 it had not been clear how this would happen. This apparently created the opening for the new (since mid-2016) Deputy Directory General, Sylvie Forbin, to try to “make things happen at WIPO” through executive action. She had appointed a researcher to study the issue, and Forbin convened small group of experts to come to Geneva this April and discuss the issue as well as serve as reviewers once the researcher was done. Although the researcher, Guilda Rostama, presented a concise and solid description of the project, Forbin then gave the floor to one of her “experts,” a Professor Pierre Sirinelli from the Sorbonne, to describe the nature of experts “brainstorming.” He spent almost an hour in rambling, verbose, sometimes off-topic, and opinionated comments around the issues called for by the GRULAC proposal. One of the questions apparently before the group is whether the WIPO 1996 treaty should be reopened or whether there were other ways to update it, including by scaling back ISP safe harbors. As he droned on, many in the room, including the Chair and Member States, seemed impatient with the presentation, eventually requesting his report in writing before they would agree to anything else. Overall, it did not leave a very positive impression of how the new DDG does business. Given that the proposed next step is a mid-summer review of the researcher’s report, time will tell whether DDG’s interest in using such small groups of experts in private session will receive support or whether the prevailing Member State

²Available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_4.pdf

culture frustrates her efforts.

1.4. “Education Exceptions”. Since 2010 the topic of archives and library exceptions was loosely coupled with developing countries’ aspirations for exceptions for education and research as well as for those with disabilities (see below). Until spring 2016, the education topic has lacked specificity and has not been discussed. At that time, Professor Daniel Seng of the University of Singapore presented a first draft of a Ken Crews style survey of the kinds of exceptions that exist in national laws of WIPO member states in support of education. He then returned to SCCR last November with a 1,009 page report covering all 189 WIPO member states, which had the unfortunate effect of some MS delegates asking for deeper examination and future updates. Fortunately for us, Seng had not completed his revisions by the time of SCCR34.

Chair Darren Tang then asked Deputy Director General Sylvie Forbin to describe work she had initiated with the International Publishers Association to work in partnership in “capacity building” by improving publishing in developing countries via a project entitled “Facilitating Access to Educational Materials and Learning Modules.” She also noted a cross-border “seminar” she was trying to organize before the next SCCR. She wanted to assemble a small group of experts who would meet without having to “stand behind a podium.” She seems to want to find something “concrete” to produce and use rightsholders to create those products, all of which would then obviate the need for exceptions, while almost certainly involving an income stream for the publishers. The MS generally did not take kindly to the idea of this being planned without their involvement. Even the US and the EU called for SCCR to serve as the body of experts and for the seminar to place during the next SCCR. Time ran out before the matter was resolved in the plenary session, but the proposed seminar did not appear in any form in the “Chair’s Summary.”

1.5 Exceptions for Persons with Other Disabilities. Until last November’s SCCR33, the exceptions for education and research were bundled together with exceptions for persons other disabilities (i.e., other than the visual impairments addressed in the Marrakesh Treaty). This created a potential problem for the archives and library advocacy, because not only did some opponents, especially Russia, want to delay action on libraries and archives until there was a merger with the education/research topic, but they also argued for incorporating the “other disabilities” as well. Doing so would have the effect of seriously slowing work down and risk having archives and libraries concerns lost within a rather large cloud. Fortunately, the common WIPO practice of commissioning separate studies may have obviated the merger problem.

During the May 2017 session, the SCCR received updates on a study by Blake Reid of the University of Colorado regarding limitations and exceptions for persons with disabilities other than visual. This well organized, content-rich, and efficiently presented summary categorized disabilities as aural, visual, physical, and cognitive, while noting the common overlapping of such disabilities suggesting the need for adaptation of exceptions across legal boundaries. However, it is too early in Reid’s study to be able to forecast what kinds of exceptions might be recommended until the full report, anticipated for delivery at the next SCCR.

2. EXCEPTIONS FOR LIBRARIES AND ARCHIVES

By contrast to prior SCCR sessions when there had been up to 1.5 days on the libraries and archives topic, Chair Seng shortened this to one-half day. Although this was disappointing, it is clear that his goal was to tamp down discontent by making sure that all of the issues before SCCR receive a hearing. It also seemed clear that he does not want to see stalemated topics, such as broadcasting, eat up the entire schedule in efforts to resolve impasses resulting from entrenched positions. Furthermore, the Wednesday morning session at this SCCR did accomplish enough to keep our issue alive and as part of the committee's workplan.

Insofar as last November's SCCR had concluded discussion of the prior Chair's sequence of eleven topics related to library and archives exceptions, there was a less specific focus to the discussions at this May's meeting. Interestingly, the interventions made by the Regional Coordinators and Member States, whether commenting pro or con, exhibited greater brevity than previously. With the possible, but notable, exception of the EU, there also seemed to be less rigidity in the opponents' statements. Despite turnover in some key friendly delegations (e.g., India and Brazil) which could have worked against continuation of support, the same players are firmly behind the effort (Africa Group, GRULAC, Asia-Pacific, Egypt, Iran). Out of these groups or their Member States, support was expressed for: a) SCCR to continue to follow the 2012 General Assembly mandate for further work on library and archives exceptions; b) adoption of the past SCCR Chair's Chart as a Committee Document; and c) addition of museums to the group of beneficiary parties. Each of these elements would aid in our cause.

The Chair moved the discussion along quickly and the MS were more concise and not prone to take the floor more than once on any given point. It would seem that Chair Tang had gotten a message out in advance that he did not want the committee to bog down. Perhaps the most nuisance-laden comment was from Russia which wants there to be a combined look at all kinds of exceptions before there is work on any specific area. This not only sets up a situation for muddling the focus that exists in the library and archives area but could be a poison pill.

When the chair gave the floor to the NGOs, he asked that our comments be limited to 2 minutes, whereas at all past meetings we have been trying to follow the three-minute rule. By this time during the week, it was clear that Chair Tang was intending to run a tight ship, thus we had to quickly make cuts. Fortunately, a slight pause that enabled me to do wholesale cutting and reduce my statement by one-third, from 474 to 298 words (See appendix A for a copy of the text of the original full-length version.) The chair did interrupt one of the NGOs after 3+ minutes and told her to speed it up, but he let her continue for what seemed like a total time of nearly 5 minutes. Later, during NGO interventions on education exceptions, he actually cut off the microphone of a NGO who was going too long. Thus, we need to remember that for future SCCRs, we will need both 475 word and 300 word versions of any statement.

Overall, the NGO interventions were dominated by the "pro" sector, and the publishers and RROs were silent (or they hit their request buttons too late). The comments reinforced several points—add museums, update the Crews study, adopt the Chair's chart, etc. so if nothing else we were able to show the "pro" MS that we were there to support them. Following the NGO comments, the chair outlined a "road map" of what he saw as facets for the committee's future work: 1) update the Crews study; 2) look at the cross-border issue, by asking the Secretariat to

organize an event with experts commenting on the effect of exceptions across sectors [a bad idea]; 3) although model law per se is not something of interest, the SCCR might adopt benchmarks and principles as useful tools; and 4) consider “moving the Chair Moscoso’s Chart to another place.” Presumably this latter item meant either have it adopted as a committee document or just establish it as the basis of future discussions. The road map idea was greeted with both positive and a few negative comments from the Member States, but the matter was left unresolved at the end of the formal library and archives part of the agenda.

3. Conclusion of SCCR34 and Chair’s Summary. The mix of grandstanding, drama, and tedium of an SCCR would never be complete without the time warp of the Friday “afternoon” session and its legendary ability to drag on into the wee hours of the morning. Until a few years ago, the Committee had to agree upon a document of “Conclusions” listing what was done and noting next steps. On one occasion, discussion vaporized nearly three hours in debate over 12 words in the document, and on others, the meeting has gone on to 1:00 or 2:00 a.m, with no dinner break or access to food. More recently, this has been avoided by the Chair insisting on his own summary and refusing to entertain any substantive debate.

Although SCCR34's Friday afternoon reconvening was delayed just one hour (to 4:00), that was only a formality before it adjourned again to allow more consultations among the Regional Coordinators and the MS. When the “afternoon” session finally reconvened at 6:59 the Chair presented and staff circulated the summary.³ He emphasized, as had Martin Moscoso before him, that MS were to limit their comments to “matters on which there are factual inaccuracies or which you have very, very very violent objections.” As a result of the comments, made a few modifications, the most significant of which was in his proposed report to this Fall’s General Assembly. For that he had proposed, in regard to broadcasting, that the “Committee recommended to the General Assembly that the Committee be directed to continue its work.” A rather legalistic objection was raised to this language to the effect that the Committee could well just continue working on what it had been doing without needing any further mandate from the GA. It was not clear whether this concern was more out of fear that the GA would call for decommissioning the SCCR (something the US tried to do a few years ago) or that the Global South Countries would use such a statement in the report as an excuse to mandate that SCCR make more progress on normative provisions. In any event, the Chair agreed to delete the statement about the General Assembly, and instead agreed that the broadcasting issue would be referenced like the other items by saying they would “be maintained on the agenda of the thirty-fifth session of the SCCR.”

In terms of library and archives exceptions, the most important, and most positive, provision in the Chair’s Summary of SCCR34 was that the “informal” chart outlining the eleven topics for exceptions, as presented by prior Chair, would be assigned a WIPO document number (SCCR 34/5 and would be the basis of discussions of becoming a Committee working document at the next SCCR. Even though this was short of SCCR formally accepting Moscoso’s chart and analysis, this step was an important advance because it gives recognition and future standing to all of the work from December 2013 to November 2016. Undeniably, there is not committee

³The text of the Chair’s Summary reflecting the changes following discussion can be found at:
http://www.wipo.int/edocs/mdocs/copyright/en/sccr_34/sccr_34_ref_summary_by_the_chair.pdf

consensus on whether an international instrument is needed for any particular topic, but as a result of SCCR34, it seems there cannot be a pre-emptive effort to remove the eleven exceptions topics from the agenda.

Also important was that Chair Tang's summary called for a further update on the Crews study and the related collection of information relating to exceptions for museums. Meanwhile, the Summary noted that the Committee called for the WIPO Secretariat to prepare a draft action plan for library and archives exceptions to be discussed and considered for adoption at SCCR35.

Comments on the New Chair:

There was a generally positive reaction to the new chair. Without any prejudice to Martin Moscoso, who was uniformly praised by Tang, MS and NGO delegates, the several positives about Tang include:

a) He speaks clearly without droning on in formalities. Not only is his English excellent, there is an economy of words and clarity in what he has to say, although one does miss the warmth and absolute cool of Moscoso's presentation.

b) Like Moscoso, he wants to manage the clock and make the SCCR start and stop as close to on time as possible. More than once, he was pointed in asking for Member States to curtail their remarks. Although his focus on time management enabled the session to deal substantively with all agenda items, it also required containing the discussion within some limits.

c) Based on what I heard while listening to the broadcasting informals, he is comfortable trying to enter into substantive conversation with the MS delegates on the issues and state his summary of what he thinks they mean. In some instances this metamorphosed into suggesting what might be seen as compromise language. Compared to Moscoso, this is closer to a negotiator rather than a studiously neutral stance of making sure that all views are treated as legitimate.

d) Without being overly meddling, he manages to keep some control on the discussion.

e) In general, he did not seem any less deferential to the advocates for exceptions than to the rightsholders, and he seemed more realistic on the continued blockages to action on broadcasting. While according her time in the schedule, he seemed no less impatient with the new Deputy Director General's seeming agenda than some of the Member States.

Summary observations. Overall, SCCR34 was much better for us than it could have been. Rather than losing ground or being closed out by the transition to a new chair, the work of the several prior sessions was accepted as part of what SCCR would continue to do even with an otherwise expanding agenda. With the broadcasting issue still moving slowly or stalled, it seems unlikely that exceptions for libraries and archives will be brushed aside. Furthermore, the new Chair, even if he does not yet have committee consensus, has a road map in mind to continue the work.

Indeed, one of the most important events of SCCR34 was the transition to a new chair who seeks to build on the work of his predecessor rather than set aside the work that has benefitted us in the past. Furthermore, from some perspectives, Darren Tang's performance as chair may be seen as an advance on Martin Moscoso. He took greater charge of the agenda, was comfortable intervening in Member States' comments to try to formulate a consensus on points where there was division. In addition, he did not cede any momentum to the new Deputy Director General's corporate, executive-directed, style.

4. CLOSING COMMENT: Given SAA's past experience with the SCCR, the 34th session presented both positives and negatives. The new Chair represents continuity with the prior Chair and the slow but definite progress of the sessions over the past few years, and the Chair has begun to formulate a workplan that will provide a future for library and archives exceptions work. In addition, he managed to keep diverse factions of Member States from discontent that their issues were being ignored without sidelining library and archives topics. On the negative side there were no signs of a decline in resistance by the EU, although they were noticeably less vocal in their opposition, especially with their legendary grandstanding late into Friday evenings. To end by noting that the good news is that the exceptions for archives and libraries will continue on the agenda for SCCR35, may seem like a small accomplishment. However, in the context of the transition from last November's SCCR to this May's session and the fact that work on library and archives exceptions has never been a given, the continuance to SCCR35 is indeed the takeaway, and one which suggests what is needed to continue charting our course forward.



**SOCIETY OF
American
Archivists**

Statement of Society of American Archivists' Representative

WIPO Standing Committee on Copyright and Related Rights SCCR 34

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3 May 2017

The Society of American Archivists, North America's largest professional archival organization, congratulates you and your vice chairs on your elections. Our members manage billions of primary source works from across the globe. So we look forward to working with you. SAA keeps returning to WIPO because copyright is central to the mission of archivists. Our daily work depends on collaborating with authors, so we have great respect for authors' rights.

We collect and preserve all kinds of creative works for one reason only—use. Most archival works have never been in commerce, but people globally need them to maintain their cultural identity, protect human rights, and support innovation through new creative works. If such works cannot be made available digitally and across borders, they might as well not exist.

Archivists and librarians are conscientious about copyright, but strict adherence to the law often conflicts with our collections and our mission. For example the 1970s collection of 120 interviews of legendary jazz musicians are available for onsite study in the archives of a US research library, but their general usefulness was hobbled by unbalanced copyright law because the original copyright assignment mentioned neither derivative works nor the yet-to-be-invented internet. As a result, risk-averse librarians and lawyers were unwilling to allow the digital accessibility of the interviews. Although jazz cannot thrive without taking risks, an archivist's obligation to the future requires that we minimize risk. That is why we need reasonable exceptions to deal with the tremendous ambiguity inherent in our collections.

Enforcement of exclusive rights operates across borders. So should access to knowledge. Society needs ready access to the historical documents that archivists curate so that people anywhere in the world can learn from the past, secure their rights, and preserve their diverse cultures. That is why archivists need coordinated copyright exceptions to bring back balance and eliminate the conflicting national practices that technology has rendered obsolete.

Unfortunately, WIPO's continued inaction leaves archivists with only two choices. Either we must exhaust our budgets in endless and fruitless searches for virtually unfindable rights holders, or we must decide not to preserve or make works available. Why? Because of fear of possible infringement. The first choice would destroy archives. The second would harm society and undermine the credibility of copyright. Is that what WIPO wants?

Copyright is already perceived to be under attack. Can WIPO afford to turn away allies such as archivists? We have quite positive approval ratings from the very public you need to reach. To keep archivists on board, the development of exceptions for archives must remain on SCCR's agenda. To this end, the committee's work should continue based on the previous chair's chart, and the chart should become a working document of the Committee.



The Society of American Archivists (SAA) is the oldest and largest association of professional archivists in North America. Representing more than 6,200 individual and institutional members, SAA is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records. SAA serves the education and information needs of its members and provides leadership to help ensure the identification, preservation, and use of the nation's historical record.

Since the 1960s, SAA has spoken in regard to archives and intellectual property and has issued more than 20 policy statements on copyright since the mid-1990s. SAA believes that archivists must take an active role in promoting the importance of archives and archivists in order to increase public support, shape public policy, and obtain the resources necessary to protect the accessibility of archival records that serve cultural functions as well as ensure the protection of citizens' rights, the accountability of organizations and governments, and the accessibility of historical records. Further, archivists promote and provide the widest possible accessibility of materials, consistent with any mandatory access restrictions. Although access may be limited in some instances, archivists seek to promote open access and use when possible.

Archivists are the custodians of writings and other materials that have been created by their own organizations and by third-party authors. Archivists try to provide access to these materials within the bounds of law, donor concerns, and public policy. Yet copyright law is perhaps the most important challenge that archivists face in providing wider access to our collections, especially digitally. It is also a challenge for the students and scholars wishing to use our collections in their research and study.

SAA created the Intellectual Property Working Group in May 2001. The Working Group responds to requests for assistance from the SAA Governing Council, tracks intellectual property issues of concern to archivists, and drafts responses or position papers for the Council as needed.

William Maher was SAA President (1997-98) and Treasurer (1991-94). He is University Archivist and Professor (1995-present) at the University of Illinois at Urbana-Champaign, and previously was Assistant University Archivist at UIUC (1977-95) and Program Officer at the U.S. National Endowment for the Humanities (1985-86). He is Chair of the International Council on Archives' Section on the Archives of Universities and Research Institutions. He is the author of one book and many articles and has taught hundreds of students in SAA's workshop on "Copyright for Archivists" since 2000.

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