

**Society of American Archivists  
Council Meeting  
August 3, 2021  
Virtual Meeting**

**Report of SAA's Representative to the World Intellectual Property  
Organization Standing Committee on Copyright and Related Rights  
(SCCR41, June 2021 Session)**

**(Prepared by William J. Maher)**

1. Since 2011, SAA has dedicated resources to represent the interests of archivists at the World Intellectual Property Organization (WIPO) in its deliberations on establishing international norms for archives and library limitations and exceptions to the monopoly rights inherent in copyright.
2. Our particular focus is in WIPO's Standing Committee on Copyright and Related Rights (SCCR).
3. We seek legal provisions for copyright exceptions necessary to fulfill our mission of preserving and making cultural heritage available in a digitized and globalized environment. The issues in SAA's advocacy at WIPO have a long and deep background. Council members new to this topic may wish to skim the last extensive report I prepared following the last in-person session in late 2019. (See Appendix 1, pg. 9.)
4. SAA, together with the International Council on Archives (ICA), has been an important part of the library, archives, and museum (LAMs) coalition, which includes the International Federation of Library Associations and Institutions (IFLA) and the International Council on Museums (ICOM).
5. SAA's presence is important to give voice to the non-commercial and cultural mission of archives at the same time as ensuring that distinctly archival conditions and needs are not subsumed by the needs of either the library or museum community.
6. The LAMs coalition is in contrast to the content industry, represented at SCCR by such non-governmental organizations as International Publishers Association (IPA), Motion Picture Association (MPA), International Federation of Musicians (IFM), and International Federation of Journalists (IFJ). Especially problematic has been the International Federation of Reproduction Rights Organisations (IFRRO), which represents collective management licensing organizations.
7. Exceptions and Limitations. As non-controversial as preservation, research, and cultural exceptions might seem to American archivists, making the case for archives exceptions in the

WIPO environment is particularly complex where the core audience is the WIPO Member States (MS) delegates, who are professional diplomats with little personal experience with archives materials and use and whose personal background is often with the “content industries.”

- a. In normal times, when SCCR meets in person, to make our case we must explain:
  - What archives contain, emphasizing the largely non-commercial nature of our holdings and use.
  - Implications of the fact that archives consist of unique materials or unique clusters of evidence.
  - Preservation copying is essential to maintaining the integrity of the record.
  - Any given archives may contain materials that are unique in the world and thus their user clientele is global.
  - Users face costly barriers to access unless we can legally make and provide copies across international borders.
  - Digitization of archives in a manner that maintains their integrity is a complex and costly process that is hard to justify if we are legally restricted from providing off-site access to what is digitized.
- b. All of this has to be explained to WIPO MS delegates within short exchanges—either in the 2- or 3-minute formal interventions made to the full assembly or in short and less formal meetings or casual exchanges during coffee breaks, lunch, and WIPO-organized receptions.

## 8. Prior Developments at SCCR

- a. From November 2011 through October 2019, SAA participated in the twice-yearly sessions, and we saw progress especially working with long-time chair Martin Moscoso (Peru) and his successor, Daren Tang (Singapore).
- b. SCCR’s knowledge of library exceptions was aided through studies by Kenneth Crews on the extent and exact nature of supporting provisions in the laws of WIPO’s 193 Member States. The delegates’ understanding of the nature of copyright issues for archives was greatly expanded through a WIPO-commissioned study by David Sutton (Director of Research Projects at the Reading University Library and editor of the WATCH project).
- c. Unfortunately, entrenched opposition has continued, especially by the European Union acting to support representatives of publishers and other parts of the corporate “creative sector”/content industry. The US delegation’s opposition has been less aggressive but persistent.
- d. Especially problematic has been the lobbying by IFRRO, which seems to have the ear of some in the WIPO Secretariat. Because their business model depends on income from fees levied for every use, they insist that any exception made for any libraries, museums, or archives copying needs to be formally licensed via a Collective Management Society

(CMO) which would collect a fee for each copy in exchange for “protecting” us against the consequences of us being found to have made an illegal use.

- e. With a new chair (Tang) and a new WIPO Deputy Director General (DDG), Sylvie Forbin, late 2016 through early summer 2018 saw the development of an “action plan” or road map to move the topic from general discussion to specific steps forward.
  - f. Thus, 2019 became a critical year in which specialized studies of archives, museums, and educational institutions were prepared by hired consultants. 2019 also saw “regional conferences” to obtain “stakeholder” perspectives in Asia/Pacific, Africa, and Latin America and the Caribbean. This culminated in a 2-day “International Conference” at WIPO in October 2019.
  - g. Unfortunately, because of the stage managing by the Secretariat, especially the DDG, the Seminar and Conferences only continued the stalemate and managed to tilt the tables toward the licensing sector.
  - h. The outcome of SCCR39 in October 2019 (immediately after the International Conference) was that no “next steps” would be developed until the Secretariat prepared a final report of the Seminars and Conference process. This was to be presented at SCCR40, planned for spring 2020, but formal discussion has been delayed by the pandemic.
  - i. The COVID-19 pandemic resulted in cancelling the spring 2020 SCCR and flipping SCCR40 into a hybrid, but largely virtual, meeting.
  - j. When SCCR40 was held in mid-November 2020 as a hybrid session, the majority of MS delegates joined remotely via a conferencing system that merged more than 100 logons with simultaneous translation in seven languages. Unfortunately there were extensive connection problems, with several MS and some NGO representatives not being able to connect.
9. Because neither SCCR40 nor SCCR41 could be held in person, a number of MS, especially from the Global South, insisted that no substantive discussions could be held. Absent the possibility that any progress could be made to advance normative work, both sessions largely contained restatements of long-standing positions.
10. SAA’s Participation in SCCR41. Within the constraints of a virtual meeting that occurred from 5:00 am to 7:30 am Chicago time, the NGOs audited the session to identify trends and themes for which we would need to prepare before the next in-person SCCR. SAA also delivered a statement to the assembly. (See Appendix 2, pg. 19). Overall outcomes suggest some substantive matters for the next in-person SCCR (presumably in 2022).
- a. Among many of the Member States, there was interest in a request first voiced by Asia/Pacific Group for a formal examination of the implications of the COVID-19 pandemic for copyright, but with quite different concerns voiced by MS from the Global

South vs. the Global North.

- b. The result was a call for an “information session” on the effects of COVID at the next in-person meeting, presumably SCCR42. However, it is unclear exactly what would constitute an “information session.” In light of the DDG’s past manipulation of the stakeholders in seminars, conferences, and “expert groups,” the LAMs coalition must monitor the planning to ensure that the “information session” is balanced to include not just creators and distributors but also custodians and users of copyrighted material.

11. Major implications of SCCR41 for future exceptions and limitations work:

- a. Based on comments from multiple MS delegates and regional groupings, it seems that there is an emerging agreement that preservation copying be the focus for the next discussions.
- b. There remains some resistance to even a preservation exception, and even more so to whether such exception would include the right of libraries, archives, and museums to make available to on-site or remote users those copies of works that have been digitally preserved.
  - The European Union, some of its Member States, and the Central European and Baltic States may acknowledge the need for preservation copying but want provisions to be addressed only through national law, thus leaving in place the cross-border barriers to doing archival work.
  - Some reproduction rights and authors’ rights organizations remain insistent that exceptions should be considered only if they include a fee-based licensing system, even in the case of the non-commercial works that predominate in archives.
- c. Assuming the next SCCR, in 2022, will be in person, it will be very important for LAMs representatives to be present to make the case for uncompensated preservation exceptions and the need for the exceptions to include the ability to make preserved works available across borders.

12. Non-exceptions matters at SCCR41 of note:

- a. New Exclusive Right in Broadcasting Signal. Discussions of creating a new monopoly right for broadcasting signals continued at SCCR41, as did the 20-year standoff regarding how narrow or broad that right should be. Although it would seem that broadcasting rights are outside of our scope, if the new right is written too broadly, it could narrow what archivists can acquire, preserve, and make available. Thus ICA and SAA prepared and submitted a joint statement to SCCR calling for any new exclusive rights to also include substantial exceptions and limitations to allow archives to preserve and make available affected audio-visual works for cultural purposes. (See Appendix 3, pg. 20)
  - It should be noted that during the broadcasting discussions, more than one MS delegate from the Global South expressed concern and frustration that there had been

a recent “Friends of the Chair” small group meeting to work on issues related to a text on broadcasting that otherwise had been evolving via a SCCR larger group process prior to the pandemic.

- b. “Other Matters.” The rather full roster for Agenda Item 8, “Other Matters” (i.e., topics raised for discussion but not yet formal agenda items), received two days of attention and revealed an interesting trend to acknowledge that copyright may not be the only way to address certain issues.
- Digital Music Market. Since the Latin American and Caribbean regional group issued a call in December 2015, the “Other Matters” have included a call for an analysis of Copyright in the Digital Environment. The discussion in recent SCCRs has narrowed the scope to focus on disparities in large web aggregators profiting from the distribution of music while creators and performers were not receiving sufficient benefits. SCCR41 presented four reports relating to the digital market for music from Latin America/Caribbean, Africa, and Asia, noting particularly how the very rapid growth in numbers of tracks available and actual plays served only to increase the “value gap.” Yet the studies also acknowledged that it was unclear whether the best way to address that gap would be through copyright or national cultural policy.
  - Theatre Directors Rights. Pursuant to a prior mandate, a Canadian scholar presented a study surveying practices in multiple countries regarding what exclusive rights and what compensation theatre directors currently have in their productions. It revealed a range of approaches, some of which involved copyright or related rights in the work but others of which managed compensation through contracts or other national laws related to cultural policy. This finding could undermine the push to have an international treaty to create an exclusive right for directors across national borders, especially for those places in which the right is structured as a matter of authorship vs. a matter of performance.
  - Public Lending Right (PLR). Starting in 2019, there has been a push for SCCR to look at creating a Public Lending Right that would require libraries to pay a fee for the loans of its books to the public. A study presented on this topic revealed a range of practices among countries, from a first-sale right (as in US Title 7, §109) allowing free lending of legally acquired work, to compensation paid by libraries for each loan (generally managed through a Collective Management Organization) and to other forms of compensation provided to authors and creators through national cultural legislation. The most notable development was a slight backing off by at least two of the Member States that had asked for SCCR’s attention to PLR. They noted that they were not really asking for it to be on the formal agenda or that it be a matter for developing a treaty, but simply that PLR be discussed. Furthermore, surprisingly the IFRRO delegate acknowledged that a PLR could be implemented either as a matter of copyright law or as part of national cultural law, although they did endorse the idea of having a further study of the issue.

- Artist Resale Right (ARR). Since before 2015, there has been a call for an international agreement to ensure that artists of original works of art would receive a portion of the income from the resale of works of art through auction houses and galleries. Since it was first requested by Senegal (quite possibly with EU's prompting), there have been some studies and discussions but without much likelihood that the US and Japan would change their opposition to such a project. At this June's SCCR41, there was little more than a restatement of prior positions, with the outcome being that it seems unlikely that the matter will move from the limbo of "Other Matters" to being an agenda item on its own.

**[See July 26 addendum beginning on page 7.]**

TO: SAA Council  
FROM: William J. Maher  
SUBJECT: Additional background information on WIPO and SCCR  
DATE: July 26, 2021

1. Note on WIPO/SCCR Governance. WIPO is a specialized agency of the United Nations. Consisting of 193 Member States, its general focus is on international protocols for ownership and use of different types of intellectual property such as, patents, copyright, trademarks, names of geographic origin, broadcasts. Although funded through payments from Member States, its major financial asset is revenue from administering patent cooperation. WIPO is headed by a Director General (Darren Tang) and each of its four divisions is headed by a Deputy Director General. The Copyright and Creative Industries Sector is headed by Sylvie Forbin. Overall, WIPO is administered by a large Secretariat staff distributed and reporting through its Divisions and administrative units. WIPO's main offices are in three modern multi-story buildings in Geneva's "international district" quite near the historic League of Nations building. While the Director General and Deputy Director Generals can exert significant influence, the ultimate decisions on treaties and other international instruments are made by the Member States. Committees such as the Standing Committee on Copyright and Related Rights are venues for Member States to discuss and develop proposals for new international norms. Once the members arrive at consensus on an issue by drafting core provisions, the proposal will not become a formal instrument until it is submitted to a Diplomatic Conference for further deliberation and possible adoption as a treaty. The most recent example is the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.
2. Clarification to my report. In paragraph 10 of my current report, the date of the statement I made on behalf of SAA at SCCR41 is June 29, 2021.
3. SAA's partners in the Libraries, Archives, and Museums (LAMS) advocacy work:

INTERNATIONAL ORGANIZATIONS:

[International Council on Archives](#) (ICA)\*

[International Council of Museums](#) (ICOM)\*

[International Federation of Library Associations and Institutions](#) (IFLA)\*

MULTINATIONAL ORGANIZATIONS:

[Corporación Innovarte](#) \*

[Electronic Information for Libraries](#) (EIFL)\*

[Association of European Research Libraries](#) (LIBER: Ligue des Bibliothèques Européennes de Recherche)

NATIONAL ORGANIZATIONS:

[Archives and Records Association](#) (ARA) UK & Ireland

[Canadian Federation of Library Associations](#) (CFLA)\*

[Center for Information Policy Research](#) (CIPR), University of Wisconsin-Milwaukee\*

[German Library Association](#)

[Library Copyright Alliance](#) (LCA-alliance of ALA, ARL, and ACRL)\*

[Society of American Archivists](#) (SAA)\*

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\*=present at the most recent SCCR

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TO: SAA Council and Intellectual Property Working Goup

FROM: William J. Maher

SUBJECT: SAA Representative's Report–WIPO International Conference and SCCR39

DATE: January 7, 2020 (abridged July 24, 2021)

Since 2011, SAA has dedicated resources to represent archivists' interests at the World Intellectual Property Organization's (WIPO) debates on exceptions and limitations to the monopoly rights inherent in copyright. As an important part of a coalition with library and museum colleagues, SAA has advocated for balance in the international copyright system. We seek legal provisions for copyright exceptions necessary for archivists' to fulfill their mission of preserving and making cultural heritage available in a globalized and digitized environment. As with domestic advocacy, obtaining change is a long game, especially when the nature and mission of archives itself is foreign to the policymakers.

The US recognized the need for archives and library provisions when exceptions were first put into the copyright law but such provisions at the international level did not receive attention until Chile called for a WIPO study in 2004-05. Although it was not for another decade that WIPO added museums to the exceptions agenda, the affinity in the missions of libraries, archives, and museums means that our needs will benefit by being treated in a coordinated fashion. In recent years, libraries, archives, and museums have collaborated closely at WIPO to advance our shared roles in knowledge preservation and cultural heritage.<sup>1</sup>

A reasonable person would think there could be international agreement on ways to work around copyright for cultural, educational, and research purposes. Especially in the internet age, where both collections and copyright are borderless, it would seem reasonable to have exceptions to support our mission. Such protocols would allow the basic functions of libraries, archives, and museums (LAMs) to produce and make available copies of works to persons regardless of where in the world they live, work, or study. The generally non-commercial nature of our cultural heritage institutions and collections, and the reach that modern technology offers should be reflected in clear and coordinated copyright exceptions. It should be non-controversial.

Unfortunately, opposition to an international instrument (e.g., a treaty) for consistent

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<sup>1</sup>In relation to archives advocacy, SAA should acknowledge the critical role played by Jean Dryden, ICA's representative to WIPO. Her persistence and collaboration are invaluable in advancing the agenda. WIPO rightly defers to her scholarly knowledge and experience.

copyright exceptions, continues for three basic reasons. First is the tension between the developed and the developing world, with the major producers of commercial intellectual property located in the Global North. Those living in the Global South, however, have substantial need for access to content from the Global North. They need it to pursue their own development and to obtain access to the portions of own national cultural heritage held in institutions of their former colonizers.

Second, while SAA's interest is archival material consisting largely of never-in-commerce, unpublished works, when Chile first called for exceptions in November 2004, they included archives with libraries as part of what they wished to be studied. As the discussions have matured since then, even though exceptions for archives material might not have a negative monetary effect on "the creative industries," the link with libraries means that a move toward exceptions of any kind is perceived by the publishing industry as a threat.

Third, and more of a problem, are the many reprographic rights organizations (RROs) that function as collectives that exist to sell licenses to any and all users of copyrighted works. Rather than exceptions, these RROs would like to expand their business by having WIPO outline rules requiring collective licensing for libraries, archives and museums. All of these tensions play out against the backdrop of the World Intellectual Property Organization (WIPO) as a regulatory organization with which the content industry has had very cozy insider relations.

Consequently advocacy for archives as part of a treaty on copyright exceptions for cultural institutions has been challenging for the SAA, the International Council on Archives (ICA), and the other non-governmental organizations representing the otherwise invisible side of the copyright system. WIPO's Standing Committee on Copyright and Related Rights (SCCR) is the body responsible for establishing international norms for copyright. Under the spirit of the 1886 Berne convention, WIPO has been called upon to ensure that creators' exclusive rights are considered in balance with users' need for access. However, the economics and power dynamics of the copyright system have meant that those responsible for commercial production and distribution of copyrighted works have disproportionate influence. They can sustain a presence at WIPO and lobby with an intensity that has been out of reach for those of us representing non-profit cultural heritage repositories and the communities we serve.

Nevertheless, SAA's and ICA's presence, along with the International Council of Museums (ICOM), and the International Federation of Library Associations and Institutions (IFLA) has provided a voice for archivists disproportionate to our relative size. We have advanced, albeit slowly, an agenda in support of our members. Despite some setbacks over the past 8-9 years, recent months have seen a significant increase in WIPO's leadership interest in making sure that its Member State delegates have a clearer understanding of the nature of archives holdings and archivists' work. Time was dedicated to archival concerns during WIPO's October 18-19, 2019 "International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions" and in the October 21-25, 2019 session of the Standing Committee on Copyright and Related Rights (SCCR39) both held in Geneva, Switzerland. Unfortunately, despite strong advocacy efforts by SAA and our coalition partners these October meetings have not eliminated resistance to exceptions. Instead, the WIPO Deputy Director General (DDG) seems convinced that the global cultural heritage

problem can be solved by a combination of incremental national measures and a system of mandatory fee-based licenses. That result would fail to provide the working room needed by the cultural heritage sector.

Action Plan (2018-19). The outcomes of the International Conference and SCCR39 should be viewed in the context of the Action Plan or “road map” adopted by SCCR in May 2018 after several years of incrementally maturing discussion about the characteristics of LAMs and the patchwork of existing copyright exceptions. By the end of 2019, the Action Plan was to “provide the Committee with suggestions and possible areas for international cooperation.” It would then be up to SCCR to determine next steps, e.g., an international instrument (e.g., a treaty), legislative guidelines, further study, or discontinuing the topic. Over its two years, the Plan called for development of typologies of exceptions; expert studies on archives and museum practices; and Regional “Seminars” to obtain perspectives of local stakeholders. This was all to lead to a wrap-up conference immediately before the October 21-25 SCCR39. In 2019, the three regional seminars were held in Singapore (April 29-30), Nairobi, Kenya (June 12-13), and Santo Domingo, Dominican Republic (July 4-5). Although the voices of ICA and the library and museum community resulted in an endorsement for an instrument on exceptions at the Singapore seminar, stage managing by the WIPO Secretariat at the Nairobi and Santo Domingo seminars gave primacy to the use representatives of Collective Management Organizations and their role in providing fee-based licenses as an alternative to internationally defined legislation-based exceptions.

For the archives, 2019 started well enough. The WIPO Secretariat took the quite unusual step of calling for assistance from the representatives of ICA and SAA to resuscitate the Action Plan-mandated study on archives and copyright. It had foundered in fall 2018 when the originally contracted author and the WIPO Deputy Director General reached an impasse on the report’s focus and tone. To restart the process, instead of the survey WIPO had imagined, the ICA and SAA representatives proposed a “background paper” that would be focused narrowly enough to be completed within the limited time before the spring SCCR. Not only did the timing make our recommendation viable but we also provided the terms of reference for the document and contributed significantly to securing of a competent and appropriate author. The resultant *Background Paper on Archives and Copyright* by David Sutton ([https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_38/sccr\\_38\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_7.pdf)) was well received at the April SCCR38. The paper and his in-person Power Point presentation provided an excellent overview of the ways in which archivists worked with copyright material and the challenges that lack of uniform exceptions impeded the international work of archivists. Sutton’s paper and his in-person presentations at the Nairobi and Santo Domingo Regional Seminars were the key means by which Seminar attendees could understand the archival mission.

Regional Seminars (April-July 2019). Although the reports and presentations on libraries, archives, and museums were successful, the results of the three Regional Seminars were uneven. They were supposed to gather input and experiences of practitioners in these sectors as well as those in educational and research institutions. Unfortunately, once WIPO saw some of the exceptions-friendly proposals voiced at the first seminar, the remaining two seminars were given a leading role to the copyright officers in the respective region, emphasizing existing national law rather than identifying policy changes needed for multi-national issues. In fact, at

Nairobi and Santo Domingo, the persons chairing the workshops within the Seminar were instructed to discussions of an international instrument for exceptions and limitations. Instead, the overall tone of the latter two seminars was to emphasize ways to further develop national or regional collective management organizations to make it easier for archivists, educators, librarians, and museum curators to obtain licenses to allow them to copy and use the works needed by their respective constituents.

The International Conference (October 18-19, 2019), was intended to report on the results of the Regional Seminars and to include plenary session panel discussions by “stakeholders” from each of the sectors so that common interests, concerns, and problems could be voiced from which options for action might appear. The conference was open for anyone wishing to attend, and all were free to pose questions or make comments from the floor, within time available in a rather tight schedule. Approximately 200 persons registered for the Conference and somewhat more attended. Although Member State delegates were allowed to attend without registration, it later became apparent that only a subset of the delegates at the next week’s SCCR had been at the Conference. Unfortunately the Secretariat’s lateness in assembling the panels and the lack of funds for civil society NGOs tilted the balance to publishers and collective management organization operatives, especially in the panels on libraries, museums, and education. (See Appendix 1 for the schedule and list of panelists.)

The archives panel was reasonably well-balanced, but the library panel largely excluded practitioners from important parts of the Global South; the museum panel was solely focused on art museums and their exhibition and publication activities; and the education panel had about 9 publisher or CMO representatives and only three persons from education, one of whom was allowed to answer only one question. The industry-heavy orientation of the conference resulted from the fact that practitioners from the civil society or user sectors inherently lacked the resources for the substantial costs of travel and lodging whereas the publisher and CMO organizations generally have substantial funds to enable their stakeholders to attend.

Because of the industry-friendly elements of the scheduling and programming neither the three Regional Seminars nor International Conference offered the hoped-for opportunity for those in the cultural sectors and those in the Global South to have their copyright exception needs voiced consistent with the United Nations Sustainable Development Goals. Instead, what emerged was a matrix of minimalist proposals encouraging nation-by-nation “solutions” that would only reinforce an economic hegemony characteristic of a colonialist past as reflected in the frequency with which such neo-liberal terms as “capacity building” and “technical assistance” arose as suggestions from the podium.

39<sup>th</sup> Session of the Standing Committee on Copyright and Related Rights (October 21-25, 2019). When the SCCR started soon after the Conference ended, the question before the committee was what the next steps would be for work action on exceptions and limitations. Once that statements from Member States and NGO representatives were taken on Monday, the Plenary received a number of commissioned presentations and reports. Extending into Tuesday, these included: Kenneth Crews on a “Typology for Archives Exceptions;” and Raquel Xalabarder and Monica Torres on “Practices and Challenges for Online Distance Education.” Tuesday afternoon included an oral summary on the Regional Seminars and International Conference to inform that

substantial portion of Member State delegates who had not attended either the seminars or the conference what had transpired. However, what I found much more troubling was DDG's presentation of what she called "Elements for the Way Forward," consisting of: 10 "general principles," three roles for Member States, and three roles for WIPO. Overall, the document started with the usual genuflection toward the importance of libraries, archives, and museums but quickly sidelined exceptions in favor of "other solutions," emphasizing contracts, licensing, and collective management. Contrary to what one would have hoped from an international organization, the document emphasized national and regional far more than international solutions, all while invoking neo-liberal ideas of "capacity building," "technical assistance," "toolkits," and adding the DDG's own new idea of "a buffet of options." (See Appendix 2)

At that point, rather than opening the session to discussion of the DDG's document, the SCCR Chair, Daren Tang, noted that since the Action Plan would be expiring soon, the Committee needed to take up the hard work of deciding what to do next. To accomplish this, he adjourned the SCCR into "Informals" for the balance of the day. ("Informals" are a common practice at WIPO whereby only the regional coordinators and a select number of Member States participate in a debate process that allows them to actually formulate, debate, and amend text.) The move to "Informals" was promising because basically all of the recent years' progress on the Broadcasting treaty has come through discussions that Chair Tang has conducted in "Informals."

Those Member States not part of the informal session and all of the NGOs were allowed to listen in on the proceedings of the Informals but were instructed to not report on the discussion. In sum, aside from a general sense that the long-standing title of the agenda item should remain unchanged, there was no clear consensus on next steps. When the SCCR Chair could not get an agreement on Next Steps from the Informals group, the session was closed at the end of Tuesday with the suggestion that he try to work out agreement on language for the document before SCCR 39's closing session on Friday. In the end, the Chair was not able to establish consensus on next steps for action on exceptions other than that the topic should continue on the SCCR agenda.

Closing of the SCCR. When the Friday afternoon session received the text of the Chair's Summary for SCCR 39, it merely called for the Secretariat to "prepare a factual report" of the results of the Regional Seminars and the International Conference "for consideration of the Committee." The Summary also called for the report to be posted in all languages "as soon as possible, but at least two months before SCCR/40." The specification for posting significantly well in advance of the next meeting appeared to be a response to an admonition by the Member States to not repeat the unacceptable action of the Secretariat of two years ago when it had presented its draft for an action plan only days before SCCR35. Regardless of where they stand on creating a treaty for exceptions, Member States can agree that the work of the SCCR should be driven by the Member States and not by the Secretariat. Furthermore, once the Chair's summary was read into the record and Member States were given the opportunity to comment, several delegates put special emphasis on the word "factual" and the call for early delivery of the International Conference report.

It is interesting that many Member State delegates seem as concerned about attempts to dictate an agenda as we are. Given the likely turnover in the senior staff positions at the

forthcoming end of Director General Francis Gurry's term, the Member States' assertion of their role during SCCR39 might work to our advantage in keeping alive, if not also advancing the case for exceptions for archives, libraries, and museums. While far less than what we would have hoped as an outcome, not only did the closing session mean that we had averted a bad outcome from SCCR 39, but it was a setback to the specific next steps proposed by the Deputy Director General and an affirmation of the role of Member State delegates in determining the course of the Committee.

In regard to the future for the two agenda items relating to exceptions the Chair's Summary read "The Committee will continue discussions on the future SCCR work program on these two agenda items based on the prior work of the Committee and existing SCCR documents. . . ." This keeps the door open to continue following the 2012 General Assembly mandate calling for work on "an international instrument, in whatever form." Thus, the bottom line result of SCCR39, is that "bad things did not happen, even if bad actors were present."

The lines of both opposition and support for exceptions remain in place. Some of the political transitions in the past couple of years have taken out a few of the stalwart supporters of a treaty, but some others have stepped to the fore. One of the staunchest and longest serving supporters, the delegate from Iran, and one of the strongest advocates at the last few sessions, Indonesia, have said they will be moving to other diplomatic service, but both have spoken of their sense that their successors will fill the gap.

Meanwhile, what emerged from the Seminars and Conferences is that there is considerable support for preservation-centered action. Nevertheless, because of the general interest in preservation, the LAMS coalition has worked on a preservation-exception-centered instrument that includes optional protocols for making copies available to users under specified circumstances. Because preservation has wide resonance, I have supported our coalition partners' efforts to make such a proposal a key in how we approach further advocacy for exceptions at WIPO. At the same time, one of the greatest weaknesses of the archives advocacy remains, that of how to generate interest by archivists in both Global South and Global North countries to advocate with the copyright ministries in their countries. At this stage, considerable work is going to be needed before the next SCCR, scheduled for the end of June/beginning of July 202, long after the new Director General has been announced, and perhaps after transitions at the deputy level become apparent. Continued engagement will be essential to advance the case for exceptions and to prevent industry developed alternative measures.

Archives' Presence at International Conference and SCCR Session. In the years since the ICA and SAA became engaged with WIPO, archives have moved from being just another special interest NGO to being a sector that deserves study and time on the agenda. Over the past year and one-half, the Committee and the Secretariat have devoted resources to helping Member State delegates learn about the nature of archives and the copyright issues we face. Following the successful April 2019 of David Sutton's "Background Paper on Archives and Copyright," he was invited to participate as a specialist expert in the Regional Seminars and the International Conference. Although ICA Executive Board responsibilities prevented him from attending the Singapore Regional Seminar, he played a role in both Nairobi and Santo Domingo. A conflict with the ICA annual conference prevented him from attending the International Conference, but

WIPO recorded a video of Sutton's presentation, which provided an excellent summary of the issues facing archives and brought new attention to the orphan works issue. He also used the video to note that copying of works to preserve them was both a universally necessary practice and sufficiently non-controversial to be central to a way forward on an international instrument.

In advance of the International Conference, the Secretariat approached us for names of archivists to invite for the conference's panel discussion on archives. Although the very limited advance notice and the lack of support for travel expenses made it difficult to find nominees, we were fortunate that Sharon Alexander-Gooding from the University of the West Indies, Cave Hill campus was able to come to Geneva. She had represented the ICA at the Santo Domingo Regional Seminar, and her experience in Barbados and as advisor elsewhere in the Caribbean gave her authority for the Conference. Alexander-Gooding not only underscored the critical need for exceptions to permit preservation copying, but she underscored the need for copyright exceptions by explaining how completely unachievable collective licensing would be for archives. These concerns were seconded by panelist Izaskun Herrojo, Director Newspaper Library of the Dominican Republic's Archivo General de la Nación. She also added that the licensing process would effectively create private profit centers through use of national heritage resources in which governments had invested. In a similar vein, Jamaâ Baida, Director of Archives of the Kingdom of Morocco, emphasized the centrality of preservation copying as a means of securing national documentary heritage, especially when that heritage had been split between a country nation and its former colonial rulers.

The recognition given to archives was also evidenced by Kenneth Crew's presentation of a Typology for Archives Exceptions. Since early in her term, WIPO Deputy Director General Sylvie Forbin has insisted that for anything to move forward, a "typology" will be needed. Although the exact meaning of "typology" remained particularly obscure for some time, Crews sketched out a model for a typology in November 2018, and he followed up in April 2019 with a fully developed typology for library exceptions. Because having a typology for archives was going to be essential for any work on archives exceptions to continue, we were fortunate that Crews was commissioned by WIPO to prepare such a document. Following the model of his library typology, he was able to produce a draft on archives.<sup>2</sup> His analysis provided multiple tables, separating out the attributes of exceptions for five archives activities related to copyright: preservation, replacement, copies for study and research, making available on terminals, and exhibition of works. In such a complex matrix, one can certainly find weak points, but Crews' charts provide a reasonable way to look at the archives facets to be considered as the SCCR moves forward to create text for an international instrument. During the question period, I was able to ask Crews about how the typology might fit various types of archives. This enabled him to step forward to indicate that collective licenses could not really deal with the variety of individual circumstances that archives encounter on a daily basis. Outside of the plenary session, I presented him with a few other concerns his typology raised for archives. I understand that he will be taking the various questions and comments received and use them to prepare a revised set of typological charts.

SAA's Statements to SCCR39. Unlike my intervention at the prior SCCR in April where I

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<sup>2</sup> See: [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_39/sccr\\_39\\_5.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_39/sccr_39_5.pdf)

attempted a positive tone, for October it was important to turn attention to the need for WIPO to move forward quickly and establish the kind of consistency only an international organization could. Based on comments I heard during the Santo Domingo Regional Seminar I stressed that there was great concern about two major threats to knowledge and cultural heritage—growing climate crises and technological obsolescence. These will be impossible to address if archivists continue to be constrained by copyright law. Furthermore, the Seminar had underscored that the archives of many countries in the Global South lacked funds for archival basics and would be further disadvantaged by fee-based licensing systems that would be a cruel hoax if proposed as substitutes for exceptions outside of certain northern countries. As is too often the case, the two-minute limit on statements prevented a full exposition, however, Appendix 3 contains an expanded version of the statement as submitted to the Secretariat and distributed at SCCR39.

In addition, before going to Geneva, to place special emphasis on the urgency of what we had heard at the Regional Seminars, I had prepared text for a flyer that would draw attention to the core threats to preservation of cultural heritage and the need for international action to resolve the copyright problems. Thanks to the SAA office, the text was converted into a flyer that I then distributed at the International Conference and the SCCR. (See Appendix4)

BROADCASTING TREATY. Although not currently an archives issue, SCCR continued its work on a treaty to create new exclusive rights in broadcasting signals. The broadcasting topic has flummoxed the SCCR for 20 years, but the past year's developments suggest that it could be moving toward a conclusion. Between SCCR38 and SCCR39, the Committee Chair held a "Friends of the Chair" discussion with a handful of the key advocates and opponents of the treaty. The United States, which has steadfastly opposed a treaty, now has come forward with language it might accept on some of the core sticking points. During SCCR39, the Committee adjourned to "Informals" to work out text, and the Chair, who may be seeking this treaty as his legacy, tried to bridge as many gaps as he could. Reports from the Informals were optimistic, but cannot obscure the divide on the remaining unresolved issues. Advocates are still hoping that the issue can be made ready to submit to a Diplomatic Conference to create a treaty, but this issue has stumbled many times before. Although seemingly irrelevant to archives, if the Committee gets closer to agreement before the next SCCR, it is likely that time now devoted to exceptions will be absorbed by broadcasting discussions. Furthermore, the nature of the broadcasting right needs to be monitored closely since it could create a post-fixation right over broadcast content and create barriers to archives preservation of audio-visual content.

"OTHER MATTERS" As customary, SCCR39 dedicated limited time on Friday to what are called "Other Matters," i.e., topics or issues not agreed to as formal work items of the committee. These included: analysis of copyright in the digital environment; establishment of an international standard for artist resale rights; and strengthening the protection of theatre directors' rights. Time on these issues focused on updates to reports and "scoping studies." However, during discussion of the digital environment topic, a recently seated NGO used his time to call for WIPO to begin work on establishing the Public Lending Right (PLR). If it eventually is placed on the WIPO agenda, this issue will be of significant concern to the US libraries and their users. Its purpose is to mandate that authors be reimbursed each time one of their works is loaned to the public. In those countries where PLR exists, there does not seem to be an immediate implication for archives content, but given the "how can we monetize that?" attitude that prevails among many WIPO lobbyists, our monitoring should be vigilant.

AFTERMATH. At the conclusion of the Friday session, and during travels back to Illinois, I could not really decide how successful or how disastrous the International Conference and SCCR39 were for archives. Our issues certainly gained attention, and the presentations increased the depth of understanding of our particular copyright problems. Compared to how the museum and the education and research sectors were treated in the International Conference, the archives panel was relatively balanced. However, persistent references to licensing and collective management organizations as alternatives to exceptions set a discouraging tone for considering the way forward. This was reinforced by what the Deputy Director General read out on October 22 as “Elements for the Way Forward” (see Appendix 2).

Following the conference and SCCR, some of our coalition partners were preparing a letter to send to WIPO Director General Francis Gurry to complain about bias in how the Regional Seminars and International Conference had been organized and led. I contributed to edits of the letter. In anticipation of SAA being able to sign-on to the letter, I routed a draft to Executive Director Nancy Beaumont who in turn offered useful edits and routed it to President Meredith Evans and obtained her approval for SAA’s name to appear on the letter. Once all of the signatory NGOs obtained approval from their organizations, the final version of the letter was sent to Gurry on November 6. (See Appendix 5)

On December 20, we received Director General Gurry’s December 16 response to our November 6 letter. The letter acknowledged our comments but countered that as NGOs we had been asked to provide names of participants for the Regional Seminars and International Conference and he emphasized that the Secretariat had tried to provide balance among stakeholders. He noted that the Secretariat’s summary had include the possibility of one or more international instruments. Importantly, he emphasized that the process needs to be in the hands of the Member States. Nevertheless, the adverse effects of the Secretariat’s planning for the Seminars and Conference were very real, whether intentional or mere accidents of poor timing.

NEXT STEPS. Obviously, no action can be taken by the Committee until it convenes for SCCR40 at the end of June 2020. As soon as the Secretariat releases its summary of the Seminars and International Conference, ostensibly by the end of April, we and our coalition partners will need to scrutinize it carefully to make sure it is a balanced representation. Perhaps more important are the upcoming changes in the WIPO senior leadership. By either early March or early May, it will become clear who will be succeeding Gurry as the next Director-General. Regardless of who that it is, we understand that a change in the DG generally means turnover of the deputy directors as well. Furthermore, if Darren Tang, the current SCCR Chair, were named DG, then there would be turnover in the Committee leadership. These changes are certain to alter the landscape significantly, whether positively or negatively is unknown.

Amid all of the back-and-forth maneuvering among the players in policy making, we should not allow the details of that process to obscure our basic goals and core professional principles. Regardless of the challenges at WIPO, archives have been recognized by Member State delegates, WIPO staff, and friendly and unfriendly NGOs as essential resources of knowledge and culture. Moreover, our work as archivists is clearly respected for our technical expertise and professionalism.

Continued advocacy should focus on translating this positive image into international

provisions that balance copyright with exceptions that give us room to accomplish our mission. Our advocacy may not diminish the geopolitical issues between the Global North and Global South nor erase the economic forces that cause archives exceptions to be seen as threats. However, this past year's events at WIPO have shown that not continuing our advocacy could leave us having to accept the creation of a mandate for market-driven licensing that would monetize knowledge and culture. This would only benefit intermediaries not the authors whom the licensing organizations claim to champion. It is important to remember that engaging in international policy advocacy is a "long game," in which sometimes painstakingly slow decisions are made. In this environment, there is no substitute for being vigilant, active, and present. SAA has been a consistent force for over 8 years in making archives visible and understood at WIPO, and it should continue to be there.

Society of American Archivists  
Statement to WIPO SCCR41 on Limitations and Exceptions for Archives  
William J. Maher  
June 29, 2021

For ten years the Society of American Archivists has provided SCCR many examples of why archives need a clear legal path to make our rare and unique works available to the world by digital technologies. These non-commercial works should never have been swept into copyright's web. We've repeatedly told this body that limiting our ability to preserve archives invites disaster. Now, the pandemic has shown that the steam-age model of the Berne Convention no longer fits today's reality. It's time to recognize that the world has changed, perhaps forever..

Like the mythological Cassandra, we seem destined to predict the future only to be ignored. We've pointed out repeatedly the unfairness caused by travel costs that impede people from access to their own heritage documents. With the pandemic, no one has access, whether poor or rich. And yet, archives, whose sole purpose is to preserve and facilitate use of rare works, are expected to fulfill their mission—a nearly impossible task in today's unbalanced copyright system.

Likewise with climate change. The recent wildfire in Capetown that destroyed its university library should be a wake-up call to exclude preservation copying from an antiquated copyright framework. Surely, no one benefits if the one and only copy of something is burned to ashes because an archivist feared a lawsuit.

The pandemic puts into stark relief the deprivation caused when people worldwide can't access unique works in archives. Students can't finish their degrees; citizens searching for their heritage can't reach it; and even governments can't access needed documents that may be held in foreign archives.

The COVID and climate crises call for SCCR to create a pathway that empowers archives, libraries, and museums to make preservation copies and make them available across borders. The global need for the unique knowledge in archives requires an international solution that only WIPO's leadership can provide. If wildfires and pandemics don't prove the urgency for global action on preservation now, what will?

**SCCR41**  
**International Council on Archives (ICA) and**  
**Society of American Archivists (SAA)**  
**Agenda item 5: Protection of Broadcasting Organizations**

Because the audio and visual content of broadcasts is often of long-term cultural and educational value to society, the International Council on Archives (ICA) and the Society of American Archivists (SAA) have important concerns with the current proposal for a Broadcasting Treaty as reflected in the chair's Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues (SCCR/39/7). The holdings of many archives include fixations of the programs and newscasts of broadcasting organizations. These works provide important evidence of the social, cultural, political, and historical life of communities and nations. Thus, when a treaty to enhance the rights of broadcasting organizations extends to post-fixation rights, archives must take notice to ensure fair access to broadcast content.

The SCCR41 agenda calls for possible next steps regarding the Broadcast Treaty. Top priority must be given to redrafting the Limitations and Exceptions provision. As it now stands, that provision is deeply flawed. It is notably weaker than the exceptions provided under the Rome Convention, which permits exemptions beyond those contained in copyright per se. Furthermore, it fails to incorporate any of the priorities identified in the SCCR's Limitations and Exceptions agenda, i.e., preservation, online sharing, and cross border uses for libraries, archives, museums, education, research, and people with disabilities. Of particular concern is that the proposed Broadcasting Treaty leaves limitations and exceptions as optional, which reflects a lack of concern for the public's enduring interest in the content of broadcasts.

The preamble of the chair's Revised Consolidated Text states the desire to protect broadcast rights "in a manner as balanced and effective as possible." However, the current text does not achieve this balance. Thus, to ensure balanced access to broadcast content for public interest purposes, including long-term preservation, more substantial exceptions and limitations must be mandated in any new treaty.

We look forward to open and transparent discussions going forward so that the negotiations will be open, and all stakeholders will be duly updated and informed.