Agenda Item V.N.

Society of American Archivists
Council Conference Call
Wednesday, January 20, 2016
2:00–4:00 pm EST

Report on Service as Society of American Archivists NGO Representative at the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights, 31st Session, December 7-11, 2015

(Prepared by William J. Maher)

EXECUTIVE SUMMARY

SAA's representative attended the December 7-11 session of to the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights as part of SAA's continuing advocacy for copyright law revisions to facilitate archivists' work. Despite an agenda that resembled some of the committee's past stalemated meetings, this session built on the progress made in the two immediately prior sessions and even saw more substantive ground covered than before. To achieve this, the committee's Chair deployed a strategy that he has utilized successfully on a parallel WIPO issue, thus setting a promising tone for the two upcoming SCCR sessions in 2016. Meanwhile, SAA will continue to work with international partners to pursue library and archives exceptions.

BACKGROUND AND OVERVIEW

Faithful adherence to copyright law limits the scope of tools archivists have to accomplish their mission of preserving and making records and manuscripts available, especially as we increasingly must act in a networked global environment. Because copyright laws are framed by international treaties, since 2011 the SAA has been attending sessions of the World Intellectual Property Organization (WIPO) to seek copyright exceptions that would support archival work in today's world. Our presence at WIPO's Standing Committee on Copyright and Related Rights (SCCR) has been in close collaboration with the International Council on Archives and the International Federation of Library Associations and Institutions (IFLA) as part of an advocacy effort to create a treaty that establishes international norms for archives- and library-friendly exceptions to copyright. However, because of entrenched opposition by the publishing and the collective reproduction rights industries, the work has been challenging. Further, given the seemingly arcane ways WIPO's committees do their work, the work has been frustrating and progress slow. Although the Committee was able in 2011 to identify a working list of 11 topics that could be considered as the facets of whatever exceptions are developed, over most of 2012 and 2013, it devoted little time to the library and archives issues. There was renewed attention in the three sessions attended by SAA between December 2013 and July 2014, but we found them marked by obstinate roadblocks with little promise of development of a treaty.

Given that record of frustration, the SAA delegate attended the December 2014 meeting

(SCCR29) with the expectation of needing to make a strong public statement as part of a withdrawal from the effort. That draft suggested that we simply recommend that archivists conclude that without meaningful exceptions copyright itself was unreasonable and that archivists should simply dismiss it as an irrelevant artifact of a dead past. Surprisingly, developments at SCCR29 changed that perspective when a new comparative study highlighting the irregularities of exceptions within existing national laws became a basis for extensive discussion by the Committee of the actual problems faced by librarians and archvists. At the same time, the SCCR's Chair developed a longer-range plan to productively use an evidenced based discussion of the 11 topics to engaged the Committee in laying the foundation for creation of a text that could develop into a treaty text.

Since December 2014, despite roadblocks attempted by some rather predictable opponents, the Chair's plan to focus on the substantive issues rather than on process resulted in a productive SCCR30 in June/July 2015, raising hopes for December's SCCR31. This most recent session not only avoided the most frustrating of past procedural battles but also saw clear progress on the path charted by the Chair's plan to have substantive discussions on the 11 topics. Thus, far from the thumb-our-noses result we had anticipated 13 months ago, the most recent SCCR leaves us seeing enough prospect for progress as to recommend continued engagement with the advocacy at WIPO at least through the next SCCR session in early May, if not also the following session in November, 2016.

Understanding what happens at an SCCR session and determining exactly what any of it means is very much a matter of contextual interpretation. Thus, the balance of this report is presented as a narrative of the entire week of SCCR31.

ADVANCE EXPECTATIONS FOR SCCR31:

The week's schedule had slated the broadcasting discussions for Monday through the end of Wednesday morning. Wednesday afternoon was to open with one hour on the Museums Exceptions Study, followed by up to two hours to start on library and archives exceptions. All of Thursday was to be library and archives. Friday morning was to be exceptions for education and research institutions and persons with disabilities. Friday afternoon was to be a discussion of a "thought" paper calling for analysis of the how business issues facing individual performers and artists work against them in the digital market. Then, there would be a long-deferred discussion of a request to create a resale right for artists. It had been expected that there will be no effort at Committee Consensus on "Conclusions," but instead, as has become a trend at WIPO, only Chair's conclusions.

STRATEGY OVERVIEW WITH SCCR CHAIR:

Compared to the four most recent SCCRs, the December 2015 session included fewer small group meetings and no side events for the library and archives advocates. However, as with the December 2014 and June/July 2015 sessions, SAA was privileged to be able to participate in a small (six, or fewer, person) group meetings of library/archives advocates with the SCCR Chair Martin Moscoso and the acting Deputy Director Michele Woods at the end of the first day of the SCCR session. At that meeting,

Moscoso spoke frankly as he privately described his overall strategy and hopes for SCCR31, and his perceptions of how the library and archives issue might proceed at this and the next few SCCRs. It was quite interesting to listen to his account. He obviously has internalized his strategy, as evidenced in the fact that his long explanation, suggested tactics, positions on various tactics, and even style were identical to what he presented to us in a similar small group meeting last June. It was if he had read my notes on that prior meeting. While I might have not agreed with his position on each of the 11 topics for Library and archives exceptions, in June his strategy seemed far better than the alternative of continued stalemate, and seeing him stick to that plan now is encouraging evidence that he is committed to making it happen. In his plan, he would keep the library and archives matter alive while the EU internally resolves some of its own copyright issues and meanwhile keep the library and archives discussions progressing within the Committee. Especially in light of how SCCR31 unfolded, this provides a reason for optimism.

Nevertheless, this being an international agency, we cannot expect immediate results. As noted in my reports from SCCR30, the Chair sees the task of working through all 11 of the proposed topics as requiring about three SCCRs total. He also believes that by discussing each of the topics in his "non-paper" grid (See Appendix A) a differentiation will arise among the issues with some clearly appropriate for a mandatory treaty provision, others left to national legislation, others best served by some sort of model law, etc. I may not agree with him on which of these are less international than others, but the idea of differentiating the topics/areas for exceptions is essential to moving forward.

IMPORTANCE OF SCCR31'S PROGRESS ON BROADCASTING ISSUES:
With the first half of the week dedicated to the discussion of a treaty on exclusive rights in a broadcasting signal, those days would seem to be irrelevant to SAA's presence at WIPO. On the other hand, we can learn something from the fact that the discussion on this now 16-year old agenda item is proceeding. Note that at the last two SCCRs where Chair Moscoso had adjourned the SCCR into "informals" with discussions being held in small meetings consisting only of the "Regional Coordinators" (i.e., the heads of the regional member states groupings, such as Africa, Group B [highly developed nations], and GRULAC) of a few other Member States delegates. To advance discussions within the informals, he had used a "grid" by which he had broken down the complex topic of broadcasting into separate components of what was to be protected, who would be the beneficiaries, and what would be the nature of the exclusive rights.

For SCCR31, he created his own text of what he understood of the meaning of each of those elements (i.e., what had been in the "cells" of his "non-paper" grid) and developed a short document outlining each facet with brief definitions and statement of the scope of a right or a beneficiary.[1] He then presented this as "the Chair's text," which he had

[1]Not only was it both a paper paper, but also a formal agenda item with number and a title "Consolidated Text [emphasis mine] on Definitions, Object of Protection, and Rights to be Granted." Available at:

intended to take back to "informals," but which the Member States insisted on discussing in a plenary session. While he has not sought votes on the document, it is significant that the discussion has been about refining that text within the context of a plenary session representing all Member States, steps that offer promise of a product sufficient to call a diplomatic conference.

Although this may appear to be little more than the minutiae of process on an issue unrelated to archives, it is important as a confidence building measure for the Committee. While there is a long way to go, if there is progress on broadcasting, it will show that SCCR is capable of overcoming some of its dysfunctionality. Most importantly, Moscoso will have found and demonstrated a methodology that actually results in a product and presumably a consensus about something on which various nations and regional groups have very fundamental philosophical and commercial differences, a situation not all that different from the library and archives issue.

In fact, at SCCR30 and in the agenda plan for SCCR31, the Chair had used the same grid-based approach to continue discussion of the library and archives exceptions. This is notable because at that past sessions a few delegates strongly opposed even having a discussion. Even more, the approach has allowed those supporting exceptions to continue to make the case and to educate the MS delegates about what archivists do, how we do it, and why the treaty topics matter to our users.

Finally, in the fact that between SCCR30 and SCCR31 the broadcasting discussions have evolved from mere elements in a grid to actual proposals, the Committee has suddenly found itself engaged in text-based discussions, which they had resisted for years. Thus, demonstrating the Chair's ability to move something out of doldrums into navigable waters. If he can do the same for library and archives exceptions over the next few SCCRs, then there will be a real chance that a treaty proposal emerges.

WIPO'S STUDY OF COPYRIGHT ISSUES FOR MUSEUMS:

As noted above, the published agenda had included an item for presentation of a "Study on Copyright Limitations and Exceptions for Museums" (hereafter "museums study") which had been completed last spring.[2] Although the study had apparently been requested by the WIPO Secretariat, neither the rationale nor driving force for it could be clearly explained even by some well-connected at WIPO. While one can speculate on the source of the WIPO study, it is clear that this did not come from the International Council of Museums (ICOM) in the way that the Library and archives proposals came from IFLA. Meanwhile, discussions we had with two key individuals from ICOM suggested that the report, did not align well with their policy priorities. Those can be better understood by examining the July 2015 *Statement by the International Council of*

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http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_3.pdf)

[2]Authored by Jean-François Canat and Lucie Guibault, in collaboration with Elisabeth Logeais, European-based legal specialists for museums. Available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_2.pdf

Museums Concerning Exceptions to Copyright.[3] In short, the WIPO study wanders into much confused territory, and the actual copyright needs of museums vary somewhat from those of libraries and archives. By contrast, in ICOM's statement we find areas of overlap where collaboration might be fruitful.

In fact SAA and ICA were invited by IFLA to a dinner with the ICOM Secretary-General and the Chair of its Legal Affairs Committee at which it appeared that some common purpose could be formed among the library, archives, and museum groups. Independently, when ICOM spoke on the WIPO museums study, they skirted some of the issues in the WIPO study but also provided a nice endorsement of the need for library and archives exceptions. Overall, whether from WIPO or ICOM, I do not think that there is any immediate plan to put together a treaty proposal, and perhaps not any specific plan for dedication of further SCCR time to the issue over its next few sessions. Nevertheless, to ensure that the collaborative opportunities with ICOM can be explored, there will likely be consultations, in the coming months, of IFLA, ICOM, and ICA on how elements of the Library and archives proposals can be tailored to address some of the concerns of museums.

Unfortunately, the presentation of the WIPO museums study by two of its authors was even more tedious than the study itself. Further, it gave rise to some equally long-winded interventions by some of the Member States interested in having WIPO develop an international agreement on resale rights but also rambling into the ever-challenging matter of Traditional Cultural Expressions. Because Chair Moscoso was absent (so he could draft and negotiate text on the broadcasting issue), the museums study discussion lacked direction, and the day's session ended before the planned discussion of the library and archives exceptions could begin. This was most distressing outcome for the library and archives advocates since it suggested that the limited time allowed for our issue would not only have lost all of the time planned for the Wednesday afternoon session but possibly much of Thursday morning would be lost as well.

NOTABLE PROGRESS IN DISCUSSIONS OF LIBRARY AND ARCHIVES ISSUES:

Fortunately, our concerns must have been communicated to the Secretariat and Chair. Thus, on Thursday morning, after only about a quarter-hour more on the museums study, Moscoso was back in the chair, and he quickly dug into the library and archives exceptions. He summarized the work to date and anchored his plan by referencing the 2014 and 2015 Kenneth Crews report as the basis for his "non-paper" grid, and how he wanted to use that as tool to move the discussion forward topic by topic.

As background, it should be noted that since immediately after the initial November 2011 introduction of the issue of a treaty to provide library and archives exceptions, the discussion of subject matter has been segmented into 11 topics (e.g., preservation, cross-

[3]Written by its Legal Affairs Committee and available: http://icom.museum/uploads/media/declaration_copy_WIPO_ICOM_eng.pdf

border supply of copies, technological protection measures, etc.).[4] From December 2013 through June/July 2014, the Committee had talked about these issues separately. However, in December 2014, following the continued stalemate, the Chair prepared what he called a "non-paper" (i.e., not an official agenda document) with a grid to summarize each of the 11 topics that evolved from prior SCCR meetings and indicate the status of discussions according to two major groupings–those topics on which formal conclusions were agreed by the Committee and those that were only covered by Chair's conclusions (See Appendix B).

At this December's SCCR31, the Chair opened the deliberations by noting positive elements of prior work, especially the usefulness of the 2014 and 2015 Kenneth Crews studies, and he restated his vision of how discussion should proceed. The Regional Groups and Member States then provided opening remarks. These largely restated the past positions with the Africa Group, GRULAC, and India stressing the need for exceptions so that libraries and archives could operate in the digital environment and the EU arguing that there was little point talking about the library and archives since "there was not consensus on what the objective would be." Nevertheless, the EU did not repeat their failed and embarrassing effort of last June to block the discussion and the use of the Chair's "non-paper" grid.

With that out of the way, the Chair picked up where the SCCR had left off in June with Topic Two from the grid– Reproduction and Safeguarding of Copies. Here too, his method seemed directed at avoiding the kind of sticking points that have stymied so many of the prior sessions. Rather than rigidly dividing the time of the discussion between Member States (whether in Regional Groups or individually) and NGOs, he altered the structure to bring NGOs into the discussion at an earlier point to provide statements that focused on specifics aspects of the topic on which the Member States were then invited to provide follow-up comments/questions. As in some prior SCCRs' he made it clear he did not want NGOs to be making general statements on why exceptions were needed or why the copyright system was already perfectly balanced. Instead, he called for focus on the particular topics. Meanwhile, when the discussion moved into the specific topics, Moscoso provided his own extensive commentary on the issues complete with an inventory of about eight or nine the facets that needed to apply to how each exception is written (e.g., non-profit nature of the copying being done, the need for format migration, and the need to consider the relationship to "moral rights). His

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[4]As articulated in the December 2013 document SCCR 26/3, those themes/topics, are: 1) Copying for preservation or replacement; 2) Reproduction and distribution of a copy of a work to a library user, or to another library or archives; 3) Legal deposit of one copy of every work published in the country, 4) Library lending to a user, or to another library; 5) Parallel importation to allow purchase or acquisition of works from other Member States; 6) Cross border provision of copies shall be possible for allowed uses; 7) Orphan works and works out of commerce may be reproduced and made available; 8) Limitations on liability when acting in good faith; 9) Circumvention technological protection measures for allowed exceptions; 10) Contractual provisions shall not overwrite the limitations and exceptions; and 11) Right to translate works.

grasp of these details was quite impressive and suggestive of how much he has come to understand the issues, but equally well how important it is for our statements on the issues to be highly specific.

Although there was a minor glitch that delayed my being able to give the SAA statement when first recognized, without much ado, I was later able to obtain later recognition and deliver the prepared statement. I noted archivists' general interest in having an international agreement on exceptions but also addressed the immediate matter of Topic Two (See Appendix C). Despite having missed my original cue, my statement ended up at a fortunate place–right after the comments of the International Federation of Journalists representative's rather extreme statement dismissing exceptions as a threat to the incomes of authors since he apparently believes every writer should get a payment for every time his/her work is read.

While my statement did not seem to connect as well as some made at prior SCCRs, overall, it contributed to there being a strong array of library/archives statements–a strength not matched by the publishers/rights holders, some of which seemed rather unengaging. While I may be far from objective in assess those who want to charge a fee every time a library loans a book, apparently the publishers themselves felt outnumbered as evidenced by a post-SCCR31 press release from the International Publishers Association. (See text below at Footnote 11.)

Regardless, the Chair's way of handling the statements and interventions enabled the Committee to complete discussion on Topic Two and move on to Topic Three, Legal Deposit. While the proposal for an exception for legal deposit has largely been to support national libraries to develop collections-of-record for published items, I had come with a prepared statement on the topic. On the theory that we should not let slip a chance to remind MS delegates and NGO representatives that copyright must recognize the world of archives, my statement argued that if the full content of an institution's web presence is to be captured, there must be an exception for archives to be able to "harvest" content not just by, but about, the institution (see Appendix D). This intervention, especially an extemporized introduction as to why it is sometimes necessary to think more broadly about the implications of some of the grid's Topics, did hit a stronger chord with the chair than my Topic Two statement

After Legal Deposit, there was still time to discuss Topic Four, Library Lending. I had not prepared a statement on library lending partially on the assumption that the Committee would not make that much progress and partially on the assumption that the only way to comment would have required me to first posit what would be a rather novel idea to the Member States–that of a "virtual reading room" wherein with users register for limited time access to digitized content of in-copyright material. This idea is still worth advancing but perhaps best within the context of the forthcoming topic on orphan works.

With the more efficient way of accepting NGO statements and Member States' interventions, the most surprising outcome of the Thursday afternoon session

presentations was that the Committee not only completed Topic Two, but also Topics Three and Four. The Chair then wrapped up the day, and the Secretariat announced that Friday morning would start with the next agenda item–education exceptions.

That the library and archives discussion now has completed four of the 11 topics and shown the Member States and the chair how not all elements in the overall issue of the exceptions are of equal weight and how some related ones could be consolidated. Thus, SCCR31 demonstrated that the Committee can actually move forward, and most importantly that the chair has a methodology to keep things moving, even if slowly.

"EDUCATION" EXCEPTIONS-COULD THEY DERAIL US?

After a very efficient Thursday session with the library and archives topic progressing as much as the Chair determined possible, the Friday morning session opened with the continuing agenda item of "Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons with other Disabilities" ("educations exceptions" for short).[5] As noted in prior reports, this proposal, which originated in the Global South similar to the library and archives exceptions, remains unfocused and lacks any notable body of NGOs to attend WIPO on its behalf or to develop a model treaty as has been the case with IFLA's TLIB document.[6] Thus, the discussion during SCCR31 did not demonstrate much direction or purpose.

In response to prior calls for clarity on the education exception, there have been calls for a couple of WIPO "studies" similar to what Kenneth Crews prepared on the libraries and archives issue, but these remain uninitiated or incomplete. The Secretariat stated that a "regional" study (presumably outlining the kinds of education exceptions that exist in present laws) should be ready for presentation at SCCR32. Further, if funds are available in 2016, a "scoping study" will be done presumably to identify what kinds of works and purposes might be appropriate to include in exceptions and for what types of educational institutions. Overall, this fuzziness just underscores the value of the work that IFLA has done to develop the library and archives issue.

Much of the December 11 discussion consisted of Member States reiterating their existing positions either for or against education exceptions. These arranged themselves along the a Global South and Global North line. There was, however, one very troubling part of the discussion, initiated by Russia but then taken up by some countries otherwise friendly to the library and archives exceptions. This was the idea that since libraries,

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[5] This terribly long title seems to weigh down the issue. Every time a delegate or NGO refers to it, they seem obligated to recite the entire long title. Given that there are some delegations wanting to merge the education topic with the library and archives and museum topics, what would then be an even longer title could become more than just an awkwardness. In the course of the December 11 discussion, opponents seemed to fix on the reciting the current title for education exceptions seemed to to give opponents as a means to "run out the clock."

[6]For IFLA's "Treaty Proposal on Copyright Exceptions and Limitations for Libraries and Archives," see http://www.ifla.org/copyright-tlib

archives, museums, and educational and research institutions are all cultural entities, then the matter of exceptions for them should be examined together. On a theoretical level, this may be a logical idea, but its presentation is probably more driven by political machinations. On the one hand, rightsholders advocates want to do anything they can to stop any exceptions. By bundling them all together, they increase the issues' complexity and consign the simplest and least problematic ones (e.g., archives and preservation exceptions) to inaction while multiple parties resist work on the broad type of exception that would be needed to meet the needs of education.[7] While the idea of merging the entire group of exceptions received positive comments from some Member States and NGOs, the library and archives representatives argued against doing so based on the relative immaturity of the education issue and the Chair has hitherto shown no interest in the idea.

A central part of the December 11 discussion was a major procedural request request by the education exceptions' proponents for the Chair or the Secretariat to prepare a grid document such as those which Moscoso had prepared for the broadcasting and the library and archives issues. After considerable discussion, it was clear that there was not sufficient clarity among the advocates for education exceptions to suggest a process for moving forward. Interestingly, a few regular opponents of the library and archives exceptions compared the education issue unfavorably to what they called the more mature issue of library and archives exceptions. As a result, there was no consensus that a grid could or would be prepared. Further the Chair's Conclusions on the education topic indicated no more than that the topic and discussions would be continued, and they contained no reference to the idea that all the exceptions should be merged into a single topic.[8]

DIGITAL MARKETPLACE AND RESALE RIGHTS ISSUES:

The Friday afternoon session contained two topics probably unimportant to archives and library concerns but worth mentioning because they reflect general underlying currents in the debates at WIPO. The first was a discussion paper submitted by Brazil on behalf of GRULAC entitled "Proposal for Analysis of Copyright Related to the Digital Environment."[9] The document calls for WIPO to work on international norms for transparency and fairness in providing compensation to artists and performers for music in the digital marketplace, especially for streaming. While it seems to lean-in to the

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[7]A US style fair use exception could indeed meet the broad array of those seeking exceptions, but there seems nothing more certain of failure in the international environment than fair use which even in the US has been attacked as being too vague. On the international level, it is seen as too subject to ambiguity resolved only through litigation and at odds with the civil law countries that link authors' rights to inalienable "moral rights."

[8]Independent of the education issue, the reference to creating a "grid" was a good sign for the library and archives issues since the "chart method" seems to be gaining recognition as the way by which issues forward in SCCR.

[9]The document is available at:
http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_4.pdf

rights holders, it may well be more intended as a criticism of WIPO's closeness to the collective management societies and content providers.

The second remaining item was a "Proposal from Senegal and [Republic of the] Congo to include the Resale Right (droit de suite) in the Agenda of Future work by the Standing Committee on Copyright and Related Rights."[10] It is hard to imagine this issue gaining much traction since many of the EU countries already have such rights in their national legislation, and the US and Japan are opposed to creation of a resale right. Overall, this is probably not an issue of concern to archives or libraries provided that whatever right that is created is limited to commercial sales of originals over a specified value.

"CONCLUSIONS" of SCCR31:

As the Chair had indicated in Monday's private session, he put forward a two-part proposal to expedite SCCR's work. On the one hand, he called for an extraordinary "intersessional" meeting to advance text-based work on a broadcasting treaty. On the other hand, he suggested the holding of regional meetings on the subject of limitations and exceptions for libraries and archives. The latter have been sought by IFLA for some time as a way to generate greater interest among member countries in having a treaty and as a tool to generate more stories to make a compelling case for the treaty. When Moscoso presented this two-part idea late on Friday, it received a mixed response from Member States, interestingly with broadcasting supporters claiming a special meeting was premature. Whether this was based on specifics of the broadcasting issue or whether it was as a means to block the regional meetings on exceptions was not entirely clear, but the result was that the Chair determined that in the absence of consensus, no action would be taken. Instead, he would just bring the proposal back to the next SCCR. If there indeed are to be regional sessions on library and archives exceptions, ICA will have to work hard to find archivists in relevant regions ready to speak to the need for exceptions.

In regard to the final result of the SCCR31 session, as has been the case since SCCR 29 in December 2014, the Chair did not give the Committee the option of trying to come to agreement on a "Conclusions" document. Rather he submitted a document titled "Summary by the Chair" to serve as Conclusions with print copies being distributed about 6:30 p.m. After entertaining, a few suggestions for "factual corrections" to his text, but mostly without accepting them, he gavelled the topic completed, and after the usual exchanges of best wishes, SCCR31 at the record early hour of 7:06 p.m.

In brief, the Chair's Conclusions called for the Committee to continue work on broadcasting, library and archives exceptions, and education exceptions. In addition, they noted that the GRULAC proposal for analysis of copyright in the digital environment and the proposal for a resale right would remain on the agenda under the heading of "Other Matters." Notable in the comments on library and archives exceptions was the complete absence of a reference to the idea that they would be joined with consideration of exceptions for education, research and persons with other disabilities.

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[10]The document is available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_5.pdf

That is a positive outcome because it avoids the opportunity for opponents to delay or defeat the library and archives issue.

On the other hand, the Conclusions' paragraphs that related to Agenda Item 6 (i.e., the item titled "Limitations and Exceptions for Libraries and Archives") noted that the museums study had been presented at SCCR31 as part of Agenda 6. However, there was no indication of any effort to join the topics. There was also no call for further discussion of the museums topic beyond a notice that Member States and NGOs have until January 20, 2016 to submit any additional comments. While it remains to be seen if the museums topic is allocated time at the next SCCR, there was nothing in these conclusions to suggest that it would have much of a presence.

OVERALL OBSERVATIONS ON SCCR31 AND RECOMMENDATION:
In general, this SCCR did not include many of the past low points for the library and archives issues or the pitched battles waged by the EU and Group B to discredit any work on or discussion of the library and archives issue. Indeed, even the rightsholder NGOs generally seemed less active, and with one or two exceptions, less strident in their opposition. In fact, a December 22 press release from the International Publishers Association seemed to portray their sector as embattled, noting "IPA and other Creative Sector NGOs were outnumbered about five to one by pro-consumer and pro-library groups." IPA also worried about "the risk of . . . a treaty on exceptions and limitations for libraries, archives and education that would be outright damaging." This could be just a "black advance" tactic whereby the rightholders settle back to engender our over-confidence while they quietly continue their backroom work at WIPO. On the other hand, the overall effect at SCCR31 was one in which the continued presence, and relative size, of the library and archives sector made clear that the supporters of exceptions will not go away, and by their presence they assured that substantive issues were discussed and the agenda advanced.[11]

For the moment, it may be best to not put too much attention on such speculation but instead look at the fundamental progress made. Even if it might be premature to declare there is momentum, it seems clear that not only was there not any backsliding, but there was continued engagement with a process that this Chair sees as necessary to produce a result, and that the Committee has accepted that process. Not only did the Committee follow the process the Chair first suggested 12 months ago but there were no challenges to using it during the session as there had been in June when he first implemented it. Further, a parallel process was resulting in progress with the broadcasting treaty.

Finally, although the museums study had appeared to risk derailing the library and archives issues, now that the study has been presented, it can be set aside. Further, there is an opportunity for ICA and IFLA to work together with ICOM on areas where some

[11] See: http://www.internationalpublishers.org/copyright/knowledge-bank/355-wipo-debates-copyright-exceptions-for-education-libraries-and-archives-as-well-as-a-new-international-broadcasting-treaty

quite capable people in the museum community will work with librarians and archivists on exceptions that may serve all three parties, and thus perhaps bring some added support behind the exceptions effort we have been pursuing. In all, with due recognition that matters at WIPO move slowly, and sometimes by convoluted routes, it seems that SAA's participation at SCCR31 contributed to advancement and that our presence at the next session in early May is recommended.

Appendix A

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WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

ORIGINAL: ENGLISH
DATE: DECEMBER 11, 2015

Standing Committee on Copyright and Related Rights

Thirty-First Session
Geneva, December 7 to 11, 2015

SUMMARY BY THE CHAIR

AGENDA ITEM 1: OPENING OF THE SESSION

1. The Thirty-First Session of the Standing Committee on Copyright and Related Rights (SCCR or Committee) was opened by Mr. Francis Gurry, Director General, who welcomed the participants and opened Agenda Item 2. Ms. Michele Woods (WIPO) acted as Secretary.

AGENDA ITEM 2: ADOPTION OF THE AGENDA OF THE THIRTY-FIRST SESSION

2. The Committee adopted the draft agenda (document SCCR/31/1 PROV.).

AGENDA ITEM 3: ACCREDITATION OF NEW NON-GOVERNMENTAL ORGANIZATIONS

3. The Committee approved the accreditation as an SCCR observer of the non-governmental organization referred to in the Annex to document SCCR/31/2, namely the African Public Broadcasting Foundation (APBF).

AGENDA ITEM 4: ADOPTION OF THE DRAFT REPORT OF THE THIRTIETH SESSION

4. The Committee approved the draft report of its thirtieth session (document SCCR/30/6) as proposed. Delegations and observers were invited to send any comments on their statements to the Secretariat at copyright.mail@wipo.int by January 15, 2016.

AGENDA ITEM 5: PROTECTION OF BROADCASTING ORGANIZATIONS

5. The documents related to this agenda item were SCCR/27/2 REV., SCCR/27/6, SCCR/30/5 and SCCR/31/3.

6. The Committee welcomed and considered document SCCR/31/3 prepared by the Chair, entitled *Consolidated Text on Definitions, Object of Protection, and Rights to be Granted.*

7. Some delegations requested further clarification on the document and others suggested textual proposals for the text.

8. The discussions contributed to progress with a view to reaching a common understanding on the protection of broadcasting organizations.

9. The Committee decided to continue discussions on this document and on a revised document that will be prepared by the Chair for the next session of the Committee taking into account the proposals and clarifications discussed.

10. Members of the Committee may submit to the Secretariat, by January 20, 2016, those specific textual proposals that were made during this session for document SCCR/31/3, for consideration by the Chair.

11. This item will be maintained on the agenda of the thirty-second session of the SCCR.

AGENDA ITEM 6: LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES

12. The documents related to this agenda item were SCCR/26/3, SCCR/26/8, SCCR/29/3, SCCR/30/2 and SCCR/30/3.

13. The Committee heard the presentation by Professor Lucie Guibault and Ms. Elisabeth Logeais on the Study on Copyright Limitations and Exceptions for Museums, contained in document SCCR/30/2. The Committee welcomed the presentation and delegations and observers participated in a question-and-answer session with the experts. Amendments and clarifications should be sent to the Secretariat (copyright.mail@wipo.int) by January 20, 2016.

14. Discussions were based on the chart introduced by the Chair on "exceptions and limitations for libraries and archives". This chart which was designed to serve as a useful tool to provide structure to discuss the substance of each topic, drawing on the many resources before the Committee. This will allow the Committee to have an evidence-based discussion respecting differing views and understanding that the goal is not to guide the discussion toward any particular or undesired outcome, but instead to lead to a better understanding of the topics and of their actual relevance to the discussions and the intended outcome.

15. The Chair highlighted some of the elements that were drawn from the views expressed in comments and submissions of Members of the Committee on the topic of preservation during the previous SCCR session.

16. Members of the Committee also exchanged views regarding the topics listed on the Chair's chart, namely reproduction and safeguard copies, legal deposit and library lending. In addition, concerns that could arise when considering limitations and exceptions related to these topics and possible measures to address such concerns were expressed. Suggestions were also made for alternative approaches.

17. This item will be maintained on the agenda of the thirty-second session of the SCCR.

AGENDA ITEM 7: LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL AND RESEARCH INSTITUTIONS AND FOR PERSONS WITH OTHER DISABILITIES

18. The documents related to this agenda item were SCCR/26/4 PROV. and SCCR/27/8.

19. The Secretariat informed the Committee about the progress made in response to the request made at SCCR/30 to update the various studies on limitations and exceptions for educational, teaching and research institutions published for the nineteenth session of the SCCR in 2009 and to aim to cover all WIPO Member States, as well as to prepare a scoping study on limitations and exceptions for persons other than persons with print disabilities. The update study has been commissioned and is expected to be presented at SCCR/32. The scoping study will be commissioned in early 2016 and is expected to be presented at SCCR/33.

20. The Committee held discussions on the topic of limitations and exceptions for educational, teaching and research institutions and their relationship with the fundamental role of education in society, with reference to the existing documents.

21. Some Members requested the preparation by the Chair of a chart like the limitations and exceptions chart to be used as a tool to focus discussions on this topic. Some other Members asked for more time to consider this suggestion. Other delegations suggested having an open-ended discussion on document SCCR/26/4 Prov.

22. This item will be maintained on the agenda of the thirty-second session of the SCCR.

AGENDA ITEM 8: OTHER MATTERS

23. The documents related to this agenda item were SCCR/31/4 and SCCR/31/5.

24. The Delegation of Brazil introduced document SCCR/31/4, entitled *Proposal for Analysis of Copyright Related to the Digital Environment*. Members of the Committee and observers offered initial comments and reactions to the proposal.

25. The Delegation of Senegal introduced document SCCR/31/5, entitled *Proposal from Senegal and Congo to include the Resale Right (droit de suite) in the Agenda of Future work by the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization*. Members of the Committee and observers offered initial comments and reactions to the proposal.

26. These topics will be maintained on the agenda of the thirty-second session of the SCCR under the agenda item for other matters.

27. The Chair presented a proposal to hold an extraordinary session of the Committee on protection for broadcasting organizations and to hold regional meetings on the subject of limitations and exceptions for libraries and archives. Some regional groups supported the proposal. Other regional groups considered it unnecessary or premature to hold sessions in addition to the ordinary sessions of the Committee. However those groups could consider the proposal again at the next session of the Committee. The Chair announced that in the absence of consensus the proposal would be discussed again at SCCR/32.

SUMMARY OF THE CHAIR

28. The Committee took note of the contents of this Summary by the Chair. The Chair clarified that this summary reflected the Chair's views on the results of the 31th session of the SCCR and that, in consequence, it was not subject to approval by the Committee.

AGENDA ITEM 9: CLOSING OF THE SESSION

29. The next session of the Committee will take place from May 9 to 13, 2016.

[End of document]

EXCEPTIONS AND LIMITATIONS FOR LIBRARIES AND ARCHIVES

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This chart is designed to serve as a useful tool to provide a structure to discuss the substance of each topic, drawing on the many resources before the Committee. This will allow the Committee to have an evidence-based discussion respecting different views, understanding that the goal is not to guide the discussion toward any particular or undesired outcome but instead to lead to a better understanding of the topics and of their actual relevance to the discussions and the intended outcome.

No	Topic	Conclusions adopted by the Committee
1	Preservation	As to the topic of preservation, it was considered that in order to ensure that libraries and archives can carry out their public service responsibility for the preservation, including in digital form, of the cumulative knowledge and heritage of nations, limitations and exceptions for the making of copies of works may be allowed so as to preserve and replace works under certain circumstances. (Document SCCR/26/REF/CONCLUSIONS, paragraph 18)
2	Right of reproduction and safeguarding copies	As to the topic of the right of reproduction and safeguarding copies, concern was expressed regarding the scope of the concepts under consideration and the possible overlap with other topics. Suggestions were made to modify the title of the topic. The Committee considered that arrangements such as limitations and exceptions for libraries and archives, among others, play an important role in allowing the reproduction of works for certain purposes, including research. Further discussion took place concerning the supply and distribution of those reproduced works. (Document SCCR/26/REF/CONCLUSIONS, paragraph 19)
3	Legal deposit	As to the topic of legal deposit, Delegations expressed differing views on the need to address this topic within the framework of limitations and exceptions. (Document SCCR/26/REF/CONCLUSIONS, paragraph 20)
4	Library lending	As to the topic of library lending, the Committee recognized the importance of addressing this issue and various Delegations suggested different alternatives for providing this service, including the use of limitations and exceptions, the exhaustion of rights, and/or licensing schemes. The Committee expressed different views on digital distribution in the scope of library lending. (Document SCCR/26/REF/CONCLUSIONS, paragraph 21)

Appendix B

		Conclusions by the Chair
5	Parallel importations	As to topic 5, on parallel importations, some delegations recognized that it was a cross-cutting sensitive issue. Some delegations emphasized that the choice for international, regional or national exhaustion was left to national law by international copyright treaties. A number of aspects of the topic were explored by delegations and observers. (Document SCCR/27/REF/ CONCLUSIONS, paragraph 16)
6	Cross-border uses	As to topic 6, on cross-border uses, a number of delegations expressed different views on how to enable libraries and archives to exchange works and copies of works across borders as part of their public service mission, particularly for education and research. A number of aspects of the topic were explored by delegations and observers. (Document SCCR/27/REF/ CONCLUSIONS, paragraph 17)
7	Orphan works, retracted and withdraw works, and works out of commerce	As to topic 7, on orphan works, retracted and withdrawn works, and works out of commerce, the importance of addressing this issue was discussed, as that subject matter was under development and consideration in many countries. Some delegations were of the view that these categories of works should be treated separately bearing in mind their own particularities. A number of aspects of the topic were explored by delegations and observers. (Document SCCR/27/REF/ CONCLUSIONS, paragraph 18)
8	Limitations on liability of libraries and archives	As to topic 8, on liability of libraries and archives, several delegations stated this was a complex topic that needed further consideration. Some were of the view that a limitation on liability would empower libraries and archives to fulfill their mission. A number of aspects of the topic were explored by delegations and observers. Some delegations expressed their concerns about cross-cutting principles of civil law and international obligations on that matter. (Document SCCR/27/REF/ CONCLUSIONS, paragraph 19)
9	Technological measures of protection	As to topic 9, technological protection measures (TPMs), a number of delegations recognized that technological measures of protection should not represent barriers for libraries and archives in fulfilling their missions. Other delegations believed that the existing international treaties already provided a flexible framework enabling appropriate solutions at the national level. Various approaches were discussed on how to address the relationship between TPMs and limitations and exceptions for libraries and archives. A number of aspects of the topic were explored by delegations and observers. (Document SCCR/27/REF/ CONCLUSIONS, paragraph 20)

10	Contracts	As to topic 10, on contracts, a number of delegations expressed views as to whether contractual practices should override the operation of exceptions and limitations at the national level. Different views were expressed regarding the need for international norms regulating the issue. Legal and practical implications of the relationship between licensing schemes and new technologies and services were also discussed. (Document SCCR/27/REF/ CONCLUSIONS, paragraph 21)
11	Right to translate works	

Appendix C

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

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

TOPIC TWO: Reproduction and Safeguarding Copies

December 2015

The Society of American Archivists, North America's largest professional archival organization, congratulates you on your continued leadership and thanks the Secretariat for its hard work and graciousness in preparing these meetings. Because our members manage billions of primary source works from throughout the world, SAA cares deeply about copyright's system of incentives, but we are equally concerned about the strong disincentives the system provides for using our collections to create new works.

Is everything that is committed to a fixed medium a commercial object? The Berne Convention assumes that is so, and therefore people at this meeting assume that copyright applies to even the tiniest scrap of paper with writing on it. But there is another universe of intellectual material that has always existed almost entirely outside the commercial world–unpublished material whose creation had no commercial intent. This is the world of archives, and by continually trying to force the round archives peg into the square commercial hole, copyright is preventing the creation of knowledge instead of cultivating new knowledge. The problem is an international one.

> For example, before he joined my university's faculty, a world-famous Armenian-Iranian architect was a leading proponent of modernism in Paris of the 1920s through 1940s. Now, a Netherlands-based biographer, himself an Iranian architect, requires images of drawings from this modernist architect's projects plus information on classes he conducted in occupied Germany and the US. Unfortunately, we are unable to verify who holds the copyright for some of the materials. Supplying the copies if he were in the US would be no problem, but sending copies across borders raises a host of barriers.
>
> A further example involves the personal archives of a prominent US chemist who led a post-World War I effort to reconcile scientists from both sides of that conflict. Now a Canadian researcher needs scans of his papers and most likely the same from European repositories holding the papers of the several Nobel laureates involved in that inter-war effort. We can tell her only what kind of use is allowed by US exceptions for our material. As for the other repositories elsewhere in the world, she must navigate a minefield of differing exceptions and limitations. This makes no sense.

The problem lies in the very foundation of the Berne Convention. Reopening Berne could solve this problem at its root by replacing its antiquated ban on formalities with a modern system of formalities recognizing that the creative world is no longer bound by physical books and travel by steam engine. Short of that, however, it's time for WIPO to recognize that archives are not and have never been about commerce. Now is the time to create predictable copyright exceptions for archives across all borders.

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

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

TOPIC TWO: Legal Deposit

December 10, 2015

The notion of legal deposit presumes the world still operates primarily on the published word, but that's not true anymore. Today's world is full of works of expression, learning, and education that are no longer solely mass-produced, commercial-market material. Instead, there is pervasive use and distribution by citizens themselves.

Archivists know this truth intimately. Today's archives are not just obscure materials or old documents, but also Twitter, Facebook, blogs, social media, and every other form of fleeting digital content. That is the future of knowledge. To ignore this is to pretend that the world of the internet does not exist, that it is merely a passing fad or is unimportant to our lives.

The US Library of Congress, for one, recognizes that legal deposit in a single institution cannot solely ensure the traditional function of national cultural preservation. They have tried, for instance, to become the depository for all Twitter activity, but even they cannot afford to make it accessible to researchers. In other words, fulfilling the aims of legal deposit in today's digital world is beyond the capacity of one single, national institution.

Archives, however, can and do provide a similar function. That's why the ability to copy and capture content from the internet is critical for archivists. To preserve today's history, we must be able to copy, or "image," what is on the web and social media before it disappears forever.

This is a truly international problem, as shown by a recent controversy at my university. When it cancelled a professor's employment offer after he used Twitter to post political comments about Israel and Gaza, it set off an international storm. The conflict's evolution over 14 months could only be found in blogs, pronouncements, reports, and postings on the web, an ever-changing place where documents disappear within days, if not hours. The US "Black Lives Matter" movement and the EU refugee crisis pose similar documentary challenges. None of this would ever appear in any repository as the result of a legal deposit requirement. For archivists to make this important, primary-source material available to researchers, however, we either must have exceptions or ignore copyright's out-of-date strictures.

Thus, one might say that archives are not on the margins of SCCR's concern, but at the very forefront. We are the proverbial canary in the coal mine warning of a danger to much more than our own vitality. Legal deposit? Who but archives can do that job when so much content today exists outside traditional published forms? Thus, the only way to truly secure national intellectual heritage is to reconceptualize legal deposit and create exceptions to address the fundamental failure-of-reach of the copyright system for the vast expansion of expressive works in the 21st century. Otherwise, the current international copyright system is destined for relevance only in an ever-narrowing world.

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