

## Comments on the Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty (SCCR/43/3)

### WIPO SCCR

Access to Knowledge (A2K) Coalition

June 16, 2023

We, the undersigned members of the [Access to Knowledge Coalition](https://www.wipo.int/meetings/en/details.jsp?meeting_id=75412), who are beneficiaries of limitations and exceptions for education, research and the activities of cultural heritage organizations, submit the following comments to guide the revision of SCCR/43/3, the Chair's Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty, available at [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=75412](https://www.wipo.int/meetings/en/details.jsp?meeting_id=75412).

### **Signal piracy and the right of fixation**

The Chair's summary (document [SCCR/43/SUMMARY](#)) expressed the "common understanding amongst the Committee that any potential treaty should be narrowly focused on signal piracy," and "that the object of protection (subject matter) of any potential treaty should be limited to the transmission of programme-carrying signals and should not extend to any post-fixation activities, thus avoiding interference with the rights related to the underlying content." The restriction of the scope of protection of the treaty to a signal based instrument was also mandated by the 33rd meeting of the General Assemblies. Yet, the Second Draft Text (SCCR/43/3) proposed to add a right of fixation to the scope of protections mandated by the treaty. Adding a fixation right is inconsistent with the desire to avoid interference with the rights related to the underlying content of a broadcast signal.

The addition of a fixation right necessarily extends the scope of protection beyond the mere signal - requiring users, including subscribers or other lawful recipients, to obtain a license to record (fix) the content of a signal for another use. Extending to fixation rights creates overlapping rights with copyright holders since broadcasters could conceivably demand licenses for activities, such as quoting broadcasted content, that copyright holders cannot. Extending a right of fixation to broadcasts poses particular problems for the use of non-infringing copies of works permitted under copyright, including for the use of works in the public domain, for the use of works that are subject to open licensing, such as Creative Commons licenses, and for uses permitted by copyright limitations and exceptions. The Coalition submits that the fixation right should consequently be removed from the Third Draft.

### **Limitations and Exceptions**

In no case should the treaty permit broadcasters to exercise greater rights of control over the content of signals than copyright owners have. Even if a right of fixation and an exclusive rights approach is not mandated by the new treaty, such an approach will in all likelihood be permitted by the treaty and therefore limitations and exceptions provisions are necessary to guide countries in implementation. Past experience shows that many countries simply cut and paste limitations and exceptions provisions into their laws with the result that important exceptions not addressed in the treaty text will also likely not be addressed in many implementing laws.

Uses of broadcasts, including fixing the contents of a signal for later use, are essential for many important public interests. Recorded broadcasts are used by libraries, museums and archives to preserve history and culture, for example in the kind of African media collection that was destroyed in the [University of Cape Town fire](#). Both recordings and retransmissions of live broadcasts are used in education, including in online education of the kind that proliferated during school closings forced by the COVID-19 pandemic. The ability to quote broadcasts is essential for political and academic commentary that lies at the core of freedom of expression rights. Broadcasts are used by researchers, including to enable media monitoring and analysis. Broadcasts and captioning are used to facilitate translation, including to increase accessibility for people with disabilities. The current draft's expansion of broadcasting rights beyond traditional over-the-air broadcasting to Internet streaming magnifies the potential impacts of the Treaty. Accordingly, the exceptions and limitations of the treaty are vital.

### Lack of mandatory exceptions

The limitations and exceptions in Article 11 of the Second Draft are all permissive, even for uses permitted in a country's copyright law and even for uses mandated to be permitted by international copyright treaties, such as for quotation. The Third Draft should add mandatory exceptions for all those areas subject to mandatory exceptions in copyright, including but not limited to quotation and the making of accessible formats for people with vision impairments.

### "Same kinds" of Exceptions as Copyright

The Second Revised Draft Text clarifies that the "same kinds" of limitations and exceptions in copyright may be provided for broadcast "irrespective of paragraph 1's" permissive list of exceptions. But the provision is permissive — a country may provide fewer exceptions than it provides for copyright. This enables countries to require licenses from broadcasters to make uses of the content of a signal that copyright permits. To prevent the countries from offering fewer exceptions for the uses of broadcast signals than for the copyrighted content those signals carry, the "may" in Second Draft Article 11(2) should be converted to "shall" to read:

"(2) Irrespective of paragraph 1 of this Article, Contracting Parties **shall**, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights."

### Requirement that Exceptions be "Specific"

Article 11(1) confines countries to the provision of "specific" exceptions, stating: "Contracting Parties may, in their domestic legislation, provide for specific limitations or exceptions to the rights and protection guaranteed in this Treaty, as regards: ..." There is not a general obligation in other copyright or related rights treaties that limitations and exceptions be "specific." Indeed, Article 10(3) of the Marrakesh Treaty specifically recognizes the authorization to implement exceptions "specifically," "other limitations or exceptions, or a combination thereof," which "may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses." A similar affirmation of the ability to adopt open general exceptions, like fair use and fair dealing, should be included in the Broadcast Treaty. For example, it could provide:

"Contracting Parties may provide specific exceptions to broadcasting protections, other limitations or exceptions, or a combination thereof, within their national legal

system and practice. These may include judicial, administrative or regulatory determinations as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties' rights and obligations under this or other international treaties."

### Opening the Closed List

The structure of Article 11 is important. For an exception to comply, it must be listed in paragraph 1's closed list of permissive exceptions or be of the "same kinds" as provided in the country's copyright law as provided for in paragraph 2. It can thus be classified as a closed list since there is no general authority to adopt public interest exceptions as is found, for example, in WCT Article 10(2).

In SCCR 43, the Chair noted that it is the intent of Third Draft to make the list of exceptions open. The words "such as" should be added to Article 11 (1) to read:

"(1) Contracting Parties ~~may~~ **shall**, in their domestic legislation, provide for ~~specific~~ limitations or exceptions to the rights and protection guaranteed in this Treaty, as regards **uses such as:** ..."

### Appropriateness of the three step test in a broadcast treaty

The three-step test should not be applied in the context of a broadcasting treaty. The Second Draft and the prior Chair's draft of the Treaty include the most confining version of the three-step test - requiring that countries "shall confine" limitations and exceptions. It fails to include the enabling version found in Article 10(1) of the WCT, 16(1) of the WPPT and 9(2) of the Berne Convention.

The three-step test is not appropriate for broadcast regulation. As Professor Hugenholtz notes in his analysis of the Second Draft:

"While the test has become a staple article in international treaties on copyright and neighboring rights, it is not immediately evident why it would be appropriate in the present treaty. First, the Rome Convention, on which much of the present text is built, does not include a similar test. Second, the alternative approaches towards signal protection expressly validated under Article 9 depart from the rights-based model on which the three-step test is grounded."<sup>1</sup>

Under TRIPS, broadcasters exceptions are covered by Article 14.6, where no three-step test is used. The proposed Broadcasting Treaty would thus be the first international treaty to impose the three-step test as confining countries' ability to make exceptions for broadcasting restrictions. The three-step test should be removed from the third draft.

### Missing exceptions from other treaties

The list of permitted exceptions in Article 11(1) does not include all those permitted in the Rome Convention and Brussels Convention Relating To The Distribution Of Programme-Carrying Signals Transmitted By Satellite, 1974, the two most relevant international treaties. The Third Draft should include, from the Rome Convention, the exception in Article 15(1)(c) for "ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts." It should also include the concept, in Article 15(2) of the Rome Convention, that "compulsory licences may be provided" to the extent to

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<sup>1</sup> Hugenholtz, Bernt, "The WIPO Broadcasting Treaty: Comments on the Second Revised Draft" (2023). Joint PIJIP/TLS Research Paper Series. 84.

which they are compatible with the treaty as a whole. Finally, it should include, from the Brussels Convention Article 7, a provision on abuse of monopoly:

“This Convention shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.”

Also missing from the present draft and its accompanying notes is a reference to the Agreed Statement concerning Article 10 of the WIPO Copyright Treaty:

"It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention"

### Removed exception for technological protection measures

The First draft contained one advance in international law on limitations and exceptions. The first draft stated:

“Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent third parties from enjoying content that is unprotected or no longer protected, as well as the limitations and exceptions provided for in this Treaty.”

This provision converted into a mandatory measure the permissible action recognized in the Agreed Statement to Article 15 of the Beijing Treaty. The mandatory provision in the First Draft obliged contracting states to ensure that anti-circumvention protection does not prevent users from enjoying public domain content or benefiting from limitations and exceptions.

The mandatory TPM exception promoted the Development Agenda Recommendations, including:

16. Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.
17. In its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries and LDCs.
19. To initiate discussions on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO.

The removal of the provision on exceptions for technological protection measures is a step backward for the public interest and the cause of promoting access to knowledge within the intellectual property system. The removed Article 12(3) should be returned in the Third Draft.

Signed,

- International Federation of Library Associations and Institutions (IFLA)
- International Council on Archives (ICA)
- International Council of Museums (ICOM) Education International
- EIFL (Electronic Information for Libraries)
- Creative Commons, Inc.
- Global Expert Network on Copyright User Rights
- Knowledge Ecology International (KEI)
- Library Copyright Alliance
- COMMUNIA
- Fundación Karisma (Colombia)
- Innovarte Ong
- Society of American Archivists
- Canadian Federation of Library Associations (CFLA-FCAB)
- Association for Recorded Sound Collections
- Electronic Frontier Foundation
- ISUR (Centro de Internet y Sociedad de la Universidad del Rosario)
- Instituto Brasileiro de Direitos Autorais (IBDAutoral - Brazilian Copyright Institute)
- Open Access India
- Datysoc (Data and Society Laboratory, Uruguay)
- Fight for the Future
- Canadian Association of Research Libraries (CARL)
- IP Justice
- Red en Defensa de los Derechos Digitales (R3D), México
- Biblioteca y Ruralidad, Colombia
- Fundación Vía Libre, Argentina
- Intellectual Property Institute, Slovenia
- Hiperderecho, Perú
- Intellectual Property Unit, University of Cape Town, South Africa