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WIPO Secretariat
Copyright Unit

By email copyright.mail@wipo.int

29 June 2022

Re: Comments and suggestions on document SCCR/42/3

Dear Madam/Sir,

EIFL (Electronic Information for Libraries) is an international NGO that works with libraries to enable access to knowledge in over 50 developing and transition economy countries in Africa, Asia, Europe and Latin America.

At SCCR/42, the Committee agreed that the Chair, working with the Vice-Chairs and Facilitators, would revise document SCCR/42/3, the Revised Draft Text for the WIPO Broadcasting Organizations Treaty, for further consideration at SCCR/43 based on comments, suggestions and questions from delegations.

EIFL welcomes the opportunity to comment on document SCCR/42/3. Our comments and suggestions focus on Article 10 Limitations and Exceptions.

We look forward to continuing to engage with the Committee on this Treaty.

Yours sincerely

A handwritten signature in purple ink that reads "Teresa Hackett" with a horizontal line underneath.

Teresa Hackett
EIFL Copyright and Libraries Programme Manager
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Comments on the Revised Draft Text for the WIPO Broadcasting Organizations Treaty (document SCCR/42/3)

The Preamble of the current draft text states the desire to protect broadcast rights ‘in a manner as balanced and effective as possible’. However, the text falls short of achieving this balance. To ensure fair access to copyright-protected content for social, educational and public interest reasons, the article on Limitations and Exceptions (Article 10) must be significantly strengthened.

Currently, there is no obligation to provide exceptions of any kind for social, educational or informational uses because Article 10 is optional, not mandatory. It doesn’t provide for exceptions and limitations that are mandatory in other treaties such as quotation and news of the day in the Berne Convention, and the making of accessible format copies in the Marrakesh Treaty. It doesn’t draw on best practices in other supra-national laws, for example, the mandatory exception for preservation in the EU Digital Single Market Directive.

The broadcast treaty sets out to update international rules to protect television broadcasts last updated in the 1961 Rome Convention. However, instead of building on the Rome Convention, the proposed new treaty takes a step backwards as regards limitations and exceptions. Article 10 in the broadcast treaty is narrower than the Rome Convention, which explicitly authorizes exceptions beyond those contained in copyright. It also fails to include the Rome Convention’s authorization of compulsory licenses. Additionally, it adds the three-step test restriction to the use of exceptions, which is not present in the Rome convention.

Further, the need for exceptions is magnified by the provisions on deferred transmission of stored programmes (Article 7), and the 20-year term of protection (Article 11).

Libraries of all types have broadcast material. For example, national libraries collect and secure for future generations television footage of iconic moments in a country’s history and culture. Academic libraries hold great collections of historical films and documentary material used for research and study. Public libraries show broadcast material for civic education and community information. During COVID lockdowns, television played a vital role keeping people informed and entertained – future scholars researching the pandemic will require access to this material. We need exceptions for these types of public interest uses.

Without proper exceptions, the treaty risks harming activities of libraries, archives and museums in support of education and research, as rights clearance becomes significantly more time-consuming and complex, transaction costs are increased, or projects and activities are stopped altogether because the process becomes too expensive or legally risky for a public institution to undertake.

Proposal for a Revision to Article 10 (document SCCR/42/3)

EIFL proposes that existing Article 10 in document SCCR/42/3 be replaced with the following language:

1. Contracting Parties shall provide an appropriate balance with respect to the protection of broadcasting organizations, among other things by means of limitations and exceptions for legitimate purposes, including for:

(a) private use;

(b) use of quotations and short excerpts, including in connection with the reporting of current events and news of the day;

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research, including computational research;

(e) uses to facilitate the availability of works in accessible format copies for beneficiary persons;

(f) preservation in any format;

(g) the same kinds of limitations as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works.

2. Any Contracting Party may, in its domestic laws and regulations, provide for exceptions to the rights provided in this Treaty for:

(a) compulsory licences with respect to a programme-carrying signal;

(b) general purposes, such as for fair practices, dealings or uses;

(c) for declaring unenforceable any contractual provision contrary to the exceptions provided for in this Treaty.

3. Contracting Parties shall provide that if a lawful reproduction is made under a limitation or exception or pursuant to operation of law, that reproduction may be distributed or made available in another Contracting Party for a use for the same purpose.

4. Contracting Parties shall take appropriate measures to ensure that effective legal remedies against the circumvention of effective technological measures does not prevent enjoyment of the limitations and exceptions provided for in this Treaty.

Note

While there is nothing in Article 10 of the revised draft text that explicitly prevents a Contracting Party from adopting exceptions along these lines, the absence of mandatory exceptions combined with the three-step test language will likely have a chilling effect on the adoption of exceptions in national legislation. Moreover, Article 10(1) suggests that a Contracting Party's existing copyright exceptions may constitute a ceiling on the exceptions it could adopt with respect to broadcast signals. In short, the Treaty should include an explicit set of mandatory exceptions, as well as a clear set of optional exceptions, to ensure that the Treaty achieves the stated objective of achieving an appropriate balance among the interests of all stakeholders.