

MEMORANDUM

To: Delegates to the World Intellectual Property Organization Standing Committee on Copyright and Related Rights

From: Creative Commons; Education International (EI); Electronic Information for Libraries (EIFL); International Council on Archives (ICA); International Federation of Library Associations and Institutions (IFLA); Global Expert Network on Copyright User Rights; Knowledge Ecology International (KEI)

RE: Broadcasting Limitations and Exceptions

INTRODUCTION

The core goals of WIPO copyright and related rights treaties include the objective to achieve a balance of exclusive rights and exceptions to “serve the larger public interest, particularly education, research and access to information.”¹ The draft Broadcast Treaty negotiations in the SCCR provide an opportunity to promote these ends. But the current chair’s text is inadequate.

The exceptions provisions in the Broadcast Treaty are particularly important, and different from the issues covered in the WIPO Performances and Phonograms Treaty and Beijing Treaty, because they could add a layer of rights clearance upon copyrighted content.

This memorandum explains how the current consolidated text would fail to ensure all uses allowed by copyright. It would also add new international law restrictions on the adoption of limitations and exceptions for parties to the Rome Convention. We offer an alternative that would take into account extensive work and progress in SCCR on limitations and exceptions to promote the needs of libraries, archives and museums, education and research, and persons with disabilities.

BROADCAST EXCEPTIONS

Chair’s Text

The current limitations and exceptions text of the Chair’s Consolidated Draft of the Broadcast Treaty states:

Limitations and Exceptions

(1) Contracting Parties may, 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.

¹ See e.g. WIPO Copyright Treaty pmb., Dec. 20, 1996 (stating goal of “balance” to serve “the larger public interest, particularly education, research and access to information”); Beijing Treaty on Audiovisual Performances pmb., Jun. 24, 2012 (stating goal to “maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information”). See also Development Agenda Recommendations 17, 19 and 22 (calling for WIPO norm setting to “take into account the flexibilities in international intellectual property agreements”; “further facilitate access to knowledge”, and “address ... potential flexibilities, exceptions and limitations for Member States”).

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the programme-carrying signal and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

Lack of mandatory copyright exceptions

Protecting broadcast signals can have the effect of creating a new level of rights clearance for content that already clears copyright rights. Most broadcasted content is subject to copyright. It is therefore essential for the broadcast right to be subject to all the same exceptions and limitations as copyright. The Chair's Text fails in this regard. It lacks mandatory minimum exceptions for the uses required by copyright treaties, including for quotation, for reporting news of the day, and for making and exchanging accessible format products.²

Restriction to copyright exceptions

The Chair's Text is more restrictive than the Rome Convention in permitting exceptions. The Chair's Text requires that exceptions be reflected in a country's copyright law. The Rome Convention explicitly authorizes exceptions beyond those contained in copyright, including a special flexibility for uses by broadcasting organizations:

Article 15 [Permitted Exceptions: 1. Specific Limitations; 2. Equivalent with copyright]

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (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.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised July 24, 1971, [hereinafter Berne Convention] Art. 10(1) ("it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries"); Art. 2(8) ("the protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information"); The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled [hereinafter Marrakesh Treaty] (requiring exceptions "to facilitate the availability of works in accessible format copies for beneficiary persons"); Art. 5(1) (requiring countries to "provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party").

It is clear from 15(2)'s application "[i]rrespective of paragraph 1" that a country may enact broadcast exceptions regardless of whether such exceptions are provided in copyright law. The flexibility to enact broadcast exceptions beyond copyright is removed from the Chair's Text.

Extending the three step test to telecommunications rights

The Chair's Text is also significantly more restrictive than the Rome Convention because it adds an obligation that countries confine limitations of or exceptions to a new version of the three step test. This is an extension of the three-step test developed for exceptions to *authors rights* into the very different realm of telecommunications signal protection. The test is ill-fitting. It proposes to require that exceptions "not conflict with a normal exploitation of the programme-carrying signal and do not unreasonably prejudice the legitimate interests of the broadcasting organization." But there is no comparable international law defining what the "normal exploitation" of a signal is or what the "legitimate interests"

The Rome convention does not contain a three-step test and none of its permissive exceptions are confined by an internal limitation as to quantity or fair practice.

This is an opportunity to improve the Rome Convention's exceptions provision, instead of restricting it. The Rome Convention's lack of mandatory exceptions means that a user may have every right under a Berne Convention-compliant copyright law to quote the content of a broadcast -- a news program, for example -- but violate the law in reproducing the broadcast signal. A Broadcast Treaty should correct this gap.

PROPOSED RULE

Mandatory Exceptions

The first paragraph would ensure broadcast rights not prevent a lawful use of copyright protected content. A similar issue was addressed in the Beijing Treaty, which permitted exceptions to technological protection measures "to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law".³ The first paragraph makes this principle mandatory and directly applicable, similar to the right of quotation in Berne Article 10(1).

The second paragraph would guarantee a basic level of harmonization of exceptions. One important reason for mandatory minimum exceptions is to prevent undue restrictions on non-copyrighted public domain content subject to broadcast. The second paragraph requires the exceptions permitted in Rome Convention Article 15(1). It adds to this positive list the mandatory exceptions for accessible formats for people with disabilities required for copyright in the Marrakesh Treaty.⁴ It also requires exceptions for issues that are now required of all EU law and which are being currently being discussed in the SCCR – namely, for libraries, archives, museums, and education.⁵

³ Beijing Treaty on Audiovisual Performances, Agreed Statement concerning Art. 15 as it relates to Art. 13 ("nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law").

⁴ The language is based on the Marrakesh Treaty.

⁵ Working Document Containing Comments on and Textual Suggestions Towards an Appropriate International Legal Instrument (in Whatever Form) on Exceptions and Limitations for Libraries and Archives (Proposal from the African Group), WIPO Doc. SCCR 26/3 (Apr. 15, 2013) ("it shall be permitted to make limited copies of published and

The third paragraph would adopt a version of the cross-border use right from Marrakesh. It makes clear that as long as a product using a broadcast can be lawfully produced in its country of origin, it can be used in any contracting party.⁶ This provision is necessary to prevent clearance complications in the trade of media, educational materials and other content relying on quotations or other uses of broadcasts.

Permissive Exceptions

The second part of the proposal includes permissive limitations and exceptions. First, it would borrow from the Marrakesh Treaty the specific authorization of flexible exceptions like fair use and fair dealing in this area – including “judicial, administrative or regulatory determinations as to fair practices, dealings or uses.”⁷ This allows countries to adopt a general public interest exception to broadcast rights, as may occur in many communications laws. Second, similar to the Rome Convention, it would include the authorization to use compulsory licenses⁸; the term “statutory licenses” is added. Third, it would permit exceptions covering the use of out of commerce works and orphan works. Finally, it would clarify that the Contracting Parties could adopt further exceptions, provided that they are permitted by existing treaties.

Exclusion from Protection

The third part of the proposal replicates article 2(8) of the Berne Convention, which excludes “news of the day” and raw facts from protection.

unpublished works, regardless of their format, to meet the needs of libraries and archives, without the authorization of the owner of copyright”); Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Legislative Resolution of Mar. 26, 2019) (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)).

⁶ See Marrakesh Treaty Art. 5(1) (requiring countries to “provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party”). See *also*. See SCCR/33/4, Proposal Concerning Limitations And Exceptions For Libraries And Archives And Limitations And Exceptions For Educational And Research Institutions And For Persons With Other Disabilities (proposal of Argentina) (permitting cross border uses of lawfully made materials for libraries, archives, museums, education and research).

⁷ Marrakesh Treaty, Art. 10(3) (“contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties’ rights and obligations under the Berne Convention, other international treaties, and Article 11”).

⁸ See Rome Convention, Art. 15(2) (“...compulsory licences may be provided for only to the extent to which they are compatible with this Convention”).

PROPOSAL

Limitations and Exceptions

1. Mandatory Limitations and Exceptions

- a. It shall be permissible to reproduce or otherwise use a broadcast signal in order to make any use of content protected by copyright or related rights that is permissible by the country's copyright and related rights law.
- b. Irrespective of paragraph (a), the broadcast right shall not prohibit uses of its content for the purposes of:
 - (i) private use;
 - (ii) quotation and use of short excerpts;
 - (iii) use in connection with the reporting of current events;
 - (iv) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
 - (v) use solely for the purposes of teaching or scientific research;
 - (vi) use to facilitate the availability of works in accessible format copies for people with disabilities;
 - (vii) use by libraries, archives, museums, and other institutions of cultural memory and learning, to undertake the necessary steps to preserve broadcasts;
 - (viii) use by educational institutions and other institutions of cultural memory and learning, to the extent the use is needed to advance the needs of education and research;
 - (ix) political speeches, and speeches delivered in the course of legal proceedings;
 - (x) lectures, addresses and other works of the same nature, when such use is justified by the informatory purpose;
 - (xi) hypertext or other links to non-infringing broadcasts.
- c. Any work lawfully created in reliance on limitations or exceptions pursuant to one Contracting Party's law may be distributed or made available in another Contracting Party.

2. Permissive Limitations and Exceptions

- a. Contracting Parties may enact limitations or exceptions to the exclusive rights required by this Treaty specifically for identified purposes, 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.

- b. Nothing in this agreement prevents a party from using compulsory licences or statutory licences with respect to a protected broadcast.
 - c. Nothing in this agreement prevents a party from creating exceptions for post fixation copies of broadcasts that are (i) out of commerce or (ii) for which rightsholders are positively indeterminate or uncontactable, including even cases where the names of the originators or the rightsholders are known, yet it is impossible to contact them because additional details cannot be found.
 - d. Without prejudice of the preceding paragraphs, contracting parties might adopt any other exception or limitation permitted by its international obligations for copyright and related rights in the Berne Convention and WIPO treaties.
3. Exclusion from Protection
- a. The protection required by this Treaty shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.