

Report on the 24th Session of the Committee of Copyright and Related Rights (SCCR) in Geneva, July 16 – 25, 2012

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After the successful conclusion of the Beijing Diplomatic Conference on Audiovisual Performances in June, different aspects of limitations of copyright and rights or broadcasting organisations have remained on the agenda and were discussed.

1. Limitations on educational, teaching and research institutions and persons with other disabilities

Discussions took place on the basis of a working document compiled by the Secretariat (and amended several times during the SCCR according to new proposals). This working document combined different kinds of proposals, in particular, proposals by Brazil (SCCR/24/7), Ecuador/Peru/Uruguay (SCCR/24/6), the comprehensive treaty text proposal by the African Group (SCCR/22/12), and proposals for topics to be included in the document (for example by China, Chile, India) as well as comments on national law experiences (in particular USA, EU and Member States of the EU).

Also, in particular Brazil and Ecuador proposed different clusters of topics according to which discussions on educational and research exceptions could be organized (Brazil: 1. access to works which have been withdrawn or which are out of print; 2. technological protection measures; 3. Use for pedagogical and teaching purposes; 4. reproduction of lectures and conferences; 5. quotations. Ecuador: 1. obligations or proposals to update exceptions of a general nature; 2. interpretative provisions on the scope of flexibilities allowed by international law, including the three-step-test, Articles 40 and 44 of TRIPS and others; 3. technological measures; 4. relationship with contracts; 5. performances for educational purposes; 6. availability on an interactive basis and communication to the general public for educational purposes; 7. translations, transformations and adaptations; 8. reproductions for educational purposes; 9. distance learning; 10. special education for persons with disabilities; 11. limitations and exceptions allowed only in the case of developing countries). Nigeria then introduced a number of much broader issues, namely, public domain, exhaustion, provisions for educational/private importation; limited liability for ISPs; personal use/use for study and research; public health, security, and others.

The main following discussion then concerned the question on how to organize discussions on these diverse proposals: on the one hand, on how to present treaty language proposals as opposed to comments/national experiences – those who had made treaty language proposals preferred to separate the comments on national experiences into a separate document or annex/second part of one document, while those who do not aim for a treaty, in particular industrialized countries, wanted to have their position reflected at equal footing within the document under each of the individual topics. The other issue of discussion concerned the organization of those topics or clusters that overlapped and in several aspects did not specifically relate to education and research but constituted horizontal issues, such as ‘public domain’ or liability of ISPs.

Finally, a broad division in three topics was provisionally agreed on, preceded by a preamble and

definitions as proposed by the African group and different proposals of a general nature including on flexibilities/three-step-test, proposals to update exceptions and the sharing of best practices and experiences. Topic 1 is called 'uses' and covers educational, teaching and research institutions, limitations regarding in-classroom teaching and those regarding outside-classroom education and research, as well as distance learning, and research. Topic 2 covers persons with other disabilities (meaning those which do not have visual disabilities), and topic 3 covers broader topics with implications for education, namely, A.: technology (specific exceptions for sciences, limitations to database protection laws, computer programs, technical protection measures, digital rights management/rights management information), B.: orphan works and withdrawn or out of print-works, C.: public domain; D.: contracts (relationship with limitations); [E. is missing]; F.: ISP liability; G.: importation and exportation; H.: public health or security.

At the end of SCCR 24, there were still some overlaps of individual topics within the three main topics, and it was not agreed which of the topics listed should be discussed or not. In particular, the EU mentioned that the horizontal, broader topics under no. 3 were not within the mandate of the SCCR to discuss the fields of education and research. It is clear that discussions are at the very beginning and that fundamental differences of views in particular on the ultimate aim of discussions (the nature of any possible text) and its scope exist. Also the title of the (provisional) working document was discussed controversially; finally, one reverted to the title of the document on libraries (provisionally) adopted in the previous SCCR and simply took this over also for education and research. It now reads: "Provisional Working Document towards an Appropriate International Legal Instrument (in whatever form) on Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons with other Disabilities containing Comments and Textual Suggestions." (SCCR/24/8 Prov.).

It was decided to continue discussion on this subject, with the target to submit recommendations on the topic to the General Assembly by SCCR 30.

2. Limitations for the benefit of libraries

The so far provisional working document on libraries of SCCR 23 was adopted as a working document (SCCR/23/8), but it was made clear at the same time that this document was open for further discussion, in particular regarding the topics included in it, which are not all specifically related to library uses and which in part are overlapping.

It was decided to continue discussion on this subject on this basis, with the target to submit recommendations on the topic to the General Assembly by SCCR 28.

3. Persons with visual impairment/print disabilities

After the SCCR 23, informal meetings of regional coordinators had taken place in March and May 2012 (USA, Mexico, Brazil and EU with the Chair of the SCCR, Ambassador Mwape) and led to additional amendments to document SCCR/23/7. After initial hesitations of certain countries to proceed on the basis of these additional amendments, work was organized so that those amendments were then officially introduced in discussions at the SCCR 24. Furthermore, additional proposals were made; among others, by Columbia to add in the preamble a recital which would recognize the importance of market solutions and of having alternative measures to grant access to works in accessible formats that are not necessarily limitations. Thereafter, more in-depth and detailed discussions on every article of document SCCR/23/7 followed, first in plenary and then in large parts in informal meetings of regional coordinators plus three persons overall. While the current text has been streamlined and to some extent consolidated, many

issues remain controversial, among which the main ones are the definition of 'authorized entity'; the question of whether to have a definition of 'reasonable price for developed countries'/'reasonable price for developing countries' or not, and if so, in which way; the way in which the three-step-test is referred to (in particular whether the specific example of a limitation in Article C(2) has to be considered per se as fulfilling the conditions of that test); the question of whether exceptions or limitations must also apply where an accessible-format copy can be obtained commercially under reasonable terms (including prices) (Article C(4)); and Article D on cross-border exchange of accessible-format copies.

Furthermore, in particular, Nigeria and other African countries introduced fundamentally new proposals that opened up the scope of discussion again, in particular, by proposing to extend the limitation under Article C to the rights of public performance and translation, on Article G on the relationship of limitations with contracts, stating that limitations prevail over contracts, while the previous language had left open the regulation of this issue to member states; and a new Article E on the interpretation of the three-step-test. By such additional proposals that opened up the so far achieved text, progress was slowed down.

Apart from these and many other issues regarding the specifics of the current text, the question on the nature of this text and its aim has remained open at this SCCR. Developing countries continue to call for a treaty; certain industrialized countries as the USA seem open to accept a treaty, and others, in particular the EU Member States and Japan, are opposed to a binding legal instrument. From a legal point of view, it remains true that a treaty is not necessary in order to introduce limitations for visually impaired persons at national level and that a mandatory exception or limitation to be introduced or applied in national law of member states would go against the principle under Article 5(3) of the Berne Convention that leaves domestic situations unaffected by international law and thus leaves national sovereignty to member states to legislate on domestic situations. Furthermore, fundamental questions still exist about the provisions on cross-border exchange of accessible format copies.

At the end of discussions, the previous document was adopted in a revised version as document SCCR/24/9. It was decided that, despite substantial progress, further work needs to be done, and recommended to the General Assembly to organize an inter-sessional meeting before the SCCR 25 and to have an extra-ordinary meeting of the General Assembly in December decide on whether or not to convene a diplomatic conference in 2013.

Broadcasting organizations

Both Japan (SCCR 24/3) and South Africa/Mexico together (SCCR 24/5) tabled new proposals for a treaty on the protection of broadcasting organizations. The main aim of a non-paper of 23 July then was to focus on reducing the number of alternatives and advancing on the basis of one common text of which the purpose would still be the protection of the signal, while the envisaged scope of protection still differed between the proposals of South Africa/Mexico on the one hand and Japan on the other. One single text with alternatives in particular reflecting India's proposals was adopted (SCCR/24/10) as a working document. It was clear that further work was necessary on this issue. It was decided to continue discussions with a view to develop a text that will be a basis for a decision on whether to convene a diplomatic conference in 2013.