EDITED BY TIM BROOKS

Copyright & Fair Use

The purpose of the Copyright & Fair Use column is to keep readers informed on copyright as it affects the preservation and availability of historic recordings. We welcome your questions regarding copyright, and will endeavor to address them in these pages. (We cannot, however, offer private legal advice.) Comments and short articles describing your own experiences with copyright are also welcome. Please send submissions to Tim Brooks, Chair, ARSC Copyright & Fair Use Committee at tim@timbrooks.net. Opinions given here are those of the contributors. For general information visit the Committee's webpage at www.arsc-audio.org and the site maintained by the Historical Recording Coalition for Access and Preservation, of which ARSC is a member (www.recordingcopyright.org).

October 2018 saw the passage of the Music Modernization Act, the most sweeping overhaul of US copyright law in twenty years. It marked the culmination – or at least, a culmination – of nearly twenty years of hard work on the part of ARSC and its allies to modify US law to better serve the interests of the public, specifically preservation and access to our recorded heritage. At many points it appeared that we would be shut out of the process by powerful interests in Washington, but in the end, through persistence and the help of valuable allies including Public Knowledge (a public-interest lobbying group) and Senator Ron Wyden, we were able to get historic pro-public interest provisions inserted into the bill. This is a major victory for all who care about our recorded heritage. It includes the establishment for the first time of a public domain for the earliest recordings in the US, preemption of the crazy quilt of state laws governing recordings, and even a start at freeing orphan works (those whose owners are not known) from the "copyright prison" in which they were previously held.

It is not the end of our work. There is more to do especially as regards overly long copyright terms and modernization of provisions allowing digital preservation and access. But it shows that the nay-sayers were wrong, that organizations like ARSC can have an impact and change is indeed possible if we're smart about it, and persistent.

A full analysis of the Music Modernization Act as it affects sound recordings will appear in a subsequent issue of the *Journal*. In the meantime, Copyright and Fair Use Committee member Eric Harbeson reports on an exciting new initiative of ARSC, on the world stage.

Thinking Globally About Copyright: ARSC at the World Intellectual Property Organization

By Eric Harbeson

For those of us who live in the United States, it is generally more than enough to keep up with the roughly 300 pages of legal code that is our copyright law. However, though copyright is, for the most part, largely a function of the rules in any given country, much of our law is shaped by international negotiations and agreements. In addition to the normative role they play in our own laws, discussions over the likes of trade agreements and treaties play a significant role in shaping the trajectory of the laws. Currently, discussions are in progress over two potential international agreements that could have a significant impact on recorded sound collecting and access. For this reason, following on the heels of some of our recent success in domestic copyright advocacy, ARSC has begun focusing attention on international discussions, to help ensure that our voices are heard and, hopefully, have an impact. This comment presents an overview of these proposals and their potential impact on ARSC members.

Background

International copyright laws are currently administered by the World Intellectual Property Organization (WIPO).[1] Formed in 1970, WIPO succeeded the United International Bureaux for the Protection of Intellectual Property (BIRPI), which was formed in 1893 to create a unified administration of the two extant IP treaties – the Paris Convention (patents) and the Berne Convention (copyright). BIRPI saw the addition of two additional copyright treaties and several revisions of the Berne Convention. Along with the name change, the Convention Establishing the World Intellectual Property Organization of 1967[2] shifted the organization into a member-state-driven organization, and in 1974, WIPO joined the United Nations as a specialized agency.

WIPO's purview covers the full spectrum of the intellectual property universe. Some of those issues, such as patents, trademarks, copyright, and trade secrets, are readily familiar in the United States. Others, such as moral rights, or geographic indicators, have some place in our laws but are mostly not a part of our traditional understanding, and still others, such as public lending rights, are entirely foreign to our system. The WIPO umbrella covers all of these – and many more – leading to some culture shock for anyone being exposed to the international IP community for the first time. In WIPO, copyright-related matters are handled by WIPO's Standing Committee on Copyright and Related Rights (SCCR). That body meets, usually, twice yearly, for a week at a time in Geneva.

Membership in WIPO consists of member states, each of which provides a delegation ranging from one to several members. Discussion is funneled, somewhat, through regional groups,[3] which help create regional consensus prior to the plenary sessions. In plenary discussions, the leader of each group is given the floor first, after which individual states may contribute additional comments. In addition, the discussions include other stakeholders and guests, whose contributions and specialized

knowledge help inform the delegates. ARSC participates in this capacity, through its membership in the Co-ordinating Council of Audiovisual Archives Associations (CCAAA), which has observer status as a registered non-governmental organization (NGO) in WIPO. The SCCR currently has two standing agenda items: a treaty to update rights of broadcasters and a proposal to create a minimum level of limitations and exceptions to copyright. Both of these create issues with which ARSC has both a strong stake and unique expertise to offer in the discussion.

Broadcast treaty

The Rome Convention is WIPO's current governing document concerning broadcast transmissions, and that treaty has grown badly outdated since it was signed in 1961. The treaty, which also requires protection for performers and record producers, requires "contracting parties" (i.e., countries joining the treaty) to provide an exclusive right of broadcasters to retransmit or publicly perform their broadcasts, fix their broadcasts in a tangible medium, or reproduce fixed copies of their broadcasts.[4] However, under the terms of the Rome Convention, a "broadcast" is defined only in terms of broadcasts of sounds or images through wireless means,[5] and this definition excludes most modern broadcast methods, such as those made via cable, satellite, or internet protocols. In addition to its clearly aged definitions, the Rome Convention's relevance is further challenged by the fact that that over half of WIPO's member states – notably including the United States – have not signed on to the treaty.

The SCCR has been discussing an international agreement to update copyright protection for broadcasting organizations since its first meeting, in 1998. The broadcast treaty discussions were prompted by the recently-passed WIPO Performances and Phonograms Treaty (WPPT), which updated the Rome Convention with respect to the rights of performers and record producers, but which omitted broadcasters. Conversations slowed during the peak years of the internet boom, but began to gather momentum, especially after the 2013 conclusion of another treaty – the Marrakesh Treaty for the visually impaired – opened up space on the committee's agenda.[6]

A study commissioned and released by WIPO in 2015 reported a significant and growing level of broadcast signal piracy, one that significantly threatens the health of that industry. At the same time, the industry has undergone an extensive and disruptive transformation, from one for which entry into the business required considerable financial resources and access to increasingly scarce space on the radio spectrum, to one in which anyone can become a "broadcaster" with as little as a phone and a web connection. That same equipment, the report argues, greatly eases the processing of pirating signals. The proposed treaty aims to address this perceived threat to the broadcast agency.

Many critics have expressed concern over the treaty, the scope and reach of which has evolved over the technological tumult of the last two decades. A joint letter signed by multiple NGOs identified several concerns, focusing especially on the scope of protection and the nature of the beneficiaries.[7]

An important area of controversy over the proposed treaty has surrounded the subject of protection. Should the main object of protection be limited to the "signal" – the actual current or wave that carries the content – or should protection extend

beyond the signal to include rights of fixation of that signal? Article 9 of the working version of the treaty currently under consideration includes two options, one of which, in addition to providing broadcasting organizations exclusive rights of retransmission and performance of their signals, also provides broadcasters exclusive rights to fix that signal in tangible form (similar to that provided by the Rome Convention), and further exclusive rights to control the use of that fixation.[8] Though more recent versions contained in the SCCR chair's consolidated texts (which are used as a starting point for discussions during sessions) do not include any mention of fixation, the most recent consolidated text continues to include provisions for up to 50-year protection for broadcasts, clearly implying a fixation.[9]

Fixation rights pose serious problems for many stakeholders, in that the additional layer of protection in theory allows any broadcaster transmitting legally licensed material to put a legal fence around that content, regardless of the copyright status of any underlying works. This potentially creates a significant problem, not only for scholars whose only access to a performance is through the broadcast, but also for performers, and even composers involved in broadcast performances.

WIPO's background brief on the topic itself provides a perhaps unwitting example. In response to concerns about locking up public domain works under new copyright, the brief offers the example of a concert broadcast of a Beethoven symphony, arguing that the symphony would remain in the public domain for others to play, record, or broadcast, but that the broadcast itself needs to be under broadcaster's exclusive rights.[10] There is no question that the musical work would remain in free, but the example ignores other right holders, and especially those of performers.

Where concert recordings are broadcast live, very often that broadcast is the only extant record of the performance. Because the broadcaster would exclusively control the broadcast, and therefore the performance, performers in that broadcast effectively lose any benefits they would otherwise enjoy under the WPPT. Unless someone were to make a simultaneous recording of the performance, the performers, and even composers whose works might have been premiered in the performance, would see their only access to their own intellectual property subject to the added layer of protection owned by the broadcaster. In addition, as the NGO letter notes, that layer of protection is theoretically perpetual, since new retransmissions of the broadcast, under the current terms, could create new exclusive rights, which are currently proposed at up to fifty years from the date of broadcast.[11]

The problems with the broadcast treaty might be alleviated if there were robust provisions for limitations and exceptions to the rule, but the current discussions are not moving in that direction. The current Revised Consolidated Text provides the option, but not the requirement, for contracting parties to provide limitations and exceptions to the new exclusive rights provided for by the treaty.[12] Since limitations and exceptions to copyright vary greatly by country, the prospect of optional exceptions does not give much comfort.

This treaty is an area of particular interest to ARSC and CCAAA in Geneva, and our uniquely specific expertise on both sides of the debate makes our voice welcome and sought after.

Limitations and Exceptions

Though limitations to copyright for the purposes of preservation and access are broadly understood to be necessary for a copyright system to work, the application of those limitations is at best inconsistent across national boundaries, and some countries have few or no exceptions.

The SCCR began discussing global limitations and exceptions action beginning in 2004 when the delegation of Chile introduced the agenda item as an "other matter," and the issue has since become a standing agenda item. In 2010, the Africa Group introduced a proposed treaty for limitations and exceptions for a variety of different stakeholders.[13] In the intervening years, WIPO's focus on limitations and exceptions has divided the original proposal into smaller parts, the most successful of which to date is WIPO's landmark Marrakesh Treaty for Visually Impaired Persons, which entered into force in 2016 and has so far been ratified by 51 countries. Currently, the SCCR consideration of limitations and exceptions is divided into two distinct agenda items: a proposal for limitations and exceptions for libraries, archives, and museums, and a proposal for educational uses, and uses by people with non-sight disabilities. Of the two, the most developed discussions currently surround the proposal for libraries, archives, and museums.

The Committee has yet to come to consensus on what kind of approach is desired, be it a binding, normative law such as a treaty, or some form of soft law or model approach. The International Federation of Library Associations and Institutions (IFLA), along with partner organizations[14], has proposed treaty text, though the treaty has yet to be formally introduced. Still, the committee's most current working document contains comments and proposed text that closely follow the IFLA-proposed text.

In addition to the proposed language, WIPO has commissioned multiple studies detailing the current state of limitations and exceptions around the world. The principal study surrounding libraries and archives, updated most recently in 2017, found that 28 countries out of 191 surveyed have no exceptions for libraries, down from 32 in 2015.[15] The Committee has commissioned an additional typology of library and archives exceptions, which is forthcoming, and will be holding regional conferences in summer 2019 to explore the issue further.

Because the limitations and exceptions discussions are not as far advanced as those of the Broadcast Treaty, the opportunities to shape and have a positive impact on the discussion are significant. From ARSC's perspective, limitations and exceptions form an essential element of the balance that must be present in a copyright system. Two of the five points in the legislative agenda for ARSC's copyright coalition, the Historical Recording Coalition for Access and Preservation (HRCAP), are topics which are under discussion in the SCCR limitations and exceptions agenda item, and many additional topics in the IFLA text are of special importance to audio archivists.

The need for an international agreement is especially sharp in countries where limitations are few or non-existent, but even countries that have robust limitations and exceptions regimes, such as the United States, stand to benefit from having consistent treatment across borders. In particular, an important traditional role of libraries and archives is sharing research copies of works with patrons in other areas where they are unavailable. Archivists who might normally be permitted to create a research copy of

a given audio work with patrons who share their nationality might find themselves in violation of the law when they share those same files with patrons in another country. With researcher bases increasingly international, enabled by technology that makes travel for local use prohibitively difficult to justify, it is imperative that libraries and archives be able to help their patrons, whatever their nationality, by supplying them with the unique material they require. A 2016 proposal by the Argentinian delegation would provide some relief by ensuring that archives activities in distributing patron copies be governed only by their home country's laws.[16] However, this only benefits institutions whose national treatment provides them effective exceptions.

Additionally, sound and video recordings are increasingly tied up in technological protection measures (TPMs) and shrink-wrap licenses. Under Article 11 of the WIPO Copyright Treaty (WCT), member states are obligated to provide some level of legal backing to TPMs, making their circumvention illegal under most circumstances, and severely restricting the ability of libraries and archives to carry out their services lawfully with respect to these works. Similarly, shrink-wrap licenses and terms of service governing many digital audio and video files in many cases restrict the ability of collecting institutions even to acquire the files. With many recordings available only under those licenses, the libraries and archives risk not being able to preserve a significant amount of the world's cultural heritage – lawfully at least – due to the failure of limitations and exceptions regimes to keep pace with the technology of the marketplace. The proposed exceptions would free archivists and librarians to engage in these crucial collecting activities, regardless of home country. Here especially, collectors and curators in the United States stand to benefit as neither our statutory nor common laws provide a clear path through the problem.

Limitations and exceptions are deeply controversial in the SCCR, especially among the NGO observers. Though limitations and exceptions, under the Berne Convention as well as nearly every other relevant copyright treaty, must not "unreasonably prejudice the legitimate interests of the author," many representatives of content industry organizations have expressed sentiments ranging from fear to outrage at the notion of limitations on the copyright monopoly. In some ways, these arguments find more favorable audiences in international forums such as WIPO because countries have in some cases significantly different philosophical understandings of the nature of copyright protection. Many NGOs representing libraries, archives, and other public interest groups are among those advocating for the treaty. ARSC adds an important voice to that advocacy.

Other issues

Limitations and exceptions and the Broadcast Treaty form the only standing agenda items in the SCCR at present, but the Committee is considering several other proposals, many of which bear watching. The delegation from Russia has for the past three sessions requested discussion of their proposal to add protection for theatre directors. SCCR has conducted studies on a resale right for artists, and there appears to be some support for adding that right to the standing agenda. Though these may not bear directly on ARSC's immediate concerns, they also are not irrelevant. A resale right is not part of the United States law at present, but it has been the subject of a Copyright

Office study as well as at least one bill introduced in Congress.[17] The introduction of a resale right into SCCR's standing agenda would increase momentum of the concept, and might increase pressure on the United States to move towards adopting more moral rights provisions.

Conclusion

WIPO rarely works quickly, and the major treaties under consideration are clearly not exceptions. For a treaty to make its way toward the ultimate goal of a diplomatic conference, the 191-member state committee needs to arrive at a *consensus,* and for the treaty to be successful it needs strong post-conference support from the national governments in the form of ratification. Despite the slow pace, rapid progress can come unexpectedly, as happened with the Marrakesh Treaty when key hold-outs suddenly reversed course. Because harmonization with international law is often a catalyst for domestic change – even extensive discussions by themselves can influence change – attention to the international stage is a strategically valuable way to advocate for change. ARSC's presence in this area reflects the organization's commitment to advocating for a sensible and balanced copyright regime.

Endnotes

1. See. U.N. Charter, art. 63. To some extent, copyright is also governed by the World Trade Organization, which administers the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), being party to which is generally a requirement of joining the WTO. Since trade agreements are notoriously opaque in terms of public participation, ARSC is focused exclusively on WIPO discussions.

2. https://www.wipo.int/treaties/en/convention/

3. These regional groups are the Group of Latin American and Caribbean Countries (GRULAC), the African Group, the Asia and Pacific Group, "Group B" (industrialized countries), the Central Europe and Baltic States (CEBS), the Central Asian and East European States, and China, which, uniquely, constitutes its own group. See: Birkbeck, Carolyn Deere, *The World Intellectual Property Organization (WIPO): A reference guide.* Cheltenham, UK: Edward Elgar Publishing, Ltd., 2016. p. 96

4. Rome Convention, art. 13.

5. Rome Convention, art. 3(f)

6. Testimony of James Packard Love, before the House Subcommittee on Courts, Intellectual Property, and the Internet (January 14, 2014). https://www.keionline.org/wp-content/uploads/JamesLove_Testimony.pdf.

7. Joint NGO letter on the proposed WIPO treaty on broadcasting (May 28,2 018). https://www.keionline.org/wp-content/uploads/2018/05/Joint-NGO-Broadcast-28May2018.pdf.

8. Working Document for a Treaty on the Protection of Broadcasting Organizations, document SCCR 27/2 Rev. (March 25, 2014). https://www.wipo.int/edocs/mdocs/copyright/en/sccr_27/sccr_27_2_rev.pdf.

9. Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted, and Other Issues, prepared by the chair, document SCCR 37/8 (November 30, 2018). https://www.wipo.int/edocs/mdocs/copyright/en/sccr_37/sccr_37_8.pdf.

10. Protection of Broadcasting Organizations – Background Brief, p.2. https://www.wipo.int/export/sites/www/pressroom/en/briefs/pdf/brief_broadcasting.pdf.

11. Joint NGO letter on the proposed WIPO treaty on broadcasting (May 28, 2018). https://www.ifla.org/files/assets/clm/joint-ngo-broadcast-28may2018.pdf

12. Revised Consolidated Text, SCCR 37/8.

13. Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries, and Archive Centers, proposal by the African Group, document SCCR/20/11 (June 15, 2010). https://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.pdf

14. International Council on Archives (ICA), Electronic Information for Libraries (EIFL), and Innovarte Corporación.

15. Crews, Kenneth D. *Study on Copyright Limitations and Exceptions for Libraries and Archives, 2017 ed.*, document SCCR 35/6 (November 2, 2017), p. 10. https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_6.pdf

16. Proposal by the Delegation of Argentina, document SCCR 37/2 (September 19, 2018). https://www.wipo.int/edocs/mdocs/copyright/en/sccr_37/sccr_37_2.pdf

17. *American Royalties Too Act of 2018, H.R. 6868* (115th Congress, 2d session). https://www.congress.gov/bill/115th-congress/house-bill/6868