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**08.08.2014**

**UN Special Rapporteur for the Human Rights Council:**

**Consultation on the impact of IP regimes on the right to science and culture**

**Submission**

The undersigned entities welcome the opportunity to participate in this consultation on the impact of intellectual property regimes on the right to science and culture (Article 15 of the International Covenant on Economic, Social and Cultural Rights (“**ICESCR)**

We understand that the Special Rapporteur has decided to focus her annual report to the General Assembly on intellectual property rights and their impact across cultural heritage, artistic freedom, access and enjoyment of the arts – not to mention the rights of indigenous peoples and local communities throughout the world.

The following statement of the legal Association of the Austrian Film- and Music Industry ( Film and Music Austria –FAMA) focuses on copyright and in particular its application to the audio-visual sector.

The consultation provides a chance to describe the vitally important role that copyright plays in our daily lives as we strive to tell our stories, finance their production, secure their distribution, protect them from unlawful use and ensure fair remuneration as well as obtain a return on investment which enables the creation of further works. Intellectual property rights provide us with the financial means to enjoy our artistic freedom, build our cultural heritage, and ensure that there is culture to enjoy. IP regimes incentivise the creation of culture for the benefit of all while they allow creators to not only to live from their work but also enable the financing and exploitation of such works.

The concrete obstacles that we meet in telling our stories take many forms. All around the world, film-makers face endemic problems related to access to capital to fund the creation of the stories they wish to tell.

Secondly, we face legal infrastructure difficulties: In many countries it is still difficult to talk about an IP regime at all, since such regimes frequently do not function well in practice. At the international level, we face a determined and politicised effort to weaken our protection based on unfounded arguments that IP regimes impede development, when in fact the audio-visual(AV) storytellers and growing industries in developing countries, like those in developed countries, need, as described, appropriate rights in their works in order to succeed. We must question whether the interests of the public and human rights are truly served by proposals that weaken copyright while strengthening the ability of wealthy technology companies to exploit creative works in making use of the exceptions for their own profit without appropriate authorisation and remuneration for the creators.

**Legal Considerations**

As per Article 15(1) ICESCR everyone has the right

1. *To take part in cultural life;*
2. *To enjoy the benefits of scientific progress and its applications;*
3. *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

This provision[[1]](#footnote-2) thus creates a human right ensuring both the access to culture and science and the protection of the moral and material interests of the author resulting from any artistic production. Indeed, the Sub-commission on Human Rights has clearly reaffirmed the status of Article 15 (and Article 27(2) UDHR) as a human right.[[2]](#footnote-3) We are also aware that the Committee on Economic, Social and Cultural Rights (CESCR) has hosted productive discussion days on the right to culture and General Comments[[3]](#footnote-4)on Article 15 ICESCR have been developed.

The undersigned Association of the Austrian Film- and Music Industry is certainly aware of the debate over the interface between intellectual property rights and other human rights. For creators the discussion has a concrete impact on their ability to make a living. In international fora, certain groups allege that IP rights impede development and hinder access to knowledge. This allegation is often made by those who stand to economically benefit from a weakening of copyright and in certain instances we note that such potential beneficiaries are funders of civil society groups whose agenda is purportedly in favor of consumers and ordinary citizens. On the whole, such polarised debates tend to underemphasize the practical, cultural, and artistic importance of IP rights.

Additionally there is the perennial debate as to whether the legal protections for rightholders are appropriately balanced with the public interest in access to culture and education. At the international level, however, the tools are clearly in place to ensure this balance in the provisions of the WCT, WPPT and the Berne Convention.

Article 15(1)(c) ICESCR protects the moral and material interests of natural persons - the authors of scientific, literary or artistic productions (screen writers, directors, composers, make-up artists, editors, performers etc.) that contribute to the creation of audio-visual productions. Producers, who are regularly established as legal entities and charged with organising, financing and ensuring the effective production and distribution of such works, benefit from and support the authors who contribute to the production of films and TV programmes. Together all those involved in the production of audio-visual works rely on the protection of the work created via IPRs to ensure the creation and distribution of film and TV programmes.

For authors, the reference to “moral interests” encompasses so-called personality or moral rights, while the material interests cover the economic rights. We understand that moral interest thus extends to the paternity and integrity rights of the author[[4]](#footnote-5). As far as the material interests are concerned, it is our understanding that Article 15(1)(c) does not establish a particular system of protection – though it may recognise key concepts such as an adequate standard of living. In any event, international copyright treaties themselves establish only minimum levels of protection and may provide further guidance. Within that framework, countries and regions have developed differing systems that nonetheless converge in many respects.

While the background to Article 15 does not provide much insight on what is to be understood by the term “productions”, we understand that “*creations of the human mind*” include cinematographic works and performances.

**Practical Perspective**

Around the world, the vast majority of audio-visual works are produced by independent companies. The AV sector, which encompasses film, TV and specific content tailored to the online environment, is a vital component of any country’s national economy and cultural identity. These companies in turn rely on a complex network of large, medium- and small-scale enterprises each specialized in specific activities. Given the level of financial investment required, most AV businesses will seek to share or outsource their financial risks. This is often done by selling rights by platform, language and/or territory to entities specialized in marketing and distributing AV content in the various exploitation channels (cinemas, online, DVD, TV, etc.) and markets.

The creative force and commercial potential of a given AV project will play a critical role in attracting investors. On the strength of that attraction, many films will finance the endeavour by selling rights by territory and/or mode of exploitation even before the actual production/shooting of the film has begun. Without those deals, a film may not get made. Attracting such investment can be a particular challenge in developing countries, where investors tend to be more sceptical about the capacity of the people making a film to claim ownership of and enforce the rights and distribution of their work to make it a commercial success.

Film-making and television production are very R&D intensive: It takes time and money to develop scripts, acquire underlying rights, cast talent, scout locations, create production designs, and complete the hundreds of other creative and administrative steps that go into making a successful film or television show. These development and pre-production activities are essential to the preparation of the production and can carry huge costs before a single frame is even shot. In many cases, a film does not progress to principal photography due to lack of the necessary financing, causing the project to be shelved and forcing the producer to absorb the loss. AV production cannot function unless it returns strong working capital to the producer so he or she can remunerate authors, performers and technical crews as well as recoup the investment and finance future projects.

Underlying film production is the copyright system, as ensured by the ICESCR, which provides a crucial strategic tool for securing financing and optimal exploitation of AV works by means of the exclusive rights granted to and/or acquired by producers to license the works to users (e.g. to film and video distributors, broadcasters, online platforms, etc.). Copyright alone permits the sector to generate revenue necessary to ensure an on-going supply of films and provide the incentive for continued creation. Copyright is a powerful incentive – and more importantly it is the means -- to embark on the considerable economic risk involved in turning a creative vision into a finished film. Once the works are produced, these rights – along with the moral rights – serve to ensure continuing protection and remuneration of all rightholders in the film.

For the specific Austrian situation be aware that – as in many small countries- the influence of public support , the dominating position of one Public Service Broadcaster and the limited national market are leading facts. Therefore also the dependence of producers as well as creative staff (authors ,directors,….) and actors and limited economic opportunities are a constant challenge and threat.

Awaiting very soon in the midst of September the Start of Netflix in Austria we are just now actually aware of the chances also of the new forms of film distribution. Professional audiovisual content still is and more and more will be the major impact for all kinds of new, non-linear and all-time-all-devices offers and and therefore the driving factor for platforms and for the development of electronic hard-and software. Professionell AV Content therefore still is “king” also of the new media world and a thriving chance for creative film makers. A strong and enforceable Copyright regime is the economic and cultural basis for this strong development and especially a chance for small countries like Austria with a strong well-known audiovisual brand ( Austrian art-house like Michael Haneke`s “Amour”) to expand their talent and innovative cultural content easier towards an even greater worldwide audience.

This stable and well-accepted process -- underpinned in some countries by collective bargaining procedures and/or statutory approaches -- enables the film authors and creative participants to realize their vision and create the film – while earning a living and with due respect for the paternity and integrity of their work.

**Conclusion**

One of the main roles of IPR regimes – which are underpinned by international norms including in particular Article 15(1)(c) – is to incentivise the creation of culture. Copyright and related rights are essential for any film production to be realized and for the vision of its creators to be fulfilled. As such, copyright is critical to securing the human right to the protection of the moral and material interests of authors and creators.

We invite the Special Rapporteur to bear in mind that weakening the copyright regime would harm the human right of authors to the protection of the moral and material interests in their works. Any weakening of this important human right can only be supported by compelling evidence of countervailing benefits to other human rights. A recent study confirmed the lack of such evidence, categorically rejecting the notion that weakening copyright would lead to increased economic performance and fosters innovation. Indeed, it argued to the contrary that the emergence of digital technologies calls for increased protection.[[5]](#footnote-6) It is also essential to reflect the inter-relationship between the authors’ and creators’ human rights and those of the public relating to access to science and culture. Without IP rights, the very objective of Article 15 would be subverted as there will be less culture and science for individuals to access, thereby depriving society of both social and economic progress.

Therefore we urge the Special Rapporteur to call for measures to support the practical implementation and application of intellectual property rights through international assistance and cooperation. Some projects of this nature are already ongoing under the auspices of the WIPO. Such an approach will not only enable developing countries to fully support and fulfil their obligations in respect of the rights provided for in Article 15, but also allow their creative sectors, including in particular in film and TV, to grow by using intellectual property rights as a proven and effective currency with which to embody the human rights of creators.

FILM AND MUSIC AUSTRIA



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1. See also Article 27 of the Universal Declaration on Human Rights (“**UDHR**”) which also protects authors’ moral and material interests. We are certainly aware of the debates surrounding the adoption of this provision, which resulted at the end of the day in the inclusion of this important right in both the UDHR and ICESR. [↑](#footnote-ref-2)
2. Resolution 2000/7 on IPRs and human rights states that “*the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2 of the Universal Declaration of Human Rights and article 15 paragraph 1(c) of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest (Res. No. 1).”* UN ECOSOC Doc. E/CN.4/SUB.2/RES/2000/7. [↑](#footnote-ref-3)
3. General Comment No. 17 (2005): Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c) of the Covenant; General Comment No. 21 (2009): Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights).These General Comments are helpful interpretative guidance but of course are not binding for States. [↑](#footnote-ref-4)
4. See Article 6*bis* of the Berne Convention which establishes minimum moral rights for authors. [↑](#footnote-ref-5)
5. John Van Reenen, LSE; Pierre Régibeau, Imperial College and CRA; and, Anne Layne-Farrar, CRA,*On the “Appropriate” Copyright Policy for the Digital Age- An Economic Analysis (March 2014).* [↑](#footnote-ref-6)