

Special Rapporteur Report on the Impact of IP Regimes on the Enjoyment of Right to Science and Culture (the “Report”)

BACKGROUND

IFPI, representing the recording industry worldwide, welcomes the opportunity to comment on the impact of intellectual property (“IP”) regimes on the enjoyment of the right to science and culture, as enshrined in particular in Article 15 of the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”). In our contribution we will concentrate on the role *copyright* is playing regarding the *music industry* and the enjoyment of right to *culture*. Of the rights that the Special Rapporteur intends to address in her Report, the rights of greatest concern to our industry are artistic freedoms and the right of people to access, contribute to and enjoy the arts.

Against this background, this paper presents the case that copyright is the cornerstone of the rights enshrined in Article 15(1) of the ICESCR. It shows that copyright – which is universally recognised as a fundamental human right - fuels creativity and the production of cultural expressions. We first explain why copyright matters, why it is the engine of cultural activity and why there is a public interest in copyright protection; we shed light on legal instruments and court cases that have recognised the importance of copyright; and we address the effect copyright has on the availability of professionally produced music. We explain why copyright and related rights are essential to create consumer products and services like music CDs or streaming services; and, before concluding, briefly address the number one challenge that continues to hamper the music industry – piracy.

COPYRIGHT AS THE CORNERSTONE OF A “RIGHT TO CULTURE”

Copyright is the cornerstone upon which today’s wide array of the legal music offer is built, both in the traditional off-line market and the increasingly important digital music marketplace. Copyright has enabled the launch of an amazing online and mobile music offer with up to 37 million songs available from hundreds of digital services, some of them free to consumers.¹ To listen to all the recordings available would take several lifetimes.² This is a source of cultural enrichment and empowerment, unthinkable only a few years ago.

WHY COPYRIGHT IS IMPORTANT

By giving creators the ability to benefit from the use of their works, copyright provides both a reward for their acts of creation and an incentive to continue creating. From the individual citizen’s

¹ See IFPI Digital Music Report 2014, available at <http://www.ifpi.org/resources-and-reports.php#/digital-music-report.php>.

² For example, assuming that every music recording lasts 3 minutes, it would take over 200 years to only listen to them all only once.

perspective copyright is therefore an essential prerequisite for the enjoyment of the right to science and culture, since it:

- 1) gives creators the necessary incentives (both economic and intellectual) to create, and therefore, ensuring them the opportunity to earn a living, and, at the same time,
- 2) ensures that original new creative content can continue to be produced.

1) *Copyright Gives Creators the Necessary Incentives to Create*

Copyright fosters creativity and fuels further artistic expression – and it therefore fosters the enjoyment of the right to science and culture. It underpins the music industry and the diversity of choice for music fans worldwide. Copyright is the means by which creators and innovators can be rewarded for their works, providing the economic and intellectual incentives for creators and creative businesses to create. It is the confidence in copyright that enables right holders and their licensees to create exciting new music services that can inspire people around the world. Copyright not only gives artists an incentive to create, safe in the knowledge that their work will be attributed to them and recognised as their (intellectual) property, but it also provides the economic means that permit them to devote the necessary time to create. Copyright of course offers no guarantee that an artist will be able to make money from his or her creative work, but an artist whose work does find success in the marketplace will be rewarded financially, and will be able to use that compensation to live on while he or she continues to create. Few artists can keep creating without earning an income from their activities.

Publishers and producers play a vital role in the commercialisation of creative content. They invest in the creative talents and their careers and therefore are an essential link in ensuring that the general public can enjoy and benefit from cultural products, as intended by Article 15(1) of the ICESCR. For that reason it is also justified to provide copyright and/or related rights protection to these entities that help deliver creative content into the market and to an audience wider than an individual creator on his or her own could ever reach. Publishers, film companies and music labels all need the legal and commercial certainty that their investments in creative talent will one day, despite the financial risks they take, bear fruit. It is possible of course that an aspiring, talented music artist can become successful on his or her own, building up a fan base on platforms like You Tube or MySpace, without the help and support a label can offer. However, these artists are the exception; the big majority of successful artists rely on or aspire to benefit from the services and support a record company can offer. Both research and a multitude of anecdotal evidence support this. A 2011 survey of unsigned aspiring artists in the US by ReverbNation and Digital Music News found that three-quarters (75%) wanted to sign to a record label.³

Recorded music is an investment-intensive business. The proportion of revenues invested by record companies in A&R activity remains exceptionally high compared to almost any other industry's investment in R&D. No other sector in the music industry, from publisher to retailer, invests on any similar scale, nor shoulders the substantial risks involved. No other sector is as dependent on having its content properly protected and its investments properly rewarded. None of this would be possible without effective copyright protection.

According to data from its members, IFPI estimates that record companies worldwide invested 16 per cent of their revenues in A&R activity (excluding marketing) in 2011. By comparison, an EU study published in 2011 – The EU Industrial R&D Investment Scoreboard, covering industries in the EU, US and Japan – showed that even the pharmaceutical and biotechnology sector globally only invested 15.3 per cent of its revenues in R&D in 2010.⁴ Without copyright, record companies

³ See "Investing in Music" 2012, page 7. Available at <http://www.ifpi.org/investing-in-music.php>.

⁴ See "Investing in Music" 2012, page 9.

would not be able to make these investments. It is copyright and related rights that promote this virtuous circle of investment, by which the revenues from a small number of successful recordings finance the substantial costs of developing, promoting and marketing new talent.

2) *Copyright Enables the Creation of New Works*

Copyright enables authors⁵ to create new original material, including material inspired by the work of others. Rather than being an impediment to creation, as some would still wrongly claim, copyright is an enabler of inspiration. This is so because one of the fundamental doctrines of copyright – the idea-expression dichotomy – limits protection to the particular expression of an author while permitting others freely to use the author’s ideas. A world without copyright would lead to a world with far less new works. Few artists or creative enterprises could take the financial risk to create anything new if everyone was free to exploit and disseminate their works to the general public. It is copyright that encourages authors to create, to invent that new melody which will storm the charts and forever stay in people’s memory. Without copyright, there could be no professional class of artists and composers whose success in the marketplace provides them with the means to make a living and continue to create new works.

Record companies, in turn, discover, nurture and promote artistic talent. They are by far the largest investors in artists’ careers. No other industry player currently offers access to such levels of investment or skills. Record companies are estimated to have invested US\$4.5 billion worldwide in artists and repertoire (A&R) combined with marketing in 2011.⁶ This represented 26 per cent of industry revenues. New talent is the lifeblood of the industry and almost one out of four artists signed to a label (23%) are new signings (signed within a calendar year). Record labels are able to reinvest the proceeds of successful campaigns in the discovery and nurturing of the next generation of talent. Those successful campaigns also need to off-set the costs of campaigns that are not successful. Estimates of the “success ratio” vary across the industry, but the most common estimate cited by senior music company management is a success ratio of one in five.⁷

COPYRIGHT PROTECTION IS IN THE PUBLIC INTEREST

Copyright is in the public interest precisely because it fuels creation, production and public dissemination of creative content. Without copyright there would be far less original content for people to enjoy – other than those funded (and therefore dictated) by governments and/or produced with a patronage of commercial sponsors or a lucky elite with the necessary financial means. This public interest in the continued creation of original materials has been recognised by legislators and courts around the world. To put it in other words, copyright underpins the creation of new cultural products, without which access to culture becomes meaningless.

The most important US case on this is the 2003 US Supreme Court decision in *Eldred v. Ashcroft*.⁸ The Court held that Congress’ extension of copyright terms by 20 years was constitutional and not in violation of the free expression rights guaranteed by the First Amendment of the US Constitution. In the opinion for the Court, Justice Ruth Bader Ginsburg wrote that the Constitution gives the government wide leeway in dealing with copyrights. The Court rejected Eldred’s claim that the term

⁵ Unlike other forms of IP, copyright protection can benefit individuals as easily as business entities because authors gain protection automatically, without the need to seek it from the government or meet difficult criteria.

⁶ Note that 2011 is the latest year for which these figure are available. See *Investing in Music*, page 7.

⁷ This is more than the commonly estimated one in ten ratio of a decade ago, reflecting a generally higher success rate than was previously the norm. See “*Investing in Music*”, pages 7 and 11.

⁸ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

extension curbed the right of free expression, noting that copyright law allows for limited reproduction of copyrighted material and therefore does not impede free expression unduly. The close time proximity within which the Copyright Clause and the First Amendment were adopted, she held, indicated that the view of the Framers of the US Constitution was that copyright's limited monopoly is compatible with free speech principles. The Court concluded that copyright "spur[s] the creation and publication of new expression" and that "[i]ndeed, copyright's purpose is to promote the creation and publication of free expression". The Court noted that copyright law, by means of its own limited scope as well as its exceptions, contains built-in First Amendment accommodations ensuring that copyright protection stays within the intended constitutional aims.

In the EU, Recital 9 of the Copyright Directive underlines the importance of copyright for creativity and creative output. The Recital provides that "[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property." The EU Commission's 2008 Green Paper on Copyright in the Knowledge Economy states that "a high level of copyright protection is crucial for intellectual creation". It sets out that "[a] rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts and to encourage producers and publishers to invest in creative works".⁹

COPYRIGHT LAW FOSTERS CULTURAL DIVERSITY AND THE CREATION OF MUSIC IN MANY LANGUAGES AND DIFFERENT GENRES

Music is the universal language that transcends borders – and IFPI's statistics confirm just that. While music sung in English is very successful in many popular genres, many local markets tend to be dominated by domestic repertoire. IFPI local chart statistics show that the percentage of top 10 albums in 2013 from locally signed artists was for example 100% in Japan (physical sales only), Croatia, Turkey (physical sales only), Finland, Greece and Hungary; 90% in Italy and Sweden; 78% in Denmark; and 56% in Norway.¹⁰ This shows that even in an age of inter-connectivity with English as the dominant language for business matters, local repertoire, local artists and also local languages continue to be successful and drive national cultural output.

COPYRIGHT PROTECTION DOES NOT INFLATE THE PRICE OF MUSIC WORKS

Critics of copyright claim that copyright protection inflates the price of cultural works, without giving (to the best of our knowledge) any convincing evidence that this is in fact the case. Regarding the music industry, there is no evidence suggesting that prices of music works out of copyright are cheaper than copyright-protected works, or, to put it in different words, that an extension of the term of copyright protection results in higher prices for consumers. For example, on iTunes a Beatles song costs 99 cents, or the local equivalent of 99 cents, in most countries where iTunes operates – whether it is still copyright-protected, such as "Let It Be" released in 1970, or whether it is out of copyright, such as "Love Me Do" released in 1962 (the single entered the public domain in 2012). To take another example, after the Directive extending the term of protection for sound recordings (2011/77/EU)

⁹ The EU Commission's Green Paper on Copyright in the Knowledge Economy, page 4, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf.

¹⁰ IFPI National Groups / local chart companies. Excludes multi-artist compilations. Cf. IFPI "Recording Industry In Numbers" 2014, page 12, available at <http://www.ifpi.org/resources-and-reports.php#/recording-industry-in-numbers.php>.

entered into force in the European Union in 2012 and was implemented by most of the Member States last year, price levels of music products throughout the EU stayed the same.

LEGAL INSTRUMENTS RECOGNISING THE IMPORTANCE OF COPYRIGHT

The importance of copyright is recognised in several international conventions. The Universal Declaration of Human Rights (“UDHR”, adopted by 48 States) includes copyright among the rights that governments are to respect and secure in their “universal and effective recognition and observance”. Article 27(2) reads “*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*”. Article 15(1)(c) of the ICESCR, one of the ten core international human rights instruments that are binding on signatory states (the majority of states are parties to the ICESCR; only 33 states have not signed or ratified it), provides that the author is “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production”.

In the European Union, the Charter of Fundamental Rights of 2000 (a policy statement, rather than a binding legal instrument) sets out in Article 17 that the protection of the right to property includes intellectual property. Article 17(2) of the Charter provides that “[i]ntellectual property shall be protected”. And the interests enshrined in the European Convention on Human Rights (“ECHR”) include the general principle of peaceful enjoyment of property - which includes intellectual property - in Article 1 of Protocol 1 to the ECHR. Similar provisions can be found in the American Convention on Human Rights and in the African Charter on Human Rights and People’s Rights. In the US, Article I, Section 8, Clause 8 of the United States Constitution (also known as the “Copyright Clause”) empowers the United States Congress “*to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*”.

In recognition of the importance of copyright and related rights, many countries around the world have committed to the standards for protection and enforcement set out in several international conventions, including the Berne Convention for the Protection of Literary and Artistic Works 1886, the Rome Convention 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the WTO TRIPS Agreement, and the WIPO Internet Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty).

COPYRIGHT WITHIN THE FRAMEWORK OF OTHER FUNDAMENTAL RIGHTS: EXCEPTIONS AND LIMITATIONS WITHIN COPYRIGHT LEGISLATION

National and international legal instruments embed copyright provisions in a framework of exceptions and limitations in order to allow for an appropriate balancing of copyright against other fundamental rights and interests.

Article 4 of the ICESCR sets out that the Covenant’s rights are restricted by limitations that “are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. In Europe, the balancing of interests in the form of exceptions and limitations must be done in accordance with the provisions of Article 5 of the Copyright Directive. The three-step-test of the Berne Convention, a long-established high-level principle which is set out in all major copyright treaties allows use of copyright-protected works if such use, in “certain special cases”, does not “unreasonably prejudice” the “legitimate interests” of right holders. All these provisions allow for the necessary flexibility to take human rights and other fundamental interests into account. This balancing of rights and weighing up of interests

always depends on the specific circumstances of a given case, and courts in many countries have ruled on this.

In Europe, in its 2006 judgement in *Laserdisken* the CJEU held that European Community courts are to protect freedom of expression as well as the right to property as fundamental rights enshrined in the ECHR and Article 1 of the Additional Protocol thereto.¹¹ The Court has also ruled on the need to reconcile other fundamental rights with copyright, most notably in its 2008 *Promusicae* decision, in which it held that IP rights such as copyright constitute general principles of Community law and that there is a need to balance and reconcile the fundamental rights to privacy, IP protection and effective remedies.¹² In the recent case of *UPC Telekabel Wien*, the CJEU had to balance the fundamental rights to IP protection, the freedom to conduct a business, and freedom of information.¹³

Also the European Court of Human Rights (ECtHR) had to deal with a balancing of copyright against other rights, for the first time in January 2013, in the case of *Ashby Donald and others v. France*.¹⁴ This was a case in which copyright protection had to be balanced against the right to freedom of expression set out in Article 10 of the ECHR. The case involved a challenge to convictions for copyright infringement by fashion photographers who took photographs of fashions protected by copyright and posted the photos on a commercial website. The Court concluded that the convictions did not violate the other ECHR interest at stake, the right of freedom of expression. The Court acknowledged that protection of copyright is a legitimate aim that can justify what might otherwise be an interference with freedom of expression under Article 10 of the ECHR. The Court explained that when determining whether criminal prosecution for copyright infringement violates freedom of expression, it is necessary to examine several factors, including the nature of the infringement, and in particular whether it is commercial in nature, as well as whether it is done for the purpose of engaging in debate on matters of public interest. The conclusion also depends on the type of expression and the type of content (information) at issue, as well as the context (political speech, a private event, etc.).

Only a few weeks later, the ECtHR in *Neij and Sunde Kolmisoppi v Sweden*¹⁵ confirmed that the criminal conviction for assisting copyright online infringement of the co-founders of The Pirate Bay, one of the world's largest websites for sharing infringing torrent files, was justified. The Court balanced the two competing ECHR interests, the right of the defendants to facilitate the exchange of information on the Internet, and that of the copyright holders to be protected against copyright infringement, and concluded that the interference with the defendants' right to freedom of expression had been necessary in a democratic society.

CHALLENGES REGARDING THE IMPLEMENTATION OF COPYRIGHT

The Special Rapporteur also wishes to address the challenges regarding the implementation of the "right to culture" and concrete obstacles met by creators. Regarding the music industry, the number one problem is and remains piracy. The music industry, like any other professional and commercial activity, depends on legal certainty, and in particular on the respect of copyright. Digital piracy is the

¹¹ See case C-479/04, *Laserdisken ApS v Kulturministeriet*, para. 62.

¹² See case C 275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, para. 62 and paras. 66 to 70.

¹³ Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktions-gesellschaft mbH*. As at August 2014 not yet published.

¹⁴ ECtHR decision (5th section), 10 January 2013. *Ashby Donald and others v. France*, Application number 36769/08.

¹⁵ ECtHR decision (5th section) of 19 February 2013. *Fredrik Neij and Peter Sunde Kolmisoppi against Sweden*, Application no. 40397/12.

biggest single threat to the development of new legitimate music services and investment in creative talent. Digital piracy takes many forms and it undermines the sector across formats and delivery channels.

Based on ComScore/Nielsen data, IFPI estimates that 26 per cent of fixed-line internet users worldwide regularly access unlicensed services (including websites, peer-to-peer services, streaming services, or locker services).¹⁶ The recording industry believes that it is essential that all parties in the digital economy start supporting legitimate digital commerce and help tackle the problem created by illegal, unlicensed services. For that reason IFPI is working to secure greater collaboration from a range of players in the digital economy, including advertisers, domain registrars, internet service providers, payment providers and search engines to achieve this goal. Even though legal services have made good progress in many territories, digital piracy remains at an extraordinarily high level and it continues to undermine the development of local music industries across the globe. Pirate services constitute unfair competition that hampers legal services' ability to develop to their full potential. For the recording industry to create new jobs and achieve sustainable growth, policymakers worldwide need to ensure that the industry can operate in a fair environment where copyright law is robustly and transparently enforced.

CONCLUSION

It is meaningless to speak of a right to culture unless the proper incentives are in place for the creation and dissemination of creative works and other protected content. Far from serving as a barrier to access to culture, copyright is a prerequisite for the creation and preservation of culture. A balanced copyright law that grants right holders the exclusive rights they need to be able to make a living and fair return for their investment, serves to implement the fundamental human right of every person *“to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”*.

¹⁶ See “Recording Industry In Numbers” 2014, page 43, available at <http://www.ifpi.org/resources-and-reports.php#/recording-industry-in-numbers.php>.