



September 15, 2014

Ms. Farida Shaheed
UN Special Rapporteur in the Field of Cultural Rights
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ms. Shaheed,

As a non-profit pan-European association representing independent music companies across Europe, which are responsible for 80% of all music released in this part of the world, IMPALA welcomes your decision to devote your next thematic report to the issue of the impact of intellectual property regimes on the enjoyment of the right to science and culture.

IMPALA is a non-profit pan-European association representing over 4.000 music companies¹ and national associations, representing 99% of Europe's music actors which are micro, small and medium sized companies. Known as the "independents", they are world leaders in terms of innovation and discovering new music and artists - as mentioned above they produce more than 80% of all new releases, thus contributing strongly to cultural diversity.

In light of our members' massive contribution to culture, we feel it is very important to share their views on these issues and welcome the opportunity to do so as provided by this consultation.

In our response we tackle the two issues of interest to you, as explained on the dedicated consultation webpage: the impact of IP regimes on the right of people to access, contribute to and enjoy the arts; and the challenges regarding the implementation of the 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/she is the author.

Cultural diversity is one of IMPALA's core principles. IMPALA was set up at the initiative of independent music companies to grow the independent music sector, promote cultural diversity and cultural entrepreneurship, improve political access and modernise the perception of the music industry.

As mentioned on the UNESCO's website², while the definition of 'culture' has long been a controversy, one commonly used definition is: "Culture is that complex whole which includes knowledge, beliefs, arts, morals, laws, customs, and any other capabilities".

As illustrated by this definition, culture is much broader than copyrighted-protected works. However, as the focus of the report is the impact of intellectual property regimes on the enjoyment of the right to science and culture, we will concentrate on this aspect of the discussion.

In IMPALA's view, this issue must be seen from two different and complementary angles: 1) the ability for citizens to access and enjoy culture, and 2) the ability for artists to create and be remunerated for their work, allowing culture to prosper and be widely disseminated (without artists able to create, there is no, or at least less, culture to access).

¹ For more about IMPALA, please visit our website: www.impalamusic.org

² http://www.unesco.org/most/migration/glossary_cultural_diversity.htm



Ability for citizens to access and enjoy culture

With regard to citizens' ability to access and enjoy culture, lots of efforts have been made by the cultural and creative sectors to allow new online uses to develop, especially in the music sector where hundreds of legal services are available throughout Europe (over 230³) and across the world (450⁴). In every European country, over 37 million tracks are accessible, which is more than one can listen to in a lifetime. Today, music lovers have unlimited and immediate access to all the music ever recorded, across all genres and regions of the world, at a reasonable price and often even for free. For example people listening to music on YouTube do not pay directly for their 'consumption' of music - like on radio, the use of music is licensed on YouTube and the user does not have to pay to listen to it. All the licensing deals are done behind the scenes between YouTube and music licensors. Similarly, people opting for music streaming services such as Spotify or Deezer (or any other similar service) usually have the option to listen to music for free through these platforms (in which case he/she will be 'served' an advertisement every few songs), the other option being to subscribe to the service to gain unlimited access to the whole repertoire (the average monthly subscription is \$5/\$10 per month).

To facilitate this type of licensing deals, Independent music labels have joined forces to launch global rights agency Merlin a few years ago (<http://www.merlinnetwork.org>). Merlin represents its independent members in new media deals that cannot be easily negotiated locally or individually, or are not covered adequately by existing arrangements. Merlin offers means for digital music services to license repertoire from a basket of independent rights. Merlin is a good example of an initiative helping license a wide variety of smaller repertoire as widely as possible, and therefore bringing this repertoire to as many potential listeners as possible.

In terms of citizens' ability to access music, we feel the music sector has delivered - most music ever released is now only one click away, at a cost close or equal to zero. To improve access to music in developing countries, the focus should be on delivering internet broadband to all: once people have access to the internet, they can access music (and other creative works) legally, often for free.

The ability for artists to create and be remunerated for their work

Artists rely on copyright to be able to create and be remunerated for their work.

These rights are protected under Article 27 of the Universal Declaration of Human Rights ("everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author") and Article 15 of the International Covenant on Economic, Social and Cultural Rights ("The State Parties to the present Covenant recognise the 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 is the author").

Copyright and related rights are granted to ensure that those who have created or invested in the creation of music, or other content such as literature or films, can determine how their creation can be used and receive remuneration for it. Copyright is both an incentive to create and a reward for creativity. It is the fundamental tool for ensuring that creators are fairly rewarded for their work all along the value chain. Our members, thousands of SMEs (small and medium-sized enterprises), European independent music companies, the artists they produce, and all the skilled individuals involved in the process of making music (composers, lyricists, music publishers, performers, backing musicians, sound engineers, recording studio staff, artists' managers, graphic artists, etc.), rely directly or indirectly on copyright.

³ For more on this, see IFPI's 2014 Digital Music Report: <http://www.ifpi.org/digital-music-report.php>

⁴ Ibid



Copyright is a liberator of creativity. It is artists' most basic of trading tools, giving them the artistic and economic freedom to create. Copyright is also particularly important for those who innovate and invest in new talent, taking risks others avoid - most of the time, it is the smaller players who do that. Artists and their partners need copyright to be in a position to negotiate remuneration and take risks.

It is in the interests of the cultural and creative sectors to have copyright protected content as widely available and consumed legally as possible across borders.

In one of your previous reports, on 'the right to freedom of artistic expression and creativity', published in 2013⁵, you mention in point 70 that "many stakeholders stress that the main impediments artists encounter in their work relate to their precarious economic and social situation" and that "some stakeholders stressed the absence of or a reduced market in their country". Indeed, without proper copyright protection granted to artists, there is no local market for local art and culture. In that case, the only culture to access is that of other, more dominant countries. This has an impact in terms of 'soft power', i.e. the power of one country to disseminate its culture to other countries and influence other countries' population and their lifestyle.

The very principle of copyright seems to be increasingly challenged by a wide range of voices, from online services to 'free internet' activists, to telecom operators and device manufacturers. We believe some of these attacks are planned and funded by very large interests, with the aim of paying less for music and other creative works, whilst protecting their own copyright and taking rights from smaller creators and the public, often without any room left for negotiating payments. Creators can't match the lobbying forces of online operators. Copyright is an asset we should be thinking about strengthening, not weakening.

Copyright is an enabler, or at least it should be. We should be making sure everything is done to ensure our market liberates the cultural and creative sectors' massive potential and avoids the trap of transferring our economic right to trade to tech companies, many of whom do not appear to be making the level of fiscal and cultural contribution that exists in our sector.

It is fundamental to creators' freedom to create and earn a living, without which only the "fast food culture" would survive with all the rights, creativity, information and personal data of our citizens already controlled and monetised with scant regard for sharing the benefits and for the freedom of artists and citizens to do things differently.

There is a great need for strong measures to enforce copyright and to support the development of the digital market for culture across the world, and more specifically in countries where the market is not developing correctly.

Freedom of expression and copyright

On a separate but related note, freedom of expression is a right which must be fully applied: for example when artistic works are made available against an artist's will, and the artists ask for their rights to be enforced (i.e. applied), some people are quick to call this 'censorship' and an 'attack on freedom of expression'. Artists know a lot about freedom of expression (just ask artists living in countries where they are not allowed to freely express their art), and they strongly value this right. If anything, making a copy of an artist's work available against the artist's will should be considered an attack on the artist's right to freely express his/herself as he/she chooses. In light of this, copyright and copyright enforcement play an important role in allowing artists to freely choose the way their work is disseminated. Copyright is often wrongly accused of being in opposition to freedom of expression, when in fact both go hand in hand: copyright is the best way for artists to retain their independence and be

⁵ <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ArtisticFreedom.aspx>



rewarded fairly for their work, hence helping safeguard artistic freedom. The artist's freedom of expression would be meaningless without the associated right to the protection of his/her moral and material interests resulting from his/her work.

In your 2013 report⁶, you mention at point 82 that “a highly debated issue is whether the moral rights and copyright systems have evolved in such a manner that the balance between the rights of authors and artists on the one hand, and the need to promote creativity and access to culture on the other, is no longer achieved”. As mentioned above, this idea that copyright is somehow a barrier to people's access to culture is, we believe, being promoted by commercially-driven interests. The idea that copyright law hinders creativity is an idea central to what is known as “free culture” (led among others by professor Lawrence Lessig). UC David professor of law Thomas W. Joo took a closer look at this movement's claims in his December 2011 article ‘remix without romance’⁷ and found that many of the factual claims made by the ‘free culture’ advocates are incorrect. For example, weakening copyright rules would not increase ‘participatory’ culture. Regarding sampling in hip-hop, often used by ‘free culture’ advocates as an example of copyright acting as a barrier to creation (something referenced in your 2013 report⁸, point 82), Thomas Joo demonstrates that this is not true since the earlier, most ‘sample heavy’ hip-hop albums, were made at a time when legal rules and business practices concerning samples were similar to today. Artists making those albums were very aware that they had to clear and license samples of other artists' works. Joo's conclusion is that “copyright law has not prevented the development of sampling”.

In your 2013 report⁹, you expressed concerns regarding “corporation consolidation within all branches of cultural productions, which frequently results in de facto monopolistic control” and “the incorporation of media, arts and entertainment holdings into corporate empires and their impact on artistic freedoms and on people's access to the arts” and the inherent dangers associated with such developments.

As mentioned above, independent music companies produce 80% of all new releases in the music sector, and are recognised as the main innovators and discoverers of new talents and new genres. Their contribution to cultural diversity in Europe is very significant and their potential is huge. However, music SMEs are facing severe problems in terms of access to the music market. The impact on diversity, consumer choice, pluralism and more generally access to culture is clear. Over 95% of what most people hear and see, whether on radio, retail or the internet, is concentrated in the hands of three multinationals, known as the ‘majors’. In light of this, IMPALA consistently calls for an adaptation of the regulatory framework to the specificities of the cultural industries, to make space for smaller actors. The role of competition authorities should be to make sure the conditions are in place for an open and competitive cultural market to thrive with a diversity of cultural entrepreneurs.

In the music sector, while SMEs (99% of music operators) are crucial to diversity, discovering and developing new artists and new trends of music, they represent only 20% of the market share. The concentration on the music market has a clear negative impact on access to culture, innovation, output, consumer choice, pluralism of content and media, and creates barriers to entry. This is a good illustration of the point you made, in your 2013 report, on the impact of corporation consolidation on artistic freedoms and people's access to culture.

There are many examples of discriminatory practices against independents. In early 2013 for example, the new Myspace Music service launched with no agreement in place with Merlin, the above-mentioned global digital rights agency for independent labels and artists. More recently, YouTube (which belongs to Google) approached independent music companies with a ‘take-it-or-leave it’ contract for its new, soon-to-be-launched music streaming service. The YouTube contracts on offer to independent labels are on highly unfavourable and non-negotiable terms, and undervalue existing rates in the marketplace from

⁶ Ibid

⁷ See here http://connecticutlawreview.org/files/2012/04/3.Joo_.pdf

⁸ <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ArtisticFreedom.aspx>

⁹ Ibid



existing music streaming partners. These contracts are different from those sent to majors, with which YouTube negotiated separate agreements over the course of several months. At the end of June 2014, IMPALA lodged a complaint with the European Commission against YouTube, focusing on a series of breaches of European competition rules. IMPALA's stance is that YouTube, in this instance, is effectively creating artificial barriers to the digital market¹⁰.

We believe that a number of measures could help level the playing field to make sure all repertoire is treated the same, irrespective whether acts are signed on a small or big record company, and to make sure local repertoire is not left out. Cultural diversity and the enjoyment of culture are at stake and it is clear that the market, if left to its own devices, will not automatically deliver diversity. The question of ensuring the regulatory framework delivers diversity and availability of content is one of the most important issues for individual artists and music SMEs, and concrete measure in this respect would be welcome. Some of the measures we believe would help level the playing field include the following:

- New framework prioritising access to culture through SME competitiveness, diversity and consumer choice;
- Competition rules should ensure a level playing field in the music sector, taking into account the cultural markets' specificities.
- "Must carry" obligations for online service that have become essential facilities like YouTube/Google;
- Diversity obligations for online services and platforms, including an obligation to license from SMEs;
- A non-discrimination principle for SMEs;
- Making cultural diversity impact assessments an essential part of all competition decisions.

Making sure the regulatory framework delivers a diversity of cultural works is one of the most important issues for delivering access to culture. Concrete measures in this respect are needed, such as for example introducing a non-discrimination principle for cultural SMEs, diversity obligations for content providers, or specific responsibilities for bigger actors towards smaller actors.

Copyright is an enabler, or at least it should be. It is fundamental to creators' freedom to create and earn a living, without which only the "fast food culture" would survive with all the rights, creativity, information and personal data of our citizens already controlled and monetised with scant regard for sharing the benefits and for the freedom of artists and citizens to do things differently.

Yours sincerely,

Helen Smith,

Executive Chair
IMPALA

¹⁰ For more on this, please see <http://www.impalamusic.org/node/325> and <http://www.impalamusic.org/node/331>