

Statement of the Federal Republic of Germany on Cultural Rights and Intellectual Property

The Federal Republic of Germany would like to take this opportunity and thank the Special Rapporteur in the field of cultural rights, Ms. Farida Shaheed, for having invited the United Nations Member States as well as specialized agencies, intergovernmental organizations, national human rights institutions and non-governmental organizations to a consultation on the impact of intellectual property regimes on the enjoyment of the right to science and culture with the intention of devoting her next thematic report to the Human Rights Council to this issue.

Convinced that this issue is of the highest importance for the wellbeing and advancement of the societies in all Member States, the Federal Republic of Germany would like to express the firm conviction that the respect of human rights and the respect of intellectual property are inseparably intertwined. The Federal Republic of Germany would like to underline her commitment to the International Covenant on Economic, Social and Cultural Rights, particularly to Article 15 para. 1 of the Covenant according to which the States Parties to the Covenant recognize the right of everyone, (a) to take part in cultural life, (b) to enjoy the benefits of scientific progress and its applications as well as (c) 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. Accordingly, by recognizing and protecting authors and their rights Member States are actively engaged in the protection of Human Rights.

With regard to the variety of topics which the Special Rapporteur intends to address, the Federal Republic of Germany would like to submit the following remarks:

1. 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

The rights of authors and holders of related rights are protected under Article 14 of the Basic Law, the constitution of the Federal Republic of Germany. The German Copyright Act reflects the protection granted by the German constitution. The German Copyright Act is available in an English translation on the web site of the German Federal Ministry of Justice and Consumer Protection:

http://www.gesetze-im-internet.de/englisch_urhg/index.html

According to Article 11 of the German Copyright Act the author is protected in his intellectual and personal relationships to the work and in respect of the use of the work. Copyright shall

also serve to ensure equitable remuneration for the exploitation of the work. In addition, the German Copyright Act reflects the requirements of international copyright law treaties such as *inter alia* the Revised Berne Convention, the Rome Convention, WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (known as the “Internet Treaties”), which aim at preventing unauthorized access to and use of creative works on the Internet or other digital networks. The same principles apply mutatis mutandis to the protection of intellectual property in other fields such as the protection of industrial property.

However, the German legal system does not only protect the interests and rights of rights holders. The German Copyright Act balances the protection granted to the author with the recognition of other interests which equally enjoy the protection of the German constitution. This balance is struck in those articles of the German Copyright Act which define the limitations to the authors’ rights. In that regard, the German Copyright Act reflects the requirements of corresponding Directives of the European Union. The challenges of the digital world and of the information society have been reflected specifically in the EU Directive 2001/29 “Copyright in the Information Society”. A particularly relevant aspect in this regard is the equitable remuneration to which the author is entitled whenever the law declares the usage of his work admissible without the contractual consent granted by the author (cf. Article 5 of the Directive 2001/29 and Articles 54 ff. of the German Copyright Act).

2. Access to the benefits of science and its applications, including scientific knowledge, technology, and opportunities to contribute to the scientific enterprise; freedom indispensable for scientific research

The Federal Republic of Germany shares the belief of the European Union and its other Member States, that the existing international copyright framework achieves the dual purpose of providing an incentive and a reward to creativity on the one side and on the other side of allowing for the access to the benefits of science as well as for the freedom indispensable for scientific research.

As pointed out above (cf. No 1) the limitations and exceptions for the benefit of libraries, archives, educational and research institutions leave the necessary space for science and research activities consisting of the use of content protected by copyright. Exceptions for the benefit of libraries and archives are provided for in European law. They are to be found notably in the above mentioned Directive 2001/29/EC and the Federal Republic of Germany just as all other EU Member States has adapted the national law to allow for libraries and archives to make copies for their clients and for their own purposes.

The Federal Republic of Germany would also like to underline that the international copyright framework leaves room for Member States to update this balance and reflect the constantly

evolving technological development. Besides, there is legal space left for introducing legislation on contractual aspects of copyright law. Thus, the Federal Republic of Germany has amended recently Article 38 of the German Copyright Act by establishing with para. 4 a secondary exploitation right for scientific authors, even if the author has granted the publisher or editor an exclusive right of use of his article: An author of an article which is the result of a research activity publicly funded by at least fifty percent has the right to make his article available on the internet, unless this serves a commercial purpose.

The Federal Republic of Germany would like to underline that Member States are strictly bound by the so called three-step test of the Revised Berne Convention in that they can only apply limitations in certain special cases which do not conflict with the normal exploitation of the work or other subject matters and which do not unreasonably prejudice the legitimate rights of the rights holders. This is altogether a framework that allows for flexibility in its implementation which is particularly important for the Member States of the European Union with different legal traditions and approaches.

Just as science and research, also education and training are essential for the European economy not only in order to evolve as a knowledge society and to compete effectively in the globalized economy, but also to permit the full exercise of fundamental freedoms, such as the rights to education which was enshrined in a charter of the fundamental rights for the European Union. Copyright protection was required so that educational establishment in the EU had access to top quality works, such as teaching material. It was therefore vital that a fair and sustainable balance was achieved between copyright protection on the one hand, and the achievement of public interest objectives on the other. Again, the framework provided for by the Revised Berne Convention, the Rome Convention as well as the WIPO Treaties together with the corresponding EU Directive 2001/29 gave Member States the possibility to establish in their legislation exceptions to copyright and related rights for the benefit of educational establishment and for teaching purposes, including the possibility for Member States to decide on whether to provide for fair compensation for rights holders when applying such exceptions.

Finally, the Federal Republic of Germany would like to underline its commitment to reflect on the necessity of an update or expansion of the existing international framework provided by the copyright treaties within the bodies of the World Intellectual Property Organization as the forum for a revision of the IP framework.

3. Artistic freedom and the right of people to access, contribute to and enjoy the arts

The aforementioned international copyright treaties establish the exclusive rights of authors to determine the use of their creations and thereby lay the foundations of artistic freedom. As artistic creation does not happen in an intellectual vacuum, the term of protection together with the relevant limitations and exception create the space for the use of content created by other artists and authors. The aforementioned framework also provides the extent to which a use of content by people is admissible without the contractual consent of the rights holders. Thus, at the EU level, Member States implemented in all 28 Member States the quotation exceptions in different ways, according to the tradition and legal frameworks of each country. Not in all but in many countries there was also a private copying exception and reprographic copying as well. Besides, the sheer enjoyment of the arts, i.e. the physical act of listening to music or to a play or of reading a text is never inhibited by copyright, as such act does not constitute a relevant act of usage of protected content.

4. Impact of intellectual property regimes on the right of people to enjoy and access cultural heritage

Cultural heritage institutions play an essential role in all our societies with regard to the dissemination of knowledge, information and culture. The Federal Republic of Germany - like the European Union and its Member States - considers it important that the copyright framework enables these institutions to fulfill their public interest missions both in the analogue and digital world. However, as explained before, also in this regard the existing international copyright framework already provides for a wide variety of possibilities for all Member States to ensure meaningful limitations and exceptions. WIPO Members that have not yet introduced such exceptions in their national legislation can currently do so and, if necessary, request the assistance of WIPO or help of other WIPO states and stakeholders. In addition, the Federal Republic of Germany would like to draw attention to a specific problem and the solution found by the European Union and its Member States: The use of so called orphan works. Orphan works are works like books, newspaper and magazine articles and films that are still protected by copyright but whose authors or other rights holders are not known or cannot be located or contacted to obtain copyright permissions. They constitute an important part of the cultural heritage. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works sets out common rules on the digitisation and online display of orphan works. Orphan works are part of the collections held by European libraries that might remain untouched without these rules which to make their digitisation and online display legally possible. The Federal Republic of Germany has already transposed this directive into national law.

5. Rights of indigenous peoples and local communities

The Federal Republic of Germany would like to draw the attention to the deliberations which are at present dedicated to the topic of genetic resources, traditional knowledge, and traditional cultural expressions within WIPO. The Federal Republic of Germany recognizes the role they play for indigenous peoples and local communities as well as in the cultural and natural heritage. The Federal Republic of Germany therefore expresses her strong commitment to maintaining existing artistic, religious, cultural and other freedoms in a multicultural world.