

Consultation by the UN Special Rapporteur for the Human Rights Council on the impact of IP regimes on the right to science and culture

Submission by the International Arts and Entertainment Alliance

As international organisations representing the professional concerns of hundreds of thousands of workers in the media and entertainment industry, FIA, FIM and UNI MEI welcome the public consultation on the impact of IP regimes on the right to science and culture and are pleased to bring their contribution to the work of Special Rapporteur, Ms. Farida Shaheed.

We understand that the scope of the annual report to the General Assembly encompasses intellectual property as a whole. This is a very broad area of law, covering things as distant from one another as geographical indications, patents, trademarks and also copyright and neighbouring rights. Each of these disciplines should therefore be analysed separately, and with reference to a specific industry, in order to gauge their effect on the right to science and culture.

Our members are the artists that entertain millions of people around the world, from singers and musicians to actors and dancers, screenwriters, directors and crew. Their contribution to cultural knowledge and diversity is not in question as most of what quenches our societies' thirst for more songs, stories and creative content is largely based on the artistic skills and the dedication of the artists we stand to represent.

Digital technologies have had an unprecedented impact on the way our members' work is now produced and distributed. It has created new opportunities for them and has greatly enhanced their reach to potential audiences worldwide. Music can be streamed or downloaded on demand from various devices and this is now increasingly the case also for audiovisual content. Limited production costs have enabled new industries to flourish, as in the case of Nigeria, now one of the worlds' biggest film producers, where production is entirely digital. Movies are streamed by satellite link from India to Nepal, where viewers can watch them in digital theatres at reasonable prices. Many broadcasters are investing heavily to offer their repertoire and a wealth of additional information to their viewers online, often with catch-up services enabling deferred access.

Consumers now need not invest on VHS or DVD recorders anymore, as they can access unprecedented repertoires on demand and on a subscription basis. They may not need to buy or rent physical copies of their favourite albums, as they may now store their collections permanently on virtual libraries. The effect of competition is constantly driving prices down, making access to content cheaper and more affordable to many. Public service radios and television stations around the world continue to enrich our lives with a wide range of educational content for a reasonable price or for free, as do certain commercial outlets, in some cases financed by advertising.

The cultural economy continues to be heavily based on copyright and neighbouring rights. Those rights are essential to protect investment and reward creative talent. The digital age has not changed that, although it has challenged the ability to enforce these rights effectively and in a balanced fashion. The difficulties and challenges posed by enforcement have themselves created a climate of hostility to IP and a new expectation that all content should be freely available - an expectation which flies in the face of the business models that underpin what generally remains a high investment industry.

Without IP protection, creators would have no incentive to invest artistic, financial and other resources in developing an audiovisual project that may attract investors. Without production, authors and performers would be left with fewer stories to tell and audiences to meet. Without IP protection, many of the new innovative licensing

mechanisms that are carrying music for the world to enjoy would simply not be possible. The sustainability of the industries that are employing our talent would be severely threatened if the pivotal role of IP was to be questioned. As a result, cultural diversity would be impoverished and freedom of expression threatened.

All main international treaties in the field of copyright and neighbouring rights, and indeed their implementation at national level, provide for a careful balance between the legitimate interests of right owners and those of civil society and the public at large. Various limitations and exceptions, inspired by the underlying principle of the three-step test, have thus seen the light and have effectively managed to facilitate access to protected works, under various circumstances, in recognition of the fact that no fundamental right may be granted in absolute terms.

Copyright and neighbouring rights are not only essential for growth and jobs. They also have a direct impact on the livelihood of many of our members, as they protect their moral interests and secure them a reasonable income from the use that is made of their work. While consumers see IP as a mechanism serving the interests of the big players, IP revenue (can be a very real and fundamental part of an artist's income. Such additional income is all the more fundamental, at a time where creative workers are widely employed on short-term contracts and are likely to have intermittent periods of unemployment. Such working patterns may also leave artists with little or no pension provision for later in their lives – in this context too, income from rights is a vital supplement. Furthermore, IP has the potential to be a tool to give creators a greater stake in, and return from, the digital exploitation of their work. Increasingly, works are exploited in new ways and for longer periods in the digital environment and creators' IP rights need to ensure they share in the profit generated. However, this potential is still underdeveloped.

Regretfully today, intellectual property rights still fail to cater for the material interests of artists and creative workers in many countries. This may be due to failure by national laws to grant those rights altogether. It often is however the undesired outcome of mainstream contractual practices, where our members are made to sign away all their rights in perpetuity and for all uses, known or unknown – often for little more than a symbolic and one-off payment. Whenever that happens, authors and performers do not earn any additional revenue from secondary exploitations and often have to take up odd and unqualified jobs to make ends meet. Many of them, despite their talent, must ultimately embrace a different professional endeavour and drop off the creative industry to make a living – which in the long term impoverishes creativity and diversity.

We argue that a balanced intellectual property system should also cater for the material interests of authors and performers by establishing safeguards against their inherent weak bargaining power and mechanisms meant to improve their ability to make a decent living from their work. Indeed this was the conclusion of the recent in-depth European study (carried out by KEA for the European Parliament) on “Contractual arrangements applicable to creators”. We anticipate similar findings from the study currently underway on contractual conditions of artists, commissioned by the European Commission before the summer, and led by Europe Economics and the University of Amsterdam. We hope that these studies will point the way towards a renewed IP regime, adapted to the creative industries, but which better rewards the creators that are their most important asset.

In conclusion, we would like to offer some reflection on the many other factors that impact on cultural diversity and freedom of artistic expression. While it has become popular to imagine that IP is the obstacle and that a world untrammelled by IP would be one in which creative expression would reach a new flowering, we believe this a view that fails to take account of the basic realities of the industries, disregarding the real mechanisms that drive them. We would respectfully claim that, in our industries, there are several other key factors deserving careful consideration, as they have clear implications with respect to the right to access a rich and diverse choice of cultural content.

1. Public funding and policies in support of local content: in too many countries around the world, access to culture is today severely limited by close to in-existent investment policies that simply make professional production impossible. In Namibia, for instance, native film production is almost non-existent despite the country's high profile as an ideal shooting location for foreign productions. Outward looking incentives are not matched by investment

policies in support of native story telling. As a result, Namibians are unlikely to see much local content on their screens, whilst most professionally produced audiovisual content comes from neighbouring countries. Similar stories may be told from around the world, where access to cultural diversity is hindered by the lack of engagement, on the side of public authorities, on quality production and cultural infrastructure. In Madagascar, only a few theatres are left in the whole country and, whilst most of them are in a very derelict state, those still capable of hosting a crowd are commonly used for political rallies and religious ceremonies. In Bulgaria a large number of municipalities are drastically reducing their support to culture and close down philharmonic orchestras and ballets, thus depriving citizens from a legitimate access to core components of cultural life. Many musicians are threatened with losing their jobs and may, as a result, either give up their musical career or leave the country in order to pursue a professional activity in a more welcoming place.

Public service broadcasting is a vital pillar for ensuring universal access to political, social, linguistic and cultural diverse content. Sustainable funding and the editorial independence of public service broadcasting are prerequisites to ensure that this essential role is nourished in a globalised digital economy. A very significant number of productions would not be possible without the mission of, and investment by, public service broadcasters. However, in recent years, the very principle of public service broadcasting has come under attack and the editorial independence was repeatedly threatened, including in democratic countries. Without the commitment to a strong, independent and diverse public service broadcasting system as an integral part of our societies, access to culture will be limited in scope, depth and diversity.

Few countries around the world have provisions with respect to quotas and minimum spending obligations for local content. These provisions have proven beneficiary to sustain native production and offer audiences opportunities to access a greater choice of local content. These provisions are regularly challenged and often minimised by bilateral trade agreements. Traditionally crafted for the analogue environment, their extension to digital services meets with great resistance – whilst traditional broadcasters and radios claim unfair competition to question the upholding of existing rules.

2. Censure: many political regimes around the world have a very heavy hand on freedom of expression and culture is often their primary target. By severely limiting the ability of artists to express themselves and reach out to their public - and also by denying citizens the right to access cultural expressions beyond national borders, as censorship regularly also extends to the digital world - these countries virtually make it impossible for their people to access a diversified cultural offer.

3. Training, status and social dialogue: creative artists may be self-taught and learn their craft directly from experience. Whilst this certainly applies in some respect to all of them, the lack of professional and vocational training opportunities in many countries around the world is a serious obstacle to more creativity and professional content – thus to greater artistic choice for the public.

Furthermore, authors and performers are often bound by atypical work relationships that are used against their best interest to deny them full access to core labour rights, including the right to organise and bargain collectively. Without the backup of a solid trade union body, only a few of them achieve sufficient clout in the industry to secure acceptable terms and conditions for their work. The very precarious nature of their job, with a multitude of employers and relatively short-term assignments followed by prolonged inactivity periods, is thus worsened by their inability to collectively negotiate with their employers.

4. Career transition: some artistic professional careers are extremely demanding, both physically and mentally, and typically come to an end when artists reach their mid '30s. Having committed all their young age to learn their craft, most of them find it very challenging to embrace other professional careers, unless properly guided and trained. Career transition programs however are limited in numbers and funding, which may act as a deterrent as young people answer their vocational call.

It is worth stressing that countries with a diverse and accessible cultural offer most often are those combining a comprehensive and effective IP system with policies that actively promote and encourage artistic production. Conversely, it is where countries have no such policies in place that culture, and access to the diversity of artistic expressions, is limited to a small trickle - despite all possible regulations in the field of IP.

The International Arts and Entertainment Alliance (IAEA) gathers all members of FIA, FIM and UNI MEI. The Alliance speaks on behalf of several hundreds of thousands of professional cultural and media workers at international and regional level – most of which are holders of intellectual property rights – and is recognised by the ITUC as the industry federation for the media, entertainment and arts sector.

FIA represents 85 trade unions, guilds and professional associations and speaks on behalf of hundreds of thousands of actors, dancers, singers, broadcast professionals, variety and circus artists in 61 countries around the world.

FIM is the only body representing musicians' unions, guilds and associations worldwide. FIM counts members in about 65 countries covering all regions of the world.

UNI MEI affiliates over 140 unions and guilds representing creators, technicians and other media & entertainment workers worldwide.