

September 15, 2014

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

**RE: Comments of the Copyright Alliance on the March 2015 Thematic Report to the Human Rights Council on the Impact of Intellectual Property Regimes on the Enjoyment of Right to Science and Culture**

Dear Ms. Shaheed,

The Copyright Alliance appreciates the opportunity to share its views with the Special Rapporteur on the impact of intellectual property regimes on the enjoyment of right to science and culture. In particular, the Copyright Alliance wishes to comment on the public benefits of effective copyright protection.

The Copyright Alliance is a nonprofit, nonpartisan membership organization dedicated to promoting the public interest by protecting the ability of creative professionals to earn a living from their creativity. Our members include artist membership organizations and associations, unions, companies, and guilds, representing millions of creative individuals.<sup>1</sup> We also collaborate with and speak for over 15,000 independent artists, creators and small businesses. While the creative community as a whole has diverse business interests, it shares the public's interest in a robust, well-functioning copyright system built on respect for creators and their moral and material rights.

**I. The impact of intellectual property regimes on the enjoyment of right to science and culture, as enshrined in particular in article 15 of the International Covenant on Economic, Social and Cultural Rights.**

Copyright has been recognized as a human right by the United Nations since 1948<sup>2</sup> and implemented through Article 15 of the International Covenant on Economic, Social and Cultural Rights. These rights serve two functions: (1) ensuring authors can participate in culture economically and with dignity, and (2) encouraging their labor for the benefit of the public.

While the United States has not adopted the Universal Declaration of Human Rights, it has consistently adhered to the same underlying principles since the drafters of our Constitution recognized that securing the exclusive rights of authors promotes the progress of the sciences and useful arts. James Madison, "Father of the Constitution", said of copyright, "The public good fully coincides...with the claims of individuals."<sup>3</sup> Madison's remarks remain just as true after

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<sup>1</sup> For a complete list of Copyright Alliance members, see <http://www.copyrightalliance.org/members>.

<sup>2</sup> Universal Declaration of Human Rights, Art. 27, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>3</sup> THE FEDERALIST NO. 43 (James Madison) (1788).

more than two hundred years. “The issues of authors are intertwined with the interests of the public,” wrote U.S. Register of Copyrights Maria Pallante last year.<sup>4</sup> “As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation.”<sup>5</sup>

Protecting the material interests of authors benefits the public by creating a marketplace for creative and expressive works. This marketplace currently contributes over \$1 trillion a year to the U.S. GDP and directly employs 5.4 million people (with average wages 33% higher than national average).<sup>6</sup> The existence of this marketplace facilitates the creation and dissemination of works that promote the progress of art, science, culture, and knowledge.

The World Intellectual Property Organization (WIPO) analyzed 30 national studies and found a strong and positive relationship between the contributions of copyright industries to GDP and (1) economic freedom, (2) global competitiveness, (3) global innovation, and (4) research and development.<sup>7</sup> Specifically, WIPO found:

- Countries that have experienced rapid economic growth typically have above average share of GDP attributed to copyright industries.<sup>8</sup>
- There is a strong and positive correlation between the contribution of copyright industries to GDP and the Index of Economic Freedom. WIPO concluded that “economic freedom tends to provide a better framework for the operation of creative industries.”<sup>9</sup>
- There is a strong and positive relationship between the contribution of copyright industries to GDP and the Global Competitiveness Index. WIPO concluded that “countries with a high level of competitiveness have a strong presence of [copyright related industries] in the economy as [these] are symbols of advanced knowledge, ideas and innovation.”<sup>10</sup>

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<sup>4</sup> *The Register’s Call For Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 26 (2013) (statement of Maria A. Pallante, Register of Copyrights United States Copyright Office).

<sup>5</sup> *Id.* Pallante adds, “A law that does not provide for authors would be illogical—hardly a copyright law at all. And it would not deserve the respect of the public.”

<sup>6</sup> Stephen Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report*, International Intellectual Property Association (2013).

<sup>7</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, *STUDIES ON THE ECONOMIC CONTRIBUTION OF THE COPYRIGHT INDUSTRIES* (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 7 (explaining “The Index of Economic ranks countries on a 1-100 scale according to 10 categories that evaluate economic openness, competitiveness and the rule of law, such as business freedom, trade freedom, fiscal freedom, property rights, freedom from corruption, etc. Countries that score well demonstrate a commitment to individual empowerment, non-discrimination and the promotion of competition.”).

<sup>10</sup> *Id.* at 9-10 (explaining that “The World Economic Forum’s Competitiveness Report and report series, as the world’s most comprehensive and respected assessment of countries’ competitiveness mirrors the business operating environment and competitiveness of over 140 economies worldwide. The report series identify advantages as well as impediments to national growth thereby offering a unique benchmarking tool to the public and private sectors as well as academia and civil society. In addition to statistical data, the index also features data from the Executive Opinion Survey carried out by the World Economic Forum with over 13,000 business leaders representing the 142 countries in the report.”).

- There is a definitive positive relationship between the GDP contribution of the creative sector and the Global Innovation Index.<sup>11</sup>

The U.S. Supreme Court has also explained the public benefit of a robust copyright system on numerous occasions:

As we have explained, “[t]he economic philosophy behind the [Copyright] [C]ause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” Accordingly, “copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit motive is the engine that ensures the progress of science.” Rewarding authors for their creative labor and “promot[ing] . . . Progress” are thus complementary. . . [the] assertion that “copyright statutes must serve public, not private, ends,” similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.<sup>12</sup>

Society enjoys this benefit firsthand. Millions of people are able to enjoy films, music, books, and other creative works on numerous platforms that did not exist even a decade ago. Around the world today, for example, there are over 70 online platforms for watching films and television shows, over 450 licensed online platforms for music, and countless others for accessing other types of works.<sup>13</sup>

**II. The impact of intellectual property regimes on the right of people to enjoy and access cultural heritage; access by everyone without discrimination to the benefits of science and its applications, including scientific knowledge, technology, and opportunities to contribute to the scientific enterprise; the freedom indispensable for scientific research, including access of researchers to scientific information and advances, as well as collaborative work; artistic freedoms and the right of people to access, contribute to and enjoy the arts; and the rights of indigenous peoples and local communities.**

It is a fundamental principle that copyright only protects particular expression or form, not ideas, facts, or sentiments. This idea-expression distinction, as it is known in the U.S., plays a powerful yet consistently underappreciated role in striking the appropriate balance between the interests of authors and the public.

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<sup>11</sup> *Id.* at 10-11 (explaining that the Global Innovation Index “acknowledges the need for a broad horizontal vision of innovation that is applicable to both developed and emerging economies, with the inclusion of indicators that go beyond the traditional measures of innovation, to also include: institutions; human capital and research; infrastructure; market and business sophistication.”).

<sup>12</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 212 n. 18 (2003).

<sup>13</sup> See WHERE TO WATCH, <http://wheretowatch.org>; International Federation for the Phonographic Industry, *IFPI Digital Music Report 2014* (2014), <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>; *The Rise of Innovative Business Models: Content Delivery in the Digital Age: Hearing Before the H. Comm. on the Judiciary Subcomm. on the Courts, Intellectual Property and the Internet*, 113<sup>th</sup> Cong. 3 (2013) (statement for the record of Sandra M. Aistars, Executive Director, Copyright Alliance) (listing and explaining numerous examples of licensed online services where content is available) available at [https://copyrightalliance.org/sites/default/files/sa\\_statement.pdf](https://copyrightalliance.org/sites/default/files/sa_statement.pdf).

Expression provides access to the public domain of ideas. By protecting expression, copyright encourages authors and publishers to invest in the creation and dissemination of ideas. Scholarly publishers, for example, have invested hundreds of millions of dollars to “create, publish, distribute and maintain scholarly articles on the Internet and in other digital formats”, making these works more accessible to the public and other scholars.<sup>14</sup>

Copyright’s idea-expression distinction also advances free speech values. The U.S. Supreme Court has said, “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>15</sup> Moreover, since they rely on the ability to express themselves to support their livelihoods, it is no surprise that authors are often some of the fiercest advocates of free speech.

The free speech protections secured by copyright cannot be understated. For instance, the investment that newspapers make in journalism, made possible by copyright protection and licensing agreements, contributes significantly to a vibrant democracy where the public can make informed decisions.<sup>16</sup> Many have recognized this contribution. For example, in a 2012 speech to the Media Institute during Free Speech Week, Senate Judiciary Committee Chairman Patrick Leahy said, “Allowing unfettered theft of copyrighted works, whether online or in the physical world, is a disincentive to speech. This is most often thought of as a problem for the music or movie industries. But the news organizations represented here also know that if their work cannot be protected and monetized, they have to cut reporters and editors, and our democracy suffers from fewer sources of quality news reporting and ideas as a result.”<sup>17</sup> And in a 2013 decision involving the Associated Press (AP), the Southern District Court of New York concurred, saying “Investigating and writing about newsworthy events occurring around the globe is an expensive undertaking, and enforcement of the copyright laws permits AP to earn the revenue that underwrites that work.”<sup>18</sup>

Ideas are the building blocks of creative works. By securing property in the expression of these ideas rather than the ideas themselves, copyright encourages productive, creative labor, as authors create “new information, new aesthetics, new insights and understandings.”<sup>19</sup>

### **III. 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 or she is the author [and] the concrete obstacles met by authors, creators and inventors, such as scientists and artists, to enjoy this right.**

<sup>14</sup> See Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, 13 GEO. MASON L. & ECON. RESEARCH PAPER SERIES (2013), available at SSRN: <http://ssrn.com/abstract=2243264>.

<sup>15</sup> Harper & Row, Publ’s, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

<sup>16</sup> See Caroline Little, *Strong Copyright Law Supports Journalism and Informed Communities*, MILWAUKEE WISCONSIN JOURNAL SENTINEL (May 15, 2014), <http://www.jsonline.com/news/opinion/strong-copyright-law-supports-journalism-and-informed-communities-b99270295z1-259443891.html>.

<sup>17</sup> Patrick Leahy, *Leahy Marks Free Speech Week With Keynote Speech Before The Media Institute*, (Oct. 25, 2012), <http://www.leahy.senate.gov/press/leahy-marks-free-speech-week-with-keynote-speech-before-the-media-institute>.

<sup>18</sup> AP v. Meltwater, 931 F. Supp. 2d. 537 (SDNY 2013).

<sup>19</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

Legal scholar Eric Priest has observed that lack of enforcement undermines creative industries in three subtle ways: “First, the scarcity of monetization options creates a winner-take-all market dominated by big producers...that undermines financial support for smaller, independent producers”. Second, lack of enforcement “distorts market signals to producers,” narrowing the range of works being produced. Third, lack of enforcement results in “reduced revenue stream diversity [that] disproportionately exposes producers to the whims of peculiar markets and exploitation by gatekeeper or monopsonist intermediaries.”<sup>20</sup>

Improving copyright infrastructure and protection can aid the development of local creative industries, particularly in lesser-developed countries.<sup>21</sup> The recent growth of the film industry in Nigeria serves as a powerful illustration. As one report notes, when the TRIPs agreement went into effect in 1994, “there was no significant African movie industry. In 2013, ‘Nollywood’ produces as many films as America or India.”<sup>22</sup> Nigerian film producer Alex Eyengho recently referred to copyright as “the indispensable establishing infrastructure for any film community to grow, to thrive and to make its full contribution to a country’s culture and economy.”<sup>23</sup>

## Conclusion

As the Special Rapporteur looks at the impact of intellectual property regimes on the enjoyment of right to science and culture, the Copyright Alliance hopes you keep in mind that the debate over effective copyright protections should not be defined as one pitting developed versus lesser developed countries, or large companies versus individual creators. Rather, the security of the moral and material interests of authors is one that benefits authors and the public alike.

Respectfully submitted,

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<sup>20</sup> Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China’s High-Piracy Environment?* 27 *Harvard Journal of Law & Technology* 469 (2014).

<sup>21</sup> See MARK SCHULTZ & ALEC VAN GELDER, NASHVILLE IN AFRICA: CULTURE, INSTITUTIONS, ENTREPRENEURSHIP AND DEVELOPMENT, TRADE, TECHNOLOGY AND DEVELOPMENT DISCUSSION PAPER NO. 2, (2008), available at [http://copyrightalliance.org/files/nashville\\_in\\_africa.pdf](http://copyrightalliance.org/files/nashville_in_africa.pdf).

<sup>22</sup> Edward Gresser, *TRIPs at 20: Patenting, Public Health, and an Agreement that’s Working*, PROGRESSIVE ECONOMY (Nov. 19, 2013), available at [http://progressive-economy.org/files/2013/11/trips.patenting\\_final\\_2.pdf](http://progressive-economy.org/files/2013/11/trips.patenting_final_2.pdf).

<sup>23</sup> ALEX EYENGHO, THE LEGAL FRAMEWORK FOR DEFENDING INTELLECTUAL PROPERTY RIGHTS NATIONALLY AND INTERNATIONALLY – A FILM PRODUCER’S PERSPECTIVE 11, Conference on Distribution in the Nigerian Film Industry (Jun 2014) (adding “copyright is the basic tenet for a long term, sustainable film production and distribution industry.”).