



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

Submission

The International Federation of Film Producers' Associations (FIAPF) is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film producers throughout the world. FIAPF's members are 34 national producers' organisations from 29 countries on the five world continents¹. FIAPF represents both mature national film industries and emerging film production countries.

The members of the International Video Federation (IVF) are businesses active in all segments of the film and audiovisual content sector in Europe. Their activities include the production of films and audiovisual content as well as publication thereof on digital media and in online channels

¹ <http://www.fiapf.org/members.asp>

The undersigned entities (“we” or “us” below) welcome the opportunity to participate in this consultation on the impact of intellectual property regimes on the right to science and culture (Article 15 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)), which should of course be viewed in the context of other relevant conventions and instruments. We understand that the Special Rapporteur has decided to focus her annual report to the General Assembly on intellectual property rights and their impact across cultural heritage, artistic freedom, access and enjoyment of the arts – not to mention the rights of indigenous peoples and local communities throughout the world.

As the Special Rapporteur will fully appreciate, there are many specific kinds of Intellectual Property (“IP”) that exhibit varying fundamental characteristics. It is thus difficult to consider IP generally. For example, the role that IP plays in economic and social contexts will depend on what kind of IP is at issue (patent, trademark, copyright, design, trade secrets, geographical indications, etc.) and what sector (fashion, pharmaceutical, music, film, technology, etc.) is being discussed. This paper focuses on copyright and in particular its application to the audio-visual sector.

For us, this consultation provides a chance to describe the vitally important role that intellectual property rights, especially copyright, plays in our daily lives as we strive to tell our stories, finance their production, secure their distribution, protect them from unlawful use and ensure fair remuneration as well as obtain a return on investment which enables the creation of further works. Intellectual property rights provide film sector at national level with the financial means to enjoy our artistic freedom, build our cultural heritage, and ensure that there is culture to enjoy. IP regimes incentivise the creation of culture for the benefit of all while they allow creators to not only to live from their work but also enable the financing and exploitation of such works.

The concrete obstacles that we meet in telling our stories take many forms. All around the world, film-makers face endemic problems related to access to capital to fund the creation of the stories they wish to tell. Many of these problems are, at their root, economic. Moreover, sources of financing that are routine in the developed world, such as bridge loans and production incentives, can be difficult or impossible to obtain in many developing countries where infrastructure is lacking or financial services are risk intolerant. In these countries, the challenges faced by film-makers are magnified. Similarly, we often find more limited distribution opportunities (modern cinemas, television platforms, online distribution platforms etc.) in developing countries. Appropriate education in the necessary production skills is also often missing in many countries and funding of these would, together with strong protection of the products created, contribute much more to solving the root problems than weakening the protection of creative works, their authors and their business partners around the world.

Secondly, we face legal infrastructure difficulties: In many countries it is still difficult to talk about an IP regime at all, since such regimes, where they exist, frequently do not function well in practice. At the international level, we face a determined and politicised effort to weaken our protection based on unfounded arguments that IP regimes impede development, when in fact the audio-visual(AV) storytellers and growing industries in developing countries, like those in developed countries, need, as described, appropriate rights in their works in order to succeed. In that context, we must question whether, the interests of the public and human rights are truly served by proposals that weaken copyright while, in fact, strengthening the ability of wealthy technology companies to exploit creative works in making use of the exceptions for their own profit without appropriate authorisation and remuneration for the filmmakers.

This short submission will first describe the legal issues as we understand them and then describe in some further detail the practical challenges that authors around the world face in not only telling their stories but then being able to make a living therefrom.

Legal Considerations

As per Article 15(1) ICESCR everyone has the right

- a) *To take part in cultural life;*
- b) *To enjoy the benefits of scientific progress and its applications;*
- 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.*

This provision² thus creates a human right ensuring both the access to culture and science and the protection of the moral and material interests of the author resulting from any scientific, literary or artistic production. Indeed, the Sub-commission on Human Rights has clearly reaffirmed the status of Article 15 (and Article 27(2) UDHR) as a human right.³ We are also aware that the Committee on Economic, Social and Cultural Rights (CESCR) has hosted productive discussion days on the right to culture and General Comments⁴ on Article 15 ICESCR have been developed.

We are certainly aware of the debate over the interface between intellectual property rights and other human rights. For some that debate is academic; for creators and their business partners, it has a concrete impact on their ability to make a living. In international fora, certain groups allege that IP rights, which provide the basis for the production and distribution of creative works, impede development and hinder access to knowledge. This allegation is often made by those who stand to economically benefit from a weakening of copyright and in certain instances we note that such potential beneficiaries are funders of civil society groups whose agenda is purportedly in favour of consumers and ordinary citizens. Moreover, we note that many of the countries which assert that IP impedes development have not implemented, and in some cases, are not yet even bound by the internationally agreed norms of which they complain. On the whole, such polarised debates tend to underemphasize the practical, cultural, and artistic importance of IP rights.

Additionally, of course, there is the perennial debate as to whether the legal protections for authors and other rightholders are appropriately balanced with the public interest in access to culture and education. At the international level, however, the tools are clearly in place to ensure this balance in the provisions of the WCT, WPPT and the Berne Convention.

Article 15(1)(c) ICESCR protects the moral and material interests of natural persons - the authors of scientific, literary or artistic productions (screen writers, directors, composers, make-up artists, editors, performers etc.) that contribute to the creation of audio-visual productions. Producers, who

² See also Article 27 of the Universal Declaration on Human Rights (“UDHR”) which also protects authors’ moral and material interests. We are certainly aware of the debates surrounding the adoption of this provision, which resulted at the end of the day in the inclusion of this important right in both the UDHR and ICESCR.

³Resolution 2000/7 on IPRs and human rights states that “*the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2 of the Universal Declaration of Human Rights and article 15 paragraph 1(c) of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest (Res. No. 1).*” UN ECOSOC Doc. E/CN.4/SUB.2/RES/2000/7.

⁴ General Comment No. 17 (2005): 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 (article 15, paragraph 1 (c) of the Covenant; General Comment No. 21 (2009): Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights). These General Comments are helpful interpretative guidance but of course are not binding for States.

are, for various reasons, often established as legal entities and charged with organising, financing and ensuring the effective production and distribution of such works, benefit from and support the authors who contribute to the production of films and TV programmes. Together all those involved in the production of audio-visual works rely on the protection of the work created via IPRs – and the human rights they embody – to ensure the creation and distribution of film and TV programmes that enrich the lives and cultures of every corner of the world.

For authors, the reference to “moral interests” encompasses so-called personality or moral rights, while the material interests cover the economic rights. We understand that moral interest thus extends to the paternity and integrity rights of the author⁵. As far as the material interests are concerned, it is our understanding that Article 15(1)(c) does not establish a particular system of protection – though it may recognise key concepts such as an adequate standard of living. In any event, international copyright treaties themselves establish only minimum levels of protection and may provide further guidance. Within that framework, countries and regions have developed differing systems that nonetheless converge in many respects.

While the background to Article 15 does not provide much insight on what is to be understood by the term “productions”, we understand – consistent with the General Comments that “*creations of the human mind*” include cinematographic works and performances.

IPRs as Human Rights

While there is in general a primacy of countries’ obligations to protect human rights over economic policies and agreements,⁶ we note that this issue presents a subtle case when an economic interest is itself protected as a human right, namely the “material” interests of the author under Article 15(1)(c) ICESCR. In such a case, protection of an human right (Article 15(1)(a) ICESCR - to take part in cultural life) must be interpreted in harmony with the author’s intellectual property right as the latter itself embodies a human right (Article 15(1)(c) ICESCR – protection of author’s works). Of course most human rights are not absolute – they must be balanced with other relevant human rights such as the right to property, culture and science, freedom of expression, rights to judicial redress etc... as per the terms of the ICESCR (Article 4) and other relevant international instruments on Human Rights protection and in line with the relevant norms. As a result, there is no tension between Article 15(1)(a)-(b) and Article 15(1)(c) ICESCR and other relevant international norms on human rights protection that cannot be addressed through appropriate balancing mechanisms. For example, according to Article 4, economic, social and cultural rights may be limited by the States parties to the ICESCR through law, insofar as this may be compatible with the nature of such rights⁷ and solely for the purpose of promoting general welfare in a democratic society.

Moreover, we note that human rights protection provided to authors (along with international copyright norms) incentivises creation and thereby the science and culture referenced in Article 15. Without IP rights and the creation they facilitate, the public will have less culture and science from which to benefit undermining not just the overarching objective of Article 15 but societal benefits writ large. This balancing is also seen in the international practice reflected in international copyright treaties – all of which are constructed on the basis of an equilibrium between various fundamental rights.

⁵ See Article 6*bis* of the Berne Convention which establishes minimum moral rights for authors.

⁶ As proclaimed by the Sub-commission on Human Rights Resolution 2000/7

⁷ The Charter of Fundamental Rights of the EU refers to the essence of the right as one of the conditions to be respected by the limitations or restrictions imposed on such rights, according to which the right cannot be deprived of its substance. Article 52(1).

Practical Perspective

Around the world, the vast majority of audio-visual works are produced by independent companies, which can be, depending on the circumstances, either longstanding businesses or one-time entities. The AV sector, which encompasses film, TV and specific content tailored to the online environment, is a vital component of any country's national economy and cultural identity. These companies in turn rely on a complex network of large, medium- and small-scale enterprises each specialized in specific activities. Given the level of financial investment required, most AV businesses will seek to share or outsource their financial risks. This is often done by selling rights by platform, language and/or territory to entities specialized in marketing and distributing AV content in the various exploitation channels (cinemas, online, DVD, TV, etc.) and markets.

The creative force and commercial potential of a given AV project will play a critical role in attracting investors. On the strength of that attraction, many films will finance the endeavour by selling rights by territory and/or mode of exploitation even before the actual production/shooting of the film has begun. Without those deals, a film may not get made. Attracting such investment can be a particular challenge in developing countries, where investors tend to be more sceptical about the capacity of the people making a film to claim ownership of and enforce the rights and distribution of their work to make it a commercial success.

Film-making and television production are very R&D intensive: It takes time and money to develop scripts, acquire underlying rights, cast talent, scout locations, create production designs, and complete the hundreds of other creative and administrative steps that go into making a successful film or television show. These development and pre-production activities are essential to the preparation of the production and can carry huge costs before a single frame is even shot. In many cases, a film does not progress to principal photography due to lack of the necessary financing, causing the project to be shelved and forcing the producer to absorb the loss. AV production cannot function unless it returns strong working capital to the producer so he or she can remunerate authors, performers and technical crews as well as recoup the investment and finance future projects.

Underlying film production is the copyright system, as ensured by the ICESCR, which provides a crucial strategic tool for securing financing and optimal exploitation of AV works by means of the exclusive rights granted to and/or acquired by producers to license the works to users (e.g. to film and video distributors, broadcasters, online platforms, etc.). Copyright alone permits the sector to generate revenue necessary to ensure an on-going supply of films and provide the incentive for continued creation. Copyright is a powerful incentive - and more importantly it is the means - to embark on the considerable economic risk involved in turning a creative vision into a finished film. Once the works are produced, these rights – along with the moral rights – serve to ensure continuing protection and remuneration of all rightholders in the film.

These human rights are often intertwined with deeply collaborative human endeavours. Audiovisual works, including in particular feature films, involve the participation of many individual filmmakers including in particular producers, script writers, directors, performers, as well as engineers, set designers, carpenters, make-up artists, etc. All the participants to these creative adventures run some form of risk to their moral and material interests.

Film authors, such as script writers and film directors, use the medium of film to communicate – visions, fantasies, realities, views, emotions, insights, ideas and political messages. The lion's share of the economic risk is usually borne by the producer, so that the film authors and performers can fully concentrate on the process of actually creating.

One practical example comes from South Africa. The film, *Otelo Burning*, was a very personal vision for director, Sara Blecher, and her executive producer, Kevin Fleischer, both from Durban, South Africa. By the time *Otelo Burning* was being developed and financed, Sara had acquired a strong local reputation as upcoming documentary maker. Sara brought to *Otelo Burning*, her first fiction film, the commitment to reality which pervades her previous work as a documentarian. “We workshopped the script for many months – says Kevin Fleischer, the executive producer – Sara wanted the actual feel of the local culture that these kids - many of them from gangs - had developed in those years, including their particular patois and the way they conducted themselves. They had a very direct input into the dialogue and narrative”.

South Africa, in contrast to many other African countries, boasts a sophisticated set of public sector mechanisms to support local film production, providing a head start that is lacking in most developing countries. After an initial grant from the National Film & Video Foundation (NFVF) which enabled the film makers to develop a fully-fleshed out script, they were able, little by little, to raise funds to cover the full production budget of \$1.3m (high by current African standards). Forty-three percent of the financing was secured through a direct equity investment by NFVF, and additional cash-flow from South Africa’s tax rebate facility. A further 17% came from a private equity source. At this delicate juncture, however, the film could not have been made, had it not been for the ability of the film makers to pre-sell rights in the film, through a single deal with a local private sector broadcasting organization, against a contribution worth 40% of the budget.

Such deals are, of course, premised on the legal promise that the human rights of the film’s creators will be secured through intellectual property rights. Where such protection is lacking, the promise of many worth projects cannot be fulfilled. For example, according to a filmmaker from the Ivory Coast, with the general deterioration of the economy, local, regional and international funding sources have been drying up and filmmakers have to depend solely on their exclusive rights to finance the production of their films. This is extremely difficult to achieve in current framework and most filmmakers in the Ivory Coast have not been able to get their recent projects off the ground.

While remuneration and moral rights are usually not subject to transfer, the creators’ exclusive rights tend to be transferred by law or contract to a film’s producer who is responsible for overseeing all the various components of a production – including financing and distribution. That way, when the producer meets with financiers, distributors, or others, they already have the ability to license all of the exclusive rights needed in order to make deals and distribute the film.

This stable and well-accepted process - underpinned in some countries by collective bargaining procedures and/or statutory approaches - enables the film authors and creative participants to realize their vision and create the film – while earning a living and with due respect for the paternity and integrity of their work.

Conclusion

One of the main roles of IPR regimes – which are underpinned by international norms including in particular Article 15(1)(c) – is to incentivise the creation of culture. Copyright and related rights are essential for any film production to be realized and for the vision of its creators to be fulfilled. As such, copyright is critical to securing the human right to the protection of the moral and material interests of authors and creators.

Human rights must exist in balance with other human rights. We invite the Special Rapporteur to bear in mind that weakening the copyright regime would harm the human right of authors to the protection of the moral and material interests in their works. As a legal matter, any weakening of this important human right can only be supported by compelling evidence of countervailing benefits to other human rights. A recent study confirmed the lack of such evidence, categorically rejecting the notion that weakening copyright would lead to increased economic performance and fosters innovation. Indeed, it argued to the contrary that the emergence of digital technologies calls for increased protection.⁸ It is also essential to reflect the inter-relationship between the authors' and creators' human rights and those of the public relating to access to science and culture. Without IP rights, the very objective of Article 15 would be subverted as there will be less culture and science for individuals to access, thereby depriving society of both social and economic progress.

Bearing in mind these considerations, we urge the Special Rapporteur to call for measures to support the practical implementation and application of intellectual property rights through international assistance and cooperation. Some projects of this nature are already ongoing under the auspices of the WIPO. Such an approach will not only enable developing countries to fully support and fulfil their obligations in respect of the rights provided for in Article 15, but also allow their creative sectors, including in particular in film and TV, to grow by using intellectual property rights as a proven and effective currency with which to embody the human rights of creators.

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⁸John Van Reenen, LSE; Pierre Régibeau, Imperial College and CRA; and, Anne Layne-Farrar, CRA ,*On the "Appropriate" Copyright Policy for the Digital Age- An Economic Analysis (March 2014)*.