Video conference by Ms. Farida Shaheed,
Special Rapporteur in the field of cultural rights

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Talking points

Ladies and gentlemen, (and others!)

- I am very pleased and honoured to take the floor before you today, in my capacity as United Nations Special Rapporteur in the field of cultural rights.

- As Special Rapporteur, I am mandated by the Human Rights Council of the United Nations to identify best practices in as well as possible obstacles to the promotion and protection of cultural rights, and to submit proposals and/or recommendations to the Council on possible actions in that regard. My point of departures therefore, like all other mandate holders, is the human rights enshrined in international human rights instruments, in particular the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

- After 5 years of work as Special Rapporteur, and after having addressed many issues relevant to cultural rights, I decided to devote my thematic research for the years 2014/2015 to intellectual property law from the perspective of the right to science and culture, meaning the right to enjoy the benefits of scientific progress and its applications and the right to access, take part in and contribute to cultural life. In March this year, I presented my first report to the Human Rights Council on copyright law, emphasizing both the need for protection of authorship and expanding opportunities for participation in cultural life. This coming October, I will present a report on patents to the General Assembly.

- In human rights law, the legal basis for the right to science and culture is to be found, in particular, in article 15 of the International Covenant on Economic, Social and Cultural Rights, one of the core human rights instruments at the United Nations, which has been ratified by most if not all European States.

- Article 15 of the ICESCR is particularly important for this discussion as it simultaneously calls for the protection of the right of everyone to:
    - take part in cultural life,
    - enjoy the benefits of scientific progress and its applications,
    - 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.

- In other words, article 15 forcefully reminds us that cultural participation and the protection of authorship are both human rights principles designed to work in tandem. Striking an appropriate balance between the two goals is thus essential, even if challenging. The right to science and culture needs to be respected in the copyright framework.

- Let me now highlight some key points of my report, which I believe are relevant for your discussions:

1) **Intellectual property rights are not human rights**.

- The equation sometimes made that intellectual property rights are human rights is false and misleading. This has been pointed out by other human rights mechanisms before me. In particular, the Committee on Economic, Social and Cultural Rights, which supervises the implementation of the IESCR (the International Covenant I just mentioned), has stressed the need to overcome this confusion. The moral and material interests of authors, from a human rights perspective, do not necessarily coincide with the prevailing approach to intellectual property law. In some ways, copyright policy falls short of adequately protecting authorship, in other ways it often goes too far, unnecessarily limiting cultural freedom and participation.

- Article 17 of the European Charter of Fundamental Rights relating to the right to property, obliges States to protect intellectual property. But that provision does not mandate any particular approach to copyright policy. States are free to adjust copyright rules through legal processes to promote the interests of authors, the right of everyone to take part in cultural life and other human rights such as the right to education. Let me stress that within the right to property framework, it is acceptable to assure authors' interests through rules granting a right to remuneration rather than a right to exclude. It is also possible to assure authors' interests through rules granting rights to exclusion or remuneration in some, but not all, circumstances.[1]

2) **It is vital to distinguish between authors and copyright-holders**. The human right to protection of authorship remains with the human author(s) whose creative vision gave expression to the work, even when the copyright interest has been sold to another entity, such as a corporate publisher or distributer. I wish to stress that I refer to the "human author", excluding corporations. Only human beings do have human rights.

- We should always keep in mind that copyright regimes may under-protect authors, contrary to what is usually assumed or expected. This is because "subsequent right-holders" (e.g. producers, publishers, distributors etc.) typically exercise more influence over law-making than individual creators, and may have divergent and possibly opposing interests to those of the creators.

[1] Geiger, "Promoting Creativity" , pp. 534–544.

- Corporate rights holders often have significant, and sometimes immense, financial resources and professional sophistication. They are therefore usually far better positioned to influence copyright policymaking than the authors. They may even claim to speak for authors in copyright debates, but it is important that we not buy into that argument for, unfortunately, the material interests of corporate rights holders do not always coincide with those of authors. The human right to protection of authorship demands particular attention to situations where those interests diverge.

3) **A separate point is that copyright law is often presented as *the only* means for improving authors' financial situation.** I believe copyright is an important mechanism for ensuring authors' material interests but it is certainly not the only mechanism needed.

- Copyright laws should be understood as part of a larger set of policies to promote the cultural sector and the right to science and culture.

- A number of measures beyond copyright law can also advance the right to protection of authorship. Artistic livelihoods may be supported by, for example, minimum wage protections, collective bargaining power, social security guarantees, budgetary support for the arts, artistic education, library purchasing, immigration and visa policies and measures to promote cultural tourism.

- In addition, as I pointed earlier on, merely enacting copyright protection is insufficient to satisfy the human right to protection of authorship. Most artists seeking to earn a living from artistic expressions must negotiate copyright licences with actors in hat is now called the cultural or creative industries (often corporations) to commercialize their works. Those contractual exchanges are often marked by an imbalance of power between the parties. Corporations may leverage a stronger bargaining position to retain most of the resulting profit, reducing benefits for artists.

- In one of my earlier report, regarding the right to freedom of artistic expression and creativity (A/HRC/23/34), I expressed concern, for example, on the common existing practice of contracts under which, creators sign away all their rights to their creation in order to gain a commission or remuneration for creating a work. A number of artists pointed out to me that as a result, they lose control over their creations which can – and have - been used in ways which are contradiction to their own vision.

- Under human rights law, this is not satisfactory. States bear a human rights obligation to ensure that copyright regulations are designed to promote creators' ability to earn a livelihood and to protect their scientific and creative freedom, the integrity of their work and their right to attribution. Given the inequality of legal expertise and bargaining power between artists and creative industries entrepreneurs, such as their publishers and distributors, States should protect artists from exploitation in the context of copyright licensing and royalty collection. In many contexts, it will be most appropriate to do so through legal protections that may not be waived by contract. Enforceable

rights of attribution and integrity, *droit de suite*, statutory licensing and reversion rights are recommended examples.

4) **I also believe, and this is one key recommendation of me report, that States should further develop and promote mechanisms for protecting the moral and material interests of creators without unnecessarily limiting public access to creative works, through exceptions and limitations and the subsidy of openly licensed works.**

- I am aware that copyright laws already incorporate exceptions and limitations, which preserve the freedom of other artists and the general public to use copyrighted works in certain ways without the copyright holder's permission. Therefore, I believe that exceptions and limitations constitute a vital part of the balance that we must strike between the interests of rights-holders in exclusive control and the interests of others in cultural participation.

- I realise that some people firmly believe that copyright exceptions are generally harmful to authors. I have argued however that such assessments need to be considerably nuanced: an appropriate balance is crucial, recognizing that creators are both supported and constrained by copyright rules:

- First, strong or stronger copyright protection does not necessarily advance the material interests of creators. Exceptions and limitations often support creators' material interests by offering opportunities for statutory licensing which can facilitate creative transactions and enhance creators' earnings. Thanks to exceptions and limitations, artists also have the possibility of relying in part on the work of other artists in a new work or performance.

- Secondly, a vital function of exceptions and limitations is also to empower new creativity. Copyright exceptions and limitations can enable caricature, parody, pastiche and appropriation art to borrow recognizably from prior works in order to express something new and different. Documentary film-makers also require freedom to use specific images, video clips or music necessary to tell a particular story. Depending on a country's exceptions and limitations regime, those artistic practices may be clearly defined as permissible or may occupy a legal grey zone that makes it difficult for creators to commercialize and distribute their works.

- Copyright exceptions and limitations are tools that can – and therefoe should – be used to ensure that States abide by their obligations in the field of human rights, in particular the right to freedom of expression, including artistic expression, and the right to take part in cultural life. I have therefore recommended that **exceptions and limitations of copyright be developed** to ensure the conditions for everyone to enjoy their right to take part in cultural life by permitting legitimate educational usages, expanding spaces for non-commercial culture and making works accessible for persons with disabilities or speakers of non-dominant languages.

- A main challenge I see is that international copyright treaties generally treat copyright protections as mandatory, while largely treating exceptions and limitations as optional. The standard for judging whether a particular exception or limitation is permissible under international copyright law is not articulated with precision. This is why one of my recommendations is **to explore the possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognized by most States, and/or an open norm. By open norm, I understand a more expansive and flexible exception or limitation, authorizing courts to adapt copyright law to permit additional unlicensed uses that comply with general standards of fairness to creators and copyright holders.** While enumerated provisions may provide greater clarity regarding permitted uses, they may also fail to be sufficiently comprehensive and adaptable to new contexts. This is why I believe a combination of the two systems might prove to be the best.

Thank you