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Office of the United Nations High
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(OHCHR)

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Dear Ms Farida Shaheed,

**Consultation on the impact of intellectual property regimes on the
enjoyment of right to science and culture**

The IPA is the international federation of national publishers associations, representing all aspects of book and journal publishing from around the world. Our 60 members represent book and journal publishers (paper and digital) from over 50 countries. Established in 1896, IPA's mission is to promote and protect publishing and to raise awareness for publishing as a force for economic, cultural and political development.

IPA is an industry association with a human rights mandate. Around the world, IPA actively fights against censorship and promotes copyright, literacy and freedom to publish. We are an active member of the International Freedom of Expression Exchange (IFEX) and have a long track record of collaboration with International PEN, Amnesty International, the International Federation of Journalists and many others. Many of our member publishers associations and their publishers are passionate about protecting human rights and active in promoting them.

We would like to thank you for the opportunity to present our perspective on the impact of intellectual property regimes on the enjoyment of right to science and culture.

It is our view that human rights and intellectual property rights are not only compatible, but also mutually supportive and interdependent. Copyright in particular, is a success story. It has proven to be a powerful tool to strengthen science and culture, improve participation in them, and provide a legal framework that confers such rights and enables policies to promote them. This is particularly true in the online environment, where copyright laws enable science and culture to prosper, and are giving scientists, creators and publishers new economic ways of exercising their profession, creating the diversity of content and services that a rapidly growing majority of the world's population is able to participate in. Copyright creates a marketplace that

International Publishers Association

empowers citizens, and reduces the need for government interference with culture and science, a welcome state of affairs, in particular from the human rights perspective.

Our submission is attached. It is limited to copyright as the fundamental legal basis for the human rights that creators and publishers exercise in their professions. We look forward to participating in the on-going debate on this issue and would be happy to present our views in any future publications, conferences or debates.

Yours sincerely,


Jens Bammel
Secretary General

The Impact of Copyright on the Enjoyment of Right to Science and Culture

1. Introduction: Copyright and the human rights of creators, scientists and publishers

The fundamental dilemma that this consultation is concerned with is how states ought to deal with different human rights that protect different types of individual freedoms. It is a question, principally, of how to reconcile the human right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author¹” with the right to “take part in cultural life” and the right to “enjoy the benefits of scientific progress and its applications”. The fact that these rights are mentioned in the same article of an international covenant illustrates how deeply interwoven they are and how artificial any hierarchies would be if applied here. IPA does not support abstract notions of hierarchies between different human rights at hand. None of the rights being discussed could exist without the others and the more that public policy incentivises creation, without interfering with the other rights, the more cultural and scientific output there would be to enjoy.

For publishers, copyright is the main intellectual property right. It enables them to collaborate with scientists, writers, musicians and other cultural stakeholders so they can all, jointly, benefit from the shared skills, creativity, and resources invested in creating and publishing scholarly, literary and artistic works. Copyright (understood as encompassing both economic and moral rights) is a concretisation of the human rights of creators: their freedom of to create science, their freedom of expression. It also underpins publishers’ freedom to publish — a term which subsumes a number of individual human rights including freedom of expression, freedom of the press, freedom to exercise a profession, the holding of property rights etc.

Through copyright and through licensing, authors and publishers exercise their right to determine how they wish to impart information, and how they wish their works to be reproduced, translated, adapted, distributed or made available — each of which are essential aspects of their freedom of expression. The right to be recognised as the author of a text and to lay claim on certain discoveries or ideas are equally important aspects of these rights.

2. Copyright as a tool to promote human rights

Copyright creates a marketplace for literary and artistic works. Some criticise that such scarcity can create an obstacle to the exercise of certain human rights because it discriminates between those who can and cannot afford to pay. Similar arguments, however, have long been discarded for other essential needs, where commercial providers have actually enhanced human rights. For example, the enterprises that produce food, provide electricity or enable Internet connectivity operate in commercial markets. For consumers too poor to participate in these markets, governments must step in and support access. Two clear, contemporary examples in the copyright field are public authorities complementing the commercial book trade by providing universal access through state-owned libraries, and publishers themselves providing heavily subsidised special access to scholarly journals in least developed countries.

Historically, copyright has proven to be a remarkably successful incentive to promote culture and science globally and across economic, social and class divides. It has created complex cultural industries where previously there were none. And it has enabled creators and publishers to invest their livelihoods in the creation and publication of works. The shift from patronage and government grants to reader-pay-models from the 16th century on has empowered readers and democratised publishing. The vast majority of people, too poor to be patrons of writers or publishers have been able to support them by becoming customers. This

¹ See Article 15.1. (c), International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966

shift provided dissenters and innovators with economic independence and unprecedented freedom. It has led to a rich diversity of publications covering all political, cultural and scientific perspectives. It has driven innovation and created new genres and types of publications as the needs of consumers evolved. Publishing output has become increasingly abundant and affordable. It is no accident that these developments coincided with the Enlightenment and the embrace of the scientific method in the West.

Where copyright has taken root, it empowers small- and medium-sized businesses and empowers local communities. With their knowledge of local needs and conditions these businesses have been able to widen access and improve distribution of cultural benefits and consumer goods in distant or difficult-to-reach markets in developing countries. Copyright has proven to be an ideal tool to foster more investment in micro-businesses and access initiatives that yield employment opportunities, empowerment and more freedom and entrepreneurship at the local level.

3. Copyright and the Internet

The Internet has created new ways of communication, information sharing, education and expression. Never before has so much information been available to so many at such low costs. The adoption of new technologies and behaviours is reaching developing and least developed countries fast.

Because so much content is freely available on the Internet, some commentators assume that copyright is not required in this space, or that it is an obstacle to the proliferation and sharing of works, or that it inherently hinders access. In fact, copyright is a powerful tool for choice. Many of the corporations that provide content seemingly “for free” rely heavily on copyright to support their business models. For example, services that provide news, maps, social discussion, content storage or file sharing would not be possible without copyright protection that allows these businesses to regulate the use of their content. Copyright does not prevent individuals or governments from placing their content in the public domain for free or offering it under very generous licensing terms. Creative Commons and many other initiatives promoting wide dissemination of information actually use copyright law to facilitate access. Advertising-based business models may provide free content, but their licensing terms frequently set out that third parties cannot commercially reuse that content without authorisation.

The present copyright regime therefore does not need to change to enable the provision of free content. In fact, changes could even threaten some such business models where the provider can no longer control how their content is being used.

4. Copyright and balance

The exercise of any human right finds its natural limits in the human rights of others. The rights of creators and publishers to authorise, restrict or not license certain acts under copyright law limits the rights of those, who in turn wish to exercise their own human rights by making use of published works against the expressed will of those creators and publishers. The need to balance such conflicting interests is inherent to human rights. A rich case law has developed around the world that seeks to maximise the rights of all concerned, while policy makers are given space to balance such rights in their application in national laws, while carefully protecting each individual's core rights.

Copyright law, as set out in international treaties and national laws, has always been mindful of this need for balance. This most obvious expression of this is the important dichotomy between expression and ideas. While the human rights of freedom of expression and the right of access to information focus on the concepts of *ideas* and *information*, copyright laws limit their protection to a mere subset of these concepts: their expression in a specific, concrete *manifestation* of a copyright protected work.

There are many other ways a balance in copyright law is created: the fundamental freedom that all creators have to regulate their own intellectual property; the limitation of the scope of copyright law; the limitation of protection to certain restricted acts; specific and general limitations and exceptions; acknowledgement of the right of governments to restrict publication of works under other laws; limitation of the duration of copyright and the ultimate donation of copyrighted works to the national and global patrimony after the expiration of copyright; special arrangements for developing countries in treaties, etc. Finally, the so-called three-step-test explicitly balances the interests of all stakeholders.

5. Copyright and access to scientific information

A key allegation that this consultation needs to address is whether current copyright law is an obstacle to universal access to scientific information and therefore requires reform.

Historically, copyright has served scholarly communication well. It has enabled the creation of a publishing sector which follows a very particular design that has evolved with the sole purpose of facilitating scholarly communication. Publishers serve scientific authors by amplifying and making tangible their human right to freedom of expression, and freedom to undertake scientific research. Publication of a journal article, the author's chosen definitive statement in time and space of an interpretation of a set of facts (scientific propositions that are falsifiable) is the final, integral part of the scientific communication process. Publishers facilitate that conclusive step and thus promote science through enabling effective scholarly communication. Every year, millions of scientists freely and deliberately choose where to publish their articles, based on their considered judgement of a journal's capacity to put their scientific results into the right scholarly context and expose it to their peers. Their reward is rarely directly financial. The accumulation of reputation and exposure to fellow researchers through publication provides for far greater gain in terms of academic reputation, career prospects and ability to obtain grants.

Due to the proliferation of scholarly publishing over the past decades, more scientists have been able to publish their findings to a far greater readership than ever before. In response to the needs of scientists who wanted better ways to share their own research and access that of others, scholarly publishers were early adopters of new technologies. On the Internet, scholarly publishers add more value than ever to scholarly communication. Publishers continue to invest in new tools that facilitate information retrieval, data mining and interoperability. The digital networking of scientific information and the literary works of academics is a huge (largely self-funded) success story.

Since it is now technically possible to make works globally available there is also a policy interest in making this a reality. Scientists and publishers aspire to universal access. Both groups agree that such access must not impact the quality of scholarly communication, which means that it must remain sustainable in the long term.

Open Access is not antithetical to copyright. In fact, copyright clearly underlies sustainable Open Access which is being integrated into the global scholarly publishing apparatus. In a crucial sense, Open Access is enabled by copyright.

Open Access is, however, more than a fundamentally shared aspiration. To achieve its goals of widest possible public access to high quality science, Open Access has to function as a business model that stands the test of economic reality and deliver incentives for the best science to be published globally. If there are no subscribers to pay the costs incurred, then others, such as sponsors, advertisers or donors must take their place. Such models are currently an area of broad experimentation and rapid new developments. All major publishers participate, partner, experiment, and compete with new open access publishers and the outcomes and assessments differ depending on the choice of revenue stream(s), technology and subject area.

Making open access work will also have to be done in ways respectful of human rights. Publication charges, a feature of many Open Access journals, put a particular burden on scientists in general, especially if they are not attached to a well-funded research institution. The perceived discrimination shifts from the researching scientist, who now has equal access to post-publication research, to the publishing scientist whose limited resources and must rely on donors or university administrations to grant or deny publication fees. How will this affect scientists in developing countries, reliant on the good will of domestic funders or on foreign publication aid? How can publication funding be allocated and distributed in ways that avoid unsuitable biases and still preserve academic freedom and independence, both inherent in true scientific endeavour?

The publishing ecosystem should not be debated without exploring the reality of scholarly communication in the developed and the developing world. Commercial licensing solutions continue to broaden access alongside Open Access business models. Rental schemes and other new business proposals reduce prices. Bulk deals increase publications available. Some developed countries have achieved de facto open access by negotiating nationwide single licences with publishers. Some partner with publishers to provide such content through their public libraries. The digital environment has allowed for differential pricing, which in developing countries has brought down costs dramatically for access to journal subscriptions and journals. Furthermore publishers, libraries and philanthropists are organising, often collaboratively, projects which not only provide free or severely discounted licences to content, but also gradually shift their focus of concern away from access itself to other obstacles to participation in science.

A 2010 study² by the Commonwealth of Universities in East Africa suggests that “availability of scholarly information can no longer be claimed as the primary problem. Access initiatives over recent years have done much to address this, successfully piloting subscription models through which affordable pricing (or in some cases free access) has been provided by major publishers, serving to bring many thousands of journals within reach of African universities. If the theoretical availability of scholarly content is now much greater, and if the sustainability of these access models can be assured, the problem may need to be redefined. It seems necessary instead to consider the ways in which available journals are or are not being accessed and used. In doing so, attention is focused on the barriers which prevent or discourage academics and students from making use of scholarly materials for research.”

All of the above suggests forcefully that the interference with current international copyright law may not only be ineffective to improve global participation in science, it could also be harmful, especially if public policy weakens the freedom of scientists to choose where they want to publish, and the freedoms of publishers who serve them.

Universal access to a varied array of content cannot be achieved unless there is a market that enables rich and efficient scholarly communications in the first place. Many routes are currently being tested and great progress is being made, within the current balanced copyright framework.

One of the most disappointing aspects of the international debate on this issue has been that public discourse has wilfully set aside aforementioned developments and replaced practical efforts that demonstrate change and encouraging developments with sweeping generalisations and polarising statements. The changing business models, shifting technologies, the lessons from failed and successful pilots, and the shared understanding that has grown over the past decade merits a more careful reflection and nuanced debate.

² Harle, Jonathan: Access to research in east and southern African universities, published by the Association of Commonwealth Universities, November 2010

6. Copyright and education

Education, in particular in developing countries with a frequent shortage of qualified teachers, requires high-quality educational content. In industrialised countries this is provided by professional, locally based educational publishers and different procurement policies are applied to ensure that a competitive marketplace provides the quality, diversity and innovation in learning materials that best supports education. Here, copyright plays a decisive role. In developing countries, too poor to develop a domestic educational publishing industry, governments have stepped in by either publishing materials themselves or by issuing tenders for international publishers to bid for, thus transferring domestic funds directly abroad.

The promotion of open educational resources (OER) is a recent policy trend, seeking to address the lack of school books in many developing countries, or providing broad access to digital content. The assumption is that the value that competitive educational content markets provide can easily be replaced by other methods.

Unfortunately, OER content is often recycled, of a lower quality, seldom updated, often gathered from dubious sources, and sometimes compromised by government or other input³. Ultimately the weak outcome of many policy initiatives to replace educational publishing is based on a lack of understanding of what educational publishers do and what factors support high-quality content. Competitive pressures force publishers to gather together teams of experts in curriculum, pedagogy, graphics and IT to work with the author(s) when developing a book or series, trying out different approaches for different audiences, checking for factual accuracy and age-appropriateness, innovating, testing, promoting a book to thousands of teachers through pedagogical seminars, explaining how it will help them succeed, obtaining feedback from them, building on the experience with this book to improve further editions, and so on. The risk of failing if it is not a great product, and the high level of investment drives the quality of the product.

Ultimately, teachers, students and their education lose out when there is no competition to drive quality. If and where commercial publishers, or other start-ups or innovators, can invest and innovate in education, society will benefit — economically, culturally.

In the context of this consultation it is worth noting that the current debate around open education resources does not require any change to the global copyright regime. The copyright regime is no longer the source of scarcity. The Internet is a source of countless books, learning videos, MOOCs, free and premium online training courses, all of which have been created without the need to change the law. Copyright enables competition and new business models. Where open educational resources fail students, publishers should be enabled to provide better content, following the best possible sustainable business models.

7. Copyright and culture

The publishing industry is an integral part of the cultural industry. The abundance and diversity of publishing output in developed and developing countries today is based on copyright. While this abundance is now being complemented by works made available without charge, this expansion of supply has not reduced the demand for copyright protected content.

Some critics have held that copyright protection inflates the price of cultural works, that it generates inequality and that copyright reform is required to reduce costs, enable translations

³ See, for example the research work of Professor Eva Matthes, Chair of Educational Science, University of Augsburg in Germany:

http://www.internationalpublishers.org/images/stories/MembersOnly/IntIPublishingUpdate/2013/Educational_media_online_EMatthes.pdf

and allow adaptation or manipulation of works⁴. It is worth looking at these points of criticism individually:

Copyright allows publishers to invest, up front, in books in the hope that readers will buy them in sufficient numbers to cover costs and, hopefully, make a profit. This trade publishing business model is high-risk as it depends on predicting the choices of book buyers. Publishers therefore produce a large number of books in the knowledge that many will make a loss, some will break even and, hopefully, a few will be profitable and cover the losses incurred elsewhere. This uncertainty of this 'portfolio' approach is not a choice but a defining feature of this business model. Comparing the prices of books in- and out-of-copyright, therefore, does not provide evidence for inflated profits, but for the cost of supporting an overall publishing ecosystem that delivers readers with an enormous range of delightful, but frequently unprofitable, titles. Republishing out-of-copyright works is a far simpler business model. The enormous price decrease of such books reflects the lack of risk for publishers of books that are in the public domain but remain popular. Such publishers reproduce old and established works with a proven track record, not what is novel, innovative or controversial. They promote cultural heritage but not new culture; global classics rather than the novel, local or quirky.

It can be no surprise, and therefore not a valid criticism of copyright, that it does not provide an incentive to translate works into all languages and sell all books in all regions. Any attempt to solve this recognised problem through changes to copyright law does not serve the public interest. Translation is a skill and an artform in itself. It is an act restricted by copyright only because unskilled translations can have a detrimental and sometimes devastating impact on the reputation and moral rights of authors. Authors and publishers have long and sad experience with botched translations that turn elegant prose into clunky word-by-word transcriptions or even unreadable gibberish. There are legitimate interests which require their involvement in the translation process, ultimately for the benefit of the reader.

There are also other ways to incentivise translation. Providing for the costs of translation and perhaps printing will encourage a publisher to find a good translator. Library purchasing programmes have the advantage of both providing guaranteed sales to publishers, that enable them to take on the risk of translation, and also ensuring that these books are widely available.

Encouraging governments to publish books themselves, however, is a return to pre-copyright times and a solution of last resort for the most desperate of circumstances. Governments have no business to censor books post-publication and therefore even less to be the initial publisher of books. Governments have never been adequate arbiters of literary taste. Where citizens can only read what a government allows them to, human rights are at a serious risk. Just because the Internet makes this possibility less expensive, it does not make it less dangerous.

8. Conclusion

In 1986 the Assembly of the Berne Convention solemnly declared "that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creation be recognized and effectively protected both in their own country and in all other countries of their world". It has proven its value in paper and digital form, its ability to achieve balance, and promote both access and prosperity. There is no need to change the international framework.

⁴ Lea Shaver, Copyright and Inequality, 92 WASH. U. L. REV.