

KERNOCHAN CENTER

FOR LAW, MEDIA AND THE ARTS



Re: The impact of intellectual property regimes on the enjoyment of right to science and culture

1. This submission is made by the Kernochan Center for Law, Media and the Arts at Columbia Law School. The Kernochan Center was established to contribute to a broader understanding of the legal aspects of creative works of authorship, including their dissemination and use. The Center has encouraged the development of instruction at the Law School in topics such as intellectual property, copyright, trademarks, the regulation of electronic media, and problems arising from new communications technologies. The Center's Faculty Director is Professor Jane Ginsburg and its Executive Director is June Besek. Bart Szewczyk, Kernochan Center Intellectual Property Fellow, also assisted in the preparation of this submission. The Kernochan Center was joined in the preparation of this submission by Professor Graeme Austin, Chair of Private Law at Victoria University of Wellington, New Zealand, and Professor of Law, Melbourne University, Australia. Professor Austin has an LL.M. and J.S.D. (doctorate in juridical science) from Columbia University, with first degrees in law and in arts from Victoria University of Wellington. He is an elected member of the American Law Institute, and has served as a member of the New Zealand Copyright Tribunal. With Professor Laurence Helfer, he is the author of *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011). He is also co-author of *International Intellectual Property Law and Policy* (Lexis/Nexis 2008).

2. The Kernochan Center welcomes the call by the Special Rapporteur in the field of cultural rights for submissions on the relationship between intellectual property and the rights set forth in article 15 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 15(1) requires member states to recognise the right of everyone:

- (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.

While some nations, including the United States of America, have not ratified the ICESCR, article 15 of that covenant is in almost identical terms to article 27 of the Universal Declaration of Human Rights (1948),¹ which forms part of the International Bill of Rights, and comprises a core international commitment to all members of the human family. Similarly worded guarantees are set forth in the 1948 American Declaration of the Rights and Duties of Man.²

Summary of Submission

3. This submission addresses four topics:

(a) The connection between the parts of article 15 ICESCR

The different parts of article 15 are interconnected. The right to take part in cultural life recognized in article 15(1)(a) requires that there *be* a culture. Since copyright promotes the creation of culture, the

¹ Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter "UDHR"]. On the drafting history of art. 15(1)(c) of the ICESCR, see Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, 35 Copyright

² O.A.S. Res. XXX, art. 13(2), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

rights of authors to protection of the moral and material interests in their works are integral to the right to participate in culture. Similarly, the right to enjoy the benefits of scientific progress and its applications in article 15(1)(b) requires the protection of authors' scientific, literary and artistic production.

(b) The connection between article 15(1)(c) and other human rights, in particular the right to freedom of expression

The right of authors to protection of the moral and material interests in their works also forms part of the context for understanding the scope of other important human rights, in particular the right to freedom of expression. It is sometimes urged that the right to freedom of expression overrides the right of authors. This view propounds a false dichotomy: rights of authors are not in conflict with the right of freedom of expression. They are essential to it. The protection of authors' rights is a prerequisite to a flourishing culture, for without the cultural productions of authors, there is nothing to flower. Moreover, elevating the right of freedom of expression over and above the rights recognized in article 15(1)(c) is inconsistent with the international commitment to indivisibility and interconnectedness of all human rights. The right of authors to protection of their moral and material interests in their works should inform domestic policy deliberations and the scope of judicial remedies, including injunctions against digital intermediaries that provide or facilitate unlicensed access to copyright-protected materials.

(c) International protection of authors' rights and suppression of authors and their works

In many nations, authors suffer from suppression of their works, imprisonment, and other abuses. International commitment to the protection of authors' moral and material interests in their works cannot always directly overcome these evils. However, moral rights protections can help ensure that authors' names are known and not forgotten. Protection of authors' material interests can help ensure that authors can derive some income from their works in other markets, even if their works are suppressed at home.

(d) The relationship between intellectual property and the right to participate in cultural life.

This relationship should be understood in the context of the right of authors to benefit from the protection of the moral and material interests in their works. This right shares significant common ground with international and domestic copyright law, a core part of intellectual property law. Copyright protections are therefore integral to human rights. Accordingly, when analysing the relationship between intellectual property and the right to culture, it should be recognized that domestic copyright law is the principal legal vehicle for realizing the human rights commitment to protecting authors' moral and material interests.

4. The Special Rapporteur asks for submissions on the "impact of intellectual property regimes on the enjoyment of [the] right to science and culture, as enshrined in particular in article 15 of the International Covenant on Economic, Social and Cultural Rights." This submission focuses on the relationship between copyright law³—a core part of intellectual property law—and the right to take part in cultural life.

(a) The connection between the different parts of article 15 ICESCR

5. All parts of article 15(1) of the ICESCR are interconnected. More specifically, protecting and fulfilling the right to take part in cultural life (article 15(1)(a)) and the right to enjoy the benefits of scientific progress and its applications (article 15(1)(b)) should be interpreted in the light of the contribution that the protection of authors' moral and material interests (article 15(1)(c)) make to cultural life and scientific progress.

³ "Copyright" is the term primarily used in common law jurisdictions. In other legal traditions, the term "authors' rights" is more familiar. In the interest of simplicity, we use "copyright" to refer to both systems.

6. A system of authors' rights can make creative work an economically viable option for people who could not otherwise afford to spend the time necessary to create sustained works of authorship. Economic barriers to creative activity can be lowered by the protections and rights that a well-functioning copyright system offers to creative workers. Similarly, scientific progress is promoted through the protection of authors' moral and material interests in their works. Intellectual property protection provides incentives for economic investment in scientific progress, which could decrease with lower protection.

(b) The connection between article 15(1)(c) and other human rights, in particular the right to freedom of expression

7. Human rights are indivisible and interdependent, as the Vienna Declaration and Programme of Action emphasized in 1993.⁴ The rights recognized in article 15(1)(c) therefore form part of the context for the understanding of other rights.

8. The relationship between authors' rights and the right to freedom of expression has received significant attention in the work of some civil society groups. The regulation of digital distribution platforms is a context in which the relationship between authors' right to the protection of moral and material interests and the right to freedom of expression has been particularly important. It is sometimes suggested that restrictions on Internet access are inconsistent with the right to freedom of expression. This view does not take sufficient account of the vulnerability of authors to infringement of their rights in the digital era, including through digital distribution platforms. While arbitrary restrictions on access should not be tolerated, legal responses to this problem should not elevate freedom of expression over and above the human rights of authors to the protection of the moral and material interests in their works. Consistent with the Vienna Declaration, proper account must be taken of *both* sets of rights. Moreover, as is discussed above, a system of authors' rights itself enhances expressive freedoms by contributing to the diversity of cultural materials available in domestic and international contexts.

9. In this context, the Kernochan Center draws to the attention of the Special Rapporteur the recent decision of the Court of Justice of the European Union in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* Case C-312/12 (March 27, 2014). Invoking the "fundamental" protections of intellectual property under article 17(2) of the European Charter of Fundamental Rights,⁵ the plaintiff sought injunctions against internet service providers to block access to third party websites⁶ that infringed and facilitated the infringement of copyright-protected works. The Court of Justice held that, in the application of this power, intellectual property rights must be balanced against other fundamental rights in the Charter, including the right to conduct a business,⁷ and the right to freedom of information of Internet users.⁸ Approving the grant of the injunction, the Court's reasoning underscored the importance of fashioning remedies that are proportionate to the harms involved, including to the rights of authors.⁹ Article 17(2) has a different legal status to article 15(1)(c) of the ICESCR. Even so, *Telekabel* illustrates that it is possible to take serious account of the right of freedom of expression *and* the rights of authors, while giving neither unwarranted priority over the other.

⁴ World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, P 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) ("All human rights are universal, indivisible and interdependent and interrelated.").

⁵ Charter of Fundamental Rights of the European Union, art. 17(2) 2000 O.J. C 364/1.

⁶ The plaintiff invoked art. 8(3) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (O.J. 2001 L. 167, p. 10).

⁷ Charter of Fundamental Rights of the European Union, art. 16.

⁸ Charter of Fundamental Rights of the European Union, art. 11.

⁹ The proportionality principle is explicitly recognized in art. 52(1) of the Charter of Fundamental Rights of the European Union.

(c) International protection of authors' rights and suppression of authors and their works

10. Protection of authors' moral and material interests is connected to basic rights and freedoms in even more fundamental ways. In many nations censorship of creative expression has become a notorious tool of oppression. Censorship can be achieved by outright bans of authorial work. It can also be achieved by denying authors the ability to reach a market for their works through techniques such as putting authors on "gray lists" that prevent them from finding publishers for their works. An especially effective way to censor creative authorship is to eliminate material rewards, so that few people, other than the economically elite, can undertake to be an author. Some forms of state abuses against authors also implicate other human rights in addition to the right to free expression, including the right to be free from torture or arbitrary imprisonment.¹⁰

11. International protection of the human right of authors to the moral and material interests in their work cannot directly overcome these evils, especially in the country in which a specific individual author and/or his or her work are subjected to repression. However, protection of authors' moral rights can help ensure that an individual author's expression is received by his or her audience *in other jurisdictions* in the form he or she originally intended, and that an author's name is known, and it is hoped, not forgotten. In addition, protecting and fulfilling authors' rights to protection of their material interests can help secure them an international income. International commitments to these rights can help prevent one regime's suppression of creative work from being "exported" to other nations. Other nations are free, indeed are obliged by human rights laws and international copyright law, to protect these rights of authors whose rights have been denied in their home nations.

(d) The relationship between intellectual property and the right to participate in cultural life.

12. As the Committee on Economic, Social & Cultural Rights emphasized in *General Comment No. 17*,¹¹ the normative content of the human rights guarantee to authors does not require protection equivalent to that provided by intellectual property law.¹² However, to the extent that intellectual property law—copyright in particular—protects authors' rights by providing a means for securing their livelihood and dignity, the two bodies of law share significant common ground. Thus, the impact of copyright law on the enjoyment of the right to culture needs to be assessed in the context of article 15(1)(c), which sets forth a human rights commitment to all members of the human family that they be entitled to the moral and material interests of works of which they are the author.¹³

13. The common ground between copyright and the promises of article 15(1)(c) is both conceptual and practical. Conceptually, human rights protections for authors are consistent with the aspirations that animated the first truly international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (1886).¹⁴ The Berne Convention requires member states to provide authors with a minimum level of substantive protections in respect of their works. In broad outline, these minimum protections are guaranteed to authors who are nationals or residents of, or whose works are first published in, any other member state. Just as human rights laws represent a set of profound commitments to the international community that transcend the vicissitudes of domestic laws and policies, the Berne Convention was motivated by a need to provide authors with protections of their rights that transcended domestic borders. While the means eventually chosen by the Berne

¹⁰ "Pen International" is a well-known and respected NGO that monitors abuses of authors of these kinds. See <http://www.pen-international.org/take-action-rans/>. See also Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property* (Cambridge University Press, 2011) at p. 194-196.

¹¹ Comm. On Econ., Soc. & Cultural Rights, *General Comment No. 17: 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 Is the Author*, art. 15(1)(c), U.N. Doc. E/C/2005 (Jan. 12, 2006) [hereinafter "*General Comment No. 17*"]

¹² *General Comment No. 17*, at para. 35.

¹³ World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, P 5, U.N. Doc. A/CONF.157/23 (July 12, 1993), art 5. The Vienna Declaration calls on the international community to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." *Id.*

¹⁴ Berne Convention of the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 31 (last revised at Paris, July 24, 1971).

Convention member states was not a universal copyright law, the Berne Convention was universalist in aspiration; like article 15(1)(c) of the ICESCR, the Berne Convention represents an *international* commitment to protecting authors.

14. Copyright is the principal domestic law vehicle that gives practical effect to the recognition of authors' moral and material interests in article 15(1)(c) of the ICESCR. Authors' moral interests are guaranteed by both article 15(1)(c) of the ICESCR and by article 6*bis* of Berne Convention. Article 6*bis* provides

Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.

Article 6*bis* was added to the Berne Convention by the Rome Act of 1928.¹⁵ At this time, many nations offered more expansive protections for authors' moral rights, and continue to do so.¹⁶ The commonality between the human rights guarantees and the existing legal protections for authors' moral rights was recognized by the drafters of article 27 of the UDHR and article 15(1)(c) of the ICESCR.¹⁷

15. The protection of authors' material interests is linked to other human rights commitments, including the right to work of one's choosing and the right to an adequate standard of living.¹⁸

16. Copyright laws support these ends by creating markets in the fruits of human creativity through the grant of exclusive rights—an author's right to reproduce his or her work, the right of public performance, the right of making the work available on digital networks, etc. Copyright law provides authors the opportunity to derive an income from their works by licensing or assigning parts of the copyright to others (such as publishers). So doing, copyright protections enable authors to realize the "material" interests in their works recognized by article 15(1)(c) of the ICESCR.¹⁹

17. By providing authors with the potential to derive an income that is independent of state or other forms of patronage, copyright protects authors' freedom of expression, and independence of thought, core human rights that are guaranteed in key human rights instruments, including the UDHR²⁰ and the International Covenant on Civil and Political Rights.²¹ Copyright can help fulfill the promises of article 15(1)(c) and the overarching commitment to the dignity of all members of the human family that is reflected in the Preamble to the UDHR, ICESCR and the ICCPR. Among the reasons for protecting authors' human rights is to provide authors with a "zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent, intellectual lives, all of which are essential requisites for any free society."²² A properly functioning copyright system can serve the same ends.

¹⁵ See Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2006) para. 10.07-10.09.

¹⁶ Article 6*bis* represented a compromise between major common law and civil law approaches. *Id.* paras. 10.07-10.11.

¹⁷ Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property* (Cambridge University Press, 2011) at p. 185.

¹⁸ *General Comment No. 17* at paras. 2, 4, 15, 16.

¹⁹ Domestic copyright laws also serve to *connect* authors' moral and material interests. The right of integrity protects authors' material interests by helping to ensure that the market is not jeopardized by the circulation of corrupted versions. The right to claim authorship helps secure authors' material interests by ensuring that the public know the identity of authors; this can help the public find new works by the same authors.

²⁰ UDHR, art. 19.

²¹ International Covenant on Civil and Political Rights arts. 2(3), 9(5), 14(6), adopted Dec. 19, 1966, 999 U.N.T.S. 171, art. 19.

²² Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. Davis L. Rev. 971, 996 (2001). See also Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property* (Cambridge University Press, 2011) at p. 189.