



**Economic and Social
Council**

Distr.
GENERAL

E/C.12/40/6
9 May 2008

ENGLISH ONLY

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Fortieth session
Geneva, 28 April – 16 May 2008

DAY OF GENERAL DISCUSSION

Right to take part in cultural life (article 15 (1) (a) of the Covenant)

Friday, 9 May 2008

NO COPYRIGHT AND NO DOMINATION OF CULTURAL MARKETS
two conditions for realising active participation in cultural life*

Background paper submitted by Mr. Joost Smiers**

* Reproduced as submitted.

** The views expressed in the present document are those of the author and do not necessarily reflect those of the United Nations. Mr. Joost Smiers is Professor (em.) of Political Science of the arts, Research Fellow in the Research Group Arts & Economics at the Utrecht School of the Arts, the Netherlands, and formerly visiting professor, Department of World Arts and Cultures, UCLA, Los Angeles.

NO COPYRIGHT AND NO DOMINATION OF CULTURAL MARKETS two conditions for realising active participation in cultural life

Joost Smiers

Article 15.1.a. of the International Covenant on Economic, Social and Cultural Rights is a quite simple, but at the same very rich text. It says: everyone has the right to take part in cultural life.

1. It must be said that that this article is less “poetic” than Article 27.1 of the Universal Declaration of Human Rights that gives, amongst others, everyone the right to participate in the cultural life of the community and to enjoy the arts. However, this short text is more realistic. In the Covenant everyone’s right on participation is not limited to the (her or his?) community, in the first place. Secondly, we should recognise that the arts are not only sources of enjoyment. They may the object of contradictions and even struggle between people. Films, theatre and dance performances, soap operas, telenovelas, shows, designs, cartoons, works of visual art, images of publicity, novels, poems, pornographic expressions, concerts and pieces of background music might be symbolic battlegrounds, locally and globally, about what kinds of representations of meanings are loved, accepted, hated or censored. The arts touch deep feelings of people. Thus, understandably those expressions might be controversial.

Participation in cultural life would mean not only the enjoyment of the arts that one likes, but also the development of the individual and communal capacity how to deal with the furious and serious contradictions that may arise concerning some artistic expressions, preferably on a peaceful way. This is an ongoing learning process. At one side, it might be effective – communally and individually - to cherish “live and let live” approaches. However, respect for the deeply felt convictions of other people might demand for some restraint, without hampering basic principles of freedom of expression and communication. The force of a democracy is that people living together in any society – that might be very local and very global at the same time - manage to balance between those different values.

Participation in cultural life cannot exist if people are excluded from the sources of cultural expression and communication. Mostly, we only finger point on censorship while speaking about exclusion. However, this happens as well when people have been transformed from citizens into consumers of artistic expressions. This will be the topic of my next observations.

2. It is unavoidable for the treatment of Article 15.1.a of the Covenant to discuss shortly its clause 15.1.c that is more or less comparable to Article 27.2 of the Universal Declaration of Human Rights. Those texts recognize everyone’s 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 author. He should be, I guess, he or she. Some people think that there has been mentioned here that a system of copyright should exist. This assumption is a misunderstanding. In those lines no word about copyright can be found. We might be happy that this is not the case. Universal Declarations and Covenants are not the places to propose practical tools for solving basic principles.

Indeed, copyright is a practical tool, and certainly not a good, effective and justifiable tool. Why not? Our common field of cultural expressions and communication becomes distorted by the exclusive ownership a creator or performer has on his or her work. Mostly it are a few cultural conglomerates that “own” hundreds of thousands of our melodies, texts and images. In most cultures in the world this kind of ownership did, and does not exist.

What is the fundamental problem that we should have with giving someone the ownership of cultural expressions, whether it is an individual or a big cultural enterprise? Ownership means in this context the exclusive and monopolistic right to control the use of a work. Basically, the answer is that we may not change those expressions or contradict them in the texts, images or melodies themselves. As passive consumers we have only one choice, to absorb them, or abstain from consumption which is difficult when one has been overwhelmed by huge publicity and marketing efforts for specific cultural

products. Actually, one has copyright on a work for many decades; it might be for more than a century. Try to imagine what a catastrophe this holds for our cultural communication and participation in cultural life. As citizens, we are made passive consumers of texts, images or melodies, instead of being active participants in the development of cultural life. We are made silent. We may not actively communicate with those cultural expressions. This is a serious objection against copyright. We may conclude that the active participation in cultural life will be better served in a world where no copyright protection exists.

Of course, for having a vibrant cultural life, we should have the contributions of artists of different ilk. Would it not be advisable to give them a copyright protection? The story goes that without, they would not make a living and would lack the incentive to create and perform and we as societies would miss their works of art, and the enjoyment they give us. Would this really be the case? First, during nearly all centuries and everywhere on earth no copyright system did exist, but nevertheless there were artistic creations and performances in abundance. Second, the reality is that copyright protection nearly does not guarantee a substantial remuneration to most of the artists; on the contrary. Only a handful of “stars” make big, big money, and a few cultural industries do so as well. So, the system of copyright does not serve the material interests of the huge majority of artists, all over the world.

Let’s face next the question, what about their moral interests? We know that most of our cultural expressions are owned by huge cultural conglomerates. They do with the works as they like, but it is not certain that they use them on morally respectful ways, to use an understatement. If the Article 15.1.c. of the Covenant has as a purpose to promote everyone’s 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 author, copyright is not an effective tool.

It is even worse. The exclusive and monopolistic control cultural conglomerates exercise over cultural expressions gives them the chance to exclude us, as citizens, from our cultural communication and the participation in cultural life. Moreover, it delivers them the protection they wish to have to invest millions of dollars or euros, and even much more, in the production, distribution and promotion of bestseller books, blockbuster films and music stars. Copyright actually turns out to be an investment protection. The consequence of those protected investments is for our common cultural life a threat.

Those blockbusters, bestsellers and stars push aside from public attention the public awareness of the reality that there are many more artists who create and perform. Of course, if there does not exist censorship, they do so, but the chance that they and the diversity of their works can be desired by many audiences, readers and buyers is nearly nil, simply because they never will know that those diversities exist. By having a system of copyright protection we detract ourselves, as societies, from the means we need to have for the full participation in cultural life. We condemn ourselves to a cultural landscape that has been dominated by a few starring works of art. This is an impoverishment.

Let’s imagine that we would not have a system of copyright any longer. What would happen? Two developments might be expected. First, cultural expressions do not become privatised any longer, and the whole richness of our commons of creativity and knowledge will come within reach and use of everyone. This will promote the active participation in cultural life. Second, many more artists and their intermediaries than at present will make a good income from their endeavours. How can this happen? When the copyright system does not exist any longer, there will be nearly no incentive anymore for cultural conglomerates to invest so heavily in blockbusters, bestsellers and stars. Though, they do not have anymore the investment protection that copyright would give them.

The consequence of this reality is fabulous. The really existing cultural diversity, that at present exists, somewhere far away in the shadow sides of our societies, will become available and in view for everyone in the population. People will, consequently, start to buy, watch and read greater diversities of works of art. This means that many more artists can sell their works for good prices and would make a reasonable to a good income, as are doing their producers and other intermediaries.

There is only one danger that this will not happen. Let’s imagine that we would still keep in place cultural conglomerates that dominate markets substantially. Unavoidably they will behave like big fishes that can do well without copyright because they control the production, distribution, promotion and conditions for the reception of cultural expressions. Without copyright they may use all creations of artists without paying any remuneration, and consequently diversity and the interests of many artists may dwindle. Thus, what to do?

3. Since neoliberalism got grip on our life, we forgot that we, as societies, may limit the size of enterprises, in order to create level playing fields. Competition policy is one tool for doing so. Certainly in the cultural fields it should not be tolerated that there are only a few conglomerates that control substantially the production, distribution, promotion and reception of our cultural expressions and communications. In the present situation the existence of huge cultural conglomerates is an obstacle to the active participation of many citizens in cultural life. Those conglomerates control considerably what is on offer, and shape the ambiances in which artistic expressions can be enjoyed, in the old material world, and more and more in the digital fields as well.

This degrades citizens into the role of passive consumers. This is not a sound base for realising what has been promised in Article 15.1.a of the Covenant. The active participation in cultural life has been guaranteed better under the condition that there are huge numbers of cultural enterprises by which citizens have a real choice and can feel, and behave, more actively engaged with what artists are presenting

Moreover, if we would get rid of those huge cultural corporations by cutting them in many pieces, a level playing field will come into existence in which many and again many cultural enterprises, and their artists, can flourish, and earn a good income. No other companies will push them, by their sheer market power, out of public attention. Thus, what we should do is this: we should abolish copyright and at the same time introduce strict competition policies in all the cultural fields.

The havoc that is coming out of the subprime mortgage crisis makes many people aware, that regulations of markets could be a blessing for our economic, social and cultural well being. So, this is the right time to take action that would serve two purposes. In the first place, many artists, and their enterprises, can make a better living from their efforts than before. Second, the active participation of many citizens in cultural life can become more than a dream: reality. We will have again a commons that is a fertile breeding ground for the realization of the purpose of the Article 15.1.a. of the Covenant on Economic, Social and Cultural Rights, that is to shape the conditions that everyone can effectuate his or her right to take part in cultural life.

Dr. Joost Smiers is Professor (em.) of Political Science of the arts, Research Fellow in the Research Group Arts & Economics at the Utrecht School of the Arts, the Netherlands, and formerly visiting professor, Department of World Arts and Cultures, UCLA, Los Angeles. He has written, lectured and researched extensively in the area of decision-making in cultural matters worldwide, on new visions of creative and intellectual property, copyright and the public domain, on freedom of expression versus responsibility, and on cultural identities. His books include *Arts under Pressure. Promoting Cultural Diversity in the Age of Globalisation* (London 2003, Zed Books), which has been published as well in Serbian, Spanish, Portuguese, Thai and Arab. Korean, Chinese, Tamil, Singalese and Indonesian translations are under way. He has edited together with Nina Obuljen a book on *Unesco's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Making it Work* (Zagreb 2006, Culturelink). He prepares a book on *Imagine! No copyright. Better for artists, diversity and the economy* (together with Marieke van Schijndel) and a book on audio and visual noise in the public space. Joost Smiers lives in Amsterdam. joost.smiers@planet.nl