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International Conference on Copyright and Human Rights in the Information Age: Conflict or Harmonious Co-existence?

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Balancing of Copyright as Human Right with Other Human Rights

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Balancing from 1884 through 1886, 1908, 1928, *1948*, 1967, 1971 and 1994 to 1996 and beyond

- Balancing of, in, and around copyright: **its traditional meaning is balancing through exception to or limitation of copyright in recognition of certain public and/or private interests, including the protection of human rights and freedoms**, such as the freedom of speech, right to access to information and knowledge, right to education, right of participation in the cultural life, right of protection of privacy, etc.

- **The international treaties on copyright and related rights have always reflected the intention to create – and, in general, have achieved – due balance** of copyright protection with other public and/or private interests.

Balancing from 1884 through 1886, 1908, 1928, *1948*, 1967, 1971 and 1994 to 1996 and beyond

- „**Copyleft" allegation: recently** – in particular as a result of the TRIPS Agreement and the WIPO Internet Treaties – **the balance has been upset in favor of owners of rights. (The concept of "copyleft" is not necessarily in accordance with the right-left division as in general politics. Those people who identify themselves as advocates of "copyleft" objectives are of the view that copyright has not *left* sufficient freedom and flexibilities. They intend to protect – and wherever possible broaden – what, according to them, has been *left.*)**

- **In reality, the recent changes of the international norms have been necessary to maintain the essence of copyright unchanged**. The existing norms are suitable to duly take into account and respect other legitimate public and private interests than those of owners of rights.
- **The balance around copyright has truly been upset recently due to the impact of new technological, social and economic developments**. New powerful forces have emerged which are of the view – although they may not be necessarily right about this – that weakening or even eliminating copyright protection is in their interest. On the basis of their great economic and lobbying potentials, and through forging alliance with certain populist (and even anarchist) movements, they have **succeeded to upset the balance to the detriment of owners of copyright and related rights.**

Balance of interests – basic considerations on exceptions and limitations

- **The need for an appropriate balance between the public interest to promote creativity** through adequate copyright protection **and other public interests has been recognized and taken into account since the very moment of the creation of an international copyright system**.
- **Statement of Numa Droz , the President of Conference at the first of the three diplomatic conferences held in Bern** (1884, 1885 and 1886) leading to the adoption of the Berne Convention: "Whereas, for one thing, certain delegations might have wished for more extensive and more uniform protection of authors' rights, ***due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually in the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated*, rightly in my opinion, *by the public interest*.** The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses. These were the various viewpoints and interests that we have sought to reconcile in the draft Convention." [Emphasis added.]

Freedom of expression; access to information under the international treaties

- **The free idea/protected expression and free information/protected original form of presentation dichotomies:** TRIPS Art. 9.2 and WCT Art. 2.

- **Access to information**: free use official texts of a legislative, administrative and legal nature (Berne Art. 2(4)), political speeches and speeches delivered in legal proceedings (Berne Art. 2*bis*(1)), and – for informatory purposes – lectures and addresses delivered in public; free re-use of articles and broadcast works on current economic, political or religious topics (Berne Art. 10*bis*(1)) and (Art.10*bis*(2)).

- **Freedom of speech, research and criticism**: free quotation (Art. 10(1)) (+ exceptions on the basis of the „three-step test" for caricature, parody and pastiche, see, e.g. Art, 5(3)(k) and (5) of the EU Information Society (Copyright) Directive of 2001).

Balancing of interests – the „three-step test" (1)

- „Invented" at the 1967 Stockholm revision conference ; **Art. 9(2) of the Berne Convention only regarding the right of reproduction**.

- Extended by the **TRIPS Agreement** to **all economic rights under copyright** (Art. 13) (but not to related rights; see Art. 14.6) and – with some wording differences – to **industrial design rights** (Art. 26.2) and **patent rights** (Art.30).

- Extended by the **WCT** to **all economic rights** under copyright (Art. 10) and by the **WPPT** to **all economic rights** of performers and producers of phonograms (Art. 16).

Balancing of interests – the „three-step test” (2)

- **The three „steps”**(three cumulative conditions that exceptions and limitations should fulfill to be applied step by step):
  - confined to **certain special cases** (copyright; related rights); **limited scope** (industrial design and patent rights);
  - **no conflict with a normal exploitation** (in the case of industrial design and patent rights: no unreasonable conflict);
  - **no unreasonable prejudice to the legitimate interests of the owners of rights** (in respect of industrial design and patent rights, it is added: „taking into account of the legitimate interests of third parties”).
- Offering **sufficient flexibilities for a due balance of interests**, as also proved by **two WTO dispute settlement reports** interpreting the test as provided in Articles 13 and 30 of the TRIPS Agreement:
  - WT/DS114/R of 17 March 2000 (*Canada – Patents*);
  - WT/DS160/R of 15 June 2000 (*USA – Copyright*) .

Balancing of interests – exceptions and limitations in the digital online environment (1)

- **Agreed statement concerning Article 10 of the WCT** (on the „three-step test" concerning copyright): „It is understood that the provisions of Article 10 permit Contacting Parties to **carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered applicable under the Berne Convention**. Similarly, these provisions should be understood to permit Contracting parties to **devise new exceptions and limitations that are appropriate in the digital network environment**.

  „It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."
- **Agreed statement concerning Article 16 of the WPPT** (on the „three-step test concerning the rights of performers and producers of phonograms)**:** The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is **applicable *mutatis mutandis* also to Article 16** (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.

A strange „copyleft" alliance

- **The engine**: **powerful and influential industries who believe** – on a longer run, wrongly – **that as weak copyright as possible is their interest**: telecommunication companies, internet intermediaries and search platforms, manufacturers of reproduction equipment and materials.
- **The fuel**: **theories and slogans produced and propagated by certain professors, researchers and internet gurus** about the need to weaken copyright protection.
- **The transmission system: consumer groups, „public interest NGOs," populist and anarchist movements**

  also

  using developing countries' legitimate demands (however, mostly in a counter-productive manner).

IT industries and internet intermediaries: the engine of anti-copyright forces

The interest chain:

- **Their huge income is based on advertisement money**.
- They receive advertisement money **in proportion with the number of visitors of their websites**; the more visitors, the more money.
- **When are there more** visitors? Of course, **if there are more attractive and valuable „contents."**
- **Works protected by copyright and productions protected by copyright form the most important part of such „contents**."
- **When are there more visitors? If their customers have to be bothered with copyright** and to pay no matter how little for valuable „contents" **or if they get all this free** through thier services? Of course, when they get all this free!
- Thus, it **is their interest to allow access to infringing contents**, **and to lobby for excluding or heavily limiting their** liability, as well as **for broadening exceptions** to **and limitations** of copyright.

The fuel: anti-copyright ideologies and movements

Richard Stallman's and the FS movement „copyleft" philosophy (excerpts from the list of „words to avoid" due to their „confusing" nature published on the GNU website):

- **"Compensation:"** To speak of "compensation for authors" in connection with copyright carries the assumptions that copyright exists for the sake of authors … The…assumption is simply false.
- **"Creator:"** The term "creator" as applied to authors implicitly compares them to a deity („the Creator").
- **"Intellectual property:"** …To avoid spreading unnecessary bias and confusion, it is best to adopt a firm policy not to speak or even think in terms of „intellectual property."…

[It is] hypocrisy [to] call… these powers "rights."

- **"Protection:"** Publishers' lawyers love to use the term "protection" to describe copyright. This word … encourages people to identify with the owner and publisher who benefit from copyright, rather than with the users who are restricted by it. It is easy to avoid "protection" and use neutral terms instead… The term "protection" is also used to describe malicious features. For instance, "copy protection" is a feature that interferes with copying. From the user's point of view, this is obstruction.

(www.gnu.org/philosophy/words-to-avoid.html)

The fuel: anti-copyright ideologies and movements

- **„Forking" of the FS movement with the emergence of the** more resonable **open-source system not as such expression of anarchist ideology but as a business model** to compete (and integrate) with proprietary software.
- **The real successor of the idelogy-based aspect of the FS is the Creative Commons movement.**

The fuel: anti-copyright ideologies and movements

- **Lessig's interview during his 2005 visit to Budapest:**

„Antenna: Mikor merült fel először a Creative Commons ötlete?

Lawrence Lessig: Az egyik ügyfelem, **Eric Eldred** esete kapcsán jutott eszünkbe a dolog. Eldred bírósági úton támadta meg a szerzői jogok kiterjesztését célzó 1998-as Copyright Term Extension Act nevű törvényt… Alkotmányos alapon építettük fel az érvelésünket, és **Eric, bár nem hitt abban, hogy az USA-ban rendkívül erős szerzői lobbival szemben sikerre vihetjük az ügyet, azt mondta, szeretné, ha mozgalom lenne belőle, amely a kultúrjavak szabad hozzáférését védelmezi. Az ötletet gyakorlatilag a Szabad Szoftver Alapítványtól loptuk, elhatároztuk, hogy szerzői jogi licenceket fogunk ingyenesen terjeszteni az interneten**, és megkíséreljük a kultúrjavak egy részét olyasfajta köztulajdonba helyezni, amilyenbe a Szabad Szoftver Alapítvány helyezte a licence alatt kibocsátott szoftvereket. A mozgalmat 2002 decemberében indítottuk el." (Downloaded from www.antennamagazin.hu/2005-04/made.html; the webpage is not acessible anymore; a copy of the downloded text is avaible from the author of this ppt.)

- English translation: **Larry Lessig on the establishment of the Creative Commons licensing system: „Practically we have stolen the idea from the Free Software Foundation."**

Creative Commons licenses

- **Advantages of CC licenses:**
  - There have always been people to make their creations available to the public free of charge who may have tried to express this in different ways. **The CC licenses form a standardized system** to express this along with **clearly recognizable symbols** for the various conditions of free uses.
  - **Enriching and facilitating availability** of certain kinds of works.
  - **Greater legal security** for users.
- **Disadvantages of CC licenses:**
  - **Rigidity** due to the irrevocable nature of the CC licenses.
  - **Conflicts with collective management systems** (due to the fact that CMOs, in order to be able to operate their licensing system – frequently in the form of „blanket licenses" – **require their members to assign, or otherwise give representation for – all of their works in respect of the given category of rights**).
  - **Creating** – or even promoting („CC revolution") – the wrong **impression** that the CC may be an alternative to mainstream copyright.

Creative Commons licenses

- **Who use CC licenses?**
  - **Academics, professors, researchers**
  - **Governments** in respect of worked owned by themselves
  - **Authors indoctrinated by „copyleft" ideology** („free software" licenses as roots)
  - **„Wiki-"type** collective creation **platforms**
  - „**Bloggers," social networks** , etc.
  - **„Vanity publishers"**
  - **„Accidental authors"**
  - Those who use them **as part of business model:** offering something free, and getting income from related sources (similar to „open source" licenses „forking" from „free software")
  - Those who use them as a matter of **carrier strategy purposes** (to succeed, to become known and then to join the mainstream copyright world)
- **Common characteristics:**
  - **Other sources** of income/financial sources
  - **Subsidy, cross subsidy, „self-subsidy"**
  - **Atypical owners of rights**

Creative Commons licenses

Who do not use CC licenses?

Briefly: the mainstream copyright world (copyright industry; those for whom copyright is a source of living; those for whom copyright has been created).

Studies on the economic contribution of copyright; two examples:

- **US (2010 data): contribution to** GDP: core copyright industries 6.36%, by total copyright industries 11.10%; **employment : core copyright industries: 5.1 million workers and 4.75% of the workforce; total copyright industries: 10.6 million workers and 9.91% of the workforce.**
- **Hungary (2002 data): contribution to** GDP: core copyright industries 3.95%, by total copyright industries 9.68%; to **employment (population. 10 million): core copyright industries: 163.000 workers; 4.15 % of the workforce; to total copyright industries: 278.000 workers; 7.10% of the workforce.**

„Copyleft" campaigns – the legend of „overprotection"

- **„Copyleft" allegation about overprotection more in detail: the international copyright system has been developing in a way that copyright protection has been constantly extended without taking care of legitimate public and private interests,** and this has become particularly obvious by the adoption of the TRIPS Agreement and the WIPO Internet Treaties (the WCT and the WPPT).
- **In reality, the TRIPS Agreement has hardly resulted in a substantial extension of copyright protection** (it has only introduced rental right for three categories of productions which has become by now quite impractical and it has extended the term of protection of performers and producers of phonograms to 50 years). It has mainly brought about changes by providing detailed norms on the protection of the *existing* rights and by the extension of the WTO dispute settlement system to disputes concerning IP rights**. This basically means a clarification that the principle of *pacta sunt servanda* also applies to international norms on IP rights.**

Historical and political background to the preparation of the WIPO "Internet Treaties"

Historical and political bacground of the WIPO „Internet Treaties":

- **No revision of the Berne Convention** since the Stockholm (1967)-Paris (1971) twin revisions, and **no revision of the Rome Convention** (1961) **in spite of the ever more numerous challenges raised by new technologies**.
- **Parallel preparatory work in the Uruguay Round GATT negotiations and in WIPO**, with slowing down the latter in order to avoid interference with the former.
- **April 1994**: adoption of the WCT package along with the **TRIPS Agreement**; the latter **only bringing about certain modest changes in the substantive copyright and related rights norms.**
- **Between the end of 1992** (the *de facto* closure of the TRIPS negotiations) **and 1994**: **spectacular development and growing use of the Internet**.
- **Serious and urgent questions** raised for the international copyright and related rights systems as a consequence of this.
- **No chance for reopening the negotiations in WCT**; **acceleration of the preparatory work in WIPO Committees** leading to the adoption of the two "Internet Treaties" within what may have seemed to be a very short time.

Three stages of the debates before the Diplomatic Conference

- **Thesis: copyright is dead** – and, if it is not yet, it should die.
- **Antithesis**: **no change is needed**; we may simply continue applying the existing international norms.
- **Synthesis: certain amendments are necessary but there is no need for fundamental changes.**

Arguments by those who were declaring – or urging – the death of copyright (1)

- *Argument:* **The cyberspace is, and should remain, the realm of complete freedom**; national laws and international treaties have nothing to do with it.

- *Response*: **there is no "cyberspace"** outside the world we live; all the computers and telecommunication systems and all those who operate and use the global network may be found in this or that country; thus, national laws and international laws do have a lot to do with all this.

Arguments by those who were declaring – or urging – the death of copyright (2)

- *Argument:* **In the cyberspace, there is no need for any legal regulation;** the operators and users of the online system are able to solve all the potential problems on the basis of a netiquette.

- *Response*: This idea **might have been realistic at the beginning of the development of the Internet** when mainly researchers, academics, technicians, etc. used it, but **turned out to be unrealistic when the Internet became an important communication and distribution channel** (and when pirates also found that it is an efficient means for their illegal activities).

Arguments by those who were declaring – or urging – the death of copyright (3)

- *Argument:* It would be **impossible to control** the use of works and other protected materials **and exercise copyright and related rights** on the Internet.

- *Response*: "**The answer to the machine is in the machine**" (Charles Clark (1933 – 2006)). That is, the application of technological protection measures and electronic rights management information is the solution.

The WIPO „Internet Treaties”

- The **WIPO „Internet Treaties”** adopted in Geneva on December 21, 1996
  - ➢ the **WIPO Copyright Treaty (WCT)**
    - entered into force on **March 6, 2002**
    - number of **Contracting Parties** on February 20, 2012: **89**
  - ➢ the **WIPO Performances and Phonograms Treaty (WPPT)**
    - entered into force on **May 20, 2002**
    - number of **Contracting Parties** on February 20, 2012: **89**
  - ➢ The Treaties offer overall regulation on copyright and two categories of related rights, but their **main objective is to adapt those rights to the digital, networked environment, to the requirements of the information society**.

- **Implementation in the US: the 1998 Digital Millennium Copyright Act; in the EU: the 2001 Information Society (Copyright) Directive.**

Characterization of the WIPO „Internet Treaties”

- *Legally*: **no revisions of the Berne Convention and the Rome Convention, but “special agreements”** (under Berne Article 20 and Rome Article 22).
- *Concerning the level of protection*: „**Berne & Rome *plus* TRIPS *plus;”*** that is, what is provided in the **Berne and Rome Convention *plus*** what is provided in the substantive provisions of the **TRIPS Agreement *plus* what is still included on the basis of the “digital agenda” of the preparatory work.**
- *From the viewpoint of economic and legislative burdens*: **no real extension of the scope of protection; clarification** of the application of the existing norms and, in certain aspects, their **adaptation** to the new environment, and **new means of exercise and enforcement of rights**.
- *Politically*: the Treaties are **well-balanced, flexible and duly take into account the interests of the different groups of countries and stakeholders.**

The „digital agenda:" clarification, adaptation and new means of exercise and enforcement

The so-called „plus" elements included in the WIPO Treaties on the basis of the „digital agenda:"

- **clarification of the application of the *right of reproduction*** in the digital environment, in particular as regards the **storage** of works, performances and phonograms **in electronic memories;**
- **recognition/clarification of the existence** – as an inevitable corollary to the right or reproduction **– of an exclusive *right of first distribution*** of copies of works, fixed performances and phonograms;
- **through a combination and adaptation of existing rights, recognition of the *exclusive right of (interactive) making available*** of works, fixed performances and phonograms;
- **clarification of the application of *exceptions and limitations*** in the new environment with the ***three-step test*** as the basis;
- obligations regarding the **protection of *technological measures and rights management information*, as means of exercising and enforcing rights**.

„Copyleft" criticism against "DRM"

- **The expression „digital rights management" (DRM)** has been introduced and used in professional (legal, technical) jargon, in the press and the media. However, it **does not appear in the texts of the provisions of the relevant international treaties** (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) **in the EU Directives** (in particular, in the Information Society (Copyright) Directive) **and in the national laws implementing them**.
- **„Technological [protection] measures" (TPMs) and „rights management information" (RMI) are the relevant expressions** used in international treaties, EU Directives and national laws.
- **„DRM" usually means the combination of TPMs and RMI**, **although** in the professional and journalistic discourse **it is** frequently **used also as a reference just to TPMs**, **and** sometimes **just to RMI**.
- **The most intensive „copyleft" criticism in connection with the two WIPO Treaties and their implementation was directed against the application and protection of DRM – in particular TPMs.**

„Copyleft" criticism against „DRM" – alleged „access rights" (1)

First charge: „DRM" (TPMs) and their protection introduces a new „access right"

- Contrary to such allegations, **no new „access right" emerges** as a result of application and protection of TPMs and RMI.

- **Access to works by users have always been controlled; it has been an indispensable part of the *broader* copyright paradigm. Without it, the copyright system simply could not have existed**. In book shops, record shops, one has had to pay for copies to get full access; in libraries, certain rules have had to be respected in order to receive copies in loan; in case of theatrical presentations, concerts, etc., buying tickets or other arrangements have been needed to the members of the public for getting access.

„Copyleft" criticism against „DRM" – alleged „access rights" (2)

No „access" right

- **Even the beneficiaries of exceptions have not been able to get access to copies without any conditions whatsoever**. Walking into a bookshop, taking a book from the shelves and walking out without payment referring to educational and research exceptions?!

- In the digital online environment, what used to be (i) going to the video shop, (ii) buying a video recording on a cassette; (iii) bringing it home, (iv) putting into the player, (v) sitting down and (vi) pressing the „play" button – **has been replaced by a simple click on the keyboard. The use of TPMs** („DRM") **is the normal way of making access conditional** to the payment of a reasonable price or some other arrangement.

„Copyleft" crtiticism against „DRM" – ideas to reduce protection (1)

Second "copyleft" claim: „even if TPMs are protected, **the protection must not cover ‚access-control' TPMs and should not extend to the prohibition of ‚preparatory acts'"**

- Such interpretation **would make the relevant provisions of the WCT and the WPPT unsuitable** to fulfill the obligation to provide adequate protection for TPMs.

- **The ordinary meaning of the text of the TPM provisions of the two Treaties and the documents of the preparatory work make it clear that such kind interpretation is not well founded** (for the interpretation rules, see Articles 31 and 32 of the Vienna Convention on the Law of Treaties).

„Copyleft" crticism against „DRM" – ideas to reduce protection (2)

Obligations to protect „access control" and to prohibit „preparatory acts":

WCT Article 11 and WPPT Article 18:

„Contracting Parties **shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures** that are used by [authors][performers or producers of phonograms] **in connection with the exercise of their rights** under [this Treaty or the Berne Convention][this Treaty] and **that restrict acts**, in respect of their [works][performances or phonograms] , **which are not authorized** by [the [authors][the performers or the producers of phonograms] concerned **or permitted by law**." (Emphasis added.)

„Copyleft" criticism against „DRM" – ideas to reduce protection (3)

Obligations to protect „access control" and to prohibit „preparatory acts":Article 6 of the 2001 Information Society (Copyright) Directive:

1. Member States shall provide adequate legal **protection against the circumvention of any effective technological measures**, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection **against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services** which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures. (Emphasis added.)

„Copyleft" criticism against „DRM" – ideas to reduce protection (4)

Obligations to protect „access control" and to prohibit „preparatory acts"

Article 6 of the 2001 Information Society (Copyright) Directive:

3. For the purposes of this Directive, the expression **'technological measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts,** in respect of works or other subject matter**, which are not authorised by the rightholder** of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed 'effective' **where the use of a protected work or other subject matter is controlled by the rightholders through application of an access control or protection process**, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

(Emphasis added.)

Copyleft" criticism against „DRM" – ideas to reduce protection (5)

Obligations to protect „access control" and to prohibit „preparatory acts"

- Such obligations follow not only from the text of the treaty provisions but it is **also confirmed by the documents of the negotiating history. The treaty language proposals submitted by the various delegations** (not only by the EC and the US, but, e.g., **also by Brazil, Argentina and other Latin American countries**) **covered all kinds of TPMs** (not only „access controls" or only „copy controls") **and also „preparatory acts"** (manufacturing and distributing TPM-defeating devices, such as decoders).
- Since actual circumvention of TPMs usually takes place in places where detection and counter-measures are unrealistic, **the obligation to grant „adequate protection" for TPMs may only be fulfilled if protection extends to the stage of „preparatory acts."**

Copyleft" criticism against „DRM" – allegations about exceptions and limitations (1)

Third "copyleft" claim: TPMs make the application of exceptions and limitations impossible.

Article 6 of the the Information Society (Copyright) Directive:

„Notwithstanding the legal protection provided for in paragraph 1**, in the absence of voluntary measures taken by rightholders**, including agreements between rightholders and other parties concerned, **Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation** provided for in national law in accordance with Article 5(2)(a) [reprographic reproduction], (2)(c) [certain library and educational uses], (2)(d) [ephemeral recording by broadcasters], (2)(e) [copying of broadcasts in social institutions], (3)(a) [illustration for teaching; scientific research], (3)(b) [use by people with disability] or (3)(e) [public security; official procedures] **the means of benefiting from that exception or limitation, to the extent necessary** to benefit from that exception or limitation and **where that beneficiary has legal access to the protected work or subject-matter concerned**. (Emphasis added; continues.)

Copyleft" criticism against „DRM" – allegations about exceptions and limitations (2)

Article 6(4) of the Information Society (Copyright) Directive (contd.)

„Member State **may also take such measures** in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b) [private copying], **unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation** concerned and **in accordance with the provisions of Article 5(2)(b) and (5)** [Article 5(5) subjects the application of all exceptions and limitations to the „three-step test"], **without preventing rightholders from adopting adequate measures regarding the number of reproductions** in accordance with these provisions…

The provisions of the first and second subparagraphs [see the preceding slide and the first paragraph on this slide] **shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them**." (Emphasis added.)

Copyleft" criticism against „DRM" – allegations about exceptions and limitations (3)

Implementation of Article 6(4) of the Directive

- **The majority Member States apply mediation-arbitration systems** as such intervention measures. In general, **the pessimistic forecasts** – according to which the application and protection of TPMs would not guarantee the applicability of important exceptions and limitations – **have turned out to be unjustified**.
- An example: **In Hungary, the intervention system also takes the form of mediation-arbitration**, for which the Copyright Experts Council is competent. The system **has been in force since May 1, 2004**, the day of Hungary's accession to the European Union.
- **The number of disputes brought in front of the Council during the more than seven years, from May 1, 2004 until February 20, 2012** (the date of completion of this ppt. presentation), because beneficiaries have been unable to get access to works and objects of related rights in order to take advantage of exceptions and limitations, is: **1.** The number of cases where complaints have turned out to be justified: **0**.

„Copyleft" theories on the three-step test and its interpretation; why the „Munich Declaration" is wrong

- The three-step test is the **basic foundation of exceptions to and limitations** of copyright and related rights **on the basis of which due balance may be established** between the public interest to adequately protect and enforce those rights and the other public interests.
- **In July 2008, a group of university professors and researchers tried to present a new theory – in the so-called „Munich Declaration" for the interpretation of the test** which is not in accordance with the meaning and the „preparatory work" of the relevant international norms.
- In the following slides the interpretation of the three-step test is discussed more in detail pointing out the **reasons for which the Munich Declaration is wrong and for which the overwhelming majority of highly respected copyright professors has not signed it**.

Structure of the test (1)

Key statement in the Munich Declaration:

„When correctly applied, **the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies**. No single step is to be prioritized. As a result, the Test does not undermine the necessary balancing of interests between different classes of rightholders or between rightholders and the larger general public. **Any contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment. The present formulation** of the Three-Step Test **does not preclude this understanding**. However, this approach has often been overlooked in decided cases." (Emphasis added.)

(Source: www.ip.mpg.de/shared/data/pdf/declaration_three_step_test.pdf)

Structure of the test (2)

Munich Declaration:

Examples of **alleged incorrect interpretation** of the three-step test in a footnote (which, in reality, all have applied a correct interpretation of the test) :

„*See* for instance the **decision of the French Supreme Court**, 28 February 2006, 37 IIC 760 (2006). The same attitude is revealed the **WTO-Panel report** WT/DS114/R of 17 March 2000 (***Canada – Patents***), **where it is held that failure to meet the requirements of one of the three steps will necessarily result in a violation of Article 30 TRIPS.** Though not expressly endorsing the same attitude, the **subsequent Panel report** WT/DS160/R, 15 June 2000 (***USA – Copyright***), has not distanced itself from *Canada – Patents* in a manner that would help to rule out further misunderstandings."

Structure of the test (3)

What may be the basis for the suggested interpretation?

- **From the viewpoint of legal authority:**
  - **decisions of the Appellate Body** established by the WTO Dispute Settlement Body having changed the „erroneous" reports of the two dispute settlement panels mentioned by the Munich „declarers"?
  - **a decision of a court more supreme than the French Supreme Court** (*Cour de cassation*) specially set up for this purpose through a modification of the French Constitution in order to correct the Supreme Court's judgment in the *Mulholland Drive case*?

- **No. But then what?**

Structure of the test (4)

What may be the basis for the suggested interpretation?

Is there some basis for it in the text of the „mother of all provisions on the test”?

- **Berne Convention, Art. 9(2):**

  (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works **in certain special cases, provided that** such reproduction **does not** conflict with a normal exploitation of the work **and does not** unreasonably prejudice the legitimate interests of the author.

- **No**. There is **one basic condition and two subsequent cumulative conditions**. See **Art. 31(1) of** the **Vienna Convention** on the Law of Treaties **and the principle of „effectiveness”** of treaty interpretation.

Structure of the test (5)

What may be the basis for the suggested interpretation?

May there be something in the way in which the TRIPS Agreement provides for the test?

- **Art. 13. of the TRIPS Agreement :**

  Members shall confine limitations or exceptions to exclusive rights to **certain special cases which do not** conflict with a normal exploitation of the work **and do not** unreasonably prejudice the legitimate interests of the right holder.

- **No,** this also speaks on three subsequently applicable criteria.

Structure of the test (6)

What may be the basis for the one-big-beer-mug interpretation?

Perhaps the WCT?

- **Art. 10 of the WCT**

  (1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty **in certain special cases that do not** conflict with a normal exploitation of the work **and do not** unreasonably prejudice the legitimate interests of the author.

  (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations or exceptions to rights provided for therein to **certain special cases that do not** conflict with a normal exploitation of the work **and do not** unreasonably prejudice the legitimate interests of the author. (Emphasis added.)

- **No**, no basis in the WCT.

Structure of the test (7)

What may be the basis for the suggested interpretation?

Or the WPPT?

- **Art. 16 of the WPPT:**

  (1) Contracting Parties may, in their national legislation, provide for **the same kinds of limitations and exceptions** with regard to the protection of performers and producers of phonograms **as** they provide for, in their national legislation, **in connection with the protection of copyright in literary and artistic works.**

  (2) Contacting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to **certain special cases which do not** conflict with a normal exploitation of the performance or phonogram **and do not** unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram. (Emphasis added.)

- **No, no, no and no.** All these provisions foresee **three cumulative conditions; if any of them is not fulfilled , the exception or limitation is not applicable.**

Structure of the test (8)

What may be the basis for the suggested interpretation?

- **Paragraph 85. of the Report of Main Commission No I of the 1967 Stockholm Diplomatic Conference:**

"**The Committee also adopted a proposal by the Drafting Committee** that the second condition should be placed before the first [meaning that the condition that exceptions or limitations must not conflict with a normal exploitation of works should be placed before the condition that they must not unreasonably prejudice the legitimate interest of authors], as this would afford a more logical order for the interpretation of the rule***. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author.*** Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment." (Emphasis and comments in square brackets added.)

- This **rebuts the Munich Declaration**. Since these statements – as the Report indicates –has been explicitly adopted as a basis of the adoption of Article 9(2) of the Berne Convention, its interpretation value is higher than mere "preparatory work" under Article 32 of the Vienna Convention on the Law of Treaties since it corresponds to the criteria of an agreed statement under Article 31(2) of the Vienna Convention.

Structure of the test (9)

„Test questions" concerning the alledgedly „judicious" interpretation suggested by the Munich „declarers":

- **Is an exception or limitation acceptable if it is not limited to a special case? Can it be said that, if this is the case, there is no conflict with a normal exploitation of works or objects of related rights and no unreasonable prejudice to the legitimate interests of owners of rights?**
- **Is an exception or limitation acceptable if it conflicts with a normal explanation of works or objects of related rights? Can it be said that, if this is the case, there is no unreasonable prejudice to the legitimate interests of owners of rights?**
- **Is and exception or limitation acceptable if it unreasonably prejudices the legitimate interests of owners of rights)?**

The answer, on basis of the treaty provisions, is „No" to all these questions.

Structure of the test (10)

In spite of this, **the answer of the Munich „declarers" is still „yes."** Excerpt from a commentary by three key authors of the Declaration:

„The… **Declaration aims to restore [?!] the "three step test" to its original role [?!]** as a relatively flexible standard precluding clearly unreasonable encroachments upon an author's rights without interfering unduly with the ability of legislatures and courts to respond to the challenges presented by shifting commercial and technological contexts in a fair and balanced manner. **It emphasises that the ‚test' functions as an indivisible entity** and that, accordingly, **<u>one particular ‚step' cannot function as a ‚show-stopper</u>.' [??!!]"** (C. Geiger, J. Griffiths, R. Hilty: „Towards a balanced interpretation of the ‚three-step test' in copyright law.")

- That is**,** according to this surprising view**,** **even if one of the three conditions is not met, an exception or limitations is still applicable**.

The first „step” (1)

- **Berne Art. 9(2): „in certain special cases.”**
- **TRIPS, art. 13**: [confined] „**to certain special cases**”
- **WCT Art. 10 (1): „ in certain special cases”**
- **WCT Art. 10(2):** [confined] „**to certain special cases**”
- **WPPT Art. 16(2):** confined] „**to certain special cases**”

The first „step” (2)

„Special” in two senses:

- **limited;** that is not generally applicable;

- **justified by some sound legal-political reason** (in particular by certain public interests to be balanced with the public interest of adequate protection of copyright and related rights).

- **Oxford Dictionary**: 1. "**having an individual or limited application or purpose**", 2. "containing details; precise, specific", 3."**exceptional in quality or degree; unusual; out of the ordinary**" 4. "**distinctive** in some way".
- Also reflected in the provisions of the **Berne Convention on specific exceptions** : Art. 10(1): „provided… their extent does not exceed that **justified by the purpose**” (of the quotation); Art. 10(2): „to the extent **justified by the purpose** (illustration for teaching); art. 10*bis* (2): „to the extent **justified by the** informatory **purpose**” (Emphasis added.)

The first „step” (3)

„Certain:”

- **„certain” is a synonym de „some”** (Oxford Dictionary: „some definitely, some at least, a restricted or limited number of”);
- the **French version** shows clearly the **difference between „*certains cas spéciaux*” and „*cas certains et speciaux*;” the latter would truly refer to a special criterion of certainty** (but it was not the one which had been adopted).

The WTO panel in the copyright case (**WT/DS160/R (*USA – Copyright*)), made an error by basing its interpretation on certain alternative definitions of the Oxford Dictionary that – contrary to the above-mentioned ones – are irrelevant** from the viewpoint of the three-step test: „determined, fixed, settled; not variable or fluctuating.”

It is another matter that, of course, the cases where exceptions and limitations may be applied **should be duly determined. However, the fair use and fair dealing system – with the organically developed body of case law – also correspond to this.**

The second „step” (1)

- **Berne, Art. 9(2):** „provided… **does not conflict with a normal exploitation** of the work…”

- **TRIPS, Art. 13**: „which **do not conflict with a normal exploitation** of the work…”

- „**WCT, Art. 10: (1)** „ that **do not conflict with a normal exploitation** of the work…”

  (2) „ that **do not conflict with a normal exploitation** of the work…”

- **WPPT, Art. 16(2):** which **do not conflict with a normal exploitation** of the performance or phonogram…

The second „step” (2)

„Normal exploitation”

- „**Exploitation**”: quite clear: **activity by which the owner of rights extracts the value of rights.**

- „**Normal”**: it follows from the „preparatory work” and it is also reflected in the findings of the two WTO panels that this **refers to both an empirical and a normative (or at least a semi-normative) aspect** in the sense in which the documents of the 1967 Stockholm revisions conference of the Berne Convention indicate the understanding of the countries of the Berne Union. Extracts from the working group with the proposals of which the Committee of experts preparing the Basic Proposal was in agreement: (next slide)

The second „step” (3)

- “[T]he Study Group observed that… it was obvious that **all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance** must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable.” (Emphasis added).
- The annotations to the basic proposal quoted the text proposed by the Study Group in which the embryonic form of Article 9(2) appears as follows: “However, **it shall be a matter for legislation** in the countries of the Union, having regard to the provisions of this Convention, **to limit the recognition and the exercising of** (the right of reproduction) **for specified purposes and on the condition that these purposes should not enter into economic competition with these works”** (emphasis added,Records of the 1967 Stockholm conference, p. 112.;).

The second „step” (4)

- That is, an exception or limitation conflicts with a normal exploitation if it undermines the possibility of the owners of rights of exploiting their works or objects of related right in the market in an appropriate way. **It can hardly be alleged seriously that this requires a too high level of protection for copyright and related rights.**
- It is also to be noted that this is a criterion for the application of the principle of proportionality in a stage of the application of the test **when it has been already clarified that a „special case” is involved.**
- In this way, the consideration of the applicability of an exception or limitations **takes place already in the general context of a normativity (and, in the second, „step” the question is to what extent the interests linked to an adequate protection of copyright and related rights may be limited).**

The second „step” (5)

This means that an exception or limitation must not go so far as to undermine the chances of the owners of rights on the relevant markets.

As Martin Senftleben puts it:

„[A] conflict with a normal exploitation arises **if the authors are deprived of an actual or potential market of considerable economic or practical importance**... The circle of these actual or potential markets is solely formed by **those possibilities of marketing a work which tipically constitute a major source of income** and, consequently, **belong to the economic core of copyright**.” (M. Senftleben: Copyright, Limitations and the Three-step Test, Kluwer Law International, 2004, pp. 184-189)

The second „step” (6)

It is submitted that adequate interpretation and application of the second „step” offers an appropriate basis also for solving the possible problems in connection with the key phenomenon of the „grey” area where solutions are needed to avoid unjustified conflicts between copyright protection and freedom of expression in the digital online environment. Namely, the – now quite massive – phenomenon of **mixing, pasting and transforming in other ways protected works and objects of related rights** by online users. If such tranformations, due to their nature, enter into economic competition of the works concerned, they may not be allowed as exceptions to copyright. If, however, the transformations differ so much that they do not replace the works concerned from the viewpoint of economic exploitation, free use may be justified.

The thirds „step” (1)

- **Berne Art. 9(2):** „…provided that… **does not unreasonably prejudice the legitimate interests** of the author.”
- **TRIPS Art. 13**: „…which… **do not unreasonably prejudice the legitimate interests** of the right holder.”
- **WCT Art. 10:** (1) „…that… **do not unreasonably prejudice the legitimate interests** of the author.”
  (2)”… that… **do not unreasonably prejudice the legitimate interests** of the author.”
- **WPPT Art. 16(2):**”… which **do not unreasonably prejudice the legitimate interests** of the performer or of the producer of the phonogram.”

The third „test" (2)

The concept of legitimate interests of owners of rights

- **Difference between the positions adopted by the two WTO panels** interpreting the three-step test in 2000. The copyright panel interpreted it in a **legal-positivist** manner, but the patent panel adopted a rather **normative** interpretation (TRIPS Art. 30 is an adapted version of the test also containing this concept):

  „to make sense of the term ‚legitimate interests'… that term must be defined in the way it is often used in legal discourse – as **a normative claim calling for the protection of interests that are ‚justifiiable**' in the sense that they are **supported by relevant public policies or other social norms**." (Emphasis added.)

- **The latter interpretation seems to be correct.**

The third „test” (3)

„Unreasonable prejudice”

- An expression of the **principle of proportionality** (along with the concept of „legitimate interests”).

- There is substantial link between the first „step” and the third one. The fine **calibration of an adequate balance takes place in the third „step”** between the public interest of protecting the economic and moral interests of creators and other owners of rights, on the one hand, and other legitimate interests (in particular the interests of the general public) that justify the recognition of the existence of a „special case” in the sense of the first step.

Summary on the „three-step test”

- **The „three-step test,”** if it is interpreted in accordance with what follows from the text and the negotiation history of („preparatory work”) of the relevant international norms, **is suitable to establish adequate balance between the protection of copyright and related rights and other legitimate interests**.

- **There is no need for a new “more flexible” interpretation - but simply for an adequate interpretation within the limits of flexibility determined in the treaty provisions.**

Going beyond usual „copyleft" criticism; methods used against attempts to re-establish balance (upset to the detriment of copyright)

- It is an **anachronistic** that some online intermediaries who pretended to be **advocates of a democratic and transparent consideration of possible norms** in order to re-establish the balance upset by warez sites, „file-sharing" networks specialized in organizing whole-sale infringements (and getting super rich at the detriment of creators and producers) illegal UGC platforms, etc., have chosen completely undemocratic methods. **If you legislators and governments try to work out systems menacing our business through new legal provisions against obvious illegal users of the Internet, we apply not only our technological power against you but we also organize mass anarchist actions using our customers who love free access offered by us. You will not endanger our advertisement income! We will constraint you; now we have become so powerful that we can! You must obey!**
- Attacks against SOPA and PIPA and now against ACTA.
- „Anonymous" **behaving as world dictatorship**: attacking and paralyzing legitimate websites and destroying the results of other people work by deleting information – just because it does not like something; for example action against such criminal system as Megaupload.

Hysteria generated against AFTA through spreading aggressive lies

Let us translate the message of www.stopacta.info (which should have had the address of www.stopacta.completemisinfo):
Do you understand us?! You should fight **for facebook, twitter and youtube which otherwise will disappear!!!** You should fight **against the provision of ACTA to introduce monitoring of all your e-mail!!!** You should fight against the provision of ACTA abolishing **the exception for quotation!!! We need you to tell the EP, the US Congress, the UN, the Pope in Rome, etc. that ACTA must be stoped** !!!!!!!!!!!!!!!!!!

Organizing „spontaneous" mob movements against ACTA (1)

It is, on the basis of such obviously unfounded suggestions that the "spontaneous" mob movement has been organized. A text published on www.stopacta.info in an earlier (2010) stage of the campaign against ACTA (emphasis added; note the telling reference to "net neutrality" and the protection of internet intermediaries against legal liability proposed as important demands by mass demonstrators):

"Contact your elected representatives to inform them about ACTA, and **advise them to oppose this circumvention of their powers and competency**. **Contact journalists and bloggers** and ask them to talk about it. **Blog about ACTA, link to websites** talking about it and analysing its content.

Use the Stop ACTA alert box on your website

Sign the Wellington declaration. You can **sign the Wellington declaration here. If you're in EU, help collect signatures about the Written Declaration 12.**

The Written declaration 12/2010 was initiated by the Members of European Parliament…It expresses concern about ACTA and sets clear negotiation "red lines" by declaring that the negotiated agreement **must respect** freedom of expression, privacy and **Net neutrality (by protecting Internet actors against excessive legal liability).**

The challenge is great. The more signatures that are collected, the stronger the political message of the declaration will be.

Inside or outside the Parliament, every European citizen can participate in this endeavour!

More information on how to participate on La Quadrature du Net's dedicated campaign page."

Organizing „spontaneous" mob movements against ACTA (2)

"EXAMPLE PHONECALL" on La Quadrature du Net's dedicated campaign page in the same period (emphasis added).

Here is an example phone, to help you to know how to talk to MEPs assistants:

YOU: *"Hello, I would like to talk to Mrs/Mr MEP, please."*

Assistant: "Mrs/Mr MEP is not available, I am her/his assistant. Can I help you?"

YOU: *"I am MyName, calling from MyCountry, I am very much concerned by the ACTA agreement currently under negotiation.* ***Has Mrs/Mr MEP signed the Written Declaration*** *12/2010 by MEPs Castex, Alvaro, Lambrinidis, Roithová?"*

Assistant: "I see. We had calls before. I have no time."

YOU: *"But it is very important! The whole negotiation is circumventing the democratic process and* ***could radically alter the Internet and citizens freedoms****."*

Assistant: "Don't worry. The Commission is negotiating, everything will be fine, the texts might be published soon."

YOU: "An analysis by the Commission itself shows that **current versions go beyond the EU acquis.** The ACTA agreement lets the Commission negotiate on civil and criminal sanctions. It is not just a trade agreement. **The European Parliament must show its commitment to protecting EU citizens**. Mrs/Mr MEP should really sign the declaration 12/2010"

Assistant: *"I'll tell Mrs/Mr MEP."*

YOU: *"Thank you very much for listening to me. I'll call you again shortly to know what he/she thought. Have a good day."*

Organizing „spontaneous" mob movements against ACTA (3)

EXAMPLE MAILS on La Quadrature du Net's dedicated campaign page in the same period (emphasis added)

„Dear xxx,

I am xxx, calling from xxx. I am very much concerned by the ACTA agreement currently under negotiation. Have you signed the Written Declaration 12/2010 by MEPs Castex, Alvaro, Lambrinidis, Roithová?

An analysis by the Commission itself shows that **current versions of the ACTA agreement** (carried out in secret) **go beyond the EU acquis**. ACTA lets the Commission negotiate on civil and criminal sanctions. It is not just a trade agreement**. The European Parliament must show its commitment to protecting EU citizens.**

I feel that it is right that you sign the declaration 12/2010. This is so very important! The whole negotiation is circumventing the democratic process and **could radically alter the Internet and citizens freedoms.**

To do so, you must personally sign the declaration on a table in front of the hemicycle during plenary sessions or go to the written question room at the European Parliament in Brussels.

Thank you very much for reading this. I would be very interested in knowing what you thought. Have a good day.

Yours sincerely,

Xxx"

Organizing „spontaneous" mob movements against ACTA (4)

The fear-mongering style, the absence of seriousness and the lack of honesty of the slogans of the organizers of hysterical mob movements have not changed since the 2010 wave of anti-ACTA campaigns.

Last week in a radio advertisement such aggressive nonsense about ACTA was read out in the Hungarian public radio (it must have cost a lot):

- **if you participate in a cooking course and then at home you share the recipe with your wife, you will be punished provided that ACTA is adopted**;

- **it will be illegal under ACTA to quote (!) an article in your email.**

Organizing „spontaneous" mob movements against ACTA (5)

It seems Anonymous is also very active. Some allegations on a petition website "sponsored by Anonymous" (emphasis added)

„This petition is to stop ACTA(Anti-counterfeiting Trade Agreement). The ACTA is an international treaty that will create problems such as these.
(Via http://boingboing.net/2009/11/03/secret-copyright-tre.html)
" That ISPs have to proactively police copyright on user-contributed material. This means that **it will be impossible to run a service like Flickr or YouTube or Blogger**, since hiring enough lawyers to ensure that the mountain of material uploaded every second isn't infringing will exceed **any hope of profitability**.
"That ISPs have to cut off the Internet access of accused copyright infringers or face liability. This means that **your entire family could be denied to the internet** -- and hence to civic participation, health information, education, communications, and their means of earning a living -- **if one member is accused of copyright infringement, without access to a trial or counsel. ..**
"**Mandatory prohibitions on breaking DRM, even if** doing so for a lawful purpose (e.g., **to make a work available to disabled people; for archival preservation**; because you own the copyrighted work that is locked up with DRM)"

Organizing „spontaneous" mob movements against ACTA (6)

Anonymous petition (continued):

"With this petition we hope to stop the unelected officials proposing this treaty, and keep the internet free.

"We must also remember this is just the first in may steps to take our other freedoms away."

"for more information http://www.youtube.com/watch?v=8XoFGApjhFE, http://ipjustice.org/wp/campaigns/acta/ "

Anonymous **expresses fears for the profitability of certain websites in its crusade to protect "freedom," but it** – which is a typical ultraliberal attitude – **does not regard free speech and freedom of expression as to deserve protection as soon as someone tries to express an opinion with which it does agree**. See the yesterday attack by Anonymous against the website of the Hungarian Christian Democrat Youth Alliance (IKSZ) destroying (deleting) a lot of contents. It announced that it had happened because IKSZ had expressed opinions on the current university reforms with which Anonymous did not agree. **Anonymous stated: "We do not tolerate that this organization make statements on behalf of university students." See** www.origo.hu/techbasis/20120225-az-anonymous-feltorte-a -fiatal- keresztenydemokratak-honlapját.htm

Organizing „spontaneous" (!) mob movements against ACTA (7)

Charming allegation on the website of one of the main organizers of the unfounded hysteria against ACTA (emphasis added)**:**

"**These anti-ACTA protests have** literally… **no organizers. They are the spontaneous** expression of the outrage which has been growing online, and is developing into a tremendous force."
(www.laquadrature.net/en/acta-why-we-take-to-the-streets)

Spon – ta – ne – ous!!!

Excerpts – only short excerpts - from the huge webpage of *La Quadrature du Net* entitled "How to act against ACTA?" of the same *Quadrature du Net which* alleges that there are no organizers and that the mob movement is fully "spontaneous":

"Contact your Elected Representatives. Contacting your Elected Representatives is the most useful thing you can do right now, and until the final vote in the European Parliament.

We need to act at each step of the parliamentary process in the European Parliament. Each of these steps is an occasion for us to make ourselves heard against ACTA.

This week, from the 27th of Feb to the 1st of March, it is an **ACTA week in the European Parliament**. It's a perfect opportunity to contact MEPs!
This weeks' key events (as a .pdf, and in .ics) :

~~mar 28 fév, 11:30: Press Conference by David Martin (video)~~

~~mar 28 fév, 15:00: ITRE Committee exchange of views on ACTA~~

~~mer 29 fév, 17:00: INTA Committee meeting~~

jeu 1er mars, 15:00: INTA workshop on ACTA…

To be informed about the next steps to urge Members of the European Parliament to reject ACTA, send a blank email to NOtoACTA-subscribe@laquadrature.net to subscribe to our list. We won't use your email for anything else. "

Spon – ta – ne – ous!!!

Excerpts – only short excerpts - from the huge webpage of *La Quadrature du Net* entitled "How to act against ACTA?" of the same *Quadrature du Net which* alleges that there are no organizers and that the mob movement is fully "spontaneous":

"How to call: First of all, get comfortable with the arguments (don't hesitate to try them out on your friends, your family etc.). Select a MEP representing you from the ones of the Committees working on ACTA (currently the INTA Committee) and dial their number. When you call, you will most likely reach a parliamentary assistant, they are usually bright and polite people, treat them accordingly.

„Being polite and calm, tell them about your concerns, asking them to take part in the parliamentary debates and to take a stand against ACTA. Rinse and repeat: pick another MEP's number and call them. Report back your call and the MEP's position to La Quadrature (It helps target specific MEPs during the campaign).

„Report your calls to INTA here.

„You should also call members of the LIBE, JURI and ITRE and DEVE committees and talk to them too. In general, don't hesitate to offer to call back with more information, to meet the MEP, to send documents, references, etc.

Sometimes, Parliamentary assistants will ask you to send an e-mail. Don't hesitate to call back later to check if they've read it and what they thought of it. See an example phone call of how a conversation with an MEP assistant might go. "

Spon – ta – ne – ous!!!

Excerpts – only short excerpts - from the huge webpage of *La Quadrature du Net* entitled "How to act against ACTA?" of the same *Quadrature du Net which* alleges that there are no organizers and that the mob movement is fully "spontaneous":

"Spread the message. Another important and complimentary way to act against ACTA is to inform people, making sure as many people as possible know about ACTA and how bad it is. It may sound obvious, but people can only want to act against ACTA if they are aware of its dangers.

You can spread resources by La Quadrature du Net and other, far and wide:

your personal spaces on the Internet (personal blogs, social networks, micro-blogging platforms)

mailing lists,

email,

forums

any other mean :)"

Spon – ta – ne – ous!!!

Excerpts – only short excerpts - from the huge webpage of *La Quadrature du Net* entitled "How to act against ACTA?" of the same *Quadrature du Net which* alleges that there are no organizers and that the mob movement is fully "spontaneous":

"Here are some ideas: **Write an article on your blog,**

Write an article for your school, college/university or company newspaper

Write to your newspapers asking why they aren't talking more about ACTA and telling them about ACTA

Create more videos, films, pictures, paintings against either the whole of ACTA or specific parts of the agreement

For instance, you can **create banners**, **buttons**, **illustrations against ACTA** (using images from the videos if you want) that others can use in their signatures, as avatars, to illustrate their blog articles, newspaper articles, etc. If you do so, please post a link to your banner here.

Remix and transform already produced material, and give it a new life.

For instance, to the right here is a cool infographics remix of the NO to ACTA video with RoboCopyright ACTA."

Spon – ta – ne – ous!!!

Excerpts – only short excerpts - from the huge webpage of *La Quadrature du Net* entitled "How to act against ACTA?" of the same *Quadrature du Net which* alleges that there are no organizers and that the mob movement is fully "spontaneous":

"Organise events. Organise public events at your school, university, work place, etc.

Organise a discussion about ACTA, linking it to your classes or your activity

Show the NO to ACTA video

Publicly take a stand. If you are part of an NGO, consider having it publicly denounce ACTA, and telling your members about ACTA's dangers. Contact well-known persons, celebrities or NGOs and ask them to take a stand....

Translate this page into your language

To help other people from different parts of the world act against ACTA, you can help translate this page.

Remember to always use the English version as the source for your translation, as it is the most up to date version. If you do so, remember to update the translated version often enough.

For collaborative translation and easy proofreading and correction, you can use an EtherPad such as… ie:

https://pad.lqdn.fr/p/How_to_act_against_ACTA_es." **etc., etc., etc.**

What the anti-ACTA „Academics' Opinion" is and what it is not (1)

„Opinion of European academics on the Anti-Counterfeiting Trade Agreement

(see: www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf).

The „Opinion" is not part of the anarchist campaign against AFTA. The mob movements take place on the basis of the previously mentioned aggressive misinformation, unfounded allegations and empty slogans.

The „Opinion" has been prepared *by a certain group* of (in general, "copyleft"-oriented) European academics on the basis of a thorough study.

However, there are two problems with it:

1) it may be (and in fact is) also used – misused – for the anarchist anti-ACTA lobbying campaign as a reference; and

2) the analysis and the arguments on the basis of which the Opinion

alleges that the Agreement is not in accordance with the *acquis communautaire*; and

invites the EU institutions to reject it,

are badly founded.

What the anti-ACTA „Opinion" is and what it is not (2)

Many other outstanding European academics do not agree with the „Opinion." Thus, it is far from being the opinion of THE European academics in general. In that respect, it is in the same category as the „Munich Declaration" on the „three-step test" and what is called by the drafters the „European Copyright Code" (and what, in reality, would have to be referred to only in this way: „Certain draft provisions on some less controversial general aspects of copyright law prepared by a group of European academics – with whom many other highly respected European academics do not agree – for a imaginary European Copyright Code, without touching upon the truly important, complex and urgent copyright issues the EU has to deal with at present").

What the anti-ACTA „Opinion" is and what it is not (3)

The European Commission's polite and correct answer:

„After close examination of the Opinion, we believe that **the opinion fails to demonstrate, in a convincing manner, that ACTA is not in line with the relevant Community *acquis* or that it raises legitimate concerns as regards certain fundamental rights**.

„While the Opinion shows that **the rules of ACTA are *not entirely similar to* the corresponding EU law, this does not imply that ACTA is *incompatible* with EU law.**

„Many of the Opinion's conclusions appear to be based on the fact that **ACTA is written in more general terms than EU legislation**, or that **the exceptions, procedural guarantees and safeguards in ACTA are less precise, and less specific than those of the relevant EU legislation.** However, it is understandable that an international agreement negotiated by parties with different legal traditions will be drafted in more general terms than is the case for EU legislation. **Nevertheless, ACTA does, in fact, contain the necessary safeguards to allow its Parties, including the EU, to strike an appropriate balance between all the rights and interests involved**. (Continues.)

What the anti-ACTA „Opinion" is and what it is not (4)

Commission (cont.):

„Obviously, **not all ACTA parties share exactly the same view** on how to put this balance into practice, **which is why**, rather than setting out every detail, **ACTA provides the Parties with the necessary flexibility** to establish a balance which takes account of their economic, political and social objectives, as well as their legal traditions.

„As a result, **ACTA is fully compatible with the relevant EU law**, even if it is not drafted in exactly the same terms, contains exceptions that are more precise and more specific than ACTA and strikes a more refined balance than the one within ACTA. This means that, **when ACTA is adopted by the EU, the relevant EU *acquis* will not have to be modified, and can not be challenged by other parties for failing to meet the standards ACTA sets**."

(See: Commission Service Working Paper: „Comments on the „Opinion of European Academics on „Anti-Conterfeiting Trade Agreement" at http://trade.ec.europa.en/doclib/2011/april/tradoc_147853.doc).

What the anti-ACTA „Opinion" is and what it is not (5)

- The author of this presentation made a detailed analysis of ACTA to be presented at the **Annual Conference on European Copyright Law organized by the Academy of European Law and held in Brussels on May 19 and 20, 2011.**

- **The analysis had been made before the publication of the above-quoted answer of the European Commission but it had reached in substance the same conclusions. In the following page, the front page of the ppt. presentation is reproduced. The entire detailed analysis is available at request.**

ANNUAL CONFERENCE ON EUROPEAN COPYRIGHT LAW

Brussels, 19-20 May, 2011

organized by the Academy of European Law

Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the EU Legal System

Dr. Mihály Ficsor,
President, Hungarian Copyright Council

The context: EU copyright – and, in general, IP – policy

As regards the EU's attitude towards ACTA **much depends on what kind of copyright policy, and in general IP policy**, if any**, the EU adopts and applies.**

It is submitted that**, Europe's traditions, its capacity of creating and producing copyright – and in general IP – goods and services, and the potential role of such goods and services in its trade and cultural relations with the rest of the world, does dictate a well balanced, but effective copyright – and, in general, IP – protection and enforcement system**. **A well balanced system** but not just against (which is so fashionable now), but **also in favor, of copyright, and in general IP rights**.

It is also submitted therefore, that **a strong ACTA – even stronger than what has emerged from the negotiations – would have been in Europe's interest**.

Such a stronger ACTA **should have been adopted by the EU bodies even if it had required modifying the EU rules** (which by now have, in fact, turned out to be insufficient, reflecting an absence of balance to the detriment of owners of rights). **The final weaker version of ACTA still represents – at the international level – certain due steps in the right direction,** which hopefully will still be followed by others, and, thus, **its adoption would be fully justified even if it required improvement of the *acquis*.**

However, in its present form, ACTA does <u>not</u> require modification of the *acquis*.

Surprising retreat by the European Commission

News on ZDNet on Febraury 22, 2012

‚The European Commission is to refer the Anti-Counterfeiting Trade Agreement to Europe's highest court to check that ACTA really does comply with existing EU laws.

ACTA will be referred to the European Court of Justice to check that it complies with existing EU laws.

Trade commissioner Karel De Gucht announced the move on Wednesday, saying he shared protestors' concerns about freedoms and rights. He said the referral to the European Court of Justice (ECJ) would cut through the "fog of uncertainty" surrounding the pact.

''I am glad to say that this morning my fellow commissioners have discussed and agreed in general with my proposal to refer the ACTA agreement to the European Court of Justice," De Gucht said in a statement. "We are planning to ask Europe's highest court to assess whether ACTA is incompatible — in any way — with the EU's fundamental rights and freedoms, such as freedom of expression and information, or data protection and the right to property, in case of intellectual property."

An EU official who declined to be named told ZDNet UK it was Viviane Reding, the justice commissioner, who had pushed for ACTA to be referred to the ECJ. In a separate statement (PDF), Reding said she is "against all attempts to block internet websites".

"Even though the text of the ACTA agreement does not provide for new rules compared to today's legal situation in Europe, I understand that many people are worried about how ACTA would be implemented," she said.’

Vivian Reding's strange statement

Vivian Reding statement (http://ec.europa.eu/commission_2010-2014/reding/pdf/quote_statement_en.pdf. ; emphasis added):

1. For the European Union, freedom of expression and freedom of information, regardless by which technological means and regardless of frontiers, are fundamental rights. They are enshrined in the EU's Charter of Fundamental Rights, which takes precedence over all EU legislation, including international agreements concluded by the EU. **The European Union therefore stands for a freely accessible Internet and for freedom of expression and freedom of information via the Internet.**

2. Intellectual property is also a fundamental right recognised by the EU's Charter of Fundamental Rights. It ensures that artistic creations by authors are protected. However, this is not an absolute fundamental right. European policy therefore should aim at mutually balancing the respect for both fundamental rights, without calling into question their essence. Freedom of information and intellectual property rights must not be enemies; they should be partners! (continues)

Vivian Reding's strange statement

3. **Copyright protection can never be a justification for eliminating freedom of expression or freedom of information**. **That is why for me, blocking the Internet is never an option.** Instead, **we need to find new, more modern and more effective ways in Europe to protect artistic creations** that take account of technological developments and the freedoms of the Internet. The promotion of legal offers, including across borders, should become a priority for policy-makers.

4. This is a position that **I have previously defended** in the debate on the EU Telecoms Package in 2009. **Some politicians wanted to include in this legislation provisions that would have authorised a "three-strikes solution" to protect copyright**. **I opposed this** at the time. In spite of significant political pressure, **I instead supported** – in the name of the European Commission and in close alliance with the European Parliament – the inclusion of an **"Internet freedom provision"** in the final text of this legislation. This "Internet freedom provision" represents a great victory. (continues)

Vivian Reding's strange statement

This situation can and must not be changed by the ACTA agreement, which has been negotiated, as regards criminal enforcement measures, by the rotating EU Council Presidency and is currently under public discussion in the European Parliament and in the national parliaments of the EU Member States. As **I said, I am against all attempts to block Internet websites**. Even though the text of the ACTA agreement does not provide for new rules compared to today's legal situation in Europe, I understand that many people are worried about how ACTA would be implemented. **The European Commission has therefore decided today to ask the European Court of Justice for a legal opinion to clarify that the ACTA agreement and its implementation must be fully compatible with freedom of expression and freedom of the Internet.**

Vivian Reding's strange statement

This statement strange for various reasons; and also quite frightening for a EU citizen who may be stupefied to see that things seem to take place and decisions seem to be taken in this way in the non-elected body – but still one of the most powerful bodies – of the EU.

He or she may be stupefied

- **by the obvious signs that some members of the Commission seem to generate weird politically- and ideologically-based infight according to party lines;**
- **by the ego-centric dictatorial style presenting a member of the Commission herself above everybody else: repeating „for me.. is never an option," „I… have defended," „ I opposed," „I… supported," „I said," „I am against,"** etc. **– and then stating that** „[**t]he European Commission has therefore** [because she did this, that and that] **decided" so and so.; and**
- **first all, by the contents of the statement.**

Vivian Reding's strange statement

Any EU citizen for whom the respect for the rule of law and democratic principles, such as the separation of powers and the independence of courts, are important values may be shocked by the contents of this statement – which is particularly strange because it has been made by that member of the EC who is in charge of the justice portfolio.

Referring ACTA to the CJEU does not seem to be truly necessary. Probably it has not taken place for substantive reasons but rather just in order to defuse the stupid mob movement artificially generated not simply by liberal (as Reding, which may still be OK, of course) but by hysterio-liberal and anarchist forces, with the technological, economic and lobbying power of anti-copyright groups of IT industries and certain online intermediaries behind them. **However, it may still be regarded a reasonable step taking into account that many misled people have participated in the anti-ACTA movements and this may be one of the means to persuade them that they have been badly misled.**

Vivian Reding's strange statement

However, Reding has done at least three things, each of which is hardly in accordance with her post as Commissioner in charge of justice.

First, she has not simply indicated that the CJEU is to give opinion on the question of whether or not ACTA is in accordance with EU law and fundamental rights and freedoms**,** but **she quite clearly intends to influence the Court's decision by outlining what it should contain.**

Secondly, by doing so, she states that the number of court rulings in the various EU Member States which has ordered the blocking of rogue websites (such as Pirate Bay) **are all wrong** (and thus **the CJEU's decision will only be accaptable if it will correspond to her opinion** according to which it must not be allowed to block any internet website).

Thirdly, by doing so, she totally misinterprets what she characterizes as the „Internet freedom provision" and what is certainly Article 3a of the Telecoms Package and, at the same time, **she revises and condemns the decision of the French Supreme Court (*Cour de cassation*)** which ruled under what conditions the HADOPI law is in accordance (but under those conditions it is) with the constitution of that country and with fundamental rights and freedoms.

Vivian Reding's strange statement

What Reding calls „Internet freedom provision" reads as follows (emphasis added):

"1.3a. **Measures taken by Member States regarding end-users' access to or use of services and applications through electronic communications networks** shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.

„Any of these measures regarding end-user's access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms **may only be imposed if** they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process."

Vivian Reding's strange statement

At first sight Vivian Reding seems to be satisfied with what she calls „Internet freedom provision" and to be proud that – as she states – it has been adopted at the result of her intervention.

However, she may not have read it carefully or may have forgotten what it contains, and **it is** even more **probable that she does not agree with it anymore**. This is so since Article 1.3a. of the Telecoms Package **does not say anything what would be close to what she says.**

It **does not suggest that there is an „Internet freedom" to do anything against anybody, anything, any rights and any values without consequences**.

And **it does not say or suggest,** in particular, **that blocking certain obviously illegal websites or applying graduated-response measures against repeat infringers** like under HADPOPI consisting in suspending Internet accounts for a certain period **is not allowed**. **It provides for the conditions under which this is allowed**.

Now Vivian Reding instructs the CJEU to adopt a ruling according to which never – under no due procedure – it is allowed to apply certain measures which are allowed, under due conditions, in accordance with „her" „Internet freedom provision."

Some questions in the name of common sense and sanity

- Is it a responsible policy to give in to populist preasure generated by irresponsible lobbyists through spreading completely false and primitive slogans?

- Is it sure that, if a big misled crowd repeats the same lie and enthusiastically supports the same stupidity, then that lie becomes information on which political decisions may be based and stupidity becomes acceptable and guidance also for statesmen?

- **Is not it cynical to allow owners of rights to be stripped of any means to act in accordance with their basic rights and justified interests and then to urge them to act?**

- **Can it be said it with any shade of seriousness that somebody who puts a plastic band on his mouth with the inscription „Stop ACTA!" cannot express anything on the earth he wants just due to ACTA?**

May not it be presumed that someone is not in a sober state of mind if he or she…

…believes that it is a denial of his „freedom of expression" if he cannot get access immediately and free of charge to any freshly released film and to anything else through illegal websites?

…is of the view that „freedom of access to information and knowledge" also includes the right to know who is the killer at the end of a thriller and, on this basis, thinks that he has a right to have free access to the entire film or novel?

…alleges that those creators and producers should be condemned as greedy parasites who would like to get back their creative and financial investments by protecting and enforcing their rights and not the operators of rogue websites who are specialized in making available the works and productions of those creators and producers „free of charge" and becoming extremely rich – as one of the favorites of „Anonymous," the fat Kim Dotcom (Kim Schmitz) – through collecting huge amounts of advertisement money attracted by the many visitors of such websites (visitors who choose such websites rather than any website where they would have to pay no matter how reasonably small counter-value for those works and objects of related rights)?

Three men to help us escape from the histerio-liberal/anarchist lunatic asylum

Thomas Malcolm Muggeridge (1903 – 1990), English journalist, media personalility and satirist:

"Never forget that only dead fish swim with the stream"

Three men to help us escape from the ultraliberal lunatic asylum

Francis Gurry, Director General of WIPO, about the future of copyright on the Internet at the „Blue Sky Conference" in Sidney in February 2011:

„It is a question that **implies a series of balances**: between **availability**, on the one hand, **and control of the distribution of works** as a means of extracting value, on the other hand; between **consumers and producers**; between **the interests of society and those of the individual creator**; and between the **short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture**."

„**Recognizing the limitation of law, and its inability to provide a comprehensive answer, should not mean that we abandon** it…I believe that **the question of… the responsibility of intermediaries is paramount.** The position of intermediaries is key."

Three men to help us escape from the ultraliberal lunatic asylum

- **About the simplistic idea of certain academics that „copying, pasting, remixing" may be presented as a serious form of culture , fulfilling the needs of the Mankind in the XXIst century.**
- **Response by Umberto Eco writing about books as a symbol of everything that is more than just such simplistic – rather childish – form of „creativity:"**

  „A book offers us a text which, while being open to multiple interpretations, tells us something that cannot be modified. Suppose you are reading Tolstoy's *War and Peace*: you desperately wish that Natasha will not accept the courtship of that miserable scoundrel Anatolij; you desperately wish that the marvellous person who is Prince Andrej will not die, and that he and Natasha will live together forever. If you had *War and Peace* on a hypertextual and interactive CD-ROM, you could rewrite your own story according to your desires; you could invent innumerable "War and Peaces", where Pierre Besuchov succeeds in killing Napoleon, or, according to your penchants, Napoleon definitely defeats General Kutusov…(continues)

Three men to help us escape from the ultraliberal lunatic asylum

Umberto Eco (continued)

Alas, with a… book…we cannot do this. We are obliged to accept fate and to realise that we are unable to change destiny. A hypertextual and interactive novel allows us to practice freedom and creativity, and I hope that such inventive activity will be implemented in the schools of the future. But the already and definitely written novel *War and Peace* does not confront us with the unlimited possibilities of our imagination, but with the severe laws governing life and death."

(Umberto Eco: „The Future of the Book")

THANK YOU
FOR YOUR ATTENTION