

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

Elena Jankoska
Skopje, Republika Macedonii

Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment

(Ograniczenia praw autorskich i ich wpływ na egzekwowanie praw autorskich w środowisku cyfrowym)

Streszczenie

W artykule omówiony został problem ograniczeń prawa autorskiego i ich wpływ na jego egzekwowanie w środowisku cyfrowym, przy czym główna uwaga została poświęcona realizacji prawa autorskiego w sferze prywatnej. Celem opracowania był nie tylko przegląd problematyki, ale także zaproponowanie możliwych rozwiązań co do egzekwowania prawa autorskiego w nowoczesnych mediach. Oprócz analizy aktualnego stanu prawnego dotyczącego regulacji prawnych w zakresie prawa autorskiego omówiono także środki i metody jego realizacji w środowisku cyfrowym, pozytywny i negatywny wpływ na społeczeństwo oraz jego rozwój. Porównano także najważniejsze europejskie i amerykańskie uregulowania legislacyjne w zakresie prawa autorskiego w środowisku cyfrowym.

Introduction

Technological and scientific development that has begun at the end of the 20th century and continued throughout the beginning of the 21st, brought about changes in the everyday life, in the way people perceive the world around them as well as in the way people think. These changes further contributed to changing the manner of doing business, so the fluctuation from material-based economy into knowledge-based economy, it self being a consequence of the fast development, further altered of the world as we knew it. Since knowledge is an immaterial, intangible asset in our present economy, it is a subject to a rather different regulation which has slowly but surely entered and tends to become predominant factor in the everyday life.

Historically, copyright has been challenged several times by the appearance of new technologies but relatively quickly got adjusted to them and went on serving its purposes. Lately, with the rapid expansion of the digital technology, copyright seems to be losing its path. The digital technology challenges copyright to the extent that instead promoting development it is actually preventing it since the well-established principles of copyright in the “offline environment” when applied online

Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58

might render almost every Internet user a criminal! And the further the copyright develops the technology does that many a times faster. In order to suitably face these challenges, copyright limitations might play the crucial role and if properly adjusted could provide the proper copyright framework to serve its purposes once again.

The focus of this paper is on the limitations of copyright, particularly the limitation for private use, and its impact on the copyright enforcement in digital environment. Its purpose is to give an overview and possible suggestions for the copyright enforcement in the digital environment. The paper includes analyse of the current and proposed legal copyright framework, the measures and methods used to enforce copyright in the digital environment, as well as its positive and negative effects on the society and its development. In addition, it briefly deals with comparison of relevant international and particularly European and some of the US legislation regulating or aiming to regulate the copyright in the digital environment.

Digital Copyright Exceptions and Limitations

It is very well known that most innovation occurs by building on preceding technologies or existing knowledge, which emphasises the crucial role access to knowledge plays in the achievement of copyright's fundamental goals. Limitations and exceptions to copyright are considered to be mechanisms of access, of creating balance inside copyright and contribute to the dissemination of knowledge, essential for variety of human activities and values.¹ They can be used to simplify the access to books and other educational material and open up rapid technological advances in information and communication technologies that in turn, as transformative means of the processes of production dissemination and storage of information, challenge the copyright internal balance. Since globalisation increases the need for innovation and knowledge dissemination, limitation and exceptions to copyright need fit the newly emerged conditions since the unlimited exercise of exclusive rights by copyright holders without corresponding and appropriate limitations has serious adverse long-term implications not only for development priorities, but indeed for the creation and innovation process itself.²

The very purpose of copyright is not just to provide protection to authors but also to give them an incentive to create new and innovative works which further contribute to the development of the

¹ P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (2008). Available at <http://www.ivir.nl/publicaties/hughholtz/finalreport2008.pdf>, last visited on May 17th, 2012

² *Supra* note 28

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

society as a whole. However, if these rights were not limited in certain way, they wouldn't have served its purpose properly.

The granting of exclusive rights means granting of monopolies. In an era when the market relies on competition and the economic tendency is to provide as competitive markets as possible for the consumers to have better choice, to have competitive industries which provide the society with high quality goods and as low as possible prices, granting of monopolies seems out of place. But given the nature of intellectual works and their “non-excludable” and “non-rival” nature³, the granting of monopoly rights is the most convenient manner of providing their creators with the possibility to economically exploit their works and profit from it.

Limitations and exceptions, in a way, are the borders of copyright protection, the borders of the intellectual monopoly. In addition, their purpose is to further contribute to the growth of our society by leaving some of the uses of copyrighted works out of the granted protection. Copyright exceptions serve the purpose of ensuring that the protection of exclusive rights in copyrighted works does not harm the public interest.⁴ This is because copyrights “are limited in nature and must ultimately serve the public good.”⁵

This means that copyrighted works can be used by the public without right holders' permission. The Berne Convention anticipates an exception from the copyright when it comes to reproduction 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.”⁶ This exception is contained in every international document regulating the copyright and related rights protection including Agreement on Trade-Related Aspects of Intellectual Property Rights, the WIPO Copyright Treaty (Article 10), the WIPO Performances and Phonograms Treaty, the Directive on the legal protection of computer programs (Article 6(3)), the EU Database Directive (Article 6(3)), and the EU Copyright Directive (Article 5(5)). This is known as the “three step test” which is applied to a certain use of protected work regarded as a use falling under the scope of limitations of copyright i.e. use for which no permission or licencing is needed from the author. However, by acting as merely the agents of copyright holders' interest, the architects of the three-step test might have

³ Being non-excludable and non-rival goods refers to the fact that, unlike tangible goods, intangible goods do not exclude one from the usage of a good that is used by somebody else, i.e. if one listens to MP3 song and other makes a copy of it, the first is not deprived of possession of the song, given that content is the product in question, not the carrier of the sound.

⁴ UNCTAD-ICTSD, Resource Book on TRIPS and Development 196 (2005)

⁵ *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1029 (1994)

⁶ Article 9(2) of the Bern Convention.

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

swept matters concerning public interest under the rug of their negotiating table. This places at risk the set of public interest-oriented copyright limitations that have been traditionally adopted in national copyright systems.⁷

Limitations in Europe vary from country to country because it is left to the national legislators to decide which limitations they incorporate in their national laws, which leaves space for broad disharmony between the copyright laws of the European countries. On the other hand, in the United States copyright law the limitations of copyright are included under the doctrine “fair use” and it comprises similar uses to those described by the limitations in Europe.

The fair use doctrine was first announced in U.S. copyright law by *Folsom v. Marsh*.⁸ Over one hundred years of judicial development and commentary on the nature of the fair use doctrine, however, has not produced a consistent and clear-cut definition of the doctrine, giving rise to a “long controversy over the related problems of fair use.”⁹ This judicially-made doctrine was given express statutory recognition in the U.S. Copyright Act in 1976.

Other common law countries use similar doctrine known as “fair dealing”. Limitations and exceptions are provided for the purposes of education, quotation, criticism, research and private use, among others and exactly these uses, upon which our society has its chance to develop and create future creator and masterminds that are to further develop the society in the future, are being threatened to be inaccessible by the means employed to regulate copyright protection in the digital environment.

Copyright law and its doctrine have lived to see many changes in the process of creativity and have adapted to them to continuously serve their purpose. But these last decades, marked by the digital revolution and the Internet, have spurred many inconsistencies in the copyright law that seem to be growing every day.

⁷ Sarah E. Henry, *The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17 U.S.C. § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement?*, 20 PENN ST. INT’L L. REV. 301, 324 (2001)

⁸ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985)

⁹ H.R. REP. NO. 94-1476, at 65 (1976), as reprinted in 1976 U.S.C.C.A.N. 5109, 5679 (“Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.”).

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

Limitations and “three-step-test” in Digital Environment

In a knowledge-based society, the unrestricted access to information becomes crucial point for the development and advancement on every level of the social life. The exclusive rights granted to the copyright holders hamper such access except when it is covered by a copyright exception. These exceptions concern the right to reproduction which, of course, is an exclusive right to the copyright holder. The exceptions are even further restricted by the ‘three step test’.

Historically, the three-step test was generally designed to shield authors’ reproduction rights under the Berne Convention. Yet, with the recent proliferation of international, regional, and bilateral treaties associated with copyright protection, the three-step test has been hailed as the panacea for measuring the legality of all limitations on copyright.¹⁰ Three-step test is applied in a cumulative manner and thus the violation of any condition set forth therein would result in invalidation of the copyright limitation concerned. It states that Member States shall confine limitations and exceptions (1) to “certain special cases,” (2) “which do not conflict with a normal exploitation of the work,” and (3) which “do not unreasonably prejudice the legitimate interests of the right holder.” As has been noted by many commentators, a restrictive approach to the “three-step test” risks paralysing the development of copyright exceptions and harming the public interest in the digital environment.¹¹

The permission to use a work without prior authorization given by the national law maker can ultimately be withdrawn by the court on the grounds that the use at issue supposedly conflicts with the three-step test of the Information Society Directive.¹² As a result, the legal security that a

¹⁰ Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, Northwestern Journal of Technology and Intellectual Property, Vol. 5, p. 265, 2007; Berkman Center Research Publication No. 2007-6. Available at SSRN: <http://ssrn.com/abstract=1021027>

¹¹ See, for example, Christophe Geiger, *From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-Step Test* (2007) EIPR 486; Kamiel Koelman, *Fixing the Three-Step Test* (2006) EIPR 407; Christophe Geiger, Jonathan Griffiths & Reto Hilty, *Towards a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law* (2008) EIPR 489.

¹² For an overview of the application of the three-step test by national judges, see Jonathan Griffiths, *The ‘Three-Step Test’ in European Copyright Law - Problems and Solutions* (September 22, 2009). Queen Mary School of Law Legal Studies Research Paper No. 31/2009. Available at SSRN: <http://ssrn.com/abstract=1476968>; Martin Senftleben, *Bridging the Differences between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine* (June 15, 2010). Journal of the Copyright Society of the U.S.A., Vol. 57, No. 3, pp. 521-552, Spring 2010. Available at SSRN: <http://ssrn.com/abstract=1723902>. The Court of Justice EU itself referred to the three-step test in CJEU, 16 July 2009, case C-5/08, *Infopaq International vs. Danske Dagblades Forening*, para. 58; CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League vs. QC Leisure*, para. 181.

Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment „Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58

structure of circumscribed limitations and exceptions might offer is severely undermined.¹³ The three-step test wields the power to strike down copyright limitations that promote public interest and copyright limitations made vulnerable by the three-step test include the U.S. fair use doctrine, the copyright misuse doctrine, the U.K. public interest defence, and the private use exemption and reverse engineering exemption available in almost all jurisdictions.¹⁴

Based on the fact that the Internet and all digital technology function on the principle of making copies, transient or permanent, the copyright problem is further enlarged. Having this in mind, today the EU Copyright Directive 2001/29 (“EC Copyright Directive”) incorporates a provision, which stands as a single compulsory limitation of copyright, that is, an exception to the reproduction right regarding transient or incidental reproduction forming an integral and essential part of technological process.¹⁵ More importantly, the Directive encourages domestic courts in EU members to directly invoke the three-step test when dealing with any disputes associated with copyright limitations. Consequently, courts in the Netherlands¹⁶ and France¹⁷ have directly applied the three-step test.

The main problem in the digital environment occurs when the right to reproduction gets limited by the right to make reproduction for personal use. This limitation has led to much debate on the subject of downloading files for personal use. If applied in the digital world, it means that every copy made on the Internet could be considered a “personal use copy” and as such covered by copyright limitation. On the other hand, the copyright holders suffer financial losses because users wouldn’t buy their product if they could have them for free under the cloak of copyright limitation. This is how the current, much debated *misbalance* between the interests of copyright holders and those of users occurs. Limitations need adjustments, however, that doesn’t mean that they should be completely annihilated. Or should they be?

¹³ P. Bernt Hugenholtz, and Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities* (February 29, 2012). Amsterdam Law School Research Paper No. 2012-39; Institute for Information Law Research Paper No. 2012-33. Available at SSRN: <http://ssrn.com/abstract=2013239>

¹⁴ *Supra* note 38

¹⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10 of 22 June 2001.

¹⁶ *De Nederlandse Dagbladders v. the Netherlands*, Court of the Hague, 2 March 2005, Case No. 192880 (Neth.), ¶ 15 (holding that copyright limitation carved out in Dutch copyright law should be in line with the three step test).

¹⁷ Cass. Ie civ., Feb. 28, 2006, Bull. civ. I, No. 824. For a comment on the decision as it stood before the Court de cassation quashed the motion, see Christophe Geiger, *The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment*, 37 IIC; INT’L REV. OF INTELL. PROP. & COMPETITION L. 74 (2006).

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

Even though limitations are considered to be the very vehicle of striking the balance between the different interests that does not seem to apply in digital environment, especially when it comes to file-sharing. Seen as the ultimate crime in the digital world, file-sharing has induced enactment of much international and national legislation aiming at its prevention.

The biggest file-sharing website today is the Swedish Pirate Bay that drew lot of attention when its organizers were accused and charged for copyright infringement. One of them was even sentenced to one-year imprisonment which in turned provoked the formation of the Swedish political Pirate Party. As opposition, many social movements have occurred to defend this activity conceived even as a human right to share information and knowledge. The formation of the Swedish political Pirate Party in 2006 was just the beginning followed by the formation of many other national pirate parties and groups across the world, including Austria, Denmark, Finland, Germany, Ireland, the Netherlands, Poland, and Spain. On 18th April 2010 on a diplomatic conference held in Brussels was formed the Pirate Parties International (PPI), an apolitical movement fighting for increased freedom in file sharing.¹⁸

However, file sharing does not only concern the right to reproduction because when a file is downloaded at the same time it is being uploaded, from where the concept of sharing originates, and as such endangers the authors' exclusive right of communication or making available to the public. So this activity infringes not one but at least two exclusive rights. While the process of downloading can be justified as making copies for private or domestic use under the limitation of copyright, even if the source is an illegal one, the uploading of the file falls under no scope of limitation. It is difficult for anyone to understand why it is legal to lend a friend a book, but not a digital music file. The technology of file-sharing does not really comply with the copyright regulation. The copyright legislation is adapting to the new challenges but is not yet achieving the desired results since the balance between the interests of the copyright holders and those of the users is not yet restored. The fact is that copyright has to be protected but the current legislation gives rise to many conflicts soon to explode. These conflicts actually represent the historical conflict between law and technology and the time is more than ripe for them to be solved when it comes to copyright.

¹⁸ *The Pirate International is born*, available at <http://www.presseurop.eu/en/content/news-brief-cover/234921-pirate-international-born>, last visited on May 8th, 2012

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

Collective management

When copyright holders first faced the technologies that facilitated home reproduction of copyright materials and sought legal protection against such uses, many countries around the world chose to limit the reproduction right and to "downgrade" its exclusive nature to a right of equitable remuneration.¹⁹ Levies are considered to be equitable remuneration for private copying and are due to be paid with the price of the copying machines, recording equipment and blank sound or video carriers. This right is administered collectively by collecting societies. Levies were reasonable choice since under such circumstances exclusive right of reproduction couldn't be enforced without serious interference with the privacy of consumers.

There are divided opinions regarding introduction of levies so as to regulate the reproduction of copyrighted works in digital environment. Whereas in the analogue environment they have played suitable role in the enforcement of copyright diminishing the damages done to creators with the reproductions of their works for private uses, some consider that in the digital environment this kind of regulation would not suffice.²⁰

Equipment and hardware manufacturers advocate "phasing levies out" and their replacement by DRMs in the digital environment since private copying levies put an undue burden on their price calculation negatively impacting their competitiveness. Big corporate right holders, such as phonogram producers and film producers, also prefer DRMs to levy systems, as applying DRM systems would give them more control over certain uses and could facilitate the deployment of new business models.

However, if we consider the current damages suffered by the creators and caused by the illicit reproduction of their works through the file-sharing networks, the introduction of digital copyright levies does not seem to sound as such a bad idea.

¹⁹ Jörg Reinbothe, *Private Copying, Levies and DRMs against the Background of the EU Copyright Framework*, DRM Levies Conference, 8th September 2003. Available at http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm#drmsystems, last visited on May 18th, 2012

²⁰ Bart Schermer, *Why a download levy is a really bad idea*, available at http://www.futureofcopyright.com/home/blog-post/2012/01/06/why-a-download-levy-is-a-really-bad-idea.html?no_cache=1&cHash=a82d0ceb08f445c2078239b4aab6de21, last visited on May 8th, 2012

Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment „Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58

For the users of file-sharing networks this might not sound attractive at all as they consider their actions to be justified considering the Internet as a free space to share. Others feel that statutory exceptions for private copying combined with levies better safeguard consumer interests than exclusive rights administered through DRMs.

The notion of collective management of digital copyright is not new and many authors²¹ have discussed it from many angles even proposed bipolar copyright systems²² that are suggested to be suitable for providing the right holders with the possibility of taking part or opting out of collective management systems.

Many Member States hold that collectively administered remuneration rights for private copying are more beneficial in particular for small right holders than exclusive rights that the latter cannot exploit individually. In this sense, levies are the means to allow all right holders (big and small) to participate in the market and to ensure "equitable remuneration".²³

The discussions on the balance between the interests of the right holders and the public are very widespread and the emphasis is always on its very importance for the maintenance of the copyright system and its functionality, however, it seems that this balance is considered to be achieved by further strengthening of the copyright protection. Whenever right holders consider their rights to be endangered the copyright protection is being enhanced, by providing longer copyright protection or internationally legalising the protection of technological measures of protection.²⁴ This gets even more peculiar when we consider that these international instruments protecting the right of the authors for the purpose of giving them incentive to create further, don't bother restricting or in any way influencing the contractual freedom that the parties have. Authors are considered to be the "weak" party when it comes to having the public as their opposition and so are protected by copyright laws in order to provide them with fair conditions. The problem is that authors very often are deprived of their legal rights by being compelled to sign contracts by which they delegate their

²¹ Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-peer File Sharing*, (17 Harv. J.L. & Tech. 1, 19–22. 2003); Jessica D. Litman, *Sharing and Stealing*, (Hastings Communications and Entertainment Law Journal, Vol. 27 2004) ; Alexander Peukert, *A bipolar copyright system for the digital network environment* (Hastings Communications and Entertainment Law Journal, Vol. 28, No. 1. 2005) Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=801124, last visited on May 18th, 2012

²² Alexander Peukert, "A bipolar copyright system for the digital network environment" in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Pub 2009)

²³ *Supra* note 77

²⁴ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (The Penguin Press HC, 2004). Available at http://www.jus.uio.no/sisu/free_culture.lawrence_lessig/portrait.pdf, last visited May 8th, 2012

Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment „Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58

rights to publishers or producers i.e. exploiters that in those cases are the strong parties having modelled the international treaties by their liking with the help of their powerful means of intensive and successful lobbying.²⁵

Collecting societies collect levies that are legally imposed for use of copyrighted works and pay royalties to authors of the works exploited. The publishers, distributors or other entities being the exploiters but not right owners per se are excluded from payment of royalties collected as levies by collecting societies. Levies are regulated by national laws and remuneration must be shared with all right holders which are subject to national treatment, however, the differences between the national levy systems are considered have a negative impact on the functioning of the Internal Market in protected goods and services.²⁶

In February 2014 the European parliament adopted a new EU Collective Management Directive²⁷ aiming at more suitable copyright protection in the digital environment and way of overcoming the issues copyright holders were facing so far.

Online publication provided authors with their long lost share of income that in the physical environment belongs to their publishers. They publish their works on their own and licence their rights only to the service provider. With the new collective management directive authors are enabled licencing on multi-territorial basis.

Conclusion

As a means to provide the balance of interest, copyright limitations, in particular the private use limitation, do not offer the appropriate flexibility they ought to. If interpreted to broad, copyright fails to ensure the protection it guarantees. If interpreted to narrow, copyright protection harms the public interest for access to copyrighted works. With the current trend being the narrow interpretation of limitations, on one hand, and “copy-based” technological development, on the other hand, the possibilities to infringe copyright in the digital environment are immense. Consequently, the need to enforce copyright grows with that same conflicting trend the world is facing.

²⁵ Sherri L. Burr, *Entertainment Law in a Nutshell (In a Nutshell)* (West Publishing 2nd ed. 2007)

²⁶ *Supra* note 77

²⁷ Available at http://ec.europa.eu/internal_market/copyright/management/index_en.htm

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

The Internet and the most popular file-sharing peer-to-peer networking proved to be of very conflicting nature in relation to the existing copyright nature. On one hand, strong industries, like the entertainment industry, software industry and music industry demand stronger copyright protection so as to protect their investment in the copyrighted works being shared through the P2P networks for free. On the other hand, being as wide and rich of information, the Internet is not conceivable to be restrained by copyright law or any other laws, at least when it comes to access to works placed online. Yet, the improvements or refinements of the existing copyright law tend to make it as restricted as possible. Christophe Geiger argues that the investigation of the basis of intellectual property shows that the classical justifications have been displaced in favour of protection of investment and that the balance within the system is threatening to break in favour of exploiters of IP rights.²⁸

The digital technology is the most perfect offspring of our society and while fighting for its existence it improves and advances. The attempt to impose liability to the Internet service providers (ISPs) for allowing the users an access to illicit websites was unsuccessful. The European Court of Justice decided that the providers are not liable and that they must not track and block users' activities on the internet because such actions deprive the users their human right of privacy. But even if this decision was not, in a way, in favour of the technology, its advancement is so rapid that soon the courts would, and still might, face similar problems involving technology that is way ahead of the law. Whether that is going to be some kind of parallel internet or non-server-connected network, not traceable by the known mechanisms, "technology" will tell.

The means to enforce copyright in the digital environment grow more restrictive every day and if once the burden of liability for copyright infringement was carried only by the ISPs, today the tendency is to relocate that burden and impose it on any single user on the Internet considered to be liable for copyright infringement. And with narrow copyright limitations, the acts of infringement could be encountered in abundance and the need to enforcement ever bigger. Given that charges for copyright infringement in the online environment are criminal charges, and the complexity of copyright does not really allow Internet users to know whether their actions are lawful or not, massive incrimination of society seems inevitable.

²⁸ Christophe Geiger, "The Constitutional Dimension of Intellectual Property", Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008).p. 131

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

Piracy is a major problem, especially on the internet, since not only the commercial scale copyright infringement is regarded as devastating activity for the right holders markets but also the non-commercial activities like file sharing largely harm their markets.

The enactment of ACTA and its draconian measures for protection and enforcement of intellectual property right would equal the extremity of the policy proposed by the Pirate Party in Europe. If the first route was taken, the incrimination of society was inevitable, implicating the public right of privacy and leading to mass public reactions and protests. It is as absurd as the proposed five year protection of authors works by the Pirate Party²⁹, not considering the fact that an artistic work might gain popularity much later after its creation, leaving the author uncompensated for its later, maybe, immense consumption.

Copyright is conceived as a measure to provide incentive for the authors to create and insure the public interest in creation of new and advanced creations. As a set of exclusive rights vested in creators, copyrights would surely prevent users from reproducing and distributing works of authorship. However, users can assert that their human rights to freedom of expression, education, cultural participation, and the benefit from scientific and technological development would be unquestionably undermined and eroded. If ACTA was adopted and limitations on copyright in digital environment remain completely restricted by DRMs, the digital environment will be stripped of its freedom of sharing knowledge and information and motivating the creation of artistic works contributory to the society and copyright. As a means created to serve the creators, copyright might live the day to be their disadvantage.

Everybody needs to give up something to gain more. The public could pay a reasonable price for free access to copyrighted works and the authors could get their “equitable remuneration” for the use of their works under copyright limitations. The “communication to the public” limitation to copyright may very well have a good role to play here. It even sounds like properly balanced solution since the damages to all interesting parties are not as tremendous as in the present state and as the proposals for the future enforcement of copyright in the digital environment might be.

As to limitations on copyright protection, with proper management and possibility of imposing a “copyright levy”, limitations would no longer have a place in the legislation regulating the digital

²⁹ *International - English - The Pirate Party*, available at <http://www.piratpartiet.se/international/english>, last visited on May 8th, 2012

Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58

environment because there would not be a copyright protection in its classical meaning but taxable service through which users get unrestricted access to digital products.

Bibliography

1. Alexander Peukert, “A bipolar copyright system for the digital network environment” in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Pub 2009)
2. Bart Schermer, *Why a download levy is a really bad idea*, available at http://www.futureofcopyright.com/home/blog-post/2012/01/06/why-a-download-levy-is-a-really-bad-idea.html?no_cache=1&cHash=a82d0ceb08f445c2078239b4aab6de21, last visited on May 8th, 2012
3. Christophe Geiger, “The Constitutional Dimension of Intellectual Property”, Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008).p. 131
4. Christophe Geiger, *From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-Step Test* (2007) EIPR 486;
5. courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.”).
6. *De Nederlandse Dagbladders v. the Netherlands*, Court of the Hague, 2 March 2005, Case No. 192880 (Neth.), ¶ 15 (holding that copyright limitation carved out in Dutch copyright law should be in line with the three step test).
7. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10 of 22 June 2001.
8. *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1029 (1994)
9. H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5109, 5679 (“Although the
10. Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, Northwestern Journal of Technology and Intellectual Property, Vol. 5, p. 265, 2007; Berkman Center Research Publication No. 2007-6. Available at SSRN: <http://ssrn.com/abstract=1021027>
11. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985)
12. Jonathan Griffiths, *The 'Three-Step Test' in European Copyright Law - Problems and Solutions* (September 22, 2009). Queen Mary School of Law Legal Studies Research Paper No. 31/2009. Available at SSRN: <http://ssrn.com/abstract=1476968>;
13. Jörg Reinbothe, *Private Copying, Levies and DRMs against the Background of the EU Copyright Framework*, DRM Levies Conference, 8th September 2003. Available at http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm#drmsystems, last visited on May 18th, 2012
14. Kamiel Koelman, *Fixing the Three-Step Test* (2006) EIPR 407; Christophe Geiger, Jonathan Griffiths & Reto Hilty, *Towards a Balanced Interpretation of the 'Three-Step Test' in Copyright Law* (2008) EIPR 489.
15. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (The Penguin Press HC, 2004). Available at http://www.jus.uio.no/sisu/free_culture.lawrence_lessig/portrait.pdf, last visited May 8th, 2012
16. Martin Senftleben, *Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine* (June 15, 2010). Journal of the Copyright Society of the U.S.A.,

Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58

- Vol. 57, No. 3, pp. 521-552, Spring 2010. Available at SSRN:
<http://ssrn.com/abstract=1723902>. The Court of Justice EU itself referred to the three-step test in CJEU, 16 July 2009, case C-5/08, Infopaq International vs. Danske Dagblades Forening, para. 58; CJEU, 4 October 2011, cases C-403/08 and C-429/08, Football Association Premier League vs. QC Leisure, para. 181.
17. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-peer File Sharing*, (17 Harv. J.L. & Tech. 1, 19–22. 2003); Jessica D. Litman, *Sharing and Stealing*, (Hastings Communications and Entertainment Law Journal, Vol. 27 2004) ; Alexander Peukert, *A bipolar copyright system for the digital network environment* (Hastings Communications and Entertainment Law Journal, Vol. 28, No. 1. 2005) Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=801124, last visited on May 18th, 2012
 18. P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (2008). Available at <http://www.ivir.nl/publicaties/hughholtz/finalreport2008.pdf>, last visited on May 17th, 2012
 19. P. Bernt. Hugenholtz, and Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities* (February 29, 2012). Amsterdam Law School Research Paper No. 2012-39; Institute for Information Law Research Paper No. 2012-33. Available at SSRN: <http://ssrn.com/abstract=2013239>
 20. Sarah E. Henry, *The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17 U.S.C. § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement?*, 20 PENN ST. INT'L L. REV. 301, 324 (2001)
 21. Sherri L. Burr, *Entertainment Law in a Nutshell (In a Nutshell)* (West Publishing 2nd ed. 2007)
 1. UNCTAD-ICTSD, *Resource Book on TRIPS and Development* 196 (2005)

Legal Instruments

2. A BILL to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes - H.R. 3261, the “Stop Online Piracy Act” - SOPA
3. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Annex 1C to the Agreement establishing the World Trade Organization of 1996
4. Anti-Counterfeiting Trade Agreement (ACTA)
5. Bern Convention for the Protection of literary and Artistic Works of 1886
6. Copyright law and copyright originated in the UK from a concept of common law; the Statute of Anne 1709.
7. Copyright, Designs and Patents Act 1988, 1988 c. 48
8. Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs.
9. Digital Millennium Copyright Act, 112 Stat. 2863, 17 U.S.
10. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
11. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
12. French: HADOPI law - *Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet*, "law promoting the distribution and protection of creative works on the internet"

*Elena Jankoska, Copyright Limitations and Their Impact on Copyright Enforcement in Digital Environment
„Naukowy Przegląd Dziennikarski” nr1/2014 (9), ss. 43-58*

13. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961
14. *Joint motion for a resolution on the EU-US Summit of 28 November 2011, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2011-0577&language=EN>, last visited on May 10th, 2012*
15. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 or “Protect IP Act” - PIPA
16. World Intellectual property Organisation Copyright Treaty (WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions) available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html, last visited on May 7th, 2012
17. World Intellectual property Organisation Phonograms and Producers Treaty (WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions), available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html, last visited on May 7th, 2012