

# INTELLECTUAL PROPERTY IN CYBERSPACE: PRINCIPAL ISSUES

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# Copyright in the IPR system

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- Copyright is the set of rights designed to protect (control) original expression in any form (including digital information)
- vs. related rights (neighboring rights)
- vs. industrial property (patents, industrial designs, trademark, commercial secret, etc.)

# The Premises of Copyright

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- Copyright is here for ~400 hundred years
- Rudiments of copyright – Shakespearean England
- Main catalyst of copyright – industrial revolution
- Main culprit – the printing press by Guttenberg

# What is copyright?

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- Copyright is the set of limited-exclusive rights granting control on the use of copyrighted work for a certain period of time
- Limitations:
  - Not perpetual
  - Exhaustion principle
  - Exceptions (fair-use)

# What is the purpose for copyright?

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- Legal and Economic Incentive for creating of new works: a grant of exclusive rights to creators enhances incentives to create / innovate & make innovative products available
- Copyright is necessary for to compensate the author/inventor (right holders) for their intellectual input
- Allowing cultural and scientific progress - creation of derivative and subsequent works based on existing works / information
- Balancing the interests of the author (right holder) and society
- IP is arguably one of the most important instruments in the knowledge society, as it effectively controls knowledge

# Main features of copyright law

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- Long established (Berne convention dates back to 1886)
- Internationally uniform (no other field of law is so harmonized)
- Copyright is usually administered through collective administration bodies rather than individually
- Copyright was born in the industrial age, but is it suited for the digital age?

# Precursors for digital copyright

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- **Dramatic progress of hardware & software technology – ‘singularity’ is approaching**
- **Emergence of new digital forms of property**
  - **Digitalization of traditional works**
  - **Emergence of new types of works (e.g. computer software, databases)**
- **Internet – the biggest copying machine**
- **Emergence of new ways for digital use and abuse**
- **Digital works (information) more susceptible to infringement than traditional works ???**

# The X factors

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- Multiplication of rights (single work protected by several different rights adherent to different parties)
- Concentration of right holding (publishers, record industry, movie industry)
- Abuse of digital rights and controls by right holders
- Digital networks amplify the effects of control
- Online environment despite its unlawful side is a major cultural/science development accelerator (solving the Fermat's theorem by Andrew Wiles)
- Current legal/technological response imperils cultural/science development

# Approaching the digital society...

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- Traditional paradigms of copyright have been undermined online
- Digital content (whether lawful or unlawful is abundant, but compensation is missing)
- The value paradox, driving users to the "Dark Side"
- Social aspects of IP are handicapped by technology

# The legal response

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- More copyright legislation in the last 20 years than for 200 years before
- 12 EU directives plus several in the pipeline
- Plentiful national and secondary legislation
- The direction of the reforms – expansion of scope and exclusivity of monopoly rights

# Main legal issues for digital copyright

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- Legalizing new works
  - Software and database law
- Expansion of exclusive rights
- Technical protection vs. legal protection  
Enforcement, EnFoRcEmEnT, ENFORCEMENT
- Challenges to collective administration
- Electronic publishing and electronic licensing
- Internet providers role and liability

# The legal response scrutinized

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- 1<sup>st</sup> wave – legitimizing of new digital forms of property
- 2<sup>nd</sup> wave – internet challenge
- 3<sup>rd</sup> wave – enforcement challenge
- 4<sup>th</sup> wave – reinstating of balance and compensation (societal interests) ???

# 1<sup>st</sup> wave

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- Software: 1980 the US, 1985 the UK&France, 1991 the EU, 1994 TRIPS
- Databases: 1996 the EU, considerations for the WIPO treaty

# Important issues of 1<sup>st</sup> wave

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- Legal recognition for new forms of copyrightable works
- Prolongation of the term of copyright
- Digital works may be a reuse of analog (printed) works (New York Times v. Tasini)
- Copyright on digital silence? (John Cage's 1952 work 4' 33")
- A result – copyright is not sufficient, while *sui generis* is over protective?

# 2<sup>nd</sup> wave

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- **1996 WIPO agreements (WCT & WPPT)**
- **1998 the US DMCA**
- **9 April 2001 EC Directive 2001/29/EC on certain aspects of copyright and related rights in the information society (EUCD)**

# 1996 WIPO agreements

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- Rights to communicate to the public including any digital transmissions, as well as distribution by any means
- Protection for technological measures
- Exceptions and limitations of copyright are left to be regulated in national laws
- No regulation for temporary copies and ISP liability

# 1998 the US DMCA

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- Extensive ban on both technological measure circumvention devices and acts of circumvention prosecuted through criminal liability
- Limitations for ISP liability (transmission, caching, user posting, linking)
- Exceptions allowed for reverse engineering (interoperability), encryption research, law enforcement and intelligence activities, protection of minors, personal privacy, security testing, non-profit institutions, web-filters and recovery of damaged copies

# EUCD

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- Rights for distribution and communication to the public in any form
- Limitations for Telco's and ISP's liability (transient reproduction, etc.)
- Compromise for anti-circumvention ?
- Exhaustive list of optional exceptions to the reproduction right and right to communicate to the public
- Fair compensation for reprography, private copying, broadcast fixations (recordings)

# Main issues of the EUCD

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- Shrinkage of copyright exceptions:
  - Exhaustive list of exceptions in the EUCD (Article 5)
  - Exceptions (e.g. private copying) excluded by technical measures (DRM)
  - No mechanism to reconcile DRM and exceptions
  - Exceptions are made more expensive (levies on media and equipment)

## Slide 19

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### MK1

photocopying (except sheet music)

non-commercial private use, when fair compensation is paid

non-commercial acts by libraries, educational establishments, museums and archives

ephemeral recordings made by and for broadcasting organisations

non-commercial reproduction of broadcasts by social institutions, provided fair compensation is paid

teaching and scientific research

use by disabled persons

news reporting

criticism or review

caricature, parody or pastiche

Mindaugas Kiskis, 12/1/2003

# Main issues of the EUCD (2)

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- New exceptions for the internet service providers
  - Interim copies (cache and proxy copies)
  - User content
- No safeguards for anti-competitive behavior
- Role of collective administration (CA)
  - Effectiveness and competition issues

# The promise of technology

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- Technology has provided “effective” tools for control of digital information
- Technology is not effective to contain professional infringement
- Abuse of technology imperils fair use and hence cultural/science development
- Technology brings lure for other abuses (e.g. privacy)
- Technological ways enforcing fair use are currently outlawed (playing DVD on Linux)
- Technology so far has proved costly and has not gained user acceptance

# Theory and practice of DRM

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- Theory:
  - Eliminating intermediaries between creator/innovator (right holder) and user
  - DRM systems shall enable individual control of IP use
  - allowing fair use
  - establishing market valuation of a particular work
  - establishing royalties according to scope and type of use
  - granting licenses directly and automatically to individual users
- Practice:
  - Controlling all uses (disallowing fair uses)
  - Compromising privacy
  - Capitalizing monopoly
  - Amplified by digital networks
  - Contribute to price of digital IP
  - Are not acceptable to consumers

# ISP role and liability

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- ISP services:
  - Access and transmission services
  - Hosting
  - Technological platform providers (P2P)
- 2000/31/EC Electronic Commerce Directive
- Not liable if meet special conditions
- No general obligation to monitor content

# ISP role and liability (2)

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- Conditions for no-liability:
  - ISP does not initiate or contribute to the transmission
  - Does not choose the recipients
  - Does not select and change the content
  - Does not know on the existence of the content
  - Duly reacts on obtaining the knowledge
- Grokster case in the USA

# ISP role and liability (3)

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- Identifying the infringer v. privacy of the infringer
- Is ISP liable for identifying the infringer, prior to infringement is established by the court?
- John Doe cases in the US
- Dutch private ISPs
- Lithuanian approach

# Digital publishing/licensing

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- Electronic licenses
  - Click-through
  - Online forms
- Contractual form issues
- All issues of cyber-law:
  - Choice of law
  - Dispute jurisdiction
  - Consumer law
  - Contractual language

# 3<sup>rd</sup> wave

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- 2004/48/EC IPR enforcement directive
  - Broad notion of infringement
  - Enforcement against non-commercial infringement
  - Enforcement without reconciliation of DRM and copyright limitations
- Wave of national legislation and lawsuits
- Privacy issues

# Forgotten economics?

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- Compensation is not sole reason for creativity/innovation, nevertheless very important
- Compensation aspect is most important for developing countries
- Abundance and abuse of digital content
  - Lawful content is priced mostly unreasonably
  - Unlawful content readily available for free
  - Arguably unlawful content prevails
  - Pirates are successfully cashing on unlawful content
- Online IP distribution businesses emerging but not yet established

# Traditional compensatory mechanisms

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- Current compensatory mechanisms
  - private bargaining (USA)
  - collective implementation through the collecting societies (Europe)
    - built on the assumption that uses cannot be controlled individually and it is inefficient to implement such controls
    - levies imposed on standardized uses
    - blank media and equipment levies
- Efficiency and flexibility of the compensatory mechanisms
  - DRM technology allows
  - right holders and collecting societies unwilling to accept

# Can DRM and current compensatory mechanisms coexist?

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- Coexistence is highly undesirable:
  - users pay twice for same rights – once by paying the levy to collecting society, and once again by paying the royalty to the right holder
  - users pay levies for disallowed uses
  - inefficiency of the collecting societies
  - no methodologies on measuring the digital uses of IP, hence for distribution of levies collected
- DRM makes collecting societies redundant
- Result is unfair and unequitable compensation to most powerful right holders on account of the others, or even society at large
- Part of compensation ends up with the intermediaries

# Putting it all together

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- Copyright extremism drawing attention from the real issues
- Current IPR and DRM policies sustainable only through increasingly fierce enforcement
- DRM solutions prevail in current political agenda, despite major drawbacks
- Current political agenda lacks the economic incentives both to IPR holders and users
- When the holders can not sustain and the users can non bear?

# Proposals

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- Neither DRM nor traditional systems provide necessary balance
- New Compensation System (NCS) is needed
- IPR reform shall be orientated to NCS in order to be sustainable and acceptable to all parties

# 4<sup>th</sup> wave ???

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- Addressing the problems of balance
- Addressing the issues of compensation

# Current reconciliation proposals

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- Content Flatrate
- Creative Commons
- Compulsory licensing
- Online digital content stores
- Collecting society reform
  - allowing of individual management
  - flexible licensing

# NCS features

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- NCS shall bring together the following features:
  - implementability on cross-border basis
  - objectivity in establishing and distributing of the compensation
  - adaptability to countries of different level of economic development
  - capability to provide new perception of the intellectual property
  - incentives to switch to the new system on the voluntary basis
  - adaptability to any form of the intellectual property
  - new infrastructure, as opposed to the existing collecting society infrastructure

# Conclusions

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- IPR needs to be reconceptualized for the global online world – re-ballancing and revising compensatory mechanisms
- Analysis of current situation supports the necessity to revise current IPR regimes and compensatory mechanisms, while suggesting that currently pushed DRM is not a viable solution
- The IPR reform shall be orientated to NCS in order to be sustainable and acceptable to all parties