

**Bridging the gaps between the social and legal norms concerning protection of intellectual and artistic creations: on the crisis of copyright law in the digital era**

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## **Introduction**

It seems that copyright law has been at a crossroads since the digital revolution. Initially, the introduction of technologies allowing consumers to access fast, easy, cheap and effective reproduction of cultural and knowledge goods, and more recently - the advent of Internet, that enables users to exchange an unlimited number of files containing protected contents, have seriously challenged the logic of copyright law. The response of the legal system to the perceived inefficiency of the solutions applied so far is the recent tendency to the exorbitant expansion of copyright law. This expansion takes various forms, the most important being: a) prolongation of the terms of protection; b) extension in the catalogue of the goods protected, that results in an inclusion of the commodities whose very nature is alien to the copyright regime (e.g. computer programmes); c) introduction of the technological means of protection simultaneous to legal restrictions and legal ban on circumventing encryptions<sup>1</sup>; d) reduction of the catalogue of limitations and exceptions to copyright; e) increasing tendency of transferring copyright regulations from the private realm into that of criminal law, etc.

In general, the trend could be described as strengthening the protection of the right-holders through the introduction of the paradigm of absolute and unlimited property at the expense of consumers' interests. Moreover, the reforms tend to universalise the regulations worldwide due to the recent globalisation of intellectual property law.<sup>2</sup> Paradoxically, however, the increasing severity of copyright law is not accompanied by a rise in the level of observance of its legal rules and respect towards the current regime. The *open-content* paradigm, promoting alternative values to those of the expanding proprietary logic is gradually gaining visibility in public discourse, the illegal file-sharing in the network is flourishing, and actions opposing contemporary intellectual property reforms are often described using the rhetoric of revolution and war.<sup>3</sup>

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1 Requirement for anti-circumvention laws was globalised in 1996 with the creation of the WIPO Copyright Treaty.

2 See e.g.: TRIPS Agreement, WIPO Treaties etc.

3 The expressions used by the opponents of the current international regime of intellectual property law to describe

## Hypothesis and research questions

Given the aforementioned circumstances this analysis will be guided by the following research questions:

- a) What mechanisms underlie the current crisis of copyright law in the digital era?
- b) Why is the legal system following the wrong pattern notwithstanding the signals which suggest that its response to the perceived crisis of copyright law is ineffective and inadequate to the needs of the digital environment?
- c) What should be modified to increase the efficiency of copyright regulations?

The primary hypothesis of the study is that the core of the current crisis of copyright law in the digital era can be found in the divergence between legal and social norms concerning the access to intellectual and artistic creations. The author discerns two main sources of the conflict between these two bodies of norms. The first is the result of the specific dynamics in the development of technology, copyright law and social norms that are perceived as a global phenomenon. The second is the outcome of specific local particularities that led to the evolution of social norms which differ considerably from the contemporary intellectual property regime. In both cases however, the core of the problem lies in the fact that consumer held social norms (developed either on the global or local level) strongly oppose the *absolute property* rhetoric present in most of the international regulations in copyright law.

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their actions include: 'war', 'consumers' revolution', 'fight for the users' rights', 'electronic civil disobedience' etc. See e.g.: Rimmer Matthew, *Digital Copyright and the Consumer Revolution: Hands Off My Ipod* (Edward Elgar Publishing, 2007); See: The content of the web page <http://thepiratebay.org/>: The whole rhetoric of the Pirate Bay, beginning from the name and official logo of the service (the pirates' ship) to the revolutionary statements and symbols (e.g. the pirate-bay fist), indicate belligerent attitude towards the current copyright regime in general, and right-holders in particular. Note especially the language used by the authors of the Pirate Bay in the responses to the legal threats sent by copyright holders at <http://thepiratebay.org/legal> (accessed 04.04.2012) and the manifesto published on the day when the Pirate Bay's administrators were sentenced to prison at <http://thepiratebay.se/blog> (note from 01.02.2012, accessed 04.04.2012), stating "2012 is the year of the storm. (...) Experiencing raids, espionage and death threats, we're still here. We've been through hell and back and it has made us tougher than ever. (...) In this year of the storm, the winners will build windmills and the losers will raise shelters. So flex your muscles, fellow pirates, and give power to us all! Build more sites! More nets! More protocols! Scream louder than ever and take it to the next level!"; See also: Sebastian Lütger from the Pirate Cinema referring to the statement by Mark Getty, the owner of Getty Images who in Lütger's words is "the largest intellectual proprietor in the world (...) who once said: intellectual property is the oil of the 21<sup>st</sup> century" in Lütger's opinion it is "a fantastic quote, you can condense it to one word, that is: 'war'. He declared war with that statement, saying we will fight for (...) these completely illusionary rights to images, ideas, texts, inventions (...) just as we are fighting now for access to natural resources. He declared war." See: *Steal this Film 2*, Directed by Jamie King, produced by The League of Noble Peers, released in 2007, available at: <http://www.stealthisfilm.com/Part2/> (accessed 08.05.2011), (at 00:05:40 of the film). There is an additional irony to Getty's statement as he actually comes from a family of billionaires which originally made its money from oil. See: [http://en.wikipedia.org/wiki/Mark\\_Getty](http://en.wikipedia.org/wiki/Mark_Getty) (accessed 08.05.2011).

The recent protests against ACTA in some countries, especially Poland were also full of anger and revolutionary rhetoric that was present both in "real" life as evidenced by the massive street protests (see the photos at: [http://wyborcza.pl/duzy\\_kadr/0,98792.html?tag=acta](http://wyborcza.pl/duzy_kadr/0,98792.html?tag=acta)) and in the virtual world that suffered numerous hackers' attacks organised mostly by the Anonymous network (See e.g.: <http://ireport.cnn.com/docs/DOC-734863>).

The analysis that follows will be aimed at answering the aforementioned research questions and led by this fundamental hypothesis.

## Methodology and description of the analysed model

The central part of the analysis focuses on the description of mutual interactions of the legal system as a whole and its particular branches: **copyright law**, **property law** and **human rights law**.

Simultaneously, the study reconstructs the mutual interplay between the **legal system** and the following elements that comprise environment in which the legal system acts: **technology**, **social norms** and **collective interests** of four groups representing most important actors in the described model, namely the state authorities, creators, public, and the intermediaries on the market between the creators and the public. It shows how the interactions of those elements with one another and with the legal system led first to the introduction of the *proprietary* paradigm in the protection of intellectual creations, and then to the degeneration of this paradigm that caused the contemporary crisis of copyright law in the digital era.

**Technology** is approached in this paper in a broad sense, as defined by the American sociologist Read Brain, who in the 1930s wrote that "*technology includes all tools, machines, utensils, weapons, instruments, housing, clothing, communicating and transporting devices and the skills by which we produce and use them.*"<sup>4</sup>

**Social norms**<sup>5</sup> are here interpreted as normative statements<sup>6</sup> that identify social expectations arising in the course of repeated interactions<sup>7</sup>. They are enforced either through the application of internal sanctions of the *ego* which emerge as a result of the internalisation of the norms<sup>8</sup> and/or through the application of external, informal (i.e. non-legal) social sanctions<sup>9</sup>. Social norms might, but do not necessarily have to, coincide with legal norms. Even if they do coincide, they belong to diverse normative systems.

**Collective interests** are here understood as covering four groups: the collective interests of: 1) authors/creators, 2) the public, 3) intermediaries on the market between the authors and the public,

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4 Bain Read, *Technology and State Government*, American Sociological Review, Vol. 2 (6) (1937), p. 860.

5 For a general review of sociological theories dealing with the concept of '*social norms*', see: e.g. Horne Christine 'Sociological Perspectives on the Emergence of Social Norms', in Hechter Michael and Opp Karl-Dieter, *Social Norms*, (Russell Sage Foundation, 2005), pp. 3-34.

6 See: e.g. Homans George C., *Social Behavior: Its Elementary Forms* (New York: Harcourt, Brace 1961), p.12.

7 See: e.g. Wrong Dennis, *The Problem Of Order: What Unites and Divides a Society*. (New York: Free Press, 1994), p.48; Bicchieri Christina, *Learning To Cooperate*, in *The Dynamics Of Norms*, ed. by Bicchieri Christina, Jeffrey Richard and Skyrms Brian, (New York: Cambridge University Press, 1997), pp. 25-27.

8 For a discussion of internalization see e.g. Durkheim Emile, *The Elementary Forms Of The Religious Life* (New York: Free Press, 1915), pp. 236-245; Durkheim Emile, *Suicide* (New York: Free Press, 1951).

9 See e.g. Parsons Talcott, *The Social System* (New York: Free Press, 1952), p. 38; Durkheim Emile, *The Determination of Moral Facts*, in *Sociology and Philosophy* (London: Cohen and West, [1903] 1953), p. 36, 43.

4) state authorities. Interests are understood as comprising both advantages of financial and non-financial nature. However, in the case of the intermediaries, due to the nature of those entities and their role in the network of interdependencies analysed below - emphasis will be placed on the commercial interests, stemming from the mass reproduction and distribution of copyrighted works. The interests are described as *collective* because they are perceived as common for the representatives of the respective groups, not as specifically relevant for some individuals only (e.g. creators' interests are those that are perceived as common for all or most of the creators in the particular territory and historical period).

## **Part I The distancing islands of law and social norms - universal problem**

It will be argued in this paper, that the current divergence between the social and legal norms is at the source of the crisis of copyright law in the digital era, which has its origins in the failure of the legal system to adapt satisfactorily to the new environment created by digital technologies, which instead applied old and inadequate patterns to an entirely new context. Rather than responding to all the stimuli of the digital environment, copyright law reproduced the rules of the physical world into the digital reality, thereby furthering the interests of right holders, while completely ignoring the emerging needs of users.

This paper, however, will show that this process did not start with the introduction of Internet and digital technologies, but actually has its roots at the inception of copyright regime when the proprietary paradigm was first transposed from property law into the new realm of protection of knowledge and artistic goods. It will be argued, nonetheless, that it was not the introduction of the proprietary rhetoric itself that led to the current crisis of copyright law, but rather the degeneration of the notion of property as applied to the protection of intellectual and artistic creations, that with the emergence of new technologies tends to be treated as an absolute and unlimited right.

To prove it the paper will focus on four historical phases that are perceived as landmarks in the development of mechanisms underlying the current crisis of copyright law<sup>10</sup>: 1) manuscript culture, 2) advent of print and birth of copyright law, 3) introduction of technologies allowing for mass consumer copying, and 4) the advent of digital technologies and Internet. It will endeavour to show not only the operations of the legal system, but also the mechanisms of the complicated mutual

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<sup>10</sup> In introducing the model described, an important reservation in terms of the scope of this analysis is in order: it does not attempt to reconstruct the entire history of copyright law, but instead solely focuses on four important phases that could be regarded as landmarks in its development.

relations between the legal system and the elements of its environment that led to the present shortcomings of copyright protection.

## 1. Manuscript culture

The analysis starts with the very beginning of the story: the era of the manuscripts - when there were no copyright regulations, no technologies that enabled copying on a mass scale, entrepreneurial interests stemming from reproduction and distribution of creative works of others were just emerging, and the general social norms concerning replication of works of human ingenuity were unambiguously in favour of copying.

In ancient times the profession of a scribe was extremely elitist, usually inherited from father to son and limited to the highest social classes.<sup>11</sup> Scribes exercised many functions that required literacy and enjoyed a high esteem. Those of them who were professionally devoted to manual copying of texts, especially sacred verses, were working at the services of the rulers or religious institutions (temples, monasteries etc.) who commissioned particular works. At that time there was no open market for manuscripts. Both the scribes and their works were part of the religious or governmental structures. The copying of sacred texts was regarded as a metaphysical activity and required complex rituals.<sup>12</sup> In Medieval Europe the spiritually important process of reproducing holy texts concentrated in Christian monasteries, that had regular provision for the making of books called *scriptorium*. Before around 1200 books were copied in ecclesiastical institutions, however by the 11<sup>th</sup> century the class of professional lay scribes and illuminators emerged.<sup>13</sup> They travelled from monastery to monastery and treated copying of texts as a mere commercial activity, rather than a religious practice.<sup>14</sup> From about 1200 books were mainly produced by lay people who were established in particular cities and who earned their living by making books.<sup>15</sup> This crucial change in the manuscript production, which moved from monasteries to lay *scriptoria* and from rural settings to urban centres, was a result of a shift in the motivation for copying the word in ink on parchment

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11 In ancient Mesopotamia as well as among the ancient Jews, scribes belonged to the highest social elites and enjoyed great esteem. In ancient Egypt the respect towards them was so high that they were considered part of the royal court and were exempted from tax and military obligations. *See*: Rice Michael, *Who's Who in Ancient Egypt*, (Routledge, 2001); Damerow Peter, *Abstraction and Representation: Essays on the Cultural Evolution of Thinking*, (Springer, 1996); McLain Carr David, *Writing on the Tablet of the Heart: Origins of Scripture and Literature*, Oxford University Press 2005; Johnson Paul, *A History of the Jews*, (Phoenix, 1993).

12 The level of complexity of the rituals involved in the process of copying the holy texts could be nowadays illustrated by the procedures followed by sofers – Jewish scribes, who transcribe by hand Torah scrolls and other religious writings, and are one of the last representatives of this profession in the current era. *See e.g.*: Ray Eric, *The Story of a Torah Scroll* (Torah Aura Productions, 1986); Kolatch Alfred J., *This is Torah* (Jonathon David Publishers Inc., 1988); for a general bibliography on the topic *see*: <http://www.sofer.co.uk/html/sources.htm> (accessed 04.04.2011).

13 Watson Rowan, *Illuminated Manuscripts and Their Makers* (Victoria & Albert Museum, 2003), p.8.

14 Ibidem.

15 Ibidem.

as it evolved from divine meditation to personal profit.<sup>16</sup> This is when, relevant for this analysis, the commercial interests of the intermediaries in the market of the creative works emerged.<sup>17</sup> As might be inferred from the historical sources, the commercial interests of those intermediaries were from the very beginning inconsistent, or in some instances even contrary to the interests of the authors themselves.<sup>18</sup> By the early 13th century, many European cities had a commercial book trade that was largely governed by the university authorities.<sup>19</sup> At this time another chain of intermediaries in the book trade emerged: *libraries*, who were middlemen responsible for hiring scribes and illuminators and for selling the completed manuscripts.<sup>20</sup> Some of the *libraries* realised the orders commissioned by particular customers, mainly belonging to nobility or clergy, however in general production of books in this time became speculative.<sup>21</sup> It meant that the business of *libraries* became unpredictable as there was no guarantee that the costs incurred in the process of books' production would be covered by adequate demand on the market. This fact is essential for the further analysis, because it will be argued that it was exactly this commercial risk of the *libraries*, who with arrival of print decommissioned the obsolete services of the scribes and turned into printers, that later triggered the transposition of the proprietary paradigm to law protecting the fruits of human creativity.

## 2. The advent of print and the birth of copyright law – the introduction of the proprietary paradigm

The introduction of the technology of printing had a double-edged effect on the interests of the intermediaries on the book market. On one hand, it allowed for fast, and for the first time in history – mass reproduction of books that could be achieved at considerably low costs, as the work of the people has been replaced by the machines.<sup>22</sup> In this way the advent of print enlarged the interests of the middlemen as they could potentially increase their profits due to the fact that copying at this moment became on a mass scale, and so the number of potential clients who could be addressed augmented. However, the new technology created new commercial risks as the potential gain could

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16 Diane E. Booton, *Manuscripts, Market and the Transition to Print in Late Medieval Brittany* (Ashgate, 2010), p.2.

17 Although the analysis focuses on the history of the books' market, the same pattern could be reconstructed with regards to other creative works.

18 Petrarch in 1363 lamented that the copyists were so eager to make their profit that they reproduced his epic '*Africa*' before final correction, Bocaccio was similarly concerned to safeguard his texts until he deemed them ready for circulation. See: Watson Rowan (2003), p. 9.

19 Ibidem.

20 Booton Diane E., (2010), p.33. For more detailed information on *libraries*, see e.g.: Booton Diane E., *The Librarian and Libraire as Witnesses to the Evolving Book Trade in Ducal Brittany in Pecia*, 13 (2010).

21 See e.g.: Watson Rowan (2003), p. 11.

22 As already mentioned, the *libraries* with the advent of print decommissioned the obsolete services of scribes and illuminators and replaced them with printing machines, themselves at the same time turning from intermediaries coordinating the work of others into publishers.

have been easily stolen by unfair competitors, who equipped with the adequate machines could easily reproduce the same material, not having incurred the transaction costs of the first stage of the publishing process, that is the costs stemming from the primary interactions between the publisher and the author.

Nonetheless, luckily for the publishers at that time in Europe their interests were compatible with the interests of the governments and the church, which in trying to protect their own affairs – introduced legal regulations that as a by-product created a monopoly for the publishers' services and in this way strengthened their position on the market. That was the case in most European countries in that period, as the states and the church trying to avoid the dissemination of undesirable content, expressing dissent and criticism of the government and established religion, introduced controls over printing, by requiring printers to have official licenses for producing books.<sup>23</sup> These licenses gave the printer an exclusive right to print particular works for a fixed period of years and enabled him to prevent others from printing the same books during that period.<sup>24</sup> The licenses usually also prohibited the import of the same works printed abroad.<sup>25</sup> This regulation system present in most European countries did not yet amount to the modern copyright law, as it had different goals and took a completely different form. Nevertheless, the licensing regime of the print industry could be perceived as the first attempt to regulate the market in intellectual creations. It was already under this regime, long before the introduction of the modern copyright law, that autopoietic operations of legal system, allowing proprietary logic to gradually enter the discourse concerning the nature of intellectual and artistic works commenced.

The proprietary logic entered the discourse concerning intellectual creations for the first time in England around 1590<sup>26</sup> when members of the Stationers' Company modified the language used in the register of printed books. As the excellent historical analysis done by Lyman Ray Patterson proves, the form of the entry “*evolved from that of a license to print, to the ownership of copy, to the ownership of a book.*”[emphasis added]<sup>27</sup>. Notwithstanding the fact that the change “*was one of form only, not substance*”<sup>28</sup> and legal basis for, as well as, legal nature of the copyright remained the same, “*the evolution in the form of entry indicates that a subtle conceptual change was occurring and that booksellers had begun to think more explicitly of their “copies” or “books” as private*.

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23 Hector L. MacQueen, Charlotte Waelde i Graeme T. Laurie, *Contemporary intellectual property: law and policy* (Oxford University Press, 2007)., p.34.

24 Ibidem.

25 Ibidem.

26 Arber, vol. II, p. 538, quoted after: Lyman Ray Patterson, *Copyright in historical perspective* (Vanderbilt University Press, 1968). p.54.

27 Patterson.

28 Ibidem.



*property*”[emphasis added]<sup>29</sup> as was perceptively noticed by Mark Rose. Although at this point the modification in rhetoric did not yet enter the public debates, the shift in the publishers' perception of their rights that ushered in the paradigm of property in knowledge goods, is crucial for this analysis. For it was exactly when this shift occurred, that the reproduction of the patterns from property law into the realm of protection of intellectual creations started.

The rhetoric of property in intellectual creations was later used by the Stationers for the purpose of agitation as early as in 1643, when threatened by the fact that their exclusive rights to print would be endangered, the printers published a pamphlet entitled *The Humble Remonstrance of the Company of Stationers to the High Court of Parliament* in which they openly referred to the proprietary paradigm, arguing that “*their ancient Right, **Propriety of Copies**”* was no longer secured, and therefore they would lack the “*encouragement to make them [their properties] active and alacrious in the service of the state*”[emphasis added].<sup>30</sup>

It is worth emphasising that the publishers at that time used the property paradigm to justify and strengthen solely their own interests, and initially did not refer at all to the interests of authors. Eventually, however, it was the publishers who for the first time applied the proprietary rhetoric with regard to the creators' rights. Nonetheless, the printers made reference to the property rights of authors in intellectual and artistic works to defend their own interests.

The *proprietary* rhetoric with regards to protection of intellectual and artistic creations should be therefore perceived as invented and popularised by the publishers, who threatened by technological and legal developments weakening their position on the market, applied it in trying to secure their own commercial interests.

Although the Stationers used the rhetoric of absolute property perceived as a natural right when lobbying for the legal protection of their commercial interests, the Statute of Anne<sup>31</sup>, enacted in 1709 that was the first instantiation of the modern copyright law was to be a considerably moderate and balanced response. The Statute introduced the concept of author's rights, as diverse from publisher's rights and by minimising the protection to the limited period of fourteen years – it asserted that the copyright law should be differentiated from property rights and treated more as a privilege granted by the state. Symptomatic of this de-propertization of the protection of intellectual and artistic creations is the fact that the initial title of the act was changed from *A Bill for the Encouragement of Learning and for Securing the **Property** of Copies of Books to the Rightful*

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29 Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass: Harvard University Press, 1993).

30 Arber, vol. I, p.586, quoted after: Rose, (1993), p. 16.

31 A Bill for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors, or Purchasers of such Copies, during the Times therein Mentioned 1709, 8 Anne c.19., (CJ 16:369).

*Owners thereof to A Bill for the Encouragement of Learning by **Vesting** the Copies of Printed Books in the Authors, or Purchasers, of such Copies, during the Times therein Mentioned”*.<sup>32</sup>

As far as the object of this analysis is concerned, although the publishers' lobbying actions later taken up by the authors themselves, attempted to introduce the proprietary rhetoric into the realm of the protection of literary works – the act itself refused to apply a proprietary paradigm. The legislator, by resisting the proprietary rhetoric wanted to limit the monopoly of the stationers in order to keep a proper balance between the interests of the creators, public, and intermediaries in the market in the knowledge and artistic goods.

Nonetheless, the introduction of the Statute of Anne should be perceived as the beginning, and not the end, of the debate on the *proprietary* paradigm in the protection of creation and dissemination of intellectual and artistic goods, especially that other Western European countries soon followed suit, providing space for public debates on the nature of literary and intellectual property.

### 3. Introduction of technologies permitting mass consumer copying – initial attempts to strengthen the proprietary paradigm

Although publishers faced with the technological novelty challenging the protection of their financial interests already in the 16<sup>th</sup> century used the strong proprietary rhetoric understood as absolute control over the use of the protected works, this power was never granted to the right holders by law. The copyright regulations never protected against consumption by individuals and the idea of a private use perceived as being outside the right holders' monopoly exploitation, thus not requiring the prior authorisation of rights, was so obvious and accepted by most early European copyright scholars that initially the copyright acts did not even contain provisions protecting private use.<sup>33</sup> They appeared only at the beginning of the 20<sup>th</sup> century.<sup>34</sup>

Nevertheless the copyright holders (represented mainly by middlemen in the market for intellectual and artistic creations) resorted to absolute property rhetoric every time they felt that their interests were being endangered by the influence of new technology. The 20<sup>th</sup> century's inventions of photocopying and analogue recording equipment had the same double-edged effect on the commercial interests of middlemen in the market for intellectual and artistic goods as before the

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32 See: Rose (1993), p.46.

33 See: P.B. Hugenholtz, L. Guibault, S. van Greffen, *The Future of Levies in a Digital Environment*, available at: <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>, p. 10.

34 Exemptions for the reproduction of a work in a limited number of copies for the purpose of private practice, study or use of the person making the copies appeared for the first time in early 1900 versions of Dutch and German copyright statutes, and a provision concerning a private use in French law was introduced as late as in 1957. See: B. Hugenholtz, L. Guibault, S. van Greffen, p. 10.

invention of print did. This time however, the new inventions were enabling consumers and not professional competitors to copy the knowledge and artistic goods on a massive scale. This once again triggered the absolute-property rhetoric on the part of the right-holders who were claiming absolute control over the use of protected works that would preclude private copying with the use of new technologies. Following the logic of this strong proprietary arguments both private individuals who made reproductions with the use of new technologies and manufacturers and retailers of the necessary equipment were infringing the owner's copyright in the work.<sup>35</sup> This reasoning finally led to the introduction of the copyright levy system that was introduced firstly in Germany as a consequence of two decisions of the German Federal Supreme Court rendered in 1955 (*Grundig Reporter* case)<sup>36</sup> and 1964 (*Personalausweise* case)<sup>37</sup> and then spread throughout the rest of continental Europe. The reasons for introducing the levy systems combined with the earlier private copying exceptions in Europe were to balance the rights of both users and right-holders as required by the three-step test set out in the Berne Convention, which establishes the conditions for any limitations of the reproduction right.<sup>38</sup>

The limits to right holders' control over the copyrighted goods were even more strongly stated in the later UK case *Amstrad Consumer Electronics plc v The British Phonograph Industry Ltd* (1986) in which the court stated that the power of the right holders is also limited by the protection of technological development.<sup>39</sup>

In conclusion it should be stated that the legal system once again managed to balance the diverse social needs as expressed in the signals stemming from the environment in which the law operates and did not succumb to the absolute-property postulates of the right holders. The levy system introduced in most European countries allowed for equitable remuneration for the creators while at the same time leaving the copyright regulations in line with the social norms favouring private copying.

#### 4. The digital era – absolute property?

It was not until another technological revolution, namely the introduction of Internet and later on P2P technologies, that the legal system was once again facing the absolute-property demands of the copyright holders, which again were mainly intermediaries. These new technologies allowed not

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35 G. Gentz, 'Überspielungsfreiheit zum persönlichen Gebrauch?', *GRUR* 11/1952, pp. 495, quoted after Hugenholtz et al. op.cit. p.10.

36 BGH, 24 June 1955- Aktz.: I ZR 88/54 (Mikrokopien) in *GRUR* 11/1955.

37 BGH, 29 May 1964 – Aktz.: Ib ZR 4/63 in *GRUR* 02/1965.

38 J. Reinbothe, *Private Copying, Levies and DRMs against the Background of the EU Copyright Frameworks*, DRM Levies Conference, 8th September 2003, available at: [http://ec.europa.eu/internal\\_market/copyright/documents/2003-speech-reinbothe\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm)

39 However it in the UK neither the right to the private copy nor the levy system exist.

only for mass reproduction but also mass distribution of the copyrighted material. Therefore the absolute-property campaign started again, this time successfully changing the face of copyright law by introducing DRM technologies simultaneously to legal restrictions and legal ban on circumventing encryptions, prolonging the terms of protection and leading to the increasing tendency of transferring copyright regulations from the realm of private into that of criminal law. No longer were potential competitors the biggest challenge to the protection of copyright holders' interests. The content industry turned on practices of individual users as endangering their legitimate interests and once again attempted to enforce the paradigm of absolute property. This destroyed the delicate balance simultaneously safeguarding the interests of the right holders and the public, that copyright law managed to maintain for a long time, and lead to the conflict between legal and social norms regarding the protection of production and dissemination of intellectual creations.

## **The response of the environment - consumer reaction**

The new technologies affected not only the legal regulations but also the social norms, increasing the number of postulates for general access to knowledge and information. Thus the exorbitant protection of copyright holders' commercial interests introduced at the expense of the public's needs led to the additional costs of compliance with the law stemming from the tension between the copyright regulations and social norms. Therefore, consumers trying to lower the incurred costs started choosing between two strategies: the strategy of avoidance or change of the onerous law.<sup>40</sup>

The mechanisms allowing for the avoidance of problematic legal regulations that started to be applied by consumers may take two forms: *evasion* understood as an investment in decreasing the odds of being punished for violating a law<sup>41</sup> or *avoision* which can be defined as efforts to exploit the differences between a law's goals and its self defined limits<sup>42</sup>. Consumers' strategies leading to the avoidance of copyright regulations in fact take both forms: the former being best exemplified by the application of various types of software enabling anonymity in the network, and the latter instantiated by the sharing platforms that create an illusion that the file-sharers are indeed close friends which would allow them to rely on private copying provisions.

The strategy of change in the case of copyright law was so far reserved to the right-holders, represented mainly by market intermediaries. The reasons for this are to be found in public choice theory which suggests that when the benefits of law are concentrated, and its costs are diffuse, a small well-focused interest group (in this case intermediaries in the market for knowledge and

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40 This part of the analysis is strongly inspired by the article written by prof. Tim Wu *When Code is not Law*, Virginia Law Review, Vol.89, 2003.

41 See: Tim Wu, op.cit. pp.112-116.

42 Ibidem.

artistic goods or collecting societies) will usually succeed in obtaining passage of the law, even if it does not benefit society as a whole.<sup>43</sup> Therefore traditionally the strategy of change was too burdensome for consumers as it involved collective action problems, which were difficult to overcome by small or loose groups. Nevertheless thanks to internet communication, especially social networking and online petition services, the difficulties associated with the process of supplying public good in the form of the modification of the existing law may be surmounted, and thus the mechanism of change of the onerous regulations becomes available to consumers as is very well exemplified by the phenomenon of the Pirate Parties and the power of the anti-ACTA protests in Europe, showing the new lobbying power of the users in copyright issues.

## **Part II Cultural colonialism - or why the anti-ACTA protests started in Poland**

In this part of the paper evolutionary institutional theory will be applied to describe another source of discrepancy between the current copyright regime and social norms: the fact that social norms, contrary to the global intellectual property regime, are not universal but have evolved under the influence of local factors such as national culture, the particular socio-economic situation of a jurisdiction and historical contrasts in legal regulations between different territories. In the second subsection of this part of the paper the Polish case study will be analysed showing how particular local developments led to the evolution of social norms that are in sharp contrast with the *absolute proprietary* paradigm present in the current intellectual property regime, and which led to extremely intensive anti-ACTA protests in Poland. Before that, however, in the first subsection a very short introduction to the evolutionary institutional theory will be provided.

### **Concise Introduction to Evolutionary Institutional Theory**

This part of the paper is highly inspired by the book on *The Evolution of Modern States. Sweden, Japan and the United States* by Sven Steinmo in which the author applies the evolutionary approach to his analysis of social institutions. In developing his theory, Steinmo primarily claims that social systems are complex phenomena, which being fundamentally different from inanimate matter, react like living organisms in that they change, adapt and evolve in response to the modifying reality.<sup>44</sup> A respective social system is often the unique result of a series of particular unguided interactions at the micro level. The interaction is the key aspect of an emergent system, therefore similar factors

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<sup>43</sup> Ibidem, pp.116-119.

<sup>44</sup> Sven Steinmo, *The Evolution of Modern States: Sweden, Japan, and the United States* (New York: Cambridge University Press, 2010), pp.10-13.

can have very different effects in different contexts.<sup>45</sup> Most importantly, however, evolutionary institutional theory „takes history seriously meaning that when and where something occurs can fundamentally shape what occurs.”<sup>46</sup>

Evolutionary institutional theory highlighting the uniqueness of the evolutionary patterns of the respective social institutions in various countries suggests that there are no *global standards* that would prove equally useful in diverse conditions.<sup>47</sup> Law, equal to the economy, in order to be effective and to respond adequately to social needs must develop in conformity with the particularities of the local environment.

Evolutionary institutional theory proves useful in describing the development of particular social norms in the given society that evolved in contrast to the universal legal regulations in the field of copyright law. The most general message stemming from the application of evolutionary institutional theory, to the analysis of the historical development of copyright law is that intellectual and artistic creation is one of the innermost spheres of the social reality. Therefore, the attitude towards the protection of the fruits of human ingeniousness depends on manifold circumstances, the most influential being: historical, cultural, religious and socio-economic determinants. Hence, the current trend for international universal regulations, providing '*one – size – fits – all*' solutions in the realm of intellectual property law must be deemed ineffective and inappropriate for the needs of the complex social reality.

## The Evolutionary Institutional Analysis of Polish social norms with regards to the distribution of copyrighted materials

In January 2012 all of Europe witnessed massive protests, both in the streets and on the Internet, opposing the ratification of the ACTA<sup>48</sup> agreement. The anti-ACTA movement started in Poland and it was also here that the protests lasted the longest. It is estimated that around hundred thousand people went to the streets of dozens of big cities and smaller towns in Poland to show their objection to the ratification of the controversial treaty.<sup>49</sup> They stayed in the streets for long weeks notwithstanding the extremely unfavourable weather conditions, when the temperatures were falling

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45 Ibidem.

46 Ibidem, p.13.

47 Sven Steinmo, *The Evolution of Modern States: Sweden, Japan, and the United States* (New York: Cambridge University Press, 2010), esp. pp.1-30.

48 The Anti-Counterfeiting Trade Agreement (ACTA) is a multinational treaty for the purpose of establishing international standards for intellectual property rights enforcement.

49 See: *Gazeta Wyborcza, Rzeczpospolita of 20.01.2012 – 20.02.2012*

to as low as minus 20 degrees. It is also in Poland that these protests actually had some further reaching consequences as they not only changed the initial position of the government with regards to the ratification of this controversial treaty,<sup>50</sup> but actually started the public debate on the role of intellectual property in the information society<sup>51</sup>. Moreover, as a result of lobbying of various stakeholders – the Ministry for Administration and Digitization promised the revision of the whole legal system in order to make sure that the Polish law is suitable to respond to the growing needs of the information society.<sup>52</sup>

The intensiveness of the anti-ACTA protests has attracted the attention of many social scientists as Poland had not witnessed such a social mobilisation since the collapse of the communist regime. Poles did not organise significant protests when the whole world was marching against the war in Afghanistan and Iraq. There was no „occupy Poland”, and Poles did not have their „indignados” movement. There are various explanations of the anti-ACTA phenomenon in Poland ranging from the assertion that it was exactly this lack of earlier reactions that led to the protests as they have given necessary vent to accumulated frustration<sup>53</sup>, to the diagnosis that the secret negotiations on the treaty and the unclear position of the Polish government triggered thinking in terms of conspiracy theories and pushed people to protest even though they were not aware of the substance of the criticised legal act.

In my opinion one of the most promising explanations of the anti-ACTA phenomenon in Poland concentrates on the analysis of the social norms with regards to the distribution of cultural and knowledge goods. The social research shows that only 13% of Poles buy books, music or films. As many as 33% gets hold of them in digital form, in a non-formal manner and for free. If also the „physical” forms of exchange are included in informal circulations, such as lending books, CDs, and DVDs from relatives and friends, then 39% of Poles participate in it.<sup>54</sup>

If not the whole population but only the most culturally and socially active group is analysed – the percentage of people engaging in the informal circulation of knowledge and cultural goods increases. The Polish *cultural elite*, understood as persons declaring much more interest in the cultural and social life as compared to the general population, equals more less the group of the active Internet users, thus the research done on this sample proves very useful.<sup>55</sup> In 2011 37% of

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50 Ibidem.

51 Ibidem.

52 Ibidem.

53 Ibidem.

54 Mirosław Filiciak, Justyna Hofmokl, Alek Tarkowski, „*Obiegi Kultury. Społeczna cyrkulacja treści*” report on the basis of the opinion poll conducted between 20.09 -02.10.2011 based on *Computer Assisted Web Interviewing* method regarding a representative sample of 1283 Polish Internet users.

55 Obviously the sheer fact of using an Internet is not enough to explain this dependencies. The Internet users differ

Polish Internet users declared having gone at least once in the previous month to a cinema, a theatre or a concert as compared to 6% of non-users.<sup>56</sup> The Internet users declared buying three times more books and films and even seven times more music than their counterparts who do not use the Internet.<sup>57</sup> Moreover, if we add the circulation of culture that requires no expenditure like borrowing books, CDs or CDroms the changes between the users and non-users grow even bigger: 88% of Polish Internet users participates in the informal circulation of music, 73% in the informal circulation of books and 78% in the informal circulation of films. The informal circulation in this questionnaire was understood widely as downloading, using the content downloaded by other members of the family, copying from friends and family, photocopying and scanning.

If this data is aggregated, we find that 72% of Polish Internet users declare that they download files with cultural goods either from web pages or peer-to-peer networks. If we add streaming and exchange of files with friends then already 92% of Polish Internet users participate in this kind of circulation of cultural goods. If informal circulation also in physical formats is taken into account (photocopying, scanning, but also exchanging books, CDs and DVDs, including copy versions, with family and friends) then 95% declares participation. More than 50% of active Internet users admit that the main reason for them to engage in informal circulation is not the price barrier of the formal market but the wider access to knowledge and cultural goods as compared to the goods that they could buy.

Moreover, as much as 52% of the whole Polish population agrees with the statement that the free access to books, films and music should be treated as a fundamental right even if it precludes copyright.<sup>58</sup>

The data quoted above proves that not only do Poles declare very strong social norms concerning access to knowledge and cultural goods but also that they act according to them. These norms clash with the strong proprietary vision of intellectual and artistic creations which was very much present in the discourse favouring the introduction of ACTA.<sup>59</sup>

The following section, strongly inspired by evolutionary institutional theory, will attempt to show

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from the non-users in terms of age, wealth, educational background and this whole aggregate of variables explains why Internet users are more active in social and cultural life than non-users. See: J. Czapiński, T. Panek (ed.), *Diagnoza Społeczna 2009*, J. Czapiński, T. Panek (ed.), *Diagnoza Społeczna 2011* at: <http://www.diagnoza.com>

56 J. Czapiński, T. Panek (ed.), *Diagnoza Społeczna 2011*.

57 Filiciak, Hofmokl, Tarkowski, *Obiegi Kultury. Społeczna cyrkulacja treści* op.cit., p.

58 Opinion poll conducted on 28-29 January 2012 on a representative sample of 1003 Poles by MillwardBrown SMG/KRC. See: <http://centrumcyfrowe.pl/2012/protest-w-sprawie-acta-to-walka-mlodych-o-wolnosc-w-internecie-potwierdzaja-wyniki-badan/>

59 For the sake of this article the fact whether ACTA does or does not change much in the Polish legal system is not important. What counts however is the fact that this treaty is associated with the very strong proprietary vision of protecting intellectual property rights.



the historical and cultural circumstances which have contributed to the development of such strong social norms favouring unrestricted access to cultural and knowledge goods amongst Poles, which are in sharp contrast not only with the ACTA treaty, but generally with the whole body of current international intellectual property law based on the strong proprietary paradigm.

In the first part of this paper four important phases, that might be considered as milestones in the development of law and technology in terms of the production and distribution of intellectual and artistic creations were described. Although these stages were universal around the globe, in various countries they took place in different historical moments and in diverse circumstances. In this section, I will focus on the same three out of four phases<sup>60</sup>, but highlighting additional elements of the environment in which both Polish copyright law and the respective social norms were evolving that were not present in Western European countries, and that might have contributed to the strong demand for unrestricted access to knowledge and culture goods amongst the Polish population.

### 1. Advent of print and the birth of copyright law – the introduction of the proprietary paradigm?

Poland was actually in the forefront of countries granting the first privileges protecting the interests of publishers, at the time that the cost of the printing press went down so drastically that the circulation of unauthorised reprints started flourishing. The first privilege was granted to a Polish publisher as early as in 1494.<sup>61</sup> The Polish system of privileges had a dual nature as it consisted of the privileges granted both by the secular and ecclesiastical authorities.<sup>62</sup> The privilege system was developing in Poland very well and as early as in the middle of the 16<sup>th</sup> century the idea of system of international protection was developed, as the protection granted in the Polish privileges was expanded to imported books in Hebrew, Greek<sup>63</sup>, and Czech<sup>64</sup>. The privileges assured the equal treatment of those imported books with regards to the Polish ones in terms of scope and the term of protection. Moreover some privileges granted protection against unauthorised reprint of the translations.<sup>65</sup> It is also already in that period that some privileges were granted directly to the

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60 The manuscript era is irrelevant for this comparison as there are no important differences between the various countries to be observed in this period.

61 *Ochrona praw autorskich w dawnej Polsce. Pamiętnik Słuchaczy Uniwersytetu Jagiellońskiego Wydany Staraniem I Nakładem Młodzieży Akademickiej Na Uroczystość Otwarcia "Collegii Novi"*, Kraków, Drukarnia Uniwersytetu Jagiellońskiego pod zarządem A.M. Kosterkiewicza, 1887, p.444.

62 The most important difference between these two types of privileges was the fact that the ecclesiastical privileges covered only a particular edition, thus the publishers had to apply for the protection every time they wanted to reprint another edition of the same work.

63 Due to the growing interest in religious studies, Greek and Hebrew were widely studied in Poland at that period. See: *Ochrona praw autorskich w dawnej Polsce*. p. 453.

64 Czech was at that time a language widely spoken by the Polish elites. Ibidem.

65 Ibidem.

authors and not to the publishers<sup>66</sup> and that generally artistic works of all types, and not only books were protected.<sup>67</sup> The legal doctrine unambiguously treated those privileges as belonging to the domain of private law, thus enforced only on the right-holder's motion.

By the second half of the 18<sup>th</sup> century the privileges were already standardised and based on the customary law that developed with the time: they granted 20 years of protection against unauthorised reprint, translation, compilation, alteration of a work and export of similar or identical works. The sanction amounted to a financial fine, half of which was paid to the right holder, the other half to the treasury.<sup>68</sup>

The first attempts to regulate copyright in a single general legal act that would replace the system of privileges were already made in 1776 and 1784.<sup>69</sup> The parliament however did not pass the law and so lost the chance to introduce the first Polish copyright act. Poland was at that time partitioned between Russia, Austria and Prussia hence soon all the copyright issues arising on Polish land were to be regulated by three various copyright acts originating in the three legal systems of the respective states.

To sum up this period of Polish legal history it should be stated that although Poland did not have a single universal copyright act, the very well developed system of privileges emerged quite early. The privileges responded to the need for protecting not only books but also other artistic creations, provided protection not only for national creations but expanded also to imported and translated works, introduced a sanction that meant both to cover the damages and to discourage future breach, and last but not least acknowledged the unique role of the author as different from the publisher. Thus it might be stated that the initial period of the development of copyright law in Poland, before the change from a system of privileges to the protection granted in the general legal acts, did not differ much from the processes that took place in Western Europe. Moreover, the well developed system of privileges made actually Poland one of the early movers in the field of protecting the fruits of human creation in this region of Europe.

Nevertheless, already at the moment when the first copyright acts on the Polish land were introduced<sup>70</sup>, the Polish case was particular. Not only did those regulations stem from three different legal systems, but they were imposed by the occupants' hostile authorities, and moreover were

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66 Ibidem.

67 Ibidem, p.455.

68 Ibidem, p.459.

69 Ibidem.

70 The first copyright regulations in the Polish territory incorporated to Austria were enacted in 1811, in the parts partitioned by Russia in 1828 and in the Prussian part – in 1835. See: Ewa Ferenc-Szydełko, *Prawo Autorskie na ziemiach polskich do 1926 r.*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej, Zeszyt 75, Kraków 2000.

strictly connected with the system of censorship, which in the territory of partitioned Poland was mainly aimed against Polish patriotic and pro-independence movements.

In Austria the preventive censorship successfully impeded both the circulation and access to Polish works from 1781.<sup>71</sup> Decisions of censors were irrevocable and were strongly interfered with the integrity of the work: the censors deleted words and phrases forbidden by the law and replaced them with random expressions.<sup>72</sup>

The situation was very similar in the Kingdom of Prussia, where from 1849 all the texts printed in Polish could only be published and imported from abroad if accepted by the censors. The strength of the censorship rendered legal circulation of Polish works (especially literature and press) in Prussia nearly inexistent.<sup>73</sup>

For Poles the most severe, however, was the system of censorship in Russia which was extremely active in blocking not only the circulation of Polish books and articles but also music, paintings, theatre and opera performances. Among the authors whose works were either completely banned or seriously changed by the Russian censors were two Nobel prize winners in literature Reymont and Sienkiewicz, famous composer Moniuszko, bard of Polish patriotic lyrics Mickiewicz and many other prominent creators. The interference of censors with the original works was so far - reaching that often authors could barely recognise their own creations as they were so cut and modified.<sup>74</sup> This power of the censors conflicted not only with the right to integrity of the work but also rendered the earnings of the authors nearly inexistent as the publishers at the time paid the remuneration to the authors proportionally to the size of the work, and thus works cut by half or more by the censors brought hardly any money to the author. The severe sanctions forced those creators, who did not want to compromise on their works and were courageous enough to object the requirements of censorship, to publish their works under pseudonyms or anonymously. Due to this fact even the right to paternity of the work was somehow biased.

Thus the strength of the censorship system in all the three territories of partitioned Poland rendered the copyright protection with regards to Polish creators fictitious, even if the legal acts regulating copyright issues were treated an author as the primordial subject of copyright protection.<sup>75</sup> The

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71 Ibidem, p. 225.

72 Ibidem, p. 226.

73 A very famous case of a publisher from Poznan who was not allowed (under the sanction of arrest) by the censors to sell the series of postcards and photographs by Artur Grottger titled *Polonia* and *Lithuania* proves that the slightest patriotic message in a Polish work was enough to be ban the work from official circulation. See: Ibidem, p. 225.

74 Ibidem, p. 227.

75 The German Copyright Act 1837 determined the author to be the primordial subject of copyright. The § 1 of the Act held that the right to reproduction, distribution (including remuneration for the distributed works) belongs "solely to the author" (*nur dem Autor derselben*). Although similar wording was not included in the first Austrian or Russian

power of censors to block the distribution of original works, including the pieces of most prominent Polish creators, led also to the emergence and fast diffusion of the illegal circulation of Polish literary, artistic and knowledge goods. In these circumstances the social norms favouring the unrestrained access to intellectual creations were flourishing, especially given literature and art were at the time important carriers of Polish national identity, which was constantly suppressed by the hostile authorities. As copyright law in many instances did not secure real protection for the Polish creators, and because many of them treated their occupation as a mission in the fight for independence, authors favoured wide access to their works. The debate on the “literary property” so powerful in England and France did not have its equivalent amongst the Polish elites. Moreover, even in the legal doctrine of that period the voices opposing the proprietary vision of copyright protection, criticising the “literary property” concept born abroad, and favouring the wide access to art and knowledge were prevailing.<sup>76</sup>

Hence, as opposed to many Western European countries, the situation in the Polish territory was not conducive to the general acceptance of the proprietary paradigm and very much favoured the concept of open access to knowledge and art. At that time the message that was conveyed in the literary and artistic works was the most important part not only of the creation, but also of the distribution process, and every effort was taken to make it reach the widest possible audience. Thus social norms emerging at that time on the Polish land although strongly opposing plagiarism<sup>77</sup>, did not condemn the unofficial, and often illegal circulation of knowledge and artistic goods.

## 2. Introduction of technologies allowing for mass consumer copying – first attempts to strengthen the proprietary paradigm?

The social norms promoting wide access to culture and knowledge, and accepting unofficial, and often illegal, circulation of intellectual and artistic creations found favourable conditions also in the second phase of the development of the mutual interactions between technology and copyright norms as analysed in this paper. When Western European democracies were trying to find a balance between the needs of consumers newly empowered by reproduction technologies, the importance of technological development and the demands of right holders who desired full control of the copyrighted works – in Poland once again the informal distribution of cultural and intellectual creations was flourishing. Although the general political situation has changed drastically since the end of the previous analysed historical period, the censorship was again very much present and

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copyright acts – the entirety of regulations proved that an author was meant to be the pivot of the protection system (and not e.g. a publisher as it used to be in the privilege system).

<sup>76</sup> See e.g.: Górski Antoni, *W kwestyi własności literackiej*, Odb. z “Biblioteki Warszawskiej”, 1891.

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playing a similar role in sustaining social norms favouring wide access to culture and knowledge, during the time of communism as it did during the partitions of Poland.

At the time when the first technologies allowing for the reproduction of copyrighted materials by consumers - namely analogue recorders - were introduced, Poland was cut off from the Western world by the heavy Iron Curtain. The censorship did not allow for import of most Western cultural and knowledge goods and kept watch and ward not to allow “harmful” trends to be imitated in socialist Poland. “Big-beat” was banned by the Polish censors not only as a genre of music, but also as a word. Wearing clothes according to Western fashion trends could be perceived as a revolutionary act, such an innocent detail as colourful socks in the 50's could cost a cruel interrogation by the security forces. Obviously those facts triggered resistance, especially on the part of young people. One of the methods of opposing the regime, and more importantly of trying to live a normal life, involved gaining access to forbidden cultural creations – mainly music.

The prominent role in the emancipation of many Polish teenagers growing up in communist Poland was played by Radio Luxembourg, the commercial multilingual radio station based in Luxembourg, which was at that time shaping the music tastes of young people around Europe. Although listening to this radio station was forbidden, most youngsters ignored the ban, and not only listened to but also recorded the broadcasts of Radio Luxembourg using the reel-to-reel audio tape recorders.<sup>78</sup> With the political thaw, another source of music recordings emerged – the Polish Radio Program 3. Although it was a public, state-owned radio station, it was allowed some autonomy, according to the “vent” strategy of the communist party, which at some point started presupposing some freedom in the least important spheres of social life as an inevitable protection against the political revolution. The Program 3 introduced broadcasts that were specially devoted to the recording activities of the audience. The speaker, presenting a list of most popular Western songs counted down before playing each track so that the members of the public knew when to start recording. The recordings of music from those radio stations were one of the most demanded goods in the informal market where both sale and exchange contracts were concluded. Social esteem and the place in the youngsters' hierarchy in communist Poland were proportional to the number of Western musical recordings owned. Most of them were either recorded from the radio stations or copied from friends.<sup>79</sup>

Simultaneously, from the 70s', the informal circulation of the written word was flourishing. Books, articles and short leaflets with political messages were mass reproduced with the use of home-made

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78 In Polish: magnetofon szpulowy. See e.g. Wojciech Mann, *Rock Mann czyli jak nie zostałem saksofonistą*, Wydawnictwo Znak, 2010.

79 Very rarely did the recordings originate from the illegal import.

duplicating machines<sup>80</sup> and distributed through the illegal chains. This phenomenon was so widespread that it got the name of the “second circulation”<sup>81</sup>, as opposed to the official distribution of cultural and knowledge goods approved of by the state censors. Between 1976 and 1980 “the second circulation” provided the space not only for political opposition but also for artistic creations the presence of which was impossible in “the first”, official circulation.<sup>82</sup> The phenomenon of “the second circulation” was already very well entrenched in the collective consciousness of the Polish intelligentsia in the 70s', and gaining the ever growing popularity among the working class. The information acquired from the informal chain of distribution with comparison to the official news allowed for developing critical opinions on the situation in Poland and abroad. Moreover, “the second circulation” was complimentary to “the first” one in terms of the distribution of art and literature, as it provided space for the works forbidden by the censors, and as such was the real gateway to Western culture.<sup>83</sup>

In the beginning of the 80s' the phenomenon of “the third circulation” emerged. “The third circulation” was a publishing and distributing movement of the youngest generation, originating from the alternative subcultures, mostly punks, opposing both the “first” political mainstream, and the “second” oppositional movements. “The third circulation” did not only deny the communist ideology, but also rejected conservative art, perceived by the youngest generation as compromising with the communist authorities. It involved unofficial distribution of tape recordings, texts and graphics. “The third circulation” was not as structurally organised as “the second” in terms of publishing and distribution chains. The works were mainly circulated via the concerts, festivals, and ad hoc meetings of members of the subcultures. As the emergence and existence of “the second circulation” was strictly connected with the technological novelty of the duplicating machines and reel-to-reel audio tape recorders, “the third circulation” was born with photocopying machines and cassette-decks. Due to these technological novelties the form of the circulating works also evolved. Whereas people involved in “the second circulation” did not learn how to use the new possibilities provided by these inventions and continued distributing mostly short leaflets as the easiest form to be copied on the duplicating machines, “the third circulation” was mainly concentrating on the distribution of tape cassettes with alternative music, recorded during live concerts or copied from master copies and fanzines: non-professional and non-official publications devoted to alternative culture, sold mainly by post for the cost of delivery. The novelty of photocopying allowed not only for much longer publications, as compared to the texts distributed within “the second circulation”,

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80 In Polish: famous “*powielacze*” that played an important role in the resistance movement against the communism.

81 In Polish: “*drugi obieg*”.

82 See e.g. Mirosław Pczak, *Kilka uwag o dwóch obiegach*, in: “*Więź*” 2(352), 1988, p.29.

83 Ibidem.

but also for much more interesting graphics and a generally attractive layout.<sup>84</sup> In the 80s' fanzines distributed within "the third circulation" reached the public of tens of thousands of young Poles between the age of 17 and 27.<sup>85</sup> What is crucial for this analysis, "the third circulation", equally in this respect to "the second circulation", was a non-profit enterprise, where facilitation of the widest possible dissemination and not financial gain was the main incentive for involvement. Needless to say both "the second" and "the third" circulations were, not only unofficial, but also illegal as they were developed outside the censoring system.

Although alternative cultural movements, such as punk subculture, which involved the unofficial distribution of cultural goods, also existed in Western Europe (especially in the U.K) and the U.S. - in Poland this phenomenon was much more influential, as it involved political opposition of the youngest generations tired both with the communist regime, and with the (in their opinion inefficient) "elder" opposition, concentrated around "the second circulation". The fact that involvement in the unofficial distribution of cultural and knowledge goods was against the laws on censorship and as such carried the danger of criminal sanctions, including imprisonment, did not discourage, but quite to the opposite - added some flavour to these activities, transforming them into the sort of a civil disobedience movement. The power of civil disobedience actions in creating and sustaining social norms is well known and cannot be underestimated. Hence the strength of both of the unofficial Polish "circulations" in reinforcing social norms favouring the unrestricted access to intellectual and artistic creations should not be found surprising.

When the Western world was discussing the dangers of new technologies in disrupting the copyright regime, epitomised by well known slogans like e.g.: "*Home taping is killing music. And it is illegal*" - majority of the Polish population was involved in illegal circulations of cultural and knowledge goods, treating it as way of combating the hostile political regime. Whereas the West was calling unauthorised distribution "*theft*" as early as in the 80s' of the last century - between the 60s' and beginning of the 90s' at least two generations of Poles, perceived engaging in unofficial circulation of music, literature and press as a virtue, providing access to objective information and a gateway to Western culture in the captive nation. The public debates on the limits of copyright monopoly triggered by the invention of new multiplying technologies that took place in the Western countries as early as in the 60s' and continued into 80s' and 90s' were absent in Poland in that time. Even the levy system, which might be perceived as the attempt to maintain a fragile balance

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84 See e.g. Paweł Dunin-Łasowicz, *Inny Obieg* at: [http://www.zinelibrary.pl/index.php?option=com\\_content&view=article&id=15%3Ainny-obieg&catid=11%3Ao-zinach&Itemid=3&fe0c5785f673d3794b20f9d4b6f1b88a=e89b83c989def4629733fbccf44dd8b3](http://www.zinelibrary.pl/index.php?option=com_content&view=article&id=15%3Ainny-obieg&catid=11%3Ao-zinach&Itemid=3&fe0c5785f673d3794b20f9d4b6f1b88a=e89b83c989def4629733fbccf44dd8b3)

85 Ibidem.

between the interests of various stake-holders was introduced in Poland as late as in 1994<sup>86</sup>.

In these circumstances social norms approving of the wide dissemination of cultural and knowledge goods, that were already rooted in the Polish culture, were further reinforced and shared by an ever growing number of Poles.

### 3. The digital era – absolute property?

As the analysis above shows, Poles entered the digital era already with strong social norms approving of the wide dissemination of cultural goods, even if such an activity was against the official laws. Contrary to the situation in Western countries, in Poland it was not only the youngsters, empowered with the new technological possibilities who suddenly changed their attitude to copyright law and shunned compliance in response to the power given to them by technology. Poles had a tradition dating back hundreds of years of unofficial and illegal circulation of cultural goods that was familiar to elder generations as much as it was to teenagers. Internet and digital technologies of reproduction and dissemination of copyrighted materials were just another technological mean that replaced tools used so far. Poles not only did not develop strong social norms opposing the unauthorised distribution of cultural goods, but did not internalise the proprietary vision of cultural and knowledge goods as in Polish history it was not the private ownership and the financial gain of the creator but the ability to convey important message to the public that was generally perceived as the incentive to create.<sup>87</sup> The copyright law was not as internalised as it was in other countries also due to the fact that for most of its existence it did not offer any real protection to Polish creators. Poland also did not witness the important public discussions concerning the nature and function of intellectual creations, and the scope of their protection, which already had taken place in Western societies in both of the historical periods analysed above and facilitated the evolution of social norms that would be in line with copyright regulations. The ratification of the ACTA treaty was actually the first event that triggered public debates on that topic, thus the escalation of the dispute should not be a surprise especially as at its core lay a vital conflict between the imposed international regulations and the strongly internalised social norms.

Concluding, the strong social norms favouring unrestricted access to culture and knowledge, in case of Polish society, should not be perceived solely as a new phenomenon triggered by the digital revolution, but also as a general cultural inclination which evolved over time due to the specific

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86 It was introduced by the Copyright Legal Act in 1994: Prawo autorskie z 1994 r.

87 This vision is still strongly reinforced in Polish schools where literature, and art generally, are described primarily as the carriers of national identity used in the fight for independence.



historical developments.

## Conclusion

Application of evolutionary institutional theory allows the conclusion to be reached that the strong proprietary vision imposed universally through the recent international treaties, which do not take into account local developments, must necessarily clash with social norms which evolved as a response to particular historical experiences. The *one-size-fits-all* formula will never be equally effective in diversified world. The law that is detached from social reality will fail to regulate human behaviour, no matter how severe it may become, as the mechanisms of civil disobedience (no matter whether justified in this situation or not) will lead to revolutionary or 'martyr's' behaviours as observed in the Pirate Bay case, where the accused managed to create the self-image of heroes fighting for the just case and exhorting Internet users to follow the suit. However, being a highly political issue, copyright laws nowadays are not that easily changed.

Both these inferences seem to lead the Polish Ministry for Administration and Digitization that did not ignore the strong anti-ACTA protests, but launched a round table gathering various stakeholders to negotiate a potential compromise with regard to copyright law that would satisfy conflicting interests, remaining however in accordance with the general framework of international law. The four rounds of negotiations shown that quite liberal Polish provisions on private use might be further modified in the "user-friendly" mode, given that a compromise on the question of the remuneration for the use of content material in the Internet will be found. The diversification between the *commercial* and *non-commercial* use is also a potential option. The most immediate reform is supposed to remain within the current international regime, using however the possible exceptions to the maximum. Nevertheless in the last part of negotiations suggestion arose that Poland might even be willing to start a campaign on re-negotiating some international treaties so that they would reintroduce the lost balance of various interests protected by the copyright regime<sup>88</sup>, as this is the only way to restore law's ability to regulate human behaviour in the field of distribution of artistic and intellectual creations.

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88 All the reports from the proceedings of the round table on the reform of intellectual property law in Poland See at: [http://warsztaty.mac.gov.pl/prawo\\_autorskie/doku.php?id=warsztat\\_2520prawo\\_2520autorskie](http://warsztaty.mac.gov.pl/prawo_autorskie/doku.php?id=warsztat_2520prawo_2520autorskie)