Copyright in the Digital Age – Exceptions and Limitations to Copyright and Their Impact on Free Access to Information

An Analysis of the Implementation of Art. 6 (4) Information Directive and its Impact on Limiting Copyright Protection in the Czech Republic and Austria

Thesis

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Table of Contents

Abbreviations

Ao.	And others
cf	From the Latin word confer meaning `compare´
CRL	Copyright Law
DMCA	Digital Millennium Copyright Act
ECJ	European Court of Justice
ECT	Treaty on the Establishment of an European Community
ErRV	Erläuterungen zur Regierungsvorlage (Comments on the government´s proposal)
EUCD	European Union Copyright Directive (= Information Directive)
Ibid.	From the Latin word ibidem meaning `in the same place´
ISP	Internet Service Provider (access provider)
KMU	Klein und Mittelunternehmung, Small and Middle Company
MS	Member States
Nov	Novelle (amendment)
op. cit.	opus citum (quoted work)
p2p	Peer to peer (like Napster)
p.m.a.	Post mortem auctoris, after the author´s death
Rec.	Recital (Erwähnung)
Rz.	Randziffer (bench number)
PDA	Personal Digital Assistant (handheld computer)
SupCt	Supreme Court
TPM	Technological Protection Measures
TRIPs	Trade Related aspects of Intellectual Property
UrhG	Urheberrechtsgesetz (Copyright Law)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

Introduction

The purpose of this thesis is to discuss the new concepts of copyright[1] in the "Information Society", Digital Rights Management (DRM) based on Technical Protection Measures, and the concept of limitations of and exceptions to it in the European Union, particularly in the Czech Republic and Austria. The Information Society's impact was first felt in the 90s, and has since then developed on the basis of the "digital revolution," although presumably this is still in its beginning. New technical platforms, with their new ways of exploiting work, demanded new copyright regulations. In this context, a redefinition of the general concepts has been discussed within the EU and also globally.

This first chapter should serve as an introduction to the basic justifications for copyright, the public interest behind states guaranteeing and also limiting copyright. Subsequently, the adoption of copyright and its limitations in the digital age will also be considered.

The second chapter deals with the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the Information Directive), from the Green Paper in 1995 to the final version in 2001.

Chapter three analyses and compares the implementation of the core provision referring to exceptions and limitations, Art. 6(4) of the Information Directive, in Czech and Austrian copyright law.

Finally, there is a brief introduction about criticisms of DRM and alternatives to it.

[1] Copyright in this master thesis is used in its general, widest sense as a generic term to describe the various systems of law to protect authors of different kinds of works and other right owners. It does not refer to the system of copyright as used in common law countries in contrast to the system of droit d´auteur used in civil law countries. There are some differences between both systems but they have recently moved closer, particularly because of the harmonization of EU and international law (WIPO, TRIPS).

1. Copyright and the Public Interest

1.1 The Functions of Copyright[2]

With the invention of the printing press the idea of copyright was also born. In the beginning it were the printers and publishers who petitioned the authorities to protect them from unfair competition from printers who simply copied their publications. The first right had been granted by the authorities to printers and publishers in the beginning of the 15th century and it soon emerged that these privileges not only encouraged a new industry by making the printers' trade more lucrative, but were also an ideal means of controlling access to information by restricting the rights to legal protection. So until the enlightenment a preliminary function of these privileges was effectively censorship. Another result of the de facto monopoly given to preferred printers, as happened in Britain, where the privileges were held by members of the Stationers' Company, were high prices and a lack of availability of books.

In 1709 the Statute of Ann was passed which described itself as, "*an Act 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*". It introduced two new principles: recognition of the individual author as the object of protection, and the adoption of the principle of a limited term of protection for published works. It was the first statute to deal with copyright unconnected with censorship.

Since this time, the public interest of creativity and mankind's development demanded the finding of a balance between conflicting interests of the authors' interests and the interest of the public in having access to (protected) works. "*From the inception of copyright law, rights have been subject to limitations of duration and exemptions for personal and scientific use. This balance has been expressed in Art. 27 of the Universal Declaration of Human Rights which provides: (i) everyone has the right freely to participate in the cultural life of the Community, to enjoy the arts and to share in scientific advancement and its benefits; (ii)*

[2] Cf. G. Davies, *Copyright and the Public Interest*, (2002) London Sweet & Maxwell, This chapter summarises Davies´ arguments in Part I The Public Interest in the Copyright System and Part III Copyright and Public Policy, including much of the author's own language.

everyone has the right to the protection of the oral and material interests resulting from any scientific, literary or artistic production of which he is an author."[3]

Referring to Davies, there are four main principles on which the modern international copyright system is founded: (i) natural law: propounded by John Locke[4] people have a natural right to property and people own the labour of their bodies and the results of that labour. "*It is just, that [the] author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish.*[5]

(ii) Just reward for labour: since creative works enrich our lives, authors deserve to be remunerated when their work is exploited. It enables the author to continue working. Nowadays considerable investment is needed to create some works. *These investments will not be made unless there is a reasonable expectation of recouping them and making a reasonable profit.*[6]

(iii) Stimulus to creativity: this principle is closely linked to the principle of just reward for labour. In the absence of subsidy (or complementary to it) this principle presupposes that authors will only be able and willing to invest sufficient resources in producing works if they can expect to be remunerated for it. *It is important to emphasise that the main purpose of copyright protection must be to stimulate the production of intellectual works.*[7]

(iv) Social requirements: *If the ideas and experiences of creators can be shared by a wide public within a short space of time they contribute to the advance of society.*[8]

But as a former US Librarian of Congress expressed, copyright's *raison d'etre* must not be forgotten: *[m]isunderstood, and with its true purposes lost sight of, copyright can become a limitation on creation and a barrier to free interchange and expression. Like many other products of man's genius in the realms both of science and of the law, it has a capacity for good or evil depending on his understanding and the use he makes of it.*

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[3] G. Davies, *op. cit.,* 13.
[4] J. Locke, *Two Treatises of Government* (1690), edited by P. Laslett, Cambridge University Press, 1988, para. 27 quoted at G. Davies, *op. cit.,* 11 footnote 10.
[5] Millar v Taylor, per Lord Mansfield, 4 Burr. 2334, at 252.
[6] G. Davies, *op. cit.,* 15.
[7] S. Ljungman, *Nogot om Verkshöjd*, (1972) NIR 35 quoted at G. Davies, *op. cit.,* 16 footnote 24.
[8] S.M. Stew Art., *International Copyright and Neighboring Rights*, (1989), 2nd ed., Butterworths, London, para. 1.05. quoted at G. Davies, *op. cit.,* 16 footnote 27.

(…) The balancing of conflicting interests and the weighing of (…) testimony should be done by others with a broader perspective and in a spirit which makes the public interest the paramount test.[9]

In 1945 Professor Zechariah Chafee[10] proposed six ideals describing the protection and the limits to the scope of protection:
(i) *Complete coverage [of different disciplines]* (the inclusion of any collocation of visible or audible points, - of lines, colours, sounds or words).
(ii) *Single monopoly* (the sole right to produce or reproduce the work or any substantial part of it in any material from whatsoever).
(iii) *International protection* (copyright should universally protect and facilitate the free flow of ideas and imaginative creations across national borders).
(iv) Protection *should not extend substantially beyond the purposes of protection*, the burdens must not outweigh the benefits.
(v) Protection given to the copyright owner *should not stifle independent creation by others.* (…) *The world goes ahead because each of us builds on the work of our predecessors. Progress would be stifled if an author were to be granted a complete monopoly for a long period. The very policy which leads the law to encourage the creativity of an author also justifies it in facilitating the creativity of others.*
(vi) Convenient to handle (rules should be certain, readily understood, not unduly complicated, and as easy as possible to apply in order to facilitate the avoidance of litigation).

As Davies points *out, it is the fourth ideal which begs the question of the functions of copyright.* As Chafee says, *[t]he burden which the monopoly imposes on readers and competing publishers should be roughly limited to what will produce the following benefits: (a) for the author, to supply a direct or indirect pecuniary return as an incentive to creation and to confer upon him control over the marketing of his creation; (b) for the surviving family, to give a pecuniary return which will save them from destitution and impel the author to create, without allowing the family to abuse a prolonged monopoly; (c) for the publisher, to give a continued pecuniary return which will indirectly benefit the author and yield to the publisher an equitable return on his investment, but which will not prevent the public from getting easy access to the creation after the author's death.*[11]

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[9] L.H. Evans, *Copyright and the Public Interest*, (1949) 53 Bulletin of the New York Public Library, 3 at 4 quoted at G. Davies, *op. cit.,* at 244 footnote 2.
[10] Z. Chafee, Jr., *Reflexions (sic) on the Law of Copyright* (Parts I and II), (1945) 45 Colombia Law Rev. 503 and 719 quoted at G. Davies, *op. cit.,* at 244 footnote 5.
Davies summarized Professor Chafee´s arguments, including much of his own language, which are again summarized by the author.
[11] Ibid. at 510.

The economic justification for copyright in the Anglo-American system as well as the moral justification for copyright in civil law countries thus demonstrate broad parallels, and form the basis for international protection. There are, however, some arguments against this moral justification for copyright. There is an important group of authors which do not expect to get direct monetary reward and who do pay to have their books published. They are much more interested in circulation of their work and the prestige it brings with it, as in the case of academics in their workplace and the *copyright system does not especially reward creators of great works of lasting social value. It favours instead the commercial, popular work with large sales.*[12]

Another argument is the fact that *the amount of reward is determined solely by the public's willingness to pay for the work. More importantly, there is no self-evident reason why authors deserve compensation fundamentally different from that given to those who perform other kinds of work; yet workers on the whole are not paid with respect to the value of their work to society, but in the amount necessary to persuade them to perform their work, plus any premium resulting from the scarcity of similar workers.*[13] It should be added that many governments as well as other institutions already award substantial sums to creators in the form of grants and prizes.

Referring to the economic justifications for copyright, Davies quotes Breyer[14] in suggesting that, at least at the time of his writing (1972), the Government subsidised scientific writing by paying for nearly two thirds of US research and development work, as well as by spending large sums on the dissemination of its results. But this substitution of the free-market of copyright with Government money, Davies suggests, increases the risk of censorship. Ultimately, *the monopoly right permits the publisher to take risks that he would not take if his more successful books were subject to reprinting without permission and without fee. Thus the copyright promotes the public interest by encouraging a great variety of books to be published, many of them economically marginal, in the hope that some will be highly profitable, and it does this without causing significantly higher book prices on account of monopolistic pricing.*[15]

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[12] G. Davies, *op. cit.,* at 248.
[13] S.N. Light, *Parody, Burlesque and the Economic Rationale for Copyright*, (1979), 11 Connecticut Law Rev., No. 4, at 619 quoted at G. Davies, *op. cit.,* at 248 footnote 13.
[14] S. Breyer, *Copyright: A Rejoinder*, (1972), 20 U.C.L.A.L. Rev.75 quoted at G. Davies, *op. cit.,* at 251 footnote 18.
[15] H.S. Bailey, *The Art and Science of Book Publishing,* (1970), Ohio University Press, at 169 quoted at G. Davies, *op. cit.,* at 253 footnote 23.

In conclusion, S.N.Light[16] is quoted to the effect that *in the context of the United States of America, the phrase "to promote progress of science and the useful arts" in the copyright clause of the Constitution embodies the economic rationale for copyright, namely, "to enhance the public welfare by encouraging artistic endeavours through the creator´s self-interest". Similarly, the constitutional limitation of the term of copyright protection is embodied in the term "by securing for limited times … the exclusive right to their respective writings …". Congress may therefore not grant nor the courts enforce copyright protection which would impede the progress which is the very purpose of copyright. Thus, Light suggests that, "Where the extension of copyright would appear to be contrary to this constitutional purpose an analysis of the economic justification should be undertaken".*

The last sentence is not only applicable in the United States but can be seen as the general principle of copyright and has to be discussed below in relation to the new copyright regime in the Information Society.

The Need for International Protection[17]

Chafee's third ideal, the need for international protection, reflects the growing intercultural interdependence of the world and should help to facilitate the free flow of ideas and artistic work across national boundaries.

The most important international agreement is the Berne Convention for the Protection of Literary and artistic Work[18], which was adopted in 1886. It is administered by the World Intellectual Property Organisation (WIPO), which is part of the UN but with its own membership. The Berne Convention has been followed by several other agreements such as the Rome Convention[19] or recently by the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) both in 1996.

Parallel to the WIPO treaties, the TRIPs (Trade Related Aspects of Intellectual Property Rights) Agreement should be mentioned. It is part of the WTO agreements and was signed in 1995 together with the WTO at the Uruguay Round. The TRIPs Agreement is built on principles

[16] G. Davies, *op. cit.,* at 256 At footnote G. Davies refers to the case.
[17] See also C. Wildpaner, *The U.S. Digital Millennium Copyright Act – A Challenge for Fair Use in the Digital Age*, Chapter 2 International Copyright Law, (2004) Wien, Verlag Medien und Recht.
[18] Berne Convention available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.
[19] International Convention for the Protection of Performers Producers of Phonograms and Broadcasting Organizations, 1961.

embodied in the Paris Convention and the Berne Convention but it went beyond them and established *universally acknowledged international minimum standards for intellectual property protection and (…) contains effective international dispute-settlement procedures.*[20] In 1995, the TRIPs and WIPO Council concluded a cooperation agreement.

1.2 Exceptions to and Limitations of Copyright

Limited Duration of Protection

The duration of copyright protection is harmonized within the European Union by Directive 93/98 of October 29, 1993 and lasts for 70 years post mortem auctoris[21] (p.m.a.), although only 3 member states then had 70 years p.m.a. protection, the rest had 50 years. At the same time there was an ongoing debate within WIPO to extend protection to 70 years, but it was not implemented because agreement proved impossible. Nevertheless, the United States of America extended the duration from 50 years p.m.a. to 70 which was unsuccessfully challenged in the US Supreme Court as unconstitutional[22].

Davies[23] points out that *long terms [of protection] are contrary to the public interest in that they enable descendants of the author and indeed publishers to either suppress works altogether or to limit access to and exploitation of works by demanding unreasonable royalties or imposing various restrictive conditions on their publication or performance. Long terms encourage piracy because they represent an unacceptable monopoly, which burdens the user with high prices, and thus leads to disrespect for the law. Long periods of copyright protection lead to difficulties in identifying the successors in title of the original authors to whom application should be made for permission to reproduce the work, and are thus contrary to Chefee`s ideal of convenience*, especially for educationalists, librarians, historians and performers.

Exceptions to Protection

Exceptions to protection break the monopoly of the right-holders by providing limited rights to use works without their consent. Steward says that *[t]he limitations on copyright are necessary to keep the*

[20] Goldstein, *International Intellectual Property Law*, 95.
[21] After the author´s death.
[22] Eldred v Ashcroft, US SupCt, No.01-618, Decided January 15, 2003, available at http://www.supremecourtus.gov/opinions/02pdf/01-618.pdf.
[23] G. Davies, *op. cit.,* at 274.

balance between two conflicting public interests: the public interest in rewarding creators and the public interest in the widest dissemination of their works, which is also the interest of the users of such works.[24] Commenting on the scope of such exceptions, Fabiani argues that limitations on the author's exclusive rights may be imposed in order to facilitate the work's contribution to the intellectual and cultural enrichment of the community. However, the limitations must not be such as to dampen the will to create and disseminate new works.[25]

The exceptions specifically permitted by the Berne Convention include free use of otherwise protected works in public speeches, lectures and legal proceedings; use of short excerpts by way of quotation or illustration for teaching (in such cases the use must be compatible with fair practice and justified by the purpose); use justified in connection with the reporting of current events; use solely for the purposes of private study and research; and, finally, the convention contains a catch-all provision, allowing reproduction in certain special cases provided that such reproduction does not constitute exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. This three-step test, as set out by the Berne Convention, is made up of the following conditions: 1. specific exceptions of limited scope for informational and educational purposes, 2. limitations on the right of reproduction and 3. non-voluntary licensing systems.

1. Exceptions for Informational and Educational Purposes:

Rights of quotation[26]: *The right to make quotations from a published work*[27] *allows the inclusion of one or more passages from someone else's work in one's own to illustrate a theme or defend some proposition or to describe or criticise the work quoted therefrom. There are three limits to[check] this licence to quote: 1. The work from which the extract is taken must have been lawfully made available to the public. 2. The quotation must be "compatible with fair practice", implying an objective appreciation of what is normally considered acceptable and is a matter for the courts to decide. 3. The quotation must only be to the extent justified by the purpose, which again is a matter for the courts.* The source and the name of the author have to be mentioned.

[24] S.M. Stew Art., *International Copyright and neighbouring Rights*, (1989), London, 2nd ed., Butterworths, para. 4.50 quoted at G. Davies, *op. cit.,* at 276, footnote 39.
[25] M.Fabianai, *A profile of Copyright in Today`s Society*, (1982) Copyright 154 quoted at G. Davies, *op. cit.,* at 277, footnote 40.
[26] G. Davies, *op. cit.,* at 278.
[27] Berne Convention, Art. 10 (1).

Use for Teaching Purposes

This right permits *the utilisation of works by way of illustration in publications, broadcasts or sound or audiovisual recordings for teaching, subject to the same conditions that govern quotations*[28]. The work's source and author's name have to be mentioned.

Exceptions for the Benefit of the Media

The reproduction by the press, the broadcasting or the communication to the public by wire of arts published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character may also be permitted by national legislation, an exception of particular value to the news media. The source must always be clearly indicated to protect moral rights and an author has the right to expressly reserve his consent to such use.[29]

Reporting Current Events

Reporting current events allows the reproduction of works to make them available to the public, when they are fortuitously seen or heard in the background in the course of an event.

2. Limitations on the Right of Reproduction

The Three-Step Test of the Berne Convention

Art. 9 of the Berne Convention grants the Right of Reproduction. Art. 9(1) grants authors of literary and artistic works (including those of an audio or visual nature) *the exclusive right of authorizing the reproduction of these works, in any manner or form.* According to 9(2) the contracting parties may legally permit the reproduction of such works (1) in certain special cases, provided that such reproduction (2) does not conflict with a normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author.

In cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation such as, for example, a system of compulsory licensing with equitable remuneration.[30] Art. 10 WCT 1996 has extended the scope of Art. 9(2) of the Berne Convention to make it applicable to all authors' rights and not merely reproduction rights. This is also part of the WPPT (Art. 16) and the TRIPs Agreement (Art. 13). The Information Directive recognizes the three-step test in it's

[28] G. Davies, *op. cit.,* at 278.
[29] G. Davies, *op. cit.,* at 278.
[30] C. Masouyé, *WIPO Guide to the Berne Convention*, WIPO para 9.8., quoted at G. Davies, *op. cit.*, at 280.

own Art. 5(5) which regulates limitations and exceptions to the reproduction right as well as to the rights of communication to the public of works and making available to the public matter subject to related rights. It is an exhaustive list of permissible but not mandatory exceptions and the member states are free to choose for themselves what to allow.

Far from harmonising the regime of exceptions in the European Union, this leaves a wide discretion to Member States with the result that there will be no Single Market so far as exceptions are concerned, a problem which is likely to cause particular problems as regards the exception for private use[31].

3. Non-Voluntary Licensing Systems

This limitation in the form of statutory or compulsory licences allows the use of a work without the author's authorisation under certain conditions such as the payment of equitable remuneration. The compulsory licence for broadcasting and cable distribution was introduced in the Berne Convention in the interest of the public but it is restricted. Such licences only apply in countries which have provided for them, they may not prejudice the authors' moral rights and fair remuneration must be paid. *The rationale for the compulsory licence concerning the right of recording musical works (…), was done in the public interest, the aim being to prevent one powerful record company from acquiring the monopoly of recording most of the successful new music. It aimed at promoting competition in what was at that time a fledgling recording industry (…).*[32]

However, there is also some criticism of this collective solution, as opposed to individual authors' rights. Critics suggest that this system would lead to (…) *patronage by the State as a substitute for copyright protection (*which*) has the overriding disadvantage of resulting in state control with the attendant risk of censorship of artistic creativity. (…) Such state control is clearly incompatible with the overriding public interest that artists should be at liberty to create without any limitation on their freedom of expression. (…) It is clear that patronage – whether private or state – is inadequate to assure the freedom upon which cultural life of a modern State should depend. That freedom should extend not only to the creator's expression but also to the public's choice, that is, the test of the market.*[33] And finally (…) *such a system has obvious disadvantages. It combines the disadvantages of a system of compulsory licensing with the risk that those controlling the disbursements may use*

[31] G. Davies, *op. cit.,* at 281.
[32] G. Davies, *op. cit.,* at 284.
[33] G. Davies, *op. cit.,* at 256-262.

their power as a means of censorship. It may also be maintained that collectivisation might deprive the authors of the motive power of their creative activity – the hope of a "just remuneration" for their toil.[34] This is also discussed in chapter 4.

1.3 Exceptions to Copyright Protection and Modern Technology

Like the WIPO Treaties and the TRIPs Agreement the Information Directive seeks to adapt the EU´s copyright regime to the information society[35].[36] Recital 5 of the Information Directive mentions that *technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.* In the same way that it was necessary to broaden the scope of copyright to new ways of distribution such as Radio or CD; digital technology and the internet represent new uses of works. Authors had to be protected against such types of exploitation and it was hoped that, *a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation (…).*[37]

In this context the scope of protection also had to be defined, particularly the question of limitations and exceptions since digital technology had completely changed the technical possibilities. While in former times copying meant to re-write a book manually at great effort, nowadays a text file can be copied within seconds. Copying of a digital file does not lead to any reduction in quality, so the original argument for private copying exceptions as a de minimis use and as causing no harm to right owners appears no longer valid.

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[34] B.S. Lassen, *Collectivism and Individual Rights in Norwegian Copyright Law*, (1963) Scandinavian Studies in Law, p. 82-83 and 88 quoted at G. Davies, *op. cit.,* at 261.

[35] Information Society has been introduced to the political discussion within the EC by the "Bangemann Report", *Europe and the global information society, Recommendations to the European Counci*l, Brussels, 26 May 1994, available at: http://europa.eu.int/ISPO/infosoc/backg/bangeman.html.

[36] Other purposes will be mentioned below in Chapter 2.1.

[37] Recital 4 Information Directive.

Another aspect has also changed: over time, home taping was no longer considered an exploitation of the work (according to the three-step test) but because of a lack of practical control over private copying and the reluctance of governments to enforce exclusive rights in the private sphere, a new exception was created permitting private audio-visual copying and reproduction for the personal use of the copier, in return for remuneration being paid at the time the blank medium was purchased, included in the cassette purchase price.

In the light of new technology, this justification seems to be anachronistic since the automatic logging of, and payment for, the use of works is now possible using Technical Protection Measures (TPM)[38]. This also raises questions relating to non-voluntary licences, since the argument was that the transaction costs of agreeing exclusive rights with individual right owners were prohibitive. Technology seems to have made such ventures much more feasible making possible the return of exclusive rights to the author.

There were also other arguments in the debate as mentioned by Kerever: new communication techniques make it possible for programs to be distributed almost instantaneously anywhere, and for recorded programs to be appropriated by individuals. The public has the right to benefit fully from these techniques, especially since they are used for the dissemination of information and culture. The legitimate demands of the public – in other words the general interest – are not done justice if each of the many uses of one and the same work is subject to the authorisation by a rights-holder. What makes this obstacle all the more formidable is that the right asserted is exclusive, monopolistic and discretionary, and that each program is normally made up of several protected works to which a complex web of intertwined rights is applicable … .[39]

The debate on the Information Directive and the scope of copyright protection moved slowly, as illustrated by the fact that it took two proposals from the European Commission and a couple of years to pass it. One reason was the directive's futuristic content at a time when a lot of the predicted technical innovations were not yet reality and the use of the so-called data highway was not widespread enough to justify talk of an information society. Regardless, both the European Union and the United States were driven by the idea of gaining an advantage on the market by

[38] See also chapter 3.
[39] A. Kerecer, *Reflections on the Future Development of Copyright*, (1983) Copyright 373 quoted at G. Davies, *op. cit.*, at 293.

recognizing copyright at a high level early on[40] and by strengthening authors' and related rights. This will be discussed and critically evaluated in the following chapters.

[40] Recital 4, Information Directive: *A harmonized legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property (…) will lead in turn to growth and increased competitiveness of Europe, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.*

2. Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

1.4 History of the Information Directive

1.4.1 1995 Green Paper, Communication on Copyright and Related Rights in the Information Society

The issue of technological development and copyright was initially dealt with in the Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action (1988)[41]. In this document, measures relating to five topics: Protection of Computer Programs, Piracy, Rental Rights, Protection of Databases and Private Copying were proposed and it lead to the "first generation" of copyright harmonization within the European Union[42].

The 1988 Green Paper was followed by the 1995 Green Paper on Copyright and Related Rights in the Information Society[43] which formed the basic discussion paper for a harmonized EU copyright regime. The first part describes the functioning of the "Information Society". On the basis of contributions by interested parties the commission compiled, in the second part, there were nine chapters with priority in relation to copyright and related rights: applicable law, limitation of rights and parallel imports, reproduction rights, communication to the public, digital distribution/transmission, digital broadcast, moral rights, acquisition and securing the rights and technical identification and protection systems.

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[41] COM/88/172final

[42] Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases Off. J. L 077, P. 0020 – 0028; Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Off. J. L 248, P. 0015 – 0021; Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights, Off. J. L 290, P. 0009 – 0013; Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Off. J. L 346, P. 0061 – 0066; Council Directive 91/250/EEC on the legal protection of computer programs, Off. J. L 122, P. 0042 - 0046.

[43] COM/95/0382, IP/95/798.

The Green Paper is part of a broad consultation process and does not attempt *to answer problems which are not known in detail yet but… [attempts] to raise questions (…)*[44]. Mr. Monti, the commissioner responsible said, when publishing the Green Paper, *"[t]he Green Paper (…) will contribute to a wide debate with all interested parties on the definition of a clear, stable and coherent regulatory framework for the development of the Information Society. (…) Without a critical mass of services to use these networks, the significant infrastructure investment required for these information highways will not be forthcoming. But many of the new services and products will be viable only if an adequate level of protection is granted throughout the European Union. The nature of future communications networks is such that these new services will not and should not be stopped at national frontiers. The question to be addressed is whether our existing single market rules are in themselves sufficient to protect the new information services."*[45]

Already at this early stage, the harmonization of limitations relating to reproduction rights were regarded as a key issue. *If technical means enabling the control or prevention of private copying are introduced, the grounds for legal licenses become invalidated.*[46]

The green paper initiated a broad consultation process which was summarized in a communication from the Commission titled, 'Follow Up to the Green Paper on Copyright and Related Rights in the Information Society'[47]. There it was said that the focus of the legislation process should be laid on four areas.

The first focus was, (i) the right of reproduction, a clear definition of what exactly is protected regarding the development of new forms of reproduction (such as scanning etc.) as well as an equivalent level of protection across the EU and also harmonization of limitations/exceptions to the reproduction right: *[t]he present differentiation in Member States' legislation or case law between unlimited exclusive rights of reproduction, cutting down the exclusive right to a right to remuneration (legal license), and*

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[44] COM/95/0382, Nr. 39: *Es sei darauf verwiesen, daß das vorliegende Dokument keine endgültigen Antworten auf im Detail noch unbekannte Probleme geben, sondern vielmehr die Fragen aufwerfen will, die für eine wirksamere Bewältigung der Herausforderung erforderlich sind, oder auch verschiedene Lösungen anregen will.*

[45] Press Release on the Green Paper on Copyright and Related Right in the Information Society, July 19 1995, available at: http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/95/798&format=HTML&aged=1&language=EN&guiLanguage=en.

[46] COM/95/0382, p. 50, *Wenn hingegen technische Mittel eingeführt werden, mit deren Hilfe private Vervielfältigungen eingeschränkt oder verhindert werden, so wird die Rechtfertigung für die legale Lizenz in Form eines Vergütungssystems hinfällig.*

[47] COM/96/0568.

permitting certain acts of reproduction without remuneration (fair use exception) will have to be reassessed and further harmonized in the new electronic environment.[48]

Secondly, (ii) the right of public communication, which was designed to regulate on-demand services (material stored in a digital format that is made available to the public or its individual members in such a way that they may access it and request its transmission, individually determining the time and place of that transmission). This right *[will] include the making available to members of the public [of] individual access to works and other protected matter* . Harmonized measures were also called for to set out the limitations to this right, *which will follow the line taken for the harmonization of the reproduction right.*[49]

Third, (iii) legal protection of anti-copying systems: *digitisation not only brings about new risks for right-holders of copyright and related rights, it also makes it potentially easier to administer and control acts of exploitation by means of access control, identification and anti-copying devices. (…) [the] successful large-scale introduction of such systems or devices - which are under development or have already been developed by the private sector - will depend upon the implementation of measures that provide for legal protection in relation to such acts such as circumvention, violation or manipulation of these systems. Community legislation is therefore required to harmonise the legal protection of the integrity of technical identification and protection schemes.*[50]

Finally, it was considered important to consider, (iv) distribution rights: *[t]he distribution right entitles the author of a work to require his consent for any distribution of tangible copies of his work. (…) Important differences exist between Member States as to the exact form as well as the exceptions to the right, in particular with respect to its exhaustion. (…) The distribution right may be considered to be exhausted with respect to tangible copies of a work once they are put into circulation in the market with the consent of the right holder.*[51]

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[48] COM/96/0568, Chapter 2.1, p. 11 *Von größter Bedeutung ist die Harmonisierung der Schranken/Ausnahmen zum Vervielfältigungsrecht. Die gegenwärtigen Unterschiede in der Gesetzgebung bzw. in der Rechtssprechung der einzelnen Mitgliedsstaaten, die insbesondere von unbegrenzten Ausschließlichkeitsrechten über die Reduzierung des Ausschließlichkeitsrechts auf einen bloßen Vergütungsanspruch (gesetzliche Lizenz) bis zur Zulassung von bestimmten Vervielfältigungsakten ohne Entgelt ("fair use" Ausnahmen) reichen, müssen angesichts des neuen elektronischen Umfelds neu bewertet werden.*

[49] Ibid., Chapter 2.2, p 14.

[50] Ibid., Chapter 2.3, p. 15-16.

[51] Ibid., Chapter 2.4, p. 17-19.

1.4.2 1996 WIPO 'Copyright' Treaty and 'Performances and Phonograms' Treaty

From 2nd to 21st December 1996, only few weeks after the delivery of the Communication on Copyright and Related Rights in the Information Society, a WIPO-hosted diplomatic conference took place to agree a Protocol to the Berne Convention on the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
The importance of these treaties to the legislation of the European Community is expressed by the communication: *(…) progress needs also to be made concerning copyright and related rights at the international level. An isolated response from the European Union will not be sufficient. As the Information Society has a global nature, it requires global answers, at least with respect to the most crucial points related to the digital environment. The Commission, in its communication, stresses the importance of a successful outcome of this conference as it provides the timely and unique opportunity for agreeing on international minimum standards of protection. Such agreements could considerably minimise the risks of divergent approaches in legislation and the creation of havens for piracy.*[52]

The WCT and WPPT were established to create new standards to respond to *the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social and cultural and technological developments (…)* and *the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and Artistic creation (…).*[53]

Alongside some clarifications relating to general discrepancies that have appeared through differing national legislations, it is also worth mentioning the anti-circumvention provision under Art. 11 WCT[54] (and Art. 18 WPPT). Legal protection was granted to back effective technological measures that restrict acts which are not authorized by the authors concerned or permitted by law.

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[52] Ibid.
[53] WCT, preamble.
[54] Art. 11 WCT: *Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors (performers or producers of phonograms) in connection with the exercise of their rights under the treaties or the Berne Convention and that restrict acts, in respect of their works, (performances or phonograms) which are not authorized by the authors, (performers or producers of phonograms) concerned or permitted by law.*

Art. 10 WCT describes the limitations and exceptions with regard to digital copying. Member states may extend discretionary exemptions to copyright owners' rights in the digital environment so long as it is compatible with the three-step test of the Berne Convention. So, referring to limitations on copyright, *the WIPO treaties do not contain any specific provisions to guarantee the rights of users such as scientists or researchers, but leave it to their member states to find adequate legal protection, and thus allow each country to decide the extent of its national fair use rights.*[55]

Not only did EC Member States sign the WIPO treaties, the EC itself also signed them, in accordance with the decision of the European Council on April 11th 2000.[56]

1.4.3 The Information Directive in General

The legal basis of the Information Directive is Art. 249 of the ECT 1997 as well as Art. 55 EC (Right of Establishment), Art. 47(2) ECT (Freedom of Services) and Art. 95 ECT (Establishment and Functioning of the Internal Market). The procedure has to follow the rules of Art. 251 ECT.

The Commission's proposal for the Information Directive closely followed the results from the green paper consultation process, especially the communication on 'Copyright and Related Rights in the Information Society' and the enforcement of the WIPO treaties[57] and was adopted by the Commission on December 10th 1997 and submitted to the European Parliament, the Council of the EU and the Economic and Social Committee. The opinion of the European Parliament under the co-decision procedure was published and a legislative resolution was adopted. This was followed by the Commission´s amended proposal in 1999[58] and after several drafts the EU Council published a common position[59] concerning the new directive, which was accepted by the EU Commission in September 2000. The EU Parliament voted on February 14th 2001 and the

[55] C. Wildpaner, *op. cit.*, 30.
[56] Decision 2000/278/EC Off. J. L 89
[57] WCT and WPPT were finally accepted by the European Council on March 16, 2000.
[58] Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society /* COM/99/0250 final - COD 97/0359 */, Official Journal C 180 , 25/06/1999 P. 0006.
[59] COMMON POSITION (EC) No 48/2000, adopted by the Council on September 28, 2000 with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... on the harmonisation of certain aspects of copyright and related rights in the information society (2000/C 344/01).

EU Commission accepted the proposed amendments. The Council accepted this directive on April 9th 2001 and it entered into force on June 22nd 2001.

As the previous documents suggested (and as already presented in previous chapters) the Information Directive, with its 15 Articles, regulates reproduction rights (Art. 2), the right of communication to the public of works and of making available to the public other subject matter (Art. 3), distribution rights (Art. 4), exceptions and limitations (Art. 5), protection of technological measures and rights-management information (Art. 6 and 7) and common provisions (sanctions and remedies etc., Articles 8 to 15).

As described in its preamble it tries to create a balance between right owners and users and follows aims already mentioned above, because a *(…) harmonized legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, (it) will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry (…).*

1.5Obligations as to Technological Measures and Rights Management Information (Art. 6)

According to Art. 6 of the Information Directive (1) *EU Member States shall provide adequate legal protection against the act of circumvention of any effective technological measures* (…) as well as (2) against the trafficking of circumvention devices and services.[60] *In both paragraphs it does not matter whether the act actually infringed copyright or not – merely the act of circumvention [of the TPM] alone is relevant.*[61] Furthermore, it is a condition that the person committing such an act is doing so knowingly. [62]

[60] *(…) provide adequate legal protection against any activities, including the manufacture or distribution of devices, products or components or the provision of services, carried out without authority, which: - are promoted, advertised or marketed for the purpose of circumvention, or- have only a limited commercially significant purpose or use other than to circumvent, or - are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating circumvention.*

[61] U. Gasser and M. Girsberger, *Transposing the Copyright Directive: Legal Protection of Technological Measures in EU – Member States*, (2004) Berkmann Publication Series No. 2004-10, available at http://cyber.law.harvard.edu/media/files/eucd.pdf.

[62] See also: M. Fallenböck, *On the Technical Protection of Copyright: The Digital Millennium Copyright Act, the European Copyright Directive and Their Anticircumvention Provisions*, IJCLP, Issue 7, 2002, 42, online available at http://www.ijclp.org/7_2003/pdf/fallenboeck-Artikel-ijclp-15-01-03.pdf.

Article 6(3) defines technological measures as, *any technology, device or component that, in the normal course of its operation[,] is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorized by the right holder of any copyright or any right related to copyright (…)*. Effectiveness, as required in (1) and (2) means, *where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.*

This means any circumvention of a TPM which is not authorized by the right-holder is illegal, irrespective of whether or not the TPM-protected work has copyright protection or not. This absolute protection was hotly discussed, as will be elaborated on later. The initial concept was to protect TPM only against circumventions with the purpose of copyright infringement. The argument against this narrow scope of protection was that this would make the protection of TPMs as a whole senseless. Therefore the Council of the EU changed the scope and granted absolute protection[63]. This goes beyond the WIPO treaties which give states discretion to exempt TPMs from legal protection. In this manner, the European Community decided to provide for a – as argued in Recital 4 – high level of protection of intellectual property.

On the other hand, the Council has provided safeguards for the protection of the legitimate interests of beneficiaries of exceptions by adding a new paragraph 4 to Art. 6 (…).[64]

2.3 Exceptions and Limitations, Art. 6(4)

In order to provide the beneficiary with exceptions and limitations without hampering TPM, the Information Directive foresees a concept of voluntary measures, as described in Recital 51: *[t]he*

[63] See also chapter 3.1.2

[64] Nr. 44 Statement of the Council´s Reasons, Common Position (EC) No 48/2000, adopted by the Council on September 28, 2000 with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... on the harmonisation of certain aspects of copyright and related rights in the information society (2000/C 344/01).

legal protection of technological measures applies without prejudice to public policy, as reflected in Art. 5,[65] *or public security. Member States should promote voluntary measures taken by the right holders, including the conclusion and implementation of agreements between right holders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive.*

Art. 6(4) stipulates that *notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by right-holders, including agreements between right-holders and other parties concerned, Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Art. 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.*

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Art. 5(2)(b), unless reproduction for private use has already been made possible by right-holders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Art. 5(2)(b) and (5)[66]*, without preventing right-holders from adopting adequate measures regarding the number of reproductions*[67] *in accordance with these provisions.*

Under the first paragraph, member states are obliged to develop appropriate measures to ensure that the right-holder makes it possible for the beneficiary of an exemption; as listed in the first paragraph the provision in the second paragraph is not mandatory. It states that the Member States (MS)can take such measures to protect beneficiaries of exemptions for reproductions made by natural persons for private use, if the right-holder him or herself did not provide for any voluntary measures or agreements. *In accordance with Art. 5 this provision strengthens the position of the right-holder, because due to Art. 5(2)(b) he has the right to receive fair compensation and due to Art. 5(5) the*

[65] Art. 5 stipulates Exceptions and Limitations. It is a closing catalogue of free uses of copyrighted work. *Contrary to the Anglo-American case law system regarding fair use and different than the two WIPO treaties* which do not foresee closed systems but basically only authorize the national legislations to provide free uses in certain cases, which are more or less precisely predetermined, *Art. 5 as a whole represents a closing catalogue of free uses of copyrighted work that defines an international minimum standard*. C. Wildpaner, op. cit, p. 157.

[66] Art. 5 (5) stipulates for the whole Art. 5, i.e. for exceptions and limitations the Three-Step test should be applied (*only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder).*

[67] E.g. only five copies of a certain piece of software can be made, before it looses its function.

exemption only applies in certain specific cases. Hence, to this end he has the right to control the reproduction for private use of technical measures protected under Art. 6(1).[68]

The technological measures applied voluntarily by right-holders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. (…)

The fourth paragraph stipulates that right-holders can prevent any exemption if they make their works or other subject-matter available to the public on agreed contractual terms via the internet (only on demand services, not web-casting, pay-per-view or 'near-on-demand-services'[69]). Finally this regulation made the Council's safeguards, provided for the protection of the legitimate interests of beneficiaries of exceptions, appear quite weak if not to say toothless since every right-holder can easily avoid the applicability (after implementation into national law) of Art. 6(1) and 6(2) by making the signing of a contract a prerequisite for access to the works.

If the agreed contractual terms as mentioned in Recital 53 (explaining 6(4)) are interpreted in the context of Recital 45, *[t]he exception[s] and limitations referred to in Art. 5 (2), (3) and (4) should not… prevent the definition of contractual relations designed to ensure fair compensation for the right-holders insofar as permitted by national law*, then, according to Michel Walter, *the question arises, whether or not the limitation of the use of contractual terms only to ensure fair compensation means that terms which prevent fair use are impermissible.*[70]

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[68] C. Wildpaner, *op. cit.*, p. 163.
[69] Cf. G. König, *Art. 6 Abs. 4 Info-RL Tod der Privatkopie?*, (2003), p. 31, available at: www.rechtsprobleme.at/doks/Art6_abs4_%20inforl-koenig.pdf.
[70] Walter in M. Walter, *Europäisches Urheberrecht*, (2001) Springer Wien New York, Chapter IV, marginal 98: *Fraglich bleibt, ob aus der Beschränkung vertraglicher Vereinbarungen auf die Sicherung eines gerechten Ausgleichs folgt, dass vertragliche Vereinbarungen unzulässig sind, mit welchen freie Nutzungen zur Gänze abbedungen werden.*

3. The Implementation of Information Directive Art. 6(4) into Czech and Austrian Law

3.1 Paragraph 43 of the Copyright Law of the Czech Republic

3.1.1 History of Paragraph (§) 43

Information Directive Art. 6(4) is implemented in Czech law by § 43 of the Czech Copyright Law[71] (Cz CRL). The Czech Parliament gave its first reading on the subject on November 15th, 1999, and it passed into law on April 7th 2000. It has been in force since December 1st 2000.[72] Referring to the *Duvoduva zprava*[73] § 43 transfers the regulation of the former §32a of the CZ CRL into the form compatible with WIPO treaties on Copyright (1996) and the Proposal of the Information Directive.

The proposal in question (of which 2 versions exist) is almost certainly[74] the amended version from May 21st 1999[75]. It was followed by the 'Common Position' of the Council of the EU with a view to adopting the Information Directive, adopted by the Council on September 28th 2000[76]. This point of time was crucial for the concept relating to exceptions and clearly explains the current regulation, which shall be shown below. Referring to the Accession Treaty, the Information Directive had to be implemented by the Czech Republic by July 1st 2005[77].

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[71] Autorský zákon, Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act).
[72] § 118 Cz CRL.
[73] "Duvoduva zprava", the legal opinion of the Ministry of Culture: Ustanovení § 43 přebírá současnou úpravou § 32a ve zpřesněné formě odpovídající ustanovením Smlouvy WIPO o právu autorském a návrhu směrnice ES o informační společnosti.
[74] There is no clear hint in the Duvoda zprava.
[75] Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society /* COM/99/0250 final – COD 97/0359 */ from 21 May 1999; available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:51999PC0250:EN:HTML.
[76] COMMON POSITION (EC) No 48/2000, adopted by the Council on September 28, 2000 with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... on the harmonisation of certain aspects of copyright and related rights in the information society (2000/C 344/01), available at http://europa.eu.int/celex/cgi/sga_rqst?SESS=10205!CTXT=4!UNIQ=3!APPLIC=celexext!FILE=VISU_visom_4_0_1!DGP=0!VIPDF_som_0_1-1/1#0.
[77] Accession treaty.

3.1.2 Current Regulation of § 43[78]:

i. Definition and Scope of Technological Protection Measures (TPM) in Relation to Art. 6(4) Information Directive

The implementation of Art. 6(4) cannot be discussed without mentioning the definition and scope of technological protection measures, because although the Information Directive seems to be quite clear, especially relating to the granting of absolute legal protection of TPMs, there are several different definitions in the Member States.[79]

The definition in the Czech CRL goes like this: § 43 (1): *"… aids designed for the removal, deactivation, or limitation of the function of technical devices or of other means applied for the protection of rights*."

"Other Means" are defined by § 43 (2): "*Other means pursuant to paragraph (1) shall mean any procedure, product or component integrated into a procedure, device or product designed to avoid or prevent infringement of copyright to a work which is made available only by application of a code or of another method enabling decoding*."

"Technological measures", the term used in the Commissions' proposal, is not used/defined in the Czech CRL, it refers to "technical devices or other means applied for the protection of rights". Technical device refers to hardware, other means refers to means designed to avoid or prevent infringement of encrypted works (which is made available only by application of a code or of another method enabling decoding).

78 § 43 Cz CRL
(1) Copyright shall also be infringed by whoever, for the purpose of achieving economic gain, develops, produces, offers for sale, rental or lending, imports, disseminates or utilizes, as a p Art. of the provision of services or for any other purpose, aids designed for the removal, deactivation, or limitation of the function of technical devices or of other means applied for the protection of rights.
(2) Other means pursuant to paragraph (1) shall mean any procedure, product or component integrated into a procedure, device or product designed to avoid or prevent infringement of copyright to a work which is made available only by application of a code or of another method enabling decoding.

79 *An initial analysis* (how 15 EU Member States implemented the Directive) *reveals that uncertainty over the scope of provisions aimed at protecting technological measures as well as the definition of crucial terms (such as `effective measures´) persists – even at a rather basic level. The question, for instance, as to what extent access control mechanism fall under the definition of technological protection measures and, as a consequence, are protected by the anti-circumvention provisions.* U. Gasser and M. Girsberger, *op. cit.*, p. 4.

Paragraph one of Art. 6(4) states that only those technological measures are protected which protect works against infringement of (copy)rights. Art. 6(2) says that "other means" are only protected as far as they avoid or prevent infringement of a work's copyright.

Therefore only the protection of works (by TPMs) against infringement of copyright is protected, not, as the directive foresees, the protection of the prevention or restriction of any act that is not authorised by the right-holder, this wide range of access control is excluded.

The narrower scope of protection against infringement of copyright obviously relates to the definition of technical measures used by the Adopted Draft Version which says in Art. 6(3): "*The expression "technological measures", as used in this Art., means any technology, device or component that, in the normal course of its operation, is designed to prevent or inhibit the infringement of any copyright or any right related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC*".[80]

The Statement of the Council's Reasons enclosed in the Common Position and headed No. 43, suggests that this interpretation was the intended one. "*In its amendment 47, the European Parliament had suggested that it be stipulated in Art. 5(4) (currently Art. 5(5)) that the legal protection of technological measures prevailed over the exceptions listed in Art. 5. The Commission had addressed this issue under Art. 6(3) of its amended proposal, providing that only technological measures preventing or inhibiting the infringement of copyright were protected under Art. 6. This meant that technological measures designed to prevent or inhibit acts allowed by law (e.g. by virtue of an exception) were not protectable under Art. 6. In other words, under the Commission's amended proposal, the exceptions provided for in Art. 5 prevailed over the legal protection of technological measures provided for in Art. 6*".[81]

In the following extract, it is explained that, on the initiative of the Council, this interpretation was no longer the intended one. The protection of TPMs was designed to be absolute and the benefit of exception rights must not be claimed by circumventing TPMs but only with the consent of the right-holders.

[80] Amended Proposal, see footnote 4.
[81] Common Position, see footnote 5.

"The Council has taken a different approach, which it considers strikes a reasonable balance between the interests of right-holders and those of beneficiaries of exceptions. It has adopted in Art. 6(3) first sentence of its Common Position a definition of the protectable technological measures which is broader than the one provided for in the Commission's amended proposal or the one set out in Parliament's amendment 54. The terms '... designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright ...' in the Council's definition make it clear that Art. 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorized by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Art. 5."[82]

This new concept stayed the same in the final version of the directive. Thus the actual implementation into Czech law is not consistent with the Information Directive and needs to be amended.

Secondly § 43 forbids actions (development, …, utilization etc.) designed to achieve economic gain, which means as long as the person performing the circumvention of a TPM does not pursue economic gain, the circumvention of a TPM is not illegal.

Grounds for this regulation can be found neither in the Duvoduva zprava, nor in the Proposal (1997), nor in the Amended Proposal of the Commission (1999). Since the Information Directive stipulates that any circumvention of a TPM without consent of the rightholder should be illegal, this regulation does not meet the requirements of the Information Directive and has therefore also to be amended.

According to the WCT and the WPPT there are no other rules to follow. Art. 11 WCT and Art. 18 WPPT, with the title "Obligations concerning Technological Measures," both Articles stipulate that the party nations (including the Czech Republic) shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures (…) and restrict acts, (…), which are not authorized by the authors concerned or permitted by law. So this regulation leaves it open to the Czech Republic to foresee exceptions from the legal protection by law as required and therefore this implementation meets the conditions of the WIPO Treaties.

[82] Ibid.

ii. Implementation of Art. 6 (4)

Art. 6(4) foresees that *in the absence of voluntary measures taken by right-holders, including agreements between right-holders, including agreements between right-holders and other parties concerned, Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Art. 5(2)(a), (2)(c), (2)(d),(2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.*

MS may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Art. 5(2)(b) and (…) (5).[83]

The Directive leaves right-holders with the primary responsibility to provide access to works for the use of beneficiaries. In the absence of access the MS should provide appropriate measures to ensure that right-holders provide them.

The Czech CRL does not contain any exceptions to the anti-circumvention provision, since 6(4) is part of the new concept of exceptions and limitations, introduced by the Common Position and the Czech CRL was passed before.

Urs Gasser and Michael Ginsberger[84] do not believe that member states are obliged to implement 6(4) at once*, however recital 51 EUCD makes clear that member states should take appropriate measures only in absence of "voluntary measures taken by the right-holders, including the conclusion and implementation of agreements between right-holders and other parties. (…) Member states– due to uncertainty with regard to future technological developments and business practices in the field of protection measures – might pursue a "wait-and-see" strategy and only intervene later on if practical need for legislation has become evident. Recital 51 and 52 state that member states should act within a reasonable time."*[85]

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[83] Art. 6 (4) Directive 2001/29/EC.

[84] U. Gasser and M. Girsberger, *Transposing the Copyright Directive: Legal Protection of Technological Measures in EU – Member States*, (2004) Berkmann Publication Series No. 2004-10, available at http://cyber.law.harvard.edu/media/files/eucd.pdf.

[85] See also v. Lewinski, *Urheberrecht und Informationsgesellschaft*, in M. Walter, *Europäisches Urheberrecht,* (2001) Springer, Info-RL, Rz 159: *Nun ist Art. 6 Abs 4 so weit formuliert, dass der nationale Gesetzgeber grundsätzlich zwei Möglichkeiten hat: Er kann entweder für den Fall fehlender freiwilliger Maßnahmen der Rechtsinhaber sofort eine Regelung zur Sicherung der Ansprüche der durch Art. 5 Info-RL Begünstigten treffen*

Nevertheless one can ask how long this "reasonable time" might be, and when the Czech Republic might be obliged to implement Art. 6(4).

iii. Scope of the Exceptions

Since under § 43 Czech CRL TPMs are only protected against copyright infringement, circumventions covered by exceptions to copyright are allowed. Since EU-Directives have to be implemented to come into force in the member state, the applicable law is Section 4 "Restriction of copyright" §§ 29-39 of the Czech Copyright Law in combination with the Berne Convention's 3 step test, which is implemented in Czech Law by § 29 (1) Czech CZ CRL.

Nevertheless, this leaves open the question of whether or not there are other possible interpretations since on the one hand there is no absolute legal protection of TPMs as requested by the Information Directive and on the other hand there is the question of whether or not the permission to circumvent TPMs for exceptions is an "appropriate measure" to ensure access to protected works for the exceptions' or limitations' intended beneficiaries, or, to put it another way, how can a user benefit from exceptions if s/he has no means to circumvent a TPM?

Firstly, from the point of view of right-holders, it was frequently argued that if legal protection for TPMs was not absolute, this would question the whole concept of legal protection of TPMs, since there was no way of controlling the use of a work if circumvention was offered and could also be used for illegal use, as was argued in the case U.S. v. ElcomSoft & Sklyarov[86]. Sklyarov was a programmer in the Russian software company ElcomSoft Co. Ltd and faced criminal charges for distributing an application that bypassed encryption-based security in Adobe System's "Acrobat E-Book Reader". This TPM prevented any copying of an once purchased and legally downloaded e-book. Therefore this e-book could only be read on the computer on which the e-book was first downloaded, so fair use rights such as reading the book on another computer (eg. on a PDA on vacation) or printing it out or loaning it to a friend were not possible.

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oder aber zunächst die weitere nationale Entwicklung beobachten und erst gesetzlich eingreifen, wenn sich dafür ein praktisches Bedürfnis zeigt.

[86] *United States of America v. Dmitry Sklyarov*, Criminal Complaint, Case Number 5 01 257, 8 (2001).

Sklyarov developed a piece of software, the advanced e-book processor (AEBPR), which enabled lawful purchasers of e-books to exercise their fair use rights. The software only worked on e-books that were legally purchased. Adobe feared that third parties might use the tool – downloadable over the internet – to copy e-books without the authorization of the copyright owner. Even if this argument could be doubted because the circumvention software only worked on e-books legally purchased, it bypassed the encryption-based security system and could also be used by a purchaser to distribute the e-book via p2p platforms.[87]

Having this case in mind, the question arises if a right-holder can prevent the distribution or use of AEBPR in the Czech Republic. AEBPR is designed for the usage of exceptions since it only works on legally-purchased books. To make a copy of a legally-purchased work for private use is therefore not against copyright protection under §43(1) and (2) of the Czech CRL (which says that only those TPMs are protected which protect [copy]right) this offering or usage of an circumvention aid is likely to be judged legal.[88] Also, by applying a consistent interpretation as requested by Art. 249(3) ECT and the case law of the ECJ there can be no other result since there is no absolute TPM protection in the Czech CRL.

Due to the fact that the deadline of implementing the Information Directive by the Czech Republic expired on July 1st 2005 the question arises as to whether or not Art. 6 is directly effective.

A Member State which has failed to adopt implementing measures required by a directive within the prescribed period may not plead its own failure to perform these obligations. Where the provisions of a directive appear unconditional and sufficiently precise they may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive in so far as the provisions of the directive define rights which individuals can assert against the State.[89]

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[87] *On August 28, 2001, Dmitry Sklyarov and his employer ElcomSoft were both charged for violating U.S. copyright law. Although Dmitry Sklyarov and ElcomSoft did not violate any copyright law, they were charged under the provisions of the DMCA. Not the copyright violation was subject to these provisions, but the distribution of tools and software or information that can be used for copyright infringement, as well as for legitimate non-infringing uses, such as fair us*e. C. Wildpaner, *op. cit.*, p. 117.

[88] This will depend on how the Czech Courts decide. It is conceivable that a Czech Court would forbid the distribution of AEBPR since it could also be used for copyright infringement.

[89] *Francovich and Others v Italy* – ECJ case 6/90, this principle of direct effect was developed by the ECJ in the case *Leberpfennig* – ECJ case 9/70.

So, it seems there are three conditions required: Firstly the directive is not implemented in time or insufficiently implemented. As described TPMs are only protected in the case of copyright infringement not as demanded by the Information Directive against all acts without the consent of the right-holder. So it can be argued that this an insufficient implementation. On the other hand the directive leaves it open to member states to provide adequate legal protection against the circumvention (…) as stipulated in Art. 6(1) and (2), which also solves the access problem for beneficiaries of exceptions. But as the explanations to the Common Position clearly state, it was designed to change the former regime of legal circumvention for exceptions and limitations and to provide absolute legal protection, thus it is clear that the implementation is insufficient.

Secondly it can only be applied if individuals are asserting the rights against the state [or a body of the state] but not in relations between private persons. In our case the right-holder is a private person, even if a state institution has the rights on a work it acts like a private person and has to be taken as private person, as well as a person making use of a work is private. So the second requirement is not met.

The third requirement the content of the directive has to be sufficiently precise and unconditional. A community provision is unconditional if the right being granted is independent of the judgement or discretion of a community institution or a member state. The provision is sufficiently precise if it supplies "workable indications" to the national court[90].[91] Art. 6 (1) and (2) stipulate that *the Member States shall provide adequate legal protection* (…). However, the member state has the benefit of discretion in its implementation, (as to how far legal protection should go). Art. 6(4) stipulates that Member States shall take appropriate measures – but "appropriate" is, like "adequate," too imprecise and therefore workable indications to the national court(s) are also lacking.

[90] *Defrenne v. Sabena*, Case 43/75, (1976) ECR 455, 473.

[91] Ibid. *(…) Despite its apparent concern to advance the application and effectiveness of Treaty provisions which have not been properly implemented or followed, the Court has shown that there are limits to its willingness to find precision of purpose in the text of a very broadly phrased provision. In certain cases, even the Court with its integrationist bias will not require national courts to give content to a particularly vague or aspirational Treaty provision. Quite ap Art. from the lack of uniformity and uncertainty to which it could give rise, such a requirement, in the absence of some more specific implementing measures at Community level, would involve too great a transfer of political discretion and legislative power to the national courts*. P. Craig and de Búrca, *EC Law*, (1995), Oxford, Clarendon Press, p. 164.

Since two of the three required conditions are not met Art. 6 of the Information Directive is not directly effective. This leaves the question open of the liability of the State for loss and damage resulting from the breach of an obligation under community law.

What if someone used AEBPR, say, to copy and sell those copies someone else in The Czech Republic? This is not part of the private use provision of the Czech CRL and therefore illegal. If the person had no access to AEBPR, he/she would not be able to sell copies, which clearly represents loss and damage to the respective right-holder.

The conditions under which liability of the State gives rise to the right to reparation depend on the nature of the breach of Community law which caused the loss and damage.[92] Has the Member State failed to fulfil its obligations under Art. 249 to take all measures necessary to achieve the result prescribed by the directive? Art. 6 of the Information Directive is implemented insufficiently, causing the prescribed result not to be achieved. For the question of reparation provided by the State there are three required conditions:

(i) *The result prescribed by the directive should entail the granting of rights to individuals.*

The absolute right to control access to the work by a right-holder as well the application of the narrower scope of exceptions laid down in Art. 6(4) are definitely rights granted to individuals, namely right-holders.

(ii) *It shall be possible to identify the content of those rights on the basis of the provisions of the directive.*

The content of the right is as described in the directive as access control and as more comprehensive copyright protection. So this condition is fulfilled.

(iii) *There should be a causal link between the breach of the State´s obligation and the loss and damage suffered by the injured parties.*

If the Czech Republic had implemented the Information Directive properly and provided absolute legal protection of TPMs, the distribution of AEBPR would have been illegal (as would using AEBPR to circumvent Adobes´ protection system, even for private use purposes) and right-holders could have filed legal action against distributors of AEBPR. The required conditions are met, so there is state liability.

But what about an user who wants to access a work and cannot? A fictitious example goes like this: *DoGoodTech.org, a non-profit organization, has developed a web-based system able to supply talking books*

[92] *Francovich and Others v Italy* – Case 6/90.

and a format for braille devices and printers – designed for visually-impaired and otherwise print disabled individuals. As far as traditional books in paper are concerned, an exception in copyright law allows the organization to scan these books, transform them into the appropriate format, and distribute it over a subscription service to visually handicapped users. The organization also seeks to supply books and other materials that have been initially been published as e-books. Most of the available e-books, however, are protected by strong DRM locks. Can the organization lawfully "translate" e-books and offer them to its subscribers if the National E-book Publishing Association (NEPA) refuses to enter an agreement? What are the relevant procedures that might be initiated by the non-profit organization?[93]

If DoGoodTech.org wants to benefit from the exceptions granted it would have to find a circumvention aid or to find a "hacker" to be able to circumvent the DRM locks. Since Art. 6(4) is not implemented there are no remedies for DoGoodTech.org to ensure that right-holders provide beneficiaries of public policy exceptions with appropriate means of benefiting from them. As shown above the term "appropriate measures" does not meet the requirement of sufficient precision and unconditionality, the Information Directive is not directly effective.

Referring to state-liability it is unclear if the precondition is also met if the directive is insufficiently implemented. As mentioned above, Rec. 51 allows, referring to Art. 6(4), for a 'wait and see' strategy, that they should act within a reasonable time if the right-holders do not act voluntarily. This leaves open a wide range of possible interpretations. It can be doubted that a national court would take a decision. This is a case for a preliminary ruling according to Art. 234 ECT. The ECT would decide it according to the circumstances in this particular case and it cannot be accurately predicted.

3.1.3 Amended version of §43 Czech Copyright Law

The Czech Ministry of Culture prepared a proposal for the adoption of the Autorský zákon[94]. The proposal was handed over to the Czech Government on July 14th 2005 which will decide whether or not to recommend it for the first reading to the Czech Parliament.

[93] U. Gasser and M. Girsberger, *op. cit*, p. 18.
[94] Author´s Law, Czech Copyright Law: Návrh Zákon ze dne … 2005 kterým se mění č 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským o změně některých zákonů (autorský zákon), ve znění zákona č. 81/2005 Sb.

Surprisingly, there is no absolute legal protection foreseen for TPMs, even in this amended version. §43(4) stipulates that in cases where it is unavoidable to use the exceptions according to §30a, §31 (b), §34 (1)(a), §37 (1)(a) and (b), §38, §38a (2) and §38e – circumvention of TPMs as stipulated in §43(1) are not prohibited except of cases referring to §43 (5), works made available on the basis of a contract.

§ 43[95]

(1) Copyright shall be infringed by anyone who knowingly circumvents effective Technical Means according to this law or if it can be reasonably assumed that a person knowingly circumvents them.

(2) Copyright shall also be infringed by anyone producing, importing, distributing, selling, renting, promoting or keeping for commercial purposes, devices, products or components or the provision of services, insofar

a) as effective Technical Means are offered for economic purposes, advertised or launched on the market or

b) as they have besides the circumvention of effective Technical Means only limited economic relevant purpose or other usage or

c) they are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective Technical Means.

(3) Technical Means, means any technology, device or component which in its normal function is designed to prevent or restrict acts in respect of works which are not authorised by the author. Technical Means shall be deemed effective, in as far as the use of a work can be controlled by the author through application of access control or protection processes, such as encryption, scrambling or other transformation of the work or through the application of a copy control mechanism.

(4) The legal protection provided for in paragraph 1 does not limit the effect of §30a[96], §31 (b), §34 (1)(a), §37 (1)(a) and (b), §38, §38a (2) and §38e to the extent that the use of the exception is necessary (unavoidable). An author who uses Technical Means to

[95] The translation of the proposal from Czech to English was done by the author.

[96] §30a ? , §31b Scientific Quotation, §34 (1) a Official and reporting licence for official purpose and current events, §37 (1) a and b Reproduction and Distribution of Reproductions, §38 Lending and rental of a work.

protect his work according to Art. 3 has the duty to make his work accessible to legitimate users to the extent that is necessary for the the intended enjoyment of the work. An author can also make his work, for which he uses Technical Means, accessible in the case of making a record of his work for personal use according to §30; this does not prevent the author from taking measurements concerning the number of copies.

(5) The regulation in paragraph (4) does not refer to a work which the author has made accessible by contract according to §18(2).[97]

(6) Technical means, which are used by the author voluntarily or by contract for the fulfilment of the duty according to paragraph (4) has the protection of paragraph (1).

Since the negotiations in the Czech Parliament have only just begun, some changes to the proposal can be expected.

3.2 § 90c UrhG 2003 Austrian Copyright Law, "Protection of Technical Measures"[98]

3.2.1 History of § 90c UrhG

According to Art. 13 of the Information Directive, Austria was obliged to implement it by December 22nd 2002. The first, informal, proposal from the Ministry of Justice was presented on December 5th 2001 but as a result of the preterm elections for the National Council (parliamentary elections) the implementation could not be finished in time. The official proposal was presented on July 25th, 2002. After autumn elections and negotiations on building a coalition it took until April 29th, 2003 to be passed by the national council and May 15th, 2003 to be passed by the federal council. It came into force on July 1st 2003. In accordance with Art. 6 of the

[97] § 18 (2) The communication of the work to the public pursuant to paragraph (1) shall also mean making the work available in such a way that members of the public may access it from a place and at a time individually chosen by them, especially by using a computer or similar network.
[98] Schutz technischer Maßnahmen.

Information Directive, parliament ordered a report on the implementation of the Information Directive by the Ministry of Justice by July 1st 2004.[99]

3.2.2 Current Regulation of § 90c UrhG

i. Definition and Scope of Technological Protection Measures (TPM) in Relation to Art. 6 (4) Information Directive

In Austria the definition of technological measures is dealt with in paragraph 90c (2):
§90c (2) *The expression 'effective technical measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict infringements described in paragraph 1, and which achieve the protection objective. These conditions are only fulfilled where the use of a protected work or other subject-matter is controlled through, 1. access control, 2. a protection process such as encryption scrambling or other transformation of the work or other subject-matter or, 3. a copy control mechanism.*[100]

(3) *Circumvention and circumvention services mean devices, products or components or, alternatively, the provision of services;*
1. which are promoted, advertised or marketed for the purpose of circumvention of effective technological measures,
2. which have only a limited commercially significant purpose or use other than to circumvent, or
3. are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.[101]

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[99] The report is to deal with questions of whether and how far TPMs are used by right-holders, whether and how far they take voluntary measures to make their works available to the beneficiary of an exception and, in the case of them not being adequate, which legal measures are proposed to ensure the benefiting of exceptions and limitations.

[100] §90c (2) *UrhG Unter wirksamen technischen Maßnahmen sind alle Technologien, Vorrichtungen und Bestandteile zu verstehen, die im normalen Betrieb dazu bestimmt sind, die in Abs. 1 bezeichneten Rechtsverletzungen zu verhindern oder einzuschränken, und die die Erreichung dieses Schutzziels sicherstellen. Diese Voraussetzungen sind nur erfüllt, soweit die Nutzung eines Werks oder sonstigen Schutzgegenstandes kontrolliert wird 1. durch eine Zugangskontrolle, 2. einen Schutzmechanismus wie Verschlüsselung, Verzerrung oder sonstige Umwandlung des Werks oder sonstigen Schutzgegenstands oder 3. durch einen Mechanismus zur Kontrolle der Vervielfältigung.*

[101] (3) *Unter Umgehungsmitteln beziehungsweise Umgehungsdienstleistungen sind Vorrichtungen, Erzeugnisse oder Bestandteile beziehungsweise Dienstleistungen zu verstehen,*
1. die Gegenstand einer Verkaufsförderung, Werbung oder Vermarktung mit dem Ziel der Umgehung wirksamer technischer Maßnahmen sind,

§90c(2) is, bar the word order, almost identical to Art. 6(3) except for the passage *is designed to prevent or restrict acts, (…) , which are not authorised by the right-holder (…)* of the Information Directive which is changed to (…)*is designed to prevent or restrict infringements labelled in sub Art. 1 (…).*

Infringements labelled in sub Art. 1 are:
(1) The right-holder of any exclusive right as provided for in this law, which takes effective technical measures to prevent or restrict acts infringing this right, may file for relief, if;
1. these measures are circumvented by a person in the knowledge (or with reasonable grounds to know) that he or she is pursuing that objective; or, 2. means of circumvention are manufactured, imported, distributed, sold, rented and for commercial purposes are possessed; or, 3. it is advertised for purchase or rental of circumvention means; or, 4. if circumvention services are provided.[102]

This narrowing of the scope of legal protection of TPMs relating to the definition of the Information Directive reminds us of the version laid down in the Commission's Proposal and also of the version done in the Czech CRL. *Although generally protected, TPMs are not protected if they prevent or limit the making of legitimate copies for private use. For this reason, although the user has no means of forcing the rights-owner to enable him to overcome the TPM, the TPM itself is impermissible.*[103]

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2. die, abgesehen von der Umgehung wirksamer technischer Maßnahmen, nur einen begrenzten wirtschaftlichen Zweck oder Nutzen haben oder

3. die hauptsächlich entworfen, hergestellt, angepasst oder erbracht werden, um die Umgehung wirksamer technischer Maßnahmen zu ermöglichen oder zu erleichtern.

[102] § 90c. (1) *Der Inhaber eines auf dieses Gesetz gegründeten Ausschließungsrechts, der sich wirksamer technischer Maßnahmen bedient, um eine Verletzung dieses Rechts zu verhindern oder einzuschränken, kann auf Unterlassung und Beseitigung des dem Gesetz widerstreitenden Zustandes klagen,*

1. wenn diese Maßnahmen durch eine Person umgangen werden, der bekannt ist oder den Umständen nach bekannt sein muss, dass sie dieses Ziel verfolgt,

2. wenn Umgehungsmittel hergestellt, eingeführt, verbreitet, verkauft, vermietet und zu kommerziellen Zwecken besessen werden,

3. wenn für den Verkauf oder die Vermietung von Umgehungsmitteln geworben wird oder

4. wenn Umgehungsdienstleistungen erbracht werden.

[103] M. Walter, *Urheberrechtsgesetz UrhGNov 2003*, (2003), Wien, Medien und Recht, p. 168: *Mit dem Abstellen auf Rechtsverletzungen greift der Umgehungsschutz ganz allgemein für technische Maßnahmen nicht, die darüber hinaus gehen und etwa (auch) die zulässige Vervielfältigung zum privaten oder eigenen Gebrauch verhindern oder einschränken. Damit kann etwa zur Ermöglichung einer zulässigen Vervielfältigung zum privaten Gebrauch zwar nicht die freiwillige Beseitigung eines gegebenenfalls vorliegenden Kopierschutzes verlangt werden, es sind Umgehungen etc aber von Vorneherein zulässig.*

According to the explanatory materials (ErlRV 2003)[104] the interpretation that circumvention of TPMs for legal exceptions was legal was not intended but Walter says the intention expressed in the ErlRV is not explicitly expressed by the wording in the law, it is even expressing the opposite. *From a practical point of view this solution might have certain charm, but it is certainly not consistent with the Information Directive.*[105]

Relating to other opinions[106] this interpretation cannot be taken as certain and may be revised by a court ruling. An infringement proceeding according to Art. 226 EC could also be expected. Although the Commission brought in infringement proceedings against MS according to Art. 223 ECT because of the failure to implement the Information Directive[107], the Commission has not yet reacted to Austria's implementation.

ii. Implementation of Art. 6(4)

As mentioned before Art. 6(4) is not implemented in the UrhG. In the explanatory materials it is said that *these regulations are expected to be implemented in such a way as to allow the exceptions mentioned in Art. 6 (4) in any event.*[108]

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[104] Erläuternde Bemerkungen zur Regierungsvorlage betreffend die UrhGNov 2003.

[105] M. Walter, op. cit., p. 168: *Aus praktischer Sicht mag diese Lösung einen gewissen Charme besitzen, sie ist aber mit Sicherheit nicht richtlinienkonform.*

[106] Eg. König or Thiele/Laimer: *Prohibited is according to §90c UrhG, to make a copy for private or other use that is only possible by circumventing TPMs (…).* But Thiele/Laimer think that there is the question as to whether §90c is unconstitutional since the legal understanding of circumvention comes into conflict with the right on enforcement of exceptions granted by the Information Directive. They come to the conclusion that circumvention of TPMs for private use (…) is in accordance with a consistent interpretation of the constitution and in any case exempt from punishment. (*Gegen §90c UrhG sind uE auch verfassungsrechtliche Bedenken angezeigt, da das formal-technische Gesetzesverständnis des Begriffs der "Umgehung" dem richtliniengebotenen Recht zur Durchsetzung der Privatkopie-Schranke zuwiderläuft. (…) Eine Umgehung des Kopierschutzes gem §90c ist bei verfassungskonformer Auslegung möglich und jedenfalls straffrei.*), in C. Thiele/B. Laimer, *Die Privatkopie nach der Urheberrechtsgesetznovelle 2003*, (2004) Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht 2004/17.

[107] See Press Release IP/03/1752 of December 17, 2003, online available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1752&format=HTML&aged=1&language=EN&guiLanguage=en>.

[108] ErlRV 2003, p. 25: *(…) ist zu erwarten, dass diese Bestimmung in der Praxis so umgesetzt werden wird, dass die technischen Maßnahmen von vornherein so ausgestaltet werden, dass sie die Nutzung der angeführten Ausnahmen in dem durch Art. 6 Abs 4 Info Rl gesteckten Rahmen ermöglichen.*

According to the report of the Ministry for Justice[109] on the implementation on the Information Directive from July 1st 2004, there are no measures necessary to implement Art. 6(4), because no serious problems have arisen out of non-implementation yet.

iii. Scope of Exceptions

In §90c UrhG, TPMs are only protected against copyright infringement, therefore circumventions for the use of exceptions of copyright are allowed. Since EU-Directives have yet to be implemented and thereby come into force in the relevant MS, Section VII "Restrictions of copyright" 1. Exceptions §§ 41-57 of the Austrian Copyright Law in combination with the 3-Step-Test of the Berne Convention, which is directly applicable according to the Oberster Gerichtshof[110], is the relevant law which defines the scope of exceptions in Austria.

As discussed in chapter 3.1 on the implementation in Czech Republic, the Information Directive has no direct effect. State liability is conceivable, depending on the case.

[109] Bericht der Bundesministerin für Justiz im Einvernehmen mit dem Bundesministerium für soziale Sicherheit, Generationen und Konsumentenschutz an den Nationalrat betreffend die Nutzung freier Werknutzungen, July 1, 2004, available at http://www.justiz.gv.at/_cms_upload/_docs/bericht_freie_werknutzung.pdf.
[110] *Ludus-Tonalis-E*, OGH 31. Mai 1995, MR 1995, 106

4. Alternatives to Digital Rights Management and Likely Future Developments

4.1 Disadvantages of DRM

The application of the copyright regime to the information society and the introduction of legal protection of DRMs and the weakening of exceptions and limitations which was followed by legal actions filed, especially by representatives of the music industry, lead to an extremely heated discussion. Within this discussion, opponents of DRM systems such as America's Electronic Frontier Foundation[111] or Germany's privatkopie.net raised several objections[112], the latter compiled these arguments in a paper issued on the adoption of the German Copyright Law in June 2004.

In this paper, privatkopie.net firstly discusses the issue of data protection with respect to citizens and consumers, especially referring to hardware-driven Trusted Computing[113], the issue of hindering the right of access to information, limiting the usage of media products, high transaction costs which have to be paid by consumers and authors, technological "lock-in" combined with limitation of the choice of technical platform and limitation to sustainable storage of information, for example by libraries.

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[111] EFF, *Unintended Consequences: Five Years under the DMCA*, (2003), available at: http://www.eff.org/IP/DMCA/?f=unintended_consequences.html.

[112] privatkopie.net ao., *Kompensation ohne Kontrolle, Stellungnahme zum Zweiten Korb der Novellierung des Urheberrechtsgesetzes*, (June, 2004), available at: http://privatkopie.net/files/Stellungnahme-ACS.pdf.

[113] *The Trusted Computing Group (TCG), successor to the Trusted Computing Platform Alliance (TCPA), is an initiative led by AMD, Hewlett-Packard, IBM, Intel, Microsoft, Sony, and Sun Microsystems to implement trusted computing. TCG's major goal is the development of a Trusted Platform Module (TPM), an additional chip that can be included in computers that permits some trusted computing features. The basic elements of trusted computing are: 1. Unique machine/CPU is identified using certificates; 2. Encryption is performed in the hardware; 3. Data can be signed with the machine's identification; 4. Data can be encrypted with the machine's secret key*. Available at: http://en.wikipedia.org/wiki/Trusted_computing. This means briefly that the hardware (computer) automatically checks if the action which the user wants to be performed is legal and only performs if this is the case, eg.: CPRM/ Directory of information on the proposed Content Protection for Recordable Media (CPRM) system, a scheme under which computer hardware vendors would build "copy protection" into all hard drives and other computer data storage devices.

The report also discusses competition and progress in the content sector, mentioning the effects of high transaction costs and market concentration. As stated in the paper, DRM would only be an advantage for big companies: KMUs or individual authors would not be able to afford the costs of DRM licences and their usage[114].

Thirdly, the report looked at competition and progress in the technology branches. The results were market concentration and the blockade of alternative developments[115].

The report concluded that the disadvantage of DRM was high transaction costs which have to be paid by consumers and authors. By income from individual remuneration for private copying they do not have to expect anything.[116] In contrast to this, they would, after all, get a part of it through collection societies. Referring to the all-purpose machine (computer) it is argued that all the previous achievements of the digital revolution were developed thanks to free programmability and if this free programmability was threatened by DRM, future progress was in danger.

On the other hand as, for example, Volker Grassmuck[117] states referring to traffic analysis,[118] p2p use of copyrighted works is, despite legal protection of DRM, the existence of TPMs and several legal actions, one of the dominating (if not to say the dominating) uses of the internet and, like

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[114] *DRM systems might be operated by big producers only*., J. Reinbothe, *Private Copying, Levies and DRMs against the Background of the EU Copyright Framework*, at the conference "The Compatibility of DRM and Levies", Brussels, September 8, 2003, available at http://europa.eu.int/comm/internal_market/en/intprop/news/2003-09-speech_en.htm).

[115] *'Lexmark Sues Over Toner Cartridges,' Lexmark, the second-largest printer vendor in the U.S., has long tried to eliminate aftermarket laser printer toner vendors that offer toner cartridges to consumers at prices below Lexmark's. In January 2003, Lexmark employed the DMCA as a new weapon in its arsenal. Lexmark obtained a DMCA injunction banning printer microchip manufacturer Static Control Components from selling chips it claimed were "technology" which "circumvented" certain "authentication routines" between Lexmark toner cartridges and printers. Lexmark added these authentication routines explicitly to hinder aftermarket toner vendors. Static Control reverse-engineered these measures and sold "Smartek" chips that enabled aftermarket cartridges to work in Lexmark printers. Lexmark used the DMCA to obtain an injunction banning Static Control from selling its reverse-engineered chips to cartridge remanufacturers.8 Static Control has appealed that decision and countered by filing an anti-trust lawsuit. Whatever the merits of Lexmark's position, it is fair to say that eliminating the laser printer toner aftermarket was not what Congress had in mind when enacting the DMCA.* At EFF, *Unintended Consequences*, p. 9.

[116] *DRM systems might be operated by big producers only, which may not pass on the revenues to authors and other non-corporate right-holders as collecting societies do according to their distribution keys. Individual rights management based on DRMs may, therefore, not ensure that all right-holders get their ‚fair share'*. J. Reinbothe, *op. cit.,* (2003).

[117] V. Grassmuck, *Alternative Kompensationssysteme*, (Dec, 2004), FIfF-Kommunikation 4/04, p. 49-51.

[118] CacheLogic, *The True Picture of Peer-to-Peer Filesharing,* (July, 2004), available at: http://www.cachelogic.com/research/index.php.

others,[119] he comes to the conclusion that the idea of DRM does not work yet and there are doubts that it ever will[120] (because it is argued that there is no truly secure system and in the end there would be an open "analogue whole" which would allow analogue copies which could be digitized anyway).

4.2 Content Flat Rate, Voluntary Collective Licensing

Regarding the disadvantages mentioned and facing the possibility of total failure of DRM, debates arose debates about possible alternatives, proposing the "Content-Flatrate"[121] or a Voluntary Collective Licensing System[122]. The idea is to permit file-sharing which cannot be prevented and to make it obligatory to pay remuneration. This would reduce the exclusive right to remuneration upon purchase to a right to remuneration. Practically, consumers would have to pay a levy according to their bandwidth to their ISPs. These would have to forward it to the collecting societies which would have to distribute it among their members.

If this system were proposed as a limitation, it would pass neither the three-step-test nor the Information Directive as argued by the Referendarentwurf[123] (ministerial proposal for an

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[119] *Today, ten years after introducing DRM, the view is prevailing that DRM is not fully developed. Such as the (German) Kulturrat, IG Wort, (…) GEMA as well as the (…) EU Commission and the WIPO*., privatkopie.net, *op. cit*., p. 4

[120] P. Biddle, P. England, M. Peinado und B. Willman (Microsoft Corporation), *The Darknet and the Future of Content Distribution*, (2002), ACM Workshop on Digital Rights Management, November 18, 2002, Washington DC, available at: http://crypto.stanford.edu/DRM2002/darknet5.doc

[121] Proposed by a coalition of the civil society such as FIfF, Chaos Computer Club or privatkopie.net, privatkopie.net, *op. cit.*, p. 8

[122] Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing, "Let the Music Play" White Paper*, (Feb, 2004), available at: http://www.eff.org/share/?f=collective_lic_wp.html.

[123] *Dem Vorschlag von privatkopie.net, eine Schrankenregelung für die Online-Nutzung zu schaffen und vergütungspflichtig zu gestalten, wird nicht gefolgt. Zum einen fehlt hierfür eine Grundlage im europäischen Urheberrecht. Der Urheber hat das Recht, sein Werk umfassend zu verwerten. Das gilt auch für eine Verwertung zum Abruf im Internet. Die Richtlinie lässt keine Regelung zu, durch die eine allgemeine Schranke für die Online-Nutzung geschaffen wird. Zum anderen würde mit einer solchen Schrankenregelung eine erfolgreiche Vermarktung urheberrechtlich geschützter Werke im Internet unmöglich gemacht. Neue Geschäftsmodelle, wie sie zur Zeit entwickelt werden, würden zugunsten einer zustimmungsfreien Zugänglichmachung zum Einheitspreis verdrängt. Schrankenregelung dürfen aber nur in Sonderfällen geschaffen werden, die weder die normale Auswertung des Werks beeinträchtigen noch die berechtigten Interessen des Urhebers unzumutbar verletzen. Bei einer allgemeinen Schranke für die Online-Nutzung wären diese Voraussetzungen nicht erfüllt: Es würde kein Sonderfall geregelt und die normale Auswertung des Werks im Internet unmöglich gemacht* (Drei-Stufen-Test). Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) in der Fassung des Referentenentwurfs des Bundesministeriums der Justiz Stand: 27.

amendment of the German Copyright Law). Another possibility was to stipulate the Content Flatrate as a non-voluntary licence[124] as proposed by Volker Grassmuck.[125] Since it was no limitation it did not collide with the three-step-test nor with the Information Directive as argued by Silke von Lewinski. V. Lewinski refers to the common belief that exclusive rights very well can be less advantageous for authors than remuneration rights according to a non-voluntary license administered by a collecting society. When analysing several non-voluntary licences, such as the mandatory licence in the Hungarian Copyright Law, she came to the conclusion that this mandatory licence did not come into conflict with international and European copyright law.

Given that the Berne Convention and the other relevant treaties aim at protecting authors' rights in as effective and uniform a manner as possible, it would even seem self-contradictory to consider the mandatory collective administration in such cases, where individual administration is hardly possible, as unduly restricting the exclusive rights granted as minimum rights.[126] Also, Walter approves of the possibility of relatavising exceptions and limitations by providing remuneration or compensational rights.[127] An alternative to this compulsory model would be a voluntary licence model as introduced by the Electronic Frontier Foundation[128].

The distribution of the incoming money could be organized by a combination of monitoring what people are sharing in the p2p networks and monitoring volunteers who could serve as the "Nielsen families". This would provide the desired accuracy together with the need to preserve privacy.

The existence of levies is heavily discussed because it is argued that they were only introduced because there was no possibility of controlling the usage as was the case with reproduction or taping. In the digital age now there is the possibility of controlling usage with DRM and the

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September 2004, available at: http://www.kopien-brauchen-originale.de/enid/1d521d8712ce34bb9e5c412d93bb2fff,55a304092d09/7f.html.

[124] see also chapter 1.2.3.

[125] V. Grassmuck, *op. cit.*, p. 50.

[126] S. von Lewinski, *Mandatory Collective Administration of Exclusive Rights – A Case Study On Its Compatibility With International and EC Copyright Law*, UNESCO e-Copyright Bulletin, No.1, January - March 2004, S. 7, http://portal.unesco.org/culture/en/ev.php-URL_ID=19552&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[127] Dazu zählt insbesondere auch die Frage, ob beziehungsweise inwieweit die Vorsehung von Ausnahmen und Schranken durch die Gewährung von Vergütungs- oder Ausgleichsansprüchen relativiert werden kann, was grundsätzlich zu bejahen sein wird., in M. Walter, Europäisches Urheberrecht, Kapitel IV. Randziffer 97.

[128] EFF, *op. cit.*

concept of levies and collectivism should be phased out, as was indicated in Rec. 35 Information Directive[129]: *In cases where right-holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive*. The more TPMs are in use, the less licence fees are needed.

Hugenholtz writes about the history of private copying: *Traditionally, copyright owners have never held absolute control over the use of their works. Everyone is therefore free to read, listen to or view a work for his or her own learning or enjoyment. In theory, copyright never protected against acts of consumption or reception of information by individuals. The view that copyright protection does not extend to the private sphere of the individual was well accepted by most early continental European copyright scholars. The private or otherwise personal use of copyrighted works without the prior authorisation of the rights owner was seen as enabling individuals to participate actively in the public debate and to develop their own personality to its fullest.* (…)

In view of the impact of home recording activities on the rights holders' interests, many commentators tried to distinguish the new circumstances from early forms of private uses. They insisted that legislatures could never have foreseen such technological development. In their opinion, limitations for private use were originally intended to permit hand copying or typewriting of a manuscript, which had no or minimal effect on the rights holders' interests. This was clearly no longer the case with home-taping technology. Since limitations on copyright had to be interpreted restrictively – or so they argued – the traditional limitation allowing private use could not be extended to cover the making of copies of works through home-recording techniques. Following the logic of these commentators, private individuals who made reproductions of sound or audiovisual works for private use were infringing the owner's copyright in his work, as were probably also the manufacturers and retailers of recording equipment necessary for doing so.[130]

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[129] *Where levies coexist with such technical measures, consumers may end up paying twice for the right to make a private copy of a work – once by paying the levy, and once again by paying the right holder for the right to copy the work. Or consumers may end up paying a levy for a work that cannot be copied, for example, a motion picture on a copy-protected DVD. The EC Copyright Directive, which was adopted in May 2001, takes an ambivalent approach towards this issue. Art. 5.2(b) of the Directive attempts to reconcile the existing system of private copying levies with a future of individual digital rights management, by prescribing that in calculating the amount of 'fair compensation' for acts of private copying the 'application or non-application of technological measures' be taken into account. This provision suggests a gradual phasing-out of levies on digital media or equipment, as digital rights management systems enable content owners to control private copying, and set conditions of private use, at their discretion.*, P.B. Hugenholtz, L. Guibault and S. van Geffen, The Future of Levies in a Digital Environment, (March, 2003), Institute for Information Law, Amsterdam, p. 2, available at www.ivir.nl/publications/ other/DRM& levies -report.pdf.

[130] Hugenholtz, *op. cit.*, p. 10.

As discussed by Hugenholtz, the argument of technical development as well as the necessity for restrictive interpretation of limitations on copyright has to be interpreted in the context of the economic impact and cannot be assumed as given or evident.

In contrast to this, privatkopie.net argues that the history of the right to private copying is not only the lack of possibility of external control, but has also the enabling of civil society to communicate, culturally participate and further develop creative processes. *The possibility of putting information in your own context, that means for example, into your own archive which is a precondition for politically mature citizens to participate in the information society, to manipulate it and to realize a "semiotic democracy"*[131] *(…).*[132]

The other reason for the criticism of mandatory licences is the distribution of the money since some collecting societies use this money partly to fund cultural activities or pension systems. *Transparency in a multi-country environment is particularly important because foreign authors and other holders of copyright don't always know how proceeds from their royalties are being spent. In some cases, domestic collecting societies take a cut of royalties to support cultural initiatives or even retirement funds. These initiatives are often undertaken for the sole benefit of domestic rights-holders.*[133] This is also core of the criticism mentioned above (chapter 1.3.3), where cultural funding was said to more or less lead to censorship. Nevertheless, in small countries with small numbers of market participants, as it is the case in Austria or Czech Republic, cultural production would be on a far lower level without funding systems. Therefore this system is some sort of cultural redistribution which should be justified according to Art. 151 ECT.

[131] W. Fisher, *Promises to Keep. Technology, Law and the Future of Entertainment*, (2004), Stanford University Press, Pre-Prints available at: http://www.tfisher.org/PTK.htm
[132] privatkopie.net, *op. cit.*, p. 3
[133] T. Lüder, *Copyright at the Crossroads*, (May, 2005), in Single Market News 37, European Commission, available at: http://europa.eu.int/comm/internal_market/smn/smn37/docs/special-feature_en.pdf.

5. Conclusion

Digital Rights Management and its impact on access to information have lead to a highly controversial discussion which is still in an early stage since the transformation of our society to an "Information Society" is only just beginning. It cannot predicted where this discussion will lead to, and whether or not DRM will become the future model of providing authors with just payments for the use of their works.

As the examples of Austria and Czech Republic have shown, there is some reluctance to give the concept of DRM this requested absolute legal protection and there is also some doubt that DRM will replace the system of collecting societies as expressed by the European Parliament in the Echerer-Report[134]. The rejection of the Commission's initiative to regulate Software Patents by the European Parliament recently (July 6th 2005) indicates that there is some awareness of the issue of Intellectual Property. *Rapporteur Michel Rocard said that the rejection for him was a signal that the problem of software patents was not "ready" yet. He also sees in it [the decision] a message to the European Patent Office to reconsider its rules on this field.*[135]

Referring to the information society it seems as if this is not the only intellectual property field to be reconsidered.

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[134] *The European Parliament (…) 31. (…) Stresses that collective management societies are the most significant option for the efficient protection of the copyright of the artist and must operate according to the principles of transparency, democracy and the participation of creators; stresses that the institution of reasonable levies as compensation for free reproduction for personal use constitutes the only means of ensuring equitable remuneration for creators and easy access by users to intellectual property works and cannot be replaced by Digital Rights Management Systems (DRMS).* REPORT on a Community framework for collecting societies for authors' rights (2002/2274(INI)) Committee on Legal Affairs and the Internal Market Rapporteur: Raina A. Mercedes Echerer, Dec 11th, 2003, available at: http://www2.europarl.eu.int/omk/sipade2?SAME_LEVEL=1&LEVEL=3&NAV=X&DETAIL=&PUBREF=-//EP//TEXT+REPORT+A5-2003-0478+0+DOC+XML+V0//EN

[135] *Die Abweisung ist für ihn ein Signal, dass das Problem der Softwarepatentierung noch nicht "reif" ist. Er sieht darin auch eine Botschaft an das Europäische Patentamt, seine Regeln auf diesem Gebiet zu überdenken.* S. Krempl, *EU-Parlament beerdigt Softwarepatentrichtlinie*, (July 6th, 2005) available at http://www.heise.de/newsticker/meldung/61446

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