

# Internet Piracy



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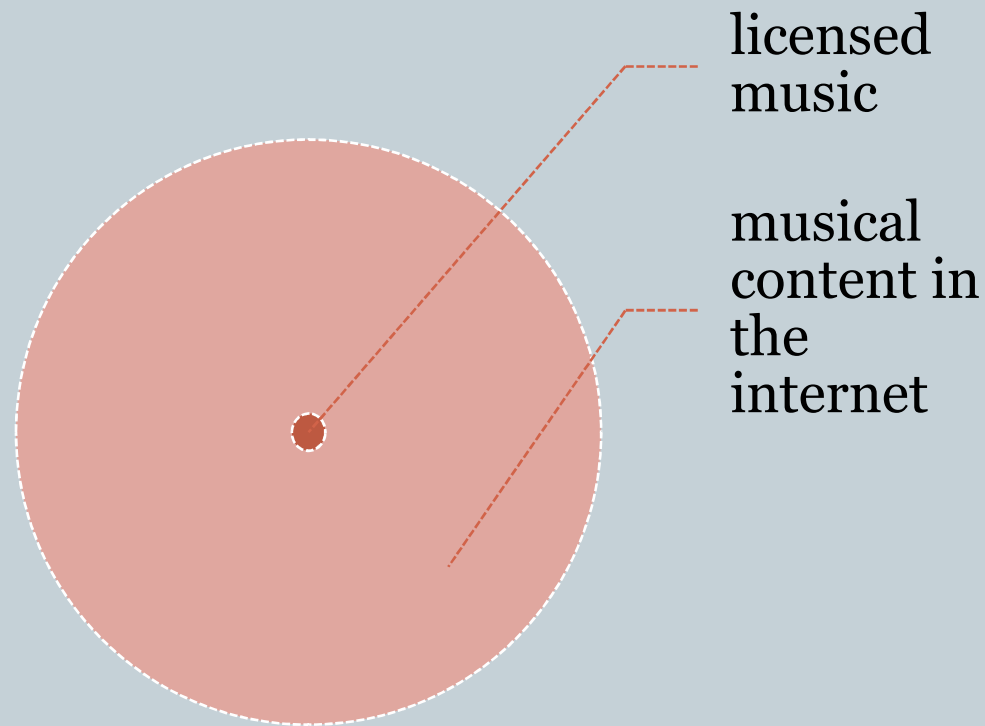
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# *Introduction...*

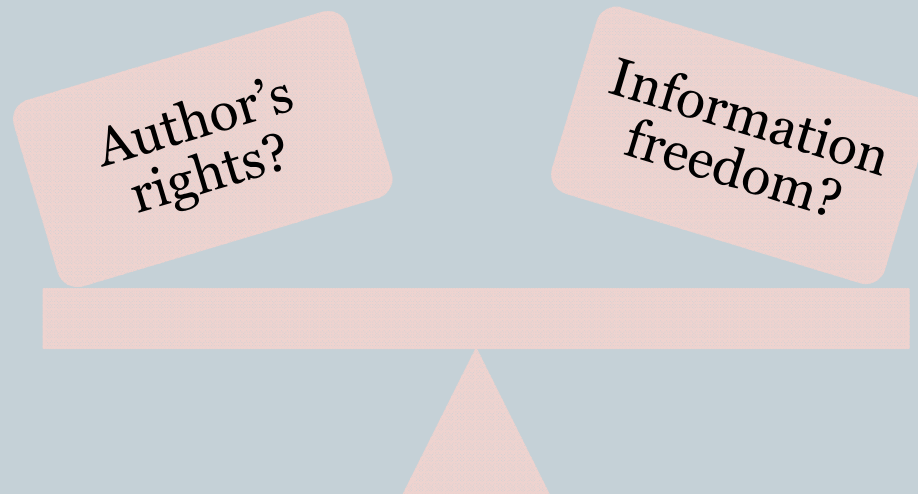


95 % of musical content in the internet illegal (IFPI)

41 % of worldwide used software unlicensed (BSA), i.e. the value of cca. 53 billions €



# General Thoughts



# General Thoughts



- Internet as a new challenge for Berne system?
  - „making available“ as a „distribution“, „broadcasting“, „transmission“...?
  - Digital copy – perfectly reproducible
- **Berne Convention** (for the Protection of Literary and Artistic Works)
- **Rome Convention** (for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations)

# Civil Law I – Legal Sources



- International public law & globalization of IP law
    - **TRIPS** (Agreement on Trade Related Aspects of Intellectual Property Rights)
    - WIPO Copyright Treaty (**WCT**)
    - WIPO Performances and Phonograms Treaty (**WPPT**)
- WIPO  
Internet  
Treaties  
(„Digital  
agenda“)
- EC is a contracting party
    - = community law, with the interpreting competence of ECJ

# Civil Law II – Legal Sources



- **USA**
  - **Digital Millennium Copyright Act (1998)** amending the U.S. Copyright Act
- **EC**
  - Directive 2000/31/EC on electronic commerce (**E-Commerce Directive**)
  - Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (**InfoSoc Directive**)
  - Directive 2004/48/EC on the enforcement of intellectual property rights (**Enforcement Directive**)

# Civil Law III – Technological Measures



- Usefulness?
- Effect?
- Restriction of user's and consumer's statutory rights?
- Circumvention of technological protections & alteration of digital rights management (DRM) information = copyright infringement

# Civil Law IV – Right of Information



- Disclosure of identity (personal data connected to IP address) vs. data protection & telecommunication secrecy?
- Art. 47 TRIPS
  - Members may provide that the judicial authorities shall have the authority [...] to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services [...].
- Art. 8 Enforcement Dir., § 40 Czech CA, § 56 Slovak CA
- § 101 UrhG („Drittauskunftsanspruch“)
  - Need of a judicial order for telecommunication data

# Civil Law V – Liability



- **Problems**
  - different national laws
  - servers in countries without enforceable IP laws
  - fast development of technologies
  - number of infringers
  - the copyright laws enacted around 2000 (like DMCA) are from times of the server-based distribution
  - misuse of internet access of others, private sharing networks...
  - towards the user's responsibility for his/her IP address?

# Civil Law VI – Liability



- Users
  - downloading – a right to private copy?
    - ✦ § 53 (1) UrhG: „obviously illegally produced or available made source“
    - ✦ the same conclusion under 3 steps test?
      - „The exceptions and limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.“

# Civil Law VII – Liability



- **Users / Content Providers**
  - sharing and/or downloading – p2p
    - ✦ Napster (1. p2p generation), Gnutella etc. (2., 3. generations) – information about users' content is not centralized on one server
  - sharing while downloading (BitTorrent protocol)

# Civil Law VIII – Liability



- **Web Hosting Services & Internet Service Providers**
  - Principles: no liability for mere conduit, caching, hosting (+information location tools); no general obligation to monitor
  - § 512 USCA, Art. 12 – 15 of E-Commerce Directive
  - in case of no requirement with the statutory conditions, a secondary (contributory / vicarious) liability may arise
  - software producers?
    - ✦ **MGM v. Grokster – US Supreme Court: liability of the p2p client producer by affirmative encouragement (analogue use of Betamax???)**

# Criminal Law I – Sources



- **International public law**
  - Art. 10, 11 Convention (of the CoE) on Cybercrime
    - ✦ Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright and/or related rights
    - ✦ PLUS - Attempt and aiding or abetting
  - Art. 61 TRIPS

# Criminal Law II – Criminal Liability



- **USA**
  - who infringes the copyright willfully and for the purpose of commercial advantage or private financial gain
    - ✦ includes „receipt of other copyrighted works“!
    - ✦ simple „intent to copy“ is not sufficient, one has to „intentional violate a known legal duty“ (United States v. Moran)
- **CZ+SK**
  - willfulness, but the aim is not important (similar in UrhG)
  - covers also the infringement of moral rights?!
  - in Slovakia – commitment via computer system is an aggravated circumstance

# Anti-piracy Efforts I



- **Criminal Prosecution**
  - individual file sharers?
  - The Pirate Bay
    - ✦ assisting in making copyrighted content available
    - ✦ advertisement revenue of the web site: 0.1 – 1.2 mil. USD / year
    - ✦ sentence (*not executable*): 1 year prison + 2.6 mil. EUR (damages+fine)
    - ✦ BUT the whole Pirate Bay index is today available as a torrent file...

# Anti-piracy Efforts II



- **Civil Enforcement**
  - A&M Records, Inc. v. Napster, Inc. (2000-2001)
    - ✦ the main argument – non-implementation of a copyright policy, including termination of repeat infringers
  - lawsuits against individual file sharers?
    - ✦ RIAA – 30,000 actions in past 4 years
    - ✦ Film producer Constantin Film – 10,000 IP addresses, 500 individual notifications (Germany, 2009)
      - criminal statistics 2008, Germany, 44% decline (in connection with the new provision of „right of information“ and private enforcement)

# Solutions?



- „3 strikes“ laws (graduated response)
  - Britain (agreements between ISPs and ent. industry)
  - France (Loi HADOPI – „Law favoring the diffusion and protection of creation on Internet“)
    - ✦ possibility of internet ban for repeated infringements (by a judicial decision) + fines up to 300,000 € / confinement
    - ✦ Problems: evading the system is easy for technically skilled users (including the decryption of foreign WIFI access etc.)

# Solutions?



- „3 strikes“ laws (graduated response)
  - European Parliament resolution of 10 April 2008 on cultural industries in Europe (2007/2153(INI))
    - ✦ „criminalising consumers who are not seeking to make a profit is not the right solution to combat digital piracy“
    - ✦ „calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access“

# Solutions?



- Development of technologies
  - enabling identification and tracking of the copyrighted content
- Internet levies & the global licence („Kulturflatrate“)
  - Isle of Man
  - Discussed in France, but rejected by the National Assembly
- BUT - The main challenge for the entertainment industry: provide a legal alternative to the file sharing – new business models needed!

# Further Reading

(Selection)



- [cz] **Čermák**, Jiří. Internet a autorské právo. 2. vydání. Praha 2003.
- [en] **Fiscor**, Mihály. The Law of Copyright and the Internet. Oxford 2002.
- [de] **Hoeren**, Thomas. Internet- und Kommunikationsrecht. Köln 2008. *available in up-to-date version [online at uni-muenster.de](http://uni-muenster.de)*
- [en] **Lucchi**, Nicola. Digital Media & Intellectual Property. Berlin, Heidelberg, New York 2006.
- [de] **Wiebe**, Andreas. Internetrecht. Wien 2004.