Arpi Abovyan

Challenges of Copyright in the Digital Age

Comparison of the Implementation of the EU Legislation in Germany and Armenia

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PREFACE

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Washington D.C., January 2014

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INTRODUCTION

Information is the basis of humanity. It enables significant changes in a great number of economic and social activities. The heart of the present technological and social revolution is the rise of digital technologies that allow more efficient processing, transmission, storage and review of information. Telecommunication, broadcasting, computer and software are the core industries as they have the strategic keys to fulfill multiple social needs by increasing the capacity to process and communicate information, and by increasing the flow of information and consequently the dissemination of knowledge.

Digitization has dramatically changed the environment in which copyrighted works are used and exploited and advances in digital technology are presenting various challenges to the world of copyright. The ease with which copyrighted works can be copied, reproduced and disseminated in the digital environment makes the transmission of unauthorized works by third parties easier. Certainly, the problem of unauthorized copying is not limited to the digital age, but it is simply greater than before and this is detrimental to the copyright industry as a whole.

In 1994, John Perry Barlow described the manifold problems connected to the digitalization of copyright content with the following metaphor: "selling wine without bottles."[1] The metaphor referred to the circumstance that the digitization of copyright content and the disappearance of the tangible medium embedding it had broken a long established equilibrium which allowed for the trade of creations subject to copyright. The availability of low-priced copying technology and the diffusion of the Internet have enabled consumers to make more wine from the one bottle they purchased and distribute it to other users for free. Thus, this phenomenon has shaken the foundation of copyright law.[2] Both legal and technical measures have been taken to try to control the digital environment.

New advancements in digital technology are normally followed by amendments of traditional laws and the adoption of new statutes to reassure the protection of the digital property. However, developments in the field of digital technology are so rapid that the laws and policy makers are often incapable of adequately responding to these challenges in due time. Today it is a fact that the Internet is fundamentally changing the way business is done and the law will have to change to reflect that.

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[1] *Barlow J. P.* "The Economy of Ideas. A Framework for Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property is Wrong)" March 1994, WIRED, Issue 2.03. See at <www.wired.com/wired/archive/2.03/economy.ideas_pr.html>.

[2] See *Arazzo E.* "Technological Measures, Software and Interoperability in Digital Age, Intellectual Property and Market Power" 2006-2007, ATRIP Papers, at pp. 449-450.

In order to address the new challenges of the digital age, the European Union (EU) adopted a series of Directives, which should be implemented in all Member States as well as in the European Neighbourhood Policy (ENP) countries. Armenia is one of the ENP-East countries, together with Ukraine, Moldova, Belarus, Georgia and Azerbaijan.

This thesis will analyze and compare the implementation of the corresponding European Directives in Germany, which is a good example of an industrialized and developed EU Member State (MS), and Armenia, as an example of an ENP country with a transition economy. For a country with a transition economy it is characteristical to create different governmental institutions, to change or to create other institutions, such as private enterprises, and to promote such enterprises, as well as independent financial institutions and markets.[3]

The main purpose of this thesis is to assess whether the European Directives can be successfully implemented in the same way in countries with different levels of development. For this, the examples of Germany and Armenia have been chosen. A Directive can be considered successfully implemented if its rules are both included in the corresponding legislation and implemented in practice. This also means that after implementation, enforcement of the laws should be realistically possible in the society and the provisions of Directives would not be solely inserted into the national laws without further implementation, i.e. would not stay on paper.

Taking the examples of two different countries-a developed country with a longstanding practice in the field of copyright and a transition country with its legislation on copyright (and on intellectual property rights in general) only 15 years old -will help to evaluate the problems of developed and transition countries concerning the challenges of copyright in the digital age. The following topics have been chosen for discussion and analysis:

1) Limitations and exceptions in the digital age;
2) Liability of Internet service providers;
3) Technological measures and rights management information;
4) Collective management organizations in the digital age; and
5) Enforcement.

These five topics have been chosen because they are basic issues in the field of digital copyright and are still in the on-going discussion process, not only in Armenia and Germany, but also at the EU level. Some of these topics, such as the role of collective management organizations, affect both the analog and digital worlds. However, this thesis will focus on the digital issues, as they are currently the EU's main concern regarding copyright, and exactly where the EU wants to get to a unified system for EU Member States and EU neighboring

[3] According to the International Monetary Fund, Armenia is a country with a transition economy. See the classification of transition economies with a list of countries at <www.imf.org/external/np/exr/ib/2000/110300.htm>.

countries. Moreover, while these five fields are in fact different and have their own specifications, the analyses and discussions below will show that they still have similar problems, especially regarding the implementation of European Directives in countries with different levels of development.

For each of the above-mentioned topics, which build the five chapters of this thesis, a separate introduction for general understanding of the sphere will be provided. This thesis will first discuss the International Treaties and corresponding European Directives in detail in order to understand the field and its main regulations in the EU level. Afterwards, the German legislation and practice will be analyzed to show how an industrialized country has implemented the EU Directives. And finally, the Armenian legislation and practice will be discussed in order to understand whether Armenia, being a transition country, can successfully implement the same EU Directives. Thus, each of the five topics will be discussed for Germany and for Armenia separately.

Comparing these two countries will help to answer the central question of this thesis: Is a one-size-fits-all approach appropriate in the digital environment or does the special situation of transition countries call for a different solution, and if so, to what extent?

Furthermore, it will show how the present Armenian legislation could be improved and whether the digital environment demands radical changes for regulating the field. In this respect, the Armenian example might be instructive for other transition countries, especially for the members of the Commonwealth of Independent States (CIS).[4]

Before starting the main discussion, this thesis will provide some general background information on Armenia and on Germany for a better understanding of the special situation in regard to copyright in both countries.

I. BACKGROUND ON ARMENIA

Armenia has a population of 3,262,000 (2010 estimate), and covers an area of 30,000 sq. km (11,600 sq. mi.). Armenians have their own distinctive language (an Indo-European language group) and alphabet (with 39 letters), which was invented in 405 CE. Over the centuries, Armenia has been occupied by Greeks, Romans, Persians, Byzantines, Mongols, Arabs, Ottoman Turks and finally Russians. Armenia declared its independence from the Soviet Union on 21 September 1991. Since gaining independence, Armenia has chosen a path of integration with the global economic community, including membership in the

[4] CIS was created in December 1991. At present, the CIS members are Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine. For more details see <e-cis.info/index.php?id=2>.

World Trade Organization (WTO) and cooperation with the EU through the ENP.[5]

A. Historical development of copyright legislation

The copyright and related rights legislation of Armenia consists of the Constitution of Armenia, the Civil Code of Armenia,[6] the Law on Copyright and Related Rights,[7] other laws and legal acts, and the relevant international agreements[8] of Armenia.[9]

According to the Constitution of Armenia, the intellectual property (IP) must be protected by the law[10] and everyone shall have the freedom of literary, aesthetic, scientific and technical creation, and the right to make use of the scientific advancement and to participate in the cultural life of the society.[11]

Development of the legislation in the sphere of copyright and related rights in the territory of Armenia began in the early 1930s. All examinations and searches of libraries and archives for evidence that copyright legislation existed prior to the thirties were unsuccessful. The first official document in this sphere can be considered "The Regulation on the Author's Right" adopted by the Decision of the Central Committee and Soviet National Committee of Armenian Soviet Socialist Republic (ArmSSR) on 10 February 1930.

During the times of Soviet power in the territory of Armenia, legislation in the copyright sphere as well as numerous governmental decisions on copyright royalties and copyright contract forms (which in reality were obligatory) were regulated by Chapter 4 of the Civil Code of ArmSSR, adopted on 4 June 1964. There was not a separate law on copyright in Armenia. Moreover, related rights were not provided by state law. Performers' received payment for their work according to basic rates fixed by the government.

Generally, in the Soviet period, culture, science, literature - everything - was regulated by the government only. Copyright legislation (Chapter 4 of the Civil Code and relevant governmental decisions) was excessively overregulated and ignored international norms. The legislation strictly regulated the content of copyright contracts (above-mentioned obligatory contracts). Furthermore, the

[5] See more on this *Abovyan Arpi* "Intellectual Property Rights: Legislation and Enforcement in the Republic of Armenia" 2008, IIC 1, at p. 5.
[6] HO - 239, 05 May 1998, HHPT 1998/17 (50), 10 August 1998.
[7] HO-142-N, 15 June 2006, 2006/38 (493), 12 July 2006, pp. 46-78.
[8] If the ratified international agreements of Armenia state norms other than those stated by the law, the norms of international agreements shall apply. Law on Copyright and Related Rights, Article 2, part 2.
[9] Article 2 (1) Law on Copyright and Related Rights.
[10] Article 31, Sentence 5 Constitution of Armenia with amendments.
[11] Article 41 Constitution of Armenia with amendments.

minimum and maximum rates of royalties for authors, as well as the calculation of the royalties and their disbursements, were also strictly controlled by the government. Thus, neither the user nor the author decided anything. Divergence from the provided conditions of contract forms or disbursement of higher or lower rewards than was provided by the government decision was considered to be infringement and punished strictly.[12]

Even after the independence of Armenia in 1991, the provisions of Chapter 4 of the Civil Code of ArmSSR remained effective until the National Assembly of Armenia adopted the Law on Copyright and Related Rights on 13 May 1996.[13] This law was the first independent legal act regulating the sphere of copyright and related rights in the Republic of Armenia. Until the adoption of the law in 1996, copyright and related rights were regulated only in a few provisions of the Civil Code. The new law repealed Chapter 4 of the Civil Code, including all amendments. According to Article 12 of the Law on Copyright and Related Rights, the government of Armenia also adopted a regulation on minimum rates of author's rewards for several types of use of works of literature and art.[14]

At the end of 1990s, the government of Armenia decided to join the World Trade Organization, which could not be possible without accepting the requirements of the TRIPS Agreement.[15] At that time, the new draft of the Civil Code had been prepared, which also provided provisions on copyright and related rights (Section 10, Chapters 63 and 64). However, it must be stated that including regulation of copyright and related rights in the Civil Code when an independent law on copyright and related rights already exists is unnecessary. Including the same provisions in both acts is meaningless and can only complicate enforcement.

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[12] See *Nersisyan S.* "Hexinakain Iravunq" (Copyright Law) 2004/2, Erevan pp. 7-11. See also *Abovyan A.* "Copyright in Armenia" Summer 2008, Journal of the Copyright Society of the USA, VOL. 55, No. 4, at p. 552.

[13] In comparison with Soviet Law, the Law on Copyright and Related Rights from 1996 provided the following provisions, which were not included in Chapter 4 of the Civil Code and were novelties for Armenian Copyright: a) the subject matters of copyright and related rights was defined; b) for the first time, the related rights also received protection (rights of performers, broadcasting organizations and phonogram producers); c) exclusive rights of authors and related rights holders were provided by the Law; d) duration of protection for copyrights was prolonged from 25 to 50 years period; e) in a separate chapter the functions and tasks of the collective management organizations were defined; f) legal remedies for copyright infringements were also provided. Thus, all these novelties gave Armenia the possibility to become a member of main international conventions and agreements in the field, notably the Berne Convention.

[14] Armenian Government Decision No 251 of 22 April 1999, which has been recognized invalid by the Government Decision No 506-N of 11 January 2007, on fixing the minimal rates of copyright awards for public performance, broadcasting, and reproduction with the help of records, renting, and works of applied decorative art.

[15] Armenia has been a member of the WTO since 5 February 2003.

The existing legislation from 1996 did not meet the requirements of the TRIPS Agreement and so it was necessary to revise and update the Law on Copyright and Related Rights. On 8 December 1999 the National Assembly of Armenia adopted the new Law on Copyright and Related Rights.[16] The new law was based on the former one, including the main chapters and articles.[17]

The law was based on the system prevailing in continental Europe and consisted of two separate rights, i.e. moral rights and economic rights. However, some articles deviated from the continental European system. For example, in the case of copyright in an employment work, the exclusive rights belonged to the employer, a legal entity.[18] Another deviation from the continental European system was Article 11, under which the author could waive his moral rights, including his right to use the work by his name, pseudonym, or anonymously.[19]

B. Current copyright legislation

Constitution of Armenia provides that intellectual property must be protected by the law (Article 31, sentence 5)[20] and everyone must have the right to freedom of literary, aesthetic, scientific and technical creation, to make use of scientific advancements and to participate in the cultural life of society (Article 40).[21]

Today, Armenia is a member of the most important agreements of the field. On 22 April 1993, Armenia became a member of the World Intellectual Property Organization (WIPO). The Brussels Convention Relating to the Distribution of Programme - Carrying Signals Transmitted by Satellite entered into force in Armenia on 13 December 1993. The Berne Convention for the Protection of Literary and Artistic Works entered into force in Armenia on 19 October 2000. On 31 January 2003 the National Assembly of Armenia ratified Armenia's accession to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of

[16] Law on Copyright and Related Rights, adopted in 8 December 1999, entered into force in 20 January 2000, repealed on 22 July 2006, HHPT 2000/1 (99) 20 January 2000, HO – 28 (Official source).
[17] For the details see *Abovyan* 2008a, at pp. 551-555.
[18] Article 19 of the former Law on the Law on Copyright and related rights (HO - 28).
[19] Id. Article 11.
[20] The Constitution does not specify further details, such as how the intellectual property must be protected.
[21] Until the changes to the Armenian Constitution in 2005, the right to freedom of literary, aesthetic, scientific and technical creation and the protection of intellectual property were provided in one Article (Article 36). After the changes in 2005, the protection of intellectual property is provided in the same Article together with the protection of other property rights (real estate etc.) and the right to freedom of literary, aesthetic, scientific and technical creation is provided in a separate Article (Article 40).

their Phonograms. On 11 October 2004, two international agreements were ratified by the National Assembly of Armenia: the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).[22]

On 23 March 2006, the government of Armenia adopted the National Program (2006-2009) (NP) for the implementation of the Partnership and Cooperation Agreement (PCA),[23] signed between the Republic of Armenia and the European Communities and its Member States and aimed at integration into the EU.[24] The NP became the most important development strategy of Armenia's PCA implementation and EU integration. A successful realization of the NP requires the country to bring its institutions, management capacity and administrative and judicial systems up to EU standards in view of effective implementation of the *acquis*,[25] including the protection of intellectual property rights (IPR) and their enforcement.[26]

As a result, the law of 1999 was replaced in 2006 by the current Law on Copyright and Related Rights of Armenia[27] in order to make it compliant with EU legislation. In 10 years Armenia adopted three laws on copyright and related rights, which shows that Armenia consistently tried to improve its legislation in response to new challenges in the field.

Except the Law on Copyright and Related Rights, Civil Code of Armenia[28] as well in its Section 10 regulates all intellectual property rights (IPR).[29] However, it is less detailed compared to the specific IPR legislation,[30] such as the Law on Copyright and Related Rights. Chapter 62 generally provides that intellectual property is a "result of intellectual activity and means of individualization of participants in civil commerce, of goods, of work, and of services." The Civil Code, in addition to the Law on Copyright and Related Rights, also provides specific provisions on copyright and related rights (Section 10, Chapters 63 and 64). Yet, it does not make much sense to have two different legal acts (Civil

[22] Adopted in Geneva on 20 December 1996.

[23] Partnership and Cooperation Agreement (PCA) between the EU and Armenia entered into force on 1 July 1999. See at <ec.europa.eu/external_relations/ceeca/pca/pca_armenia.pdf>.

[24] Protocol No. 11 of the Government meeting of 23 March 2006.

[25] See also *Abovyan A.* "Intellectual Property Rights: Legislation and Enforcement in the Republic of Armenia" 2008, IIC 1, at p. 5.

[26] Id.

[27] HO-142-N, 15 June 2006, 2006/38 (493), 12 July 2006, pp. 46-78.

[28] Civil Code of Armenia, HO-239, 5 May 5 1998, HHPT 17 (50), translated at: <www.parliament.am/legislation.php?sel=show&ID=1556&lang=eng>.

[29] Including provisions on inventions, utility models, industrial designs, trademarks, geographical indications and topographies of integrated circuits.

[30] Compare with the Law of the Republic of Armenia on Inventions, Utility Models and Industrial designs (No. HO-111-N, 1 January 2009); Law of the Republic of Armenia on Trademarks (No. HO-59-N, 1 July 2010); Law of the Republic of Armenia on Geographical Indications (HO-60-N, 1 July 2010); and Law of the Republic of Armenia on the Legal Protection of Topographies of Integrated Circuits (HO-198, 24 March 1998).

Code and Law on Copyright and Related Rights) on the same scope of rights. Moreover, this can complicate the implementation of legislation in this field. However, it should be mentioned that in Armenia, if the specific legislation contradicts the Civil Code, the Code prevails. Nevertheless, such cases of contradiction in the field of IPRs have not been recorded in practice.

Most of the modern copyright legislations are structurally similar to each other in that they consist of at least five subsystems or "pillars" of copyright law: substantive copyright (authors' rights) law – neighboring or related rights – copyright contracts law – collective management organizations – enforcement of copyright.[31] The Armenian Law on Copyright and Related Rights also follows the structure of "five pillars."[32]

Generally, one of the main problems of the Armenian Copyright Law is that its provisions are derived from different systems, i.e. from American, European and Russian systems. The fact is that Armenia is a small country with a transition economy and the country gets support from developed countries in order to improve its legal system and enforcement. The developed countries who offer such support have very often different legal systems – common law or civil law systems. That is why the law contains mixed provisions from different systems. Furthermore, historically, Armenia was close to the Russian system and Armenian legislators took Russian provisions and inserted them literally into the Armenian legal system without any adaptations. Since 2006, however, the situation has changed.

Nevertheless, copyright and its protection is not an important issue for either the Armenian government or the society in general. The reasons will be analyzed below.

II. BACKGROUND ON GERMANY

In Germany, the previous copyright legislation[33] was replaced by the new Copyright Act (*Gesetz ueber Urheberrecht und verwandte Schutzrechte* (UrhG)) in 1965.[34]

[31] For more details see *Dietz A.* "The Five Pillars of Modern European Copyright (Authors´ Rights) Protection" 2003, Forum Europa III. Literature Today and Tomorrow. Shaping the Profile of Europe at Large, pp. 25-30.

[32] Armenian legal acts are organized according to Section (Bajin), Chapter (Glukh), Article (Hodvac), Part (mas), Point (ket), Sentence (naxadasutun). See Law on Legal Acts of the Republic of Armenia, No. HO- 320, HHPT 2002/15 (190), 31 May 2002.

[33] Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst (LUG) (9 June 1901, Reichsgesetzblatt 227; Gesetz betreffend das Urheberrecht an Werken der bildenden Kuenste und der Photographie (KUG), 9 January 1907, Reichsgesetzblatt 7.

[34] Copyright Act of 9 September 1965 BGBl. I, 1273 (Federal Law Gazette Part I), as last amended by Article 83 of the Act of 17 December 2008 BGBl. I, 2586).

The emergence of digital technology created the need to update the Copyright Act. However, it took several years to complete the reform of copyright law in Germany after the first announcement of the so-called 'second basket' of copyright law reform in 2003.[35] The second basket raised very lively and controversial discussions when it was first brought into the debate by the industry.[36]

After 4 long years of discussions and debates, one of the most disputed copyright reform projects has passed the legislative process in Germany.[37] On 1 January 2008 the second law on regulating copyright in the information society came into force (the Second Law).[38] This is the second part of the reformation, which provides additional changes to the German law on copyright and related rights.[39]

Although the new law ends some of the long discussions which lasted so many years, a lot of new questions and debates have opened up. Various groups, including the representation of the "Laender" (the German states), the Bundesrat (upper chamber of the German parliament) and several political parties, have mentioned the need for a 'third basket' of copyright reform and requested that the government start to work on it.[40] The discussions regarding the reform are still in process. The question of IP rights, especially of copyright and related rights, is so important in German society and so advanced in German reality that a political party named "Piratenpartei" – Pirate party (Pirates for short) was established in Germany in September 2006, referring explicitly to – and advocating for – copyright piracy. As a party of the information society, the Pirates is a part of the international movement of pirate parties and is also a member of the Pirate Parties International.[41] Since 2011 the party has even

[35] The elections in September 2005 and the change of government have caused this delay but also, and more importantly, the new concept of device levies onto PCs and other technical devices. *Scheja, Mantz 2007,* at p. 1.

[36] Facing too much opposition, the Schroeder administration decided to implement the mandatory parts of the InfoSoc Directive first, and only thereafter deal with device levies and other unsolved issues in a 'second' basket. Yet again the fruits of this basket were considered poisonous rather than sweet by industry, lobby groups and large parts of the legal community and in 2005 the draft did not succeed. The elections for the German Parliament further delayed the project and the process of drafting, hearings and changes started all over again when the new administration took office. Currently the discussions on "third basket" are in process. *Scheja, Mantz 2007,* at p. 1.

[37] Id. at p. 1; *Hoffmann* "Die Entwicklung des Internet-Rechts bis Mitte 2008" 2008, NJW 36, at pp. 2624-2625.

[38] Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft. See at <www.urheberrecht.org/topic/Korb-2/bmj/0582-07B.pdf>.

[39] The first and second parts are called "The First Basket" and "The Second Basket" and these titles are used so often that they have become very commonplace.

[40] *Scheja K. and Mantz R.* "Copyright Law Reform Finally Enacted in Germany" December 2007, Frankfurt, at p. 159.

[41] It states general agreement with the Swedish Piratpartiet.

succeeded in attaining a high enough vote share to enter four "Laender" parliaments in Germany, including Berlin.[42] The Pirates' focus is on Internet freedom, so they fight against government regulations concerning these issues. The Pirates particularly capture the attention especially of the younger generation.[43]

These developments show once more how important the question of protection of copyright and related rights is, not only for the country but for the society in general, especially among young people.

[42] Berlin, North Rhine-Westphalia, Saarland and Schleswig-Holstein.

[43] In May 2012, the Pirates won 8.2% of the vote in Schleswig-Holstein, which was sufficient to enter the state parliament, gaining 6 seats. Also in May 2012, they won 7.8% of the vote in North Rhine-Westphalia, gaining 20 seats. For more information see the official website of the Pirates at <www.piratenpartei.de/>.

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