

On the Role of Copyright Protection in the Information Society

Anti-ACTA Protests in Poland as a Lesson in Participatory Democracy

by Katarzyna Gracz*

Phd Candidate at the Department of Law, European University Institute, Florence

Abstract: In January 2012, Poland witnessed massive protests, both in the streets and on the Internet, opposing ratification of the Anti-Counterfeiting Trade Agreement, which triggered a wave of strong anti-ACTA movements across Europe. In Poland, these protests had further far-reaching consequences, as they not only changed the initial position of the government on the controversial treaty but also actually started a public debate on the role of copyright law in the information society. Moreover, as a result of these events the Polish Ministry for Administration and Digitisation launched a round table, gathering various stakeholders to negotiate a potential compromise with regard to

copyright law that would satisfy conflicting interests of various actors.

This contribution will focus on a description of this massive resentment towards ACTA and a discussion of its potential reasons. Furthermore, the mechanisms that led to the extraordinary influence of the anti-ACTA movement on the governmental decisions in Poland will be analysed through the application of models and theories stemming from the social sciences. The importance of procedural justice in the copyright legislation process, especially its influence on the image of copyright law and obedience of its norms, will also be emphasised.

Keywords: Copyright; Compliance; ACTA; Sociology of Law

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A. Introduction

1 In January 2012, Poland witnessed massive protests, both in the streets and on the Internet, opposing ratification of the Anti-Counterfeiting Trade Agreement,¹ which triggered a wave of strong anti-ACTA movements across the whole of Europe. In Poland, these protests had further far-reaching consequences, as they not only changed the initial position of the government regarding the ratification of the Treaty but also actually started a public debate on the role of copyright law in the information society. Moreover, as a result of these

events, the Polish Ministry for Administration and Digitisation launched a round table, gathering various stakeholders to negotiate a potential compromise with regard to copyright law that would satisfy conflicting interests of various parties to the dispute. This round table was the beginning of the wider social consultations with academia, non-governmental organisations, industry and interested individuals on the shape that the potential reform of the Polish law in general (not only intellectual property law) should take to be able to adequately meet the expectations of the information society. The consultations, apart from intellectual property law, focused on the new Internet business models,

protection of privacy, digital exclusion/integration and the meta topic, i.e. the issues of successful formula for social consultations in the digital environment.²

- 2 In general, it might be stated that the Polish government learned an important lesson during the anti-ACTA protests and realised that recent changes, which took place in Polish society due to the information revolution, changed the political climate in the country and the rules of the political game, in which civil society must be taken into consideration in the process of ruling and setting the goals of governmental policies.³ The anti-ACTA protests proved also that freedom of Internet, including protection of free speech and wide access to knowledge and art in the digital environment, are important values in Polish society, which should shape the governmental plans and strategies. Moreover, the role of the Internet as a successful communication tool in the relations between the state representatives and the civil society was emphasised.
- 3 Change in the governmental position on the ACTA treaty was a trigger for the formulation of the wider, multi-dimensional policy with regards to the problems of the digital environment, in which the Polish government decided to base its decisions on wide social consultations with many stake holders. This new direction taken by the Polish government, as a result of the anti-ACTA protests, should be interpreted as supporting open Internet, especially various safeguards of the freedom of speech in the digital environment, net-neutrality and the idea of the Internet as a global public good.⁴ The anti-ACTA movement in Poland resulted in a very courageous approach by the government that differs greatly from the current trends in the European and Northern American arena that seems to favour corporate benefits over the public interest.
- 4 This contribution will endeavour to describe and analyse the characteristics of the anti-ACTA movement and explain its extraordinary influence on the governmental decisions in Poland through the application of models and theories stemming from the social sciences. To facilitate reading, this article has been divided into two parts. The first is devoted to the description of the anti-ACTA phenomenon, whereas the second puts the protests in the wider context of the current crisis of copyright norms in the digital environment and evaluates actions taken by the Polish government in reaction to public discontent as a positive step on the way to restoring lost respect for copyright regulations.

1. The anti-ACTA protests in Poland

- 5 In January 2012, all of Europe⁵ witnessed massive protests, both in the streets and on the Internet, opposing the ACTA agreement, as a result of which ratification of the Treaty by the European Union has halted.⁶ The anti-ACTA movement started in Poland and it was also here that the protests lasted the longest and had the furthest-reaching consequences. The protest started first in the virtual world after media informed the Polish society about the government's willingness to sign the Treaty. On the 21st of January, a number of Polish governmental websites, including the official sites of the President, Prime Minister and the Parliament were shut down by the denial of service attacks. Shortly afterwards the protests in the streets started, which spread when the Polish ambassador to Tokyo signed the Treaty notwithstanding the clear objection of the general public.⁷ It is estimated that around a hundred thousand people went to the streets of dozens of big cities and smaller towns in Poland to show their objection to the ratification of the controversial treaty.⁸ They stayed in the streets for long weeks, notwithstanding the extremely unfavourable weather conditions, when the temperatures were falling to as low as minus 20 degrees.
- 6 The intensiveness of the anti-ACTA protests has attracted the attention of many social scientists⁹ as Poland has not witnessed such a social mobilisation since the collapse of the communist regime. Poles did not organise significant protests when the whole world was opposing the war in Afghanistan and Iraq. There was no "Occupy Poland" that was recognised as an influential social movement and Polish "Indignados" did not raise their voice in a manner similar to their counterparts in Southern Europe.
- 7 There are various explanations for the anti-ACTA phenomenon in Poland, ranging from the assertion that it was exactly this lack of earlier expression of discontent on the part of the society that led to the protests as they gave necessary vent to accumulated frustration¹⁰, to the diagnosis that the secret negotiations on the Treaty and the unclear position of the Polish government triggered conspiracy theories and pushed people to protest even though they were not aware of the substance of the criticised legal act. The fact that the well-publicised protests against SOPA and PIPA took place only two days before the Polish government announced its willingness to sign the ACTA should also not be underestimated.
- 8 The reasons for this unprecedented rise of the Polish public opinion against the international treaty dealing with the complicated and technical regulations in the scope of intellectual property are multiple. Understanding the mechanisms that led hundreds of thousands of individuals to join the anti-

ACTA movement and protest in the streets in very unfavourable weather conditions requires, however, an analysis of the protesters' self-statements that can be reconstructed from the discourse covered in detail by the media.¹¹

1. Why did they voluntarily freeze? On the reasons of the anti-ACTA protests.

9 The analysis of the discourse presented in the media during the protests allows for the classification of various causes self-reported by the protesters, both individuals and organisations, which made them join the anti-ACTA movement. They might be divided into two general categories: reasons of *legal* nature and reasons of *extralegal* nature. The first category should be subdivided into two types: *legal* reasons of *material* and *procedural* nature.¹²

10 The *material* reasons hereinafter are understood as referring to the provisions of the controversial treaty that might have led to changes in Polish law. The causes of *procedural* nature refer to the procedures that were applied in the process of negotiations and ratification of the ACTA treaty.

a. Reasons of legal nature

aa. Legal reasons of material nature

11 With regards to the causes of *material* nature, the protesters were afraid that ratification of the ACTA treaty might endanger access to knowledge and art in the digital environment, especially by changing the scope of the *permissible personal use clause* that has quite a liberal wording in current Polish copyright law as compared to other European regulations. They also pointed at the expressions used in Article 9 of the ACTA Treaty, which refers to damages for copyright infringement, warning that the concepts used in this provision stem from the Anglo-Saxon common-law copyright tradition and as such may drastically change the model used so far in Polish copyright law for determining the amount of damages in cases of copyright infringement.¹³ The protesters stated that they were afraid of massive trials against the end-users, similar to the proceedings that have already taken place in the United States. They emphasised that such a practice is unknown so far in the Polish legal system and might also seriously endanger legal access to knowledge and culture if the individuals threatened with arbitrarily-determined and extremely high damages will fear acting even within the scope of their *permissible personal use*.¹⁴

12 The representatives of the anti-ACTA movement also raised the argument that the regulations of the controversial treaty endangered freedom of

expression on the Internet and the protection of personal data. They also argued that ratification of ACTA would allow for the introduction of the institution of a *private police* by granting power to private entities, such as ISPs and collecting societies, in the scope of enforcement in cases of copyright infringement, which would remain outside judicial control.

13 They stated that ratification of the ACTA treaty would lead to the unacceptable situation in which private interests of the copyright-holders would be valued more highly than the fundamental rights of individuals (protection of privacy and freedom of speech) and the common public interest (access to knowledge and art and freedom of speech).

14 It is worth mentioning that Polish Ombudsman and General Inspector for the Protection of Personal Data shared the above mentioned worries raised by the protesters in their official statements, in which they strongly advised against ratification of the ACTA treaty.¹⁵

bb. Legal reasons of procedural nature

15 The reasons of *procedural* nature enumerated by the representatives of the anti-ACTA movement included secrecy of the negotiations of the Treaty on the international level, lack of adequate social consultations with all the stakeholders on the national level, lack of public discussions in the media before the ratification, and the atmosphere of hatching and conspiracy during the whole legislative process. Also these types of accusations against the government were acknowledged both by the Ombudsman and the General Inspector for the Protection of Personal Data. In her letter to the Prime Minister of 25th January 2012, the Ombudsman stated that the procedures applied both at the level of negotiations and ratification of the ACTA treaty were against the rule of law expressed in Article 2 of the Polish Constitution.¹⁶

b. Reasons of extralegal nature

16 Reasons of *extra legal* nature, i.e. postulates that did not directly refer to law, neither to its material nor to procedural aspects, could be described as political postulates of the leftist orientation that resonated very well with the earlier slogans of the "Occupy" and "Indignados" movements. The anti-ACTA protesters were formulating postulates against favouring corporate interests over public good. They were also promoting a liberal approach to access to knowledge and culture and protesting against globalisation and gradual monopolisation/oligopolisation of the creative industries by multi-national corporations, which in their opinion is leading to a decrease

in diversity on the cultural goods market. The protesters were also raising their voices against the aspirations of the American entertainment industry to impose American legal solutions on those outside the territory of the U.S.

2. The paradox of the anti-ACTA protests

17 Paradoxically, when the protests commenced, the majority of the Polish copyright scholars unequivocally stated that ratification of the ACTA would not introduce any significant changes to the Polish copyright law order due to the fact that the level of enforcement in cases of copyright infringement provided for by the Polish law currently fulfils the requirements of the controversial Treaty.¹⁷ This fact may seem incomprehensible given that the flagship argument of the anti-ACTA movement was that the Treaty would irreversibly change the face of Polish copyright law, and moreover, that as a result of the protests, government decided to organise a round-table negotiations that focused on the desirable shape of copyright law that would satisfy various parties to the dispute.

18 This paradox might be better understood when one more general problem, highlighted both by the protesters and some public institutions supporting them, is considered. The opponents of the ACTA treaty raised the question of the role of copyright law in the information society, claiming that ratification of the ACTA treaty would lead to the petrification of the old copyright regime and preclude any potential attempts to modify it in the future.¹⁸ They warned that such a situation endangers public interest, protection of which requires renegotiation of the social contract on which copyright protection is based. In their opinion, the new social contract should take into consideration social changes triggered by rapid technological development.

19 This argument treated ACTA as the symbol of the very strong proprietary vision of copyright law as opposed to the more open model favoured by the protesters. The anti-ACTA movement might therefore be perceived as the act of objection towards a strong proprietary paradigm that is present in most current international regulations in the scope of intellectual property in general, and copyright law in particular.

3. Strong Proprietary paradigm vs Open Access approach. Conflict of norms

20 In my opinion, such an approach that classifies the anti-ACTA movement as an example of the clash between the *strong proprietary* vision of copyright law present in the current intellectual property regime

on one hand, and the *open access* paradigm on the other hand, is very promising and allows for treating these particular protests as an example of the wider social phenomenon present worldwide. I assume that the core of the current crisis of copyright law in the digital era can be found in the divergence between legal and social norms concerning the access to intellectual and artistic creations. I discern two main sources of the conflict between these two norms. The first is the result of the specific dynamics in the development of technology, copyright law and social norms, which are perceived as a global phenomenon. The second is the outcome of specific local particularities that led to the evolution of social norms, which differ considerably from the contemporary intellectual property regime. In both cases, however, the core of the problem lies in the fact that consumer held social norms (developed either on the global or local level) strongly oppose the *absolute property* rhetoric present in most of the international regulations in copyright law. The rejection of the *strong proprietary* vision of copyright law refers both to material and procedural elements of the current international intellectual property regime. This regime is characterised by the tendency to neglect needs of the end-users, and public interest in general, not only in the content of the legal regulations but also in the procedures applied in the legislation processes, which rely on the opinions of the copyright-holders, represented mainly by the powerful entertainment industries and collecting societies from primarily the developed countries whilst excluding the representatives of the civil society and the developing world.

II. The anti-ACTA protests put in context

21 In the Polish case both of the aforementioned sources of conflict between the legal and social norms intertwine. The first category is universal in its nature and explains resentment towards the *strong proprietary* vision of law both locally and globally; the second refers to the peculiar historical and social conditions in which specific Polish social norms regarding access to intellectual and artistic goods developed.¹⁹

22 Due to the limits of this contribution, the second category, category of local conditions favouring development of social norms approving of *open access* to knowledge and culture and disapproving of the *strong proprietary* vision of culture, which is specific to Polish situation, will remain only signalled and not developed in detail. The more universal trends, stemming from the digital revolution and relevant for the developments in many parts of the world, will be analysed more closely.

23 Therefore in the following section I will endeavour to explain why the anti-ACTA protests were not ignored by the government, but quite the opposite, were highly ranked on its political agenda and managed not only to change the governmental position with regard to the ACTA treaty, but also triggered further-reaching processes aimed at reforming Polish copyright law in accordance with emerging needs of the information society. In this analysis I will concentrate solely on the universal grounds that might have been relevant to the Polish situation and to that of the other states which experienced the anti-ACTA, or more general anti-strong-proprietary-copyright, movements.

1. Genesis of the conflict between the social norms and legal regulations. Technological revolution – contradictory expectations of the end-users and the copyright holders

24 Before the digital revolution, as perceptively noticed by Ysolde Gendreau, “*copyright law was perceived, even by those in the legal profession, as an arcane and highly specialised area of the law. Its status as an intellectual property right that pertains to the arts helped to cultivate an aura of exclusivity around it. Few people studied it: few courses on it were offered in law schools. Today, the situation has changed radically.*”²⁰ The situation changed after the introduction of digital technologies and the Internet. The new technologies affected both the legal regulations and the social norms held by the public. Technological revolution through computer facilitation made both artistic creation and access to the works of others available to everyone on an unprecedented mass scale. Due to the technological changes, but also due to the expansion of the content and creative industries, consumers became surrounded by copyrighted material. The contemporary world is bursting with music, film, photographs and other creative works and access to (and even distribution of) the works of others, as well as the possibility of creating one’s own work based on the reuse and remix of existing materials, has become an inherent part of everyday life in the information society.²¹ What was once only possibility turned into a need and a must. The sheer technological potentialities unknown before made the end-users change their attitude towards what should be legally allowed, and they led to an increasing number of postulates for unlimited access to knowledge and culture, based on the assumption that technological and legal possibilities should be equated.

25 However, the same technological changes that led end-users to articulate their postulates for freedom of information and culture were used by the copyright holders to reinforce the legal

protection of their rights. End-users who expected more access were faced with increased protection of works with the proliferation of “secondary” remedies,²² such as the technical measures blocking the copyrighted material even against the legitimate acts of consumers and the introduction of legal regulations protecting these technical measures against circumvention.²³

26 This protection of copyright holders’ commercial interests has been perceived by the consumers as being introduced at the expense of the public needs and led to the initial problems with the image of copyright law. This reinforcement of copyrights not only went against the new expectations that emerged with the novel technologies, that allowed for the cumulative research and creativity on a scale unknown so far, but also went against the entrenched social norms that favoured a private use exception,²⁴ which was seriously weakened by the new technological and legal shields used by the copyright holders.

27 Also, exactly at this point, the place of copyright law in the public discourse drastically changed. Nowadays copyright law is one of the mostly discussed legal issues present in the public debate around the world, often taken up by laymen. “*This heightened visibility – [however, as Gendreau emphasises] – has not translated itself into a greater degree of popularity. On the contrary, copyright law has an image problem.*”²⁵

28 In the following sections I will endeavour to explain both why an image of law and law understood as the normative reality is important for the discussion on the relation between the legal and social norms, and what the causes are of the observed unpopularity of copyright law among the general public.

2. The image of law and its influence on social norms

29 The general public, as opposed to lawyers, usually has no specific professional knowledge in the field of law, and thus its attitude towards legal regulations depends not solely on the particular norms and its influence on the social reality, but also on the image of those regulations. Whether the society respects given law and obeys particular legal norms depends not only on the normative reality, but also on the way in which the society *perceives* the particular branch of law. What the general public thinks the law says and how it apprehends respective legal acts is equally important for the internalisation of the legal norms as what the law actually says. The importance of the image of law originates in the fact that both legal and social norms, as well as the process of their internalisation, are social facts. The notion of ‘social fact’ is used here as understood by Emile Durkheim,

i.e. as an independent entity that has its origins in the respective society, owes its characteristics to the specificity of that society, and would not have existed if not for that society.²⁶ Already at the dawn of sociology, Durkheim and Weber asserted that social facts construct the social reality that is separate and autonomous from the material world and, as such, is ruled by distinct principles.²⁷ Social reality is created not only from *what is* but also equally from *how people perceive what is*. Thus, according to Weber, the appropriate cognitive category for the analysis of the social reality ought to be inter-subjectivism, as opposed to objectivism, which should be reserved for the analysis of the material world solely.²⁸

30 Basing on the aforementioned theoretical assumptions, this chapter is also guided by the hypothesis that as the internalisation of legal norms is a social fact - an element of the social reality that does not belong to the material world - its analysis should use inter-subjectivism as a cognitive tool. That is why in the analysis of the mutual interaction between the legal and social norms, not only should the so-called *objective*²⁹ normative plane be taken into consideration, but also the intersubjective dimension of the copyright law - its *image*, i.e. the way this branch of law is perceived amongst the general public. This expansion of the scope of research from *what the law is* to *what society thinks the law is* allows for the conclusion that the negative representation of copyright law is yet one more reason, besides the technological revolution, for the emergence of social norms that diverge significantly from the current copyright regime.

3. Why copyright law suffers from an image problem

31 This section will refer to the concept of *image of law*, understood as an inter-subjective perception of what copyright law is. It will describe the popular image of contemporary copyright law, based on the presumption that the general public, as a rule, perceives copyright law in the negative light and that this negative perception impedes obedience to its norms. Furthermore, this section will aim to explain the manifold reasons for this observed image problem.

32 One of the most important causes of copyright's bad publicity is the perceived disappearance of the creative author from the system, who has instead been replaced by the huge companies that possess and manage the copyrights in millions of works of art produced by the thousands of creators,³⁰ and by the collecting societies that are equally anonymous and far from the source of the creative process.³¹ Consequently, profit for the distributors of the creative works has lost its public acceptance and

the copyright norms assuring this profit have been perceived as illegitimate because the marginal cost of the reproduction and the distribution of most of the works in the digital era have become minimal.

33 A following reason for the bad image of copyright law is the current trend of strengthening protection, together with the globalisation of more general intellectual property standards, which in many countries is perceived as American *neocolonialism*³² due to the fact that it imposes a vision of copyright that originates in the U.S. and does not necessarily correspond to other legal traditions; not to mention the role of the American entertainment industry in the drafting of the current international copyright regime. The notorious cases of Pirate Bay, Richard O'Dwyer and others reinforce this vision of copyright as the tool for the worldwide expansion of American corporations due to the doubtful legality of the application of American law outside U.S. territory.³³

34 This negative picture emerges also as a result of the extreme opaqueness of the negotiation and legislative process of recent international treaties regulating intellectual property issues, best exemplified by the ACTA case. The negotiations of the Anti-Counterfeiting Trade Agreement were secret and the first bits of information about the proceedings leaked through WikiLeaks in May 2008, followed by the numerous press reports and scientific articles. Leading non-governmental organisations advocating for the digital citizen's rights from all over the world urged for more transparency in the negotiation proceedings and more inclusiveness,³⁴ as the initial documents were drafted without the participation of civil society groups and representatives of the developing countries. They also referred to the negative influence of the negotiations' secrecy on the general public's perception of the drafted document.³⁵ Nevertheless, the call to open up the negotiations was ignored; instead the negotiating parties justified secrecy by the nature of the negotiated interests.³⁶ Still, secrecy of the negotiations was perceived negatively by the citizens' organisations that treated the lack of transparency as proof of the negotiators' bad intentions. Their concerns were shared by the European Parliament, who urged for transparency and called on the European Commission to "*immediately make all documents related to the ongoing international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) publicly available*" in its resolution of 10 March 2010.³⁷ The adamant position on the secrecy of the negotiations taken by the involved parties, which remained long unchanged notwithstanding the pressure of the various groups urging for transparency and inclusiveness, shaped a very negative image of the ACTA document still at the drafting level and that played an essential role further on in the protests against its ratification.

- 35 The atmosphere of opaqueness, conspiracy and hatching perceived by the general public as aimed against its interests is present not only in the negotiation process of international treaties, but also in the case of domestic agreements that point at enforcing copyright law.³⁸ Copyright holders explain the need for secrecy by the professional character of trade consultations, which should involve only the commercial players and exclude the general public. This approach originates in the period before the technological revolution, when indeed copyright law was the arcane arena of authors and only a handful of specialised lawyers. However, with the introduction of the Internet and digital technologies, the situation has drastically changed not only because of the shift in the consumers' attitudes. The new technologies have changed social reality by providing general public with so far unknown means of expression; hence what before amounted to regulations concerning only a small number of professionals now refers to everyday practices of the general public. Moreover, the unbalanced protection of copyright interests on such an unprecedented scale endangers some fundamental rights such as privacy and freedom of expression. Therefore what used to be a highly specialised domain of law, where only professionals could negotiate amongst each other, now needs the inclusion of the general public.
- 36 Nevertheless, the inclination to conceal originates also in the presumption that protection of copyright holders necessarily involves fight with the end-users. The copyright campaign is, in fact, called a *copyright war* - a war between the end-users on one side and the intermediaries in the market for the intellectual goods on the other. The secrecy of the negotiations is just one of the examples of belligerent strategies: you do not negotiate with the enemy. Another involves the application of criminal law and linguistic battles that shape the discourse of copyright law.
- 37 Excessive criminalisation of acts that go against the norm of protecting creative works, which shifts the burden within the branch of copyright law from the civil to the criminal regulation, is one more reason for the bad image of copyright law.³⁹ This belligerent strategy was first invented in the mid-90s of the last century in the U.S. with the expansion of the digital technologies that empowered consumers in an unprecedented way.⁴⁰ It was initially epitomised by the strengthening of criminal penalties for copyright infringement and was soon followed by the aggressive litigation campaigns aimed not only against the commercial entities but also against ordinary citizens. Finally, the last step added to the already destroyed image of copyright law was both the dangerously rising number of litigations against consumers, and the biased method of ascertaining the responsible person based mostly on IP addresses, leading to ridiculous outcomes of teenagers, or even the deceased, being sued.⁴¹ These litigations, in which individuals were obliged to pay unreasonably high damages to the copyright holders for illegal *file-sharing*, completely destroyed the already poor perception of copyright law for the general public.⁴²
- 38 Started in the U.S., the copyright war with the consumers has spread all over the world. The best instantiation of this strategy in Europe is the French *HADOPI* law,⁴³ which introduced a so-called *three strikes* policy that is aimed at encouraging compliance with copyright law in the digital environment, and which allows for internet access to be blocked for the holder of the IP address from which the copyright infringement has supposedly been committed. The British *Digital Economy Act* is just another instantiation of this process.
- 39 The American and French examples of regulations aimed at fighting copyright infringement in the digital environment through criminal proceedings against the end-users show that this strategy is very harmful in terms of image, as consumers have started to perceive copyright law mostly as an unpredictable weapon pointed against them, and so their respect towards this branch of law has greatly diminished.
- 40 The tendency to aim criminal sanctions against the private persons who infringe copyright through private use, and not in commercial dealings, has also marked an important shift within the copyright regime as these means had so far been reserved for the unfair competitor, who copied and distributed copyrighted material for profit without the proper authorisation. The same shift can also be observed in the linguistic plane as copyright holders, mostly intermediaries, have come to describe copyright infringements committed by the end-users as *piracy* - a notion that was again so far reserved for the commercial entities.⁴⁴ These two tendencies have also really harmed the popular image of copyright law because they have blurred the borders between the infringing acts of consumers and the *real piracy*, i.e. large-scale copying and sale to the public by for-profit actors.⁴⁵ This confusion of the terms and actions leads to the trivialisation of *piracy* in the perception of the general public as it sees no difference between arresting teenagers, deceased, the innocent or just those who commit a copyright infringement in non-for-profit dealings, and the criminal proceedings against the entities that base their commercial activity on the non-authorized mass reproduction and distribution of the copyrighted material. In such a situation myths of the martyrs sacrificing themselves for the supposed sake of freedom of knowledge, culture and the Internet, are easily created and lead to an increasing decline in respect for copyright norms. Moreover the application of the belligerent strategies that have been used thus far by the copyright holders to stop the acts of unfair competitors profiting from the unauthorised distribution of copyrighted materials

seem to be completely inadequate with regards to the end-users, as they, contrary to the competitors, are actually the target group of the creative and content industries, and their cooperation is essential for the provision of profit to the copyright holders. The *copyright wars*, instead of convincing consumers to respect copyright law and contribute financially for the access to intellectual and artistic goods, only encouraged consumers to apply various strategies to oppose the current regime, which will be described in detail in the next section.

- 41 Further cause for the negative image of the copyright law is the further prolongation of the terms of copyright protection that, for an average individual, seem nearly eternal. This adds up to another problem concerning the terms of protection – they seem arbitrary due to the fact that the optimal duration of copyright protection has never been assigned and proven scientifically.
 - 42 The above described multiple factors result in the very negative image of the current copyright regime that is shared by the growing number of end-users as the role of the copyright regulations in the information society have become an important topic in the public debate around the globe. This negative image, added to the new expectations of the end-users that arose with the technological revolution, led to the discrepancy between the legal regulations and the social norms⁴⁶ held by the public with regards to access to knowledge and culture. This discrepancy subsequently resulted in additional costs of compliance with the law. The following section will be devoted to the description of the various reactions of the end-users faced with the tension between *what they perceive as fair* in terms of copyright protection and *what the law allows for*, which led to the situation where obeying the law became onerous.
- #### 4. The response of the environment – end-users' reaction to the discrepancy of social and legal norms
- 43 Current legal scholarship abounds with works developing various options available to regulators, ignoring, however, the reaction of the regulated to the given laws.⁴⁷ Copyright law is no different, if not a perfect example of such an approach, which stems from the positivist thinking of law as a separate entity, independent from other social processes. Nonetheless, this paper, as already mentioned, is based on the assumption that an in-depth analysis of the current crisis of copyright law requires the reaction of the regulated to be included in the research model.
 - 44 There are various types of the regulated groups and even though they might be regulated by the same piece of legislation stemming from the same regulator, the law will still concern them in different ways. Needless to say, in the case of copyright law, the same regulation has various effects on copyright holders and the end-users. Therefore, their attitude towards law differs and so does their reaction towards respective pieces of legislation. The model therefore has to take into consideration the various interest groups among the regulated.
 - 45 Hence, this section will analyse what the impact of copyright law is on both interest groups, and it will show what strategies are available to them when dissatisfied with the regulation. The model considers both the copyright holders and the end-users. However, given that the main topic of this analysis is the current trouble with compliance in the domain of copyright law, more focus will be put on the reaction of the end-users to the expansion of the copyright regime. The chapter is based on the assumption that the bad image of copyright law and the conflict between the legal regulations and the norms held by the general public with regards to the distribution of, and access to, the copyrighted goods, has led to additional costs of compliance with the copyright law and will analyse various strategies that end-users apply to try to lower those costs, showing also how they differ from the strategies available to the copyright holders⁴⁸.
 - 46 The theoretical introduction will be followed by practical examples, showing how the interaction between the regulator, the law and the regulated shapes the current situation in the field of copyright law in the digital era.
 - 47 There are two main bodies of scholarship that describe the options available for the regulated when faced with burdensome law.⁴⁹ The compliance literature suggests that groups try to *avoid* laws that they find too costly to comply with, while the political choice literature on the other hand suggests that groups in such situations tend to *change* the law. Both bodies of scholarship analyse various cases in which law may become burdensome. In this model, the conflict of social norms held by the end-users with the legal norms will be treated as the main reason for the high costs of compliance. Subsequently, the concept of *political salience* will be introduced as another dimension influencing the dynamics between the *strategies of avoidance* and *change*.
 - a. The Model of Compliance and the Strategy of Avoidance
 - 48 In its simplified version, the model of compliance might be presented as a statement according to

which, “Laws are followed when the expected costs of legal punishment exceed the expected benefits of the banned behaviour.”⁵⁰ There are, however, two sets of external factors that contribute essentially to the compliance of law: 1) social norms and 2) investment in mechanisms that allow avoidance of sanctions.⁵¹ These two sets of factors that influence compliance with the law are interdependent and as such should be taken into consideration simultaneously. Hence the conflict of social norms with legal regulations may lead to initial disinclination to comply,⁵² which is further developed if mechanisms to avoid sanctions are available. In other words if social norms are not in line with the legal regulations, groups may seek to avoid complying with the law while at the same time trying to avoid sanctions. The reverse situation is also plausible when the availability of mechanisms allowing for the avoidance of sanctions, i.e. lack of effective enforcement of law, leads to changes in social norms and as a result lowers the level of compliance. In the critical situation of a very serious clash between the social and legal norms, the regulated shun compliance and stop avoiding sanctions; quite to the opposite, they want to be punished to prove the injustice of law. This is how civil disobedience or revolutionary movements are born.

49 According to the compliance literature, mechanisms allowing for the avoidance of problematic legal regulations may take two forms: *evasion*, understood as an investment in trying to decrease the odds of being punished for violating a law⁵³ or *avoidance*, which can be defined as efforts to exploit the differences between the law’s goals and its self-defined limits.⁵⁴ End-users’ strategies of file-sharing, leading to the avoidance of copyright regulations in fact take both forms: the former being best exemplified by the application of various types of software enabling anonymity in the networks, and the latter instantiated by the sharing platforms that create an illusion that the *file-sharers* are indeed close friends, which would allow them to rely on private copying exception.

50 Both types of *avoidance strategies* involve individual action, where no cooperation between the subjects of the law dissatisfied with its functioning is required. Thus the *avoidance strategy* is perfectly suited for unorganised large groups of end-users. This is not the case when it comes to the *strategy of change*, as the following section should suggest.

b. The Model of Political Choice and the Strategy of Change

51 The literature on political choice has distinguished between two major types of strategies that change the law that the regulated find burdensome: *litigation* and *lobbying*. The former strategy is probably more

effective in the common-law systems, where the law is modified on the basis of the cases decided by judges, and it is best exemplified by strategic litigations. Both instantiations of the *strategy of change*, however, differ from the *avoidance strategy* in that they require a collective action on the part of the dissatisfied regulated groups in order to be effective in modifying the legal regulations. Therefore small, well-organised interest groups are much more effective in changing the law than large, unorganised groups. Hence when the benefits of law are concentrated and its costs are diffuse, a small well-focused interest group will usually succeed in obtaining passage of a law, even if it does not benefit society as a whole.⁵⁵

52 In compliance with these theoretical assumptions is the case of copyright law where the *strategy of change* had so far been reserved to the right holders, represented mainly by the intermediaries in the market for knowledge and artistic goods or collecting societies. The general public, as a large unorganised group, rather had to resort to the above described *strategies of avoidance*, for the *strategy of change* was too burdensome because it involved collective action problems, which were difficult to overcome by large or loose groups. Therefore, the sheer nature of the *strategy of change* renders it much more easily available for the well-organised interest groups than for the general public, which resorts to the *avoidance strategies* (See the table below).

Strategies of avoidance vs Strategies of change

STRATEGIES OF AVOIDANCE	STRATEGIES OF CHANGE
No collective action needed	High cost of collective action
Perfectly suited for large, unorganised groups	Suited for small, well-organised interest groups
Used so far by the end-users unsatisfied with copyright law	Reserved so far for the copyright holders

53 The following section will introduce another dimension to the model in which the mutual interactions between the regulator, the regulated and the law are analysed – the importance of *political salience* of the regulated domain. It will show that *political salience* is yet another factor that advantages the well-organised interest groups in influencing law over the general public.

c. Political Salience and its influence on the Strategies of Change

54 The political scientists use a concept of *political salience*, understood as the importance of a political issue to an average voter relative to other issues.⁵⁶ Issues of *high political salience* are the issues that are important for the general public, topics on which the

public discussions focus and which serve as the basis for formulating electoral programmes. Nevertheless, many issues in capitalist democracies are not subject to a general vote⁵⁷ either because the nature of those issues is too complicated for the general public to formulate opinions on, or because the *median voter* perceives them as irrelevant.⁵⁸ Issues of *high political salience* win elections; those of *low political salience* have no significant influence in the political race between the parties. Issues of *low political salience* are absent in the mainstream media; hence, they create no incentives for politicians to gain expertise in them. Nonetheless, even though the *issues of low political salience* do not formulate a part of the public political discussions, they might be of crucial importance for some organised interest groups. The lack of public interest, and consequently, the lack of media coverage and in-depth knowledge of the issue among the politicians, “create an ideal political terrain for interest groups with a concentrated interest in the outcome of the political process.”⁵⁹ These groups do not need to resort to the elections as the method of realising their interests. In most cases, they apply *quiet politics*⁶⁰ in which they use soft methods of convincing politicians into protecting their interests during the meetings and negotiations that remain invisible to the general public. Consequently, as a result of negligence, decision-makers often lack competence in challenging the expertise of the interest groups and do not possess counterbalancing arguments that could have been developed by the general public, and hence remain prone to the persuasion of strong business powers.⁶¹

- 55 The situation changes however, once the general public starts paying attention to a particular issue, turning it from a matter of *low political salience* into a one of *high political salience*. The interest of the general public is interdependent on the mass media coverage and both of these factors increase the interest of the decision-makers in the issue. Thus if the voters care about an issue, the politicians will start paying attention, trying to win the public support. However, for the public opinion to be strong enough to counterbalance the power of concentrated interest groups, the voters need to retain their interest in the issue. *Temporary political salience* will not suffice to incentivize journalists and politicians to develop an expertise in the issue, especially when the issue is complicated.⁶²
- 56 Therefore, as it may be inferred from the above argumentation, the *low political salience* of a particular issue becomes equivalent to the nature and impact of the *strategy of change*, giving the advantage to the well-organised interest groups over the general public. The history of the development of copyright law proves once again the general theories developed by the political scientists. Hence, not only does it confirm the relevance of the *strategy of avoidance* vs. *strategy of change* dynamics, but also

the importance of the *political salience* dimension in favouring copyright holders against the end-users.⁶³

d. Power shift?

- 57 According to the above presented argumentation, the *low salience* of copyright law, which until recently has been absent in the public discourse, constituting instead a domain reserved for the right holders and specialised lawyers, as well as the difficulty with applying the *strategy of change* by dissatisfied with the law end-users gave the general public no significant influence on the regulation in the domain of access to knowledge and culture.
- 58 Nevertheless, the digital revolution situation has changed the scene drastically. Firstly, the fact that today, anyone can be subject to copyright regulations, either as a creator or as an end-user getting access to or distributing the works of others, turns the copyright regulations into an issue of *high political salience*.
- 59 Secondly, thanks to Internet communication, especially social networking and online petition services, the difficulties associated with supplying public good in the form of a modification of the existing law are surmountable, and thus the strategy of change becomes available to the general public. As is very well exemplified by the phenomenon of the Pirate Parties and the influence of the recent anti-ACTA protests in Europe, the digital revolution has facilitated the birth of a new lobbying power in the copyright regulation domain – the power of the end-users.
- 60 The *political salience* of an issue differs between societies and might be conditioned by specific historical experience. Hence *political salience* of copyright law differs between the countries and recent events prove that it is in fact much higher in Poland⁶⁴ than in the Western states, which is what motivates Poles more than Western societies to resort to the *strategies of change* of an onerous law, which could help in attaining a compromise between the conflicting interests in the digital environment.

5. The anti-ACTA movement as a strategy of change of the onerous law

- 61 As the above described analysis suggests, the Polish anti-ACTA movement and its influence on the governmental strategy on the scope of copyright law in the digital environment could be explained by the application of the model based on the concepts of *strategy of change* of the onerous law and *political salience* of the copyright law.

- 62 Interestingly enough the Polish government understood the *high political salience* of the ACTA conflict and reacted to the social dissent by applying a well-proven method used in Poland in the transition period: the round table negotiation.
- 63 The Polish case may set a positive example for other European States challenged by the rapidly changing needs of the digital environment. Nevertheless, the power of social norms will only be able to change the law if the general public does not lose its interest in the case, especially since the new strategy of the government concerning intellectual property law does not legally bind its successors. Therefore, *temporary political salience* will not be enough, and will once again only lead dissatisfied end-users to avoid burdensome regulation and consequently, to develop profound disrespect for copyright law.

B. Conclusion: The anti-ACTA movement as a lesson of participatory democracy. On the importance of procedural justice.

- 64 As the above provided analysis proves, the crucial reason for disregard towards regulations of copyright law and resistance towards the current international intellectual property regime lies in the negative image of the copyright law and its influence on social norms. Both the personal statements of the anti-ACTA movement participants in Poland quoted at the beginning of this paper and the further analysis of causes for the negative image of copyright law worldwide indicate that elements of the *material* and *procedural* nature are equally important to the public in the process of perception and evaluation of the given branch of law.
- 65 This observation is in line with findings of the research in the scope of social sciences, which proves that individuals value *procedural justice* as much as *material justice*, and that in some cases adequate application of rules of *procedural justice* may improve perceptions of *material* law.
- 66 *Material justice* is here understood as being represented by two types of justice: *distributive justice*, which means “*fairness in the distribution of rights or resources*” and *restorative justice*, which refers to “*fairness in the punishment of wrongs.*” *Procedural justice* on the other hand refers to the “*idea of fairness in the processes that resolves disputes and allocates resources.*” The concept of *procedural justice* includes “*neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens’ rights.*”⁶⁵ Essential is also a concept of *inclusiveness*, which allows all parties to the dispute to participate in the decision-making process.
- 67 The concept of different types of justice is not a new one; nevertheless, assurance of the proper realisation of the rules of procedural justice is still problematic in many democracies, which theoretically should be based on the idea of the rule of law. Copyright law is the best example of this problem.
- 68 It is worth emphasising that the decision of the Polish government to launch negotiations on the round table open to all parties interested in the problems of copyright law in the digital era; the rules of transparency that governed the consultations; as well as the outcomes of the negotiations are all manifestations of the proper application of rules of *procedural justice*. Given the fact that material norms of copyright law are not that easily changed because many provisions stem from international regulations, legislators should concentrate at least on implementing the rules of *procedural justice*, which might considerably improve the image of copyright law and as a result lead to an increase in respect towards its rules. The safeguards of *procedural justice* should become a priority in copyright policies, especially since social scientists prove that an individual’s identification with decisions increases when he or she is involved in the process assuring procedural justice. “*Where people feel that they have control over decisions they believe that the procedure is fair; where they feel they lack control they believe it is unfair.*”⁶⁶ Moreover “*depending on the procedural justice processes of the group, the social identity of the members will be influenced accordingly and different values will be emphasised. The more a member agrees with the type of procedural justice employed, the more they will identify with their group. This increased identification results in the internalisation of the group’s values and attitudes for the group member. This creates a circular relationship as the group’s procedural justice processes will affect group members’ levels of identification and, as a consequence, this level and type of identification will affect their own values of what is fair and unfair.*”⁶⁷ The influence of *procedural justice* on identification with norms regulated by law should be perceived as the more important given the current conflict of legal regulations with social norms, which leads to the situation in which the general public usually treats copyright law as *unfair*.
- 69 It is worth reminding that the slippery slope on which the positive (or neutral) image of copyright law was gradually sliding down was first introduced in the U.S. already in the “*first decade of the twentieth century, when Congress faced the problem of updating and revising a law that was perceived as too arcane and complex for legislators to understand without expert assistance. To solve that problem, members of Congress prodded the Librarian of Congress to set up a series of meetings with representatives of industries with an interest in copyright*”⁶⁸. Since then, legislative processes in many countries have involved the excessive influence of the representatives of the

right holders with the exclusion of the end-users. Recent social and technological changes prove, however, that the time is ripe for changes that would introduce *procedural justice* with regards to the access to legislative processes, before any material changes improving the situation of the end-users might be introduced.

70 Representatives of WIPO have in the recent past repeatedly stated that the multi-stakeholder environment is “*the best and most appropriate when it comes to the debate on copyright in the digital age, (and that) WIPO is preparing for such multi-stakeholder discussions.*”⁶⁹

71 The European Commissioner responsible for the Digital Agenda in Europe also promoted the method of round table negotiations on many occasions. Neelie Kroes, who claimed that open public dialogue is the only way to achieve a long-standing compromise between the conflicting interests of various stakeholders in the digital environment, said this would assure compliance with copyright law. A similar approach has also been taken by Michel Barnier, the Commissioner responsible for Internal Market and Services. So far, however, most of the decisions in the European Union in the scope of copyright law have been taken in accordance with the logic of *quiet politics*, where low salience of the issue and the difficulty in changing the law by the unorganised general public, favours lobbying of the small but strong interest groups.

72 In these circumstances, the new *post-ACTA* approach of the Polish government towards copyright policy might set a positive example in the international arena, showing how procedures of the *round table* applied in the transition period, enhanced by the new communication technologies, might be useful in building participatory democracy and solving contemporary problems that are common for all of the European states.

* The paper was presented at the “1st International Research Forum on Law and ICT/IP” on 7th / 8th of November 2012 at Georg-August-Universität in Göttingen, Germany. The Colloquium is an annual event and provides the opportunity for young researchers to present the results of their scientific work and obtain valuable feedback from senior academics and practitioners in the field of ICT and IP Law.

I would like to express my gratitude to Prof. Giovanni Sartor, supervisor of my doctoral thesis “Copyright in decline? Systems theory, autopoiesis of law and the crisis of copyright law in digital era”, as well as to Dr. Julia Hörnle, who not only gave me a very detailed feedback that allowed me to improve my work, but also inspired and encouraged me for further research.

1 Hereinafter referred to as the ACTA treaty, ACTA agreement, controversial treaty or the Treaty.

2 The proceedings of all the consultations are available online (in Polish) at: <http://warsztaty.mac.gov.pl/> [Accessed on 31.01.2013].

3 Just before the anti-ACTA movement was born in Poland, the Polish government had been faced with smaller demonstrations concerning GMOs and reform of the national health system, in which the ruling coalition did not involve wide social consultations, trying instead to ignore the public discontent and carry on its own projects at all costs. The government was repeatedly criticised by the media and representatives of the civil society for not paying due attention to the public opinion and attempting to rule with an iron fist. At the beginning of the anti-ACTA protests, when the government had not yet managed to assess adequately the scale of discontent, it tried to apply its old methods by ignoring the protesters and ridiculing the whole movement. It was only in the later stage, when faced with the massiveness, long duration and wide territorial scope of protests, the government decided to change its strategy and initiate a serious dialogue with the protesters. See: Żakowski, J., “Porozmawiajcie z nami,” *Gazeta Wyborcza*, 30.01.2012.

4 One of the first steps taken by the Polish government with this new *post-ACTA* approach, not directly connected with the copyright issues, was the decision not to sign the International Telecommunications Regulations in Dubai in December 2012 without first engaging in profound social consultations. Notwithstanding the initial consultations before the World Conference on International Telecommunications, the Ministry for Administration and Digitization decided to open a wide public debate on the ITRs that would be accessible online, giving every interested individual an opportunity to comment on or criticise the Regulations and to show one’s opinion on the potential accession of Poland. See: <http://mac.gov.pl/wiadomosci/rozpoczynamy-konsultacje-miedzynarodowych-regulacji-telekomunikacyjnych-itw-wersji-przyjetej-w-dubaju-ale-nie-przez-polske/> [Accessed on 31.01.2013].

5 The protests that started in Poland in January spread to many European countries in February. On the 4th of February 2012, hackers who identified themselves as belonging to Anonymous and CyberForce groups blocked the websites of the Swedish government on the same day the protests began in the streets of Sweden. See: PAP (Polish Press Agency), “Anonymous przeciwko ACTA w Szwecji.” *Rzeczpospolita*, 04.02.2012. On the 11th of February 2012, a pan-European protest inspired by the Polish demonstrators took place in many European cities including Munich, Salzburg, Vienna, Graz, Praha, Tallin, Vilnius, Riga, Sofia, Budapest, Paris and Bucharest. See: PAP (Polish Press Agency), “Przeciw ACTA. Dzień demonstracji w Europie.” *Gazeta Wyborcza*, 11.02.2012.

6 The European Commission confirmed on 20 December 2012 that it was withdrawing ACTA referral to the Court of Justice of the European Union, which confirms the rejection of the Treaty by the European Union at this point.

7 Gryniewicz, T. “ACTA podpisana, temperatura nie opada.” *Gazeta Wyborcza*, 26.01.2012; PAP (Polish Press Agency), “ACTA. Demonstracje w kraju.” *Gazeta Wyborcza*, 11.02.2012.

8 Ibidem.

9 The phenomenon of the anti-ACTA movement in Poland is being analysed by many research groups; however it seems that the most extensive and coherent research has been conducted by Zespół Analiz Ruchów Społecznych (Team for the Analysis of Social Movements) see: <http://zars.home.pl/autoinstalator/wordpress/zars/>. The results of their sociological intervention and quantitative research, as those of the other research groups, has not been published so far. Therefore the description of the anti-ACTA movement in Poland presented in this contribution is based solely on the analysis of the discourse shaped by the representatives of various interest groups present in the media. Publication

- of the results of the qualitative interviews and quantitative research may consequently enrich my reasoning in the future.
- 10 See, e.g.: Danielewski, M., "Acta jak wystrzał z >>Aurory<<," *Gazeta Wyborcza*, 26.01.2012.
 - 11 See: ante, footnote number 9.
 - 12 This categorization of the reasons for objecting the ACTA treaty into *material* and *procedural* intentionally plays with the conception of *procedural* vs. *material* justice that will be applied in the paper later.
 - 13 Article 9 of ACTA reads as follows: "In determining the amount of damages for infringement of intellectual property rights, a Party's judicial authorities shall have the authority to consider, inter alia, any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price" [emphasis added]. Polish copyright law regulates question of damages in case of copyright infringement in Article 79. 1 b) of the Polish Copyright Act, which refers to the doubling of damages, and in cases when the infringer is culpable – triple the amount of the royalties that the end-user would have had to pay to get legal access to copyrighted work.
 - 14 Judgement of 16.09.2011 in the case *Sony BMG Music Entertainment* against Joel Tenenbaum, in which the court obliged a minor to pay damages in the amount of \$675,000 for the infringement of copyright through illegal *file-sharing*, is a good example of the threats to which protesters were referring. See: Judgement of 16.09.2011 *Sony BMG Music Entertainment vs. Joel Tenenbaum*, United States Court of Appeals for the First Circuit, Nos. 10-1883-10-1947, 10-2052. Available at: <http://www.ca1.uscourts.gov/pdf/opinions/10-1883P-01A.pdf>.
 - 15 See: Wiewiórkowski, W. *Opinion of the General Inspector for the Protection of Personal Data of 23 January 2013*; Lipowicz, I., *Opinion of the Ombudsman of 25 January 2013*.
 - 16 The Ombudsman also quoted the Constitutional Tribunal which stated that:

"[T]he principle of citizens' trust in the state and its laws is based on the legal certainty (...) which ensures legal safety to each individual. This enables each individual to decide on their behaviour based on the full knowledge of the premises of the state authorities and the legal implications of what her actions may entail. Every individual should be able to determine the consequences of specific behaviours and events on the basis of the law currently in force as well as to expect that the law will not be changed arbitrarily. Legal safety of each individual, therefore, allows for predictability on the part of the state authorities (...)"

The Ombudsman stated that the government did not apply the principle of legal certainty during the negotiation and ratification of ACTA, and thus acted against the constitutional rule of law.

See: Lipowicz, I., *Ibidem*, p. 2; Article 2 of the Constitution of the Republic of Poland reads as follows: *The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*.
 - 17 See e.g.: Interview with Prof. Jan Bleszyński in: Wielowieyska, D. "Prawo autorskie znacznie surowsze niż ACTA," *Gazeta Wyborcza*, 27.01.2012.
 - 18 This argument was also raised by the Ombudsman, See: Lipowicz, I., *Ibidem*, p. 3; see also: Interview with Katarzyna Szymielewicz, President of Panoptykon, important Polish NGO engaged in the protection of fundamental rights in the information society, leading institutional actor in the anti-ACTA protests in Poland in: Płociński, M., "ACTA czyli z armaty do komara" *Rzeczpospolita*, 20.01.2012. For more information on the Panoptykon organisation (also in English) see: <http://www.panoptykon.org/node/112>.
 - 19 I develop this argument further in my PhD thesis *Copyright in decline? Systems theory, autopoiesis of law and the crisis of copyright law in digital era*, which I am currently finalising under the supervision of Prof. Giovanni Sartor at the Department of Law of the European University Institute in Florence. Part of the analysis present in my PhD thesis is strongly inspired by the Evolutionary Institutional Theory, which holds that contrary to the omnipresent trend of globalising legal regulations, social norms that guide human behaviour with regards to law develop gradually in response to local social, economic, and historical conditions. As a result, I argue that the peculiar historical conditioning of Polish society, from the partition of the country in the 18th century to the experience of communist regime in the 20th century, characterised by a strong censorship regime impeding the access to knowledge and culture and normal circulation of various intellectual creations, favoured development of social norms approving of informal and illegal circulation of copyrighted works long before the digital revolution. For the more detailed historical analysis see also: Gracz, K., "Bridging the gaps between the social and legal norms concerning protection of intellectual and artistic creations: on the crisis of copyright law in the digital era." *The Journal of World Intellectual Property*, Blackwell Publishing Ltd, (forthcoming 2013). Draft available at: <http://www.atrip.org/Essays> [Accessed on 31.01.2013].
 - 20 Gendreau, Y., 'The Image of Copyright,' *E.I.P.R.*, 2006, 28 (4), 209–212, p. 209.
 - 21 The increasing popularity of social media partially stems from the fact that they are based on the concept of posting and re-posting copyrightable works of various genres: music, photographs, articles.
 - 22 Gendreau, Y., *op. cit.* p. 210.
 - 23 Requirement for anti-circumvention laws was globalised in 1996 with the creation of the WIPO Copyright Treaty.
 - 24 At least in countries with continental law that introduce *private personal use* clause. The British copyright system, for instance, does not introduce the institution of the *private copy* so the expectations of the British end-users might considerably differ from their counterparts in continental Europe. On the other hand, however, the *Hargreaves Report* recommended the introduction of a private copying exception for the Internet, partly because of social norms demanding it. The report is available at: www.ipo.gov.uk/ipreview-finalreport.pdf.
 - 25 Gendreau, Y., *op. cit.* p. 210.
 - 26 Durkheim, E. "Socjologia i jej dziedzina badań," tłum. Szacki J., Trybusiewicz J., in: *Filozofia i socjologia XX wieku*, part 1, Warszawa 1965, p. 118.
 - 27 *Ibidem*.
 - 28 See: Szacki, J., *Socjologia rozumiejąca Maxa Webera* in: Szacki, J., *Historia myśli socjologicznej*. Wydanie nowe, Wydawnictwo Naukowe PWN, Warszawa 2003, pp. 458-495.
 - 29 Whether the normative reality might be treated as objective is also doubtful as it emerges in the process of constant interpretation and as such should also be treated as an inter-subjective social fact, which seems obvious for sociologists but not always for lawyers.
 - 30 See: Ginsburg, J.C. "How Copyright Got a Bad Name for Itself" *26 Colum. J.L. & Arts 61 (Fall 2002)*, pp.61-62.
 - 31 Gendreau, Y., *op. cit.* p. 210.
 - 32 E.g. One of the major accusations raised by the opponents of the ACTA was the fact that the treaty was instantiating a vision of copyright law developed by the U.S. that would be imposed on other signatories. Similar arguments had been earlier raised with regards to the ratification of the TRIPS.
 - 33 See e.g.: Halliday, J. *Richard O'Dwyer: leaked memo exposes lobbying by Hollywood studios*, *The Guardian*, 08.08.2012,

- available at: <http://www.guardian.co.uk/technology/2012/aug/08/richard-odwyer-leaked-memo-hollywood-lobbying> [Accessed on 31.01.2013]. *Pirate Bay Founder Arrest Followed by & 59m Swedish Aid Package for Cambodia* at: <http://torrentfreak.com/pirate-bay-founder-arrest-followed-by-59m-swedish-aid-package-for-cambodia-120905/> [Accessed on 31.01.2013].
- 34 In the open letter signed by numerous citizens groups and consumers associations such as Consumers Union, Electronic Frontier Foundation, Essential Action, IP Justice, Knowledge Ecology International, Public Knowledge, Global Trade Watch, U.S. Public Interest Research Group, IP Left (Korea), Australian Digital Alliance, The Canadian Library Association, Consumers Union of Japan, National Consumer Council (UK) and Doctors without Borders' Campaign for Essential Medicines, the representatives of the advocacy groups wrote: "We are writing to urge the negotiators of the Anti-Counterfeiting Trade Agreement (ACTA) to immediately publish the draft text of the agreement, as well as pre-draft discussion papers (especially for portions for which no draft text yet exists), before continuing further discussions over the treaty. We ask also that you publish the agenda for negotiating sessions and treaty-related meetings in advance of such meetings, and publish a list of participants in the negotiations." See at: http://www.wired.com/images_blogs/threatlevel/files/actaletter.pdf. [Accessed on 31.01.2013].
- 35 "The lack of transparency in negotiations of an agreement that will affect the fundamental rights of citizens of the world is fundamentally undemocratic. It is made worse by the public perception that lobbyists from the music, film, software, video games, luxury goods and pharmaceutical industries have had ready access to the ACTA text and pre-text discussion documents through long-standing communication channels." Ibidem.
- 36 A good example of such an explanation is the position of the European Commission issued in November 2008 in which it stated as follows: "It is alleged that the negotiations are undertaken under a veil of secrecy. This is not correct. For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion." See: European Commission, "Fact Sheet: Anti-Counterfeiting Trade Agreement" 23 October 2007 (Updated November 2008) available at: trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf. [Accessed on 31.01.2013].
- 37 European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0058&language=EN&ring=P7-RC-2010-0154> [Accessed on 31.01.2013].
- 38 Such agreements are often made between the ISPs and the representatives of copyright holders or the collecting societies. They are usually negotiated in secret, and information about them most often leaks to the public through unofficial sources, causing discontent or even indignation on the part of the general public. A good example of such an agreement is the Polish draft agreement, "On cooperation and mutual assistance in the protection of intellectual property rights in the digital environment," negotiated between the representatives of collecting societies and ISPs under the auspices of the Polish Ministry of Culture, which was finally blocked by the NGOs claiming it would endanger the fundamental right to privacy.
- 39 See: Lessig, L. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, Penguin Press, New York, 2008.
- 40 See: Lehman, B. *Intellectual Property and the national Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, Darby: Diane Publishing, 1995 quoted after: Lawrence Lessig, *Remix*, op. cit. p.39.
- 41 See: Mook, N. "RIAA Sues 261, Including 12-Year-Old Girl," *BetaNews*, 09.09.2003, available at: <http://betanews.com/2003/09/09/riaa-sues-261-including-12-year-old-girl/> [Accessed on 31.01.2013]; Mook, N. "RIAA Sues Deceased Grandmother," *BetaNews*, 04.02.2005, available at: <http://betanews.com/2005/02/04/riaa-sues-deceased-grandmother/> [Accessed on 31.01.2013].
- 42 See especially: Judgement of 16.09.2011 *Sony BMG Music Entertainment vs. Joel Tenenbaum*, United States Court of Appeals for the First Circuit, Nos. 10-1883-10-1947, 10-2052, already quoted before, in which the court obliged a minor to pay damages in amount of \$ 675,000 for the infringement of copyright through the act of illegal *file-sharing*, available at: <http://www.ca1.uscourts.gov/pdf.opinions/10-1883P-01A.pdf> [Accessed on 31.01.2013].
- 43 The official name of the so-called "HADOPI Law " in French is «Loi n° 2009-669 du 12 juin 2009, Projet de loi favorisant la diffusion et la protection de la création sur Internet.» See, e.g.: Johns, A., *Piracy: The Intellectual Property Wars from Gutenberg to Gates*. Reprint, University of Chicago Press, Chicago, 2011.
- 44 See, e.g.: Ibidem.
- 45 Ginsburg, J.C., op.cit., p.5.
- 46 Social norms are here interpreted as normative statements that identify social expectations arising in the course of repeated interactions. They are enforced either through the application of internal sanctions of the *ego*, which emerge as a result of the internalisation of the norms and/or through the application of external, informal (i.e. non-legal) social sanctions. Social norms might, but do not necessarily have to, coincide with legal norms. Even if they do coincide, they belong to diverse normative systems. For a general review of sociological theories dealing with the concept of 'social norms,' see: e.g., Horne Christine 'Sociological Perspectives on the Emergence of Social Norms,' in Hechter Michael and Opp Karl-Dieter, *Social Norms*, (Russell Sage Foundation, 2005), pp. 3-34; See also: Durkheim, E. (1915) *The Elementary Forms Of The Religious Life*. Free Press, New York; Durkheim, E. (1951) *Suicide*. Free Press, New York; Durkheim, E. ([1903] 1953) 'The Determination of Moral Facts,' in Durkheim, E., *Sociology and Philosophy*. Cohen and West, ([1903] 1953), London, pp. 36- 43. For an analysis of the mutual influence between social and legal norms, see: e.g., Bicchieri Ch., Jeffrey R. and Skyrms B., (eds) (1997) *The Dynamics Of Norms*. Cambridge University Press, New York.
- 47 Wu, T. (2003) 'When Code is not Law,' *Virginia Law Review*, Vol.89, p. 111.
- 48 I applied this reasoning also in my other analyses, esp.: Gracz, K., "Bridging the gaps between the social and legal norms concerning protection of intellectual and artistic creations: on the crisis of copyright law in the digital era." op.cit. and Gracz, K., "Opposing Expansion of Copyright Law. Social norms in quest against ACTA and Commodification of Knowledge and Culture Project" in: Dimou A., and Daale C., (eds.) *Expansion of Intellectual Property in Modern Europe*. Geisteswissenschaftliches Zentrum der Universität Leipzig, Leipzig 2013 (forthcoming).
- 49 This part of the analysis is strongly inspired by the article written by Prof. Tim Wu, *When Code is not Law*, Ibidem.
- 50 See, e.g.: Posner, R.A., *Economic Analysis of Law*. Aspen Law & Business, New York, 1998, p. 242, where the author states: "The model can be very simple: A person commits a crime because the expected benefits of the crime to him exceed the expected costs."
- 51 Professor Wu in his article, *When Code is not Law*, suggests that the influence of social norms on compliance has already been a topic of profound research, whereas the mechanisms of avoidance have been so far neglected. In his article he elaborates on the latter.
- 52 The most basic models of compliance acknowledge the power of social norms in encouraging compliance with law; however the reverse process of the discouraging effect in the situation of conflicts between law and legal norms should not be undervalued.

- 53 See: Tim Wu, *op. cit.* pp.112-116.
- 54 Ibidem.
- 55 Wilson, J.Q. *Political Organizations*, Basic Books, New York, 1973.
- 56 Kollman, K. *Outside Lobbying: Public Opinion and Interest Group Strategies*, Princeton University Press, Princeton (NJ), 1998, p. 9.
- 57 Culpepper, P.D., *Quiet Politics and Business Power. Corporate Control in Europe and Japan*, Cambridge University Press, New York 2011, p. 5.
- 58 Ibidem, pp. 4-5.
- 59 Ibidem, p. 5.
- 60 Ibidem, generally.
- 61 Ibidem, generally.
- 62 Ibidem, p.10.
- 63 Daly A. and Farrand B., *Scarlet v SABAM: Evidence of an Emerging Backlash Against Corporate Copyrights Lobbies in Europe?* (May 14, 2012), available at SSRN: <http://ssrn.com/abstract=2095295>, p. 9. [Accessed on 31.01.2013].
- 64 One of the plausible explanations of this fact, which I develop in my PhD project, stems from the historical analysis of the development of Polish social norms with regards to access to knowledge and culture, which proves that due to historical experience, Poles support open access to cultural and knowledge goods much more than Western-Europeans. For more details see also: Gracz, K., *Bridging the norms... op.cit.* Another reason might be the shape of the Polish Copyright Law currently in force, with its considerably liberal approach to permissible private use that undoubtedly shapes expectations of the general public as to the wide access to cultural goods within the scope of legal use, and as such may partially explain why the anti-ACTA movement started in Poland and why it was in this country that ratification of the Treaty triggered such a strong resistance. For the potency of copyright regulations is not limited to the direct normative plan and the bare legal operations but it “also stems from the power of legal rules to determine discourse, which in turn determines thought,” as it was aptly stated by Prof. Neil Natanel. See: Netanel, N. “Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation,” 24 *Rutgers L.J.* 347, 1993, p. 442.
- 65 Tyler, T.R. *Why People Obey the Law*. Yale University Press, New Haven and London, 1990, p. 7.
- 66 Tyler, T.R. *The psychology of Procedural Justice*, in: *Why People...* *op.cit.* pp. 115-125.
- 67 Ibidem. See also: http://en.wikipedia.org/wiki/Procedural_justice#The_participation_model [Accessed on 31.01.2013].
- 68 Netanel, N. “Why has Copyright Expanded. Analysis and Critique” in: *6 New Directions in Copyright Law*, MacMillan, F. (ed.), Edward Elgar, Cheltenham, UK; Northampton, MA, USA, 2008, p. 5.
- 69 E.g. Trevor Clarke, Assistant Director General for the Culture and Creative Industries Sector of WIPO, see: Ermert, M., “Multi-Stakeholder Discussions à la Internet Governance Forum For WIPO?” in: *Intellectual Property Watch*, 8.11.2012, available at: http://www.ip-watch.org/2012/11/08/multi-stakeholder-discussions-a-la-internet-governance-forum-for-wipo/?utm_source=daily&utm_medium=email&utm_campaign=alerts [Accessed on 31.01.2012].