

# **TPMs AND FLEXIBILITY (“THE ABILITY OF BENDING *WITHOUT BREAKING*”) – WHY SHOULD THE TPM PROVISIONS OF BILL C-32 PROTECT ACCESS CONTROLS AND PROHIBIT “PREPARATORY ACTS”**

## **Introduction**

Nowadays there is an overproduction of publications, studies, blog posts, social network comments and the like about copyright. Even if one wanted to read everything about what is going on in the various countries, it would be impossible due to the mere fact that a day only lasts 24 hours and that for health reasons it is necessary to sleep a couple of hours. The WIPO and EU copyright agenda alone keeps me quite busy now that my country will have the honor to take the role of EU presidency country.

Therefore, recently I have not followed the debate on the TPM provisions of Bill C-32 in Canada. It seems, however, that it does follow me.

Several Canadian colleagues of mine have drawn my attention to a new study<sup>1</sup> of my virtual namesake – Prof. Michael Geist – in which he still insists that the Canadian government is wrong when it interprets and intends to implement the TPM provisions of the two WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in main aspects in the same way as the main trade partners of the country have done. The immediate target of Prof. Geist’s study is my paper published on the IP Osgoode blog<sup>2</sup> on the interpretation of the TPM provisions of the WIPO Treaties. He suggests that my interpretation which supports the basic elements of the TPM provisions of Bill C-32 is badly founded and misleading at the best.

My analysis below – which unfortunately has to be as voluminous as his – proves that his contentions are not justified for the following reasons:

**(1) Prof. Geist does not pay sufficient attention to the key interpretation source of any treaty provisions; namely to their plain language (the ordinary meaning of their terms). As discussed below, it may be deduced from this key source of interpretation alone that**

**(i) the Internet Treaties’ TPM provisions cover all categories of TPMs and not only some of them; thus, they apply to both access-control and copy-control measures – contrary to M. Geist’s allegation that they do not apply for access-control measures;**

**(ii) no adequate protection may be provided for TPMs as prescribed in the Treaties without establishing a defense line already in the**

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<sup>1</sup> M. Geist “The Case for Flexibility in Implementing the WIPO Internet Treaties,” Chapter VIII, in M. Geist (ed.) *From ‘Radical Extremism’ to ‘Balanced Copyright:’ Canadian Copyright and the Digital Agenda* (Toronto; Irwin Law, 2010) (hereinafter: Prof.Geist’s chapter).

<sup>2</sup> See Mihály Ficsor: “Legends and reality about the 1996 WIPO Treaties in the light of certain comments on Bill C-32” (June 16, 2010), online; IP Osgoode <<http://www.iposgoode.ca/wp-content/uploads/2010/Ficsor-Legends-and-Reality-about-the-1996-WIPO-Treaties-C-32-and-TPMs.pdf>> (hereinafter: Ficsor on IP Osgoode).

stage of so-called “preparatory acts”<sup>3</sup> – contrary to M. Geist’s allegation according to which it is sufficient to simply prohibit the very acts of circumvention (in the stage of which alone there is no real hope anymore for such protection);

(iii) an adequate, rather than more than sufficient, level of protection requires appropriate norms to guarantee the applicability of exceptions to copyright justified by relevant public interests; this, however, requires cautious regulation duly balancing between the various interests and it cannot take the form of simply providing direct free access for any beneficiaries of any exceptions in any possible format by eliminating the applicability of any kind of TPM – contrary to Prof. Geist’s allegation according to which the purpose of the application and protection of TPMs, and through it, the adequate protection and normal exploitation of copyright, could be achieved also by allowing the circumvention of TPMs for anybody in order to directly enjoy any exception (for example, a “private copy” exception by each member of the huge Internet population, and in fact anybody who wants at all a copy) **or to get access to works otherwise** (for example, in order to receive freely any online communication of works citing the fact that such acts are not directly controlled by copyright).

(2) Prof. Geist insists on flexible interpretation and implementation of the TPM provisions, and alleges that those who do not agree with him – such as me – are the advocates of inflexible interpretation and implementation. The truth is that everybody – including myself, as I have clearly stated – is of the view that the TPM provisions offer flexibility. The difference between us is only that, while Prof. Geist – as he quite clearly states<sup>4</sup> – is in favor of an unlimited flexibility, myself and others are of the view that the requirement of adequate protection sets limits in this respect.

(3) The “preparatory work” (“negotiation history”) of the Treaties confirms the interpretation reached on the basis of the plain language of the TPM provisions in the sense indicated above. During the preparation of the Treaties, there were animated debates, in certain stages of which there were some delegations which had doubts about the need and justification of TPM provisions. However, contrary to Prof. Geist’s suggestion, it is irrelevant from the viewpoint of the

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<sup>3</sup> This expression means the manufacture and distribution of unauthorized circumvention devices and offering such services. It is used not only in legal literature, but also in official texts. For example, in the Explanatory Memorandum (doc. COM (97) 628 final) of the draft directive which was adopted later as the Information Society (Copyright) Directive (*Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*) and later also in other EC documents concerning the draft treaty.

<sup>4</sup> He opposes the view that the flexibility is supposed to be limited. See, his following statement: „For supported of the US approach, the anti-circumvention provisions in Bill C-32 merely reflect the treaty requirements **which, in their view, provide only limited flexibility** for implementation into domestic law.” (Emphasis added; Prof. Geist’s chapter, p. 207.)

interpretation of a unanimously adopted text requiring adequate protection of TPMs that previously there were some delegations which at that time were not yet ready to support such protection by the Treaties. More importantly, in the debates, again contrary to what Prof. Geist suggests, no delegation made any proposal or comment to the effect that access-control TPMs should be excluded from protection (the comments aimed at taking care of the applicability of certain exceptions, but it is a different thing than just allowing general and direct free access to digital contents by denying protection for the measures controlling regulated access that is also normal in the traditional analogue world). Furthermore, it also transpires from the preparatory documents and the reports that, where there were debates regarding “preparatory acts” (circumvention-defeating devices, etc.), those debates mainly – nearly exclusively – concerned the definition of devices to be prohibited and not the general scope of protection in the sense that it should also extend to the protection against certain “preparatory acts.” Thus, Prof. Geist’s allegation is unfounded regarding the general scope of the requirement of adequate protection; there was no understanding whatsoever according to which access-control TPMs would be excluded from the treaty obligations or that adequate protection was regarded possible without providing it already in the stage of “preparatory acts.”

- (4) The “subsequent practice” of countries party to the two Treaties implementing the TPM provisions indicates that Canada’s major trading partners have duly implemented the treaty obligations as outlined above (not limiting protection to copy-control TPMs, but equally applying it to access-control TPMs and also prohibiting relevant “preparatory acts”). Prof. Geist suggests the contrary. His examples covering certain developing and “transition” countries and countries which have not acceded yet to the Treaties, along with extremely few isolated other cases, are not suitable to justify his position.<sup>5</sup>
- (5) The consistently applied international provisions on the interpretation of treaties do not list views expressed in legal literature as relevant separate sources of interpretation. Nevertheless, all the *authoritative* sources of legal literature based on a truly thorough analysis do agree that the Treaties’ TPM provisions cover both access-control and copy-control TPMs and that in order to provide adequate protection it is necessary to prohibit “preparatory acts.” Prof. Geist tries to present some other literary views collected from all kinds of sources about which he believes that they may support his contentions. In connection with this, two comments are justified. First, not all of those literary sources are truly suitable to serve as “witnesses of prosecution” against Bill C-32, since they do not necessarily state what M. Geist would like to prove. Secondly, with minimum efforts,

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<sup>5</sup> It is on the basis of such allegations that Prof. Geist suggests that the „majority” of the 88 Contracting Parties have not implemented the Treaties in the US way. This is not true, as discussed below in detail.

**one can collect and present a number of scholarly views to support any kind of legal position – and also a number of scholarly views to support exactly the opposite position. Therefore, what may only be relevant at all is what follows from truly authoritative sources and – in close connection with this – what kinds of legal analyses and arguments the views expressed are based.**

### **Main issues of the debates on the TPM provisions of Bill C-32**

It seems that the vehemently debated issues in connection with the TPM provisions of Bill C-32 are the questions of (i) whether it is a treaty obligation to protect both access-control and copy-control TPMs; (ii) whether it is a treaty obligation to prohibit so-called “preparatory acts” (the manufacture and distribution of “protection-defeating devices,” etc.); and (iii) whether circumvention should only be prohibited when it is linked to infringement. Canada’s major trading partners have answered affirmatively the first two questions and negatively the third one. I submit, along with authoritative commentators, that – in view of the treaty provisions and their negotiation history – these are the correct answers. Prof. Geist’s views are just the contrary, and therefore he alleges that the TPM provisions of Bill C-32 are wrong.

A solution might be to go through these issues by dealing with Prof. Geist’s contentions. However, the structure of his paper is different, and in order to duly consider all his arguments, it seems better to proceed according to his structure (where it is possible at all) which follows this order: (i) plain language of the treaty provisions; (ii) negotiation history; (iii) implementation of the treaty provisions; and (iv) views expressed in legal literature. The phrase “where it is possible at all” refers to the fact that this structure is not rigidly applied in it. For example, there are frequent references in the study to views expressed in legal literature also in the first three parts. (This is quite understandable and also shows that it might have been better to deal with the given issues from the viewpoint of all possible interpretation tools, rather than what follows from the various interpretation sources separately for all the issues at the same time.)

### **The treaty provisions and the rules of interpretation of treaties**

The TPM provisions may be found in Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) which only differ regarding the subject matter of protection:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by [authors] [performers or producers of phonograms] in connection with the exercise of their rights under this [Treaty or the Berne Convention][Treaty] and that restrict acts, in respect of their [works][performances or phonograms], which are not authorized by the [authors] [performers or producers] concerned or permitted by law.

It is also worthwhile quoting, at the outset, the provisions of Article 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (provisions which are also applicable for the interpretation of the WIPO "Internet Treaties"):

#### Article 31

##### General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32

##### Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33 of the Vienna Convention deals with the interpretation issues emerging in case of differences between various language versions of a treaty. It seems that no significant differences exist between the various language versions of the above-quoted TPM provisions. At the same time, it appears to be worthwhile also quoting Articles 26 and 27 of the Vienna Convention since they further strengthen the basic rule of Article 31(1) which requires good faith interpretation. They underline that it is not allowable for a party to a treaty to simply note the failure to perform treaty provisions where one way of implementation has such a result but there is another way of implementation available on the basis of which it is possible to fulfill treaty obligations. In other words, it is not sufficient to apply certain measures and then sit idle simply observing that they happen to be unsuitable to fulfill the obligations under the treaty. There is a performance-based

obligation in the sense that, if there is any suitable measure to perform treaty provisions in good faith, it must be applied.

#### Article 26

##### *“Pacta sunt servanda”*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

#### Article 27

##### Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.<sup>6</sup>

Article 31(1) of the Vienna Convention contains the basic rule of interpretation. Depending on the concrete circumstances an appropriate interpretation may be reached on its basis alone without the need – or even the possibility – of applying other interpretation rules of the Convention.

In the case of the TPM provisions of the WIPO Internet Treaties, neither of the sources of interpretation mentioned in paragraphs 2(a) and (b), 3 (a) and (c) and 4 of Article 31 seems to be applicable. This is so since (i) no agreement relating to the TPM provisions was made between all the parties in connection with the conclusion of the Treaties; (ii) no instrument was made by one or more parties in connection with the conclusion of the Treaties that would have been accepted by the other parties as an instrument related to the Treaties; (iii) no subsequent agreement has been adopted between the parties regarding the interpretation of the Treaties or the application of their provisions; (iv) there appears to be no specific international law applicable concerning the relations between the parties that might have a direct influence on the interpretation of the TPM rules; and (v) there was no specific agreement between the parties as to a special meaning to be given to relevant terms of the TPM provisions.

Thus, the provisions of the Vienna Convention the application of which may emerge in addition to paragraph (1) of Article 31 are included in Article 31(3)(b) and Article 32.

As regards “subsequent practice,” mentioned in Article 31(3)(b), due to the structure of Prof. Geist’s study, it is necessary to deal with it separately below.

Under Article 32, the negotiation history (“preparatory work”) of a treaty, in principle, is only applicable if it is necessary to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation

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<sup>6</sup> Article 46 on “Provisions of internal law regarding competence to conclude treaties” reads as follows:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. Therefore, the question of whether Article 32 may or should also be applied can only be responded when the attempts at the interpretation of the relevant norms on the basis of Article 31 is completed. (As discussed below, in my view, the correct answer to this question seems to be that one could hardly speak about ambiguous or obscure meaning or absurd and unreasonable results in the case of the Treaties' TPM provisions. Thus, only one possible function of the negotiation history remains: to confirm the meaning of the TPM provisions. Such confirmation may not be truly necessary. However, the review of the negotiation history of a treaty may always be useful, and the discussion below seems to prove this.)

### **Interpretation of the TPM provisions on the basis of their plain language**

As discussed above, the basic interpretation rule in Article 31(1) of the Vienna Convention is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In spite of this, **Prof. Geist’s study does not pay sufficient attention to the interpretation of the treaty provisions on the basis of their plain language as this rule requires.**

**As regards the key obligations** under the Treaties’ TPM provisions – namely that Contracting Parties must provide for “adequate protection” and “effective remedies” against the circumvention of TPMs, **he makes the following analysis:**

[T]he treaties do not provide definitions for the words “adequate” and “effective” with respect to legal protections. Since all TPMs can be circumvented, the provision points to the fact that perfection is not required nor does a minimum global standard exist. Instead, any national legislation will be measured against an adequacy criterion such that the legal protection must provide some measure of protection that a reasonable person would perceive as evidencing effectiveness.”<sup>7</sup>

In addition to the too short way of addressing the interpretation of these basic criteria of the obligations under the Treaties, **there are also substantive problems with these statements.**

**It is true that “perfection is not required”** for the anti-circumvention provisions to qualify as “adequate” and for the corresponding remedies to qualify as “effective” in the sense that they simply cannot be so perfect as to be able to totally exclude the very possibility of circumvention of TPMs. **However, the statement that is deduced from this – namely that “nor does a minimum global standard exist” – misses the point.**

The point is how a Contracting Party may fulfill the obligations to provide “adequate protection” and “effective remedies” against circumvention of TPMs. This is a performance requirement and as such it does not need to be

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<sup>7</sup> Prof. Geist's chapter, p. 210.

accompanied by a detailed description of legal-technical methodology on how the requirement must be achieved.

***The concept of adequacy is the most important in this context. As quoted above, Prof. Geist offers the following definition:*** “[a]ny national legislation will be measured against an adequacy criterion] such that the legal protections must provide *some measure of protection* that a reasonable person would perceive as evidencing effectiveness” (emphasis added). (Prof. Geist speaks of perceiving some measures as evidencing “effectiveness;” however, quite probably he means adequacy since this sentence is about the “adequacy criterion.”)

***Providing some measures of protection that may be perceived by somebody*** – even if he or she is selected to qualify as a “reasonable person” – ***as adequate may hardly be regarded as a well-founded adequacy concept. What is prescribed is not a mere matter of perception but an objective criterion: the suitability of the measures for the protection of TPMs.*** (Not mentioning the question of how an Oscar nomination committee of reasonable persons would function. How would it be decided who is reasonable and who is not and who would be authorized to categorize people according to the level of reasonableness.)

In order to fulfill the Treaties’ performance requirement, ***it is not sufficient and adequate to provide for some measures; it is only sufficient and adequate to provide all the reasonably available measures necessary to fulfill that requirement.***

Under Article 31(1) of the Vienna Convention, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.” ***The mere fact that a treaty does not contain a specific definition of a term does not mean that its ordinary meaning may just be left to the subjective perception of a “reasonable person.”*** Attempt must be made to carry out the task of good faith interpretation through the use of all available means.

A quite general method applied for this purpose is to try to identify the ordinary meaning of a term by using well-known and reliable dictionaries, whose objective is exactly to determine the generally ordinary meaning(s) of words. This method is used consistently by the WTO dispute settlement panels (which, in the case of English-language texts, in general, apply Oxford dictionaries). As one of the means – along with all other means of interpretation possibly available – its legitimacy could hardly be questioned.

According to the dictionary definition, ***“adequate” means “enough in quantity, or good enough in quality, for a particular purpose or need.”***<sup>8</sup> Within this definition, the word “enough” (of which the word “sufficient” is a synonym<sup>9</sup>) and the “particular purpose” appear to be the key terms. In the given case, the particular purpose is the protection of effective TPMs against circumvention, and ***the legal machinery to be made available for this purpose by a Contracting Party must***

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<sup>8</sup> S. Wehmeier (ed.), *Oxford Advanced Learner’s Dictionary of Current English* (6<sup>th</sup> edn, Oxford, OUP, 2000), p. 15.

<sup>9</sup> *Ibid.*, p. 417.

**be sufficient and adequate to fulfill the performance requirement prescribed by the Treaties.**

One of the key questions concerning the adequacy of legal protection against circumvention of TPMs is whether it is sufficient to provide legal measures against circumvention at the stage when the very acts of circumvention are performed, or whether the Treaties also oblige Contracting Parties to apply sufficient legal measures at the earlier stage of what are referred to as “preparatory acts.”

As discussed below, **where there was truly an absence of agreement during the preparatory work was not the justification of establishing a defense line already in the stage of “preparatory acts,”** such as the manufacture and distribution of protection-defeating devices. **The real differences rather emerged about the coverage of such devices.**

Let us take, however, what seems to have emerged as best practices (it may also be called as emerging minimum criteria – and, yes, performance “standards”) to identify those devices (and services) which need to be prohibited in order to provide adequate TPM protection: (i) those which are promoted, advertised or marketed for the purpose of circumvention; (ii) those which have only limited commercially significant purpose or use of circumvention (sole purpose or virtual sole purpose with possible other insignificant, marginal functions); (iii) those which are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating circumvention.<sup>10</sup>

And let us ask the question: **could it be characterized as an adequate protection of just prohibiting the very acts of circumvention** (usually carried out in a domestic or internal environment where there is no real chance anymore to prevent unauthorized circumvention) **and allow manufacturers and distributors to freely produce, advertise and market such devices** (and offer such services). It is submitted that **one could hardly give an affirmative answer to this.** An affirmative answer to this question would be somewhat similar to saying that it would be an adequate measure to respect the legal prohibition of using live rabbits for feeding tigers by placing a rabbit into a tiger’s cage and simply prohibiting to the tiger to eat it.

**One may and should, of course, look at the concept of adequacy also from an opposite angle;** namely not from the viewpoint of what is still sufficient to fulfill the performance requirement prescribed in the TPM provisions, but from the viewpoint of **how the legitimate interests of others may and should be taken into account by limiting the protection against circumvention.** This is the issue in respect of establishing **due balance concerning the “interface”**

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<sup>10</sup> The determination of these categories (which appear in a similar way, e.g. in the US Copyright Act and in the EU Information Society Directive) serves the purpose of identifying those “preparatory acts” which must be prohibited in order to provide adequate protection for TPMs. As a result of these detailed criteria, two undesirable effects may be avoided: first, that kind of vagueness for which the TPM provisions of the Basic Proposal were criticized at the 1996 Diplomatic Conference, and, secondly, any unintended extension of the prohibition to true multi-purpose devices.

**between TPM protection and the applicability of certain exceptions** indispensable from the viewpoint of public interests.

From this angle, let us also ask the question: **would it result in adequate protection of TPMs if protection simply did not extend to any case where any exception may be applied?** For example, if it did not extend to the TPM control of online making available of, and access to, works through the Internet since it might prevent benefiting academics from the exception for free quotations. Or if it were allowed to any member of the huge Internet population to make “just one private copy” (potentially resulting in as many free copies as the number of those who care at all for copies) since there is an alleged right to make private copies (there is, of course, no such “right;” the private copying exception is also subject to the “three-step test;” and one could hardly find a better example for an exception conflicting with the test than such a one-free-copy-for-everybody-in-the-world exception).

Again: **would it be possible to give an affirmative answer to this question? Hardly.**

The negative answer to this question becomes even more obvious if the two questions asked above are combined. All this then should **also be considered in the light of the object and purpose of the Treaties** (and of copyright protection at all) as required by Article 31(1) of the Vienna Convention. Would it be acceptable to offer only one single possibility of making available works through the digital online system, the distribution-dissemination channel which is emerging as by far the most important one: namely, making them available without any chance of controlling access to and use of them? Would this correspond to the purpose of the WCT (and the Berne Convention) reflected in the Preamble; namely, “to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as affective as possible” on the basis of the recognition of “the outstanding significance of copyright protection as an incentive for literary and artistic creation?” Let me answer these further questions by simply asking one more: Would it be necessary to answer these questions at all for anybody who takes these objectives seriously?

Yes, the WCT Preamble also recognizes “the need to maintain a balance of interest between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.” However, what is justified is maintaining the existing balance, and not to drastically modify it to the detriment of copyright protection.

***It would not be a due balance of interests to provide that, if owners of rights want to make use of the enormous opportunities of making available their works through the global digital network, they are supposed to do only by offering free access to the entire world.<sup>11</sup> This would be the case if the huge***

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<sup>11</sup> Yes, in the digital online environment, there are certain possible business models that may function to a certain extent also without any TPMs; such as, in particular, free making available works through advertisement-supported systems. It seems, however, quite clear that reducing business models to this one would not allow normal exploitation of copyright in many valuable productions. Advertisement money is only one of the various possible sources *along with many*

**Internet population were authorized to circumvent any access and/or copy-control TPM by making use of the huge and uncontrolled offer of circumvention devices. On the basis of what is suggested by Prof. Geist, they could do so by citing the facts that receiving a transmission without making a copy is not covered by copyright proper and that it is also free to make copies on the basis of the alleged “right” to make private copies.**

**An adequate balance** – and in fact any situation in the case of which one may truly speak about any balance at all – **should obviously be established in a completely different way.**<sup>12</sup> This is also – and, from a certain viewpoint, even more – relevant as regards the interpretation of the last part of the Treaties’ TPM provisions (“acts... not authorized by the authors [performers or producers of phonograms] or *permitted by law*” [emphasis added]). Thus, it is further discussed below in respect of that part of the provisions.

Prof. Geist’s study briefly deals with the concept of “effective technological measure” from the viewpoint of “effectiveness” (and rightly states that it does not imply infallibility of TPMs) and the concept of “circumvention” (which has hardly raised any serious interpretation problem). Then, on the basis of the reference to a view expressed in legal literature, he just proceeds to addressing the issues of the interpretation of the following phrases of the Treaties’ TPM provisions (in the version provided in the WCT): “used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention” and “restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

There is, however, an aspect of the expression “effective technological measures” other than the concept of “effectiveness” that also requires interpretation, namely, the term “technological measures” proper from the viewpoint of the question of whether it covers both “access-control” and “copy-control” TPMs. Prof. Geist’s study does not deal with this aspect separately, although it is justified to also consider it as such.

There is hardly any controversy about the fact that **both access control and copy-control measures are TPMs** (what is only debated time and again is whether the Treaties’ provisions cover both categories).

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*important other sources*; it cannot replace all them or even the majority of them. There is a need also for various systems where access to and use of works are controlled in a way that consumers have to pay for them either separately per-access or per-use or in the form of some sort of subscription (it is to be noted, however, that online subscription systems also may hardly work without some kind of TPMs, since the alternative would be just free access). A “global license” managed by collecting societies – in addition to the hardly surmountable problems of its practical application – could not fulfill either the role of a general solution for all forms exploitation of rights in all categories of works and objects of related rights.

<sup>12</sup> It should be noted that TPMs may also serve due access to works by the beneficiaries of exceptions in a duly regulated way. The Technology, Education and Copyright Harmonization Act of 2002 (known as The US TEACH Act of 2002) is an example. It has extended the class-room teaching exception to distant education, but subjected the permission to make available teaching materials through the Internet to the condition of using appropriate TPMs to guarantee that the materials are only available to the beneficiaries of the exception (those who participate in organized distant education programs) rather than to the entire Internet population.

**The Treaties do not contain any definition of the concept of TPM that would reduce it to certain categories of measures. Therefore, if the term “technological measure” is considered as such, hardly any other meaning may be determined than that it covers both access-control and “copy-control” measures.** Any other meaning could only be identified if the contrary followed from the context of the treaty provisions. However, as it is discussed below, this is not the case.

In this respect, Prof. Geist seems to abandon his decision to discuss views expressed in legal literature only after an analysis of the plain text of the treaty provisions, their negotiation history and the “subsequent practice.” He states that the “[l]atter part of the provision has also generated conflicting interpretations.”<sup>13</sup> Then **he quotes only one of those “conflicting interpretations,” namely one with which he apparently agrees, and according to which “article 11 of the WCT does not require states to prohibit the circumvention of a TPM in order to benefit from one of the exceptions to copyright” and just mentions that “[t]he alternate interpretation posits that this provision seeks to protect rights holders against the circumvention of TPMs which limit access, effectively creating a sui generis right of access control.”**<sup>14</sup>

The first part of the latter statement is partly correct since the “alternate interpretation” truly is that the TPM protection must *also* extend to “access controls.” Nevertheless, it is not complete because, **under the real “alternate interpretation” – reflected not only in legal literature but also in the statutory rules of Canada’s major trading partners – both “access control” and “copy control” TPMs must be protected.** The second part of Prof. Geist’s statement, however, hardly describes the essence of that “alternate interpretation.” **It is true that, in the academic discussions on TPM protection, also the view has been expressed that by protecting TPMs, and in particular access-control measures, a new<sup>15</sup> “access right” emerges. However, this view may hardly be characterized as dominant and certainly it has not served as a basis for the national laws providing protection for both access-control and copy-control” measures.** As discussed below, it is not justified to speak about a new “access right,” but, if what truly is involved is still characterized as “access right,” there has always been such a “right” as an indispensable corollary to copyright without which copyright could not have existed.

Now let us look at the entire text of that part of Ian Kerr’s analysis which is quoted by Prof. Geist and with which he apparently agrees:

A literal interpretation of the requirements that TPMs must be “used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention” and “restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law” suggests

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<sup>13</sup> Prof. Geist’ chapter, p. 211.

<sup>14</sup> *Ibid.*; Prof. Geist quotes Ian Kerr’s study (source indicated in his footnote).

<sup>15</sup> See the discussion below about the alleged “access right” where it is pointed out that, if controlling access by TPMs is characterized such a right, then it has always existed on the basis of other legal bases as an indispensable corollary of copyright protection. This is the reason for which the adjective “new” is emphasized here.

that ***TPMs must restrict acts that are protected by copyright law in order to qualify for legal protection*** pursuant to article 11 of the WCT. According to this interpretation, article 11 of the WCT does not require states to prohibit the circumvention of a TPM in order to benefit from one of the exceptions to copyright (such as, for example, fair dealing in Canada). This suggests that only circumventions resulting in copyright infringement will be subject to article 11.<sup>16</sup> (Emphasis added.)

It appears, on the basis of the above-quoted text, that Ian Kerr ***rather focuses on the phrase “used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention”*** when he states that “according to this [literal] interpretation, article 11 of the WCT does not require states to prohibit the circumvention of a TPM in order to benefit from one of the exceptions to copyright.” He concludes: “This suggests that only circumventions resulting in copyright infringement will be subject to article 11.”

As quoted above, ***Ian Kerr emphasizes that this is stated on the basis of literal interpretation of the treaty provisions.*** As discussed below, ***the negotiation history and the subsequent practice of the Treaties would contradict such sort of literal interpretation. Nevertheless, it is true that Article 31(1) of the Vienna Convention does justify that first a literal interpretation be made*** (although not on the basis of the text alone in an isolated way, but in the context of the treaty duly taking into account also its object and purpose).

Having clarified this, it should be noted ***that it does not follow from a mere literal interpretation either that access-control” measures are excluded from TPM protection, and that only circumventions resulting in infringements should be prohibited.***

As a general comment, ***it may be questioned whether such an interpretation could be in accordance at all with one of the basic principles of good faith interpretation.*** Namely with the principle according to which, if a certain interpretation makes a treaty provision meaningless, but another interpretation is available which makes it meaningful, that other interpretation should be chosen. In this case, the suggestion is that only those circumventions should be prohibited which result in infringements. However, it should be seen that, ***under the Treaties, all infringements of the rights provided in them are prohibited irrespective of the means used for committing them. Thus, a provision merely consisting in the prohibition of infringements committed through circumvention would just prohibit a specific way of committing infringements; in other words, it would prohibit what is already prohibited.***

According to Prof. Geist, “Kerr acknowledges, however, that others have interpreted the clause differently, focusing instead on the latter phrase ‘restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.’”<sup>17</sup> ***Prof. Geist, in this context, does not find it necessary to discuss those alternative interpretations to which Ian Kerr refers.***

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

The above-quoted reference seems to indicate ***that, according to Ian Kerr and/or Prof. Geist, the opposite view – namely the view that the prohibition of circumvention of TPMs is not reduced to circumventions linked to infringement – would rather be the result of focusing on the last phrase of the treaty provision:*** “that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

***The “different” views, however, follow not just from one phrase but from the entire text of the treaty provisions*** in their context duly taken into account also their object and purpose. In fact, it follows at least as much from the other phrase quoted by Ian Kerr: “used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention.” This is so since ***the treaty provisions speak about TPMs used in connection with rights. If they spoke about TPMs used for the exercise of rights, they may perhaps be interpreted more easily in a way that they only apply for copy-control measures. This is, however, not the case, and TPMs used to control the access to works*** in order to make the exploitation of copyright possible at all, beyond any doubts ***are used in connection with rights*** by their owners, or the successor-in-title or licensees thereof.

There is another important aspect of the phrase “in connection with the exercise of their rights under this Treaty or the Berne Convention.” Namely, that it determines the scope of application of the TPM norms in the sense that ***it makes it clear that TPM protection does not extend to any subject matter not protected by copyright.*** Thus, ***the TPM provisions do not apply to works in the public domain at all,*** as they do not apply to TPMs protecting garage door or ink cartridge technologies. If somebody wants to use the treaty provisions for the protection of such subject matter (as it has happened), the problem may not be found in the treaty provisions but in the absence of ability to understand what is crystal clear.

Thus, it is not just focusing on the last phrase – “acts not authorized by the author or permitted by law” – that the “different views” may be justified. Nevertheless, it is true that the last phrase does not change what follows from the rest of the treaty provisions. The term “acts not authorized by the author” is sufficiently clear, although it may be worthwhile noting that – as in any other provisions of the WCT (and also in the Berne Convention) – “author” does not only mean the “author” alone but, in the given cases, also any other original owner of right, successor-in-title, licensee, etc., as referred to above.

***It is truly relevant that the treaty provision does not use the term “or [acts] covered by exceptions or limitations under Article 10”*** (or other equivalent text referring to exceptions and limitations) ***but the term “acts [not] permitted by law.”*** ***The former version might have been more easily (mis)interpreted suggesting a linkage between circumventions and infringements, but the Treaties do not use it.*** In the context of the TPM provisions, the question of whether or not certain acts are permitted by law may have – and as the various national provisions show, do have – a relationship with the applicability of exceptions and limitations. ***The balance of interests concerning to TPM protection and the applicability of exceptions and limitations,*** however,

**requires specific regulation on what acts should be permitted in a TPM-free manner and in which way** (usually by automatically allowing the performance of certain acts on the basis of a given exception, but rather only in a specific manner along with special guarantees).

**When the TPM provisions are considered in the context of the two “Internet Treaties,” it is further confirmed that not only circumventions linked to infringements are prohibited.** This is so, in particular, for the following reasons. In both Treaties, **the articles on technological measures are followed by the articles on rights management information** (WCT Article 12 and WPPT Article 19). **The acts mentioned in the latter** (unauthorized removal or alteration of electronic rights management information, etc.) **are only prohibited where such an act is committed by a person “knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement.”** It is conspicuous that **the TPM provisions do not have any reference to such kind of connection between circumventions and infringements. If the Diplomatic Conference had had an intention to only prohibit circumventions when they enable or facilitate infringements, it would have certainly done so in a way similar to how it has happened in the case of the right management provisions. However, it did not do so.**

Finally, let us address the charge that the “Internet Treaties,” by prescribing adequate TPM protection for all TPMs, and thus also for access control measures, have introduced a new *sui generis* “access right.”

It is to be noted that **“access” basically means original access to a work** – by obtaining a copy thereof or by becoming able to listen to it or watch it while performed or communicated without making available a copy. **Allowing such access took place also before the advent of digital technology and the adoption and application of the two Treaties in a duly controlled way “in connection with”** – that is, related to – **the exercise of copyright. Without the possibility of controlling such (original) access** – and without the legal machinery necessary for it, even if it was not provided in the copyright legislation proper – **copyright could not have prevailed;** there would not have been a real chance for owners of rights to exploit their rights.

**Since the very birth of copyright, there have always been legally controlled forms of getting access to protected works,** such as buying copies of works and records; lending books from libraries; acquiring entrance fees for cinemas, theaters, concert halls and exhibition halls; paying newspaper, radio and television subscription fees, etc.

**Even in the case of uses covered by exceptions, there have been controlled forms of access also in the “traditional,” analogue environment.** For example, nobody is allowed to walk into a book shop, take a book from the shelves and walk out with it without payment just because he or she wants to benefit from the exception to the right of reproduction for the purposes of quotations, or nobody is able to simply enter a public theatre without an entrance ticket referring to his or her need to see a presentation for the purpose of preparing a homework for the

school. There have been other – adequate – ways to benefit from these and other exceptions.

It should be seen that, ***if it were allowed to eliminate these control mechanisms, the copyright system would collapse.*** This would be the case, since, if there were free access to copies in book shops, record shops, rental shops, etc., free entrance to cinemas, theaters and concert halls, etc., the creators, publishers and producers would not have income to recoup their investments and even their operational costs, because no licensees would be able to pay remuneration to them. Such unauthorized acts of access would not qualify as copyright infringements proper, but if there were no legal protection against them, they would undermine the exercise and exploitation of copyright and related right.

It is equally important to see that, in the digital online environment, the traditional chain of events is transformed: what used to be entering a book shop, buying a copy, bringing it home and reading it – or going to cinema, buying a ticket, entering the movie theater and watch the film – ***now may be concentrated into simple clicks on the keyboard. In the case of these complex condensed acts, control by TPMs has the same role as property protection for copies of books and records in shops or by trespass laws against someone who tries to enter a theatre, cinema or concert hall without buying a ticket, etc.***

This means that, ***there is nothing alien to the copyright paradigm in the application and protection of access control measures.*** In the online environment, such measures ***may guarantee the sort of control of access to works and objects of related rights that have always existed as an indispensable corollary of copyright protection proper. If one still characterizes this as an “access right,”*** he or she should recognize that ***such “access right” has always existed.*** What the two “Internet Treaties” have done is just that they have provided for this indispensable condition of – and corollary to – the exercise of copyright also in the new environment.

It goes without saying that, ***as in the “traditional” analogue world, also in the new digital online environment, it is necessary to ensure access to works in order to benefit from certain exceptions*** recognized in order to duly take into account certain public interests. However, ***also as in the traditional environment, the access to works and object of related rights for such purposes should be provided in a duly regulated manner in order to maintain the necessary balance of interests.***

It should also be noted that ***many of the arguments presented against “access-control” TPMs concern post-original-access.*** There are various possible categories of such systems, and it has been their application which has mainly created resistance among consumers.

Copy-protection TPMs form the most typical and best known category of such systems. Some of their variants allow the perception of a work or object of related rights on the basis of a lawfully obtained copy, but do not allow further copying. It is also possible that such a system allows copying but, e.g., only in analogue

format or only until a limited number of copies.

The most extensive – and by certain consumers the most disliked – TPM systems are those that, e.g., after a certain number of uses or after the expiry of a certain time, do not allow to end users to use a lawfully obtained copy anymore. The function of obtaining such copies is similar, e.g., to buying entrance fees or to rent copies. (This is so since, e.g., the effect of a TPM system that only allows the viewing of a film for a certain number of times in a family circle – even if it is more flexible regarding the number of persons who can watch it – has a similar effect from the viewpoint of exploitation of the work as theatrical presentations, and a system which only allows the use of works for a given number of days offers the same sort of possibilities as rental of copies). ***Viewing works, listening to music and similar ways of perceiving works and recordings by end users are not covered by copyright. At the same time, it has always been necessary for duly flexible and well balanced exploitation of copyright to make available these kinds of alternative options for those end users who do not want to pay the necessarily higher price of obtaining copies for use to an unlimited extent and for an unlimited time.***

Therefore, the application of these kinds of TPM systems seems to be advantageous for certain consumers. As Sam Ricketson and Jane Ginsburg also remark: “[t]hese sorts of formats may be particularly appealing to users who do not need or desire unlimited viewings or hearings of the work, assuming that a reduction in price accompanies the reduction of access.”<sup>18</sup> (It should be added, of course, that consumers should be duly informed about the impact of the various possible TPM systems applied by the owners of rights and their licensees at the moment of deciding in which way, to which extent and for how long time they would like to get access to a work.) Not making it possible to apply such TPM systems by denying adequate protection against their circumvention would result in limiting the applicability of certain innovative business methods and favorable options that may be offered to consumers.

### **„Preparatory work” (negotiation history) of the TPM provisions**

***Prof. Geist***, after a couple of introductory sentences, ***begins this part of his study with a misrepresentation of my position:***

The WIPO Internet treaties do not include any specific reference to access controls or to circumvention devices. Yet Dr. Mihály Ficsor, who served as the secretary to the Diplomatic Conference for the treaties and has emerged as the most vocal proponent of an inflexible implementation, has suggested that the preparatory negotiations reflected a complete consensus that the treaty must prohibit circumvention of access controls generally, and that the prohibition must extend to trafficking in devices... However, the record of the meetings of the Committee of Experts cast doubt on these claims.<sup>19</sup>

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<sup>18</sup> Sam Ricketson & Jane Ginsburg: *International Copyright and Neighboring Rights* (Oxford University Press, 2005) (hereinafter: Ricketson – Ginsburg), p. 974.

<sup>19</sup> Prof. Geist’s chapter, p. 212.

Since Prof. Geist has not devoted real attention to the analysis of the most important source of interpretation of treaty provisions (the ordinary meaning of their terms used in their context also taking into account the object and purpose of the treaty), **he tries to prove here what cannot be, namely that the treaty obligations may be fulfilled by not protecting access-control TPMs and by also allowing free manufacture, distribution, advertisement, etc. of unauthorized circumvention devices.**

Let us start with **his first sentence: “The WIPO Internet treaties do not include any specific reference to access controls or to circumvention devices.” This is true, and it may also be added that they do not include specific reference to copy-control TPMs either. However, this is not the point.** The Treaties use the comprehensive term “technological measures” about which it cannot be said that it only covers this or that type of TPMs. **One could only allege with good faith that the obligation to provide protection for technological measures does not extend to access-control measures if this followed from the text of the treaty provisions in their context and in view of their object and purpose. However,** as discussed above, **this is not the case;** just the contrary is the case. And **as regards circumvention devices, it would hardly show any intention of providing adequate protection for TPMs if they were allowed to be freely manufactured, distributed, marketed, advertised, etc. in order to apply them for the circumvention of any kinds of TPMs.** This follows from a *bona fide* interpretation of the plain language, the context, the object and the purpose of the treaty provisions.

Thus, the above-quoted first sentence **contains a non sequitur conclusion.**

In the second sentence, **I am virtually disqualified as participant in a debate on the topic of the study** – which is announced to be the application of the “flexibilities” of the treaty provisions – **since I am declared to be in favor of an inflexible way of implementation.**

Let me express my own opinion about “flexibilities” since Prof. Geist has not turned out to be a successful interpreter of my position. I do agree that there is flexibility but with due limits. I have expressed my opinion about it in my paper published on the IP Osgoode blog<sup>20</sup> in the following way: “It is a *non sequitur* inference to deduce from the absence of a technology- or function-specific list of technological measures that, due to this, Contracting Parties would have the ‘flexibility’ to decide that they protect certain TPMs but do not protect other TPMs.”<sup>21</sup> I still maintain that this is true. This does not mean that I would think that no flexibility is offered by the treaty provisions. **There is flexibility in how to fulfill the obligation to provide adequate protection for TPMs** (this is particularly true concerning the way in which due balance is established between the protection of TPMs and the applicability of certain exceptions granted in recognition of public

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<sup>20</sup> As indicated, this is from my paper published on the IP Osgoode blog. It seems Prof. Geist has read it, although not with sufficient attention, but he does not quote this part. And where he quotes another part of my paper, he does not do so from the original IP Osgoode source, but rather from Barry Sookman’s blog who also published it after with my permission. (It seems that for some reason he prefers Barry’s blog to IP Osgoode’s blog.)

<sup>21</sup> Ficsor on IP Osgoode, p. 8.

interests). **However, the flexibility extends only so far as this obligation may truly be respected.**

I mean the same under “flexibility” what is determined as the original meaning of the adjective “flexible” in the Oxford dictionary: **“able to bend easily without breaking.”** In the framework of the implementation of the Treaties’ TPM provisions, there is certainly a potential of bending. However, **it also follows from the very concept of flexibility that there are also limits; if one tries to go beyond certain limits, the object, the legal means, etc. is not flexible anymore; it is broken. Implementing rules that would not protect “access control” measures as one of the basic categories of TPMs, that would allow free manufacture, distribution and promotion of circumvention devices, etc. and/or that would only prohibit circumventions in connection with infringements (which are already prohibited no matter how they are committed), would not be flexible. They would be broken rules not suitable to provide adequate protection.** This is the way I can see the issue of “flexibility.”

**The preparatory work of the two Treaties is suitable** for the purpose referred to in Article 32(b) of the Vienna Convention if it is needed at all; namely **“to confirm the meaning resulting from the application of article 31” according to which all kinds of TPMs – thus also “access control” TPMs – should be protected and “preparatory acts”** (protection-defeating devices, etc.) **should be prohibited in order to provide adequate protection.** Of course, what happened at the Diplomatic Conference was not that, for example, the Chairman asked the question of whether there was complete agreement in that also “access control” measures should be protected and that trafficking in circumvention devices should be prohibited. Nevertheless, **the documents reflect that on these aspects did exist a partly explicit and partly implicit agreement.**

Let us see what has truly happened during the preparatory meetings and at the Diplomatic Conference. Unfortunately, for this purpose, I am constrained to go into details as Prof. Geist did in his study.

The truly concrete developments that may have relevance as “preparatory work” referred to in Article 32 of the Vienna Convention began at the **sixth session of the WIPO Committee preparing what became the WCT and the fifth session of the WIPO Committee preparing what became the WPPT** held together in February 1996 for which the delegations were supposed to submit treaty language proposals.<sup>22</sup>

The proposals and comments submitted for those joint sessions were as follows:

- a proposal submitted by the US to prohibit „preparatory acts,”<sup>23</sup>

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<sup>22</sup> For a detailed description of the preparatory work in the WIPO committees and at the Diplomatic Conference (with the text of the proposals and references to comments) see Mihály Ficsor: *The Law of Copyright and the Internet* (Oxford University Press, 2002) (hereinafter: Ficsor 2002), pp. 386 to 406.

<sup>23</sup> WIPO document BCP/CE/VII/2, pp. 37-38.

- a proposal submitted by Argentina to prohibit (i) the circumvention of „copy-control” TPMs applied in copies of works; (ii) in another context, the circumvention of both „access control” and „copy control” TPMs in general („any coded signals designed to restrict the communication of protected works, productions or broadcasts to the public or to prevent the copying thereof”) and (iii) „preparatory acts” (protection-defeating devices),<sup>24</sup>
- a proposal made by Brazil, which, with certain wording differences, was the same as the Argentine proposal,<sup>25</sup>
- a subsequent proposal submitted by 17 Latin American countries<sup>26</sup> supporting the above-mentioned Argentine proposal,
- a comment made by 15 African countries stating as follows: “We accept the proposal of the United States concerning the prohibition of protection-defeating devices.”<sup>27</sup>
- a comment made by China simply stating that various issues, including TPMs, „should be studied further,”<sup>28</sup>
- a comment made by Japan simply reserving its position on this issue;<sup>29</sup> and
- a statement by the European Community and its Member States indicating that they are in the stage of preparing their position.

No other proposal was submitted, in particular ***no proposal that would have suggested that only “copy-control” measures should be protected or that, contrary to what emerged at that time as a consensus at the level of concrete proposals submitted by 1 (US) + 17 (Latin American countries) + 12 (African countries) = 30 countries, it would not be necessary to prohibit “preparatory acts” (protection-defeating devices).***

There were comments at the joint sessions of the two Committees, but no other treaty language proposals, which have been summed up by the Chairman as follows:

There had been many suggestions concerning which technical measures should be covered, and it would be necessary to consider further the test of whether the devices should be designed for the given purpose, or, have it as their sole or primary purpose. Also the acts covered by the relevant provisions, such as importation, manufacturing, distribution or

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<sup>24</sup> *Ibid*, p. 36.

<sup>25</sup> *Ibid*, pp. 36-37.

<sup>26</sup> By Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela; WIPO document BCP/CE/VI/15.

<sup>27</sup> WIPO document BCP/CE/VI/14.

<sup>28</sup> WIPO document BCP/CE/VI/4.

<sup>29</sup> WIPO document BCP/CE/VI/9.

even use for defeating purposes, should be elaborated further, as should links to other legislation.<sup>30</sup>

As the summary of the Chairman indicates ***no comments addressed the specific issues of the protection of “access control” TPMs and the prohibition of duly determined “preparatory” acts which is the main aspect of Prof. Geist’s study and his problems with Bill C-32.*** Apart from the 17 Latin American delegations which clearly stated the understanding that TPMs are supposed to also mean “access control” TPMs, there was, in fact, only one delegation which commented on this issue; namely the delegation of Norway which “supported the inclusion of provisions on technological measures... to prevent illegal access to and use of protected material.”<sup>31</sup> No delegation opposed that statement.

***Nevertheless, Prof. Geist sums up the outcome of this meeting in the following way:***

The Argentine and Brazilian proposals were broader in scope [than the US proposal only covering “preparatory acts”] applying to both the act of circumvention and trafficking in circumvention devices. However, both proposals were limited to copy controls, with no reference to access controls. Notwithstanding claims that all proposals envisioned including access controls, no control that applied only after a work had been lawfully distributed to, or received by, a consumer would be covered under the Argentine or Brazilian proposals [...]

No delegation spoke in favour of a broader protection for access controls. A number of delegations expressed concerns about the scope of the three proposals, however. For example, the Korean delegation supported mandatory exceptions with obligations imposed on rights-holders to serve the public interest. The Danish delegation argued for a declaration of principle only, with more flexibility for Contracting Parties to implement measures as they saw fit. Other countries were even less supportive: Thailand opposed including *any* protection for TPMs; China thought the idea required further study, and was also not prepared to support inclusion of any measures at that time. Given the differing views, the Chairman’s summary of the debate reflects the lack of consensus.<sup>32</sup>

The following comments should be added to this:

***It would be difficult to allege that the proposals of the 17 Latin American countries “were limited to copy controls, with no reference to access controls.” Still Prof. Geist does allege this.*** According to him, TPMs consisting in “coded signals designed to restrict the communication of protected works, productions or broadcasts to the public” (after which it is added clearly as a separate thing: “or [coded signals designed to] prevent the copying thereof”) are “copy controls” rather than “access controls.” Furthermore, he implies that what

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<sup>30</sup> WIPO document BCP/CE/VI/16 – INR/CE/V/14, para. 236.

<sup>31</sup> *Ibid*, para. 207.

<sup>32</sup> Prof. Geist’s chapter, pp. 214-215.

those TPMs restrict is infringing acts and not just the possibility of reception and perception of works communicated.

Probably he also has doubts whether this contention may stand a thorough scrutiny since he adds that, even if somebody recognized such measures as access-control TPMs, at least one thing is still certain; namely that “no control that applied only after a work had been lawfully distributed to, or received by, a consumer would be covered under the Argentine or Brazilian proposals.” The proposals did not state this and their texts do not support such a view. ***They spoke about signals in which such kinds of TPMs were included; they did not imply that including specific TPMs to control further communication or copying would be excluded from protection.***

As stressed above, no specific comments were made at the session to oppose this aspect of the proposals. Prof. Geist states that “no delegation spoke in favor of a broader protection of access controls.” It is not clear in what aspect it would have been necessary to speak in favor of an even broader protection of “access controls.” It is, however, sure that ***what happened at that session does not support his allegation that the treaty-language proposals did not cover access-control TPMs.***

Yes, ***there was still hesitation*** on the part of some delegations at that time. ***However, the concept of “preparatory work” to which Article 32 of the Vienna Convention refers cannot be interpreted and applied in a way that not the final position adopted by a country at the end of a negotiation process and not its position reflected in the way a treaty is implemented is taken into account, but an earlier position*** which was still different but which has been changed.

Let us take the four examples mentioned by Prof. Geist:

The delegation of the Republic of Korea truly said that owners of rights must be obligated to make the application of certain exceptions possible that are important from the viewpoint of the public interest. This, however, ***has nothing to do with the question of what kinds of TPMs should be protected.*** In fact, the principle suggested by the Korean delegation is applied in the 2001 Information Society (Copyright) Directive of the EU. In certain cases, the Directive does foresee the obligation of owners of rights to open TPM protection used by them in order to make the application of certain exceptions possible. This, however, goes together with due general protection of TPMs, both access-control and copy-control measures.

The Danish delegation truly said that the TPM provision should not be too stringent. However, the position of Denmark that really counts in respect of the issues on which Prof. Geist concentrates – access-control protection and “preparatory acts” – is by definition the position reflected in the EU Information Society (Copyright) Directive; that is, both access-control and copy-control measures must be protected and “preparatory acts” must be prohibited. Thus, ***Denmark is a bad candidate to play the role of an oak tree to concentrate on at the brink of a solid maple forest.***

The delegation of Thailand really opposed the inclusion of TPM provisions in that stage stressing that there must be an opportunity to study the issues before a consensus was possible. Thailand, however, has become part of the consensus when the TPM provisions were included in the Treaties. So ***it is not relevant that in an earlier stage it still opposed such provisions.*** (It is a completely different matter that Thailand has not acceded to the Treaties yet.)

Finally, the reference to ***the Chinese comments does not support Prof. Geist's claims either.*** Not only because China was also part of the unanimous adoption of the TPM provisions, but also because it has implemented those provisions in a way that it contradicts to his contentions (see below).

To sum up: we are faced with ***a typical example of "grinding in another mill."*** ***He lists certain facts which are true, from which, however, does not follow what he wants to prove.***

To ***the seventh session of the Committee preparing what became the WCT and the sixth session of the Committee preparing what became the WPPT*** held together in May 1996 (as their last sessions before the Diplomatic Conference) only one further proposal had been submitted on TPMs. The European Community and its Member States had presented their proposal for the prohibitions of "preparatory acts."

***The situation had hardly changed concerning the specific issues of the protection of "access control" and the prohibition of "preparatory acts" –*** apart from the fact that in respect of the second aspect, now the EC and its 15 Member States (plus those "candidate countries" which were negotiating accession to the EC) were also clearly in favor of such a prohibition.

Prof. Geist applies the same method describing the events of those sessions of the Committees as in the case of the previous sessions. ***He refers to the following comments and in the following way***<sup>33</sup>:

- The delegation of Singapore felt the proposal went too far: it would interfere with legitimate uses would harm industry; and would create a barrier to innovation. Furthermore, the proposal was so broad that it would capture both licit and illicit uses.
- The delegation of Thailand thought the proposal was too vague, and would lead to confusion. Further, the delegation stated that the proposals went too far, and compared them to past efforts to ban video recorders.
- The Korean delegation again stressed its concerns about the harms to the public interest that could result from the protection of TPMs. The delegation also thought the proposal would inappropriately impose liability on manufacturers of lawful products for the illicit acts of others.
- The Chinese delegation thought the whole issue might not fit within the sphere of copyright.

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<sup>33</sup> Prof Geist's chapter, pp 217-218 (footnotes omitted).

- The Ghanaian delegation felt that protection of TPMs could be oppressive to developing nations, and suggested the whole subject should be “reconsidered.”
- The Brazilian delegation stated that the grounds for protecting TPMs needed further clarification.
- The Moroccan delegation simply noted that it was not fully in agreement with the European proposal.
- The delegation from South Africa was concerned about the ambiguity of the language, and raised questions about the allocation of liability.
- The Nigerian delegation, on behalf of the African Group, also expressed concerns about the vagueness of the language. The delegation went on to stress that the subject needed to be considered in terms of its impact on access to knowledge and economic and social development. The delegation asked that the committee reassess the question from the perspective of developing nations, and suggested that while some nations might wish to impose such prohibitions in their domestic codes, this might not be practical for developing nations.
- The delegation from Guinea supported the Nigerian delegations’ remarks.
- The Egyptian delegation joined with those delegations seeking additional clarification.

***The references to those comments are more or less correct***, although Prof. Geist adds emphasis in certain aspects which are not necessary reflected in that way in the report. ***However, the following things should be stressed in this connection:***

First, it should be noted that ***the subject matter of discussion was not all the previously submitted treaty language proposals but only the new EC proposal***. That is, ***the references to vagueness of the text concerned that proposal***. In general, it was not identified which elements of the proposal were vague; ***it seems, however, that the subjective knowledge-based conditions*** – not appearing in previous treaty-language proposals and also left out from the text of the adopted TPM provisions – ***were mainly referred to***. All ***this had no relationship with the reasons for which Prof. Geist opposes the application of the implementation standards adopted by Canada’s main trading partners and also reflected in Bill C-32***.

Secondly, ***the same is true in respect of the comments on the need for further clarification***, in general, without elaboration on what should be further clarified.

Thirdly, in respect of ***the then position of the Republic of Korea and China, the same applies as what is discussed above in connection with the previous sessions: their actual position does not support Prof. Geist’s claims***.

Fourthly, ***there were certain statements which were not clear***. For example, what did it mean that Morocco did not *fully* support the EC proposal, or for what reasons the reference by the delegation of Thailand to video recorders was considered to do anything with the question of circumvention of TPMs. These comments again do not support Prof. Geist’s contention that the Treaties’ provisions do not cover access-control TPMs and that adequate protection of TPMs does not require prohibition of “preparatory acts.”

Fifthly, certain African countries did refer to the special considerations to be taken into account in **developing countries**, but again they did not elaborate on those considerations. It is submitted, however, that this may not have true relevance from the viewpoint of how Canada – definitely not in the category of developing countries – would implement the TPM provisions.

It should also be pointed out that **Prof. Geist does not mention the comments of those delegations which supported the EC proposal**: in the order they appear in the report: Venezuela, the US, Uruguay, Switzerland and Hungary,<sup>34</sup> **neither the position of the 15 Member States of the EC on behalf of which the proposal had been made. He equally does not mention that Argentina and Chile basically also agreed**, just they – rightly enough – proposed the deletion of the reference to the vague subjective knowledge criterion from the EC proposal.<sup>35</sup> Equally, there is no reference to those delegations which spoke about other issues but not on TPMs. (What about the dialectics between silence and possible agreement?)

However, what is important to emphasize is that he misses the real target here. . **He seems to suggest that all this supports his specific contentions about access-control TPMs and “preparatory acts.” But, as pointed out, it is not the case.**

Let us turn now to the **Diplomatic Conference. He begins again with me:**

Dr. Ficsor’s account of the Diplomatic Conference claims:

The reports of Main Committee I and the Plenary of the Diplomatic Conference did not contain any statement or reference to any intention of any delegation to narrow the scope of the protection of TPMs from what was proposed previously.

Yet the WIPO record — as well as that chronicled by other observers — paint a much different picture.<sup>36</sup>

The problem with this is that he **uses a statement completely out of context and tries to deduce something from it in that way.**

**The context in which I wrote this makes it clear that the “scope” of protection in that context means the coverage of both access-control and copy-control TPMs and the obligation to establish a defense line already in the stage of “preparatory acts.” There were other aspects where there were statements opposing the way the Basic Proposal suggested to settle the issue of TPM protection**, but they did not concern these basic issues, but rather only two things: **First, the determination of what “preparatory acts” should be prohibited** (the categories of “preparatory acts” to be prohibited and not the requirement of a scope of protection extending to all kinds of TPMs and to the prohibition of duly determined “preparatory acts”). **Secondly, such comments**

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<sup>34</sup> WIPO document BCP/CE/VII/4 – INR/CE/V/4, paras. 13, 16, 27 and 31.

<sup>35</sup> *Ibid*, paras. 17 and 23.

<sup>36</sup> Prof. Geist’s chapter, p. 218.

**concerned the issue of the “interface” between the protection of TPMs and the applicability of exceptions** important from the viewpoint of public interests.

Let me quote what I have truly written about this:

On the basis of the documents of the preparatory work as reflected in the records of the Diplomatic Conference, it may be stated that ***there were truly animated debates*** about the provisions on technological protection measures, ***but nothing in these documents contradicts the interpretation outlined above; namely that, since no protection may be adequate without prohibiting certain “preparatory acts,” Contracting Parties should prohibit such acts; just they should duly determine their scope.*** The majority of those delegations did not, in fact, oppose the essence of the original language used in the Basic Proposals either, but rather ***made comments on certain details of the definition of “protection-defeating devices” or stressed the need for not extending the provisions to also cover non-protected material and for guaranteeing the applicability of certain exceptions and limitations*** (an issue which should and may be settled adequately as discussed below).<sup>37</sup> (Emphasis added.)

What Prof. Geist does is that he refers to the relevant parts of the reports of Main Committee I and the Plenary which reflect exactly what I have described in the above-quoted paragraph. ***Contrary to what he alleges those parts of the reports paint exactly the same picture as what I have described in the above-quoted text.*** He uses a big machinery to try to prove something (i) that is not in conflict with what I have said and (ii) which does not support his contentions (the New York brothels and grinding in another mill phenomena together).

Let us see, first the text of the Basic Proposal (in the version of the draft treaty which became the WCT):

- (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.
- (2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

At the outset, it should be noted that ***the final TPM provisions adopted by the Diplomatic Conference contain two changes that means improvements in contrast with the Basic Proposal, and confirm the interpretation I have outlined above.*** First, ***the knowledge criterion*** – which was criticized as vague, and rightly enough – ***has been left out***, and thus ***the absence of necessary link between circumventions and infringements has become even clearer.*** Secondly, as already mentioned above, ***the phrase “used for, or in the course***

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<sup>37</sup> Ficsor on IP Osgoode, pp. 14-15.

of, ***the exercise of rights***” ***has been replaced by the phrase “used*** by authors [and other owners of rights] ***in connection with the exercise of their rights.***”

In my paper, I also reviewed in detail the debates at the Diplomatic Conference. However, let us choose Prof. Geist’s description as follows and let me add rather my comments to the various points.

The very first statement about the draft articles on the protection of Technological Measures in the Summary Minutes, Main Committee I, is the demand by the Ghanaian delegation for the article to be dropped entirely, or at least substantially reduced in scope (the substantive impact of the proposal to replace the “primary purpose” standard with a “sole purpose” standard would be to exclude all multi-purpose devices from the scope of the provision).<sup>38</sup>

[Comment: This was so; and I have also referred to this. It is important to note, however, that ***the Ghanaian delegation expressed readiness to accept, as a second option, a provision prohibiting “protection-defeating devices” with a clarification that it does not apply to multi-purpose devices. This is an issue that may be*** – and that in fact is – ***duly settled in those laws about which M. Geist is of the opinion that Canada should not follow their approach.*** It should also be noted that, in spite of the comments made in that stage of the discussions, Ghana ***did not insist on the first option***; namely, on dropping the TPM provision. ***Also there seems to be good reason to understand that it was ready to interpret the meaning of the general obligation to provide adequate protection in a way that it also requires the prohibition of trafficking in “protection-defeating devices”*** provided that it corresponds to the second option acceptable for it; namely, that the prohibition should not cover multi-purpose devices.]

This was followed by a succession of critical comments from country delegations. The Canadian delegation insisted that draft wording was not acceptable, and that the provision should not “create problems for producers and sellers of equipment which might have a significant non-infringing use but which could also be used to defeat copyright protection.” In order for devices with significant non-infringing uses to be protected, the scope of protection of the Basic Proposal would need to be reduced.<sup>39</sup>

[Comment: I have quoted this also in my paper, although more precisely, since ***there is nowhere in the report such an expression as that “the scope of protection of the Basic Proposal would need to be reduced.”*** The comments made by the Canadian delegation ***was not aimed at the reduction of the scope of protection in the sense that it should only extend to copy-control TPMs and not to access-control TPMs and that it should not involve prohibitions of “preparatory works.”*** The comments addressed the criteria issues of the extent of coverage of the prohibited circumvention-defeating devices and the “interface” between TPM protection and exceptions.]

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<sup>38</sup> Prof. Geist’s chapter, pp. 218-219.

<sup>39</sup> *Ibid*, p. 219.

The Korean delegation proposed changes aimed at ensuring that circumvention for the purposes of exercising an exception to exclusive rights remained not just lawful, but practically possible.<sup>40</sup>

[Comment: ***In fact***, the Republic of Korea, in its written proposal – ***without any change in the text of the said provisions in the Basic Proposals – suggested the inclusion of a second paragraph in the relevant articles of the Basic Proposals to allow for Contracting Parties*** “to lay down conditions on technological measures designed to protect productions which are not original nor protected by law and productions in which the exclusive rights are limited by law, only to the extent permitted by the Berne Convention and this Treaty.”<sup>41</sup> This means that the Republic of Korea ***did not truly oppose the Basic Proposal; it only wanted to leave public domain works free*** (which in fact were not covered even by the Basic Proposal) ***and to establish appropriate “interface” between TPM protection and the applicability of certain exceptions*** (an issue duly dealt with also in those countries which clearly protect “access-control” TPMs and prohibit “preparatory acts”).]

The South African delegation stated that the language of the Basic Proposal created “a danger that no provision could be adopted relating to technological measures.” ***It offered an alternate proposal, which ultimately became the basis for the language adopted unanimously that dropped any reference to devices and services, instead targeting only the act of circumvention.***<sup>42</sup>

[Comment: Contrary to Prof. Geist’ suggestion, ***what the provision does is obligating countries to provide adequate protection for TPMs, and as discussed above, it is impossible to provide adequate protection against acts of circumvention without establishing a defense line in the stage of “preparatory acts”*** which may be controlled rather than in the moment of where the acts of circumvention are committed in private homes or in other places where no adequate protection may be provided alone. ***This understanding was one of the conditions of accepting the text as the basis for consensus.***]

The delegations of Nigeria, Senegal and Côte d’Ivoire supported the positions of Ghana and South Africa, which clearly call for a reduction in scope of the provision, or in the alternative, its removal.<sup>43</sup>

[Comment: ***To the extent that it suggests that kind of reduction of the scope of the provision which M. Geist claims, this is not accurate in this way. Ghana said to be able to accept the prohibition of “protection-defeating devices” other than multi-purpose devices.*** Thus ***it did not insist on the reduction of the scope of the provision in the sense that no such prohibition be provided. What it wanted to reduce is the coverage of the definition of such devices.*** As regards the South African proposal, see above. Nigeria,

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<sup>40</sup> *Ibid.*

<sup>41</sup> Documents CRNR/DC/24 and CRNR/DC/25; see *Records of the 1996 WIPO Diplomatic Conference*, WIPO Publication No. 348 (E) (hereinafter: Records), p. 408.

<sup>42</sup> Prof. Geist’s chapter, p. 219.

<sup>43</sup> *Ibid.*

Senegal and Côte d'Ivoire, when they supported those delegations, they did so in that way.]

Singapore called for reducing the “primary purpose” standard to a “sole purpose” standard, stressing “the need to ensure that bona fide legitimate manufacturers and users of general-purpose equipment would not be exposed to liability for the possible use of such devices for illegitimate purposes.”<sup>44</sup>

[Comment: The same may be stated as in respect of the statements made by Ghana. ***This did not mean general opposition to the prohibition of “protection-defeating devices,” but only the intention to exclude general-purpose devices from the obligation.*** In fact, ***the delegation of Singapore, in its written proposal, proposed only one change in the draft provisions on technological measures. It would have left the prohibition of “protection-defeating devices” intact,*** but in paragraph (3) on the definition of such devices ***it would have replaced the expression “primary purpose or primary effect” of such devices by the expression “sole intended purpose.”***<sup>45</sup> Although this change would have narrowed the scope of devices too much, ***it does not support Prof. Geist’s implied allegation that Singapore was against the prohibition of protection-defeating devices.***]

Several countries called for narrowing the scope of the provisions. For example, Jamaica noted that “in the view of her Delegation, the formulation ‘any of the rights covered by the rights under the Treaty’ was too broad and imprecise and its proposed amendment would not contravene the basic intention of the Article.”<sup>46</sup>

[Comment: Prof. Geist forgets to mention that ***the amendments proposed by the delegation of Jamaica in writing did not aim at any change in the essence of the obligation to prohibit certain “preparatory acts.”*** They would have only involved certain wording changes concerning the knowledge requirement and in the definition of “protection-defeating devices” in paragraph (3) of the draft articles.<sup>47</sup> This definitely ***does not support Prof. Geist’s contention that Jamaica would have been against the prohibition of “protection-defeating devices.”***]

The Australian delegation sought to modify the provision to “confine its operations to clear cases of intended use for copyright breaches.”<sup>48</sup>

[Comment: First, this comment ***mainly concerns the “interface” between TPM protection and exceptions which is a separate issue,*** and secondly, ***the current Australian law*** – as also noted by Prof. Geist – ***does show the understanding that the treaty provisions require the protection of both access-control and copy-control TPMs and the prohibition of “preparatory***

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<sup>44</sup> *Ibid.*

<sup>45</sup> Document CRNR/DC/12, see *Records*, p. 397.

<sup>46</sup> Prof. Geist’s chapter, p. 219-220.

<sup>47</sup> Document CRNR/DC/37; see *Records*, p. 419.

<sup>48</sup> Prof. Geist’s chapter, p. 220.

**acts.” Thus, *it could hardly be derived from all this that the Australian position would support his claims.***]

The Norwegian delegation “agreed with those who had proposed narrowing the scope of those provisions, for the main reason that such provisions should not prevent legitimate use of works, for example, private and educational uses, and use of works which had fallen into the public domain.”<sup>49</sup>

[Comment: Again, these statements ***did not concern the scope of protection proper in the sense that it does not have to extend to access-control measures and to the prohibition of “preparatory acts,” but another aspect; namely the general coverage of the treaty provisions in the sense that it should not extend to the public domain*** (and obviously they do not) ***and the need to find solution in order to make the application of certain exceptions possible*** (a task which is taken care of by all the legislations that Prof. Geist does not like; by the US law, the EU Directive, etc. as well as by Bill C-32).]

The German delegation also “joined those Delegations which had considered that the scope of the provisions in question should be narrowed.”<sup>50</sup>

[Comment: ***It is not clear*** what the German delegate meant by “narrowing the provisions.” In any way, ***the position of Germany is now what is reflected in the EU Directive*** in the sense that TPM protection must cover all kinds of TPMs and that it should extend to the prohibition of “preparatory acts.” The German position is ***not suitable to support Prof. Geist’s contentions either.***]

After this, Prof. Geist states:

Contrary to Dr. Ficsor’s contention, of the nineteen delegations to speak in the debate in Main Committee I, thirteen of them spoke explicitly in favour of some amendment that would reduce the scope of the protection of technological measures, relative to the Basic Proposal. Three others contemplated some form of clarification to avoid over-application that would interfere with legitimate uses. Only three delegations — the US, Columbia, and Dr. Ficsor’s native Hungary — were substantially satisfied with the scope of the proposal.<sup>51</sup>

Prof. Geist ***seems to neglect two sets of facts.*** First, ***the reason for which he condemns the Canadian government for the TPM provisions of Bill C-32 is that those provisions also cover “access control” and that they prohibit certain “preparatory acts.” In this respect, however, the “score” is what I have indicated and not what he suggests*** (by grinding in another mill). ***None of the nineteen delegations referred to by Prof. Geist proposed that only “copy-protection” TPMs should be protected, and, in respect of “preparatory acts,” the comments only concerned the criteria of identifying the “preparatory***

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

**acts” that should be prohibited.** Even those countries which, in a certain stage of the negotiations, still raised doubts about the justification of TPM provisions in general, **expressed readiness to agree to the prohibition of circumvention-defeating devices if it did not cover multi-purpose devices. The real debate was about the latter aspect and about the task of establishing due balance between adequate TPM protection and the applicability of certain exceptions** (this, however, is another issue addressed in different ways in the various countries party to the Treaties where the scope of TPM protection, in accordance with the Treaties’ provisions, cover all TPMs, including “access-control” TPMs and the prohibition of duly determined “preparatory acts.”) My contention, as quoted above (not in the out-of-context New York brothels version, but the real one) was and is exactly this.

The second set of facts is that, **even if the comments of the 19 delegations referred to by Prof. Geist supported his contentions – which, however, is not the case; just the opposite is the case – his counting is inaccurate.** If Ghana spoke on behalf of the African Group, which seems to be the case,<sup>52</sup> it **spoke on behalf of 27 countries**, also counting those specifically mentioned above (**but then this also implied the acceptance of the option that the Treaty obligations require the prohibition of “protection-defeating devices” provided that it did not extend to multi-purpose devices**). At the same time, **Columbia’s supporting comments were made clearly on behalf of the Group of Latin American and Caribbean countries,<sup>53</sup> and 21 such countries** participated in the Diplomatic Conferences. Furthermore, **the Delegation of the European Communities also spoke on behalf of the then 15 Member States.**  
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Otherwise, **the comments made on behalf of the European Communities and the 15 Member States quite clearly reflect the understanding of the finally adopted text from the viewpoint of the question of whether adequate protection of TPMs is imaginable without prohibiting duly determined “preparatory acts.”** The EC delegation stated as follows: “when seeking the right balance in these provisions, **the elements of primary purpose and primary effect needed to be carefully assessed, and the provisions should possibly be simplified, without undermining their efficiency. He expressed interest in the suggestions made by the Delegation of South Africa.**”<sup>55</sup> **This shows the understanding –** and since no contrary statement were made in this respect, certainly not only the understanding of the EC and its Member States – **that it is not possible to fulfill the obligation to provide adequate protection required by the consensus text presented by the delegation of South Africa** (which then was adopted as such) **without the prohibition of “preparatory acts;” just the coverage of such acts**, from the viewpoint of the criteria of primary purpose and primary effect, **should be carefully assessed without undermining the efficiency of protection.** In fact, it was this understanding when the text of the Treaties’ provisions was worked out jointly by the various delegations during the

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<sup>52</sup> Records, p. 710, para. 517.

<sup>53</sup> Ibid, p. 714, para. 534.

<sup>54</sup> Ibid, p. 713, para. 529.

<sup>55</sup> Ibid.

informal consultations and that it was agreed upon that it would be presented by the South African delegation.

**After the review of the relevant parts of the report of Main Committee I – which, as seen above, have not supported his contentions – Prof. Geist continues: “Opposition to the proposal was not limited to the Main Committee.”<sup>56</sup> He refers to certain *comments made during the first sessions of the Plenary which were of the same nature as the comments made in Main Committee I, but much fewer and less detailed.* This was due to the fact that *the real debate on the TPM provisions took place later in Main Committee I and during informal consultations* where in addition to the delegations only the Chairman of Main Committee I and the Secretary of the Diplomatic Conference (that is me, as WIPO Assistant Director General in charge of copyright) participated.**

**In the room where the informal consultations took place** – sometimes also in the night, but in quite a good mood – **there were many participants. Prof. Geist, however, quotes somebody to report on what happened who did not participate in those consultations and who** – according to the List of Participants – **was not even among the participants in the Diplomatic Conference;** namely Pamela Samuelson:

Facing the prospect of little support for the Chairman’s watered-down version of the US White Paper proposal, the US delegation was in the uncomfortable position of trying to find a national delegation willing to introduce a compromise provision brokered by US industry groups that would simply require states to have adequate and effective legal protection against circumvention technologies and services. In the end, such a delegation was found, and the final treaty embodied this sort of provision in article.<sup>57</sup>

With due respect to Professor Samuelson, **it did not happen in this way.** First, **the Chairman’s proposal was not a watered-down version of the US White Paper proposal.** The notes to the Basic Proposal clearly indicated the basis: **it had been based on the converging elements of the treaty-language proposals submitted by the EC and the Member States, the US and the Latin American countries.**<sup>58</sup> Secondly, the compromise text was **“brokered” not by the US industry groups, but, as regards the US, by the US delegation – and, of course, not alone by the US delegation** since a diplomatic conference is even more complex than tango; not just two, but many more partners are needed for brokering a consensus text. In the 33-member US delegation, in addition to the government officials, all the major stakeholder groups were represented in a well-balanced way: not only certain copyright industries, but **also IT industries**, which

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<sup>56</sup> Prof. Geist’s chapter, p 220.

<sup>57</sup> *Ibid*, p. 221; the quotation from Pamela Samuelson: „The US Digital Agenda at WIPO” (1996-1997) 37 V. J. Int’l L. P. P. 369 (hereinafter: Samuelson).

<sup>58</sup> See *Records*, pp. 216 and 320. When the Chairman of Main Committee I opened the debate on the draft provisions included in the Basic Proposal, he also clearly stated: “The provisions on obligations concerning technological measures were based on the proposals presented by certain Governments in the preparatory process.” (*Records*, p. 709).

were campaigning for as narrow TPM protection as possible, **as well as the organizations of academics, educators, researchers and libraries**. Thirdly, **it was not the case that a delegation “brokered” a compromise text and then it tried to find another delegation to present it**. At the informal consultations, **the consensus texts brokered were the results of joint efforts** – in which the selected “brokers” (the Chairman of Main Committee I and the Secretary of the Diplomatic Conference) also participated – and then **the roles of presenting the texts were distributed among the various delegations volunteering to fulfill this task**.

Professor Samuelson seems to have based her report on what she heard from others (but what those others told her was possibly also just hearsay).

**Prof. Geist, however, does not quote that part of Professor Samuelson’s article which, although from a special angle, refers to the essence: “The inclusion of terms like ‘adequate’ and ‘effective’ protection in the treaty will mean that US firms will be able to challenge national regulations that they deem deficient.”**<sup>59</sup> This refers to the main point, although it should have been stated in a somewhat different way, since **not only US firms but any owners of rights are able to challenge national legislations that they deem deficient and that are truly deficient** – because they do not fulfill the requirements of adequacy and efficiency. This is truly the outcome; **these are the criteria and the reasonable limits of “flexibility.”** The negotiation history of the TPM provisions confirms this as **it also fully confirms my “contention” which** – now, at the end of the description of the “negotiation history” **I quote again:**

To sum up: On the basis of the documents of the preparatory work as reflected in the records of the Diplomatic Conference, it may be stated that **there were truly animated debates about the provisions on technological protection measures, but nothing in these documents contradicts the interpretation outlined above; namely that, since no protection may be adequate without prohibiting certain “preparatory acts,” Contracting Parties should prohibit such acts; just they should duly determine their scope**. The majority of those delegations did not, in fact, oppose the essence of the original language used in the Basic Proposals either, but **rather made comments on certain details of the definition of “protection-defeating devices” or stressed the need for not extending the provisions to also cover non-protected material and for guaranteeing the applicability of certain exceptions and limitations** (an issue which should and may be settled adequately as discussed below).<sup>60</sup> (Emphasis added.)

**In contrast, the “negotiation history” does not support Prof. Geist’s contentions.**

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<sup>59</sup> Samuelson, p. 369.

<sup>60</sup> Ficsor on IP Osgoode, pp. 14-15.

## **Implementation of the Treaties by Contracting Parties (“subsequent practice”)**

Prof. Geist, after that he did not seem to pay as much attention to the plain language (ordinary meaning of the terms) of the Treaties as required by the Vienna Convention and fails in his attempt to justify his anti-C-32 contentions on the basis of the „negotiation history,” offers a brief review of the implementation of the TPM provisions. He begins with the following statement:

As noted above, according to the Vienna Convention on the Law of Treaties, state implementation is a factor in considering how to interpret treaty provisions. In view of the broad range of interpretations open to the anti-circumvention provisions in the WIPO Internet treaties, it should come as little surprise to find that there is wide divergence among ratifying countries in the way they have implemented their anti-circumvention obligations into national law. Although a comprehensive review of the implementing legislation of the countries that have ratified the WIPO Internet treaties is beyond the scope of this article, a spectrum of approaches is presented below.<sup>61</sup>

First of all, ***certain comments are needed concerning his following statement: “according to the Vienna Convention on the Law of Treaties, state implementation is a factor in considering how to interpret treaty provisions.”***

It is worthwhile quoting the relevant provision (Article 31(3)(b)) of the Vienna Convention:

3. There shall be taken into account, together with the context:...
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

That is, ***what is to be taken into account together with the context of the treaty provisions is an agreement established as a result of “any subsequent practice in the application of the treaty.”*** Thus, although it is true what Prof. Geist states – namely, that “state implementation is a factor in considering how to interpret treaty provisions” – ***not any kind of implementation practice may be an appropriate basis of interpretation.***

Sir Ian Sinclair, in his authoritative book on the Vienna Convention points this out in the following way:

The value and significance of subsequent practice ***will naturally depend on the extent to which it is concordant, common and consistent. A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications.***

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<sup>61</sup> Prof. Geist’s chapter, p. 222.

It should... be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice – that is to say, concordant subsequent practice common to all parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention.<sup>62</sup>(Emphasis added.)

**Prof. Geist's announced intention**, in fact, **is to prove that there is no established substantial practice, and therefore there is complete freedom – unlimited flexibility** – of Contracting Parties how to implement the TPM provisions or even regarding the question of whether or not they implement the provisions at all.

However, **this contention is not well-founded either. There are emerging standards** – definitely followed by Canada's major trading partners – **which correspond to the basic aspects of the TPM provisions of Bill C-32**. These include: (i) TPM protection for both access-control and copy-control TPMs; (ii) prohibition of duly determined "preparatory acts;" (iii) provisions to guarantee due balance between adequate TPM protection and the applicability of certain exceptions, without, however, allowing circumvention directly by the beneficiaries of any kinds of exceptions.

This may be seen also on the basis of the examples presented by Prof. Geist. However, it becomes even more evident by completing the description he has given about certain national laws and by referring to further relevant copyright laws.

Let us see his examples:

**Canada:** He refers to **a previous draft** which did not seem to be in accordance with the treaty requirements and which has been dropped. It is needless to say why **this could hardly be referred to as a relevant "subsequent practice"** in the sense of Article 31(3)(b) of the Vienna Convention.

**United States:** **It would be difficult to characterize the US legislation in any way other than that – as that as part of the "subsequent practice" – it is an example of the emerging standards I have outlined above.** No previous drafts which were different but which – rightly enough – were not adopted and no declaration of some law professors who did not like TPM protection and, on the basis of flawed arguments, opposed due implementation of the Treaties has any relevance whatsoever as an indication of "subsequent practice" of Contracting Parties. The same is true regarding the statements quoted by Prof. Geist from Bruce Lehman and from Marybeth Peters (who otherwise pointed out exactly that the fact that the treaty provisions do not specifically mention access-control TPMs – as they do not specifically mention any other categories of TPMs either – does not mean that, for a due implementation of the Treaties, it would not be necessary to protect those TPMs, or that the absence of a special mention of the prohibition

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<sup>62</sup> Sir Ian Sinclair: „The Vienna Convention on the Law of Treaties,“ Manchester University Press, 1973, p. 173-174.

of “preparatory acts” as a condition of adequate protection would not be required for such protection).<sup>63</sup>

***Australia:*** Prof. Geist himself recognizes that the Australian legislation ***does follow the standards I have outlined above.*** Obviously, ***only this is relevant from the viewpoint of emerging standards regarding “subsequent practice” and not a law which has been modified and is not applicable anymore.***

***EU and its 27 Member States:*** the provisions of Article 6 of the Information Society (Copyright) Directive are ***in perfect accordance with the emerging standards outlined above.*** They include the following elements: (i) protection for both “access-control” and “copy-control” TPMs and irrespective of whether or not circumventions have any link with infringements; (ii) prohibition of “preparatory acts;” (iii) appropriate balance between TPM protection and the applicability of certain exceptions without simply removing TPM protection for direct applicability of any kinds of exceptions.

In this connection, it is necessary to refer to an alleged EC document prepared by somebody in the European Commission in connection with the ACTA negotiations and which have been leaked. Prof. Geist would like to use this funny “leaked” document as an argument to try to prove that the EU Information Society (Copyright) Directive does not protect access-control TPMs.<sup>64</sup>

Very briefly: if such an analysis were “leaked” let us say to the European Court of Justice, in the framework of a procedure where, contrary to its good taste, it would be constrained to deal with something of this poor quality, it would declare it to be completely groundless and being in head-on crash with the *acquis communautaire*.

Let us take the text which allegedly has been leaked (I add access to those parts of the text which deserve special attention, and I add my comments):

As far as technical protection measures (TPMs) are concerned ***the aim of this provision is that only circumvention undertaken to commit an IP infringement can be made subject to civil or criminal liability.***

[Comment: The aim of the Treaties’ and the EU Information Society (Copyright) Directive’ TPM provisions do not reflect such kind of unserious position. Copyright

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<sup>63</sup> Prof. Geist tries to suggest that the „majority” of the 88 Contracting Parties have not implemented the Treaties in the US way. This is not true, of course. First of all, it is not clear what he truly means by the US way. Let us refer, however, to those aspects in connection with which he attacks C-32; namely: (i) protection for all kinds of TPMs as prescribed by the Treaties, including access-control measures; (ii) prohibition of duly determined “preparatory acts” as a condition of providing adequate protection for TPMs; (iii) not reducing prohibition to circumventions linked to infringements (which would make the Treaties and their implementation meaningless, since it would consist in the prohibition of what is already prohibited); (iv) establishing due balance of interests between TPM protection and the applicability of certain exceptions, but not in a way to directly allowing circumvention for any kinds of exceptions in any manner and in any form. The US Copyright Act really corresponds to this model, but the clear majority of Contracting Parties having implemented the Treaties also does so. Certainly the overwhelming – sweeping – majority of Canada’s major trading partners follow this way of *bona fide* implementation of the Treaties.

<sup>64</sup> See <http://www.michaelgeist.ca/content/view/5435/125>.

infringements are prohibited and are subject to civil or criminal liability. It would be completely needless to include provisions to prohibit what is already prohibited. The objective of the Treaties and the Directive is not this kind of useless repetition, and as far as the Directive is concerned, it makes this clear; it is not necessary to interpret it by an EC official. It is obvious on the basis of the text of Article 6 that the protection of TPMs are not limited against circumventions linked to infringements and that, although there are provisions to guarantee the availability of TPM-protected works and objects of related rights to the beneficiaries of certain exceptions in a duly regulated and well-balanced manner, the Directive does not allow the direct circumvention of TPMs in order to apply any exceptions for any purpose in any manner and in any form.

If the alleged leaked text truly exists, it seems that the drafter has not read with due attention the relevant recitals and provisions of the Directive or just disregarded them.

First of all, of course, no objective is mentioned or referred to in the Directive about the existence of which this “opinion” is speaking, and there is nothing in the Directive that could be distorted in this way.

The relevant recitals simply state as follows:

**(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures.** In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, **there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.**

**(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases** without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

The recitals do not speak at all about infringements and not at all about alleged reduction of protection to circumventions linked to infringements. There is nothing

like that in the Directive. The alleged leaked “analysis” states something that is non-existent in the *acquis communautaires*.

Most importantly, the provisions of Article 6 of the Directive contradict such an unfounded allegation in a way that could not be any clearer. Article 6(1) simply provides that: “Member States shall provide adequate legal protection against the circumvention of **any effective technological measures**, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective” (emphasis added), and then Article 6(2) prohibits “preparatory acts” in respect of **any TPMs**. Following this, Article 6(3) defines TPMs clearly covering both access-control and copy-control:

3. For the purposes of this Directive, the expression ‘**technological measures**’ means **any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright** as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed ‘effective’ where the use of a protected work or other subject-matter is controlled by the rightholders **through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective**. (Emphasis added.)

Having read this text, it is difficult to understand how can one contend that the Directive only prohibits circumventions that are linked to infringements. The definition covers any TPMs “**to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright**.” Any such acts! There is no indication whatsoever here about any linkage of the prohibition of circumvention to infringements. Also it goes without saying that “rightholder” – unless expressly provided otherwise (and in this case, there is no contrary provision) – does not only mean original rightholders but also their successors-in-title, licensees, etc. This has always been a more than logical general understanding under the international treaties and the laws implementing them.

In view of the **clear statement in the definition that both access-control and copy-control measures are protected** it is particularly incomprehensible what is included in the “leaked analysis.”

It is already at this point that we would have to stop, since this something which is said to be a leaked as an EC opinion is so much obviously contrary to what is truly the situation under the *acquis*.

However, it should also be seen that, if there has truly been somebody in the EC who has written this “analysis,” he or she presupposes of the EU bodies which have adopted the Directive that they have done something completely illogical. According to the “analysis,” their intention – nowhere declared and non-existing, of course – was to restrict prohibitions to circumventions linked to infringements, and

consequently (as it is also explicitly stated in the “opinion”) to make it possible the application exceptions by simply allowing circumvention for such a purpose. Still the EU bodies which adopted the Directive have ***included detailed provisions on how the applicability of certain – only certain! – exceptions should be guaranteed; and not directly but in a duly regulated way.***

No, the European institutions did not act in such an illogical way; the above-quoted “leaked” statement has nothing to do with the *acquis*. However, let us continue with these statements.]

***The Commission reads the provision*** of paragraph 2.18.5, including the definition provided in footnote 14, ***as implying that all protection granted to TPM are limited to providing adequate legal protection and effective legal remedies against the circumvention of TPM, as long as:***

- the TPM are effective (TPM themselves are not a form of copyright or neighbouring rights);
- the TPM are used by authors, performers or producers of phonograms in connection with the exercise of their rights (i.e., ***TPM used by any other group, such as broadcasters, to control access to scheduled programmes are not protected, TPM used by the group of beneficiaries to achieve goals not linked to protecting their copyrights ("access control") are not protected either;***
- ***the TPM are used to restrict acts, in respect of works, performances or phonograms, which are not authorised by authors, performers or producers of phonograms or are not permitted by law - this essentially implies two things:***
  - (1) ***acts not prohibited by copyright, such as browsing, linking, ... cannot be prevented by using TPM; and***
  - (2) ***TPM cannot be used to override statutory exceptions ("permitted by law").***

***In order to clarify the concerns in relation to "access control", it is the view of the Commission that with the current definition given in footnote 14 it cannot be inferred that copyright allows rightholders to prohibit certain forms of "use" and thus prevent access to works. This form of "usage" control is not part of the EU acquis.***

As international and domestic laws currently stand, copyright and related rights allow the right holder to prevent certain acts such as reproductions, fixations, adaptations, the distribution of copies and the communication to the public (including making a work available to the public in an interactive manner). ***None of these restricted acts should be confused with a right to prevent use (e.g., reading, viewing) of a work. Any attempt to expand copyright to cover "use" would***

***muddle the distinction between IP and conditional access. The Commission cannot follow an approach where controlling access to services is mixed with the infringement of IP rights.***

[Comment: The Commission is not authorized to express disagreement with a Directive adopted according to the established internal rules of the EU and to read into it something that is 100% contrary what it truly says. Considering the language, my strong impression is that the drafter, if he or she really exists, had set aside the text of the Directive and has expressed his or her own views. The text speaks about browsing,<sup>65</sup> etc., instead of the question of, e.g., whether the access-control of a streamed film could be freely circumvented (yes?, it would be a most surprising answer considering the *acquis*).

As far as statutory exceptions are concerned, as it is clear under Article 6(4) of the Directive, their applicability is not settled in the way that the “opinion” suggests. ***The prohibition of circumvention is not removed simply for any exceptions but only those indicated in the provisions and only in the way regulated there in a detailed manner.***

Access-control TPMs are covered by Article 6(3) and, such measures makes possible the exploitation of works through conditional access systems. The alternative would be just to allow only one thing in the digital online environment: to make available works to anybody for use without any control whatsoever. The Directive does not follow this kind of idea.

Let us look more thoroughly, for example, at this part of the above-quoted text:

„[all protection granted to TPM are limited to providing adequate legal protection and effective legal remedies against the circumvention of TPM, as long as...]

the TPMs are used by authors, performers or producers of phonograms in connection with the exercise of their rights (i.e., ***TPMs used by any other group, such as broadcasters, to control access to scheduled programmes are not protected, TPMs used by the group of beneficiaries to achieve goals not linked to protecting their copyrights ("access control") are not protected either;***)”

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<sup>65</sup> „Browsing” is possible in the case of lawfully obtained copies. Also, there are various TPM-based business models that make „browsing” (partial access to works in order to get an impression about its topic and quality) possible without, however, making available the entire work for use. In fact, it is in the interest of the owners of rights not only allow but also proactively offer such an insight, since they do not want to keep their works for themselves but to make available to the public in an ordinary way for as broad use as possible. For example, in the case of films, „trailers” are created exactly for such a purpose. An idea that the circumvention of access-control TPMs should not be prohibited if the objective of the consumer is „browsing” would mean that such a consumer would be in the possession of the work; full stop. Why would he or she stop just at „browsing”? As a matter of mere self-constraint? Or because there would be a legal provision according to which, when TPM protection is broken for the purpose of „browsing,” the persons circumventing TPMs should take a solemn oath that, even if now they could use the entire works the way they want without any obstacle whatsoever, they still would not do so? It would be a mockery to call this adequate protection of TPMs.

The concept of related rights, in addition to the rights of performers and phonogram producers, also covers the rights of broadcasting organizations. The provisions of the Information Society (Copyright) Directive (see in particular Articles 2 and 3(2) which explicitly list broadcasting organizations as owners of those rights which are protected by the Directive) do not leave any doubt that the expression “rightholder... of any right related to copyright” appearing in the definition of TPMs in Article 6(3) of Directive is used in this sense and that it also means broadcasters. In view of this, how could anybody have been able to write down such a statement as part of the “reading” of the Directive that “TPMs used by... broadcasters are not protected”?!

The phrase “TPMs used by the group of beneficiaries to achieve goals not linked to protecting their copyrights (‘access control’) are not protected either” has several problems. First, the text of the Directive (and indirectly the two WIPO Treaties) is “paraphrased” in an extremely easy-going way. The text is about TPMs used by owners of rights “**in connection with**” the exercise of their rights and not “for the exercise” of their rights or as “paraphrased” above: “protecting their rights.” It is discussed above why the concept of TPMs used “in connection with,” and not just “in the course of, exercising copyright covers all kinds of TPMs, also access-control measures. However, in the context of the Directive, there is no real need to elaborate on this, since Article 6(3) clarifies and confirms this in 100% clarity; it states explicitly: “access control” TPMs are also TPMs covered by the provisions of the Directive. Since this is the case, it truly may make one curious how anybody could have included a statement in an EU document according to which the *acquis* does not protect access-control TPMs. How could it have happened? Should we imagine that such an official simply did not pay attention to the text of the Directive? This is not probable since the leaked “analysis” speaks about “reading” of the Directive. Thus, is it rather possible that it has happened in the following way: the drafter of the “opinion” read the Directive but he or she did not agree with the definition included in Article 6(3) of the Directive and, therefore, he or she decided to replace it with his or her own definition? All these possible explanations are so absurd that this strengthen my optimistic belief that something like this simply cannot happen in the European Commission.

However, let us continue the reading of the “leaked” text.]

In these circumstances the reference to access control is highly sensitive. ***The only way acceptable by the Commission in the ACTA text was by adding a caveat to footnote 14 which read as follows: "without prejudice to the scope of copyright or related rights contained in a Party's law..."***

***By doing that, the definition in footnote 14 does not extend the scope of protection to encryption devices or other tools to control access independently to the exercise of their rights by authors, performers or producers of phonograms.***

[Comment: As far as the EU is concerned, if such a comment has really been made, it is a major self-contradiction. The proviso ***"without prejudice to the scope of copyright or related rights contained in a Party's law..."*** is perfectly

justified, and it is just normal that the EC insists on rules that are in accordance with the *acquis*. However, the statement according to which TPM protection “**does not extend the scope of protection to encryption devices or other tools to control access independently to the exercise of their rights by authors, performers or producers of phonograms**” is in complete contradiction with the definition of “technological measures” included in Article 6(3) of the Directive and with the provisions of Article 6 in general.]

However, let us further underline what kind of misinterpretation of Article 6 of the Directive is contained in the alleged leaked EC text by referring to the understanding of the EU bodies – also duly reflected in the text of the Directive – reached in the legislative process. It is this which is truly relevant and decisive and not any arbitrary “reading” of somebody who apparently does not agree with TPM provisions of the Directive.

***In an earlier version of the draft Directive, there was truly reference to infringements, but it was recognized that it was wrong. The definition which appears now in Article 6(3) of the Directive appeared, for the first time, in the Common Provision of the Council adopted on September 28, 2000. The definition did not speak about infringements anymore, and it was not just by chance.*** This was pointed out in the comments in the Statement of the Council’ Reasons concerning the Common Position:

43. In its amendment 47, the European Parliament had suggested that it be stipulated... that the legal protection of technological measures prevailed over the exceptions listed in Article 5. The Commission had addressed this issue under Article 6(3) of its amended proposal, providing that only technological measures preventing or inhibiting the infringement of copyright were protected under Article 6. This meant that technological measures designed to prevent or inhibit acts allowed by law (e.g. by virtue of an exception) were not protectable under Article 6. In other words, under the Commission’s amended proposal, the exceptions provided in Article 5 prevailed over the legal protection of technological protections measures. The Council has taken a different approach, which it considers strikes a reasonable balance between the interests of rightholders and those of beneficiaries of exceptions. It has adopted in Article 6(3) first sentence of its Common Position a definition of the protectable technological measures which is broader than the one provided for in the Commission’s amended proposal or the one set out in the Parliament’s amendment 54. ***The terms “... designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorized by the rightholder of any copyright... in the Council’s definition make it clear that that Article 6(1) protects against circumvention of all technological measures regardless of whether the person performing the circumvention is a beneficiary of any of the exceptions provided for in Article 5.”***<sup>66</sup> (Emphasis added.)

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<sup>66</sup> “Common Position (EC) No 48/2000 of 28 September 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society,” Official Journal C 344 , 01/12/2000 P. 0001 – 0022; available at <http://eur->

In the Communication from the Commission to the European Parliament and the Council of October 20, 2000, the Commission stated that it had accepted all the changes made to its Amended Proposal by the Council – included, of course, the above mentioned one. The Communication described in very clear terms the understanding of the Commission:

The relationship between the legal protection of technological measures and the exceptions (Article 5) has been amongst the most political and difficult topics of this Directive. The issue had been addressed by the European Parliament in its amendment 47. ***In the view of the European Parliament, the legal protection of technological measures should always prevail over the exceptions set out in Article 5. This had not been accepted by the Commission in its amended proposal. The Commission retained the approach of its initial proposal, under which only those technological measures which prevent or inhibit the infringement of copyright were to be protected. In this regard, the Council has achieved a reasonable compromise, midway between amendment 47 of the European Parliament and the Commission's amended proposal and one which seeks to accommodate the interests of rightholders and beneficiaries of exceptions. In certain circumstances, provision is made for intervention on the part of Member States (either obligatory or discretionary) in order to ensure that the beneficiaries of exceptions have the means to benefit from that exception.***

***In its Article 6(3), the common position provides for a definition of protected technological measures which is broader than the one set out in the Commission's amended proposal. The effect of this definition is two-fold.***

Firstly, ***it implies that Article 6(1) protects against circumvention of all technological measures*** which the person concerned carries out in the knowledge, or with reasonable grounds to know that he or she pursues such an act.

Secondly, under Article 6(2), consistent with amendment 47 of the European Parliament, ***Member States are required to provide adequate protection against the relevant circumscribed activities.*** The effect of this provision is likely to give rightholders significant control over the particular activities specified in Article 6(2). ***The Commission can support this solution as any other approach would have carried a high risk of abuse and piracy.***

Article 6(4) subparagraph 1 sets out that ***rightholders have to provide the beneficiaries of the exceptions and limitations listed in that subparagraph, Article 5(2)(a),(2)(c),(2)(d),(2)(e), (3)(a),(3)(b) or 3(e)), with the means to benefit from the exception or limitation*** in question either voluntarily or by way of agreements with other parties. In the absence of

voluntary measures taken by rightholders, Member States are obliged to ensure that such means will exist in practice.

**Article 6 (4) subparagraph 2, provides for greater protection, as far as private copying is concerned.** This is in line with what the Commission had suggested in its amended proposal (under Article 5(2)(b)(bis)) and the European Parliament in its amendment 37, although not in the context of Article 6. In subparagraph 2, once again in the absence of voluntary measures taken by rightholders, **Member States, may (but are not obliged to) take appropriate measures to ensure that rightholders enable beneficiaries to engage in certain specific acts of private copying covered by Article 5(2)(b). In view of the detrimental effect private copying and in particular digital private copying may have on rightholders, a reference to Article 5(5), the so-called "three-steps-test", has been added. Furthermore, the text acknowledges that any such measures do not prevent rightholders from adopting measures which limit the number of reproductions...**

**The Commission takes the view that the solutions found in the Council to the difficult issues posed by Article 6 and in particular its relationship to Article 5 represent remarkable progress in the effort to ensure effective and adequate protection of rightholders whilst at the same time not neglecting the legitimate interests of beneficiaries of exceptions. It can therefore support it fully.**<sup>67</sup>

After this, the text of Article 6 of the Directive did not change. It was adopted with this understanding which is duly and clearly reflected in its text.

On the basis of the discussion above, it is needless to say that the description provided in the allegedly "leaked" document about the EU *acquis communautaire* is completely unfounded. The EU Directive does protect all TPMs, including access-control TPMs, and this protection is not only against circumventions linked to infringements.<sup>68</sup>

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<sup>67</sup> "Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information Society," SEC/2000/1734 final - COD 97/0359; available at <http://www.eur-lex.europa/LexUriServ/LexUriServ.do?uri=CELEX:52000SC1734:EN:NOT>. (Last time visited on November 8, 2010.)

<sup>68</sup> Otherwise, in the meantime the final consolidated text of ACTA has been published on the official website of the European Commission.

(See [www.trade\\_ec.europa.eu/doclib/docs/2010/october/tradoc\\_14669.pdf](http://www.trade_ec.europa.eu/doclib/docs/2010/october/tradoc_14669.pdf).)

It confirms that contrary to the alleged „leaked“ analysis, the TPM provisions do not reduce protection against circumventions linked to infringements, and that the definition of TPMs, in accordance with the *acquis*, expressly states that both access-control and copy-control measures are covered: „For the purposes of this Agreement, **technological measure** means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances or phonograms, which are not authorized by authors, performers, or producers of phonograms, as provided for by a Party's law. Without prejudice to the scope of copyright or related rights contained in a Party's law, technological measures shall be deemed **effective** where the use of protected works, performances or phonograms is controlled by authors, performers, or producers of phonograms through the application of a relevant *access control* or protection

***Japan:*** Prof. Geist *recognizes that the Japanese law also prohibits “preparatory acts.” He would like to present it, however, as different from the US, Australian and EU implementation in the sense that it does not extend to the prohibition of access-control measures. This is, however, a badly founded contention. The Japanese TPM protection also extends to access-control measures;* just the provisions prohibiting the circumvention of such measures and the related “preparatory acts” are ***included in the Unfair Competition Prevention Law*** rather than in the Copyright Act proper.<sup>69</sup> It is, of course, prescribed in the Treaties in which concrete piece of legislation a Contracting Party provides adequate protection for TPMs as long as national legislation provides for such protection.

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process, such as encryption or scrambling, ***or a copy control mechanism***, which achieves the objective of protection.” (See footnote 14; emphasis added.) The relevant ACTA provisions – Article 2.18(5) and (6) also prohibit „preparatory acts.”

<sup>69</sup> Unfair Competition Prevention Law No. 47 of 1993 consolidated text with subsequent amendments; Article 2 on Definitions:

(1) The term ***“unfair competition”*** as used in this Act means any of the following:..

(x) acts of assigning, delivering, displaying for the purpose of assignment or delivery, exporting or importing (a) devices (including machines incorporating such devices) ***having the sole function of enabling the viewing of images or hearing of sounds, the running of programs***, or the recording of images, sounds or programs which are restricted by technological restriction measures that are used in business (excluding technological restriction measures used to restrict all but specific persons from viewing images or hearing sounds, running programs, or recording images, sounds or programs), by ***obstructing the effect of such technological restriction measures***, or (b) ***data storage media or machines on which programs having only such function*** (including other types of programs combined with such programs) have been recorded, or acts of providing programs having only such function through an electric telecommunication line;

(xi) acts of assigning, delivering, displaying for the purpose of assignment or delivery, exporting or importing to all but specific persons (a) devices (including machines incorporating such devices) ***having the sole function of enabling the viewing of images or hearing of sounds, the running of programs***, or the recording of images, sounds or programs which are restricted by technological restriction measures that are used in business to restrict all but said specific persons from viewing images or hearing sounds, running programs, or recording images, sounds or programs, by ***obstructing the effect of such technological restriction measures***, or (b) ***data storage media or machines on which programs having only such function*** (including other types of programs combined with such programs) have been recorded, or the act of providing programs having only such function through an electric telecommunication line;...

(7) The term ***“technological restriction measures”*** as used in this Act means measures ***which restrict the viewing of images or hearing of sounds, or running of programs***, or recording of images, sounds or programs through electromagnetic means (which means electronic means, magnetic means or other means that are imperceptible by humans), and which adopt a method of recording on data storage media or ***transmitting signals that make machines for viewing and hearing*** (which means machines used for viewing images or hearing sounds, running programs, or recording images, sounds or programs; the same shall apply hereinafter) react in a specific manner along with the images, sounds or programs, or a method of recording on data storage media or transmitting. (Emphasis added.)

The Law provides the consequences of such prohibited acts such as injunctions, destruction of the devices concerned and damages caused to the owners of rights.

**Switzerland:** Yes, Switzerland *seems to be an exception in certain respect*. However, for those who know the national laws of the major trading partners of Canada this oak tree can hardly be used to cover the solid maple forest of emerging standards. ***Allowing circumvention directly by any kinds of exceptions in any manner does not result in adequate protection*** (this appears to include private use which means no TPM protection at all in the digital online environment; and no possibility for any “business model” other than allowing free access for the entire Internet and mobile population – the size of which is getting ever closer to cover anybody in the world who cares at all to have copies or receive transmissions containing protected material). It does happen time and again that certain Contracting Parties do not fulfill their treaty obligations. In this respect, Switzerland is such a country. However, as pointed out by Sir Ian Sinclair quoted above, ***such an isolated case has nothing to do with the concept of “subsequent practice” that may be taken into account for the interpretation of a treaty.***

**Certain developing countries having not implemented the Treaties:** The example of a country that has not implemented a treaty obviously ***cannot be reasonably referred to as a relevant indication of “subsequent practice” of implementing the treaty.***

**Draft laws of countries not party to the Treaties:** The question of the practice of Contracting Parties of implementing a treaty obviously only emerge in respect of countries that are party to the treaty and which have implemented the treaties. ***It could hardly be regarded as a serious attempt at identifying “subsequent practice” of implementation of a treaty on the basis of mere draft laws of countries not party to the treaty.***

In the latter category, ***Prof. Geist refers to draft laws of two “BRIC” countries – Brazil and India – that are not party to the Treaties*** and in the case of which one could not speak about any “subsequent practice” of Contracting Parties. ***The other two “BRIC” countries – China and Russia – however, are party to the Treaties and have implemented them.*** Although, I do agree with Prof. Geist that, in such a study, it would hardly be possible to try to analyze all the various national laws, ***even a very brief review could hardly be sufficiently representative from the viewpoint of “subsequent practice” if it does not extend to these two huge countries and important players in the worldwide political and trade relations.***

**China:** Article 4 of the “Internet Regulations” which reads as follows: „No organization or person shall intentionally avoid or destroy the technical measures, shall intentionally manufacture, import, or provide the public with devices or components mainly used to avoid or destroy the technical measures, and shall intentionally provide technical services to others to avoid or destroy the technical measures, unless it is provided for by any law or administrative regulation that the technical measures may be avoided.” This provision ***is in accordance with the emerging standards applied by Canada’s major trade partners (and also in Bill C-32)***, since the protection against circumvention covers ***any kinds of TPMs*** (both access-control and copy-control measures) and to ***the prohibition of “preparatory acts.”***

**Russia:** Article 1299 of Part IV of the Civil Code of the Russian Federation contains the following provisions on “Technical Means of Protection of Copyright:”

1. Technological means of protection of copyright are any technology, technological devices or their components **controlling access to a work, or preventing or limiting acts that are not permitted by the author or other rightholder** with respect to the work. .
2. With respect to works, the following shall not be allowed:
  - 1) performing, without the permission of the author or other rightholder, acts directed at removing the limitations on the use of a work established by the application of technical means of protection of copyright;
  - 2) manufacture, distribution, rental, providing for temporary uncompensated use, importation, advertising of **any technical device or its components**, and their use for the purpose of obtaining income, **or rendering services** when, as the results of such acts, it becomes impossible to use the technical means of protection of copyright, or such technical means cannot ensure proper protection thereof. (Emphasis added; the application of these provisions is extended *mutatis mutandis* to related rights by the relevant provisions of the Civil Code.)

That is, ***the Russian copyright law is in accordance with the standards followed by Canada’s major trading partners (and also by Bill C-32):*** TPM protection clearly extends to both access control and copy-control measures and includes the prohibition of “preparatory acts.”

***Thus, contrary to Prof. Geist’s contentions, there are emerging standards for the implementation of the Treaties’ TPM provisions in the basic aspects shared by Canada’s major trading partners. Bill C-32 is in accordance with those standards and rightly enough since these are necessary for any bona fide fulfillment of the treaty obligations to provide adequate protection for all kinds of TPMs. The “flexibility” of the treaty provisions – which does exist in certain respects – does not extend so far as to make it possible to disregard these requirements.***

### **Views expressed in legal literature**

Before addressing the last part of Prof. Geist’s study, it should be stressed that the views expressed in legal literature are not listed or referred to in the Vienna Convention among the direct or subsidiary sources of interpretation. Such views ***may only be interesting to the extent that they identify truly relevant interpretation sources as a result of thorough research of the negotiation history of a treaty or subsequent practice of its implementation or if they present well-founded arguments supporting this or that interpretation.*** It is obvious that ***no view expressed in legal literature may have any relevance that simply expresses disagreement with a treaty provision or with emerging standards as “subsequent practice,” or that is not in accordance with the***

***interpretation of a treaty that follows from the application of the provisions of Vienna Convention.***

This part of Prof. Geist's study begins again by characterizing me as a main figure of the forces of "inflexibility." My alleged leading role is emphasized, exaggerated and overstated so much that I might be even flattered and grateful to him for doing such publicity for his virtual namesake. I am not, however, because nobody knows better than me that this is not the case. What I have done is just thoroughly describing, on the basis of all the available documents what has happened during the negotiation process and analyzing the text of the relevant norms in accordance with what is dictated by the Vienna Convention concerning the interpretation of treaty provisions.

Prof. Geist presents my role as follows:

Dr. Ficsor is the unquestioned leader of those arguing for an inflexible implementation, complete with limited exceptions and strong anti-device provisions. He has written a text on the treaties as well as the WIPO Guide to its implementation. Ficsor is unequivocal in claiming that "adequate" legal protections necessitate broad protections that bear a striking similarity to the Basic Proposal that failed to find consensus support at the 1996 Diplomatic Conference. He argues:

Contracting Parties may only fulfill their obligations under Article 11 [of the WCT] if they provide protection and remedies:

- against preparatory acts (manufacture, importation and distribution of tools and offering of services);
- against circumvention of access controls and copy controls (and any other control of exercise of rights);
- against dual- or multi-use devices which are "primarily designed" for circumvention, have only limited commercial use other than circumvention, or are marketed for use for circumvention; and
- against individual components of such a device.<sup>70</sup>

***I am not such a leader and I do not argue for any kind of inflexibility (but for flexibility with due limits).*** I truly have written a "text;" it is a nearly 800-page "peer-reviewed" book on the negotiation history, interpretation and implementation of the two Treaties published by Oxford University Press<sup>71</sup> (well, it is a "text," but, as far as I know, it is one of the two most detailed descriptions and analyses of the two Treaties), and I have also truly written the WIPO Guide to the two Treaties (not as an "official interpretation" but still vetted by the WIPO Secretariat before its publication). He quotes the above text of mine from the latter book and ***he alleges that what I have expressed is in striking similarity to the Basic Proposal that failed to find consensus at the 1996 Diplomatic Conference. The truth is, however, that this is just the interpretation of the Treaties' TPM provisions as adopted and reflects the basic elements of the emerging standards of implementation of the Treaties followed by Canada's major trading parties.*** I do not want to react to the implied suggestion that those many countries followed me as a "leader" of allegedly inflexible interpretation and implementation of the

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<sup>70</sup> Prof. Geist's chapter, pp. 236-237.

<sup>71</sup> Ficsor 2002.

Treaties, since I do not think that such a thing could be taken seriously. ***If somebody was influenced it was me by seeing that the implementation practice emerging at that time was confirming this interpretation of the obligation of providing adequate protection for TPMs.***

What follows, however, is even more surprising. He states as follows:

***Professor Silke von Lewinski and Dr. Jörg Reinbothe***, co-authors of another text on international copyright law and members of the European Union delegation at the 1996 Diplomatic Conference, ***are the most notable supporters of the Ficsor position.*** They argue:

By its nature, Article 11 WCT provides for minimum protection, which Contracting Parties are free to go beyond in their domestic law. The question arises, whether this minimum protection only covers acts of circumvention. It seems that limiting the protection to such acts would not correspond to the objective of the provision. . . . Accordingly, the obligation to provide for “adequate protection” under Article 11 WCT would seem to require that rightsholders enjoy protection also against preparatory acts on top of protection against the acts of circumvention themselves.<sup>72</sup> (Emphasis added.)

I do not think that it is only Silke von Lewinski, Jörg Reinbothe and me who know that qualifying them as my “supporters” ***has nothing to do with reality.*** We were writing our books independently from each other. In fact, their book was published first (their 600-page “text” is ***the other most detailed description and analysis of the two Treaties***), but at that time also my book was already close to publication with finalized and edited text. ***It is another matter that our views are – on all the major issues – practically the same.*** This, however, ***is not the result of some of us being the supporter or follower of another.*** It simply follows from the fact that ***all of us had participated at all stages of the negotiation of the Treaties, all of us had taken into account all the relevant documents, and all of us had interpreted the same treaty provisions applying the same interpretation rules of the Vienna Convention.***

***Prof. Geist then states that “Ficsor and von Lewinski are frequently cited as evidence for the requirement to implement the WIPO Internet Treaties...”***<sup>73</sup> It is true that these two books along with the WIPO Guide are the most frequently cited, not as “evidence” but as reliable and authoritative sources due to the detailed description and analysis included in them.

***Although those two books deal with the Treaties as main subject matter*** (with references to other copyright and related rights treaties), ***there is another book which is regarded one of the most authoritative treatises (if not the most authoritative one) on the international copyright and related rights norms; namely, Sam Ricketson’s and Jane Ginsburg’s more than 1.500-page book published in 2005.*** It uses an extremely rich machinery for the interpretation of the treaties, including the two WIPO Internet Treaties, and ***they happen to***

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<sup>72</sup> Prof. Geist’s chapter, p. 237.

<sup>73</sup> *Ibid*, 237-238.

**express practically the same – or very similar views – on the main issues** of the interpretation as Silke von Lewinski, Jörg Reinbothe and me. Let me quote them on the issues of the protection of access-control measures and the prohibition of “preparatory acts:”

**[O]ne must... ask whether access controls are technological measures “used in connection with the exercise” of exclusive rights. Here the case for WCT coverage appears stronger.** For example, access controls may be used in connection with the exercise of the reproduction and communication rights, because an access-controlled copy, even if reproduced or communicated without authorization, will yield its copyist or recipient no benefits; that person will not be able to apprehend the work. Thus, **access controls underpin the reproduction, communication, and distribution rights...**<sup>74</sup>

**An interpretation that disfavors effective protection against circumvention by limiting the prohibited conduct to the sole act of circumvention, rather than encompassing the provision of devices as well, would be inconsistent with art. 11’s direction that member States “shall provide adequate legal protection and effective legal remedies against the circumvention”.**<sup>75</sup> (Emphasis added.)

No, Sam Ricketson and Jane Ginsburg, these two great scholarly figures, are definitely not my supporters. I do not think that, no matter how much he would like to flatter to me, even Prof. Geist would really want to allege something like this. Still their opinion, in essence, does not differ from mine.

Prof. Geist, however, after having stated that Silke von Lewinski’s and my books are cited most frequently in the way he has mentioned, adds: “a broader examination of the global scholarly analysis indicate many experts disagree.”<sup>76</sup>

**What he presents is a arbitrary collection of various views published in legal literature about which he believes that they may support his position.** They, however (i) **partly unsuitable for this purpose since in fact they do not say what he would like to read into them;** (ii) **partly are unclear in this respect;** and (iii) **partly simply express certain views that hardly stand serious scrutiny.**

First, a reference is made to a 2002 WIPO survey that “has acknowledged the flexibility in the language” in this way: “[t]he treaty language is general enough to allow significant flexibility to national governments in determining the details of appropriate implementation.”<sup>77</sup> This is, however, a statement that **does not contradict Sam Ricketson’s, Jane Ginsburg’s Silke von Lewinski’s, Jörg Reinbothe’s and my views.** Yes, there is flexibility; the question is only how the treaty provisions may be applied in a flexible way but still in accordance with the obligations prescribed in them.

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<sup>74</sup> Ricketson–Ginsburg, pp. 975-976.

<sup>75</sup> Ricketson–Ginsburg, p. 977.

<sup>76</sup> Prof. Geist’s chapter, p. 238.

<sup>77</sup> *Ibid.*

We may certainly agree with such kind of concept of flexibility which is reflected in one of the opinions quoted by Prof. Geist:

The two Articles give substantial leeway to the Contracting Parties in determining how to implement these obligations. ***So long as the legal protection is “adequate” and the legal remedies “effective,” the obligations will be met.*** They do not have to be air-tight and prevent every single type of act of circumvention. In particular, ***the texts do not bar Contracting Parties from crafting appropriate exceptions and limitations to the legal protections and remedies, so long as those carve-outs do not undermine the protections envisioned by the Contracting Parties for “effective technological measures.”***<sup>78</sup> (Emphasis added.)

***It may not be difficult either to agree with certain basic suggestions according to which appropriate machinery is needed to guarantee the applicability of certain exceptions*** (for example, Ian Kerr recognizes the need for the protection of access-control measures provided such guarantee exists<sup>79</sup>). ***It is another matter that one could not agree with allowing direct circumvention of TPMs for the applicability of any kind of exception in any possible way whatsoever*** (various adequate solutions exist for this purpose which do not contradict to the requirement of adequate protection).

***Certain suggestions*** referred to by Prof. Geist, however, ***do not seem to be sufficiently clear.*** For example, there would hardly be any dispute among us in respect of such kind of statement: "In order for the right granted to be truly adequate, some measure of prohibition or limitation of certain devices may be necessary." However, it is hardly understandable why it is preceded by another statement according to which "in order to constitute 'adequate legal protection' under the WCT and WPPT, one does not have to go so far as to provide a right to prevent the circumvention of effective technological measures protecting access to a work."<sup>80</sup>

Such a position is not in accordance with the plain language of the Treaties on the basis of which it is not possible to exclude certain categories of TPMs from protection, with the negotiation history which did not include any indication in such a sense, and with the emerging standards of implementation of the treaty provisions which also include the protection of access-control measures.

***In general, it could not be regarded to be a serious counter-argument against the interpretation and the adequacy of the emerging standards of implementation described above that, in certain articles quoted by Prof. Geist, simply opposition is expressed against the protection of access-control measures and the prohibition of “preparatory acts” without any sound justification.***

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<sup>78</sup> *Ibid*, p. 240; Prof. Geist quoting Jeffrey Cunard (reference included there).

<sup>79</sup> *Ibid*, p. 239; Prof. Geist quoting Ian Kerr (reference included there).

<sup>80</sup> *Ibid*, p. 238; Prof. Geist quoting Mark Hayes (reference included there).

In view of this last part of Prof. Geist's study, ***the following statement may hardly be regarded justified: "There are well-known scholars who advocate for US-style implementation, however, the majority of scholars around the world have concluded that the treaties offer far more flexibility and that the US approach extends well beyond the treaty requirements."***<sup>81</sup> In this way, it would be easy to produce a "majority" on any views expressed on any issue in legal publications.

### **Conclusions**

***Prof. Geist has failed in his attempt of trying to prove in his study (through targeting my paper published on the IP Osgoode blog) that his criticism against the TPM provisions of Bill C-32 is well founded and that it is not justified to implement the Treaties' TPM provisions in the way followed by Canada's major trading partners.***

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*Post scriptum:* In this paper, I have only or mainly dealt with those issues which concern Prof. Geist's criticism against the TPM provisions of Bill C-32. I have not dealt with every claim he has made<sup>82</sup> or with other aspects where Bill C-32 could be improved.

Budapest, November 15, 2010

dr. Mihály Ficsor,  
former Assistant Director General of WIPO,  
President, Hungarian Copyright Council<sup>83</sup>

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<sup>81</sup> *Ibid*, p. 246.

<sup>82</sup> For example, Barry Sookman in his blog has also pointed out other unfounded opinions expressed or circulated by Prof. Geist on the topic of legal protection for TPMs. See, for example, *Turning up the rhetoric on C-32's TPM provisions; Are the TPM provisions in C-32 more restrictive than those in the DMCA?; Separating facts from hype about C-32.*

<sup>83</sup> Prof. Geist, in his chapter referred to in this paper, alleges that my biography may be found on the website of the International Intellectual Property Alliance (IIPA) and he also gives a web address, namely the following one: [www.iipa.com/html/Bio\\_Mihaly\\_Ficsor.html](http://www.iipa.com/html/Bio_Mihaly_Ficsor.html). I became curious about this biography and I tried to visit the web page indicated by him; however, no such web page is available. Then I also visited the IIPA website itself but I did not find any reference to me. If somebody wants to really get online access to a biography of mine, I may recommend, for example, the following WIPO page: [www.wipo.int/academy/en/iped\\_sym\\_05/cv.ficsor.html](http://www.wipo.int/academy/en/iped_sym_05/cv.ficsor.html).