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TECHNOLOGICAL MEASURES (TPMs) TO PROTECT VIDEO GAMES AND ILLEGAL „MOD CHIPS" TO CIRCUMVENT THEM – IN THE LIGHT OF A REFERENCE TO THE CJEU

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Introduction

- In the **United States**, the attempt to use the administrative rulemaking system to remove firmware TPM protection built in video consoles has failed – (see the Section 2012 rulemaking report on the US Copyright Office – www.copyright.gov – at „Rulemaking Proceedings").
- **The courts of the** various **EU Member States** – sometimes after some „detours" in the wrong direction – **have also recognized**, in an ever more uniform manner, **that adequate protection must be granted against illegal „mod chips" to circumvent such TPMs** in accordance with the WCT and the Information Society (Copyright) Directive)
- **An Italian court, however**, surprisingly, has decided not to follow the thus developed correct case law and has **raises doubts** about the already duly settled issues **in a reference to the CJEU**.
- The purpose of this presentation is not only to discuss why the reference was unnecessary and the doubts unfounded, but also to use the case as an illustration of some dysfunctional aspects of the CJEU preliminary ruling system.

The WCT on technological protection measures (TPMs)

Article 11 of the WIPO Copyright Treaty (WCT)

Obligations concerning Technological Measures

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

Interpretation of the WCT provisions on TPMs (1)

- 1. „[A]dequate legal protection... against... circumvention:" **the treaty obligations extend to provide protection against „preparatory acts."**
- 2. „[T]echnological measures that are used... in connection with... exercise of rights... and that restrict acts:" **the treaty obligations to provide adequate protection cover both „access-control" and „copy-control."**
- 3. „[Technological measures that are used by [authors] [performers or producers of phonograms]:" **the treaty obligations also cover TPMs applied by successors in title and licensees of authors, performers and producers of phonograms, respectively.**
- 4. „[Effective Technological Measures:" **infallibility is not a criterion of effectiveness.**

Interpretation of the WCT provisions on TPMs (2)

- 5. „[I]n Connection with the Exercise of Their Rights... and That Restricts Acts... Which Are Not Authorized by [the Authors] [the Performers or the Producers of Phonograms]:" **the treaty obligations to provide adequate protection against circumvention are not reduced to acts linked to infringements; at the same time, they do not result in a new 'access right' alien to the copyright paradigm.**

- 6. „[I]n connection with the exercise of their rights... and that restrict acts... which are not... permitted by law:" **it is necessary (and possible) to establish adequate balance between the protection of TPMs and the applicability of exceptions and limitations.**

Interpretation of the WCT provisions on TPMs (3)

- 7. „[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] [under this Treaty] and that restrict acts, in respect of their [works][performances or phonograms]:" **the anti-circumvention provisions do not apply to productions not qualifying as works, performances or phonograms neither to those that are in the public domain.**

- 8. „Effective legal remedies:" **the same kinds of remedies are needed as in the case of infringements and, in respect of commercial 'preparatory acts', as in the case of piracy on a commercial scale.**

For detailed analysis, *see* M. Ficsor: "Protection of 'DRM' under the WIPO 'Internet Treaties:' Interpretation, Implementation and Application" in I. A. Stamatoudi (ed.): "*Copyright Enforcement and the Internet*," Wolters Kluwer, 2010

The EU Information Society (Copyright) on TPMs and the transposition in Italian law

Key provisions of Article 6 of the Directive:

1. 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.

2. Member States **shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which**:

(a) are **promoted, advertised or marketed for the purpose of circumvention** of, or

(b) **have only a limited commercially significant purpose or use other than to circumvent**, or

(c) **are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention**

of, any effective technological measures. (Emphasis added.)

The EU Information Society (Copyright) on TPMs and the transposition in Italian law

Key provisions of Article 6 of the Directive:

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.)

In **the Italian Copyright Law**, Articles 102-quarter and 171-ter implement the provisions of the WCT and the Directive (which, of course, are to be interpreted in accordance with the above-quoted provisions of the Directive).

Key issues; protection must cover both „access-control" and „copy-control" TPMs

WIPO Guide to the WCT:

„**Contracting Parties may only be sure that they are able to fulfil their obligations under Article 11 of the Treaty if they provide the required protection and remedies**: **(i) against both unauthorized acts of circumvention, and the so-called "preparatory activities**" rendering such acts possible (that is, **against the manufacture, importation and distribution of circumvention tools and the offering of services** for circumvention); **(ii)** against all such acts **in respect of both technological measures used for "access-control" and those used for the control of exercise of rights, such as "copy-control" devices …**; (iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which it is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such; and (iv) not only against an entire device which is of the nature just described, but also against individual components or built-in special functions that correspond to the criteria indicated concerning entire devices." (Emphasis added.)

(M. Ficsor: "*Guide to the Copyright and Related Rights Treaties Administered by WIPO*;" WIPO publication No. 891(E), 2003 (hereinafter: WIPO Guide), p. 218.)

Key issues; protection must cover both „access-control" and „copy-control" TPMs

Allain Strowel and Severine Dussolier at the first WIPO meeting on the implementation of the WCT and the WPPT (held in 1999):

„**The access mechanism can either controls initial access**, and then leave the work free for any further use, **or a check can be made that conditions have been met each time access is requested. Access can also be differentiated with ease according to the type of user, and this is the huge advantage of these systems**. For example, a university may have obtained access by paying an annual fee for a work or a collection of works, for a certain number of students or for one year. The system will check in such cases for a decrypting key on the university's computers or for a password agreed by contract, or even via the student's identity. Conversely, the same technology can provide repeated access to an individual in exchange for a renewable payment, usually proportionate to the frequency of use.

(A. Strowel, S. Dussolier, *Legal protection of technological systems* (Geneva, WIPO document WCT-WPPT/IMP/2, 1999), p. 28.)

Key issues; protection must cover both „access-control" and „copy-control" TPMs

Dean Marks and Severine Dussolier at the same first WIPO meeting on the implementation of the WCT and the WPPT:

„[P]protection technologies currently fall into **two general categories: measures that control access to content, such as encryption, and measures that control the copying of content...** Access control technologies, such as encryption, generally pose clear-cut situations for the application of anti-circumvention laws. **If content is encrypted, a playback or record device can either pass along the content in encrypted form without descrambling it, or the device can decrypt the content to make it viewable or accessible to the end user. Such decryption cannot occur by accident. Decryption requires affirmative action by the device to "unlock" the controls on the content and make it accessible. Therefore, decryption without authorization constitutes circumvention**." (Emphasis added.)

D. S. Marks, B. H. Turnbull, *„Technical protection measures: the intersection of technology, law and commercial licenses"* (Geneva, WIPO document WCT-WPPT/IMP/3, 1999) p. 6.

Key issues; protection must cover both „access-control" and „copy-control" TPMs

Jörg Reinbothe and Silke von Lewinski in their treatise on the WIPO Treaties:

„**If the technological protection measures** applied by rightholders **consist of access control technology, circumvention presupposes decryption**. Decryption requires deliberate action and an active step taken by the device and its operator. **In this scenario, granting adequate legal protection under Article 11 WCT would require rightholders to be protected against such affirmative action**." (Emphasis added.)

(J. Reinbothe – S. v. Lewinski: „*The WIPO Treaties 1996 – The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty; Commentary and Legal Analysis,"* Butterworth – LexisNexis, 2002, p. 143.)

Key issues; protection must cover both „access-control" and „copy-control" TPMs

Sam Ricketson and Jane Ginsburg in their seminal book on the international copyright treaties also point out that an "access-control" TPMs correspond to the condition that a TPM is supposed to be "used by [authors][performers or producers of phonograms] in connection with the exercise of their rights:"

„[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."

(S. Ricketson – J. C.Ginsburg: „*International Copyright and Neighbouring Rights – The Berne Convention and Beyond*," Oxford University Press, 2006; pp. 975-976.)

Key issues; protection must cover both „access-control" and „copy-control" TPMs

- **The text of Article 11 of the WCT clearly covers all kinds of TPMs**: „access-control," „copy-control," „right-control" measures; software-based and firmware based measures and TPM systems in which various elements are combined.
- **The preparatory work („negotiation history") also confirms this**:
  - the Basic Proposal was based*, inter alia*, on treaty-language proposals for protection against unauthorized circumvention of „access control" coding-decoding TPM systems;
  - at the Diplomatic Conference this was accepted (the issue of access for certain exceptions was raised);
  - the text of the Basic Proposal was changed from TPMs used *„for the exercise of*" to TPMs used *„in in connection with the exercise*" of rights.

- **The InfoSoc Directive does recognize this when in Article 6(3) on the definition of TPMs states that „access-control" is also covered** .

Key issues; the circumvention of TMPs is prohibited also where it would not result in direct infringement

In earlier stages of the preparatory work of the InfoSoc Directive , also certain versions were considered which – contrary to what follows from Article 11 of the WCT – **would have reduced the prohibition of circumvention of TPMs to those cases where it results in infringements.**

Fortunately, **the provisons adopted in Articel 6 of the WCT** is not limited in such an unjustified manner. This turns out also in a crytal-clear manner from the Statement of the Council's Reasons concerning the Common Provision (which then was accepted by both the Commission and the Parliament) (see next slide):

Key issues; the circumvention of TMPs is prohibited also where it would not result in direct infringement

Statement of the Council's Reasons concerning the Common Provision on the InfoSoc Dierective (which then was accepted by both the Commission and the Parliament):

„[U]under the Commission's amended proposal, **the exceptions provided for in Article 5 prevailed over the legal protection of technological measures** provided for in Article 6. **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 Parliament's amendment 54. The terms "... designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright ..." in the Council's definition make it clear that Article 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorised by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5…** (Emphasis added.)

Key issues; the circumvention of TMPs is prohibited also where it would not result in direct infringement

- **It is exactly as a result of this final substantive modification that the Directive became compatible with Article 11 of the WCT and Article 18 of the WPPT,** since the obligation to provide adequate protection and effective remedies for the protection of TPMs prescribed in **those provisions is not limited to those TPMs that are designed to prevent or inhibit infringements**.

- **The treaty provisions do not speak just about 'technological measures that are used by [authors][performers or producers of phonograms] to prevent or inhibit infringements of their rights'.** If the delegations participating in the Diplomatic Conference had had the intention to limit the scope of protected TPMs in this way, they could have done so, but they did not. Otherwise, it is quite understandable why they did not, since by doing so they would have just included more or less redundant provisions; provisions that would not have been truly necessary, since what would have been provided in them followed already from the existing international norms.

Key issues; the circumvention of TMPs is prohibited also where it would not result in direct infringement

This is so since **it goes without saying that it was already an obligation under the Berne Convention, the Rome Convention, the Phonograms Convention and** – in particular – **under the TRIPS Agreement to provide adequate legal protection against infringements**; that is, against uses of works and objects of related rights without the authorization of the owners of rights. Therefore, **if the Treaties had only obligated the Contracting Parties to provide for adequate protection against the circumvention of TPMs designed to prevent or inhibit infringements** in order to make it possible such unauthorized uses of works or objects of related rights, **they would have hardly stated more than that the obligation to provide adequate protection against infringements also applies when infringements are committed through circumvention of TPMs** designed to prevent or inhibit infringements.

Key issues; the circumvention of TMPs is prohibited also where it would not result in direct infringement

All this shows that, **even if the function of the firmware measure built in video consoles is regarded to only control the visualization and use of video games by not allowing that it may be performed in the case of illegal copies, the manufacture, distribution of devices** (mod chips or game copiers) **to circumvent this element of the TPM system would be prohibited under the WCT and the Directive. However,** it should also be taken into account that, **when a pirated copy of a game** – as a result of the removal of TPM protection – **is included in a console to visualize and use it, at least a temporary copy is made in the RAM** of the console. Such an act is covered by the right of reproduction due to the fact that at least a temporary copy is made (and **since no lawful use takes place, the exception foreseen in Article 5(1) of the Directive is not applicable**). That is, **the firmware measure has both "access-control" and "copy-control" functions**.

Convergent – and correct – European case law (to be disturbed by an unnecessary CJEU reference)

United Kingdom

- ***Gilham* v. *the Queen*** (EWCA Crim. 2293 of November 3,2009): the defendant **condemned for criminal offence by distributing mod chips.**
- ***Nintendo Co Ltd and Nintendo of Europe GmbH v Playables Ltd and Wai Dat Chan*** *(*EWHC 1932 (Ch) of July 28, 2010): **summary judgment against an importer of R4 mod chip cards** for copyright infringement and unauthorized circumvention of TPM. **The defendant tried to argue that the circumvention device had also a lawful use in the form of playing "homebrew games." However, the court was not impressed by this theory.** It stated that "[t]he mere fact that the device can be used for a non-infringing purpose is not a defence, provided one of the conditions in section 296ZD(l)(b) [of the amended Copyright, Designs and Patents Act of 1988 on the prohibitions of circumvention of TPMs] is satisfied."
- ***Sony v Ball* case** EHWC [2004] 1738 (Ch): ***Justice Laddie* directly addressed the two combined elements of TPM system** applied for lawful playing of Sony's PS2 games (with **TPM as software**) on PlayStation PS2 consoles (with **TPM embedded as firmware**) pointing out their inseparable nature: **"The two parts co-operate together… like a lock and key enabling the P22 game to be played on the type of P2P console for which it is designed."**

Convergent – and correct – European case law (to be disturbed by an unnecessary CJEU reference)

Spain

- **In 2009, the Court of Salamanca adopted a weird ruling in *Nintendo v. Movilquick*** disregarding the international, EU and national norms on the protection of TPMs**.** The court **found that Movilquick's mod chip served for circumventing the TPM** applied by Nintendo in its video console for the protection of games**.** It **also recognized that this opened the gate for the use of pirated games.** However, the court **still dismissed Nintendo's claim by referring to the possibility that, when the TPM was circumvented, the console might be used not only for illegal objectives but also for certain legal purposes. The court did not interpret the provisions on prohibition of unauthorized circumvention of TPMs in a narrower or broader way; it simply neglected them. (**The ruling was adopted in November 2009 by the Salamanca court. Its text has not been available to me. However, various reports have been published on it; e.g. on the *Techdirt* website (www.techdirt.com) on November 23,2009.)
- **Another Spanish court, however, corrected this easy-going judicial error the year after. In 2010, the Criminal Court of Palma de Mallorca, found guilty the importers and sellers of R4 card mod chips for circumvention of the firmware TPM applied in Nintendo video consoles. One of the defendants was condemned to imprisonment; heavy fines were applied; and the payment of substantial damages was ordered.** (Decision of the Criminal Court of Palma de Mallorca, October 26, 2010.)

Convergent – and correct – European case law (to be disturbed by an unnecessary CJEU reference)

France

Similar developments have taken place. **In 2009, a criminal court in Paris adopted more or less the same kind of strange judgment - and for similar flawed reasons - as the Salamanca court** in Spain in a procedure **in *Nintendo v. Divineo SARL,*** a distributor of illegal R4 cards to circumvent the TPM protection of video consoles**.** It did not condemn the perpetrators; **however, two years later, the Court of Appeals in Paris issued a guilty verdict imposing suspended imprisonment, high criminal fines and a big amount of damages** (decision of September 23, 2011 of the Court of Appeal).

Italy

Since the verdict of the Supreme Court *(Corte di Cassazione)* **adopted in 2007** (Cass., penale 33768/07) – confirmed by another one in 2011 (Cass, penale 8791/11) – **it has been a stable position in jurisprudence that the circumvention of TPM protection of video consoles is prohibited and the distribution of mod chips is a crime.** The referral by the Tribunal of Milan has emerged as a surprising (and unjustified) development acting against the ever more harmonious court practice established in the Member States of the EU.

Reference by the Italian court to the CJEU

In the ***Case C-355/12*** of the CJEU, reference has been made by **Tribunal of Milan** in main proceeding ***Nintendo Co., Ltd and Others v PC Box Srl and 9Net Srl*** No. R.G. 11739/09. Subject matter of the dispute: (i) **handheld portable videogame systems** (Nintendo DS and *Nintendo DS Lite) and (ii)* ***fixed console game systems (Wii)*** *.*

In this peresentation, **I concentrate mainly on the latter category**. The videogame console called the **Wii** consists of a **hardware/software system t**hat is connected to a television set and its videogames are contained on **optical discs to be inserted into the device. The discs contain a protection system** which prevents the use of unauthorized copies of Wii games. It consists of a **software-based protection code** that is detected by the central processing unit (CPU) in the Wii console, and **if this code is missing, the disc is not loaded.** The protection code cannot be read and copied by using normal CD or DVD writers, as making **a pirated copy requires the (unauthorized) copy of the decryption code that grants access to the game software found on the Wii di**sc.

Reference by the Italian court to the CJEU

- **Devices known as "mod chips"** (modifying chips) **are produced and distributed to be installed on the device Wii in order to "trick" the firmware element** of the TPM system and, thus, **to allow pirated video games to be used**.
- The plaintiffs filed a **lawsuit** before the Milan court **against the defendants PC Box s.r.l. and 9NET s.r.l. after having obtained the precautionary sequestration of several types of mod chips** (namely Argon, D2Pro2, Wiikley and D2Sun) and game copiers (namely K7, N5Revolution, R4 Revolution and DSOne) **and their further marketing by PC Box s.r.l** which was selling them on its website, as well as by **9NET s.r.l., the internet service provider hosting the website in question.**
- **The reference included two questions, which are discussed in the following slides.**

First question referred to the CJEU

The first question reads as follows:

„**Must Article 6 of Directive 2001/29/EC be interpreted, including in the light of recital 48 i**n the preamble thereto, **as meaning that the protection of technological protection measures attaching to copyright-protected works or other subject matter may also extend to a system, produced and marketed by the same undertaking, in which a device is installed in the hardware which is capable of recognising on a separate housing mechanism containing the protected works** (videogames produced by the same undertaking as well as by third parties, proprietors of the protected works) **a recognition code, in the absence of which the works in question cannot be visualised or used** in conjunction with that system, the equipment in question **thus incorporating a system which is not interoperable with complementary equipment or products** other than those of the undertaking which produces the system itself? (Emphasis added.)

First question referred to the CJEU

- To put it in a simpler way, by asking this question, the Italian court would like to know **whether the obligation to provide adequate protection and effective remedies against circumvention of TPMs also apply to Nintendo's TPM systems described above**. The question suggests that the **possible reason for which doubts may emerge** in this connection is that the system "is **not interoperable with complementary equipment or products other than those of the undertaking which produces the system itself." It is to be noted that the court believes that asking this question is justified in the light of Recital (48) in the preamble of the Information Society (Copyright) Directive.**
- On the basis of the analysis above, **there may hardly be any doubt that the Nintendo combined software-firmware TPM system, as any other TPMs, are covered by the prohibition of circumevention** under the WCT and the InfoSoc Directive. **But let us see that famous Recital (48).**

First question referred to the CJEU

Recital (48) reads as follows:

„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." (Emphasis added)

In the **last-but-one sente**nce of Recital (48) on which the Milan court seems to mainly concentrate **two elements are included**. The first one is a general reference to the p**rinciple is proportionality** the validity of which is hardly questionable. However, in the given context, it should be applied **not only** from the viewpoint of whether or not, in the name of proportionality, it is justified to disregard the need for the protection of TPMs, **but also** from the viewpoint of whether or not it would be proportionate to remove the key element of the ecosystem of the game industry and, thus, to deprive it of an indispensable means of protection against piracy.

First question referred to the CJEU

The Directive **not only states the general principle of proportionality in that recital but it also includes detailed norms in Article 6 to regulate how the protection of TPMs against unauthorized circumvention may be applied in a proportionate way ensuring truly adequate protection but also duly recognizing the legitimate interests of other actors on the digital markets and the public interests** justifying special arrangements to facilitate the applicability of exceptions and limitations dictated by those interests:

- a well-thought determination of the **scope of devices, products or components the manufacture, import, distribution, etc. of which is prohibited**;
- **a selection of exceptions and limitations in the case of which measures are needed to guarantee that the beneficiaries may enjoy them**,
- even in the case of those exceptions and limitations, the beneficiaries are not allowed simply to circumvent TPMs; first, preference must be given to voluntary arrangements, and even where such arrangements are not applied, the solution is not just giving green light to circumvention, but the application of appropriate measures by the governments of the Member States
- The intervention mechanisms applied in Member States must not go beyond "the extent necessary to benefit from [the given] exception or limitation."
- the application of intervention mechanisms is excluded where works or other protected materials are made available to the public on agreed contractual terms for online interactive use.

First question referred to the CJEU

The **second element** in the sentence on which the Italian court mainly concentrates in Recital (48) **is a reference to Article 6(2)(b) of the Directive under which devices or activities that have a commercially significant purpose or use other than to circumvent TPMs are not prohibited**.

However, **in the given case** – where not only the primary but exclusive objective of mod chips is to circumvent – **obviously not Article 6(2)(b) but Article 6(2)(c) applies** where „by definition" **it cannot emerge that the prohibition might depend on for what kind of „quantitative" or „qualitative" criteria may be used to determine to what extent the TPM may be used for purposes other than circumvention** in order to decide whether it must be prohibited. **Such devices are prohibited. Period.**

Michel Walter and Silke von Lewisnki put this in their excellent book on EU copyright law in this way: in the case of such a device, **"the objective purpose, which can be concluded from the qualities of the device, should matter;" it is irrelevant "whether the person designing, producing, etc. the device does so with the aim of enabling or facilitating circumvention."** (M. Walter – S. von Lewinski: „*European Copyright Law*," Oxford University Press, 2010, p. 1070.)

First question referred to the CJEU

Thus, to the first question, the answer should be a clear and loud „Yes" (using the language in reference): „Yes, Article 6 of Directive 2001/29/EC obviously must be interpreted in a way that the protection of technological protection measures attaching to copyright-protected works or other subject matter also **extends** to a system, produced and marketed by the same undertaking, in which "a device" mentioned in the question – more precisely a firmware-based authentication measure – is installed in the hardware capable of recognising on a separate housing mechanism containing the protected works (videogames produced by the same undertaking as well as by third parties, proprietors of the protected works) a recognition code, in the absence of which the works in question cannot be visualised or used in conjunction with that system**. The reference to Recital 48 is not justified in this respect since it has nothing to do with the concept and definition of technological measures. From the viewpoint of the question of whether or not such technological measures are covered by the definition of technological measures it is also irrelevant whether or not the equipment incorporating such a system is "interoperable with complementary equipment or products other than those of the undertaking which produces the system itself system."**

Second question referred to the CJEU

The second question referred to the CJEU reads as follows:

„**Should it be necessary to consider whether or not the use of a product or component whose purpose is to circumvent a technological protection measure predominates over other commercially important purposes or uses, may Article 6 of Directive 2001/29/EC be interpreted**, including in the light of recital 48 in the preamble thereto, **as meaning that the national court must adopt criteria in assessing that question which give prominence to the particular intended use attributed by the right holder to the product in which the protected content is inserted or, in the alternative or in addition, criteria of a quantitative nature relating to the extent of the uses under comparison, or criteria of a qualitative nature, that is, relating to the nature and importance of the uses themselves**?

Second question referred to the CJEU

- **The answer** – on the basis of the text of Article 6 and the related Recital (48) – **seems easy: „No, obviosuly no."** It is paragraph (2) of the article which determines the scope of devices the manufacture, distribution, etc. of which is prohibited. It lists three categories which are independent from each other. **Mod chips and game copiers are not only primarily – but specifically and exclusively – designed, produced and performed for the circumvention of firmware-based TPMs** included in game consoles and hand-held devices**. Thus, they fall beyond any doubt under point (c) of paragraph (2) and are prohibited under the Directive.**
- **It is possible that such circumvention devices also fall under point (a) of paragraph (2),** provided they are promoted, advertised or marketed for the purpose of circumvention**.** However, since they are already clearly prohibited under point (c), there is no need to determine whether they are also prohibited for that other reason**. While, the further consideration of the criteria of point (a) is superfluous, any consideration of the criteria of point (b) of paragraph (2) is not only superfluous but also meaningless. It is only in the case of multi-purpose devices falling under point (b) that the question of what sorts of quantitative and/or qualitative criteria should be used to determine whether or not there is a commercially significant use other than to circumvent. Mod chips and game copiers have nothing to do with this category; they are designed, produced and distributed exclusively for the purpose of circumvention.**

Second question referred to the CJEU

In the longer paper version submitted to the conference, I review in detail for what reasons the Italian court still had some doubts and why those reasons and doubts are not well founded.

The court's theory based on competition reasons is badly founded for various reasons:

- **it is not true that Nintendo does not allow the use of „homebrew" games**; it does so provided the producers of those games accept the condition that TPM system remains intact (that their games are also used protected by it);
- **the Italian Antitrust Authority adopted a decision finding that Nintendo**, by using the TPM system, **does not perform anti-competitive activity**;
- For „homebrew" producers, there are **a great number of alternative systems** available; thus, **circumvention might only serve better convenience** rather than eliminating an obstacle;
- in case of circumvention of the firmware element of the TPM system, **only a marginal percentage of games fall in the category of „homebrew" games**; **the overwhelming majority are pirated games**;
- thus, to **allow eliminating TPM protection** as an indispensable element of the ecosystem of the video game industry for such marginal and convenience purposes would be not only in conflict with the relevant international and EU norms, but **would also be an obvious conflict with the principle of proportionality.**

Second question referred to the CJEU

Let us presume, however (what is not the case in reality) **that a video game producer still would use its TPM system for anti-competitive purposes**. Even this **would hardly justify denying protection against circumvention of the TPM system** through mod chips and/or game copiers. **Competition law** exists in order to control abuses of rights, and it **provides appropriate remedies including fines by the European Commission** against companies which engage in anti-competitive behavior. **Article 6 of the Directive** – in particular in view of the finely tuned and well-balanced („proportional") provisions of its paragraph (4) – **hardly allows any acceptable interpretation to suggets that, in case of a some (quite abstract) chance for anti-competive behavior, the protection of such TPMs may simply be eliminated and unauthorized circumvention may be allowed by mod chips.**

Second question referred to the CJEU

Thus, to the second question, the answer should be a clear and loud „No" (using the language in reference):

„**No**, **in the case of devices**, **products or component primarily (or, as it may be established in the cause of action, exclusively) designed, produced or performed for the purpose of enabling or facilitating the circumvention of effective technological measures** – which thus fall under point (c) of Article 6(2) of Directive 2001/29/EC – **it is obviously not necessary and it is even not possible to consider whether or not the** use of a device, product or component whose purpose is **to circumvent** a technological protection measure **predominates over other commercially important purposes or uses,** since by definition, such a device, product or component may not be used for any commercially important purpose other than to circumvent. **It is only under point (b) of Article 6(2) of the Directive that the application of criteria of quantitative or qualitative nature may be necessary** to establish whether the manufacture, distribution, etc. of a device, product or component is prohibited since it has only a limited commercially significant purpose or use other than to circumvent. It is that category of devices, products and components where the application of the proportionality principle pronounced in Recital (48) is truly justified, the more so since, when the recital states the principle, it refers in the same sentence exclusively to the criteria provided in point (b) of Article 6(2). However, as pointed out, **the devices concerned in the case of action are not covered by point (b); they are covered exclusively by point (c).**"

THANK YOU

in particular if you are ready to join me in praying for the poor CJEU to be protected against unnecessary references

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