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More than a game: Did Nintendo v. PC Box give manufacturers more control over the use of hardware?

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A B S T R A C T

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The impact of the judgement of the Court of Justice of the European Union issued in the case C-355/12 *Nintendo v. PC Box*, which concerned the scope of protection granted to technological protection measures (TPMs) of videogames, goes beyond the videogame industry. The CJEU confirmed that TPMs entailing both software media and hardware are admissible. Moreover, according to the CJEU, if a software product also contains other copyrighted media, the general provisions of European copyright law concerning copyright take precedence over software-specific provisions. The article discusses to what extent additional protection of TPMs has been made available to hardware manufacturers, who are also copyright holders, to software which allows the hardware to perform its function.

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1. Introduction

Although the distinction between hardware and software appears clear, even from a purely functional point of view the border is blurred. The hardware cannot function properly without software, including firmware or embedded software. From the legal point of view, hardware and software are becoming even more intertwined due to adoption of regulations concerning protection of technical protection measures (TPMs).

The first major international legal act which related to this area was the WIPO Copyright Treaty (WCT). According to its Article 11, the parties are obligated to:

'provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors' in order to allow authors to 'restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law'.

Following the adoption of the WCT, major regulations concerning TPMs appeared in the United States (the so called Digital Millennium Copyright Act) and in the European Union (the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, or InfoSoc Directive¹ which – along with the directive 2009/24/EC on the legal protection of computer programs, or Software

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¹ 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, OJ L 167, 22.6.2001, pp. 10–19.

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Directive,² forms the basis of copyright law in the European Union).

Over time, hardware manufacturers, who were also right holders to software operating their hardware, started to make attempts to use the TPM protection measures to legally limit the scope of actions which, from the technical point of view, could be taken in relation to their hardware. Among examples of such actions are:

- an attempt (unsuccessful) by a tape library manufacturer to prevent a producer of custom hardware circumventing TPMs which limited access to maintenance software of the tape library,³
- an attempt (unsuccessful) by a producer of garage door openers to prevent a competitor from marketing a universal door opener which bypassed the original ‘authentication’ methods,⁴
- an attempt (successful) by a producer of protection devices to prevent another company from producing analog-to-digital video enhancements, which facilitated making copies of videos without further analog copy protection.⁵

The debate is ongoing in major jurisdictions. In the United States of America, in 2014, the Librarian of Congress started proceedings which were expected to lead to issuing exemptions from the general prohibition of TPM circumvention, as described in the DMCA. One of the proposed exemptions was to allow lawful owners of vehicles to circumvent TPMs protecting programs that control the functioning of their vehicle, for purposes of ‘lawful diagnosis and repair, or aftermarket personalization, modification, or other improvement’. The proposal was deemed too narrow by opponents of TPM protection,⁶ but was sharply criticised by manufacturers, including John Deere⁷ and General Motors.⁸ Both producers argued, among others, that the exemptions were too broad and that unauthorised modifications were a safety threat. Eventually, the exemption was adopted, albeit with a narrowed scope (in particular, TPMs cannot be circumvented with respect to software de-

signed chiefly to operate vehicle entertainment and telematics systems).⁹

In the European Union, no such procedure of adding exemptions exists either in the InfoSoc Directive or the Software Directive. The European copyright law is mostly shaped by rulings of the Court of Justice of the European Union (CJEU). On January 23, 2014 the Court of Justice of the European Union (CJEU) issued its first judgement concerning TPMs in C-355/12, *Nintendo v PC Box*.¹⁰ The case involved primarily videogame consoles, but the influence of the ruling reaches beyond the gaming industry.

2. Videogame consoles: the most recent legal proving ground

Cases involving videogame consoles are particularly interesting, not only because there many similar cases in various jurisdictions, which allows comparison, but also because some of the arguments used by the parties and courts can be extrapolated to other types of hardware and software. In the case of consoles, embedded codes and similar technological measures are used both to prevent running unauthorised games and to support regional differentiation of markets, which eventually permits the maintenance of a business model based on selling consoles for reduced prices, while ensuring substantial revenue from sales of games developed internally or by licensed developers.¹¹ This business model adopted by console manufacturers led to the creation of devices meant to circumvent the protective measures. So-called ‘mod chips’ and ‘game copiers’ were designed to enable running games other than those produced or endorsed by producers. For years console manufacturers have been involved in court battles against a number of distributors and producers of TPM circumvention devices. The cases were litigated in various jurisdictions in the European Union and most of them resulted in the manufacturers’ success.

In the United Kingdom, there were both civil and criminal cases regarding TPMs. In 2004, a group of Sony undertakings sought relief against producers of an electronic chip which modified PS2 consoles in such way that it would play not only games designed for the geographical region for which the console was intended (depending on the television system, these regions were Europe/PAL, United States/NTSC and Japan/NTSC), but also unauthorised copies, as well as games from non-supported regions. The High Court of Justice ruled in favour of Sony.¹² In 2009, the England and Wales Court of Appeal upheld

² Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, pp. 16–22.

³ Berkeley Technology Law Journal, *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 21 Berkeley Tech Law Journal. 395 (2006), <http://scholarship.law.berkeley.edu/btlj/vol21/iss1/29> (Accessed 30 August 2016).

⁴ *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

⁵ *Macrovision v. Sima Prod. Corp.*, No. 2006-1441, 2006 WL 1063284 (S.D.N.Y. Apr. 20, 2006).

⁶ In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies Under 17 U.S.C. 1201 – Comment of Electronic Frontier Foundation, http://copyright.gov/1201/2015/comments-020615/InitialComments_longform_EFF_Class21.pdf (Accessed 30 August 2016).

⁷ Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201, http://copyright.gov/1201/2015/comments-032715/class%2021/John_Deere_Class21_1201_2014.pdf (Accessed 30 August 2016).

⁸ Comments of General Motors LLC, http://copyright.gov/1201/2015/comments-032715/class%2021/General_Motors_Class21_1201_2014.pdf (Accessed 30 August 2016).

⁹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, <https://www.federalregister.gov/articles/2015/10/28/2015-27212/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control> (Accessed 30 August 2016).

¹⁰ Judgement of 24.01.2014 in *Nintendo Co Ltd v PC Box Srl*, C-355/12, ECLI:EU:C:2014:25.

¹¹ Booton, D., MacCulloch, A. (2012), ‘Liability for the Circumvention of Technological Protection Measures Applied to Videogames: Lessons from the UK’s Experience’, *Journal of Business Law* 2012, no. 3, pp. 165–190.

¹² *Sony Computer Entertainment v Ball* [2004] EWHC 1738 (Ch).

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