

Court of Justice of the European Union (CJEU) Provides Guidance on Technological Copyright Protection Measures in Games Consoles

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In Case C-355/12, **Nintendo Co Ltd v PC Box Srl**, the Court of Justice of the European Union has provided guidance on the legality of using technological measures to prevent or restrict unauthorised acts of copyright infringement in video games and consoles. The CJEU's decision suggests that measures circumventing a protection system may, in certain circumstances, be lawful.

BACKGROUND

Article 6 of the Copyright Directive (2001/29/EC) requires Member States to provide adequate legal protection against a variety of acts or activities that circumvent, or the purpose of which is to circumvent, effective technological measures designed to prevent or restrict acts that are not authorised by the owner of a copyright or related right.

Nintendo issued proceedings in the Italian courts against PC Box, a company that markets “mod chips” and “game copiers”, both devices that enable video games other than those manufactured by Nintendo to be played on its consoles. Nintendo sought to prevent PC Box's devices from being offered for sale. Nintendo argued that it had lawfully equipped its consoles and games with technological measures to ensure that unauthorised copies of its games could not be used with its consoles. PC Box challenged Nintendo's application of technological measures to its games and consoles, contending that Nintendo's purpose in using blocking technological measures was to prevent the use of independent software unconnected with the illegal video games sector and to compartmentalise the market by rendering games purchased in one geographical zone incompatible with consoles purchased in another.

The Italian court referred two questions to the CJEU:

1. Whether or not Article 6 covered technological measures installed in hardware, i.e., consoles, as well as in copyright material itself, i.e., games, even though interoperability between device and product was thereby limited. In addition, whether or not such measures qualified for protection under Article 6 where their effect was not merely to restrict unauthorised reproduction of the copyright material, but also to preclude any use of that

material with other devices or of other, legitimate material with those devices.

2. The Italian court asked what criteria should be applied when assessing the extent to which the purpose or use of devices, such as those of PC Box, was to circumvent technological measures.

DECISION

The CJEU held that the concept of an “effective technological measure” had to be understood broadly to include the application of an access code or protection process (such as encryption or scrambling). Accordingly, measures that were both incorporated in the physical housing of videogames and in consoles, and which required interaction between them, fell within its scope.

The CJEU further held that technological measures were only legally protected insofar as they were intended to prevent or eliminate copyright infringement. That legal protection has to respect the principle of proportionality, without prohibiting devices that had a lawful, commercially significant purpose or use.

It was for the national courts to determine whether or not other measures that were not installed in consoles could cause less interference with, or limitations to, the activities of third parties, while still protecting the copyright owner’s rights. Accordingly, it was relevant to take into account, amongst other matters, the relative costs of different types of technological measures, the technological and practical aspects of their implementation and a comparison of the effectiveness of those different types of technological measures as regards the protection of the copyright owner’s rights. The national courts would also need to consider the purpose of devices, products or components that were capable of circumventing those technological measures. Evidence of use that third parties actually made of such measures was particularly relevant. National courts could consider matters such as how often those devices, products or components were in fact used in disregard of copyright, as opposed to for purposes that did not infringe copyright.

COMMENT

The decision suggests that circumventing a protection system of a games console may, in certain circumstances, be lawful. “Game copiers” and “mod chips” in fact circumvent technological measures in consoles and games themselves, and therefore allow pirated or unauthorised copies of games to be played. The question is whether or not that is the primary function of such devices and the extent to which other purposes are relevant.

It will be for the Italian court to determine the purposes of PC Box’s devices and whether or not the technological measures taken by Nintendo are proportionate to achieve the objective of protecting against unauthorised acts without going beyond what is necessary.

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