

The Legal Protection of Technological Measures in the European Union: Don't believe the hype?

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Introduction



- © **WIPO Treaties (WCT Art. 11; WPPT Art. 18.)**
 - © **Directive 2001/29/EC on © in the Infosoc**
 - © **Some National and Court of Justice Case Law**
 - © **Proposed Directive on © from DSM**
 - © **Case Study – Stream Ripping**
 - © **Trends and Conclusions**
- [Technological Measures (TPMs) aka Digital Rights Management (DRM); Rightholders (RHs)]**

© Directive – legislative debate and beyond

- © Technology (software/hardware) which restricts access or use of copyright material without the consent of RH
- © A threat to democracy for some; or the driving force behind new business models in the digital environment
- © TPMs v. Exceptions was a major stumbling block
- © Circumvention for non-infringing use/Access
- © Finnish Compromise: The regulatory carve-out for new business models broke the logjam
- © DRM grew exponentially and now underpins most online business models



Article 6: Legal Protection of Technological Measures

- 1) Act of Circumvention of access and copy controls**
- 2) Preparatory Acts of Circumvention of such controls**
- 3) Definitions of TMs and Effective TMs – only effective TMs get legal protection**
- 4) © Exceptions: 'The Intervention Mechanism'**
 - 1. Public Interest Exceptions**
 - 2. Private Copy Exception (optional)**
 - 3. Voluntary Measures enjoy protection in 6(1)**
 - 4. The carve-out for on-demand**

Article 6: Legal Protection of Technological Measures

Member States are required to provide adequate legal protection against circumvention utilities/services which:

- © are promoted, advertised or marketed for the purpose of circumvention of, or**
- © have only a limited commercially significant purpose or use other than to circumvent, or**
- © are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures**

The relationship between © Exceptions and TPMs



The 'Intervention Mechanism' in Article 6(4)

Article 6(4)(1): Member States must intervene

- SEVEN Public Interest Exceptions
- Need to provide the benefit,
- after reasonable time,
- voluntary measures, including agreements,
- where the beneficiary has legal access, and
- to extent necessary
- This list is exhaustive



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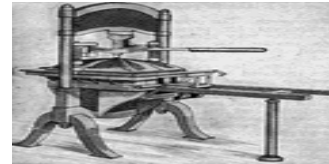
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ephemeral recordings



uses for public security, official proceedings



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reprography



uses for the disabled



use for illustration for teaching or scientific research

Article 6(4)(2): Member States may intervene

- © Only PRIVATE COPY EXCEPTION (Art. 5.2b)
- © Subject to the exception and 3-step test
- © unless reproduction is made possible by rights holders...
- © ...to the extent necessary to benefit from that exception,
- © ...without preventing rights holders from adopting measures regarding the number of reproductions.



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Article 6(4)(3): Voluntary Agreements

- **Legal protection for TPMs deployed**
 - **in the context of voluntary agreements;**
 - and,**
 - **in implementation of measures taken by Member States**
- **To prevent abuse of voluntary agreements**
- **No definition and not many examples**

Article 6(4)(4) – Carve-out for on-demand services

© Making available of works or other subject matter on agreed contractual terms in such a way that members of the public can access them from a place and at a time individually chosen by them

© On-demand services (SVOD, TVOD, EST, etc.)



© Where user agrees to contract terms

© Where interactivity is due to the medium and technology available or the service

© Where Article 6(4)(4) applies, Member States may not intervene to regulate DRMs

Member State Implementations

- © Vary dramatically in all respects (except 6(4)(4))
- © National intervention mechanisms especially
- © However, there are some trends:
 - © alternative dispute resolution
 - © recourse to the Courts
 - © potential fines
 - © self-help
 - © labelling requirements/playability/interoperability
- © No real practical experience apparently....



Some case law



© National

- © FR: *Mulholland Drive (2006)/Le Class Action (2007)*

- © FI: Helsinki Court of Appeal (2008 and 2010) – on 'effective' (see also Munich Court Judgment of 26 July 2012, Az 7 O 10502/12)

 - © Normal or average user -- Rightholder judgment/discretion

- © *Video Games* – multiple jurisdictions/cases v. mod-chippers

 - © E.g., UK: *Nintendo Company Limited v Playables Limited (2010)*

- © *Stream ripping cases* – mostly in DE – mixed results/ongoing

© European Court of Justice

- © *Nintendo v. PC Box (2014)*

- © *VG Wort v Kyocera (2013)*



VG Wort v Kyocera

- © Recitals 35 and Recital 45 give some credence to contractual override of the private copy exception.
- © See also Article 6(4)(4) in the on-demand space ('on agreed contractual terms')
- © *Padawan* and *Thuiskopie* seem to preclude levies on licensed copies
- © However, in *VG Wort*, the Court, appears to take the opposite view
 - © If a MS adopts an exception
 - © RHs are excluded from the right to authorise reproduction
 - © *any authorising act the RHs may adopt is devoid of legal effects*
 - © No bearing on fair compensation owed



Nintendo v PC Box



- © Concept of 'effective technological measures' is defined broadly
- © Principal objective of the Directive is a high level of protection (yup)
- © TPM does not need to be applied to a specific work
- © What matters is the TPM's objective i.e., preventing or eliminating, as regards works, acts not authorised by the rightholder
- © TPMs have to be proportionate
- © Take into account
 - © relative costs of different types of TPMs
 - © technological and practical aspects of their implementation
 - © comparison of those different TPMs v. protection of rightholder's rights
 - © that effectiveness however not having to be absolute.'
- © TPMs don't have to be 'unhackable' to be effective (also national judgments)



The Proposed Directive on Copyright in the DSM



- © Some New Mandatory Cross-Border Exceptions on steroids
- © But it is what's missing that hurts
- © Article 6 of the Proposed Directive:
 - 'Article 5(5) and the first, third **[FOURTH]** and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title.'*
- © The ship has sailed from Marrakech (see Article 3(4) same as above)
- © And the destruction of contractual freedom – see also
 - © Portability Regulation
 - © Proposed Broadcaster Regulation



But don't worry....



- ▶ Recital 7: ***The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law.*** This protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and the limitation established in this Directive, which are particularly relevant in the online environment. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the format and the modalities to provide the beneficiaries of the exceptions and the limitation established in this Directive with the means to benefit from them provided that such means are appropriate. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC.

Stream Ripping – a case study

- © Turns the streaming model upside down - ownership
- © The process of creating a downloadable file from content available for streaming online
- © User indicates a 3rd party stream to a service, requests conversion and gets the content
- © Services available via websites, apps or software
- © Some services save a copy of the file and reuse it
- © YouTube is the favourite but Spotify, Deezer and more



Stream Ripping – key questions

- **Does the Provision of a Stream Ripping Service infringe Article 6?**
- **Have effective technological measures been applied?**
- **Are these services primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective TPM or does the service in question have only a limited commercially significant purpose or use other than to circumvent?**



Stream Ripping – are TPMs applied?

- Any method for preventing the download of streamed content that is a technology designed to prevent unauthorised reproduction of protected works is a TPM
- YouTube's rolling cipher, for example, is a TPM which is applied to the delivery of streaming content on YouTube.



Please insert a YouTube video URL

mp3 mp4

Stream Ripping – if so, are they effective?

- © An effective technological measure is one which prevents a normal or average user, without special skills or tools, from accessing the content.
- © Widespread availability of circumvention utilities doesn't matter - If anyone could do it, there would be no such services
- © A good indicator of effectiveness is the subjective determination of RHs, i.e., if RHs elect to make their content available on a restricted basis, subject to certain TPMs, -- there is a presumption that such a TPM can achieve that purpose and, thus, is effective.

Stream Ripping – who has to apply TPMs?

- **Article 6 requires TPMs to be applied to control use of a work by the rightholder**
- **But, it does not require that:**
 - **the TPM be applied to the work itself**
 - **the TPM be applied by the RH herself**
- **It is sufficient that TPMs are applied to control use of a work**



SR services enable circumvention of effective TPMs

- © The provision of services to users for the purpose of downloading streamed content made available subject to TPMs
- © In ID'ing the location of the streamed content to the service and pressing the 'button', the user uses the service to circumvent
- © Most stream ripping services appear to have no function other than enabling circumvention of TPMs so users can download
- © The sole purpose of enabling users to circumvent restrictions on the ability to download content that is streamed
- © Not a private copy
- © PS they CTPP too

Trends and Conclusions

- National implementations vary – but in practice no major problems
- That said nearly 100% faithful implementation of Article 6(4)(4)
- Member State intervention – few and far between – again not much in the way of reported problems
- Voluntary agreements – not extensive
- Most recent caselaw around video games/private copy – only one major CJEU decision
- Bans on contract override
- Recent legislative reform weakens protection
- Impact on business models/technology: everything is on-demand
- Article 7 -- !?



PEACE LOVE AND COPYRIGHT