

# A Wii too stretched? DRM protection of game consoles

Marcella Favale  
Research Fellow



Centre for Intellectual Property  
Policy and Management (CIPPM)

# What is DRM?

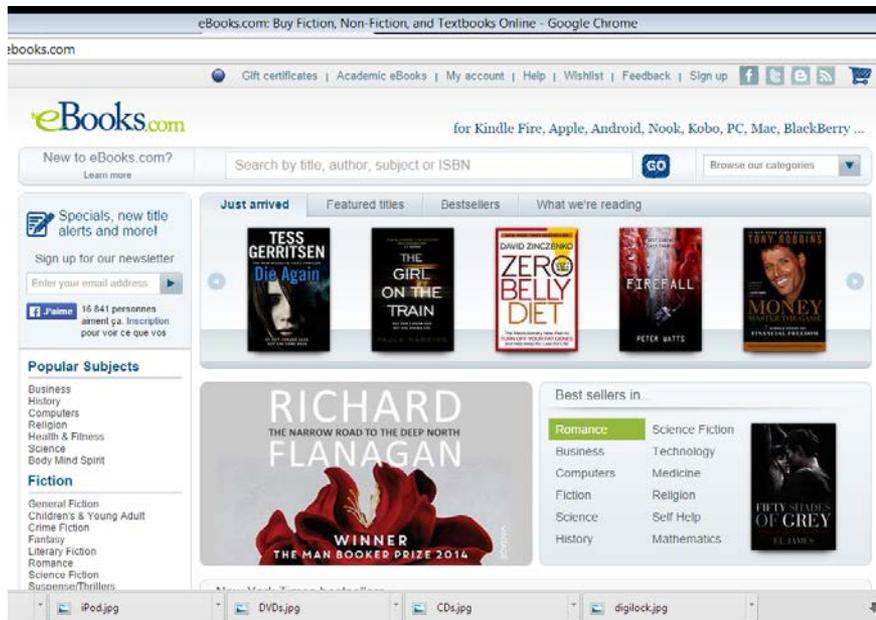


DRM is a system consisting of :

- Technological Protection Measures (Digital Locks)
- The copyright law protecting them (e.g. Article 6 InfoSoc Directive EC/29/2001)

# Where DRM is implemented?

## On copyright works



# ...or not



# DRM on videogames



# Case C-355/12 - *Nintendo v. PCBox*

- 23/01/2014 : first ruling *ever* by CJEU on DRM
- DRM are protected by Directive 29/2001/EC (the Copyright Directive)

“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.”

- All EU Member States have implemented the protection of technological protection measures

# RPR submitted by Tribunale di Milano

FACT: Nintendo Co. Ltd (and others) sued the Tuscan company PC Box Srl over the sale of “mod Chips” and “game copiers”

*Other lawsuits in Europe:*

- *Nintendo Co Ltd v Playables UK*
- *Nintendo Co Ltd v Console PC Com Ltd UK*
- *Nintendo v SR Tronic – Germany*
- Etc...

# The First Question:

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 (...) 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? [emphasys added]

# In short:

Are TPMs protectable when implemented not only on the disk but also on the player (hardware)?

Despite this means lack of interoperability?

# Q1: Interpretation of the AG

(...) the first question comprises two parts. First, do 'technological measures' (...) include not only those which are physically linked to the copyright material itself (...) but also those which are physically linked to devices required in order to use or enjoy that material (...)? Second, do such measures qualify for the protection to be provided pursuant to that provision where (or even if) their effect is 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 material with those devices?[=interoperability?]

# In short:

Are TPMs protectable when implemented not only on the disk but also on the player (hardware)?

Despite not only unauthorised use but also ANY use would be prevented?

# Q1: Interpretation of the Court

(...) the referring court asks, in essence, in the first place, whether Directive 2001/29 must be interpreted as meaning that the concept of an 'effective technological measure' (...) is capable of covering technological measures comprising, principally, equipping not only the housing system containing the protected work, such as the videogame, with a recognition device in order to protect it against acts which are not authorised by the holder of any copyright, but also portable equipment or consoles intended to ensure access to those games and their use

---

# In short:

Are TPMs protectable when implemented not only on the disk but also on the player (hardware)?

[ Despite???

# Answer:

- 1) “there is nothing in that directive [the Copyright Directive] to suggest that Article 6(3) thereof does not refer to technological measures such as those at issue in the main proceedings, which are partly incorporated in the physical housing systems of games and partly in consoles which requires interaction between them.” [ In short: “why not?”]
- 2) TPMs in the directive are defined broadly.

---

# Objection 1

The Directive does not say TPMs does not apply to hardware.

But neither it says that it does.

# Objection 2

TPM is defined broadly:

“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.”

Examples suggest:

- Boundaries rather than open-ended
- Connection with copyright work
- Broad interpretation = high level of protection for the owner. But the latter only refers to exclusive rights.

***TPMs are not rights***

# The second question

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?

# In short:

What considerations on the potential uses of the circumventing device when assessing whether TPMs deserve or not protection?

- the intended use attributed by the manufacturer ?
- the volume of infringing behaviours compared to legitimate behaviours?
- the relative importance of either behaviour?

# Opinion of the AG

- TPMs have to be « effective »
- the Directive “does not seek to create any rights other than those specified in Articles 2, 3 and 4”
- a proportionality test has to be applied (Recital 48)
  - 1) whether a TPM pursues a legitimate aim;
  - 2) whether the TPM is suitable to achieve that aim; and
  - 3) whether it does not go beyond what it is necessary to achieve that aim

# Key considerations

(for both the Court and the AG)

“the extent, the importance and the nature of the uses”

Main difference between AG and Court:

for the Court the volume of infringing behaviour prevails (quantitative assessment)

# The Answer

The National Court should assess:

- how often the allegedly circumventing devices are used for infringing behaviours and how often they are used for legitimate aims
- whether TPMs different from those installed on the game console “could cause less interference” with the activities of third parties [...] while still providing comparable protection to the right holder’s rights”

# The Answer

- This assessment has to be performed by keeping into account
- 1) the relative costs of the compared measures;
- 2) their relative effectiveness;
- 3) “technological and practical aspects of their implementation”.

# Overall (Answer1+2):

Yes, TPMs are protectable on hardware if

- It pursues a legitimate aim
- If it is proved that illegitimate behaviours prevail over legitimate behaviours
- If there is nothing better (less intrusive? More flexible?) given the state of the art

# What is missing?

## Qualitative assessment of uses

(the **importance** of the permitted uses vs the forbidden uses)

- The AG dismisses the potential protection of user's rights since « these are not fundamental rights » (quantitative prevail over qualitative)
- The Court does not addresses this issue at all

# What is missing?

## The Competition issue

- The AG stresses the presence of competition issues, however she declares she will not discuss them because the NC did not include them in the PR
- However, she also stresses the importance of pursuing a legitimate aim, repeatedly and in detail. This may suggest that the legitimate aim could be a container for competition issues

# What is missing?

## The Software Directive issue

The application of the SD is dismissed in one paragraph, by arguing:

- 1) Directive 2009/24 protects only computer programs;
- 2) Videogames consist of software, graphic and sound;
- 3) Graphic and sound are protected by copyright (Directive 29/2001) together with the whole work.

# However...

The AG argued that another case was pending before the Court (*Grund* C-458/13 ) where there will be a full discussion of the issue.

***Grund* was Radiated from the Court Registry in May 2014.**

# An Happy Ending?

The civil litigation before the Tribunale di Milano, if pursued, it is likely to require and be decided on the basis of technical expertise

Software  
engineer/  
DRM  
expert



Social science  
Quantitative  
Researcher/  
Market  
Research Firm

# ...not for Everybody

In July 2014 the owners of PC Box have been sentenced by the Tribunale di Firenze to 1y & 2m of prison and 5K euros for copyright infringement



# Conclusion:

A victory for DRM? Unlikely.

Meanwhile, important principles have been decided which **HAVE NOT** been thoroughly discussed before the Court, such as:

- Copyright user's rights are not fundamental rights
- The Software Directive does not apply to videogames

---

# THANKS!

Marcella Favale  
mfavale@bournemouth.ac.uk