The protection of technological measures

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not only of the use of copyrighted materials, but general behavior online. Thus we see the cases that have leveraged the access right into a right to control access to Web pages or to servers, or leveraged it into a right to control the behavior of individuals online. Although the plaintiffs in these cases may have legitimate business reasons for seeking to control individual behavior in these ways, it is hard to see why copyright law should facilitate these attempts to exert control.

Finally, the ubiquity of access applies offline as well, as can be seen from the tying cases. Computer software now sits at the juncture of so many of our everyday products. And software is often used to control how real-world devices and products operate and interoperate. Taken literally, an overly broad understanding of the term "access" leads to absurd results. This does suggest, ultimately, that the courts have properly begun to recognize limits on how far the access right should extend.

This chapter has focused largely on looking at actual DMCA case law to highlight some of the complexities associated with the DMCA's new right to access, but has spent relatively less time on the various proposed solutions. Several appellate courts have, as noted above, interpreted "access" in a more nuanced fashion, to preclude overly expansive applications of the DMCA. Still other courts have imported into the DMCA a general requirement that circumvention of access be tied to an underlying copyright interest. Yet another potential response might be to interpret "work[s] protected under this title" in a more nuanced fashion, to exclude some of the potential for abuse.[52] Whether one or many of these solutions ultimately find favor with the courts, it is clear that the courts need to find doctrinal avenues to ensure that some of the complexities associated with this new right of access are carefully considered, and that this new right be tailored to fulfill identified copyright interests.

Conclusion

In the end, the subsequent case law interpreting the DMCA's access right highlights the inherently more complicated nature of a right to control access in the digital environment. Courts have begun to implicitly recognize these complications and have started to adopt doctrines that will give them some room to interpret the access right in a way that ties it to the underlying copyright interests. In the end, this reflects some of the complexities inherent in creating a new right, in a complex and fast-changing technological environment, extending the boundaries at the very edge of our existing intellectual property rights.

[52] Ginsburg, "The Pros and Cons," (exploring this possible approach).

12 The protection of technological measures: Much ado about nothing or silent remodeling of copyright?

Séverine Dusollier

The enactment of anti-circumvention provisions in the European Union (EU) has witnessed the same fierce opposition as in the United States (US), generally based on the fear that such an extensive protection, instead of aligning itself on the contours of copyright, would enlarge the control of copyright holders on access to and use of works, and create what some have called "paracopyright."[1] The designated culprit of such an extension has been found in the criteria used to define the technological protection measures (hereafter TPM) protected by the European Copyright Directive,[2] i.e. the lack of authorization by the right holders. Article 6(3) of the 2001 Directive indeed defines technological measures as "any technology designed to prevent acts not authorized by the right holder." In comparison to the US Digital Millennium Copyright Act of 1998 (DMCA), where two categories of TPM are protected, on one hand measures preventing copyright infringement, on the other hand, measures controlling access to a copyrighted work, the EU protection of TPM, through this vague wording, seems to extend to any use unauthorized by the copyright owners irrespective of its link with the exclusive rights.

Critique has therefore been intense against the anti-circumvention provisions contained in the so-called Infosoc Directive of 2001. Yet, surprisingly, all has been rather quiet on the judicial front as far as Digital Rights Management (DRM) is concerned. No ink cartridge, garage

[1] M. Nimmer, *Nimmer on Copyright* (Matthew Bender & Co., Lexis/Nexis, 2001), 12A-72; this terminology also appears in the preparatory work of the Digital Millennium Copyright Act of 1998, see Report of the Committee of Commerce to accompany H.R. 2281, House of Representatives, 105th Congress, 2d Session, Rept. 105-551 Part 2, 24.

[2] S. Dusollier, "Tipping the Scale in Favor of the Right Holders: The Anti-Circumvention Provisions of the European Directive," in *Digital Rights Management – Technological, Economic, Legal and Political Aspects in the European Union* (E. Becker, W. Buhse, D. Gunnewig & N. Rump (eds.), Berlin, Springer-Verlag, 2003), 462–78; Institute for Information Law (IVIR), *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 2007, at 73–75.

door opener, or online game cheating, to mention some case law described by Joseph Liu in Chapter 11 in this volume, has crossed the European sky.

Another ground for discontent has been the risk that TPM would be applied to curtail copyright exceptions.[3] The EU lawmaker has devised a particular solution to this issue, requiring the safeguarding of some exceptions to some users, and in some limited cases, in Article 6(4) of the 2001 Directive. But the provision safeguarding the exceptions has so far not been put into practice before courts or administrative bodies in charge of such conciliation between exceptions and TPM. Would that indicate, as for the range of technological devices to be protected, that the critique was not justified and that the copyright exceptions had (and still have) nothing to fear?

This chapter investigates both questions and considers whether paracopyright, in the form of an extended protection towards the control of access to and use of the work, has finally settled in the copyright regime through the guise of anti-circumvention provisions. Part I of this chapter discusses the definition of technological measures aimed at by the EU lawmaker and whether it has led to excessive protection in national case law, lacking any nexus to copyright, following the methodology of Joseph Liu's chapter. Part II will come back to the issue of exceptions and analyze whether, albeit the lack of any formal complaints by users, copyright exceptions have not been transformed by anti-circumvention laws.

PART I: THE PROTECTED TECHNOLOGICAL MEASURES IN RELATIONSHIP WITH COPYRIGHT SCOPE

European anti-circumvention provisions

The European equivalent of the DMCA is the Directive 2001/29 of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society.[4] At the time of the Directive, comparison was often made with its US counterpart, particularly concerning the

[3] S. Dusollier, "Exceptions and Technological Measures in the European Copyright Directive of 2001," *International Review of Industrial Property and Copyright Law* (2003), 62–83; IVIR Study, *supra* note 2, at 101. S. Bechtold, "Comment on Article 6 of the Directive," in T. Dreier & B. Hugenholtz (eds.), *Concise European Copyright Law* (Kluwer Law International, Alphenaan den Rijn, 2006), 393.

[4] It should be noted that, contrary to the DMCA, the European Directive is not of direct application as it is a harmonization measure that provides rules and principles that the Member States need to implement in their national laws while keeping some maneuver in doing so.

anti-circumvention provisions.[5] It was generally concluded that such provisions, whatever their side of the Atlantic, shared an extension of copyright towards access and use of works.[6]

The European text has a rather indirect and blurry way to include access to and use of works within its ambit. Its Article 6 deals with technological measures of protection that are defined as: "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 authorized by the right holder of any copyright or any right related to copyright as provided for by law or the sui generis right." Additionally the definition of the effectiveness of the TPM, a further prerequisite to the protection, refers to access controls.

Such a definition has been understood as opening a broad scope of protection to technological locks. The triggering factor of the protection against circumvention lies in the absence of authorization of the copyright owner. As soon as the technological protection embeds this prohibition or control of use in the digital format or enabling device, it would be legally secured against tampering, for the terminology of the provision appears extremely broad, as it focuses on the absence of authorization by the rights owners, not by the law. Despite the fact that the provision indicates that the rights protected are those "provided by the law," scholars have generally construed the protection as going beyond the control of activities recognized as an exclusive right by copyright law, arguably reaching mere acts of access or use.[7]

Indeed, the emphasis put on the "act not authorized by the right holder," rather than on the legally defined scope of exclusive rights is puzzling. Obviously, since the right holder has decided to protect technically some defined uses related to her work, it means that she was not willing to authorize such activities. Through the definition contained in Article 6(3) of the Directive, referring to what the copyright owner is willing and able to protect through technology, any TPM is then addressed by the EU anti-circumvention protection.

[5] J. de Werra, "The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Legislations (Australia, Japan)," 189 *Revue Internationale du Droit d'Auteur* (July 2001), 66–213; S. Dusollier & A. Strowel, "La protection légale des systèmes techniques: Analyse de la directive 2001/29 sur le droit d'auteur dans une perspective comparatiste," *Propriétés Intellectuelles* (2001), 10–27; See also the proceedings of the ALAI Conference held in New York in 2001, *Adjuncts and Alternatives to Copyright*, ALAI-USA, Inc., 2002.

[6] See *supra* note 2.

[7] IVIR Study, *supra* note 2, 95–97.

Should this broad interpretation prevail, the technological capacity would dictate the legal scope of protection. The scope of copyright would not be decided according to what its proper scope should be, but according to what the technology can do. Any use of a work would enter, through the legal prohibition of the circumvention of a TPM, in the arena of control granted to copyright holders.

However, not all scholars have interpreted the scope of the Directive so extensively[8] and some elements in the legislative history of this provision may incline to establish more firmly a connection between the technically protected uses and the legally protected ones. The proposal for a directive of 1997, as well as further versions until the common position of 2000, only required the Member States of the EU to prohibit the circumvention of "technological measures designed to prevent or inhibit the infringement of any copyright or any rights related to copyright as provided by law."[9]

In the Explanatory Memorandum to the Proposal, the Commission had insisted that:

> Finally, the provision prohibits activities aimed at an infringement of a copyright, a related right or a sui generis right in databases granted by Community and national law: this would imply that not any circumvention of technical means of protection should be covered, but only those which constitute an infringement of a right, i.e. which are not authorized by law or by the author.[10]

This could indicate that the substitution of the expression "acts not authorized by the rights holders" at the stage of the Common position in 2000, aimed indeed at encompassing a broader scope than the exclusive rights.[11] Having said that, the same statement could also be said to

[8] T. Hoeren, "Access Right as a Postmodern Symbol of Copyright Deconstruction?," in *Adjuncts and Alternatives to Copyright*, *supra* note 5; Bechtold, *supra* note 3, at 387.

[9] Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM/97/0628 final, Official Journal, C-108, 07/04/1998, at 6. See also the Explanation of the Common Position, 28 September 2000, no. 45 ("access to works or other subject-matter is not part of copyright").

[10] Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51999PC0250:EN:NOT, at 41.

[11] IVIR Study, *supra* note 2, 79. That would be confirmed by the Statement issued by the European Council, that explains that the new definition of the protectable technological measures "is broader than the one provided for in the Commission's amended proposal or the one set out in Parliament's amendment" (see Statement of the Council's reasons, Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, Common Position (EC) No 48/2000 of 28 September 2000 adopted by the Council, Official Journal, C 344, 01/12/2000, pp. 1–22, § 43).

indicate only that TPM are protected, even though the person performing the circumvention does so to benefit from one exception.

Yet, this interpretation has been denied by the European Commission in its 2007 evaluation report on the Directive.[12] This report clearly affirms the required connection between copyright and the TPM, as follows:

> The wording "acts not authorised by the rightholder" in Article 6(3) aims to link TPM to the exercise of the exclusive rights mentioned in this paragraph. Therefore, the Directive aims to establish a connection between the technological measure and the exercise of copyright. This implies that Article 6(3) only protects technological measures that restrict acts which come within the scope of the exclusive rights. (. . .) Moreover, it is clear that the mention of "access control" is no more than an example to define an effective TPM. It cannot be relied upon to widen the scope of the legal definition of TPM under Article 6(3) beyond what is in the rightholders' normative power to prohibit.[13]

Some Member States have similarly emphasized the link that should exist between what a technological measure could encapsulate and what a copyright owner is legally entitled to control.[14] This is the case of the UK whose protection against circumvention only applies where TPM protects a copyright work, which is limited to "the prevention or restriction of acts that are not authorised by the copyright owner of that work and are restricted by copyright."[15] Similar definitions, firmly attaching TPM ambition to copyright scope, can be found in Austria, Denmark and Germany.[16]

In addition, one UK court decision convincingly affirmed that:

> When speaking of "acts which are not authorised" it is implicit that one is considering only acts which need authorisation, i.e. acts which are otherwise restricted. To "authorise" a man to do something he is free to do anyway – something which needs no authority – is a meaningless concept. So we think the UK draftsman was merely making explicit that which was implicit in the Directive – and indeed in the original 1996 Treaty obligations.[17]

[12] Commission Staff Working Document, Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, November 30, 2007, SEC(2007) 1556.

[13] *Ibid.* at 7.

[14] U. Gasser & M. Girsberger, "Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States – A Genie Stuck in the Bottle?," November 2004, Berkman Working Paper No. 2004-10, available at http://ssrn.com/abstract=628007.

[15] Section 296ZF (3) of the Copyright, Designs and Patent Act of 1988. See also part (b) of this section that reads that "use of a work does not extend to any use of the work that is outside the scope of the acts restricted by copyright."

[16] IVIR Study, *supra* note 2, Part II, at 52.

[17] *Higgs* v. *The Queen*, [2008] EWCA Crim 1324, at 32.

Case law

Surprisingly enough, anti-circumvention provisions yielded less case law than theoretical criticism. To follow Liu's analysis, in Chapter 11, of the post-DMCA court decisions and its division between canonical and intended cases and those whose purpose has nothing to do with preventing copyright infringement, this section will first draw a similar line between the expected and unexpected cases, i.e. between the "core" cases where limiting copyright infringement is aimed at, and some other court decisions apparently lacking some nexus to copyright protection. The latter proved to be rather scarce in the countries reviewed.[18] Many decisions concern the use and sale of modchips for videogames that have generated a mixed judicial response. I will focus my attention on that particular application of anti-circumvention provisions.

Expected and unexpected cases

As in the US, DVD hacking has provided some of the first decisions in Europe. However, provision or trafficking in DeCSS code has not made the headlines of many court cases, except perhaps for one Finnish decision that has unexpectedly declined to enforce the protection against circumvention of the DVD, considering that the huge circulation of the hacking tool had rendered ineffective the CSS protection, therefore making the DVDs ineligible for protection against circumvention.[19] In other cases, the technological measure that was tampered with either prevented musical CDs from being burned,[20] or software from being used without authorization,[21] or controlled the individual access to a videogame[22] or to copyrighted maps,[23] all cases that demonstrate some link with copyrighted works and copyright protection.

[18] Not all 27 Member States' case law has been analyzed, as court decisions of all countries are difficult to find in another language than their original one. Our informal survey has been limited to the UK, Belgium, France, Germany, Italy and the Netherlands. Even for those countries, we might have missed some court decision dealing with circumvention of technological measures.

[19] Helsinki District Court, Case R 07/1004, May 25, 2007, unofficial English translation available at www.valimaki.com/org/docs/css/css_helsinki_district_court.pdf.

[20] BGH, July 17, 2008, GRUR, 2008, at 996; LG Köln, Urteil v. November 23, 2005 – Az: 28 S 6/05 (2006) Jur-PC Web-Dok. 49/2006, Nos. 1–63, available at www.jurpc.de/rechtspr/20060049.htm.

[21] Anvers (9th ch.), 28 February 2002, *Auteurs & Media*, 2002, at 340; Corr. Charleroi, October 23, 2003, no. 2626; Corr. Gand, April 23, 2008, no. 2008/1322; Mons, May 4, 2007, no. 135 H 04. Note that in those cases another legal provision than the national implementation of the 2001 Directive applies. Such a legal provision has an explicit link with the exclusive rights in the software.

[22] BGH, February 11, 2010 – I ZR 178/08 (OLG Hamburg) Half-Life 2.

[23] BGH, April 29, 2010 – I ZR 39/08 (OLG Hamburg) Session-ID.

In Germany, freedom of expression and freedom of the press were applied to deny the application of an anti-circumvention provision to an online news site that had reported about an allegedly illegal circumvention device (and linked thereto).[24]

Odd cases, which would confirm the potential excess of anti-circumvention provisions are difficult to find in Europe. In Belgium, a person having tampered with the SIM card of cell phones[25] to make them operate on other telecommunications networks had been convicted of infringement of copyright anti-circumvention provisions, though this ground was in the end not even discussed by the criminal judge.[26]

Modchips and videogames: the uneasy case

Videogames are generally protected by built-in authentication measures and copy-protection that ensure many functions: they guarantee the authenticity of a game inserted in a console, verify the authorized region where the game was marketed and prevent the playing of unauthentic or pirated games. Modchips (that stand for modification chips) disable these mechanisms so as to allow the running of games bought in other markets, unlicensed games created by the user herself or a third party, or even copied games. More recently, modchips have also been used to transform the console in a genuine computer capable of performing other functions than those assigned by the console maker.

Litigation related to modchips has been considered in Liu's chapter (Chapter 11) as belonging to the normal remit of the anti-circumvention provisions. This does not seem so straightforward however, particularly if one looks to the diverging case law on that issue, namely in Europe. Whereas selling or making available modchips in any way has been condemned on the basis of anti-circumvention provisions namely in Belgium,[27] France,[28] the UK[29] and Germany,[30] some doubts have been

[24] BVerfG, December 15, 2011, 1 BvR 1248/11, Absatz-Nr. (1 – 38), available at www.bverfg.de/entscheidungen/rk20111215_1bvr124811.html.

[25] Mobile communications in Europe operate with chip cards inserted in phones and related to the provider with which the user has a subscription. Some so-called SIM cards are locked to prevent users from moving to another operator (to preserve the duration or other conditions imposed on the subscription).

[26] Civ. Namur, January 7, 2004, *R.D.T.I.*, October 2005, 113, note Dusollier & Potelle.

[27] Corr. Charleroi, October 23, 2003, no. 68.L7.343/02; Corr. Gand, April 23, 2008, no. 68.98.1806/07/FS1; Mons, May 4, 2007, no. 135 H 04.

[28] CA Paris, September 26, 2011, *Nintendo c. Absolute Games & Divineo*, available at www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3238.

[29] *Kabushiki Kaisha Sony Computer Entertainment Inc. (t/a Sony Computer Entertainment Inc.)* v. *Ball & Ors* [2004] EWHC 1192 (Ch) (May 17, 2004), available at www.bailii.org/ew/cases/EWHC/Ch/2004/1192.html.

[30] LG München, March 13, 2008, 7 O 16829/07, *MMR*, 2008, 839.

raised in Spain[31] and in first degree decisions in France[32] and Italy[33] as to the lacking connection between copyright protection and the use secured and restrained by videogame consoles.

Trafficking in modchips is indeed a difficult application of anti-circumvention provisions. True, modchips tamper with a set of protection measures set around videogames being without any doubt copyrighted works. They disable the protection that indirectly secures the regional distribution market of authentic videogames. Yet, as such, modchips do not copy protected works and their use to play imported or unlicensed games is, in some senses, external to the key purpose of copyright protection to the extent it circumvents the prohibition of parallel imports or alternative manufacturing of games. Playing games acquired in a different region than that of the device does not arguably infringe any exclusive rights of the copyright owner, as no distribution or resale act occurs.[34] A further difficulty is that the mere use of pirated games, enabled by modchips, does not clearly constitute an infringement of copyright save for a strict application of the temporary reproduction right. Under European law, a RAM-copy, such as that occurring when playing a game, contravenes the copyright if it is not a technical and essential part of a lawful use and has an independent economic significance.

The broad interpretation that the Court of Justice of the European Union (CJEU) has given to the temporary reproduction right might confirm the analysis of the mere use of a counterfeited work being a copyright infringement, thereby triggering the protection of the TPM controlling such use.[35] Only transient copying, occurring during a lawful use of a work, upon the condition that it is an integral and essential part of such use and does not have any other significant economic independence would be exempted under a rule of exception. The lawfulness of the use of pirated games is undoubtedly lacking, but the question is less certain for unlicensed games or games created by the user herself, the owner of the right in the console

[31] Audiencia Provincial de Las Palmas, March 5, 2010, Modchips y Swap Magic; Juzgado de instrucción no. 004 Salamanca, November 20, 2009, *Nintendo* v. *Movilquick*.

[32] TGI Paris, December 3, 2009, *Nintendo* v. *Divineo*, available at http://juriscom.net/2009/12/tgi-paris-3-decembre-2009-nintendo-c-sarl-divineo-et-autres/.

[33] Tribunale del riesame di Bolzano, December 31, 2003, available (in Italian) at www.diritto.it/sentenze/magistratord/ord_bo_31_12_03.html.

[34] As agreed by the European Commission's evaluation of the Directive, see *supra* note 12, at 8.

[35] CJEU, July 16, 2009, *Infopaq International*, C-5/08; CJEU, January 17, 2012, *Infopaq International*, C-302/10; CJEU, October 4, 2011, *Football Association Premier League*, C-403/08, & *Karen Murphy*, C-429/08. For a comment on its effect on anti-circumvention protection, see G Westkamp, "Code, Copying, Competition: The Subversive Force of Para-Copyright and the Need for an Unfair Competition Based Reassessment of DRM Laws after Infopaq," 58 *J. Copyright Soc'y* (2011), 665.

having no copyright in such games. As to regional coding, if the use of games imported from another region than that of the console is not illegal, this also renders the RAM-copy thereof an integral part of a lawful use.

In modchips cases, only the UK decisions have directly addressed the issue by considering that running counterfeited games constitutes an infringement of copyright due to the illicit temporary copying.[36]

An added difficulty results from the diverging protection of TPM applying to software or to other types of works. Indeed the 2001 Directive left intact the former protection of technological measures applied to computer programs, which was more limited: Only acts of trafficking in circumventing devices were aimed at (whereas the act of circumventing is also covered by the 2001 Directive) and they should have the *sole purpose* of circumventing to be considered as illegitimate (compared to the less restrictive standard of "limited commercially significant purpose or use other than to circumvent" found in the 2001 Directive). In some court decisions, when videogames were qualified as being software, it might have led to some doubts as to whether modchips have the sole purpose of circumventing the protection of games, as they could generally serve other legitimate purposes (even though minimal). This has informed an Australian decision[37] as well as the decision of the Italian district court. In other countries, this challenge has been avoided either by considering videogames as multimedia works to which the protection of the 2001 Directive applies, or as embracing a rather broad construction of the criteria of the sole purpose.[38]

A French district court rejected the request of Nintendo to condemn the sale of modchip-like tools.[39] The court considered that the modchip aimed at achieving interoperability of the Nintendo console with other games, which was not prohibited by the law, making a rather surprising application of the French law that provides that the TPM should not hamper interoperability.[40] On appeal,[41] the exception for interoperability was properly limited to the requirement to claim such benefit in the way

[36] *Gilham* v. *R* [2009] EWCA Crim 2293; *Nintendo Company Ltd & ANR* v. *Console PC Com Ltd* [2010] EWHC 1932 (Ch).

[37] High Court of Australia, *Stevens* v. *Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (October 6, 2005).

[38] In the Netherlands, Rb. Alkmaar November 30, 2000, Computerrecht, 2001–3, note K. Koelman.

[39] TGI Paris, December 3, 2009, *Nintendo* v. *Divineo*, available at http://juriscom.net/2009/12/tgi-paris-3-decembre-2009-nintendo-c-sarl-divineo-et-autres/.

[40] Actually this provision, albeit somewhat vague, aims at directing makers of devices that need to interoperate to DRM to address a request to an ad hoc administrative body to get the necessary information. It was not thought as providing a limitation of the protection against circumvention to achieve interoperability.

[41] Court of Appeal, Paris, September 26, 2011, no. 10/01053.

organized by law. The decision has been reversed and the modchips were considered as having been designed solely to circumvent the TPM affixed to the videogames and consoles.

In Italy, two district courts[42] had also refused to condemn the modification of PlayStations that aimed at enabling playing games imported from other regions. The decision of the *Bolzano* court considered that the main objective of the modchips was "to overcome monopolistic obstacles and to have a better use of the PlayStation." Namely, the chip was deemed to serve legitimate purposes such as playing imported games, backup copies, games of other brands, or even transforming the console into a genuine and unfettered computer. The judge did not find any relationship of the TPM with copyright but considered that the modchip rather reinstalls all functionalities that a legitimate owner should benefit from. This opinion was reversed on appeal,[43] followed by the Italian Supreme Court in 2007, which held that modchips are unauthorized circumventing devices.[44]

From Italy again a decisive interpretation could come, as a Milan Court has recently referred some questions to the CJEU for preliminary ruling as to the scope of the protection of TPM under the 2001 Directive and its application to modchips.[45] The referred questions enquire whether anti-circumvention provisions apply to a recognition code that prevents interoperability between the console and complementary products or equipment, not marketed by the same undertaking as the seller of the console. The CJEU should then soon shed some light on this unclear issue or, as has regularly been the case in the last years, it might add further complexity and uncertainty.[46]

PART II: THE INTERFACE BETWEEN TPM AND EXCEPTIONS

Article 6(4) of the Directive: a European oddity

As to the exceptions to copyright, the solution put forward by the European Directive in its Article 6(4) is a bold one as it induces

[42] Tribunale del riesame di Bolzano, December 31, 2003, available (in Italian) at www.diritto.it/sentenze/magistratord/ord_bo_31_12_03.html; Trib. Vincenza, June 27, 2003, nr. 53/03.
[43] Corte di Appello di Trento, May 18, 2006.
[44] Corte Suprema di Cassazione, September 3, 2007, no. 33768.
[45] Reference for a preliminary ruling from the Tribunale di Milano (Italy) lodged on July 26, 2012 – *Nintendo Co., Ltd and Others* v. *PC Box Srl and 9Net Srl*, Case C-355/12.
[46] The conclusions of the Advocate General were released on September 19, 2013; see the case C-355/12 on curia.europa.eu.

implementation of copyright exceptions in the very design of the technical, business and contractual models for distributing copyrighted works. Indeed, while the US have only considered the solution to that "fair use" issue at the level of the sanction for circumvention,[47] the EU has chosen to rule on the matter even before the enforcement stage.

Its first principle is to entrust the right holders with the task of reconciling the technological measures with the safeguarding of the exceptions. The first subsection of Article 6(4) states:

> [I]n the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation (. . .), the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

The intervention of the lawmaker is therefore subsidiary to that of the authors and other rights owners. Adoption of any voluntary measures by right holders should be the preferred solution. The state should intervene only in default of such measures. The second subsection of Article 6(4) provides for a similar solution (appropriate measures of the states if right holders fail to do so) as to private copying. In that case, the intervention of the legislator is not mandatory, but optional. Here also, the initiative lies on the right holders. In a way, this solution implies that the exceptions are given a positive meaning and not only a defensive nature. It was certainly the first time that authors were asked to facilitate the exercise of exceptions to their rights.

However, the accommodation of the exceptions is limited in different ways. First, the intervention of the Member States is only subsidiary to the primary intervention of the copyright owners themselves. Second, it applies only to some exceptions, such as library privileges, use for education, use by disabled persons, etc. And, finally, this approach does not apply if the work is made available on demand on agreed contractual terms, which could potentially cover many online services.

Fragmented solution within the Member States

Member States have implemented the accommodation of the exceptions within anti-circumvention measures rather differently. Some have done

[47] The DMCA sets up a rulemaking procedure where defined acts of circumvention are declared as being outside of the prohibition.

nothing, others have set up specific mechanisms, whether administrative or judicial, to complain of a technical limitation of an exception, or have simply referred the issue to the courts or to a mediation procedure.[48] This rather kaleidoscopic regime was largely criticized as it could not give security to European beneficiaries of exceptions. The recourse offered to the users in some countries may also have been perceived as too burdensome compared to the benefit of some exceptions. No user will start a lawsuit for the sole benefit of making a private copy of a CD or DVD she bought for a few euros.[49]

The absence of complaints: A solution in quest of an issue?

In any event, in the decade following the adoption of the 2001 Directive, almost no beneficiary of exceptions safeguarded by Article 6(4) of the Directive has, to my knowledge, complained before the dedicated administrative body or to any court about the operation of technological measures and reclaimed the due benefit of the privileged use. For instance, the 2008 report of the French Authority for the Regulation of Technological Measures (ARMT), whose primary mission was to hear the requests of users who could not benefit from an exception, was never seized.[50] In Belgium, where the conflict was referred to courts competent to issue injunctions in case of a technological measure unduly impeding a privileged exception, no case was ever brought to justice.

Would that be an indication that the concerns were overstated and that technological measures do not curb the benefit of exceptions as they were deemed to do? Yet, a 2009 empirical study,[51] carried out by Patricia Akester and based on many interviews with right holders and users alike, has shown that the latter declare that they are being adversely affected by the use of DRM.

Many factors can explain the lack of cases on the interface of exceptions and technological measures. First, most restraining TPM have been gradually abandoned. The music industry, for instance, has renounced protecting CDs against copying due to the hostility of consumers. Second, the room left to the initiative of right holders has yielded some

[48] IVIR Study, *supra* note 2, Part II, *The Implementation of Directive 2001/29/EC in the Member States*, 65–74 and the table at 95; Gasser & Girsberger, *supra* note 14.

[49] Systems of collective redress upon a complaint by consumers' associations could prove more effective in that regard.

[50] Annual Report, ARMT, 2008.

[51] P. Akester, "The Impact of Digital Rights Management on Freedom of Expression – The First Empirical Assessment," 1 *International Review of Intellectual Property and Competition Law* (2010), 31.

private arrangements, namely through contracts, to accommodate the needs of the beneficiaries of exceptions. In Germany for instance, scientific publishers have agreed with libraries to enable them to carry on some privileged uses for archiving purposes, despite the presence of a technological measure. Then the procedures set up to the benefit of users might be too costly and complex to engage, particularly for individuals or small institutions. But that might not be a decisive factor, as no cases were initiated in the countries where a collective action has been conferred to the representatives of the beneficiaries of exceptions (e.g. an association of libraries) either.

Finally, technological measures have evolved from genuine locks, blocking access to works or preventing their copy, to more refined systems controlling the use while allowing many activities. Users might then be sufficiently happy with the breathing space offered to them and not feel the need to rely on copyright exceptions. Downloading films or music on iTunes, for instance, entitles the buyer to make some copies and to transfer the file to a limited set of personal devices, which creates a sphere of personal use that might not be exactly identical to what is allowed under the private copy exceptions or limitations but could be flexible enough to meet the needs of users.[52]

Conclusion

Actual application of anti-circumvention in Europe has all the appearance of a quiet sea. This significantly contrasts with the accusation of creating paracopyright with no other legitimacy than the desire for more control of copyright owners over use of their works.

The scope of anti-circumvention provisions has rarely reached contested territory, where any trace of copyright infringement would be lacking and even copyright exceptions, which were considered as being the sacrificed victims of the protection of TPM, seem to have been largely preserved from an excessive technological restraint, at least if one considers the lack of recourse to the solution imposed by Article 6(4) of the 2001 Directive.

In my view, that does not mean that problems have been exaggerated or are nonexistent. I would rather suggest that a more insidious shift of copyright control lurks behind this apparent quietness. TPM have succeeded in embarking new business models in entertainment and cultural artefacts to the extent that the technical choices have already won over

[52] Some users also confess that they download works from file-sharing networks if the copy they legally bought is restricted in some way.

legal balances and design. They do not prohibit or block any use anymore, which might explain the shortage of complaints about their possible excess. Instead, current technological protection measures control and modulate use of works. The French philosopher Deleuze said about the electronic card imagined by Guattari for the future of urban cities: "[W]hat matters is not the gate, but the computer that identifies the position of each, whether legal or illegal, and operates a universal modulation."[53] He considered that the disciplinary society described by Foucault, including locking up and prohibition, was now transforming into a society of control and of freedom under probation.

Technologies of discipline constrain, lock up and prevent while the technologies of control authorize but in a regime of probation. Deleuze said that the regulation enforced by the first ones is a sort of mold, while that enforced by the second ones operates as a modulation. DRM are closer to a modulation mechanism of regulation, since they determine and adjust the extent of the use of the work allowed, depending on the user, on the license she entered into or on the remuneration she paid. They do not block the access to works but make it subject to the disciplinary conditions as decided by the right holder. Where the right owners decide to provide digital content with some defined usage rules, e.g. including a number of copies, a number of allowed viewings, etc., this usage becomes the norm for the recipients and users of such content, even though the usage they are entitled to enjoy from such works under the law might be broader and less restricted.

Today, DRM do not prevent copying, but regulate it as to the number of copies allowed, the media or device where they are installed and the authorized sphere in which they occur. Usages authorized by iTunes, Amazon or others might be an imperfect substitute to the legal private copy, depending on its scope in some countries. Modchips cases prove that parallel imports sustained by the distribution right limited by the first sale doctrine are replaced by a regional fragmentation of the markets and game/console tying through technological tricks. Finally, the example of the contractual arrangements agreed upon between some European libraries and publishers proves that the legally defined exception for archival purposes has left the floor to bilateral agreements and private ordering.

This could be considered as paracopyright to the extent it relies on a combination of technological measures, business models, contractual schemes and acceptance of users, which are substitutes for

[53] G. Deleuze, "Post-scriptum sur les sociétés de contrôle," in *Pourparlers – 1972–1990*, (Les Editions de Minuit, Paris, 1990), at 242 (my translation).

the definition in copyright law of the rights of the copyright owners and their proper boundaries.

What makes this transformation more difficult to resist is its apparent plasticity and adaptation to new digital needs and practices. Regulating a number of copies and uses within a device-based individual sphere might not exactly conform to copyright legal exceptions but at least it meets the needs of the consumer and enables the provision of legal downloading of creative content. And, importantly, regulating freedoms of use allowed to the user in that way is more flexible than the current regulatory framework.

What has been lost in this shift is the legitimacy of copyright law to draw the proper boundaries of its scope of protection. Initially, copyright is about entitling the author to control the public exploitation of her works and to decide in what ways her works will be made available to the public. For that purpose, copyright grants the author the right to authorize the making of copies of her work (right of reproduction) and the right to authorize the diffusion of her work to the public (that could encompass, according to the country, rights of public communication, making available, display, performance, or distribution).

The "public" element of such rights is crucial. The core of the copyright monopoly is the public diffusion of the work, either directly by acts of communication or indirectly by the making of copies that could be distributed or perceived by the public. What copyright encompasses is the making available of the work to the public; it is not the reception or enjoyment of the work by an individual, member of that public.[54] This "publicity" of the copyright monopoly is rooted in the history and justifications of literary and artistic property. What technological protection measures, and their offspring, the anti-circumvention laws, do is to shift copyright from a control of public exploitation to the securing of business models and users' reception of works. This is a new direction that copyright takes. It could be deemed legitimate to turn the attention of the copyright law to individual access to works that now constitute the relevant exploitation in digital networks. However, this evolution, namely brought in by anti-circumvention provisions, would certainly merit further discussion. The judicial application of those provisions in EU Member States reveals that the scope of this new copyright still contains many uncertainties. The recent questions that have been referred to the CJEU will, I hope, clarify the matter.

[54] CJEU, October 4, 2011, *Football Association Premier League*, C-403/08 & C-429/08, at 171.