bileta 2014

media@uea
teaching | research | policy

Legal Regulation & Education: Doing the Right Thing?

Martina Gillen

University of the West of England

martina.gillen@uwe.ac.uk

DRM and Modchips: Time for the CJEU to Do the "Right" Thing

Empirical Framework: Two major cases are currently pending before the CJEU which go to the heart of the balance between proprietary rights and the freedoms of the lawful purchaser. The cases in question are Case C-355/12 (Nintendo v PC Box) and Case C-458/13 (Grund and Others). C-355/12 concerns the creation and supply of modchips which allow games not authorised by Nintendo to be played upon consoles like the DS and Wii. The plaintiffs contention is that this facilitates the playing of pirated versions of their games upon these consoles. The question before the court is:

Must Article 6 of Directive 2001/29/EC be interpreted, including in the light of recital 48 in the preamble thereto, as meaning that the protection of technological protection measures attaching to copyright-protected works or other subject matter may also extend to a system, ...

Should […] the national court […] 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?

Commentators have found these questions difficult to dissect but in essence the Italian court is asking if the legal protection afforded to technological protection measures tends to permit manufacturers to effectively lock devices and what criteria should be relevant when considering whether this locking is permissible – i.e. how significant do non-infringing uses have to be before they can counterbalance the interests of the copyright holder.

Grund which also concerns similar technologies referred to in the case as "adaptors" asks:

1. Does Article 1 (2) (a) of Directive 2001/29/EC on the harmonisation of certain aspect of copyright and related rights in the information society (the Directive), preclude the application of a domestic provision which transposes Article 6(2) of the Directive into national law if the technological measure in question protects not only works or other protected subject matter, but also computer programs?

This question is intended to untangle the law applicable to video games. Specifically, are they correctly viewed as a collation of various of copyrighted works (graphics, music etc.,) in which case article 6 (2) of the Information Society Directive would apply? It states:

6.2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
(a) are promoted, advertised or marketed for the purpose of circumvention of, or
(b) have only a limited commercially significant purpose or use other than to circumvent, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.

Alternatively, should they, instead of being such a collation, correctly be viewed as computer programs and thus article 7 (1) (c) of the Software Directive be applied? It states:

...'any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.'

If they are computer programs, then this makes the decision in Nintendo about the application of technological protection measures moot since it concerns the Information Society Directive which would then be viewed as not applicable.

Argument: It is the contention of this paper that the CJEU should not follow the opinion of the Advocate General already rendered in the case of Case C-355/12. Rather the CJEU should seize this opportunity to redirect the law and policy in this area, specifically in the following three particulars.

1) To reject that TPM embedded in devices this way is acceptable (in the language of Grund to define games as computer software).

2) To consider the purpose and correct scope of the right granted to Nintendo in line with the UsedSoft judgement (C-128/11) rather than focusing solely on the non-infringing uses of the modchips.

3) Finally, and most boldly to recognise the competition aspects of these cases.