



IPKEY EU-CHINA EXCHANGE

TPMs in the Entertainment Industry

ROUSE
CONSULTANCY

THE ENTERTAINMENT INDUSTRY

Film

\$136Bn

2019, IBISworld

Game

\$135Bn

2019, Gl.Biz

Television

\$95Bn

2019, PwC

Streaming

\$51Bn

2019, Reuters (est)

Music

\$19Bn

2019, IFPI

Entertainment industry

\$436Bn

2018 Revenue

TECHNOLOGICAL PROTECTION MEASURES (TPMs) - EXAMPLES

Games	Film	Television	Streaming	Music
Access control				
<p>Ecosystem control <i>Console makers encrypt games published for use on their platform to prevent unauthorised access to them</i></p>	<p>Time access control <i>Many platforms offer access to movies for a limited time after purchase, for example a 48 hour period</i></p>	<p>Hardware control <i>Some broadcasts are scrambled to ensure that only users with special hardware can view the channel</i></p>	<p>Age control <i>Video platforms often require users to sign in to confirm their age</i></p>	<p>Account password control <i>Music streaming services often require (paid) accounts that limit uncontrolled usage</i></p>
<p>Regional access <i>Many access codes for games are delimited to a single region</i></p>			<p>Regional access <i>Streaming platforms can control the availability of content by geography</i></p>	
Copy control				
<p>Pre-download access <i>Games are sometimes downloadable before release. In that case, key booting files will be kept out until internet access is established</i></p>	<p>DVD copy protection <i>DVDs use a proprietary file system that makes it hard to watch a movie when it is not shown directly from a DVD</i></p>	<p>Hardware control <i>The requirement of special hardware prevents the use of generic recording devices</i></p>	<p>Encryption <i>Many platforms allow videos to be downloaded within the ecosystem, but they can not be played without being signed in or transferred</i></p>	<p>Encryption <i>Music streaming services encrypt downloaded songs to prevent copying and prevent playing after subscription ends</i></p>
<p>Hardware lock <i>Software may be bound to key parts of the computer so it cannot be transferred to another device</i></p>				

BACKGROUND TO EUROPEAN LEGISLATION

- WCT, Article 11
 - Contracting Parties shall provide **adequate legal protection** and **effective legal remedies** against the **circumvention of effective technological measures** that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.
- WPPT, Article 18
 - Contracting Parties shall provide **adequate legal protection** and **effective legal remedies** against the **circumvention of effective technological measures** that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

EUROPEAN LEGISLATION CONTEXT: THE NEED FOR TPMs

- Copyright Directive/Information Society Directive 2001/29/EC; Recitals 47 to 53:

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright... The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures... there is [therefore] a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright...without, however, preventing the normal operation of electronic equipment and its technological development... Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection...

EUROPEAN LEGISLATION – SUBSTANTIVE PROVISIONS

- Copyright Directive/Information Society Directive 2001/29/EC; Article 6:
 1. Member States shall 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.
 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**.

EUROPEAN LEGISLATION – SUBSTANTIVE PROVISIONS

- Copyright Directive/Information Society Directive 2001/29/EC; Article 6:
 3. For the purposes of this Directive, the expression "technological measures" means **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 authorised** by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures **shall be deemed "effective"** where the use of a protected work or other subject-matter is **controlled by the rightholders** through 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, **which achieves the protection objective**.

CJEU INTERPRETATION OF THE LAW: CASE C-355-12 NINTENDO V PC BOX

In January 2014, the CJEU ruled that:

1. Protection granted to TPMs by Article 6 include measures which are incorporated partly in the video game itself and partly in the console, and which interact to allow a videogame to be played on the console.
2. To be entitled to protection under the Copyright Directive, the **TPM must be proportionate and suitable for the achieving the objective of protecting copyright works**. They must not go beyond what is necessary to achieve that objective.
3. The national courts are to determine whether TPM are proportionate and this involves the examination of:
 1. **the actual use of the circumvention devices** – to see how often they are in fact used to allow unauthorised copies of video games and how often they are used for purposes which do not infringe copyright;
 2. **whether other measures or measures which are not installed in consoles could cause less interference with the activities of third parties, while still providing comparable level of protection of the rights holder's rights; and**
 3. **the relative costs of different types of TPMs, and the technological and practical aspects of their implementation.**

CIVIL SANCTIONS FOR CIRCUMVENTION AND TRAFFICKING IN DEVICES

- Exactly what is 'adequate legal protection' is decided by EU member states
- All have civil sanctions for circumvention Art. 6(1) and trafficking Art. 6(2)
- Circumvention Art. 6(1): Most have criminal sanctions for circumvention, normally for acts of a commercial nature:
 - under copyright law: Austria, Belgium, Denmark, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Norway, Slovakia, Slovenia
 - under criminal/penal law: Finland, France, Germany, Ireland, Italy, Portugal, Spain, Sweden, UK
- Trafficking Art. 6(2): Most have criminal sanctions for trafficking, normally for acts of a commercial nature:
 - under copyright law: Hungary, Latvia, Lithuania, Malta, Norway, Slovakia
 - under criminal/penal law: Cyprus, Estonia, Finland, France, Germany, Ireland, Italy, Luxembourg, Poland, Portugal, Spain, Sweden, UK

LEADING JUDGMENTS FROM COURTS IN EU MEMBER STATES

Games industry cases since 2010

- **France:**
 - Court d'Appel de Paris, 26 September 2011 („Divineo“). Case No.: 10/01053.
- **UK:**
 - High Court of Justice, 28 July 2010 („Playables“) Case No.: HC09C00988;
 - High Court of Justice, 10 Sept 2019 (“Team Xecuter“) Case [2019] EWHC 2376 (Ch)
- **Germany:**
 - Munich Higher Regional Court, 22 Sept 2016 („SR Tronic“). Case No.: 6 U 5037/09.
- **The Netherlands:**
 - Court of The Hague, 21 July 2010 („Webshops“). Case No.: 324867 / HA ZA 08-3879 de.
- **Italy:**
 - Court of Milan, Case Nr 12508 , 6 November 2015 („PC Box“) implementing CJEU ruling (C 355/12); Supreme Court, Case Nr 4503/2017, 27 April 2017 („PC Box“)
- **Belgium:**
 - Court of First Instance of Tournai, 13 Nov 2012 („Van den Bosch“). Judgment No.: 874
- **Spain:**
 - Commercial Court No. 2 of Madrid, 27 Sept 2017 („Nosolochips“). Judgment No. 275/2017
 - Criminal Court No. 4 of Fuenlabrada, 23 June 2016 („Myconsola“). Judgment No. 162/2016
 - Commercial Court No. 2 of Barcelona, 12 May 2016 („Disfrutadetuconsola“). Judgment No. 156/2016
 - Appeal Court of Vizcaya, 1 Oct 2015 („Myrtle“). Judgment No. 90288/15



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