Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 September 2013[1]

Case C-355/12

Nintendo Co. Ltd
Nintendo of America Inc.
Nintendo of Europe GmbH
v
PC Box Srl
9Net Srl

(Request for a preliminary ruling from the Tribunale di Milano (Italy))

(Copyright and related rights in the information society — Protection of technological measures designed to prevent or restrict acts not authorised by the rightholder — Video game consoles structured to prevent the use of games other than those authorised by the console manufacturer — Devices capable of circumventing such measures — Relevance of the intended use of the consoles — Relevance of the extent, nature and importance of different possible uses of the devices)

1. Article 6 of Directive 2001/29[2] requires Member States to provide adequate legal protection against a variety of acts or activities which circumvent, or whose purpose is to circumvent, effective technological measures designed to prevent or restrict acts which are not authorised by the rightholder of a copyright or related right.

2. A manufacturer of video games, and of consoles on which to play them, structures both items so that they must recognise each other by exchanging encrypted information in order for the games to be played on the consoles. The stated intention is to ensure that only games produced by or under licence from the manufacturer (which are protected under Directive 2001/29) can be played on those consoles (which are not claimed to be protected under that directive) and thus to prevent use of the consoles to play unauthorised copies of the protected games.

3. Another operator markets devices which can be used to enable other games, including games which are not copies of those produced or authorised by the console manufacturer, to be played on the consoles. It alleges that the aim of the manufacturer – who wishes to prevent the marketing of such devices – is not to prevent unauthorised copying of its games (an aim which must be protected against circumvention under Article 6 of Directive 2001/29) but to increase sales of those games (an aim for which no such protection is required).

1 — Original language: English.

2 — Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

4. Against that background, the Tribunale di Milano (Milan District Court) asks, essentially, (i) whether Article 6 of Directive 2001/29 covers recognition devices installed in hardware (consoles) as well as encrypted codes in the copyright material itself even though interoperability between devices and products is thereby limited and (ii), when determining whether other devices have commercially significant purposes or uses other than circumvention, what weight it should accord to the intended use of the consoles and how it should evaluate the various uses to which the other devices can be put.

5. The national court restricts its questions to the interpretation of Directive 2001/29. However, a video game is to a large extent a type of computer program (though it may also incorporate other types of intellectual work, both narrative and graphic), and computer programs fall within the scope of Directive 2009/24. [3]

Summary of the relevant EU legislation

6. The principal relevant aspects of Directive 2001/29 and Directive 2009/24 may be summarised as follows.

Directive 2001/29

7. The preamble to Directive 2001/29 acknowledges that technological measures will increasingly enable rightholders to prevent or restrict acts which they have not authorised but expresses a concern that means of illegally circumventing such measures will develop at a similar pace. Measures put in place by rightholders should therefore be legally protected. [4] Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the *sui generis* right in databases but must not prevent the normal operation or technological development of electronic equipment. It should respect proportionality and should not prohibit devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. [5] In addition, the legal protection afforded by Directive 2001/29 should not overlap with that given to technological measures used in connection with computer programs under Directive 2009/24. [6]

8. Article 1(2)(a) of Directive 2001/29 thus specifies that the directive leaves intact and in no way affects existing EU provisions relating to the legal protection of computer programs.

9. Article 6 of the same directive is entitled ‘Obligations as to technological measures’.

10. Article 6(1) requires Member States to 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.

3 — Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (OJ 2009 L 111, p. 16). Directive 2009/24 repealed and replaced Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).

4 — See recital 47.

5 — See recital 48.

6 — See recital 50. The reference was originally to Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), which was repealed and replaced by Directive 2009/24 (see Article 10 of the latter).

11. Article 6(2) requires Member States to 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 any effective technological measures, or (b) have only a limited commercially significant purpose or use other than to circumvent such measures, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating their circumvention.

12. Article 6(3) defines 'technological measures' 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 authorised by the rightholder …'. They are deemed 'effective' where the use of protected material is controlled by rightholders through an access control or protection process such as encryption, scrambling or other transformation of the protected material or a copy control mechanism which achieves the protection objective.

Directive 2009/24

13. The preamble to Directive 2009/24 apparently defines the term 'computer program' as including programs incorporated into hardware [7] and makes clear that only 'the expression of a computer program' is to be protected, not the underlying ideas and principles themselves. [8] It specifies that 'unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available' infringes the author's exclusive rights, but acknowledges that such reproduction and translation may be necessary, for example, to achieve interoperability with other programs or to allow all components of a computer system, including those of different manufacturers, to work together. To that limited extent, a 'person having a right to use a copy of the program' must not be required to obtain the rightholder's authorisation. [9] Copyright protection of computer programs should be without prejudice to other forms of protection, where appropriate. However, contractual terms contrary to the provisions of the directive in respect of, inter alia, decompilation should be null and void. [10]

14. Accordingly, Article 1(1) and (2) requires Member States to provide copyright protection to computer programs (including their expression in any form but not the ideas and principles underlying them) as literary works within the meaning of the Berne Convention. [11]

15. Under Article 4(1)(a) and (c), the rightholder's exclusive rights must include, inter alia, 'the right to do or to authorise' (a) 'the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole' and (c) 'any form of distribution to the public, including rental, of the original computer program or of copies thereof'.

7 — See recital 7. To seek to define a term in the preamble is an unusual legislative technique. Guideline 14 of the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions stipulates that terms which are not unambiguous 'should be defined together in a single article at the beginning of the act'. See also Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, paragraph 32, and, more recently, the Opinion of Advocate General Jarabo-Colomer in Case C-192/08 *TeliaSonera Finland* [2009] ECR I-10717, in particular at point 89.

8 — See recital 11.

9 — See recital 15.

10 — See recital 16.

11 — Berne Convention for the Protection of Literary and Artistic Works (1886), as most recently amended in 1979. All the Member States are parties to the Berne Convention.

16. However, Article 5 provides for a number of exceptions to those exclusive rights. In particular, for any person lawfully in possession of a computer program and entitled to use it, authorisation is not required for: reproduction, where it is necessary for the use of the program in accordance with its intended purpose, including for error correction; the making of a back-up copy, in so far as necessary for the use of the program; or observation, studying or testing of the functioning of the program in order to determine the ideas and principles which underlie any element of it, if carried out while performing any act which the person concerned is entitled to carry out.

17. Article 6 of Directive 2009/24 is headed 'Decompilation', a term which is not further defined. Under Article 6(1), the rightholder's authorisation is not to be required where reproduction of a code or translation of its form are indispensable to achieve interoperability between computer programs, provided that (a) the act is carried out by or on behalf of a person entitled to use the program (b) who did not previously have the information necessary to achieve interoperability and (c) that it is confined to the parts of the original program which are necessary for that purpose. Article 6(2) adds that information obtained through the application of paragraph 1 must be used only for such purposes and Article 6(3) that the rightholder's legitimate interests must not be unreasonably prejudiced.

18. Article 7 of Directive 2009/24 concerns special measures of protection. It requires Member States to provide appropriate remedies against, essentially, those who knowingly put into circulation or possess for commercial purposes any infringing copy of a computer program or any means whose sole intended purpose is to facilitate unauthorised removal or circumvention of a technical device applied to protect a computer program.

Facts, procedure and questions referred

19. The national proceedings are brought by three companies in the Nintendo group ('Nintendo'), which produce video games and consoles, against PC Box Srl ('PC Box'), a company which markets 'mod chips' and 'game copiers' ('PC Box's devices') via its website. Both types of device enable video games other than those manufactured by Nintendo or by independent producers under licence from Nintendo ('Nintendo and Nintendo-licensed games') to be played on Nintendo consoles. The internet provider which hosts PC Box's website is also a defendant.[12] Nintendo seeks to prevent PC Box's devices from being offered for sale.

20. The referring court provides a certain amount of technical detail (and Nintendo has provided even more) as to how PC Box's devices enable games other than Nintendo and Nintendo-licensed games to be played on Nintendo consoles. Much of that detail does not appear to me to be relevant to the legal issues raised. Suffice it to note the following.

21. The main proceedings concern two types of console manufactured by Nintendo ('DS' consoles and 'Wii' consoles), and the Nintendo and Nintendo-licensed games which are designed for them. Nintendo states that it provides free support for producers of the games which it licenses and sells its games in competition with them, demanding no royalties but charging for the supply of the cartridges or DVDs on which the games are recorded and which already contain the relevant encrypted information. Games for 'DS' consoles are recorded on cartridges which are slotted into the console; games for 'Wii' consoles are recorded on DVDs, which are inserted into the console. The cartridges and DVDs contain encrypted information which must be exchanged with other encrypted information contained in the consoles in order for the games to be played on those consoles.

12 — This reference does not concern the involvement of the internet provider (9Net Srl).

22. It is not disputed that PC Box's devices can be used to circumvent the blocking effect of the required exchange of encrypted information between, on the one hand, Nintendo and Nintendo-licensed games and, on the other hand, Nintendo consoles. Nor is it disputed that the blocking effect of Nintendo's measures prevents games other than Nintendo and Nintendo-licensed games from being played on Nintendo consoles and that PC Box's devices will circumvent that effect also.

23. According to the referring court, Nintendo claims to have equipped its consoles and games with technological measures lawfully in order to ensure that unauthorised copies of Nintendo and Nintendo-licensed games may not be used with its consoles. It also asserts that the principal purpose or use of PC Box's devices is to circumvent those measures.

24. PC Box queries whether video games are to be regarded as computer programs or intellectual work. In either event, it submits that it markets original Nintendo consoles with a software pack comprising applications specifically created by independent producers for use on such consoles [13] in conjunction with mod chips or game copiers designed to disable the blocking mechanism built into the console. PC Box also considers that Nintendo's true purpose is (i) to prevent the use of independent software unconnected with the illegal video game copies sector and (ii) to compartmentalise markets by rendering games purchased in one geographical zone incompatible with consoles purchased in another. It therefore challenges Nintendo's application of technological measures not only to its video games but also to hardware, which it considers to be contrary to Article 6(3) of Directive 2001/29.

25. The referring court finds that, in line with the case-law of the Italian courts, video games such as those in issue cannot be regarded simply as computer programs but are complex multimedia works expressing conceptually autonomous narrative and graphic creations. Such games must therefore be regarded as intellectual works protected by copyright. It notes also that the technological measures put in place by Nintendo in its consoles contribute only indirectly to the prevention of unauthorised copying of games, and that the need to exchange information between the game and the console has the effect not only of allowing only Nintendo and Nintendo-licensed games to be played on Nintendo consoles but also of preventing such games from being played on any other console, thus restricting interoperability and consumer choice.

26. The Tribunale di Milano therefore seeks a preliminary ruling on the following questions:

'(1) 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, 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 (video games produced by the same undertaking as well as by third parties, proprietors of 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 precludes interoperability with complementary equipment or products other than those of the undertaking which produces the system itself?

(2) If it should be necessary to consider whether or not the use of a product or component to circumvent a technological protection measure predominates over other commercially significant 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 apply criteria which give prominence to the particular intended use attributed by the rightholder to

13 — Independently produced video games, designed for use on proprietary hardware such as Nintendo consoles, are often referred to as 'homebrew'.

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?'[14]

27. Written observations were submitted by Nintendo, PC Box, the Polish Government and the European Commission. At the hearing on 30 May 2013, Nintendo, PC Box and the Commission made oral submissions.

Assessment

Preliminary remarks

28. First, it has been made clear that the underlying dispute between the parties to the main proceedings concerns not only copyright law but also the question whether the measures put in place by Nintendo are lawful in the light of the rules of competition law. Since the national court's questions are confined to issues of copyright law, it does not seem to me appropriate to express any view on the latter aspect in the context of this reference.

29. Second, it appears that the technological measures put in place by Nintendo seek to prevent or restrict unauthorised acts in respect not only of Nintendo's own copyright material (its own games) but also of copyright material belonging to licensed independent producers.[15] The question whether, in order to benefit from protection under Article 6 of Directive 2001/29, technological measures must be put in place by the rightholder himself is alluded to by the referring court in question 1, but is neither mentioned in its reasoning nor addressed in the submissions to this Court. I shall not address it either.

30. Third, the outcome of the main proceedings will depend on findings of fact which can be made only by the national court (and I would agree here with the Commission that such findings must be made separately for each of PC Box's devices and for each type of Nintendo console). This Court cannot, for example, reach any conclusion or express any view on the relative extents to which Nintendo's purpose or intention is in fact to prevent unauthorised copying of its games and/or to gain commercial advantage by excluding interoperability with other products. Nor can it decide whether PC Box's devices in fact meet one or more of the criteria set out in Article 6(2) of Directive 2001/29. It can merely provide guidance as to the types of fact which may be relevant when applying national legislation implementing that article.

Relevance of Directive 2009/24

31. It is clear from the order for reference that the national court has made certain findings of fact as to the nature of Nintendo and Nintendo-licensed games and has concluded that, contrary to an argument put forward by PC Box, those games are not to be regarded as computer programs within the meaning of Directive 2009/24 but as complex multimedia works falling within the scope of Directive 2001/29.

14 — Although the actual wording of the second question might leave room for doubt, it is clear from the reasoning set out in the order for reference that the 'uses' referred to in relation to quantitative or qualitative criteria are those of the 'product or component' to be evaluated (namely, the mod chip or game copier), and not those of the 'product in which the protected content is inserted' (the console).

15 — See point 21 above.

32. In its written observations, Poland suggested that those findings might be queried, although its own, not entirely conclusive, analysis seemed to lead it in the same direction. The Court therefore asked the parties attending the hearing (Nintendo, PC Box and the Commission) to address the question of the applicability of Directive 2001/29 in circumstances such as those of the main proceedings. Nintendo and the Commission agreed with the approach taken by the national court. PC Box, on the other hand, contended that Directive 2009/24, and not Directive 2001/29, was relevant to the circumstances in issue; it asserted that the decompilation carried out by PC Box was confined to the parts of the programme strictly necessary in order to ensure interoperability between Nintendo consoles and 'homebrew' games which did not infringe any copyright or related right.

33. It seems to me that this Court has no reason and no competence to reassess the facts found by the referring court, and that the conclusion which the latter draws from its findings in this regard is difficult to call in question as a matter of EU law.

34. Directive 2009/24 concerns only computer programs, whereas Directive 2001/29 concerns copyright and related rights in intellectual works in general. The latter leaves intact and in no way affects existing EU provisions relating to, inter alia, the legal protection of computer programs. The Court has thus stated that Directive 2009/24 constitutes a *lex specialis* in relation to the provisions of Directive 2001/29.[16] In my view, that statement must be read as meaning that the provisions of Directive 2009/24 take precedence over those of Directive 2001/29, but only where the protected material falls entirely within the scope of the former. If Nintendo and Nintendo-licensed games were computer programs and no more, Directive 2009/24 would therefore apply, displacing Directive 2001/29. Indeed, if Nintendo applied separate technological measures to protect the computer programs and the other material, Directive 2009/24 could apply to the former, and Directive 2001/29 to the latter.

35. However, the national court has found that Nintendo and Nintendo-licensed games cannot be reduced to the status of computer programs alone. They include also intellectual works in narrative and graphic form, which appear to be inextricable from the programs themselves. Nintendo's measures affect access to and use of the games as a whole, not merely their computer program component. The protection which Directive 2009/24 affords against unauthorised acts in respect of computer programs is slightly less generous (by reason of the exceptions provided for in Articles 5 and 6[17]) than that which Directive 2001/29 affords against circumvention of technological measures designed to prevent or restrict unauthorised acts in respect of intellectual works in general. Where complex intellectual works comprising both computer programs and other material are concerned – and where the two cannot be separated – it seems to me that the greater, and not the lesser, protection should be accorded. If that were not so, rightholders would not receive in respect of that other material the degree of protection to which they are entitled under Directive 2001/29.

36. In any event, it does not appear that the acts made possible by the use of PC Box's devices, and with which the main proceedings are concerned, fall within any of the exceptions set out in Articles 5 and 6 of Directive 2009/24, although that again is a matter pertaining to the national court's assessments of fact.

37. Finally, I am aware that the German Bundesgerichtshof (Federal Court of Justice) has referred a specific question to this Court on the applicability of Directive 2009/24 to video games of the kind in issue.[18] I think it preferable for the Court to decide such a question in the light of the fuller submissions which will be presented to it in that case and to confine its assessment in the present case to the specific issues of interpretation raised by the national court.

16 — Case C-128/11 *UsedSoft* [2012] ECR, paragraph 51.

17 — See points 16 and 17 above.

18 — Case C-458/13 *Grund and Nintendo*.

38. I shall therefore address the questions by reference to Directive 2001/29 alone.

The questions referred

39. The Tribunale di Milano poses two questions, though perhaps not quite as clearly as might have been desired. [19]

40. As I understand it, the first question comprises two parts. First, do 'technological measures' within the meaning of Article 6 of Directive 2001/29 include not only those which are physically linked to the copyright material itself (here, by incorporation in the cartridges or DVDs on which the games are recorded) but also those which are physically linked to devices required in order to use or enjoy that material (here, by incorporation in the consoles on which the games are played)? 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?

41. The second question seems to concern essentially the criteria to be applied when assessing, in the context of Article 6(2) of Directive 2001/29, the purpose or use of devices such as those of PC Box which do or can in fact circumvent technological measures qualifying for protection. The national court refers in that regard, on the one hand, to 'the particular intended use attributed by the rightholder to the product in which the protected content is inserted' (here, Nintendo's consoles) and, on the other hand, to the extent, nature and importance of the uses of the device, product or component itself (here, PC Box's devices).

42. I infer that the national court wishes to establish, first, whether Nintendo's technological measures qualify for protection because they are designed to prevent or restrict acts not authorised by the rightholder, even if they also restrict interoperability; then, if so, secondly and separately, whether that protection must be provided against the supply of PC Box's devices because they allow or facilitate the performance of such unauthorised acts. I consider, however, that the two issues cannot be entirely separated, and that factors mentioned in relation to one may be relevant to the solution of the other.

Question 1

43. The first part of the question can, in my view, be taken alone and seems to pose no great difficulty. Nothing in the wording of Article 6 of Directive 2001/29 excludes measures such as those in issue, which are incorporated partly in the games media and partly in the consoles, and which involve interaction between the two. The definition in Article 6(3) – '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' – is broad, and includes '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'. To exclude measures which are, in part, incorporated in devices other than those which house the copyright material itself would be likely to deny to a broad range of technological measures the protection which the directive seeks to ensure.

44. The second part of the question is less straightforward.

19 — Nintendo has quoted a learned commentator as saying: 'It is difficult to decipher the meaning of these complicated questions. (The CJEU might have to refer these questions back for preliminary explanation by the Milan court or by a committee of linguists.)' That appears something of an exaggeration, but their formulation is indeed not simple.

45. Both Nintendo and the Commission have rightly pointed out that, to benefit from legal protection pursuant to Article 6 of Directive 2001/29, a technological measure must be effective. Thus, in accordance with Article 6(3), not only must it be designed, in the normal course of its operation, to prevent or restrict unauthorised acts but it must also allow the use of the material to be controlled by the rightholder. In addition, as the Commission rightly submits, the acts which it must be designed to prevent or restrict are those for which the rightholder's authorisation is required under the directive – namely, reproduction (Article 2), communication or making available to the public (Article 3) or distribution (Article 4) of the rightholder's work.

46. The Commission considers that the acts specifically in issue in the main proceedings are, primarily, reproduction and, secondarily (because copies may subsequently be distributed), distribution of Nintendo and Nintendo-licensed games. I see no reason to disagree with that view.

47. As I have stressed, findings of fact are a matter for the national court, but Nintendo's technological measures seem to me likely to be effective in, if not preventing, at least restricting unauthorised reproduction of Nintendo and Nintendo-licensed games. It is true that the national court has found that their effect is largely indirect in that regard (the immediate effect being to prevent the use of unauthorised copies on Nintendo consoles) but I do not find that Article 6 of Directive 2001/29 contains any condition or makes any distinction as to directness of effect. If unauthorised copies are unusable (at least on Nintendo consoles), that is likely to have a significant restrictive effect on their production and thus their subsequent distribution. It also seems likely that the measures will have that effect 'in the normal course of their operation'. For the purposes of what follows, therefore, I shall assume that to be true.

48. If those were their only effects, the technological measures in issue would clearly fall within the scope of Article 6 of Directive 2001/29 and would be entitled to benefit from the required legal protection.

49. However, it is a premiss of the national court's question that those measures also prevent or restrict acts which do not require the rightholder's authorisation under Directive 2001/29 – such as the use of Nintendo consoles to play games other than Nintendo and Nintendo-licensed games or copies thereof, or the playing of Nintendo and Nintendo-licensed games on consoles other than those manufactured by Nintendo.

50. To the extent that such other effects are generated, Directive 2001/29 does not require any legal protection to be given to the technological measures in question. Indeed, there would not appear to be any justification for such protection, if it were granted.

51. The difficulty lies in the fact that the same measures prevent or restrict acts which do require authorisation and those which do not.

52. Nintendo submits that the fact that a technological measure prevents or restricts acts which do not require authorisation is immaterial, provided that such an effect is only occasional or incidental to the main aim and effect of preventing or restricting acts which do require authorisation. PC Box, by contrast, stresses the principles of proportionality and interoperability set out in recitals 48 and 54, respectively, in the preamble to Directive 2001/29: technological measures which go beyond what is necessary to protect the copyright material itself or which exclude interoperability should therefore not benefit from protection. The Commission considers that, if such measures prevent also acts which do not require authorisation then, if they could have been designed so as to prevent only acts which require authorisation, they are disproportionate and do not qualify for protection; however, if it is unavoidable that they prevent also acts which do not require authorisation, they might not be

disproportionate and might thus qualify for protection; the evaluation requires the current state of technology to be taken into account. Both Nintendo and the Polish Government submit that Nintendo consoles are not general-purpose computing devices; they are designed and marketed for the sole and explicit purpose of enabling Nintendo and Nintendo-licensed games to be played on them.

53. There is thus in fact broad agreement between those submitting observations (and I too agree) that a test of proportionality, the principle referred to in recital 48 in the preamble to Directive 2001/29, must be applied. Nintendo and PC Box, however, approach that test from opposite starting-points and argue for opposite outcomes.

54. I agree with the Commission that it is necessary for the national court to examine whether, in the current state of technology, the desired effect of preventing or restricting acts which require the rightholder's authorisation can be achieved without also preventing or restricting acts which require no such authorisation. In other words, could Nintendo have protected its own or licensed games without preventing or restricting the use of its consoles to play 'homebrew' games?

55. I agree also with the cautious and nuanced manner in which the Commission expresses its view. The test of proportionality cannot be reduced to a mere assertion that interference with legitimate activity is immaterial provided that it is only incidental (Nintendo) or that any restriction of interoperability is necessarily disproportionate (PC Box).

56. In its classic form, as applied by the Court, that test involves determining whether a measure pursues a legitimate aim, whether it is suitable to achieve that aim and whether it does not go beyond what is necessary to achieve it.

57. As to the first element of the test, the aim of preventing or restricting acts not authorised by the rightholder is inherent in any system of copyright and is specifically encouraged by the legal protection required under Article 6 of Directive 2001/29.

58. To the extent that Nintendo's technological measures pursue only that legitimate aim, the question of their suitability to achieve it is linked to that of their effectiveness, which I have addressed in points 45 to 47 above. The national court must decide, on the evidence presented to it, which technological measures, among those currently available, can effectively protect against unauthorised reproduction of Nintendo and Nintendo-licensed games. There are perhaps no measures which can ensure that such acts are totally prevented. However, different measures can lead to different degrees of restriction. The national court must determine whether the degree of restriction attained by the technological measure in issue provides effective protection against unauthorised acts.

59. If, on the other hand, the national court were to find that Nintendo was pursuing in addition any other aim not justified in the context of that directive, the extent to which the nature of the technological measures was determined by the latter aim would have to be taken into account when examining whether those measures were suitable to achieve the legitimate aim of preventing or restricting unauthorised acts.

60. The remaining question is whether the measures do not go beyond what is necessary to achieve the aim of preventing or restricting unauthorised reproduction of Nintendo and Nintendo-licensed games.

61. In that regard, the national court must look at the degree of restriction of acts which do not require the rightholder's authorisation. What categories of act are in fact prevented or restricted where the technological measures in issue are applied and are not circumvented? How important is it that such acts should not be prevented or restricted?

62. Whatever the assessment of the degree of interference caused by the technological measures in issue, it will be necessary to decide whether other measures could have caused less interference while still providing comparable protection of rightholders' rights. In that regard, it may be relevant to take account of the relative costs of different types of technological measure, together with any other factors which might influence or determine the choice between them.

63. It is on the basis of considerations such as those which I have (without any claim to exhaustivity) outlined above that the national court must decide whether the technological measures in issue in the main proceedings are proportionate to achieve the aim of protection against unauthorised acts, as contemplated in Article 6 of Directive 2001/29, and thus qualify for the legal protection required by that provision, or whether they go beyond what is necessary for that purpose and thus do not qualify for such protection.

64. However, the analysis cannot be complete without considering the protection also in the light of the devices, products, components or services against which it is sought, with which Question 2 is concerned.

Question 2

65. The national court seeks guidance on the relevance of 'the particular intended use attributed by the rightholder to the product in which the protected content is inserted' (Nintendo's consoles) and of the extent, nature and importance of the uses of the devices against whose use protection is sought (PC Box's mod chips and game copiers).

66. As regards the first aspect, the national court refers to case-law of the Italian criminal courts according to which, apparently, the way in which the consoles are presented to the public and the fact that they are designed to play video games may lead to the conclusion that the use of mod chips has the primary purpose of circumventing the technological measures put in place. The referring court does, however, query whether that reasoning is adequate, particularly in proceedings such as those before it. In their observations, Nintendo and the Commission both consider that the manufacturer's intention as regards the use of the consoles is not a relevant criterion when assessing the purpose of the mod chips or game copiers. By implication, PC Box appears to take the same view in its very brief observations on this question, while the Polish Government regards intended use as a factor which may be taken into consideration without being decisive.

67. I too consider that the particular use intended by Nintendo for its consoles is of no relevance to the assessment of whether protection should be provided against the supply of PC Box's devices. What matters is whether the latter fall within the scope of Article 6(2) of Directive 2001/29, and it is therefore the second aspect of the question – the extent, nature and importance of the uses of PC Box's devices – which must be addressed.

68. As the Commission has pointed out, where a technological measure qualifies for protection pursuant to Article 6(2) of Directive 2001/29, that protection must be provided against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices which (a) are promoted, advertised or marketed for the purpose of circumventing the technological measure in question, or (b) have only a limited commercially significant purpose or use other than to circumvent it, or (c) are primarily designed, produced or adapted for the purpose of enabling or facilitating its circumvention. Where none of those criteria are met, there is no protection pursuant to those provisions; by contrast, it is sufficient that a single criterion is met for protection to be required.

69. The national court's concern in its question is apparently less with (a) or (c), namely, purposes for which the devices are marketed or designed, than with (b), namely, the commercially significant uses of the devices in question. What types of criteria, it wishes to know – quantitative and/or qualitative – should be relied upon in order to assess whether PC Box's mod chips or game copiers 'have only a limited commercially significant purpose or use other than to circumvent' the technological measures put in place by Nintendo?

70. The reference to quantitative criteria in the question seems to indicate that the national court envisages examining evidence as to, for example, how often PC Box's devices are in fact used in order to allow unauthorised copies of Nintendo and Nintendo-licensed games to be played on Nintendo consoles and how often they are used in order to allow the playing of games which do not infringe copyright in Nintendo and Nintendo-licensed games.

71. That, Nintendo submits, reveals a misconception: what matters is not whether there are commercially significant purposes or uses *other than facilitating infringement* of the exclusive rights protected by the technological measures but simply whether there are commercially significant purposes or uses *other than circumventing those measures*, regardless of the type of act or activity which is thereby facilitated.

72. The Commission, however, stressed at the hearing that Directive 2001/29 does not seek to create any rights other than those specified in Articles 2, 3 and 4 (in essence, to grant or refuse authorisation for the reproduction, communication or distribution of a protected work). Legal protection pursuant to Article 6 is required only against circumvention which would infringe those specific rights.[20] Consequently, it is relevant to consider the ultimate purposes or uses of PC Box's devices and not merely the question whether there are commercially significant purposes or uses other than circumventing Nintendo's technological measures.

73. I would agree here with the Commission, and I would add that the same factors are relevant to the assessment of Nintendo's technological measures themselves.

74. It is not disputed that Nintendo's technological measures block both unauthorised acts (the use of unauthorised copies of Nintendo and Nintendo-licensed games) and acts which do not require authorisation (the use of other games), and that PC Box's devices circumvent that blocking in both cases. The blocking and the circumvention are thus coextensive; they are two sides of the same coin.

75. The extent to which PC Box's devices may in fact be used for purposes other than allowing infringement of exclusive rights will therefore be a factor to be taken into account when deciding not only whether those devices fall within Article 6(2) of Directive 2001/29 but also whether Nintendo's technological measures meet the test of proportionality. If it can be established that they are used primarily for such other purposes (and whether such a proposition can be established is a matter for the national court), not only are they used in ways which do not infringe any of the exclusive rights guaranteed by Directive 2001/29, but there will be a strong indication that the technological measures are not proportionate. By contrast, if it can be established that the devices are used primarily in such a way as to infringe exclusive rights, that will be a strong indication that the measures are proportionate. Consequently, if it is possible, a quantitative assessment of the ultimate purposes for which the technological measures are circumvented by means of the devices will be relevant in determining both whether Nintendo's technological measures qualify in general for legal protection and whether protection should be given against the marketing of PC Box's devices.

20 — The Commission pointed out that, in its proposal and amended proposal for Directive 2001/29, Article 6(1) and (2) specified that they concerned 'circumvention without authority of any effective technological measures designed to protect any copyright or any rights related to copyright …' and that it was only with a view to 'simplifying the drafting' that the Council removed that specification (see Common Position (EC) No 48/2000, OJ 2000 C 344, p. 1).

76. The question of qualitative criteria, raised by the national court, has scarcely been addressed in the observations to the Court. It seems from the order for reference that the national court was envisaging that the importance of allowing Nintendo's consoles to be used for purposes which did not infringe any exclusive rights might outweigh the importance of preventing or restricting unauthorised acts.

77. I have indicated above[21] that such considerations may be relevant when applying the test of proportionality to Nintendo's technological measures. They may in my view also be relevant to the question whether protection must be provided against the marketing of PC Box's devices.

78. I would agree that it may be important in some cases (though less important in others) that the implementation of technological measures which protect exclusive rights should not interfere with users' rights to carry out acts which require no authorisation. However, to the extent that the latter are not fundamental rights, the importance of protecting copyright and related rights must also be given due recognition. None the less, such qualitative criteria should be viewed in the light of the quantitative criteria already discussed, namely, the relative extent and frequency of uses which do and of those which do not infringe exclusive rights.

Conclusion

79. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Tribunale di Milano to the following effect:

(1) On a proper construction of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 'technological measures' within the meaning of Article 6 of that directive may include measures incorporated not only in protected works themselves but also in devices designed to allow access to those works.

(2) When determining whether measures of that kind qualify for protection pursuant to Article 6 of Directive 2001/29/EC where they have the effect of preventing or restricting not only acts which require the rightholder's authorisation pursuant to that directive but also acts which do not require such authorisation, a national court must verify whether the application of the measures complies with the principle of proportionality and, in particular, must consider whether, in the current state of technology, the former effect could be achieved without producing the latter effect or while producing it to a lesser extent.

(3) When determining whether protection must be provided against any supply of devices, products, components or services pursuant to Article 6(2) of Directive 2001/29, it is not necessary to consider the particular intended use attributed by the rightholder to a device designed to allow access to protected works. By contrast, the extent to which the devices, products, components or services against which protection is sought are or can be used for legitimate purposes other than allowing acts which require the rightholder's authorisation is a relevant consideration.

21 — At point 61.