[DE] Federal Supreme Court Submits Questions on Video Game Copyright Protection

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On 6 February 2013, the Bundesgerichtshof (Federal Supreme Court - BGH) decided, in a request for a preliminary ruling, to ask the Court of Justice of the European Union under which provisions technical measures taken to protect copyrighted video games were themselves protected.

The plaintiff in the national court proceedings produces and sells video games for a portable games console, which are only sold on special memory cards exclusively designed for this console. The defendants had sold, on the Internet, adapters for these memory cards with either a built-in memory chip or a slot for standard memory cards, which could be used to play unauthorised copies of the games on the console. The plaintiff claimed that this infringed Article 95a(3) of the Urheberrechtsgesetz (Copyright Act - UrhG), which is based on Article 6 of Copyright Directive 2001/29/EC and prohibits the sale of devices that enable the circumvention of effective technological measures designed to protect works protected by copyright.

The lower-instance courts had upheld the complaint and found that the common format of the memory cards and consoles produced by the plaintiff constituted an effective technological measure designed to protect the spoken, musical, photographic and video content of the games.

However, the BGH adjourned the proceedings on the grounds that the video games sold by the plaintiff did not only consist of spoken, musical, photographic and video content, but were primarily based on computer programs. These were governed by specific, less stringent regulations of the Directive on the legal protection of computer programs (2009/24/EC). Furthermore, Directive 2001/29/EC stated that its provisions did not affect existing Community law provisions on the legal protection of computer programs. On this basis, Article 69a(5) UrhG, which was designed to transpose this provision, stipulated that Article 95a(3) UrhG did not apply to computer programs.

The question that therefore arises is whether the ban on the sale of devices that enable the circumvention of effective technological measures designed to protect “hybrid products” such as those at issue in this case is governed by the provisions specifically applicable to computer programs or by those generally applicable to works protected by copyright, or whether both sets of rules are applicable to

video games.

Pressemitteilung des BGH vom 7. Februar 2013 (Az. I ZR 124/11)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&Sort=3&nr=63116&pos=0&anz=25

BGH press release of 7 February 2013 (case no. I ZR 124/11)