

- Subject** Circumvention of an effective technological measure
- Applicant** District Prosecutor N.N.
- Issued** August 29, 2007
- In brief** *Questions of interpretation relating to the protection of technological measures referred to in Sections 50a and 50b of the Copyright Act, e.g. efficiency of measures.*

I. APPLICATION

In a letter received on 1 June 2007, the applicant requested the opinion of the Copyright Council on the following two questions:

- 1) Does the CSS (Content Scrambling System) protection constitute an effective measure referred to in the Copyright Act, which is based on the Directive of the European Parliament and Council 2001/29/EC and the WIPO Treaty of 1996?
- 2) Does the action of the defendants meet one or several criteria referred to in the provisions of Section 50b? If it does, which criteria are fulfilled?

Account of the matter

Helsinki District Court has tried criminal case number R 07/1004 (Prosecutor's registry number R 06/5527), in which the charge concerned the circumvention of a technological measure and the time of commission was 1 January 2006 - 7 January 2006.

Helsinki District Court rendered judgement in the matter on 25 May 2007, dismissing the charge in the case of both defendants. The judgement has not gained legal force; the Prosecutor gave notice of intent to appeal in regard of the judgement in its entirety on 31 May 2007.

Statement of the criminal act charged

The description of the criminal act charged presented by the Prosecutor at the court of first instance was the following:

"K.K. and M.M. have together contravened the prohibition to manufacture and distribute devices for circumventing a technological measure to the effect that M.M., against a remuneration of 0.05 euro offered by K.K., created a computer program written in Haskell programming language, which enables a protected work or the technological protection of other material, that is, CSS protection on a DVD, the purpose of which, among other things, is to prevent direct reproduction of material on the DVD, to be circumvented or dismantled or which at least facilitates the circumvention or dismantling of this protection. After this, the defendants made the program in question available to the public via an information network by posting it on an internet site called "Organisoitukeskustelu" (organised discussion), which is maintained by K.K. and the purpose of which is to offer services in the circumvention and/or dismantling of technological measures in an organised manner."

The investigation of the criminal case was put in motion by the defendants' express desire to criticise the new Copyright Act and intent to test the limits and interpretation of and action prescribed punishable by law.

There is an internet site called "Organisoitukeskustelu" (organised discussion). The express purpose of the site was to offer circumvention and/or dismantling services. The site has been used, among other things, for presenting, making available to the public, publishing and marketing circumvention and dismantling programs and instructions. The participants – that is, the writers and uploaders of the programs – are offered a small monetary compensation. After the site had been in operation for approximately one week, the defendants gave themselves up to the police, which is how the matter came to be investigated by the police.

Regarding Question 2, the applicant notes that the fulfilment of even one criterion referred to in Section 50b of the Copyright Act causes the device or service to be prohibited and the essential elements of the offence to be fulfilled. Although the applicant deems that in the case in hand it is indisputable that the definition of the main purpose in Section 50b(2)(3) is fulfilled (a computer program was designed primarily for the purpose of enabling or facilitating the circumvention of effective technological measures protecting protected works with the intention of distributing it in Finland, after which it was distributed), the applicant requests an opinion also regarding the other criteria.

According to the applicant, in the case in hand it has been particularly in dispute whether the defendants' action fulfils the definition of "service". The definition of service and its interpretation have generated extensive discussion in the "internet community", among others.

Defendants' briefs

The defendants denied the charge. First of all, the protecting device cannot be considered effective (both defendants' briefs, p.2):

"Anyone who knows anything about information technology can in 2007 no longer consider the CSS "effective" in the meaning of the Act. The protection was introduced in 1997 and was circumvented for the first time in 1999. After this, instructions and different programs on how to circumvent the protection have been freely, easily and readily available in the internet (...). Detailed technical information about the technical implementation and its weaknesses has also been available (...)."

Another indication of the weakness of CSS is that there are several products on the market which add a new protection layer to the CSS protection. When the CSS protection was circumvented in 1999, the US organisation DVD CCA attempted to stop those distributing circumvention programs by taking legal action. In 2004, however, the organisation voluntarily dropped the legal action. Since then the organisation has not demanded any sanctions for anybody or taken new legal action in the United States or elsewhere in the world. (p. 3)

Secondly, the defendants have a legal right to circumvent the protection. The defendants use the Linux system on their computers and their purpose has been to view legally acquired DVDs, which has not been possible without circumventing the protection. The defendants also refer to the right of quotation. (p. 4).

Thirdly, the matter concerned is not a "service" referred to in the Act. Despite its name and nominal "service fees", the web site in question is not actually a service referred to in the Act and its preamble (p. 5).

Fourthly, prohibiting discussion on the net violates the freedom of speech. The defendants' primary motivation in taking part in the discussion has been to contribute to a topical social debate on the repercussions of the Copyright Act. The protection technology of film DVDs has been intentionally chosen as the discussion theme. The Prosecutor is attempting to limit the freedom of speech of the defendants and the other debaters. (p. 6)

Ruling of the court of first instance

The ruling of the court of first instance was as follows:

"The crime concerns an effective technological measure protecting a protected work, which means technology, a device or a component designed, in its ordinary purpose, to prevent or limit acts in regard of a work without the permission of the author or other right-holder and which achieves the desired protection.

According to Y.Y. and Z.Z., who can be considered experts in information technology and who were heard as witnesses in the matter, it has been reliably established that after a Norwegian hacker succeeded in breaking the CSS protection of DVD discs in 1999, the situation from the standpoint of the end-user changed in that corresponding circumvention programs are easily accessible on the internet by the dozens, even free of charge. In some computers such a program is pre-installed.

As regards the holders of the copyright, M.M.'s and K.K.'s action, as recounted in the charge, cannot be considered in the least to cause added "breach" in the CSS protection as compared to the current state of affairs. The CSS protection cannot be considered an effective technological measure referred to in the Act. Consequently, the criteria of an offence against a technological measure are not fulfilled. Hence, the charge must be dismissed."

Observations on the trial materials

The trial material is enclosed with the Prosecutors' request for an opinion. It reveals the following.

The documents submitted to the police (investigation notice, p. 2) state, among other things, that "the content of DVD discs is protected by a technological protection obviously designed to make it difficult to view the discs. The CSS protection works by encrypting the content and in no way prevents the copying of the discs. The consequent problem is playing the disc in operating systems which have no player program installed. The following program tries to contribute to solving this problem."

The fact that the problem particularly relates to the Linux operating system becomes clear from a statement in the conclusions on page 5:

"The defendants consider that it has not been established that the CSS protection is an effective technological protection whose circumvention is a punishable act in the meaning of the Act. (...) The majority of operating systems have a pre-installed play program dismantling the CSS protection and it is not reasonable or in keeping with the purpose of the Act to punish for the fact that the Linux operating system has no such play program."

There is also a reference to this problem in the defendants' briefs, which describes the features of different operating systems as being different (p. 2 in both):

"However, if the user needs to watch a DVD film on Linux or quote a DVD film in the Windows system, it can be done very quickly (...)"

In his examination record, K.K. states in answer to a question that *"it has to be noted, however, that the average citizen will hardly be able to dismantle the DVD encrypting with the program in question."* (Preliminary investigation record, p. 8, K.K.'s examination record, p. 3).

The defendants' brief to the court of first instance also notes (p. 2):

"It remains unclear whether the intended meaning in the enactment of the Act was so-called objective effectiveness or subjective effectiveness. It may well be that most of Finns know nothing about CSS encrypting."

Supplementary material provided by the Prosecutor

The Prosecutor has provided the Copyright Council with supplementary material at the final stage of the processing of the matter by the Council on 15 August 2007. The material consists of a Technical Statement concerning the CSS protection system (subsequently: Technical Statement) and a statement by Mihaly Ficsor focusing on the international regulation of TPMs.

The Copyright Council will not deal with Ficsor's statement. In the Technical Statement, the Council only addresses the mention on page 8 concerning CSS licensed program solutions and the contexts in which they are used.

Under the rules of procedure of the Copyright Council (21.6.1999, Section 2), the Council does not request a statement of defence from the other party if the request for the Council's opinion has been made by a court of law, a Prosecutor or a pre-trial investigating authority. According to the covering note, the opinions are intended to be presented at the court of appeal.

II. LEGAL BACKGROUND

Protection of a technological measure in EC regulation

The Copyright Act provides for the protection of a technological measure. In this respect the legislation is based on the harmonisation of copyright legislation within the European Union and on the implementation of the relevant Directive in Finnish legislation.

The regulation concerning the protection of a technological measure is based on EC Directive 2001/29/EC (on the harmonisation of certain aspects of copyright and related rights in the information society, issued on 22 May 2001, subsequently the "Infosoc Directive"), the purpose of which was to harmonise copyright and neighbouring rights in the digital operating environment. The Preamble to the Directive (point 15) refers to two treaties adopted by the World Intellectual Property Organisation WIPO in December 1996: WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.¹

Under paragraph 1 of Article 6 "Obligations as to technological measures" of the Directive, "*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.*"

Under Article 6, paragraph 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*

¹ Regarding the background to the directive, see also the IVIR Study , pp. 69-73. More about the study on page 8.

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures."

According to Article 6(3), 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 or a database rightholder as provided for by law.

Technological measures shall be deemed "effective" (Article 6(3)) 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, which are for example encrypting, modification or other alteration of the work or other material or a system controlling reproduction, the rightholders control the use of a protected work or other material by means of a system controlling reproduction.

Report KM 2002:5 of the Copyright Commission the status of TPMs in terms of the Infosoc Directive (p. 62):

"All TPMs used in a digital environment can be circumvented more or less easily. Correspondingly all means of locking in an analogue environment can be opened. The fact that a lock does not prevent break-in with the most heavy-duty tools does not mean that such means of protection would not be effective in the meaning of the Directive."

"The provision is intended to guarantee the protection of property, which in a digital environment should be as good as in an analogue environment. In a digital environment the purpose of protection of a TPM should be regarded as having been achieved when the protection used makes the purpose of protecting evident for everyone."

Measures which make a technological measure ineffective or which influence its operation to the effect that it no longer works in the way intended are considered to constitute circumvention of a technological measure. (KM 2002:5 s. 154).

The protection of a technological measure was also discussed fairly extensively in the Commission proposal for the Infosoc Directive (COM(97) 628 final, pp. 41-42). According to this document, the draft directive included intentionally loose definitions: "adequate...effective". The Directive was seen to be wider in scope than the WIPO Treaties, which only mention "circumvention of technological measures". The regulation in the Directive comprises any action, preparatory action (manufacture, distribution) and services which contribute to or enable a protective measure to be circumvented.² This

² COM (97) 628 final, p 41: "It is not directed simply against the "circumvention of technological measures" as in the WIPO Treaties, but covers any activity, including preparatory activities such as the manufacture and distribution, as well as services that facilitate or enable the circumvention of these devices." - The broad wording has also given rise to critical discussion whether the reference in the WIPO Treaties to circumvention, "with the exercise of their rights", should also be added to the wording of the Directive or at least the Directive should be interpreted in that sense (WCT Art. 11,

extension was considered necessary particularly for the reason that it is not circumvention by single citizens that imperils copyright but actions by commercial enterprises in the purpose of producing, selling, renting or advertising devices for circumventing a technological measure.

"Technical effectiveness" refers to the fact that it is incumbent on the rightholders to demonstrate the effectiveness of the technology. The provision also introduces another element, that is, the awareness of the person circumventing the protection of the matter. The protection does not encompass measures which do not involve awareness of the fact that the action enables technological protection measures (TPMs) to be circumvented. Further, if the action taken or the services used only marginally have a purpose other than to circumvent protection, they come under the regulation. The purpose of the regulation is not to make general-use electronic equipment or services illegal only because they may, alongside their primary purpose, have the capability to circumvent TPMs.³

Not any circumvention of protective measures comes under regulation, it has to specifically relate to circumvention of a technological measure put in place to protect copyright, a neighbouring right or a database.⁴

IVIR Study

The Commission commissioned an IVIR Study⁵ on the Infosoc Directive, which was published in February 2007. Regarding the effectiveness criterion of TPMs, the study notes, among other things, that the qualification "effective" is used in order that "completely useless TPMs are not protected, while TPMs that do achieve the protection objective and exercise at least some control over the use of the work are protected, even if they eventually get circumvented."⁶

WPPT Art. 18). The purpose is not to offer a wider protection than one that specifically relates to the protection of copyright. Copyright Conference, Munich, 14.-15.6.2007, Paper by Tillman Lüder (EU-Commission).

³ COM (97) 628 final, p 41: "As in the WIPO Treaties, the provision contains an element concerning the technical "effectiveness" of the measure, which is further defined in the provision. This would imply that rightholders have a duty to demonstrate the effectiveness of the technology chosen in order to obtain protection. The provision adds an element of knowledge by the party liable for the circumvention. The expression "knowingly or having reasonable grounds to know" is already used in the provisions on enforcement in the WTO/TRIPS agreement. (...) Thereby it excludes from protection those activities and services which have only a limited commercially significant purpose or use other than to circumvent. This solution would ensure that general-purpose electronic equipment and services are not outlawed merely because they may also be used in breaking copy protection or similar measures."

⁴ COM (97) 628 final, pp. 41-42: "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." (...) "It should be stressed that such legal protection is complementary with the initiative already proposed by the Commission in the field of the protection of conditional access services (...)". See also footnote 2.

⁵ IVIR = IViR: Instituut voor Informatierecht (Institute for Information Law), University of Amsterdam; Prof. Bernt Hugenholtz, Director. The full name of the study: "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 (IVIR Study)".

⁶ IVIR Study, p. 75: "Completely useless TPM's are not protected, while TPM's that do achieve the protection objective and exercise at least some control over the use of the work are protected, even if they eventually get circumvented."

Protection of a TPM in the Copyright Act

Under Section 50a of the Copyright Act, an effective technological measure which the author or some other person with the author's permission has put in place in order to protect a work, may not be circumvented.

Under subsection 2 of Section 50a, an "effective technological measure" 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 author or some other rightholder and which achieve the desired protection.

Under subsection 3, the provision in subsection 1 does not apply if the technological measure is circumvented in the course of research or teaching relating to cryptology or if a person who has legally purchased or is legally in possession of a work circumvents a technological measure in order to listen to or view the work.⁷ A work in which a technological measure protecting the work has been circumvented may not be reproduced. According to paragraph 4, Section 50a does not apply to a technological measure protecting a computer program. This comes under other provisions elsewhere in the Copyright Act.

According to the Government Proposal, the provision applies to all actual situations in which technological measures are used to protect protected works. Circumvention of technological measures is considered to comprise acts by which the protection method used is made inoperative or its operation is influenced to the effect that it no longer works as intended. (Govt Proposal 28/2004 vp p. 123).

The Government Proposal discusses the protection of a technological measure extensively. The technological measures referred to in the provision include 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 author or some other rightholder or a database rightholder and which achieve the desired protection. Technological protection may, for example, be effected as encrypting, modification or alteration (watermark and digital signature) or a system controlling reproduction. The technological measure referred to in the Act may be a computer program, or the protection may be partly or entirely imbedded in the equipment intended for the use of the work, for instance as a microcircuit or a coupling installed by means of electric wire. (Govt Proposal 28/2004 vp pp. 123-124)

A technological measure is sufficiently effective when the purpose of protection is achieved. The purpose of protection must be manifest in the effective technological measure. An effective technological measure cannot normally be circumvented or

⁷ Article 6 of the Infosoc Directive concerning technological measures does not include a limitation concerning a legally acquired work. Art. 6.3. does, however, limit the application of the provision to acts relevant in copyright terms, which listening to or viewing a legally acquired work is not. Govt Proposal 28/2004 vp p. 124: "The protection provided for in Article 6 (1) of the Directive (...) only concerns technological measures by means of which it is possible to prevent or limit such acts in regard of protected works as require authorisation by the author."

dismantled by accident.⁸ When the electronic rights management information contains technological protecting systems, these can also be effective in the meaning of the Act and thereby protected against circumvention. The provision does not apply to circumvention done in connection with research or teaching relating to cryptology. (Gvt Proposal 28/2004 vp p. 124)

The purpose of Section 50a(3) is that it would be possible to listen or view a protected work in cases where the ownership of the copy of the work has been acquired or the copy of the work has been obtained by a legal transaction. If the possession of the copy of the work entails paying a fee or fulfilling some other conditions, the technological protection should not be circumvented before the fee has been paid or the conditions have been fulfilled. The provision is not, however, applied to material transmitted in an information network. (Gvt Proposal 28/2004 vp p. 125)

A technological measure may be circumvented in the purpose of being able to view or hear a work by a person who has legally acquired or obtained the work. On his or her request the circumvention may also be performed by another person. The circumvention of a technological measure does not, however, give the right to reproduce the work. (Gvt Proposal 28/2004 vp p. 125)

Section 50b of the Copyright Act lays down provisions prohibiting the manufacturing and distribution of means of circumventing a technological measure. Devices, products or components facilitating the circumvention of a technological measure may not be manufactured or imported for distribution to the public or imported to Finnish territory to be freighted to a third country; distributed to the public; sold; rented; advertised for sale or rental; or be kept in possession for a commercial purpose. Nor may services enabling or facilitating the circumvention of a technological measure be offered.

Under subsection 2, devices, products or components or services referred to in subsection 1 are those

- 1) which are marketed, advertised or put on sale for the purpose of circumventing effective TPMs;
- 2) whose purpose or use other than circumvention has only limited commercial significance; or
- 3) which are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures protecting works protected under the Copyright Act.

Under Section 50b(3), the prohibition in subsection 1 does not apply to a technological measure protecting a computer program.

According to the Government Proposal (28/2004 vp p. 126), services prohibited in the Section are those the use of which makes it possible to circumvent a technological measure. These could be, for example, different services for installing prohibited devices or programs. It may also constitute a service prohibited in the provision when a computer

⁸ Copyright Commission "Tekijänoikeudet tietoyhteiskunnassa" KM 2002:5 p. 61: "For an act to be circumvention of a protective measure referred to in Article 6(1), the person doing the act should have known or should have had a well-founded reason to know that the act he/she is performing means circumvention."

program used to dismantle encryption is conveyed to the client via an information network. If the program is delivered on a physical platform (disc, CD-ROM), it is a question of distributing a dismantling device to the public. It is of no consequence whether the client for whom the installation or dismantling service is produced is a private person or a business enterprise.

The Government Proposal (28/2004 vp p. 126) also delimits the concept of service:

"Offering instructions for removing or circumventing a technological protection may also constitute a dismantling service referred to in the provision in cases in which the issuing of instructions takes place, for instance, within the scope of an organised or commercial service."

"As such, the providing of information about ways to dismantle or circumvent a protection, for example by means of e-mail to a circle of friends, in a magazine article or in connection with education, cannot alone be considered to constitute an offer of a dismantling service."

Supreme Court rulings

The Supreme Court has not dealt with the issue in its previous rulings.

Previous opinions of the Copyright Council

The Copyright Council has not dealt with the matter in its previous opinions.

III. OPINION OF THE COPYRIGHT COUNCIL

1) 1) Does the CSS (Content Scrambling System) protection constitute an effective measure referred to in the Copyright Act, which is based on the Directive of the European Parliament and Council 2001/29/EC and the WIPO Treaty of 1996?

The Council's approach

The definition of effective TPMs is circular by nature. A protection is effective if it achieves the protection objective. If it does not, the protection is not a protection referred to in the Act.⁹

From the standpoint of legal interpretation it is necessary to specify the definition. Therefore the Copyright Council will below state its views of the relevant criteria for a technological measure in terms of the interpretation of the law.

Awareness

⁹ E.g., KM 2002:5 p. 153: "a technological measure is sufficiently effective when it fulfils the purpose of protecting." For criticism of the definition of effectiveness in the IVIR study, see e.g. p. 75, 176.

One feature of an effective protection measure is that by fitting a protection measure, the author or other rightholder communicates that he himself considers the use of the work restricted.¹⁰

In the case under review there is no uncertainty that the persons involved in the circumvention were fully aware of the fact that they were dismantling a protection expressly fitted by the rightholders (or their representatives or assignees) to protect the work against the will of the rightholders. Hence the "awareness element", which was brought up in the preparation of the Directive, exists irrespective of how widely or restrictedly the information about the technology needed to circumvent the protection measure is available and exploitable. For example, dismantling by accident, which was mentioned in the preparation of both the Directive and the amendment to the Finnish Copyright Act with regard to the appraisal of effectiveness, cannot be the case here.

Ease and prevalence of circumvention

As regards information and knowledge available for circumvention of a technological protection, attention should be paid not only to whether the circumvention of a technological protection is overall possible (this may be the case) but also whether this takes place extensively, in which case the protection could no longer be considered effective and it could be possible to circumvent it even accidentally.

In the light of the material presented at the District Court, it is obvious that as such the information needed to circumvent TPMs is readily accessible in general information networks. However, this alone does not give a clear enough picture of how easy or prevalent the circumvention of protection measures actually is.

The documents submitted to the court of first instance include two A4 pages of commands written in a computer programming language which, when performed, remove the protection. In the opinion of the Copyright Council, it is justified to ask how many private persons in actual fact could perform these operations without familiarising themselves extensively with programming and the operation of the computer, despite the fact that the sequence of commands as such is easily accessible. This same problem is also indicated in the other defendant's statement in the court of first instance, as well as in the defendants' briefs.

Differences between operating system

The material presented at the court of first instance shows that the problem in hand relates specifically to the Linux operating system. According to the defendants, the feature capable of circumventing the protection is available in most operating systems. In other words, it is possible that for instance a Windows user can unwittingly open the CSS protection, but a Linux user may have to perform a series of operations, which require information technology expertise, in order to get the same end result.

¹⁰ See KM 2002:5 p. 62 above: "The provision is intended to guarantee the protection of property, which in a digital environment should be as good as in an analogue environment." It is inconceivable to think in the analogue environment that breaking a lock, even a even a shoddy one, were permissible.

Regarding the other operating systems, however, it has to be noted that the operation of the program opening the CSS protection in them may be appropriately licensed by the right-holders, which must be taken into account in the appraisal of effectiveness. This is indicated on page 8 of the Technical Statement, according to which "up to very recently, all the CSS-licensed program solutions have been designed to work in the Microsoft Windows or Apple operating systems". Thus, as regards these operating systems, it is not a question of so-called hacking but of authorised use of the unlocking program. From the Technical Statement, it also becomes evident that licences have been granted for the DVD player program solutions that work in the Linux operating system (Technical Statement, p. 8).

Licensing and the extent to which licensing has taken place are a factor in the matter. Similarly, if licensing with regard to the other operating systems has for example been more restricted in terms of operation (e.g. only for enabling an appropriately acquired DVD to be played privately on the computer) than the extent in which the defendants have used the dismantling program and distributed it to the public, a comparison with other operating systems will lead to an erroneous conclusion as to the inefficacy of the CSS protection system.

The Copyright Council will not address more extensively this evidentiary question, which will be examined in possible legal proceedings in the future, but stresses its importance.

Summary

In view of the above, the Copyright Council notes that it cannot be considered likely that the circumvention of the CSS protection by means of a program is ordinary activity among consumers, let alone that it could happen by accident in the course of ordinary activity. In addition, it seems likely that in some widely used operating systems other than Linux, the opening of the CSS protection is automatically available to the consumer based on appropriate licensing. Moreover, according to the Technical Statement, licences have also been granted to a certain extent to program applications that work in the Linux system. This being the case, the prevalence of the use and the effectiveness of the protection will also be assessed in the light of this fact and possible terms of licensing in particular.

2) Does the action of the defendants meet one or several criteria referred to in the provisions of Section 50b? If it does, which criteria are fulfilled?

The interpretation of Section 50b of the Copyright Act depends, in the manner described above, on whether the technological measure in question is "effective". The definitive interpretation of the provision thus entails in this case that question (1) is solved.

If it is a question of an effective measure, it is not permissible to produce a device, a product or part thereof for the purpose of circumventing it. In her description of the criminal act charged, the Prosecutor states that M.M. has produced a computer program capable of this operation. The Government Proposal (28/2004 vp p. 126) specifically mentions a computer program as an example of such a product.

Production

It has been claimed in the matter that the defendants produced the program in order to be able to use their legally acquired DVD appropriately. In the Linux operating system this required the breaking of the CSS protection.

According to the commentary to Section 50b, manufacture (Infosoc Directive, Art. 6(2)) principally means manufacture for purposes other than one's own use (Gvt Proposal 28/2004 vp p. 125).

According to the Prosecutor's description of the criminal act charged, M.M. designed the computer program used in the circumvention at K.K.'s request. The program has been produced with the purpose of making it available to the public against Section 50b of the Copyright Act.

The Copyright Council will not take a stance as to the identity of the offender and possible complicity, which must be considered an evidentiary question.

Distribution to the public

If the measure in question is an effective technological measure, a product manufactured for the purpose of circumventing it or facilitating its circumvention may not be distributed, nor may services enabling or facilitating its circumvention be offered.

According to the description of the criminal act charged, both defendants were involved in making the program available to the public in an information network. The act in question does not, however, constitute distribution in the meaning of Section 50b of the Copyright Act, which concerns a physical copy, but an offer of a service enabling or facilitating the circumvention of an effective technological measure.

Section 50b(2) of the Copyright Act

This case does not involve marketing, advertising or holding in possession for commercial purposes a service referred to in the Act. Section 50b(2) of the Copyright Act does not apply to this case.

Instead, the definitions in Section 50b(2), paragraph 2 ("whose purpose or use other than circumvention has only limited commercial significance") and paragraph 3 ("which are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures protecting works protected under this Act") are obviously fulfilled if the technological measure in question is effective.

Summary

Consequently, the Copyright Council sees that, with the reservation concerning the effectiveness of the technological measure (answer to Question 1), the act appears to

fulfil the wording of Section 50b of the Copyright Act in the manners described above. The final assessment of the identity of the offender and possible complicity will be left to possible court proceedings.

Other matters put forward

The defendants have referred to the right of quotation (Copyright Act, Section 22; Defendants' brief, p.4). According to them, it is not possible to use the right of quotation if the work is not available owing to a technological measure. The Copyright Council notes that the right of quotation does not mean a subjective right to gratuitous acquisition of a work for the purpose of using the right of quotation.

In the court of first instance, the defendants referred to the Prosecutor seeking to limit their freedom of speech and that of others taking part in the debate on protection measures. As regards this, the Copyright Council refers to a statement in the Government Proposal HE 28/2004 vp (p. 126), which makes a distinction between ordinary discussion and an offer of a dismantling service:

"As such, the providing of information about ways to dismantle or circumvent a protection, for example by means of e-mail to a circle of friends, in a magazine article or in connection with education, cannot alone be considered to constitute an offer of a dismantling service."

The Copyright Council notes that the Copyright Act does not limit free exchange of opinions about the drawbacks in the Act or about the shortcomings of the regulation concerning technological measures.

Conclusion

In the foregoing, the Copyright Council, in keeping with its mandate, has kept to matters concerning the interpretation of the Copyright Act and the European Community Directive (2001/29/EC). The appraisal of the facts relating to the matter and the consideration of evidence are left in the first phase to the applicant, i.e. the Prosecutor, and later to the court hearing a possible appeal.

Chair

Niklas Bruun

Secretary

Mikko Huuskonen

This opinion has been dealt with by the Copyright Council at a plenary session. The following have contributed to the solution of the matter: Niklas Bruun (Chair), Arto Alaspää, Martti Heikkilä, Tuula Hämäläinen, Satu Kangas, Marianne Leskinen, Kirsi-Marja Okkonen, Tytti Peltonen, Pekka Pulkkinen, Maria E. Reh binder, Risto Ryti, Tommi Saarikivi, Katariina Sorvari, Markku Uotila, Martti Virtanen and Ahti Vääntinen.