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### **NINTENDO, VIDEOGAMES, CONSOLES AND COPYRIGHT.**

On January 23 of this month, the Court of Justice of the EU will pronounce on certain issues relating to technological measures implemented by Nintendo to protect their rights (at least this is the purpose stated by Nintendo), giving response to preliminary ruling made by the Court of Milan.

The case processing before the Court of Milan is about consoles "DS" and "Wii" manufactured by Nintendo and Nintendo games (or authorized by Nintendo) which are recorded on data cartridges and DVD respectively, containing encoded information that has to be necessarily exchanged with the encoded information contained in consoles to make it possible to play the games.

PC BOX distribute certain devices that can be used to avoid the blocking effect produced by the necessary exchange of encoded information between the Nintendo games on one hand and Nintendo consoles on the other hand.

The Milan court makes de assumption that the Nintendo measures prevent or restrict some actions that pursuant to Directive 2001/29 do not require any authorization by the holder of the right, such as the use of Nintendo consoles with other games different from Nintendo games, authorized games by Nintendo or the authorized copies thereof, as well as the use of the Nintendo games with other consoles not manufactured by Nintendo. As the Court of Milan makes the said assumption, ie, the application to the specific case of the copyright protection system, the Advocate-General considers that the Court will not definitely pronounce if the videogames fall into the scope of Directive 2001/29 or if, on the other hand, the Directive 2009/24 about the protection of computer programs applies in this case. The Advocate-General further concludes that this issue will soon be examined by the Court on the preliminary ruling made by the German Federal Court ( C-458/13 Grund and Nintendo).

According to the Advocate-General conclusions such measures as those in question, some of which are partially incorporated to support the games and partially to consoles involving interaction, should not be excluded from the technological

measures under sec. 6, paragraph 3 of the Directive 2001/29 that the author can apply to protect his rights. The Advocate-General agrees with the Commission in the point that a technological measure must be effective. Therefore, pursuant to Art. 6 paragraph 3, the said measure must be designed, in its normal proceedings, not only to prevent or restrict unauthorized actions, but also to permit that the use of the material is controlled by the holder of the rights.

The question raised by the Court of Milan starts from its assumptions that the measures in question also prevent or restrict actions that pursuant to the Directive 2001/29 do not require authorization by the holder of the rights, such as the use of the console Nintendo with other games different from those of Nintendo, games authorized by Nintendo or the authorized copies thereof, or the use of Nintendo games or authorized by Nintendo with other consoles not manufactured by Nintendo.

As those effects take place, the Advocate-General considers that Directive 2001/29 does not require the legal protection of present technological measures.

For Nintendo, the fact that a technological measure prevents or restricts those actions not requiring an authorization is irrelevant, provided that such effect is only of an occasional and accessory nature for the main purpose and effect of preventing or restricting the actions requiring authorization. PC Box, however, emphasizes the established principles of proportionality and interoperability, respectively, in paragraphs 48 and 54 of Directive 2001/29. And, in the opinion of the Commission, if these measures also prevent actions that do not require a permit, when they could have been conceived in a different way that only prevents those actions subject to authorization, they are disproportionate and are not under protection. However, if it is inevitable that such measures also prevent those actions that do not require authorization, it may not be disproportionate and be under protection.

The Advocate-General concludes that as long as Nintendo technological measures only pursue the legitimate purpose to prevent or restrict actions not authorized by the holder of the rights, its adequacy is linked to its effectiveness. According to that, the Court of Milan has to decide on the bases of the evidence presented which technological measures, among those that are currently available, can effectively protect the unauthorized reproductions of Nintendo games or those authorized by Nintendo.

Perhaps there are no measures that can completely prevent such actions. However different measures may involve different degrees of restriction. The Court of Milan should check whether the application of the measures accomplishes the principle of proportionality and must take into account, specifically, whether in the present condition of the technology the first effect could be achieved without producing the second or producing it to a lesser extent.

Finally, the Advocate-General considers that having the Court of Milan clarified whether the protection should be granted in any supply of devices, products, components or services pursuant to Section 6, paragraph 2 of the Directive 2001/29,

it is not necessary to take into consideration the peculiar destination assigned by the holder of the rights to a device, designed to access to the protected works, but, on the contrary, it must be taken into account the extent to which devices, products, components or services seeking protection are or may be used to pursue other legitimate purposes different from providing actions requiring authorization from the holder of the right.