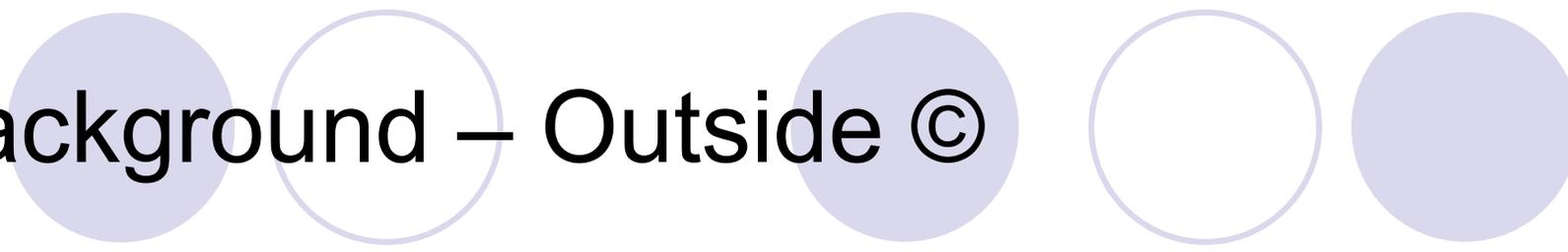




QUEEN MARY  
INTELLECTUAL PROPERTY  
RESEARCH INSTITUTE  
*University of London*

# Technical Protection Measures for Software and Databases in European Copyright Law

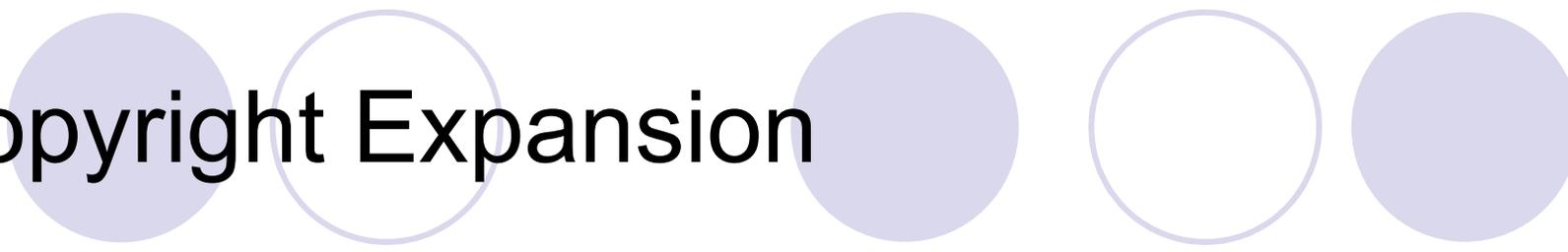
Dr Guido Westkamp, LL.M



# Background – Outside ©

- Software- TPM Protection under 1991 Directive (Article 7) against commercial dealings in circumvention devices
- Databases → Protection under 2001 Directive (EU CD) against AND private acts of circumvention for BOTH copyright and sui generis right
- Precedents: unfair competition → conditional access/computer programs/broadcast signals
  - In general, may be characterised as unfair competition, i.e. protection against free riding:
  - Conditional Access Dir: 'Member States shall prohibit on their territory all of the following activities:
    - (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;
    - (b) the installation, maintenance or replacement for commercial purposes of an illicit device;
    - (c) the use of commercial communications to promote illicit devices.'

# Copyright Expansion



- Five Pillars:

- Factual (TPM) protection
- Legal Protection against
  - Immediate Private Acts of Circumvention
  - Commercial dealings in circumvention devices
- Therefore → freedom of contractual arrangements
- Copyright limitations are subject to the three step test (“certain special cases”/no conflict with legitimate interests /no prejudice normal exploitation) -- EUCD generally asserts that limitations may create dangers for “authors and right holders” (Art. 13 TRIPs; 5 Abs. 5 EUCD)
- Additional Protection via extensive economic rights
  - Reproduction (including temporary and transient copies)
  - (possibly) extensive making available/communication to the public right’

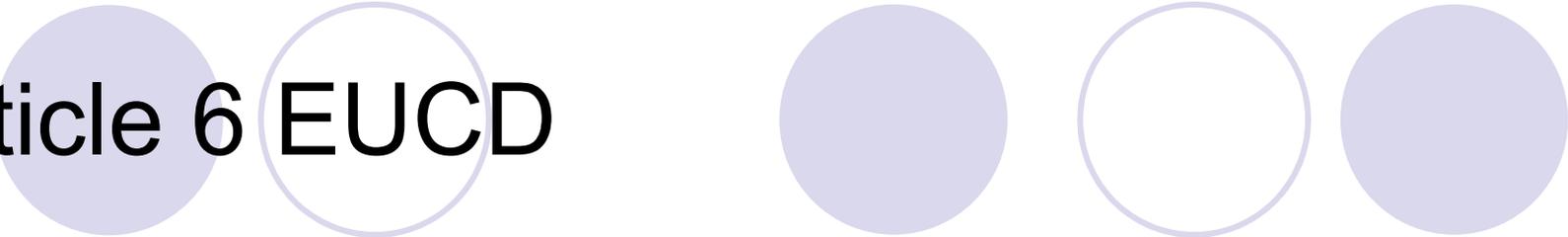
# Overview of international precedents

- WCT/WPPT 1996 → adequate measures against commercial dealings:
- WCT Art. 11
  - “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”
- US DMCA, para. 1201 (1): general protection of TPM’s (electric fence); ,fair use‘ exceptions excluded [*...effectively controls access to a work if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work*”.

## EUCD, Art. 6:

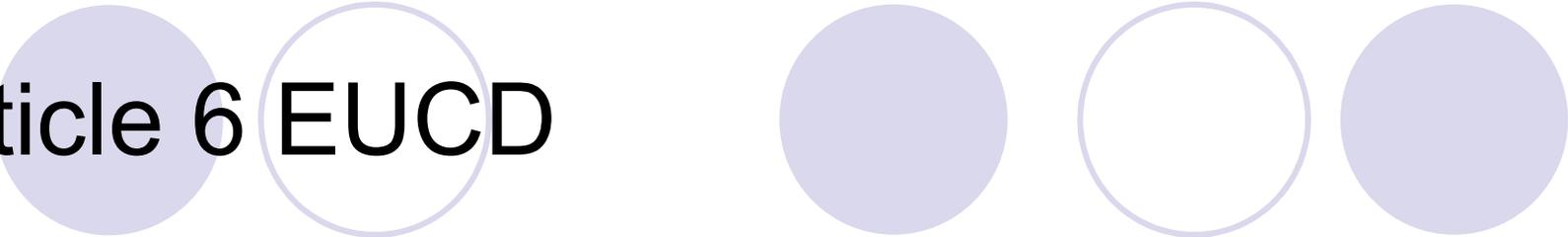
- No assertion as to relationship with (c)
- Problem of limitations largely left to member states (certain limitations may be rendered enforceable subject to ,voluntary agreements‘)
- Switzerland, Art. 39a UrhG: all limitations are enforceable vis-à-vis TPM’s

# Article 6 EUCD



- **Obligations as to technological measures**
- **1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.**
- **2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:**
  - **(a) are promoted, advertised or marketed for the purpose of circumvention of, or**
  - **(b) have only a limited commercially significant purpose or use other than to circumvent, or**
  - **(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,**
  - **any effective technological measures.**

# Article 6 EUCD

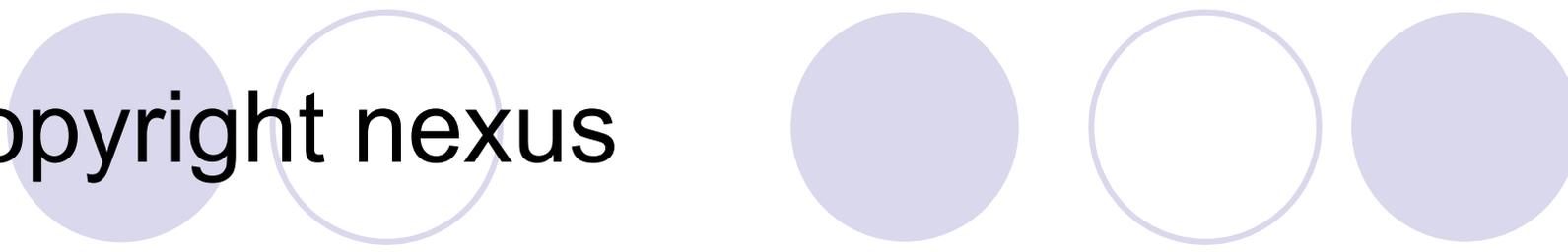


- **3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.**
- **4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.**

# TPM's in the © System

- Fundamental Conflict: Member states face uncertainty as to relationship between TPM's and Copyright
- Contractual freedom (in particular, online services) take precedence (Art 6 (4)(4) EU CD)
- Software: no rules as regards circumvention means and specific software limitations (note: different positions in the USA) → competition freedom
- Protection against private acts of circumvention extends to works; neighbouring rights; database sui generis right
  - Protected subject matter
  - Structural protection and/or protection of expressions?
  - Derivative uses (see German CA Art. 24)
  - Infringement of Economic Rights
  - Relationship with limitations
    - Existing levy systems
    - Existing limitations (cf. Art. 5(1)-5(3) EU CD)
    - Impact of the three step test

# Copyright nexus



- Typical scenario → does TPM violation require copyright infringement, or is infringing TPM sufficient?
  - UK position (*Sony v Ball* [2005] FSR 9); question of copyright 'nexus' does not arise because fixation of work in machine readable form is sufficient.
  - AUS → *Eddie Stevens v Sony Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (6 October 2005). Not an infringement of s. 116A(1) of the Copyright Act 1968 to modify a games console (with a mod chip) to enable infringing copies of games and games purchased in other regions to be played on it.
  - US – no express reference to copyright, thus copyright protectability will be sufficient
  - Italy – Court of Bolzano 31.12.2005 → circumvention of 'mod chip' no violation of copyright
  - Germany? Art 6(1) requires infringement of copyright

# Art. 6 Abs. 1 – national implementation and divergences

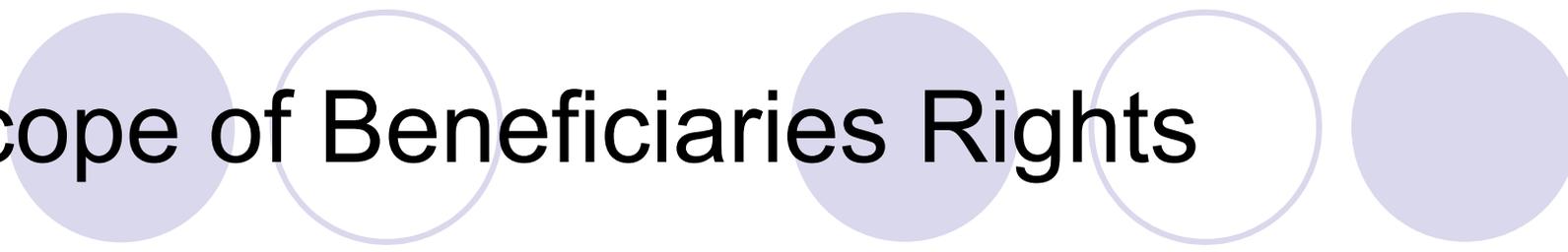
- In general: no express legislative categorisation of copyright ,nexus‘ problem.
- Systematically implemented in chapters on copyright infringement (exception; Italy; Estonia (,exclusive right‘ to employ TPM)
  - Finland → circumvention must result in infringement
  - Belgium: (presumed) intention of copyright infringement
  - Germany, Austria....: protection afforded to ,authors right‘
  - UK: TPM rule protect copyright (but temporary fixation is sufficient for infringement)
  - Hungary: act of circumvention ,as such‘ prohibited

# TPM's and Copyright Infringement

- Reproduction Right (mere use of work may be excluded (FIN))
- Extensive Reproduction Right and Article 5 (1):
- Categorisation of Art 5 (1) as 'limitation' or carve out provision
- → any act of circumvention will result in the making of copies (or in copying protecting software)
- UK → Sony v Ball: circumvention creates fixation (temporary); opposite view taken in Australia)

# Limitations (Art 6 (4)) and TPM's

- Reactions by Member States
- 'wait and see' → Austria
- Judicial decisions: B, CYP, D, E, IRL, M.
- Administrative Complaints Procedures: S; UK ('breach of statutory duty').
- Regulatory Bodies: F, NL, N
- Mediation and Arbitration Procedures (plus subsequent admission to courts) in
  - DK (Copyright Licensing Tribunal); GR (Mediation); H ('Council of Experts'); SLO: Parties to agree on mediation

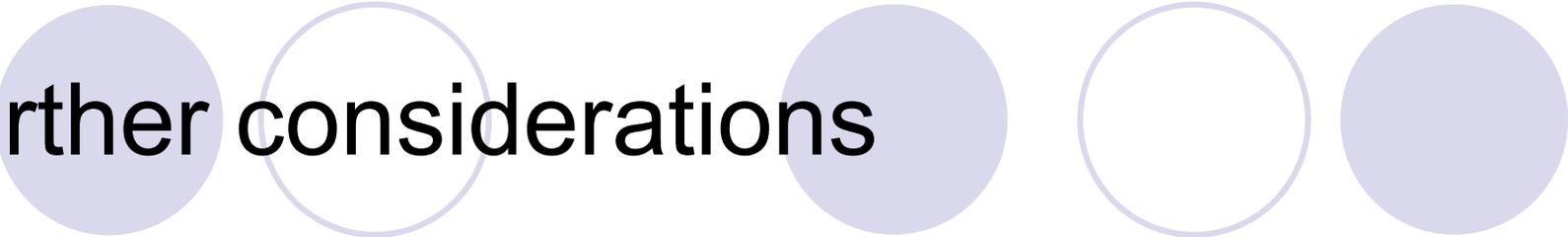


# Scope of Beneficiaries Rights

- Uncertain, particularly as regards precedence of contractual agreements
- Starting points:
  - Access to courts: more chances of ,full‘ benefit (but three step test may be imposed); terms and conditions of agreements may be subject to judicial control
  - UK: general discretion of Secretary of State
  - ,Self help‘ in general not permitted, though permissible in case of not complying with orders in DK, FIN, N, EE
  - Problematic in all cases were mediation or arbitration foreseen
- Consequences: material devaluation of existing limitations

# TPM's – further considerations

- Impact of information and communication guarantees
  - irrelevant under EUCD Art. 6 (4)
- Scope of Art. 6(4)??
- Meaning of 'exceptions and limitations' under EUCD?
- Free and derivative uses?
- Example: parodies , decompilation



# Further considerations

- Need to reconsider the relationship between consumer and exploiter
- Paradigmatic shift towards right holders/exploiters/ AND clear focus on fostering ,online business models‘ under EUCD in general
- Readjustment of Art 6(1) (primary interest of right holders against ,free riding‘)
- Readjustment of the Three Step Test
- → protection of exploiters as reflection of market regulation
- Impact of three step test on ,neutrality‘ of market regulation and legislative freedom
- Limitations as market regulation norms
- Role of contracts between exploiters and users