

Full Federal Court rules that PlayStation "mod-chipping" infringes copyright law

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In a recent decision, the Full Federal Court of Australia overturned a first instance ruling, holding that "mod-chipping" PlayStation consoles infringes copyright law.

On 30 July 2003, the Full Federal Court allowed Sony's appeal in *Kabushiki Kaisha Sony Computer Entertainment v Stevens*, commonly known as the Sony PlayStation "mod chipping" case.¹ This case is one of the first to interpret the "anti-circumvention" provisions of the *Digital Agenda Act 2000* (Cth), which was intended to satisfy Australia's obligations under the WIPO Copyright Treaty. These are the same obligations that led to the anti-circumvention provisions of the *Digital Millennium Copyright Act 1998* in the United States.

Sony manufactures PlayStation games, which can be played on ordinary television sets when connected to a PlayStation console. The games themselves are sold in CD format.

The Sony PlayStation system uses a combination of hardware (a "Boot Rom" chip installed in each console) and software (an access code track on each CD) to prevent the use of unauthorised copies of games. Unauthorised copies of the game CDs do not contain the access code, causing the Sony chip to prevent the copy from working.

This system also enforces by technological means regional coding of the consoles and gaming software. PlayStation consoles are manufactured to play games marketed for one of three geographic regions, roughly identified by the United States, Europe/Australia/New Zealand, and Japan/Asia. This system is similar to DVD regional playback control, in which DVD device manufacturers are required, as licensees of a central patent, to produce players and drives compatible with media produced for

only one of up to eight regions.² The regional coding systems allow the producers of PlayStation games or DVD format movies to exercise forms of product and price discrimination between different geographic markets.

The *Sony v Stevens* case involved a local Sydney retailer of PlayStation consoles and games, who sold and installed modifying chips (often referred to as "mod chips") for the consoles. The modified players allowed customers to play PlayStation games manufactured for other regions or to play unauthorised copies of PlayStation games, which Stevens also sold.

Stevens was sued by Sony for trade mark infringement, misleading or deceptive conduct under the *Fair Trading Act 1987* (NSW), and liability under section 116A of the *Copyright Act 1968* (Cth). Liability under section 116A of the Copyright Act was said to arise because Stevens' supply and installation of the mod chips constituted selling or offering to sell a "circumvention device" capable of circumventing "technological protection measures" comprised by the Boot Rom chip and the access codes. Sony emphasized that mod-chipping enabled owners of PlayStation consoles to play illegal copies of games, and paid less attention to the regional coding issues.

At first instance, Justice Sackville held that the chip and the access codes did *not* constitute a "technological protection measure" as referred to in section 116A(1) of the Copyright Act, and thus that Stevens' mod chips were *not* infringing circumvention devices. Justice Sackville reasoned that Sony's chip and access code was not designed to prevent or inhibit post-access infringement of copyright, but simply deterred such infringement. It was not enough, he held, to simply discourage infringement, holding that the devices did not constitute "technological protection measures".³

Accordingly, Sackville J did not address whether the mod chips were circumvention devices. He did, however, suggest on the basis of evidence produced by the parties, that the mod chips had a limited commercially significant use other than circumventing Sony's protection measures. Thus, had Sony's chip and access code combination qualified as a technological protection measure, Sackville J would likely have held that the mod chips were circumvention devices.⁴

The Full Federal Court overturned the first instance ruling, holding that Sony's hardware/software combination was in fact a "technological protection measure", as it inhibited infringement by making it impossible to use the unauthorised copies. This finding turned on the justices' understanding of what constitutes a "technological protection measure", which they interpreted on the basis of the ordinary meanings of language used in the definition. In addition, a majority of the Full Court (French and Lindgren JJ) affirmed that Justice Sackville was correct in holding that infringing reproductions of computer programs or games are not created in the random access memory of a PlayStation console when a game is played.⁵

The effect of this decision is unlikely to be limited to PlayStation technology, but may extend to other media systems organised on a regional coding basis, such as DVD technology. Until now, resellers who have modified DVD players to accept DVDs manufactured for any of the eight international regions have not been caught by copyright law. However, on the basis of this decision, these resellers may be the next targets of copyright owners.

The ACCC has already expressed its disapproval of the decision, noting in a media release that "consumers will suffer a loss of choice and pay more

for their games". The Commission also asserted that mod-chipping allows consumers to play both legally imported and legitimate backup copies of games, and that recent advances in easing the restrictions on parallel imports of computer software in Australia may be eroded as a result of this decision.⁶

¹ *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 (French, Lindgren, and Finkelstein JJ).

² The DVD regions are defined as including the following countries or geographic areas: 1 (North America), 2 (Japan, Europe, South Africa, Middle East), 3 (Southeast Asia and East Asia, including Hong Kong), 4 (Australia, New Zealand, Pacific Islands, Central and South America, and the Caribbean), 5 (former Soviet Union, India, Africa, North Korea, and Mongolia), 6 (China), 7 (Reserved), and 8 (airplanes, cruise ships).

³ *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906 (Sackville J).

⁴ *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906,

[165]-[167]. It is interesting to note that although Stevens himself was unrepresented at first instance, the Australian Competition and Consumer Commission (the "ACCC") gave assistance to the court, and was allowed to appear as amicus curiae at the hearing. In the Full Federal Court, Stevens was represented by counsel.

⁵ *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157.

⁶ Australian Competition and Consumer Commission, "Consumers Lose in Playstation Decision" (31 July 2003).

Review of Digital Agenda Copyright Reforms

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The debate over the application of copyright law and policy in the digital age is alive again, with the commencement of the public consultation phase of a major review of the "Digital Agenda" copyright reforms that came into effect in March 2001. The review provides an opportunity for copyright owners and users to present their practical experiences of the operation of the legislative reforms, and to argue for changes where the reforms have not achieved their objectives. This article provides a brief overview of the reforms and the review process, and examines some of the issues that are expected to be particularly contentious.

The Digital Agenda Reforms

The *Copyright Amendment (Digital Agenda) Act 2000* (the **Digital Agenda Act**) implemented a comprehensive package of amendments of the *Copyright Act 1968* (the **Copyright Act**), which were designed to update Australian copyright law to meet the challenges posed by rapidly advancing digital and communication technologies. The central objective of the amendments was to ensure that copyright law would continue to promote creative endeavour in the online environment,

while still allowing reasonable access to copyright material through the use of new technologies.

To implement this objective, there were five key elements to the Digital Agenda reforms:

- The introduction of a broadly-based, technology-neutral right of communication to the public, which replaced and extended the previous technology specific broadcasting and cable-diffusion rights.
- The updating and appropriate extension into the digital environment of key exceptions in the Copyright Act, including the "fair dealing" exceptions and certain statutory licences.
- The introduction of new enforcement measures for copyright owners, covering devices designed to circumvent technological protection measures, electronic rights management information and broadcast decoding devices.
- The introduction of provisions designed to limit and clarify the liability of carriers and carriage service providers, including internet service providers (ISPs),

for third party copyright infringements.

- The introduction of a new statutory licence scheme for the retransmission of free-to-air broadcasts, which provides remuneration to the underlying owners of copyright in works and other subject matter included in the broadcasts.

The Review

Because of the rapid pace of technological change, and the fact that online business models were still in the relatively early stages of their evolution, the Government acknowledged that the Digital Agenda Act was in some areas "entering uncharted waters". For this reason, it undertook to review the legislative reforms within three years of their commencement.

In April 2003, the Attorney-General, the Hon. Daryl Williams AM QC MP, announced that an external consultant, law firm Phillips Fox, had been appointed to analyse certain key aspects of the Digital Agenda Act and related legislative reforms (the **Review**). Since then, the consultant has undertaken research and engaged